

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Elisa H. Lucksinger

91-00249

Name of Respondent(s)

Rauscher Pierce Refnes, Inc.
John M. Thrower

REPRESENTATION

For Claimant: Elisa H. Lucksinger was represented by Lisa D. Schafroth, Esq. and Steven M. Bowers, Esq. of Winstead, Sechrest & Minick, Austin, Texas.

For Respondents: Rauscher Pierce Refnes, Inc. was represented by Scott M. Kline, Esq. of Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas. John M. Thrower appeared pro se.

CASE INFORMATION

Statement of Claim filed: January 23, 1991
Amended Statement of Claim filed: May 3, 1991
Second Amended Statement of Claim filed: July 8, 1991
Claimant's Submission Agreement signed on: January 14, 1991

Statement of Answer filed by Respondent Rauscher Pierce Refnes, Inc. on: March 27, 1991
Amended Statement of Answer filed by Respondent Rauscher Pierce Refnes, Inc. on: July 15, 1991
Respondent Rauscher Pierce Refnes, Inc.'s Submission Agreement signed on: March 8, 1991 by Sharon J. Stumway, Vice-President and Director of Compliance

Statement of Answer filed by Respondent John M. Thrower on: October 7, 1991
Respondent John M. Thrower's Submission Agreement signed on: October 4, 1991

HEARING INFORMATION

Hearing Dates/Sessions: October 16, 1991 for two (2) sessions

Hearing Location: Houston, Texas

CASE SUMMARY

Claimant Elisa H. Lucksinger ("Luck singer") alleged that Respondent John M. Thrower ("Thrower"), while employed by or acting as an agent for Respondent Rauscher Pierce Refnes, Inc. ("Rauscher Pierce"), engaged in the following acts:

1. Invested Luck singer's funds in the Putnam Premier Income Trust which was unsuitable for Luck singer given her investment objectives, lack of financial sophistication, need to preserve capital and stage in life;
2. Misrepresented or failed to explain the risks associated with the types of securities the Putnam Fund was investing in, such as high yield, lower rated U.S. fixed income securities and the international sector of the fixed income securities market;
3. Misrepresented that Luck singer's funds were placed in a "CD-type" investment that would have little or no risk of loss of principal and would generate stable interest income.

Based upon the above allegations, Luck singer asserted causes of action for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder, violation of NASD Rule of Fair Practice Article III, Section 2 (the "Suitability Rule"), common law fraud and/or negligence and breach of Respondents' fiduciary duty to Luck singer.

Respondent Rauscher Pierce Refnes, Inc. denied the material allegations made by Luck singer, alleging that:

1. Luck singer received a prospectus prior to investing in the fund which clearly explained the risks of the fund, including that the value of the shares would fluctuate, that the shares in the fund were non-redeemable unless a buy-back was authorized by the fund and that the shares traded at a discount to net asset value in the market;
2. During the 2 1/2 years she owned the shares, Luck singer received monthly statements showing the fluctuation in value and never made any complaint;
3. The fund was suitable for Luck singer because it offered her diversification and high yield, which was consistent with her investment objective to maximize current income without undue risk to capital;

4. Lucksinger made all her own investment decisions and, therefore, Respondents could not have violated a duty to her unless it acted directly contrary to her wishes;

5. Only 20% of the fund was invested in the high-yield bonds complained of;

6. Lucksinger's damage claim is overstated.

Rauscher Pierce alleged the following affirmative defenses:

1. The claims are barred by the applicable statute of limitations and the doctrines of laches, waiver, estoppel and ratification;

2. Lucksinger's own negligence proximately caused the transactions or occurrences of which she complains;

3. Lucksinger fails to state a claim upon which relief can be granted under Rule 10(b)-5.

Rauscher Pierce filed a crossclaim against Thrower for contribution and indemnity, stating that if Thrower committed any wrongdoing, then Thrower alone is responsible for any damages caused thereby.

Thrower denied the material allegations made by Lucksinger, alleging that;

1. Prior to investing, Lucksinger received the prospectus and Thrower explained that the Fund would invest in a variety of bonds and the portfolio would not have a fixed maturity;

2. The fund held investments in which Lucksinger had previous experience and which fit her request for a higher yield;

3. Lucksinger was aware of the fluctuation in value, but chose to hold her shares because of the distribution she was receiving and the possibility that the value would go up; and

4. Lucksinger had a working knowledge of her portfolio and the income it generated.

At hearing, Lucksinger made a motion to bar the answer of Respondent Thrower pursuant to Section 25(b)(2)(iii) of the Code of Arbitration Procedure. After hearing the arguments of the parties and upon review, the panel determined that the motion would be denied.

RELIEF REQUESTED

Claimant requested entry of an award against Respondents for \$37,500.00 plus commissions and handling charges paid by her, attorneys' fees and costs.

Respondent Rauscher Pierce requested that the claims be dismissed in their entirety and that the panel award it reasonable attorneys' fees and costs

incurred in defending this claim.

Respondent Thrower requested that the claims be dismissed and denied in their entirety.

AWARD

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

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 original(s) remain on file with the NASD;
2. Respondents Rauscher Pierce Refnes, Inc. and John M. Thrower are jointly and severally liable for and shall pay to Claimant Elisa H. Lucksinger the sum of \$42,102.00;
3. In addition, Respondents Rauscher Pierce Refnes, Inc. and John M. Thrower are jointly and severally liable for and shall pay to Claimant Elisa H. Lucksinger the sum of \$15,000.00 as attorneys' fees and costs. In making this award of attorneys' fees and costs to Claimant, the panel considered the Texas authority and the arguments presented by the parties and determined that authority existed for an award of attorneys' fees to the Claimant Elisa H. Lucksinger;
4. The crossclaim filed by Respondent Rauscher Pierce Refnes, Inc. against Respondent John M. Thrower is hereby dismissed and denied in its entirety.

FORUM FEES

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

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$120.00 and the hearing session deposit of \$400.00 previously filed by the Claimant Elisa H. Lucksinger. Respondents Rauscher Pierce Refnes, Inc. and John M. Thrower are jointly and severally liable for and shall pay to the NASD additional forum fees in the sum of \$800.00. In payment of the additional forum fees, the NASD shall retain the \$600.00 hearing session deposit previously deposited by the Respondent Rauscher Pierce Refnes, Inc., leaving a balance due of \$200.00. The NASD shall also retain the non-refundable claim filing fee of \$500.00 previously deposited by the Respondent Rauscher Pierce Refnes, Inc.

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

BY THE ARBITRATION PANEL

DATED:

A. Bentley Nettles
A. Bentley Nettles, Esq.
Public Arbitrator
Chairperson

November 4, 1991

James P. Roefling
James P. Roefling
Public Arbitrator

December 2, 1991

Ronald R. Simpson
Ronald R. Simpson
Industry Arbitrator

November 2, 1991

Date Served: _____