

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Kathleen A. Foster

88-03197

Name of Respondent(s)

A.G. Edwards & Sons, Inc.  
Stuart Thorn

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REPRESENTATION

Claimant Kathleen A. Foster was represented by Raymond S. Heyman of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A., Phoenix, Arizona.

Respondent A. G. Edwards & Sons, Inc. was represented by Rose M. Schindler of A. G. Edwards & Sons, Inc., St. Louis, Missouri.

Respondent Stuart Thorn was represented by Roger W. Martin of the Law Offices of Roger Martin & Associates, Scottsdale, Arizona.

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on October 18, 1988 and as later amended. Claimant Kathleen Foster ("Foster") alleged that Respondent Stuart E. Thorn ("Thorn"), while acting as an agent of or employed by Respondent A.G. Edwards & Sons, Inc. ("A.G. Edwards"), misrepresented or omitted certain facts regarding the status and risk of an investment in Public Service Company of New Hampshire bonds and continued to misrepresent the status of the bonds as they declined in value. In addition, Foster alleged that Thorn failed to advise her of the risks of margining her account; misrepresented that the investments were suitable for her and engaged in unauthorized transactions in her account. Based upon the foregoing allegations, Claimant asserted claims for fraud under the Arizona Securities Act (A.R.S. 44-1991); violation of the Arizona Racketeering Act ("Azrac"), A.R.S. 13-2301. et seq.; common law fraud; intentional and

negligent misrepresentation; breach of fiduciary duty; and violations of the NASD's Rules of Fair Practice.

In a Statement of Answer, Counterclaim and Crossclaim filed with the NASD on December 8, 1988, Respondent A.G. Edwards & Sons, Inc., denied the material allegations of the Statement of Claim, stating that Foster was fully informed of the risks of margining an account, was kept fully informed of the status of the Public Service Bonds and that Foster had a proclivity for high yield securities. In addition, A.G. Edwards alleged the following defenses: 1) Claimant failed to state a claim upon which relief can be granted because there is no private right of action for alleged violations of the NASD Rules of Fair Practice or New York Stock Exchange Rules; 2) Claimant is barred from recovery as a result of her failure to object or notify A.G. Edwards of the acts and omissions of which she complains within 10 days of receipt of written confirmations, account statements or other documents evidencing or setting forth transactions in Foster's account; 3) Foster is barred from recovery due to her contributory negligence in failing to exercise the degree of care an ordinarily prudent investor would exercise; 4) Foster's knowledge and voluntary assumption of the risks associated with the investing of Securities was the sole and proximate cause of her alleged damage; and, 5) The damages Foster allegedly suffered were caused by unforeseeable market factors and conditions for which A.G. Edwards is not liable or responsible. Furthermore, A.G. Edwards alleged a counterclaim against Foster pursuant to paragraph 23 of the Customer's Agreement which Foster executed on December 28, 1984. The agreement provided that Foster agreed to pay A.G. Edwards any expenses including attorneys' fees incurred by A.G. Edwards in defense of an action brought by Claimant should A.G. Edwards prevail. In addition, A.G. Edwards asserted a crossclaim against Thorn, seeking indemnification for any liability found against A.G. Edwards pursuant to violation of the employment agreement entered into by Respondents on July 1, 1983.

In an Answer, Counterclaim, Answer to Crossclaim and Counter-Crossclaim filed with the NASD on February 14, 1989, Respondent Stuart Thorn denied the allegations of the Statement of Claim and further denied any violation of the employment agreement as stated in A.G. Edward's crossclaim, stating that Claimant was a sophisticated businesswoman and aggressive investor; the securities and accounts were suitable for Claimant; and all matters involving the accounts were discussed with Claimant who made her own investment decisions. Thorn presented the following affirmative defense:

1. The Statement of Claim fails to state a claim upon which relief can be granted;
2. Claimant's failure to object to any transactions within 10 days after receipt of the Statements of Account confirmations, or other papers showing the transactions is a bar to the Statement of Claim;
3. Claimant is barred from recover due to her contributory negligence;
4. Claimants voluntary assumption of the risk of investing was the sole and proximate cause of her alleged damage;
5. The alleged damages are the result of unforeseeable market

factors and are not Thorn's responsibility;

6. Thorn was acting in the scope of his employment with A.G. Edwards & Sons Inc., and cannot be held individually liable;

