

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Kenneth L. Colquitt

89-02987

Name of Respondent(s)

Shearson Lehman Hutton, Inc.
Drexel Burnham Lambert, Inc.
Leigh Burch, III

REPRESENTATION

Claimant Kenneth Colquitt was represented by Fredrick H. Thomforde, Jr., Esq. of Morton, Thomforde and Morton, Knoxville, Tennessee. Respondent Shearson Lehman Hutton, Inc. was represented by Therese Obringer, Esq. of Neal Garber & Eisenberg, Chicago, Illinois.

CASE SUMMARY

In a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on or about October 24, 1989, Claimant Kenneth Colquitt ("Colquitt") alleged that Respondent Shearson Lehman Hutton, Inc. ("Shearson"), through its agent, transacted eight (8) unauthorized buys during the time between March 9, 1989 and April 20, 1989. Colquitt alleged that in each and every case of an unauthorized transaction when he learned of it through receiving the confirmation notice in the mail, he protested the unauthorized transaction, but was assured through a representative of Shearson that they would no longer engage in further unauthorized transactions. Colquitt further alleged that by June 1989, he learned that the representative from Shearson who was responsible for the transactions, had serious personal financial problems arising from his having repeatedly taken high risks in the market in an attempt to cover past losses. At that time, Colquitt alleged he ceased trading through that representative of Shearson. Colquitt alleged the seven (7) following violations: 1) breach of the customer agreement between Colquitt and Shearson in that said agreement did not authorize Shearson, their agents or employees to effect transaction in Colquitt's accounts without Colquitt's prior approval and breach of the implied agreement between the parties that no such unauthorized transaction would take place; 2) common law fraud in that Shearson represented to Colquitt, by means of the written customer agreements and their oral statements, that no transaction would be effected in Colquitt's account without his prior approval, that as a result of, and in reliance on, such express and implied representations, Colquitt was induced to open an account or accounts with the respondents and to continue to maintain such accounts and to trade in securities, and that in reliance on said intentional

misrepresentation, Colquitt incurred substantial financial damages; 3) breach of the common law fiduciary duty owed by Shearson to Colquitt in that Shearson intentionally and with wanton and reckless disregard for the duties owed to Colquitt, engaged in unauthorized transactions; 4) violated the Tennessee Securities Act, Section 48-2-121 in that it constitutes device, scheme or artifice to defraud as well as acts, practices and a course of business which operated as a fraud and deceit upon Colquitt; 5) violated Section 10(b) and 10(b)(5) of the Securities Exchange Act of 1934; 6) common law agency in that Shearson is vicariously liable under the Doctrine of Respondeat Superior and directly liable in that they recklessly disregarded to supervise their agent; and 7) violated RICO, 18 U.S.C. Section 1962(c).

In a Statement of Answer filed with the NASD on or about February 20, 1990, Shearson denied the claim in its entirety. Respondent's answer refuted the claim, alleging that Colquitt was a sophisticated investor who was not misled into a "false sense of security," but, in fact, had traded with Shearson in the past. Shearson denied the allegation that "in each and every case, Claimant protested the unauthorized transaction." In fact, Shearson's answer alleged that at no time during any of the numerous phone conversations with Shearson's sales assistant did Colquitt ever protest or complain about any transaction. As to the 18000 shares of Regina stock, 200 shares of Texas Air, 10 Kindercare options, and 20 Northwest Airlines options in issue, Shearson alleged that Colquitt was never dissatisfied concerning unauthorized trades. Shearson further alleged that Colquitt never responded to the customer dissatisfaction notices on the confirmations and monthly statements. Shearson alleged that Colquitt was an experienced investor who was dissatisfied with the conservative returns.

RELIEF REQUESTED

Colquitt requested total compensatory damages of \$52,653.32 which included the losses suffered by Colquitt as a result of the unauthorized transactions, including commissions, plus interest expenses incurred by Colquitt on his margin account as a result of said unauthorized transactions, plus interest from the date of said transaction plus attorneys fees as provided by the Tennessee Securities Act Section 48-2-122(f). Colquitt also requested punitive damages and RICO treble damages, plus costs, including reasonable attorneys fees, as provided by 18 U.S.C. Section 1964(c). Shearson requested that Colquitt's claims be dismissed in their entirety and that costs be awarded to Shearson in defending this action.

OTHER ISSUES

Leigh Burch III ("Burch") and Drexel Burnham Lambert, Inc. ("Drexel") were, originally, additional respondents to the claim. However, the arbitration proceeding had been stayed against both Burch and Drexel due to the Chapter 7 and Chapter 11 Bankruptcy filings, respectively, by each of the parties. At the hearing, under the authority of the panel members, the amount of Claimant's requested compensatory damages was amended to \$87,189.86 as indicated in Claimant's Exhibit 5. Claimants original amount for compensatory damages was \$201,445.61 which included Burch and Drexel as respondents.

PROCEDURAL MATTERS

On Thursday, July 18, 1991 in Nashville, Tennessee during a hearing lasting a total of 2 sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on October 19, 1989 by Claimant Kenneth L. Colquitt, on January 11, 1990 by William A. Hohauser on behalf of Respondent Shearson Lehman Hutton, Inc.

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 original(s) remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The motion to dismiss the claim on the basis of Section 15 of the NASD Code of Arbitration is denied;

2. Shearson Lehman Hutton, Inc. is liable for and shall pay to Colquitt the Sum of \$87,189.86. (Eighty Seven Thousand One Hundred Eight Nine and Eighty Six Cents);

3. The parties shall each bear their own costs and expenses other than forum fees enumerated below; and

4. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall refund the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant Colquitt. Respondent Shearson shall be liable for the forum fees in the amount of \$2000.00 and also the \$250.00 claim filing fee.

By the Panel

Dated: July 18, 1991

Joseph C. Loser
Presiding Chair
Public Arbitrator

Dated: July 18, 1991

David N. Burn, Esq.
Public Arbitrator

Dated: July 18, 1991

Milton E. Sitton, Esq.
Industry Arbitrator

Dated Served: July 31, 1991