

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Sally L. Lowe Bifarella Claimant

vs.

A. Hunter Land, PaineWebber, Inc., Respondents  
and Merrill Lynch Money Markets,  
Inc. as successor of A. G. Becker, Inc.

AWARD

CASE NO. 87-02613

SUMMARY OF ISSUES

This case was filed on December 15, 1987. Claimant alleged the following:

The Sally L. Lowe Family Trust ("Lowe Trust") was created in July 1968 with Charles H. Land as trustor and Respondent A. Hunter Land ("A. H. Land") as trustee. The trust instrument designated Claimant as the primary beneficiary and its stated purpose was to provide for her maintenance, support and education. In September of 1968, Charles Land, Claimant's and Respondent's father, delivered an unknown amount of cash and securities to Respondent A. H. Land as trustee under a trust instrument entitled "Charles H. Land Revocable Trust." Upon the death of Charles Land on February 17, 1969, the Revocable Trust terminated and its assets were distributed to the Charles H. Land Charitable Trust ("Charitable Trust"). That trust terminated on February 17, 1989, with remaining principal to be divided between the Lowe Trust and the Land II Family Trust. The Charitable Trust required its annual net income to be distributed to the Charles H. Land Family Foundation ("Foundation"), a California, non-profit corporation, each year for 20 years. Under the Charitable Trust, for any year in which the net income available for distribution was less than five percent of the value of the original principal, the trustee was required to distribute out of principal an amount necessary to bring the total for the year to five percent.

Upon receipt of the cash and securities from the Charitable Trust, Respondent A. H. Land placed them in a securities account with Blyth & Co. ("Blyth") in his name as trustee of the Charles H. Land Charitable Trust. He was employed by Blyth at the time and thereafter was employed as a stockbroker at various times by Respondents Merrill Lynch Money Markets, Inc. ("Merrill") and PaineWebber, Inc. ("PW") and placed the assets of the Charitable Trust in accounts at those brokerage firms in his name. Respondent A. H. Land traded these accounts in such a way as to deplete the majority of the trust assets in violation of his duty as trustee. Respondent A. H. Land purchased and sold securities for the trust account

which were unsuitable and engaged in trades which were excessive in volume and frequency in light of his duty as trustee. Respondent A. H. Land profited from his management of the trust assets in the form of increased commissions and other compensation as the stockbroker servicing the trust accounts.

Each of the brokerage firms described was under a duty, which they breached, to supervise Respondent A. H. Land and not allow the unsuitable and excessive trades. These firms profited from Respondent A. H. Land's dealings with the trust assets in the form of increased commissions.

Claimant was repeatedly assured by Respondent A. H. Land that "things were going well in the trust account and [she] had no cause for concern." Claimant did not receive any confirmations or statement of account regarding the trust accounts; she received accountings which she did not understand.

Respondent Merrill as successor of A. G. Becker ("Becker") alleged the following:

Becker denied any wrongdoing by Respondent A. H. Land as registered representative of Becker and also denied that it failed to supervise him.

The trust account was transferred from PW (A. H. Land's prior employer) to Becker in June 1980, with a total market value of only \$380,000.00. At that time, however, nine additional annual payments of \$108,625.00 - or a total of \$977, 500 - were still outstanding through 1989 (\$108,625.00 derived from calculating five percent of the original funding of the trust of \$2,172,500.00). Therefore, whatever losses the trust had suffered, which rendered Claimant's interest valueless, had accrued prior to the account's transfer to, and A. H. Land's employment with, Becker in 1980.

Respondent Becker counterclaimed for costs and attorneys' fees as a result of the "baseless nature of the claim."

Respondent PW alleges the following:

Respondent A. H. Land was PW's "customer" as to the Charitable Trust's securities account and entitled to all rights and obligations arising out of the account, including receipt of monthly statements. Claimant did not receive statements because she was not PW's "customer." The trust granted Respondent A. H. Land full discretion to make investments, without obtaining Claimant's approval.

Claimant received trust accountings for the years 1974-80 but presented no written objections within 60 days as required by the trust so that a "final and binding approval" did not become operational. Claimant is not unsophisticated and maintained a personal securities account between 1972-80. Claimant is barred from recovery due to the defenses of waiver and laches as there was no objection for five years after the Charitable Trust's PW account terminated and more than four years after her last purported trust accounting. The claims are also barred by applicable

statutes of limitations (four years for a claim accounting, three years for "churning," two or four years for breach of fiduciary duty). As to violations of New York Stock Exchange and National Association of Securities Dealers, Inc. suitability rules, there is a failure to state a cause of action for which relief can be granted, since there is no private cause of action for such violations.

PW acted in good faith, exercised due diligence and reasonable care in its supervision of A. H. Land. The acts complained of were beyond the scope of A. H. Land's authority as an employee of PW; PW did not act with the requisite scienter, and there is no fiduciary nor other relationship between Claimant and PW.

PW requests an award dismissing claim and assessing costs against Claimant.

Respondent A. H. Land alleges the following:

He was granted broad powers to manage the trust property and insulated from liability for any losses to the Trust except those caused by "willful neglect or default." He was entitled to "reasonable compensation for his services," and as such has received normal brokerage fees for his services over a period of 19 years. Annual accountings since 1969 were sent to Claimant to which she never objected.

