

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

George M. Loy, Jr.

92-00337

Name of Respondents

Smith Barney, Harris Upham & Co., Inc.;
Warren W. Langford

REPRESENTATION

For Claimant: George M. Loy, Jr. was represented by Harry O. Moline, Esq. and Sherri C. Strand, Esq. of Moline, Ottsen, Mauze', Leggat & Shostak, located in St. Louis, Missouri. and Edward Lander, Esq. of Lander & Berkowitz, located in St. Louis, Missouri.

For Respondents: Smith Barney, Harris Upham & Co., Inc. was represented by Alejandro Shwed, Esq. of counsel to Smith Barney, Harris Upham & Co., Inc., located in New York, New York.

Warren W. Langford was represented by Martin M. Green, Esq. and H. Todd Iveson of Green, Hoffmann & Dankenbring, located in St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed: January 29, 1992.

Claimant's Submission Agreement signed on: June 24, 1992.

Statement of Answer filed by Respondent Smith Barney, Harris Upham & Co., Inc. on: March 16, 1992.

Respondent Smith Barney, Harris Upham & Co., Inc.'s Submission Agreement signed on: March 17, 1992 by Alejandro Schwed, Vice President, Smith Barney, Harris Upham & Co., Inc.

Statement of Answer filed by Respondent Warren W. Langford on: March 20, 1992.
Respondent Warren W. Langford's Submission Agreement signed on: April 15, 1992.

HEARING INFORMATION

Pre-Hearing Conference:	None Held.
Hearing Dates/Sessions:	November 17, 1992 for Two (2) sessions; November 18, 1992 for Two (2) sessions.
Hearing Location:	St. Louis, Missouri.

CASE SUMMARY

Claimant George M. Loy, Jr. ("Loy") alleged that Respondent Warren W. Langford ("Langford"), while employed by or acting as an agent for Respondent Smith Barney, Harris Upham & Co., Inc. ("Smith Barney"), recommended unsuitable investments, mismanaged his account and falsely represented account balances in connection with the purchase of an IRA and consequent securities investments made with the principal of that account. The Claimant specifically alleged that:

1. In Mid-1985, Langford, while employed by Drexel Burnham Lambert, Inc. ("Drexel"), "cold" called Loy and recommended that Loy purchase shares of Franklin U.S. Government Securities Fund with funds from Loy's IRA account;
2. In a meeting at his home, Loy advised Langford that while he could use additional income, his family lived on Social Security and the income from the IRA account, could not risk the loss of any principal, and were unsophisticated with respect to stock investments. In addition, Loy advised Langford that the funds were needed to provide support for his disabled daughter;
3. Subsequently, Langford persuaded Loy to sell the Franklin shares and reinvest in a Drexel Burnham High Income Trust and to later switch from the Drexel Trust into the New American High Income Fund and a zero coupon bond, without explaining that Loy would not have access to his funds and that the

strategy was inconsistent with his desires and needs;

4. In late 1988, Langford transferred to Smith Barney, at which time Smith Barney became the successor custodian of Loy's IRA account. While at Smith Barney, Langford continued to reassure Loy that the principal was still intact and that the market value reflected on the Smith Barney statements was inaccurate. Loy continued to stress his family's need for safety and no risk. In fact, the market values on the statements were accurate and the investment principal was eroding;

5. The above-noted investments were not only high-risk trades in contravention of his stated objectives but constituted misrepresentations and acts of mismanagement resulting in substantial erosion of his IRA account. Moreover, Smith Barney was aware of the unsuitability of the investments in the portfolio and failed to take any action with regard to Langford's misrepresentations.

Respondent Langford denied the material allegations of the Statement of Claim, alleging that Loy was a sophisticated investor who knew of and authorized the investments, accepting any associated risks; the recommended investments were suitable; and adequate information was provided to Loy so that he could make appropriate investment decisions. In addition, Langford asserted the following affirmative defenses:

- 1) Loy had knowledge of and assumed the risks inherent in trading securities;
- 2) Loy authorized and consented to each of the transactions described in the Statement of Claim;
- 3) Loy, through his inaction, waived all claims contained in the Statement of Claim;
- 4) By failing to object to the transactions, Loy ratified each transaction;
- 5) Loy is barred from any recovery because he failed to exercise due diligence in monitoring his securities transactions;
- 6) Loy's claim is barred by the applicable Statute of Limitations; and
- 7) Loy's request for punitive damages is barred by applicable law.

Respondent Smith Barney denied the material allegations and any liability alleging that there was not a single investment purchased at Smith Barney and the only transaction at Smith Barney was the sale of the New American High Income Trust. Smith Barney further adopted the Answer of Respondent Langford to the extent it relates to charges made while Loy's account was at

Smith Barney. In addition, Smith Barney asserted that it was not liable for recommendations made at another brokerage house and there is no legal duty by a stockbroker to supervise a clients account after purchases have been made.

