

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Russell & Margery Handy

90-00974

Name of Respondent(s)

William Rosenberger
B.C. Christopher Securities Company
Blunt, Ellis & Loewi Incorporated

CASE SUMMARY

In a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on April 2, 1990, Claimants Russell and Margery Handy alleged that Respondent William Rosenberger, while acting as an agent or employee of Respondents B. C. Christopher Securities Company and Blunt, Ellis & Loewi, Inc., engaged in the following wrongful acts during the years 1983 through 1986:

- 1) Without the knowledge or authorization of Claimants, forged Claimants' signatures to a B.C. Christopher's Customer Agreement in 1983 and began to engage in certain margin transactions involving speculative stocks;
- 2) Engaged in unauthorized margin transactions in Claimants' account which were unsuitable and contrary to the Claimants' investment objectives;
- 3) Engaged in a pattern of trading excessive in size and frequency in light of the financial needs and objectives of Claimants which were designed to further only the interests of maximizing Respondents' commissions earnings;
- 4) Failed to disclose or misrepresented to the Claimants material facts regarding the risk and suitability of the investments for the purpose of misleading Claimants;

It was further alleged that Respondents B.C. Christopher and Blunt, Ellis & Loewi failed to properly manage and supervise Claimants' account during those periods when the accounts were located at the respective firms and that the Respondents engaged in a pattern of racketeering activity through Respondent Rosenberger, whose predicate acts of securities fraud were alleged specifically in the Statement of Claim.

Claimants alleged that Respondents breached their fiduciary duty to Claimants, committed common law fraud and negligence, violated Federal Securities Laws (15 U.S.C. 78a, et seq.) and violated the Federal RICO Statute (18 U.S.C. 1962, et seq.). Liability of Respondents Blunt, Ellis, and Loewi, Inc. and B.C. Christopher is alleged for aiding and abetting Respondent Rosenberger, for violation of Section 20 of the Securities and Exchange act of 1934 (controlling person liability) and under Respondent Superior.

In a Statement of Answer filed with the NASD on May 31, 1990, Respondent Blunt, Ellis & Loewi, Inc. denied the material allegations of the Statement of Claim and stated affirmatively that:

- 1) The Claimants were educated and sophisticated individuals who allowed Respondent Rosenberger a range of discretion to effect marginal stock transactions within parameters they established;
- 2) Respondent Rosenberger acted within the parameters established by Claimants;
- 3) The transactions complained of were neither excessive or unsuitable in light of Claimants circumstances and desire for increasingly aggressive investments;
- 4) The Claimants ratified and approved all purchases by directing the transfer of shares to Respondent B.C. Christopher;
- 5) The Claimants failed to exercise ordinary care in their investment affairs;
- 6) The loss which Claimants ultimately realized was not caused by anything which occurred at Blunt, Ellis & Loewi;
- 7) Respondent Rosenberger was adequately and completely supervised during his employment at Blunt, Ellis, & Loewi; and,
- 8) The allegations of securities law violations by Respondent Rosenberger would not establish RICO liability against Blunt, Ellis, & Loewi.

In a Statement of Answer filed with the NASD on June 4, 1990, Respondent B. C. Christopher Securities Co. denied the material allegations of the Statement of Claim, alleging affirmatively as follows:

- 1) The Statement of Claim failed to state a claim upon which relief can be granted;
- 2) Respondent Rosenberger did not act within the scope of his employment with respect to any act and/or representation made to the Claimants;
- 3) The claim is barred by the applicable statute of limitations;

- 4) The acts claimed of occurred while Respondent Rosenberger was employed by other firms;
- 5) If Respondent B.C. Christopher is found liable for any part of the Claimants' damages, then the liability should be apportioned between all parties at fault;
- 6) Respondent B.C. Christopher was not a control person with respect to any of Claimants' allegations;
- 7) Respondent B.C. Christopher acted in good faith;
- 8) All trades were authorized and any alleged unauthorized trades were ratified by Claimants;
- 9) The claims are barred by the defense of in pari delicto;
- 10) Claimants have failed to plead fraud with sufficient particularity;
- 11) Claimants failed to act with due diligence with respect to their claims;
- 12) The Claimants maintained control over all trading conducted in their account;
- 13) Any losses in the account were a result of market conditions and risks of trading which the Claimants willingly and knowingly assumed;
- 14) Claimants are estopped from asserting their claim;
- 15) Claimants failed to mitigate their losses;
- 16) RICO liability cannot be established against a corporate employer solely on the principal of respondent superior;
- 17) Claimants have failed to state a claim for punitives under Missouri and/or federal law;
- 18) The standard of conduct alleged by Claimants is vague and arbitrary and denies due process in violation of the Missouri and U.S. Constitution;
- 19) Claims for punitives are barred by the 1st, 4th, 6th, 8th, and 14th Amendments to the U.S. Constitution;
- 20) The standards for determining the imposition of punitive damages are vague, supply no nature to Respondents of the potential repercussion, and are subject to the unbridled discretion of the arbitrators, thereby denying the constitutional right to due process;

- 21) The request for punitives is criminal in nature and the rights given to defendants in criminal proceeds are applicable;
- 22) The request for damages is a request for an excessive fine in violation of the Missouri and U.S. Constitution;
- 23) The request for punitive damages constitutes cruel and unusual punishment in violation of the Missouri and U.S. Constitutions;
- 24) The request for punitive damages constitutes a denial of equal protection under the law in violation of the 5th and 14th amendments;
- 25) The request or imposition of punitive damages does not protect Respondent against multiple punishments and violates the State and Federal constitutions.

