

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Jackie B. Clayton

90-02694

Name of Respondent(s)

Shearson Lehman Hutton, Inc.
Mark S. McAfee

REPRESENTATION

Claimant Jackie B. Clayton was represented by P. David Newsome, Jr., Esq. of Conner & Winters, Tulsa, Oklahoma. Respondents Shearson Lehman Hutton, Inc. and Mark S. McAfee were represented by William A. Olshan, Esq. of Shearson Lehman Brothers, Inc., New York, New York.

CASE SUMMARY

In a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on or about September 27, 1990, Claimant Jackie B. Clayton ("Clayton") alleged violations of Sections 12(2) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Additionally, Clayton alleged violations of Section 408 of the Oklahoma Securities Act, failure to supervise, control person liability, aiding and abetting and common law fraud. Clayton alleged that Respondent Mark S. McAfee ("McAfee") convinced Clayton to establish an IRA with McAfee at Shearson. Clayton alleged that McAfee contacted him about the Colonial Intermediate High Income Fund ("Colonial Fund") and that McAfee described the Colonial Fund as comprised of 80% high rated bonds and 20% unrated securities yielding a 12% return per annum. McAfee also allegedly told Clayton that if he acted quickly he could purchase senior notes of the Colonial Fund instead of shares. McAfee allegedly stated that by purchasing the senior notes, Clayton's money would be protected since the senior notes were redeemable at face value in five years whereas the shares of the Colonial fund were highly volatile because the Colonial Fund was composed of junk bonds. Clayton alleged that although the Colonial Fund was part of a new issue he did not receive a prospectus until August of 1988 which was after Clayton's purchase in July of 1988. Clayton alleged that the purchase of such a junk bond fund was an unsuitable investment for a retiree seeking to minimize risk and protect principal. Clayton also alleged that the Colonial Fund was not registered under the applicable provisions of the Oklahoma Securities Act.

In a joint Statement of Answer filed with the NASD on December 19, 1990, Shearson and McAfee denied that the characteristics of the mutual fund purchased by Clayton were misrepresented by McAfee. Shearson and McAfee also denied that the mutual fund was unsuitable for Clayton. Shearson and McAfee alleged that Clayton and McAfee met on several occasions over a period of one and one half months during which several different investment options were presented to Clayton. McAfee and Shearson alleged that the risks of all the investments were described to Clayton and that Clayton rejected previous recommendations of more secure investments because the income generated by these investments was too low. Shearson and McAfee alleged that Clayton understood he would have to assume greater risk to achieve the income he wished. Shearson and McAfee asserted that Clayton received a confirmation reflecting his investment in the Colonial Fund and not in the notes he described in his claim. Shearson and McAfee asserted that the Colonial Fund was exempt from registration under the Oklahoma Securities Act. Lastly, Shearson and McAfee asserted various affirmative defenses to the claim including, but not limited to, failure to mitigate damages.

RELIEF REQUESTED

Clayton requested actual damages of not less than \$215,646.63, plus a reasonable return on the monies if the account was handled properly, interest, attorney's fees, costs and punitive damages in an amount determined by the arbitrators. Shearson and McAfee requested that the claim be dismissed in its entirety.

PROCEDURAL MATTERS

On Wednesday, June 12, 1991 in Oklahoma City, Oklahoma during a hearing lasting two (2) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on September 21, 1990 by Claimant Jackie B. Clayton.

Respondents Shearson and McAfee did not file with the NASD properly executed submissions to arbitration but are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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, and the evidence presented at the hearing, has decided in full and final resolution of the issues submitted for determination as follows:

1. All claims asserted by Clayton against Shearson and McAfee are denied and dismissed in their entirety;

2. The parties shall each bear their own costs, expenses and attorneys fees incurred in this matter; and

3. Pursuant to Section 43(c) of the Code of Arbitration, the National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant Clayton. Shearson is assessed additional forum fees of \$750.00 which sum is payable to the NASD.

Dated: 8/13/91

N. Martin Stringer
N. Martin Stringer
Presiding Chair
Public Arbitrator

Dated: _____

James E. Golden, Jr.
James E. Golden, Jr.
Public Arbitrator

Dated: _____

Anne M. Long-Larsen
Anne M. Long-Larsen
Industry Arbitrator

Date Served by the NASD: _____

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Dated: _____

N. Martin Stringer
Presiding Chair
Public Arbitrator

Dated: 8/12/91



James E. Golden, Jr.
Public Arbitrator

Dated: _____

Anne M. Long-Larsen
Industry Arbitrator

Date Served by the NASD: _____

NASD

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Dated: _____

N. Martin Stringer
Presiding Chair
Public Arbitrator

Dated: _____

James E. Golden, Jr.
Public Arbitrator

Dated: 8/27/91

Ann M. Long-Jensen
Ann M. Long-Jensen
Industry Arbitrator

Date Served by the NASD: _____