

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

Wanda E. Jarrell

91-04059

Name of Respondents/Counter-Claimants

Shearson Lehman Hutton, Inc., now known
as Shearson Lehman Brothers, Inc.;
Harold Finstad

REPRESENTATION

For Claimant/Counter-Respondent: Wanda E. Jarrell was represented by William Vincent Walker, Esq. of Bonham, Carrington & Fox, P.C., located in Houston, Texas.

For Respondents/Counter-Claimants: Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., and Harold Finstad were represented by Ronald J. Restrepo, Esq. of Doyle, Reed, Restrepo, Harvin & Robbins, located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed: December 23, 1991.
Claimant/Counter-Respondent's Submission Agreement signed on: December 19, 1991.

Joint Statement of Answer and Counterclaim filed by Respondents/Counter-Claimants Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., and Harold M. Finstad on: March 13, 1992.
Respondent/Counter-Claimant Harold M. Finstad's Submission Agreement signed on: August 26, 1992.

Respondent/Counter-Claimant Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., did not file a properly executed submission agreement.

but was represented at the hearing and as a member firm of the NASD is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: August 26, 1992 for Three (3) sessions;
August 27, 1992 for One (1) session;
August 29, 1992 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant/Counter-Respondent Wanda E. Jarrell ("Jarrell") alleged that Respondent/Counter-Claimant Harold Finstad ("Finstad"), while employed by or acting as an agent for Respondent/Counter-Claimant Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc. ("Shearson"), engaged in conduct in Jarrell's common stock account which constituted fraud, unauthorized trading, failure to invest in suitable securities, negligence and breach of fiduciary duty. Jarrell specifically alleged that:

1. In August of 1982, Jarrell opened an account with E.F. Hutton (now Shearson) through Finstad with the proceeds of life insurance on her husband which had been maintained in a Certificate of Deposit for a period of two years. Finstad knew that Jarrell was an unsophisticated investor who was inexperienced in finance, securities market and trading;
2. Jarrell informed Finstad that the funds, approximately \$107,000.00, represented her entire estate, other than her home. In addition, Jarrell informed Finstad she was unemployed and relied on her social security, her husband's modest pension and the income of these funds deposited with Shearson to support Jarrell and her mentally handicapped son;
3. Finstad informed Jarrell that he would invest in securities that would generate \$700 to \$1,000 per month, that she open an account that would permit her to write checks, that the income would be deposited into the account, the investments would be in safe, income generating securities and the her principal would be safe;
4. During the next few years, Jarrell would regularly draw checks on the account in amounts from \$700 to \$1,000 per month, or, if an extraordinary amount of money was needed, would contact Finstad to ask if it was appropriate. Finstad told her to write the checks with no problem, but never informed Jarrell that the withdrawals were causing a reduction in the principal in the account;

5. While Jarrell received monthly statements, she did not understand her principal was being eroded and Finstad never took the time to explain the status of the account, even though Finstad was aware that Jarrell had no knowledge of securities and no experience at reviewing customer accounts;

6. In mid-1987, without notice and advise to Jarrell, Finstad sold the utility stocks which were the principal securities in the account and purchased securities in Permian Partners, Ltd., a highly speculative limited partnership subject to the highly volatile oil and gas production and pricing. In addition, in January of 1988, Finstad purchased "junk bonds" for Jarrell's account;

7. After Jarrell insisted on a personal meeting in January of 1989, Finstad sent a letter which advised of the income in the coming year, but did not advise Jarrell of the type of unsuitable securities placed in her account without her knowledge. After discovery of the unsuitable securities in September of 1989, Jarrell demanded that the account be returned to the condition Finstad represented it would be maintained and Shearson refused.

Jarrell asserted claims for violation of the federal and state securities laws, Texas common law relating to fraud, negligence, conversion, breach of fiduciary duty, trespass and violation of the rules of the NASD.