7. Claimant reached an accord and satisfaction;

8. The claim is barred by the doctrines of waiver and estoppel;

9. Claimants allegations are fraudulent;

10. No breaches occurred which caused damages;

11. Claimant's damages, if any, were caused by her own actions or by her reliance on parties other than Thorn.

In the Counterclaim against Foster, Thorn alleged that Claimant was liable pursuant to the customer agreement for his attorneys' fees should Respondent prevail and that Foster made false and malicious statements designed to do harm to his personal and professional reputation. In addition, Thorn denied owing any sums on A.G. Edwards' Crossclaim, alleging that; 1) he was acting within the scope of his employment at all times; 2) A. G. Edwards is estopped by its own acts; 3) A. G. Edwards has waived its claims; 4) Thorn's acts did not cause damage to A.G. Edwards; 5) A.G. Edwards was contributorily negligent; 6) A.G. Edwards assumed the risk; and, 7) any damage suffered by Foster was caused by the acts of Foster and/or A.G. Edwards. Furthermore, Thorn asserted a Counter-Crossclaim against A.G. Edwards for indemnity and contribution alleging that any liability to Foster found will be attributable solely to the faulty supervision by A.G. Edwards or its other employees and officers.

Claimant denied the allegations of the Counterclaims filed against her. Respondent A.G. Edwards denied the allegations of the Counter-Crossclaim filed by Respondent Thorn.

#### OTHER ISSUES

Prior to hearing, Respondent A.G. Edwards filed a Motion to Dismiss the Amended Statement of Claim. Upon review of the Motion and all responses, the panel took the matter under advisement.

On October 29, 1990 and January 4, 1991, a pre-hearing conference was held pursuant to Section 32 of the Code of Arbitration Procedure before the panel chairman to resolve outstanding discovery issues.

At the initial hearing date of January 31, 1991, Respondents made a motion to adjourn the hearing pursuant to Section 30 of the Code of Arbitration Procedure. Upon hearing argument, the panel determined that the motion for adjournment would be granted.

#### RELIEF REQUESTED

Claimant Kathleen A. Foster originally requested damages from Respondents in

the amount of \$23,391.00. In the Ammended Statement of Claim, Claimant requested treble damages pursuant to AZRAC of at least \$90,000.00 plus interest at the legal rate of 10% per annum; consequential damages according to the proof; punitive damages of \$1,000,000.00; reasonable attorneys' fees and costs.

Respondent A.G. Edwards & Sons, Inc. requested that the claim be dismissed and denied in its entirety; that an award be entered against Foster for all costs and attorneys' fees expended pursuant to the Counterclaim; and that Thorn indemnify it for all costs, attorneys' fee and the amount of any liability found under the Claim.

Respondent Stuart Thorn requested that the Statement of Claim be dismissed and denied in its entirety; that Claimant pay his attorneys' fees and costs pursuant to the Counterclaim; that A. G. Edwards Crossclaim be dismissed and denied in its entirety; and that A. G. Edwards indemnify him pursuant to his Counter-Crossclaim.

#### PROCEDURAL MATTERS

On March 20, 21, 22 and April 1, 1991 in Phoenix, Arizona during a hearing lasting eight (8) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant Kathleen A. Foster on October 11, 1988, signed by Stephen G. Sneeringer on behalf of Respondent A. G. Edwards & Sons, Inc. on December 5, 1988 and on January 23, 1989 by Respondent Stuart E. Thorn.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with the NASD.

#### AWARD

After considering the pleadings, the pre-hearing memorandum, the testimony, and the evidence presented at the hearing, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent A. G. Edwards & Sons, Inc. is liable for and shall pay to Claimant Kathleen A. Foster the sum of \$13,000.00 as damages;
2. Respondent Stuart E. Thorn is liable for and shall pay to Claimant Kathleen A. Foster the sum of \$200.00 as damages;
3. All counterclaims filed against Claimant Kathleen A. Foster by Respondents A. G. Edwards & Sons, Inc. and Stuart E. Thorn are hereby dismissed and denied in their entirety;
4. The crossclaims filed by Respondents A. G. Edwards & Sons, Inc. and Stuart E. Thorn are hereby dismissed and denied in their entirety;

5. The claims for treble damages and punitive damages are hereby dismissed and denied in their entirety;

6. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

#### FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

The National Association of Securities Dealers, Inc. shall retain the \$120.00 claim filing fee and refund the \$280.00 hearing session deposit previously deposited with the NASD by the Claimant Kathleen A. Foster. Respondent A. G. Edwards & Sons, Inc. is liable for and shall pay to the NASD forum fees in the amount of \$4300.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrator(s) Signature

Christian J. Hoffman, III  
Christian J. Hoffman, III  
Public Arbitrator  
Presiding Chair

Dated: June 6, 1991

Melvin H. Borovay  
Melvin H. Borovay  
Public Arbitrator

Dated: June 6, 1991

Bruce W. Genther  
Bruce W. Genther  
Industry Arbitrator

Dated: June 6, 1991