

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Names of Claimants

Patrick G. Henry and Richard W. Bowers

91-01099

Names of Respondents

Shearson Lehman Hutton, Inc. n/k/a
Shearson Lehman Brothers, Inc.,
Max Cates, Robert Hollinger and
Boettcher & Co., Inc.

REPRESENTATION

Claimants were represented by Victoria Gruver, Esq. of North & Vaira, P.C., Phoenix, Arizona.

Respondent, Shearson Lehman Hutton, Inc. n/k/a Shearson Lehman Brothers, Inc. was represented by Jesse B. Simpson, Esq. of Lewis and Roca, Phoenix, Arizona.

Respondents, Max Cates and Robert Hollinger appeared pro se.

Respondent, Boettcher & Co., Inc. arrived at a settlement with the Claimant prior to the hearing in this matter and was therefore not represented at the hearing.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on or about April 1, 1991.

Claimants' Submission Agreement was signed on March 27, 1991 by Patrick Henry.

Respondent, Shearson Lehman Hutton Inc.'s Statement of Answer was filed with the NASD on August 27, 1991.

Respondent, Shearson Lehman Hutton, Inc. n/k/a Shearson Lehman Brothers, Inc. did not file an executed Submission Agreement with the NASD.

Respondent, Max Cates' Statement of Answer was filed with the NASD on August 21, 1991.

Respondent, Max Cates' Submission Agreement was signed on July 30, 1991 by Max Cates.

Respondent, Robert Hollinger's Statement of Answer was filed with the NASD on September 4, 1991.

Respondent, Robert Hollinger's Submission Agreement was signed on August 30, 1991 by Robert Hollinger.

Respondent, Boettcher & Co., Inc.'s Statement of Answer was filed with the NASD on or about August 21, 1991.

Respondent, Boettcher & Co., Inc.'s Submission Agreement was signed on August 21, 1991 by William D. Nelson.

HEARING INFORMATION

A pre-hearing conference was held on November 9, 1992 for one (1) session.

Hearings were held on November 12, 1992 for two (2) sessions, on November 13, 1992 for two (2) sessions, and on November 23, 1992 for two (2) sessions.

The location of the hearings was Phoenix, Arizona.

CASE SUMMARY

Claimant, Patrick Henry ("Henry") as heir to Priscilla and Howard Henry ("the Henrys") alleged that the Respondent Shearson Lehman Hutton, Inc. n/k/a Shearson Lehman Brothers, Inc. ("Shearson") by and through the Respondent agents Max Cates ("Cates") and Robert Hollinger ("Hollinger") recommended unsuitable investments and mismanaged the Henry's investment accounts. The facts giving rise to the allegations were as follows:

In 1982 the Henry's opened an account with E. F. Hutton & Company. Beginning in 1984, their account executive was Respondent, Cates. In 1985 they opened a second account with Cates at E.F. Hutton. In late 1987 the two accounts were assigned to Respondent, Hollinger at Shearson. Hollinger later became employed by Respondent, Boettcher & Co., Inc. ("Boettcher") and the Henry's accounts were transferred to Boettcher. Henry alleged that during the duration of these accounts the Respondents encouraged risky, speculative, and inappropriate investments contrary to the Henry's stated investment objectives. These investments included

uncovered options, puts and calls, index options and limited partnerships. As a result of mismanagement, misrepresentations, overtrading and fraudulent and negligent conduct on the part of the Respondents, Henry alleged significant and unjustified losses concerning the accounts. The legal claims asserted were: 1) violations of Arizona Statutes, Sections 44-1991 and 13-2301 et seq., 2) breach of fiduciary duty, 3) fraud, 4) negligence, 5) breach of contract, and 6) conduct warranting punitive damages.

Respondent, Cates categorically denied all allegations contained in the Statement of Claim. Cates asserted that the Henrys were extremely satisfied with the handling of their accounts while he was assigned to be their account executive.

Respondent, Shearson answered the claim and asserted that the NASD had no jurisdiction over the claim because Patrick Henry had no relationship with either Shearson Lehman Brothers, Inc. or its predecessor corporation, E. F. Hutton & Co., Inc. Shearson therefore requested that the claim be dismissed and the parties referred to their remedies at law. Shearson further denied that the accounts of the Henrys were traded excessively, denied that the Henrys were defrauded and denied that the securities purchased for their accounts were unsuitable. Shearson maintained that all trading in the Henry's accounts was consistent with their investment objectives of appreciation with safety, income with safety and income with risk. Shearson asked for its attorneys' fees incurred to defend a baseless claim.