RELIEF REQUESTED

Claimant Loy requested that the panel enter an award in his favor for \$87,000.00 in actual damages against Respondent Langford; \$57,000.00 in actual damages against Respondent Smith Barney; appropriate and available punitive damages against both Respondents; and interest, attorneys' fees and costs associated with this arbitration.

Respondents Smith Barney and Langford requested that the Statement of Claim be dismissed and that all costs incurred in the defense of the claims be assessed against the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

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.

A majority of the Arbitrators specifically found that:

1. Respondent Warren W. Langford breached his duty to Claimant by recommending the purchase of unsuitable investments; and
2. Respondent Smith Barney breached its duty to Claimant by failing to review Claimant's account at the time that Smith Barney acquired it or during a reasonable period thereafter.

AWARD

After considering the pleading, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned majority of the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Smith Barney, Harris Upham & Co. Inc. and Warren W. Langford are jointly and severally liable for and shall pay to Claimant George M. Loy, Jr. the sum of \$39,417.00;

2. In addition, Respondent Warren W. Langford is individually liable for and shall pay to Claimant George M. Loy, Jr. the sum of \$33,081.38;
3. The above sums include interest and costs of hearing incurred by Claimant George M. Loy, Jr.;
4. The claims for punitive damages and attorneys' fees are hereby dismissed and denied in their entirety;
5. The parties shall each bear their other 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: Four (4) hearing sessions x \$750.00 per hearing session = \$3,000.00.

The National Association of Securities Dealers Inc. shall retain the claim filing fee of \$200.00 and the hearing session deposit of \$750.00 previously deposited by the Claimant, George M. Loy, Jr. Respondents Warren W. Langford and Smith Barney, Harris Upham & Co., Inc. are jointly and severally liable for and shall pay to the NASD the sum of \$2,250.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

Gerald Cohen, Esq.
Gerald Cohen, Esq.
Public Arbitrator
Chairperson

July 7, 1993

James A. Winkelmann
James A. Winkelmann
Industry Arbitrator

June 26, 1993

Dissenting Arbitrator's Signature

Respondent Langford's liability should not have been predicated on the suitability of the investments; rather, at issue was whether Langford had a reasonable basis for making his recommendations. The credible evidence failed to persuade me that he lacked one. Respondent Smith Barney had no duty to review the suitability of the investments. Even if it did, it should be liable only if a review would have triggered a non-suitability warning from Smith Barney and the warning would have prompted Claimant to invest in a lower risk portfolio. The credible evidence showed that neither would have likely occurred.

In any event, the damages awarded far exceed the losses attributable to Langford's recommendations or to Smith Barney's failure to review. Only serious mistakes could account for this disparity, but I cannot identify them precisely because my requests for the damages calculation remain unanswered. I can identify some of the likely possibilities, however, based upon our discussions of an initial draft of this award and the fact that no change was made in the damages assessed. These possibilities include the failure to account for three facts: (i) that Claimant received much more income from the investments recommended by Langford than he would have received from less risky ones; (ii) that Claimant recouped some of his principal before selling these investments; and (iii) that Claimant missed several opportunities to mitigate his losses. Additionally, punitive damages may have been assessed, despite the award's statement to the contrary.

Name

Date

Mark R. Lee, Esq.
Mark R. Lee, Esq.
Public Arbitrator

June 27, 1993

For NASD Use Only

Date of Service of Award: 7-8-93

N.A.S.D. DISCIPLINARY REFERRAL

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

George M. Loy, Jr.

92-00337

Name of Respondents

Smith Barney, Harris Upham & Co., Inc.;
Warren W. Langford

REPORT OF ARBITRATORS

During the course of the hearing in the above-captioned arbitration hearing, the undersigned arbitrators heard testimony and evidence which called into question the adequacy of supervision of customer accounts transferred into the St. Louis office of Smith Barney, Harris Upham & Co., Inc. Specifically, the undersigned arbitrators believe that few, if any, of the customer accounts transferred from Drexel Burnham Lambert, Inc. to Smith Barney, Harris Upham & Co., Inc. were reviewed and therefore suspect serious supervisory rule infractions and that the District office of the NASD investigate the matter to determine if there is a violation of the Rules of Fair practice.

Concurring Arbitrators' Signatures

Gerald Cohen, Esq.
Gerald Cohen, Esq.

July 7, 1993
Date

James A. Winkelmann
James A. Winkelmann

June 26, 1993
Date

Dissenting Arbitrator's Signature

Mark R. Lee, Esq.
Mark R. Lee, Esq.

June 27, 1993
Date