The Charitable Trust's assets by the end of its third year, 1972, were \$929,261, 43.2% of its original principal, but it was obligated to make 17 more gifts to charity, totalling \$1,840,029. This obligation was thus twice the value of the trust assets. By 1975, Claimant's and Respondent's A. H. Land's future interest in the trust were for practical purpose valueless (principal was \$517,987 and charitable obligation of \$1,515,323). However, no action was brought by Claimant for another 10 years. Claimant, in 1975, knew, or should have known, that her interest in the Trust was valueless.

Respondent A. H. Land had as great a stake as Claimant in the success of the Trust. He acted diligently and in good faith and was in no sense guilty of "willful neglect," therefore denies all allegations of wrongdoing. He also asserts the claims are barred by virtue of the doctrines of estoppel, laches and satisfaction and by the applicable statutes of limitation.

The issues presented to the arbitrators were:

For Claimant:

1. Was there a breach of duty arising out of the relationship between Respondents Land and his employers and the Charitable Trust as their customer?
  - A) Did Respondent Land violate any duty to his customer, the Charitable Trust, in trading the account?

- B) Did Respondent brokerage firms breach their duty in failing to exercise proper and diligent supervisory activity over Respondent Land in his capacity as a stockbroker only, not as a trustee?

For Respondent Merrill Lynch Money Markets, Inc. as successor of A. G. Becker, Inc.:

1. Whether conduct or omissions of Respondents injured the Claimant as a remainder person?
  - A) If Claimant was injured, to what extent?
2. Whether it should be awarded attorneys' fees and costs as a result of the frivolousness of the claim?

For Respondent PaineWebber, Inc.:

1. Whether Respondent A. H. Land's duty as trustee is before the panel?
2. Whether the trust was churned while at Blyth, Eastman, Dillon & Co. ("Bedco")?
3. Was the trust account properly supervised from 1972-80?
4. Even if churning or lack of supervision is found, was Claimant damaged?
5. Are claims barred by applicable statutes of limitation?

For Respondent A. H. Land:

1. Whether conduct of Land as trustee is at issue?
  - A) Assuming it is, did his conduct as a broker or trustee violate a duty to make suitable investment and not trade excessively, as framed in the claim?
  - B) Did Claimant suffer any damages to her remainder interest?

#### DAMAGES AND RELIEF REQUESTED

Claimant requests:

1. Accounting of the trust assets;
2. Return by Respondents of the commissions and interest on margin debit balance which were charged to the trust account;

3. An amount representing the value which the trust corpus would have attained had it been prudently invested and managed;
4. Costs of suit incurred.

Respondent Merrill Lynch Money Markets, Inc. requests:

1. Attorneys' fees and costs as its counterclaim.

Respondent PaineWebber, Inc. requests costs.

#### DAMAGES AND RELIEF AWARDED

On May 16 and 17 and July 17, 18 and 19, 1989 in San Francisco, California the undersigned arbitrators heard the controversy in ten sessions between the parties as set forth in submissions to arbitration signed by Claimant Sally L. Lowe Bifarella on November 19, 1987, and by Respondents Merrill Lynch Money Markets, Inc. on July 5, 1989, PaineWebber, Inc. on March 11, 1988 and A. Hunter Land on May 23, 1988. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted for determination as follows:

1. Each and every claim is dismissed. The dismissal of each and every claim against respondent A. H. Land is with respect to his capacity as a stockbroker only, not as a trustee.

2. Claimant is liable for and shall pay to Respondent Merrill Lynch Money Markets, Inc. as successor to A. G. Becker, Inc. the sum of One Thousand Five Hundred Dollars and Zero Cents (\$1,500.00) as costs for its counterclaim.

3. All other parties shall each bear their respective costs including attorneys' fees.

4. Pursuant to Section 43 of the National Association of Securities Dealers, Inc. ("NASD") Code of Arbitration Procedure, the arbitrators assess forum fees of \$10,000.00 to be paid to the NASD as follows:

1. \$3,500.00 against Claimant, \$1,000.00 of which has already been paid as her initial filing deposit;
2. \$3,500.00 against Respondent A. Hunter Land;
3. \$1,500.00 against Respondent A. G. Becker; and
4. \$1,500.00 against Respondent PaineWebber, Incorporated.

OTHER ISSUES

The panel of arbitrators directed the NASD to notify the Attorney General of the State of California of the pendency of this arbitration. This was based on their determination that the State of California represents the income beneficiary and may be a proper, necessary or indispensable party. Notice was sent by letter via Federal Express on July 17, 1989.

ARBITRATORS CONCURRING

DATE SERVED: 09/15/89

Andrew J. Carroll  
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Owen Guinn Smith

Robert I. Recker

William H. Le Rand

Hugh W. Ditzler

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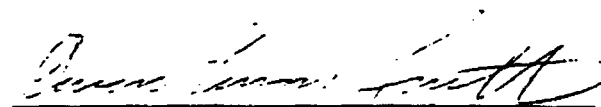


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