

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

Annette Marie Grubich

91-01115

Name of Respondent/Counter-Claimant

Lovett Underwood Neuhaus & Webb, a
division of Kemper Securities Group, Inc.
(incorrectly named as Lovett Mitchell
Webb & Garrison, Inc.).

REPRESENTATION

For Claimant/Counter-Respondent: Annette Marie Grubich was represented by John M. Zukowski, Esq. of Campbell, Zukowski, Bresenhan & Woods, L.L.P., located in Houston, Texas.

For Respondent/Counter-Claimant: Lovett Underwood Neuhaus & Webb, a division of Kemper Securities Group, Inc. (incorrectly named by Claimant as Lovett Mitchell Webb & Garrison, Inc.) was represented by Bill Kroger, Esq. and Linda Brooks, Esq. of Baker & Botts, located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed: April 10, 1991.

Claimant's Submission Agreement signed on: April 24, 1991.

Statement of Answer/Counterclaim filed by Respondent on: June 27, 1991.

Respondent's Submission Agreement signed on: June 11, 1991 by R. Gerald Baker, Senior Vice President and Director of Compliance, Kemper Securities Group, Inc..

Motion for Leave to File Claimant's First Amended Statement of Claim filed: July 10, 1992.
First Amended Statement of Claim filed: July 10, 1992.

Respondent's Motion to Dismiss Claimant's First Amended Statement of Claim filed: July 17, 1992.

Claimant's Reply to Motion to Dismiss Claimant's First Amended Statement of Claim filed: July 21, 1992.

Respondent's Motion to Limit Claimant's Case to Pleadings filed: August 5, 1992.

Claimant's Reply to Respondent's Motion to Limit Claimant's Case to Pleadings filed: August 18, 1992.

Respondent's Response to Claimant's Reply to Respondent's Motion to Limit filed: August 12, 1992.

Claimant's Request for Clarification of Determination, or in the Alternative, Request for a Rehearing filed: August 18, 1992.

Respondent's Response to Claimant's Request for Clarification or Rehearing filed: August 19, 1992.

Respondents' First Amended Answer/Counterclaim to Claimant's First Amended Statement of Claim filed: September 20, 1992.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: November 12, 1992 for Two (2) sessions;
November 13, 1992 for Two (2) sessions; and
December 1, 1992 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant/Counter-Respondent Annette Marie Grubich ("Grubich") alleged that Respondent/Counter-Claimant Lovett, Underwood, Neuhaus & Webb, Inc., a division of Kemper Securities Group, Inc., placed her funds into unsuitable investments, churned the account and failed to provide Grubich with relevant information about the securities purchased

for her account. Grubich specifically alleged that:

1. In the summer of 1987, Grubich met with one of Lovett's brokers for the purpose of discussing the transfer of her investment account. At the meeting, Grubich related that she was an unsophisticated investor whose prior investment experience was unsatisfactory and that she was only interested in low-risk, conservative investments;
2. The broker from Lovett assured her that he understood her needs, would personally supervise the account and would only recommend conservative, no risk investments. Grubich agreed to transfer her account based upon these representations;
3. The Lovett broker took control over the account and began to change its conservative character and trade the account excessively, disregarding Grubich's investment objectives and financial needs;
4. Grubich was placed in numerous initial public offerings without being consulted or provided with relevant information or prospectus;
5. In particular, on August 19, 1987, Lovett purchased for Grubich's account 10,000 shares of stock in Eastex Energy, Inc. without obtaining her approval or providing a prospectus. Eastex was a new issue underwritten by Lovett and purchased with margin funds;
6. Numerous securities for which Lovett was making a market were purchased for Grubich's account without disclosing that character, there was an excessive turnover rate in investments, in-and-out trading and inappropriate holding periods;
7. Lovett did not diligently supervise the handling of the account to assure that the investments were suitable for Grubich's known financial situation or needs.

Based upon the above allegations, Grubich asserted violations of the Texas Deceptive Trade Practices, Consumer Protection Act ("DTPA"), Par. 17.41, et seq.; engaged in fraud involving transactions in stock in violation of the Tex. Bus. & Com. Code Par. 27.01; violated several federal security statutes and/or regulations; and for breach of fiduciary duty and contract.

Respondent/Counter-Claimant Lovett denied the material allegations of the Claimant's claim, alleging that:

1. Grubich opened a margin account with Lovett on or about July 1, 1986, advising Lovett that her investment objectives were for both Long- and Short-term capital gains and "investment grade" investments. In addition, Grubich told Lovett that she had ten years of previous investment experience, listed Shearson

Lehman and Dean Witter as references and stated that her annual income was \$350,000.00 and net worth exceeded \$1,000,000.00;

2. The account was not discretionary and no investment was made without first getting Grubich's instructions and approval to proceed. Furthermore, there was not an excessive turnover rate, unauthorized and undisclosed in-and-out trading, or inappropriate holding periods in Grubich's account;

3. Lovett's broker and his assistant frequently spoke with Grubich about the handling of her account, answering questions about such things as commissions, fees and her monthly statements. Grubich and her accountant both received confirmations and monthly statements from Lovett that reflected each trade and the corresponding commissions, yet neither complained of the trades until years later;

4. In the summer of 1987, Lovett became the lead underwriter for the Eastex initial public offering and in doing its due diligence, investigated the management, Eastex's business strategy, its actual and projected earnings and its industry. Lovett determined that Eastex was a good investment in 1987;

5. Grubich was told of the opportunity to invest in Eastex and she told Lovett's broker to buy it weeks before the offering on August 12, 1987. Lovett's Syndicate Department mailed out the prospectuses and confirmation statements by a mass mailing to all purchasers of the Eastex stock. Grubich received at minimum one final prospectus and a written confirmation in connection with the purchase;

6. The Eastex stock was bought with cash in August of 1987, and moved into a margin position in late September;

7. Eastex and the other natural gas aggregators/marketeers began to suffer from unforeseeable industry developments which severely damaged the values of the stock. Grubich held on to her stock for more than a year and could, have sold her stock at any time.