Respondent, Hollinger adopted Shearson's response to the Statement of Claim as his own and therefore requested that the claim be dismissed in its entirety. Hollinger noted one exception with Shearson's answer. Hollinger asserted that Shearson's answer incorrectly indicated that occupation of Mr. Henry before he retired. Hollinger asserted that Mr. Henry was an engineer.

Respondent, Boettcher also denied the claims asserted by Patrick Henry and asserted the following affirmative defenses:

1. Mr. Henry failed to state a claim against Boettcher upon which relief could be granted.
2. The claims are barred in whole or in part by the failure of the actions to survive the death of the account holders.
3. The claims are barred in whole or in part because Mr. Henry may not be the real party in interest.
4. Mr. Henry's damages, if any, were caused by factors over which Boettcher had neither responsibility or control.
5. Mr. Henry's damages, if any, were caused by parties other than Boettcher.

6. Mr. Henry's damages, if any, were not proximately caused by any act or omission of Boettcher.

RELIEF REQUESTED

The Claimant requested damages in the amount of \$178,755.00, attorneys' fees, costs associated with the proceedings, and such other relief as the panel deemed just and proper.

Each of the Respondents requested that the Statement of Claim be dismissed in its entirety and Shearson requested that it be awarded attorneys' fees in defending this action.

OTHER ISSUES CONSIDERED & DECIDED

In a telephonic pre-hearing conference held on November 9, 1992, the panel considered Shearson's Motion to Dismiss the Claim for lack of jurisdiction by the NASD, Shearson's Motion to Dismiss because the claims were not assignable and Claimant, Henry's request to strike from the pleadings and all references to felony convictions of Claimant. The panel took Shearson's motions under advisement and deferred ruling pending receipt of legal briefs from the parties on these issues. The arbitrators denied Claimant's Motion to strike any reference to felony convictions of the Claimant and refused to recuse themselves given the fact that they had knowledge of these matters.

At the hearing on November 12, 1992, Shearson reasserted and argued its Motions to Dismiss. The panel advised the parties that these motions would continue to be taken under advisement and would be decided when the panel decided the merits of the case. Shearson also asserted a Motion in Limine Re: Expert Opinion. This motion was denied by the panel. Shearson also argued a Motion in Limine Re: Other Customer Complaints. This motion was granted by the panel. Any and all other motions argued by the parties at the hearing were expressly denied at the hearing or are hereby denied.

Shearson did not file an executed Submission Agreement with the NASD, but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure. Accordingly, Shearson will be bound by the arbitration panel's determination on all issues submitted for determination.

Prior to the hearing, the NASD was informed that Respondent, Boettcher had reached a settlement with the claimant in this action. The NASD removed Boettcher as a party to the matter and the panel therefore did not consider the claims as asserted against Boettcher. The NASD also administratively removed Mr. Richard W. Bowers as a party Claimant because he had released any interest he held in the accounts at issue.

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

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. Respondents, Shearson Lehman Brothers, Inc. and Robert Hollinger are liable to Claimant Patrick Henry for the sum of \$12,600.00 in compensatory damages.
2. The above sum is assessed against Hollinger and Shearson as follows:
 - (a) Shearson shall pay two thirds of the \$12,600.00 or \$8,400.00; and
 - (b) Hollinger shall pay one third of the \$12,600.00 or \$4,200.00.
3. The claim for treble damages under the Arizona RICO statute is denied.
4. The parties shall each pay their respective costs, expenses and attorney's fees incurred in this proceeding and Shearson's request for its attorney's fees to defend what it termed a baseless claim is denied.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the non-refundable claim filing fee of \$200.00 and the \$750.00 hearing session deposit previously deposited with the NASD by Claimant. Additional Forum Fees in the amount of \$2250.00 are assessed against Shearson and in the amount of \$2250.00 against Hollinger. Forum Fees were calculated on the basis of seven (7) sessions at \$750.00 per hearing session.

Additional Forum Fees assessed to the parties are payable to the NASD.

Concurring Arbitrators' Signatures

/S/ Christian J. Hoffmann, III
Christian J. Hoffmann, III
Public Arbitrator
Chairperson

March 22, 1993
Dated

/S/ Jay Alan Gatlin
Jay Alan Gatlin
Public Arbitrator
Panelist

March 11, 1993
Dated

/S/ William L. Olson
William L. Olson
Panelist
Industry Arbitrator

March 11, 1993
Dated

Date Award Served by the NASD: March 25, 1993