

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Rosemarie L. Koss

vs.

Case #  
91-00183

Name of Respondents

Andover Securities, Inc.  
Kent Miller  
Terry McGavern  
Dennis Smith

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**REPRESENTATION**

For Claimant: Christopher J. Barber of the law firm of Adler, Kaplan & Begy

For Respondents: James D. Griffin from the law firm of Blackwell Sanders Matthew Weary & Lombardi, for the commencement of the hearing. During the hearing, Respondents were represented by David Hargrave, Esq. from the law firm of Frensley & Twoerman, P.C. and co-counsel Martin Mushkin, Esq. who is in private practice.

**CASE INFORMATION**

Statement of Claim filed on: January 16, 1992.

Claimant's Submission Agreement signed on: January 14, 1991.

Joint Statement of Answer filed by Respondents, Andover Securities, Inc. ("Andover"), Kent Miller ("Miller"), Terry McGavern ("McGavern"), and Dennis Smith ("Smith") (collectively "Respondents") on: August 21, 1991.

Respondent, Andover Group, Inc. ("Andover Group") did not file a Statement of Answer.

Respondent, Andover Securities, Inc.'s Submission Agreement signed on: August 19, 1991.

Respondent, Kent Miller's Submission Agreement signed on: August 19, 1992.

Respondent, Terry McGavern's Submission Agreement signed on: August 19, 1992.

Respondent, Dennis Smith's Submission Agreement Signed on: August 20, 1992.

Respondent, Andover Group, Inc. did not file a Submission Agreement.

### HEARING INFORMATION

Hearing Date/Sessions: October 19, 1992	-	3 Sessions
May 14, 1992	-	2 Sessions
May 13, 1992	-	2 Sessions

Hearing Location: Ramada Inn, 1228 Western Ave., Albany, New York.

### CASE SUMMARY

Claimant alleged that she became acquainted with Gary J. Bohling ("Bohling") F prior to his affiliation with Respondent, Andover as a Registered Representative. Claimant alleged that she informed Bohling, who had then become an agent and representative of Andover, of her extremely conservative investment objectives

which consisted of guaranteed safety of principal, liquidity and a guaranteed rate of return. Claimant alleged that she also informed Bohling that she was an unsophisticated investor whose previous investments included credit union savings and bank-issued certificates of deposits, and that any money invested would be for her children's education and her retirement. Claimant alleged that she invested funds in excess of \$150,000 with Andover, in addition to \$25,000, which she held for the benefit of her brother who is a disabled veteran. Claimant alleged that Bohling proceeded to purchase investments which were unsuitable and inappropriate for her and inconsistent with her investment objectives. In particular, Claimant alleged that Bohling purchased investments for her which included interest in oil and gas exploration partnerships, speculative low-grade bonds, high-risk gold certificates and highly-speculative securities offerings, such as a company which franchises combination laundromat/taverns. Claimant alleged that neither of these investments possessed the stated qualities of safety and liquidity as Claimant directed. Claimant alleged that Bohling misrepresented these investments as safe and liquid and made statements which included but not limited to, representations that the investments were without risk, were just like certificate of deposits, and were guaranteed by the FDIC. Claimant further alleged that she did not receive a prospectus prior to purchasing most of the investments, that Bohling breached his fiduciary duty, that Andover, through its controlling officers; Miller, McGavern, and Smith, knew of the misrepresentations made to her by Bohling. Claimant alleged that Andover failed to make adequate inquiry with regard to Claimant's financial position, sophistication as an investor, and expressed investment objectives and that Andover intentionally withheld relevant information so as to make certain statements regarding her investments to be untrue or misleading. Claimant alleged that she relied on these statements to her detriment. Claimant alleged that some of the funds given to Bohling to be invested were retained by Andover and Bohling and converted by them for their own use and benefit.

Respondents maintained that each investment made for Claimant was suitable with regards to net worth and sophistication in that Claimant initially represented her investment objective as earning a high rate of return and reducing the high amount of taxes she was paying. When informed that greater return meant the assumption of greater risk, Claimant did not object and upon direct questioning was evasive regarding her net worth. Respondents maintained that Claimant chose investments consistent with her investment objectives, such as Mentor Corporate bonds which paid 14 1/2 percent interest. Respondents maintained that they learned that Claimant is of considerable net worth through their dealings with her over several years. Respondents maintained that Bohling regularly delivered a prospectus to her with each investment and thoroughly explained private placement memoranda to her prior to all applicable investments. Respondents maintained that on occasion Claimant did not want to review the prospectuses and signed the private placement memorandums which clearly described net worth requirements. Respondents maintained that Claimant subsequently changed her investment objective to require more secure investments. However, once investments which provided safety of principal were purchased, Claimant bitterly complained about the low rate of interest. Respondent maintained that they later discovered that this investment was not for her but for her brother, but listed in her name. Respondent maintained that no representative of Andover ever guaranteed investments made for Claimant or misrepresented safeness, liquidity or rate of return to Claimant.