In addition, Lovett asserted the following affirmative defenses:

1. Grubich is not entitled to relief under the DTPA, because the strict liability provisions of the DTPA are inconsistent with the Texas Securities Act and the Securities Exchange Act of 1934. In addition, the DTPA action was brought in bad faith;

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

3. Grubich failed to mitigate her damages and alternatively, at least part of the damages, if any, were proximately and unavoidably caused by extraordinary and unforeseeable market conditions;

4. Lovett did not violate 17 C.F.R. Sec. 240.10b-6 because its dealings with Grubich were not prohibited by that regulation;

5. Grubich's claim based upon "Securities and Exchange Act of 1934, Article 3, Section 1-failure to follow written investment instructions" fails to state a claim upon which relief can be granted;

6. Grubich's damages, if any, were proximately caused by her own negligence;

7. Lovett acted in good faith and without malice in handling Grubich's account; and

8. Any claim for punitive damages cannot be sustained because any award, for various reasons, would violate Lovett's rights under Amendments IV, V, VI and/or XIV of the United States Constitution.

Lovett asserted a counterclaim for an award of attorneys' fees and costs, alleging that Grubich's claims under the DTPA were groundless because the Act did not apply to the facts at issue in the arbitration.

RELIEF REQUESTED

Claimant/Counter-Respondent Grubich requested entry of an award for damages of at least \$250,000.00, consisting of approximately \$165,000 for excessive portfolio decline due to Lovett's misconduct, \$50,000.00 for excessive commission payments and \$35,000 for severe mental anguish and distress; for recovery of exemplary or punitive damages of at least 3 times her actual damages for reckless, willful and wanton disregard for Grubich's needs and rights; any additional relief according to statute; for reasonable and necessary attorneys' fees in the sum of at least \$75,000.00 in accordance with Tex. Bus. & Com. Code Par. 17.50(b) and 27.01(e), and the Tex. Civ. Prac. & Rem. Code Par. 38.001, et seq.; and for interest at the rate of 10% compounded daily, in accordance with Article 5069-1 of the V.A.T.S. and post judgment interest at the highest legal rate, together with the costs expended.

Respondent/Counter-Claimant Lovett requested that the panel deny all of Grubich's claims and that it order Grubich to reimburse Lovett for all its reasonable and necessary attorneys' fees and court costs. In addition, Lovett requested an award of its reasonable and necessary attorneys' fees and court costs because Grubich's claims under the DTPA were groundless.

OTHER ISSUES CONSIDERED & DECIDED

On August 17, 1992, the panel determined that the Motion for Leave to File Claimant's First Amended Statement of Claim would be denied. In determining to deny this Motion, the panel reviewed the Motion for Leave to File Claimant's First Amended Statement of Claim, Respondent's Motion to Dismiss Claimant's First Amended Statement of Claim and Claimant's Reply to Motion to Dismiss.

Upon review of Claimant's Request for Clarification of Determination, or in the Alternative, Request for a Rehearing and the Response thereto, and Respondent's Motion to Limit Claimant's Case to Pleaded Claims and the responses thereto, the panel determined on August 24, 1992 that the Motion for Leave to Amend would be granted and the Motion to Limit was denied. The panel postponed the hearing pursuant to Section 30 of the Code of Arbitration Procedure.

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 and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The claims asserted in Claimant/Counter-Respondent Annette Marie Grubich's First Amended Statement of Claim are hereby dismissed and denied in their entirety;
2. The counterclaim asserted by Respondent/Counter-Claimant Lovett Underwood Neuhaus & Webb, a division of Kemper Securities Group, Inc., is hereby dismissed and denied in its entirety;
3. Pursuant to Section 43(c), Respondent/Counter-Claimant Lovett Underwood Neuhaus & Webb, a division of Kemper Securities Group, Inc. is liable for and shall pay to Claimant/Counter-Respondent Annette Marie Grubich the sum of \$200.00 as reimbursement of the non-refundable filing fee paid;
4. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed: Six (6) hearing sessions x \$750.00 per session = \$4,500.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and refund the \$750.00 hearing session deposit previously deposited by Claimant/Counter-Respondent Annette Marie Grubich. Respondent/Counter-Claimant Lovett Underwood Neuhaus & Webb, a division of Kemper Securities Group, Inc., is liable for and shall pay to the NASD the claim filing fee of \$250.00 and forum fees in the sum of \$4,500.00.

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

Concurring Arbitrators' Signatures

Name

Dated:

George T. Barrow, Esq.
George T. Barrow, Esq.
Public Arbitrator
Chairperson

March 4, 1993

Charlotte F. Simpson
Charlotte F. Simpson
Public Arbitrator

March 2, 1993

Laila M. Asmar
Laila M. Asmar, Esq.
Industry Arbitrator

March 2, 1993

Date of Service of Parties: _____