

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of
Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, N.Y. 10004
FAX (212) 858-4389

In the Matter of the Arbitration BetweenName of Claimant

Benjamin A. Wisniewski, etal.

91-01988

Name of RespondentsFirst Investors Corporation
Peter FrancoREPRESENTATION

For Claimant: Thomas D. Giachetti, Esq. of the law firm of Stark & Stark.

For Respondents First Investors Corporation and Peter Franco: Stephen L. Ratner, Esq. of the law firm of Rosenman & Colin.

CASE INFORMATION

Statement of Claim filed: June 26, 1991.

Claimant Benjamin A. Wisniewski's Submission Agreement signed on: April 16, 1991.

Claimant Karen T. Wisniewski's Submission Agreement signed on: April 15, 1991.

Claimant Helen Wisniewski's Submission Agreement signed on: May 1, 1991.

Claimant Janet Mickelsen's Submission Agreement signed on: April 10, 1991.

Statement of Answer filed by Respondents First Investors Corporation and Peter Franco on: November 14, 1991.

Respondent First Investors Corporation's Submission Agreement signed on: July 29, 1991.

Respondent Peter Franco's Submission Agreement signed on: August 31, 1991.

HEARING INFORMATION

Hearing Dates/Sessions: March 3, 1992, 2 Sessions.
 May 4, 1992, 2 Sessions.
 May 28, 1992, 2 Sessions.

Hearing Location: NASD offices located in New York City, New York.

CASE SUMMARY

Claimants alleged that Respondent Franco took advantage of their trust and lack of sophistication in the market by inducing them, through material misrepresentations and omissions upon which Claimants relied, to make investments which were unsuitable in light of their financial circumstances and investment objectives. Claimants further alleged that the Respondents, except for one instance, failed to provide the Claimants with a prospectus for their investments. Claimants further alleged that Respondent Franco sold Benjamin Wisniewski, a New Jersey resident, annuities that could only be sold to New York residents. Claimants further alleged that Mr. Franco told Benjamin Wisniewski that the sale of the annuities would be legal if Wisniewski used the address of a relative living in New York, which he did, as Mr. Franco was not licensed to sell insurance in New Jersey when he sold the annuities to Mr. Wisniewski. Claimants further alleged that Respondents violated certain sections of NASD Rules of Fair Practice relating to unsuitability, material misstatement of fact, material omission of fact, mutual fund swaps, fraud and failure to supervise.

Respondents maintained that Mr. Franco made no misrepresentations or omissions and that the Claimants were fully informed about the risks associated with their investments and that Claimants were supplied with a prospectus for each of their investments. Respondents further maintained that Claimant Benjamin Wisniewski was thoroughly familiar with the risks involved in investing in mutual funds. Respondents further maintained that Claimants overstated their losses and/or actually realized gains on their investments. Respondents further maintained that Franco was licensed to sell insurance products in New Jersey and that it was Benjamin Wisniewski, and not Franco, who insisted on using a New York address for the purchase of the annuities. Respondents further maintained that Wisniewski suffered no damage as a result of the annuity purchases. Respondents denied each of the allegations of NASD rule violations. Respondents alleged as affirmative defenses that Claimants approved all the transactions; Claimants' claims were barred by their failure to mitigate damages; any losses were caused by Claimants' conduct; Claimants were aware of all risks and knowingly assumed those risks; and Claimants' claims were barred by estoppel, unclean hands, the applicable statute of limitations and by the doctrine of In Pari Delicto.

RELIEF REQUESTED

Claimants requested the following damages:

- A. \$59,286.99 for principal loss on unsuitable investments calculated as follows: Total original principal invested by all Claimants (including commissions) + reinvested dividends - remaining principal in all of Claimants' accounts at the time of redemption.
- B. \$6,178.60 for lost interest income (Differential between CD interest and actual dividends earned) calculated as follows: Total original principal invested by all Claimants compounded annually at prevailing interest rates - total dividends earned by all Claimants.
- C. \$40,000 in punitive damages (\$10,000 to each Claimant).
- D. All attorney fees and costs of arbitration.

Respondents requested that the Claimants' Statement of Claim be dismissed in its entirety and requested an Award of the costs and expenses of arbitration including, but not limited to their attorney's fees, and such other and further relief the panel deemed just and proper.

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:

- A. Respondent Peter Franco be and hereby is liable and shall pay to the Claimants the sum of Five Thousand Dollars and No Cents (\$5,000.00), inclusive of interest, and Respondent First Investors Corporation be and hereby is liable and shall pay to the Claimants the sum of Twenty Two Thousand Dollars and No Cents (\$22,000.00), inclusive of interest.
- B. The award is to be divided among Claimants as follows:
 - 1. The sum of Twelve Thousand Dollars and No Cents (\$12,000.00) to Karen Wisniewski for damages to the account held in her name.
 - 2. The sum of Seven Thousand Dollars and No Cents (\$7,000.00) to Helen Wisniewski and Karen Wisniewski for damages to their joint account.

3. The sum of Eight Thousand Dollars and No Cents (\$8,000.00) to Helen Wisniewski and Janet Mickelsen for damages to their joint account.
- C. The Claimants' request for punitive damages is denied.
- D. Each party shall bear their respective costs including attorney's fees.

FORUM FEES

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

6 Sessions X \$500.00 = \$3,000.00 minus hearing session deposit of \$500.00 = net \$2,500.00 due.

The Respondent First Investors Corporation be and hereby is liable and shall pay to the NASD the sum of \$2,500.00 to represent forum fees and shall pay to the Claimants the sum of \$650.00 to reimburse them for the claim filing fee and hearing session deposit paid.

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

ARBITRATOR SIGNATURES


Dorothy F. Gray, Esq.
Public Arbitrator

Date of Decision: August 5, 1992

91-1988

STATE OF: New York
COUNTY OF: New York

S.S.:

On this 21st day of July, 1992, before me personally appeared Dorothy F. Gray, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

Notary Public, State of New York
No. 24-4936733
Qualified in New York County
Commission Expires September 23, 1993

Hazel Guizaro

STATE OF: New York
COUNTY OF: New York

S.S.:

On this 2nd day of July, 1992, before me personally appeared George R. Freund known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

DIANA M. PALLANTE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 17, 1994

Diana M. Pallante

STATE OF: New York
COUNTY OF: New York

S.S.:

On this 31st day of July, 1992, before me personally appeared Patricia Langan known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that she executed the same.

Maryanne Romano
MARYANNE ROMANO
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 21, 1993