In an Statement of Answer filed with the NASD on June 4, 1990, Respondent William Rosenberger denied the material allegations of the Statement of Claim, claiming the following affirmative defenses:

- 1) Claimants fail to state a claim upon which relief can be granted;
- 2) The claims are barred, in whole or in part, by the applicable statute of limitations;
- 3) If Respondent Rosenberger is found liable of any damages, then fault should be apportion among all parties at fault, including Claimants who directed and consulted to all purchases;
- 4) If the Claimants fault exceeds one-half of the total fault, they should take nothing on their claim;
- 5) Respondent Rosenberger acted in good faith;
- 6) Punitive damages can not be awarded in an arbitration proceeding and the panel is without jurisdiction to make such an award;
- 7) Claimants are barred by the defense of in pari delicto;
- 8) Claimants failed to act with diligence with respect to their claims;
- 9) Claimants maintained control over all trading conducted in their account and authorized and/or ratified the positions when they transferred to B.C. Christopher;
- 10) Any losses sustained by Claimants where a result of market conditions and risks of security trading willingly and knowingly assumed by Claimants;

- 11) Claimants failed to mitigate their losses;
- 12) Claimants are estopped from pleading predicates acts which are the subject of pending litigation.

RELIEF REQUESTED

Claimants Russell and Margery Handy requested entry of an award against Respondents in an amount in excess of \$10,000.00, plus treble damages pursuant to the RICO claim, \$1,000,000.00 in punitive damages, interest, cost, and attorneys' fees.

Respondents Blunt, Ellis, & Loewi, Incorporated, B.C. Christopher Securities Company, and William Rosenberger all requested that the Statement of Claim be dismissed and denied in its entirety and that they recover their costs.

OTHER ISSUES

Prior to the hearing date, the parties informed the NASD arbitration staff that Claimants Russell and Margery Handy had settled their claim against Respondent Blunt, Ellis, & Loewi, Incorporated, but would continue with the claims involving Respondent B. C. Christopher Securities Company and William Rosenberger. The parties informed the panel of the above action on the hearing date and determined that the hearing would proceed without Respondent Blunt Ellis and Loewi, Incorporated and that any award rendered would be confined to the claims against the remaining Respondents.

PROCEDURAL MATTERS

On March 14 and 15, 1991, in Kansas City, Missouri during a hearing lasting a total of four (4) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on September 29, 1989 by Claimants Russell L. Handy, Jr. and Margery S. Handy, on June 8, 1990 by Elrod P. Wilson on behalf of Respondent B.C. Christopher Securities Co., on March 14, 1991 by Respondent William M. Rosenberger, and on May 29, 1990 by Connie Shannon on behalf of Respondent Blunt Ellis & Loewi, Incorporated.

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

The arbitration panel, having considered the pleadings, the testimony, the evidence presented at the hearing, and the post hearing submissions, has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents B.C. Christopher Securities Co. and William Rosenberger are jointly and severally liable for and shall pay to Claimants Russell and Margery Handy the sum of \$5,000.00;

2. Each party shall bear their own costs, including attorney's fees, except for those specifically enumerated herein;
3. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$250.00 non-refundable filing fee and refund the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimants Russell and Margery Handy. Respondent B.C. Christopher is liable for and shall pay to the NASD forum fees in the amount of \$4000.00.

BY THE PANEL

Dated:

7/25/91

Michael W. Gear
Michael W. Gear
Presiding Chair

William L. Beedles, Ph.D.

Patrick E. Hartigan, Esq.
Industry Arbitrator

90-974

2. Each party shall bear their own costs, including attorney's fees, except for those specifically enumerated herein;
3. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$250.00 non-refundable filing fee and refund the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimants Russell and Margery Handy. Respondent B.C. Christopher is liable for and shall pay to the NASD forum fees in the amount of \$4000.00.

BY THE PANEL

Dated:

April 22, 1991

Michael W. Gear
Presiding Chair

William L. Beedles, Ph.D.

Patrick E. Hartigan, Esq.
Industry Arbitrator

96-774

2. Each party shall bear their own costs, including attorney's fees, except for those specifically enumerated herein;
3. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$250.00 non-refundable filing fee and refund the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimants Russell and Margery Handy. Respondent B.C. Christopher is liable for and shall pay to the NASD forum fees in the amount of \$4000.00.

BY THE PANEL

Dated:

Michael W. Gear
Presiding Chair

4/25/91

William L. Beedles, Ph.D.

Patrick E. Hartigan, Esq.
Industry Arbitrator