Respondents Shearson and Finstad denied the material allegations of the Statement of Claim, alleging that:

1. Finstad was employed by Rotan-Mosle in August of 1982, did not begin working for Shearson until mid-1987 and Jarrell did not open her account with Shearson until June of 1987;

2. Finstad was not responsible for explaining to a customer that, as is already set forth in account statements, regular withdrawals of money may effect the balance in the account;

3. The purchase of the Permian Partners, Ltd. investment was made with funds obtained from a sale of stock demanded by Jarrell, was contrary to the advice of Finstad, and only after a thorough discussion between Jarrell and Finstad. The investment was held in the account from Mid-1987 until November, 1990, during which time Jarrell received approximately 40 monthly statements and the confirmation of the transaction. In addition, Finstad advised Jarrell to sell the interest at a time when she could have taken a limited loss, but Jarrell rejected the advice and retained the interest;

4. The securities labelled "junk bonds" by Jarrell were actually the preferred stock in two entities, AMAC Holding Corp. and SPI Holding, were made with Jarrell's approval after thorough discussion, and were neither inappropriate or unsuitable when recommended in January of 1988; and

5. Jarrell is attempting to recover for losses sustained in her

account due to legitimate market fluctuations or intervening events, for which Respondents cannot be held responsible.

Shearson and Finstad asserted as affirmative defenses that:

1. Jarrell, through her actions and deeds, has waived her right to maintain this action or is estopped to assert her claims;
2. The claims are barred by the applicable statute of limitations, by the doctrine of laches and because Jarrell assumed the risk of market fluctuations;
3. The damages claimed have no causal relationship with any act committed by or legally attributable to the Respondents;
4. The injuries alleged were caused, in whole or in part, by Jarrell's failure to mitigate damages;
5. Respondents never had or exercised discretionary authority over Jarrell's account and no fiduciary duty existed between them and Jarrell;
6. Jarrell had actual or constructive knowledge of all occurrences in her account and is barred from recovery;
7. Jarrell ratified all trades in the account and recovery is barred; and
8. The claims asserted by Jarrell with regard to the investment in Permian Partners are the subject of pending class-action litigation which Jarrell has failed to opt out as a member of the class and is barred from recovery.

In addition, Respondents Shearson and Finstad asserted a Counterclaim, alleging that Jarrell's claim for conversion was false and libelous and that they are entitled to damages reasonably anticipated to be suffered by them because of these frivolous claims, including loss of reputation to Finstad.

RELIEF REQUESTED

Claimant/Counter-Respondent Jarrell requested that the arbitrators enter an award against Respondents/Counter-Claimants in the sum of \$223,851.00, of which \$86,326.00 is due to the joint and several liability of Shearson; for unspecified exemplary and punitive damages; for costs and attorneys' fees, if any, as required by Section 33 of the Texas Securities Act; and for such other relief as Jarrell showed herself due.

Respondent/Counter-Claimants Shearson and Finstad requested that the claims of Jarrell be dismissed in their entirety and that Respondent/Counter-Claimants be awarded their damages not exceed \$10,000.00 and attorneys' fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

Shearson failed to file an properly executed submission agreement, but the arbitrators have determined that Shearson is required to submit to arbitration pursuant to Section 12 of the NASD 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 the post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent/Counter-Claimant Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., is liable for and shall pay to Claimant/Counter-Respondent Wanda E. Jarrell the sum of \$33,000.00;
2. In addition, Respondents/Counter-Claimants Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., and Harold Finstad are jointly and severally liable for and shall pay to Claimant/Counter-Respondent Wanda E. Jarrell the sum of \$22,000.00;
3. Claimant/Counter-Respondent Wanda E. Jarrell's claim for punitive and exemplary damages is hereby dismissed and denied in its entirety;
4. The counterclaim filed by Respondents/Counter-Claimants Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., and Harold Finstad against Claimant/Counter-Respondent Wanda E. Jarrell is hereby dismissed and denied in its entirety; and
5. 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: Six (6) hearing sessions x \$750.00 per session = \$4,500.00.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the \$200.00 claim filing fee and the \$1,050.00 hearing session deposit previously deposited by the Claimant-Counter-Respondent Wanda E. Jarrell. Claimant-Counter-Respondent Wanda E. Jarrell is liable for and shall pay to the NASD

additional forum fees in the sum of \$1,200.00. Respondents/Counter-Claimants Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., and Harold Finstad are jointly and severally liable for and shall pay to the NASD a claim filing fee in the sum of \$600.00 and forum fees in the sum of \$2,250.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Mark A. Banks-Golub, Esq.
Mark A. Banks-Golub, Esq.
Public Arbitrator
Chairperson

December 28, 1992

Kathryn Ann McCoach
Kathryn Ann McCoach
Public Arbitrator

December 28, 1992

Christine E. Monical, Esq.
Christine E. Monical, Esq.
Industry Arbitrator

January 18, 1993

Date of Service on the Parties: 1-19-93