

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Sue A. Smoot

92-01842

Name of Respondents

Shearson Lehman Brothers, Inc.;
Carl Weiner

REPRESENTATION

For Claimant: Sue A. Smoot was represented by John S. Campbell, Esq. of J.S. Campbell & Associates, P.A., located in Albuquerque, New Mexico.

For Respondent: Shearson Lehman Brothers, Inc. and Carl Weiner were represented by Jeffrey R. Brannen, Esq. of Montgomery & Andrews, P.A., located in Santa Fe, New Mexico.

CASE INFORMATION

Statement of Claim filed: June 2, 1992.

Claimant's Submission Agreement signed on: May 27, 1992.

Joint Statement of Answer of Respondents Shearson Lehman Brothers, Inc. and Carl Weiner filed: February 9, 1993.

Claimant's Motion to Bar any Facts or Defenses filed: September 30, 1992

Response in Opposition to Motion to Bar any Facts or Defenses filed by Respondents on: February 9, 1993.

Respondents Shearson Lehman Brothers, Inc. and Carl Weiner did not file properly executed submission agreements, but are a member firm and an associated person and are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

CASE HISTORY

Prehearing Conferences: None Held

Hearing Date/Sessions: February 17, 1993 for two (2) sessions

Hearing Location: Albuquerque, New Mexico.

CASE SUMMARY

Claimant Sue A. Smoot ("Smoot") alleged that Respondent Carl Weiner ("Weiner"), while employed by or acting as an agent for Respondent Shearson Lehman Brothers, Inc. ("Shearson"), misrepresented and failed to disclose the risks to her of investing in limited partnerships, thereby placing her monies in the following unsuitable investments.

1. Sahara Casino Partnership;
2. Participating Income Property II;
3. Secured Equity Leasing Plus, R.P.; and
4. LCIF II (Le Percq).

Smoot specifically alleged that:

1. Smoot was an unsophisticated investor who lacked knowledge of financial investment matters and, in particular, was unsophisticated in investments in the stock market or in real estate and other limited partnerships;
2. In or about August 1986, Smoot met with Weiner and discussed with him the possibility of investment in securities, advising him of her personal information, current financial needs and investment objectives of security, lack of risk and liquidity;
3. From time to time Weiner would recommend that Smoot purchase certain securities. Smoot purchased certain of the recommended securities based solely on Weiner's advice and recommendations, relying on him to recommend secure, liquid investments and not risky, non-liquid investments;
4. Prior to making the purchases, Smoot was not given any prospectus, offering memorandum or other document describing the securities. Weiner would call Smoot and, under the threat of the expiration of the offering, would persuade Smoot to purchase the investment and would forward prospectus to Smoot after purchase. In each case, the date of delivery was backdated to show delivery prior to purchase;
5. The investments made were high risk limited partnerships and investments that were sponsored or underwritten by Shearson that Weiner recommended to earn higher commissions. Weiner's failure to advise Smoot of the true nature of the investments was a misrepresentation of material fact and the investments were

unsuitable given her stated investment objectives, or in her best interest; and

6. The filing of Claimant's Statement of Claim was timely under the applicable Statute of Limitations and Section 15 of the Code of Arbitration Procedure because Smoot could not have known, with the exercise of reasonable diligence, or discovered Weiner's misrepresentations until June 1990.

Based upon the above allegations, Smoot asserted claims for violations of the New Mexico Securities Act; fraud and constructive fraud; negligence and negligent misrepresentation.

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

1. Smoot inquired about the specifics of any and every investment made, raised questions both before and after reviewing the prospectuses, and demonstrated business sophistication and knowledge of financial investment matters and the risks involved; Weiner at all times explained to Smoot the nature of the investments recommended, responded to her many questions, and that the discussions and prospectuses fully disclosed all pertinent information;
2. Smoot did not narrowly define or confine her investment risk, but expressed particular interest in tax sheltered and/or tax advantaged investments because of her income situation;
3. Weiner did recommend the purchase of certain securities, which Smoot would consider, ask questions about and then make an independent decision as to whether to invest;
4. Smoot was given prospectuses, offering memoranda or other documents describing the securities and risks involved in purchasing the securities. Smoot would telephone Weiner, discuss the specifics of the prospectus or offering memorandum, raise questions and demonstrated that she had thoroughly reviewed and understood its contents;
5. The interest of Shearson in any partnership was fully disclosed by the prospectus or offering memorandum and Weiner did not recommend the purchases based on the commission received;
6. There was no misrepresentation of material fact by commission or omission. The investments recommended and purchased by Smoot were suitable for her and not in violation of any applicable rules or guidelines;
7. Claimant is limited to claims to which the four year statute applies, and the claims made pursuant to the New Mexico Securities Act are banned.

RELIEF REQUESTED

Claimant Smoot requested entry of an award against Respondents Shearson and Weiner for recovery of the monies invested in the sum of \$47,200.00 together with interest at the highest legal rate from the date of each investment until the date of payment; punitive damages in the amount of \$50,000.00; and costs, post award interest and attorney's fees. In addition, Claimant requested rescission pursuant to the New Mexico Securities Act.

Respondents Shearson and Weiner requested that the panel deny all relief sought by Smoot and that they be awarded their costs and attorneys' fees in this matter.

OTHER ISSUES CONSIDERED AND 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.

Respondent Shearson Lehman Brothers, Inc. and Carl Weiner did not file properly executed submission agreements. The panel determined that as a member firm and associated person of the NASD, Respondents are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

At the beginning of hearing, Claimant asserted her Motion to Bar any Facts or Defenses pursuant to Section 25 of the NASD Code of Arbitration Procedure. The panel considered the Motion, the Response and the arguments presented by the parties and determined that the Motion would be denied, subject to renewal of the objection if any prejudicial defense asserted by Respondents arose. The Motion was not renewed during hearing.

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. Respondents Shearson Lehman Brothers, Inc. and Carl Weiner are jointly and severally liable for and shall pay to Claimant Sue A. Smoot the sum of \$15,887.00 plus interest at rate of 15% per annum from the date the award is served until the amount is paid in full;
2. In addition, Respondent Shearson Lehman Brothers, Inc. and Carl Weiner are jointly and severally liable for and shall pay to Claimant Sue A. Smoot the sum of \$650.00 as reimbursement of the Claim filing fee and hearing session deposit filed in this matter;
3. The claim for punitive damages is dismissed and denied in its entirety;

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

The National Association of Securities Dealers, Inc. shall retain the \$150.00 non-refundable claim filing fee and the \$500.00 hearing session deposit previously deposited by the Claimant Sue A. Smoot. Respondents Shearson Lehman Brothers, Inc. and Carl Wiener are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$500.00.

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

Concurring Arbitrators' Signatures

Name

Date:

Peter J. Broullire, III, Esq.
Peter J. Broullire, III, Esq.
Public Arbitrator
Chairperson

March 1, 1993

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

March 2, 1993

Richard H. Follingstad
Richard H. Follingstad
Industry Arbitrator

March 2, 1993

Date of Service on Parties:

3/9/93