Respondent maintained that Claimant failed to state a claim upon which relief can be granted, that claimant claims are barred by the applicable statute of limitations, that Claimant has waived her claims by continuing to invest with Mr. Bohling and by not objecting to any alleged improper investments until 1990. Respondent further maintained that Respondent acted in good faith at all times, the claim that Bohling "guaranteed" investments are unenforceable because of the Statutes of Frauds, that Claimant claims are barred by the defense of equal

fault, that Claimant has failed to plead fraud with sufficient particularity and, therefore, any count alleging fraud or any derivative of fraud is barred and any loss sustained by Claimant was a direct result of market conditions and risk of securities investments which Koss willingly and knowingly assumed.

#### **RELIEF REQUESTED**

Claimant requested \$150,000 as out-of-pocket losses and an additional \$25,000, which represents loss of funds held for the benefit of her brother Pasquale Nicoterra. Claimant also requested interest and costs for this proceeding.

Respondent requested that the claims be dismissed in its entirety.

### OTHER ISSUES CONSIDERED & DECIDED

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.

Respondent requested that the claim against Andover Group, Inc. and Dennis Smith, a Registered Representative thereof, be dismissed. Respondent maintained that Andover Group is not a member of the NASD and thus not subject to NASD jurisdiction. Respondent further maintained that Dennis Smith who was named in this proceeding as a controlling person with Andover Securities is not a controlling person nor is he a principal.

The panel denied the request to dismiss the claim against Andover Group, Inc.. The panel granted the request to dismiss the claim against Dennis Smith.

### AWARD

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

1. The arbitrators find in favor of the Claimant in the sum of **ONE HUNDRED TWENTY SEVEN THOUSAND THREE HUNDRED TWENTY ONE DOLLARS (\$127,321.00)** with interest to run the legal rate (9%) from the date of filing, January 16, 1991 until the date the award is paid in full. The award is rendered against Andover Securities, Inc. Andover Group, Inc., Kent Miller and Terry McGavern, jointly and severally.

### FORUM FEES

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

The cost of arbitration are to be divided equally between the parties.

Filing Fee: \$200.00

Hearing Session Deposit: \$750 x 7 Sessions = \$5,250.00

1. Claimant is to pay the NASD the sum of \$2,725.00. Claimant is allowed to offset this amount with the deposit of \$950.00 already held by the NASD. Thus Claimant is to pay the balance of \$775.00.

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2. Respondent are to pay the NASD the amount of \$2,725.00, jointly and severally.
3. Andover Securities, Inc. requested and received tapes of the above proceedings. The NASD has received \$105.00 to cover the cost of duplication.
4. Claimant filed a motion and request for a continuance of the above proceedings prior to the commencement of the first Session. The panel granted the request and retained the postponement fee of \$750.00.
5. Respondents filed a joint motion to continue the hearing prior to the commencement of the first session. The panel granted the request and retained the postponement fee of \$750.00.

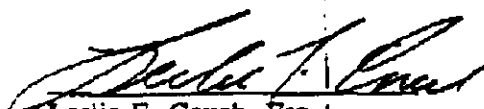
Fees are payable to the National Association of Securities Dealers, Inc.

**ARBITRATION PANEL**

Leslie F. Couch, Esq.  
Roger S. Smith  
Daniel S. Cooper

- Public Chairperson  
- Public Panelist  
- Industry Panelist

Concurring Arbitrator's Signature

  
Leslie F. Couch, Esq.

Date of Decision: January 8, 1993

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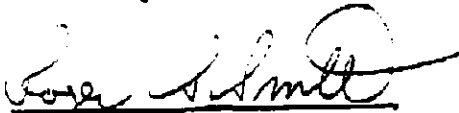
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Concurring Arbitrator's Signature

  
Daniel S. Cooper

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Susan Dora  
Notary Public, State of New York  
Qualified in Hamilton County  
Commission Expires March 22, 1993