

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Marabelle P. Van Alsbury

91-03995

Name of Respondents

Waddell & Reed, Inc.
Norman Seim
Marcia Kemmerly

REPRESENTATION

For Claimant: Marabelle P. Van Alsbury was represented by Elizabeth A. Jaffe, Esq. and Mel E. Yost, Esq. of Scheuer & Yost, P.C., located in Santa Fe, New Mexico.

For Respondents: Waddell & Reed, Inc. and Norman Seim were represented by Rodney O. McWhinney, Esq. of Waddell & Reed, Inc., located in Shawnee Mission, Kansas.

CASE INFORMATION

Statement of Claim filed: December 17, 1991.

Claimant's Submission Agreement signed on: December 10, 1991.

Joint Statement of Answer filed by Respondents Waddell & Reed, Inc. and Norman Seim on: February 10, 1992.

Respondent Waddell & Reed, Inc.'s Submission Agreement signed on: February 7, 1992 by Rodney O. McWhinney, Senior Vice President, Waddell & Reed, Inc.

Respondent Norman Seim's Submission Agreement signed on: January 21, 1992.

Request to Dismiss Claims filed by Respondents Waddell & Reed, Inc. and Norman Seim on: June 1, 1992.

Response to Request to Dismiss Claims filed by Claimant Marabelle P. Van Alsbury on: July 10, 1992.

Reply to the Response to the Request to Dismiss Claims filed by Respondents Waddell & Reed, Inc. and Norman Seim on: July 28, 1992.

Respondent Marcia Kemmerly did not file a properly executed Submission Agreement and, by letter dated July 27, 1992, advised the NASD that she was not an associated person since approximately 1978 and would not voluntarily submit to the jurisdiction of the NASD.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Date/Sessions: September 2, 1992 for Two (2) sessions.

Hearing Location: Albuquerque, New Mexico.

CASE SUMMARY

Claimant Marabelle P. Van Alsbury ("Van Alsbury") alleged that Respondent Norman Seim ("Seim"), while employed by or acting as an agent for Respondent Waddell & Reed, Inc. ("Waddell & Reed"), negligently recommended and improperly managed a mutual fund account that was unsuitable given Van Alsbury's investment objectives. As alleged in the Statement of Claim, Van Alsbury was an unsophisticated investor who consulted with Seim in the late summer of 1982, advising him that she was not looking for present income, but would likely use the money to relocate to a local retirement home. Seim selected the United High Income Fund for Van Alsbury. Through the years, Seim continued to represent to Van Alsbury that the fund was doing well.

As was further alleged, in mid or late 1990, Van Alsbury was notified by another investor that the United High Income Fund had taken a substantial loss. Upon discussing this matter with Seim, they agreed to diversify the portfolio by transferring sums into the United Bond Fund. In March of 1991, Van Alsbury discovered during tax preparation that her investment had taken a \$54,000.00 loss. After discussing the matter with Seim, Van Alsbury closed her account. Based upon the above allegations, Van Alsbury alleged that Seim misrepresented that he would properly manage the account; Seim breached his fiduciary duty to Van Alsbury; Seim negligently managed the investment; and that Seim misrepresented the status of her investment.

Respondents Waddell & Reed and Seim denied the material allegations of the Statement of Claim, alleging that:

1. At the time Van Alsbury closed her account, the account contained a profit of \$22,224.52 over the amount she had invested;
2. Respondents did not provide investment management or advisory services to Van Alsbury, but Seim made recommendations to her which he believed were suitable based on the facts and circumstances known to him as they existed at the time, supplied her with a current prospectus and discussed with her the characteristics of the fund;
3. United High Income Fund invests in below investment grade bonds, popularly called "junk bonds." At the time of the initial investment and for several years thereafter, the fund had solid performance because the yield premium offset the default risk on the individual bonds held in the portfolio;
4. Van Alsbury was aware, or should have been aware, of the progress of her investment because the fund sent her updated prospectus, annual and semi-annual reports, notices with respect to the reinvestment of the monthly dividends and annual 1099 tax

information concerning the dividends credited to her account during the year. In addition, the daily value of the fund's shares were available to her from most any metropolitan newspaper;

5. The redemption of Van Alsbury's United Bond Fund was made against Seim's recommendations and if she had not so acted, the account would have provided a \$55,000.00 gain;

6. The NASD lacks jurisdiction over any claim arising out of the purchase of United High Income Shares that occurred prior to Mid-December, 1985 as the claims are ineligible pursuant to Section 15 of the NASD Code of Arbitration Procedure; and

7. The claims are barred by the applicable statute of limitations.

RELIEF REQUESTED

Claimant Marabelle P. Van Alsbury requested that the arbitrators award her \$54,000.00 in damages, plus interest and attorneys' fees.

Respondent Waddell & Reed, Inc. and Norman Seim requested that the Statement of Claim be dismissed and denied in its entirety and that the Respondents be awarded their costs expended in this proceeding.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Marcia Kemmerly did not voluntarily submit to the jurisdiction of the NASD and was not an associated person within the meaning of Section 8 or 12 of the NASD Code of Arbitration procedure. At hearing, the counsel for Claimant agreed that Kemmerly had been improperly named as a Respondent. Therefore, the panel finds no jurisdiction over Respondent Marcia Kemmerly and makes no determination as to liability.

On August 31, 1992, upon review of the Respondents' Motion to Dismiss and all responses and replies filed thereafter, the Director of Arbitration determined that the Motion would be denied.

On August 31, 1992, upon review of the Respondents' Motion to Dismiss and all Responses and Replies filed thereafter, the Arbitration panel determined that the Motion would be denied, but would be reconsidered after the presentation of the evidence. Upon reconsideration, the panel hereby denies the motion.

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. Respondent Waddell & Reed, Inc. is liable for and shall pay to

Claimant Marabelle P. Van Alsbury the sum of \$10,400.00;

2. The claims asserted against Respondent Norman Seim are hereby dismissed and denied in their entirety; and

3. 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 Fees are assessed: Two (2) sessions x \$500.00 per session = \$1,000.00.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the \$150.00 claim filing fee and refund the \$500.00 hearing session deposit previously deposited by the Claimant Marabelle P. Van Alsbury. Respondent Waddell & Reed, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$1,000.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

George F. Bingham, Esq.
George F. Bingham, Esq.
Public Arbitrator
Chairperson

November 9, 1992

Ross B. Perkal, Esq.
Ross B. Perkal, Esq.
Public Arbitrator

November 9, 1992

Richard W. Arms, Jr.
Richard W. Arms, Jr.
Industry Arbitrator

November 9, 1992

Date of Service on Parties: November 20, 1992