

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between )

Name of Claimant(s) )

Annabel H. Newell )

Case No. 90-03302

Name of Respondent(s) )

Merrill Lynch Pierce Fenner & Smith Inc.)

Smith Barney Harris Upham & Co., Inc. )

Drexel Burnham Lambert, Inc. )

Kidder, Peabody & Co., Incorporated )

Alan I. Schreiber )

Michael Novak )

David Pines )

REPRESENTATION

For Claimant, Annabel H. Newell ("Newell"): Theodore F. Brill, Esq. of Theodore F. Brill, P.A.

For Respondent, Michael Novak ("Novak"): Ronald Shindler, Esq. of Fowler, White, Burnett, etc. For Respondents, Kidder Peabody & Co., Inc. ("Kidder") and David Pines ("Pines"): George C. Cabell, Esq. of Kidder.

CASE INFORMATION

Statement of Claim filed: November 21, 1990. Claimant's Submission Agreement signed: November 14, 1990.

Respondent, Novak's, Statement of Answer filed: February 4, 1991. Respondents, Kidder and Pine's, Statement of Answer filed: January 11, 1991. Respondents' Submission Agreements signed by Novak on November 19, 1991; by Pines on January 14, 1991; and, by Peter C. Salerno on behalf of Kidder on January 22, 1991.

HEARING INFORMATION

On November 19 and 20; December 9 and 11, 1991; and January 2, 3 and 4, 1992, in Fort Lauderdale, Florida, hearings lasting sixteen (16) sessions were conducted.

CASE SUMMARY

Claimant alleged that she is an unsophisticated, 89 year old. retired widow; that her account objective was preservation of capital; that Respondents,

through Alan Schreiber ("Schreiber"), Newell's account executive, churned the account; placed Claimant on margin; made misrepresentations of and omitted to state material facts; that Respondents recommended and effected in Claimant's accounts trades in equity securities, mutual funds and bonds that were unsuitable; and, that Respondents' actions constituted fraud, negligence, gross negligence, breach of fiduciary duty, negligent supervision and violation of Sections 517.301 and 211, Florida Statutes.

Respondents denied all allegations of wrongdoing. Respondent, Novak, alleged the defenses of approval and ratification; knowledge; failure to complain; accord with industry standards; failure to state a claim; statute of limitations; failure to mitigate; failure to use due diligence; losses result of Claimant's own negligence; assumption of risk; laches; authorization and ratification; waiver and estoppel; and, no entitlement to attorney's fees or punitives.

Respondents, Kidder and Pines, alleged the defenses of losses were the result of market conditions; Claimant's failure to object; failure to state a claim; estoppel, and, bar by ratification, waiver and failure to mitigate.

#### RELIEF REQUESTED

Claimant requested from Kidder and Pines damages in the amount of \$71,398.12, and from Novak damages in the amount of \$143,821.36; interest; a reasonable return based upon yield from suitable investments; punitive damages; attorney's fees; and, other relief.

Respondents requested dismissal, costs and expenses.

#### OTHER ISSUES CONSIDERED & DECIDED

1. 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.
2. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Smith Barney Harris Upham & Co., have settled with the Claimant and have been removed as parties to this matter. This Award does not make any determination regarding these removed parties.
3. Respondents, Drexel Burnham Lambert, Inc. and Alan I. Schreiber, have filed bankruptcy petitions and, as a result of the automatic stays, have been removed as parties. This Award does not make any determination regarding these removed parties.

#### AWARD

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

1. Respondent, Pines, is found not liable and, therefore, all claims against him are hereby dismissed.
2. Respondent, Kidder, is found liable and shall pay to Claimant the amount of \$25,539.49, plus interest at the legal rate of 12%, from October 29, 1989 through date of Award, in the amount of \$7,069.89, for a total due to the Claimant of \$32,609.38, based upon negligence, negligent supervision and breach of fiduciary duty.
3. Respondent, Novak, is found liable and shall pay to the Claimant the amount of \$26,979.74, plus interest at the legal rate of 12% per annum from February 26, 1988 to date of Award in the amount of \$12,905.92, for a total due to the Claimant of \$39,885.66, based upon negligence, negligent supervision, gross negligence, and breach of fiduciary duty.
4. Respondent, Novak, is also found liable and shall pay to the Claimant the further amount of \$15,000.00 for punitive damages. The Panel specifically finds that Novak failed to prove that New York law applied to his case and, therefore, the Panel determined that Florida law applied to the claim against Novak and has awarded the punitive damages under Florida law upon its finding of gross negligence.
5. Claimant's request for attorney's fees is denied.
6. Claimant's request for punitive damages against Kidder is denied.
7. Respondents, Kidder and Novak, are further found liable, jointly and severally, for costs and expenses and shall pay to the Claimant the additional amount of \$6,262.86.

#### OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

#### FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$15,300.00 (one hearing with a single arbitrator x \$300.00 plus fifteen (15) sessions x \$1,000.00). Respondents, Novak and Kidder, are hereby assessed, \$15,300.00, jointly and severally, \$1,000.00 of which shall be paid directly to the Claimant and \$14,300.00 of which shall be paid to the National Association of Securities Dealers, Inc.
  2. Respondents, Novak and Kidder, jointly and severally, shall also reimburse Claimant \$250.00 for the non-refundable filing fee.
- Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRING AND DISSENTING STATEMENTS OF ARBITRATORS

1. Arbitrator Paetro: I concur in the above Award except that I would find: a. that Respondent, Pines, is liable for negligent supervision; and, b. that Respondent, Novak, is liable for rescissory damages pursuant to Sections 517.301 and 211, Florida Statutes in the total amount of \$143,821.36 plus attorney's fees, based upon the uncontroverted damage evidence presented by the Claimant.

2. Arbitrator Avey: I concur in the above Award, including that Respondent, Novak, failed to prove that New York law applies to his case. However, I dissent to that portion of the Award finding punitive damages against Respondent, Novak.

3. Arbitrator Stein: I concur in the above Award except that I dissent to the Award of any costs related to Claimant's expert witness fees.

Concurring and Partially Dissenting Arbitrators' Signatures

151  
Craig Edward Stein, Esq.

Public

151  
Judy Avey

Public

151  
Anthony S. Paetro, Esq.

Industry

Date of Decision: MARCH 5, 1992