

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Sandra L. Schiermeier

92-02019

Name of Respondents

R.G. Dickinson & Co.;
W. Kirk Smith

REPRESENTATION

For Claimant: Sandra L. Schiermeier was represented by Don K. Leufven, Esq. of Houston, Texas.

For Respondents: R. G. Dickinson & Co. was represented by Joseph L. Hood, Jr., Esq. of Scott, Hulse, Marshall, Feuille, Finger & Thurmond, P.C., located in El Paso, Texas.

W. Kirk Smith did not appear at hearing, but filed a Statement of Answer and an executed submission agreement.

CASE INFORMATION

Statement of Claim filed: June 16, 1992.

Claimant's Submission Agreement signed on: June 15, 1992.

Statement of Answer filed by Respondent R. G. Dickinson & Co. on: August 31, 1992.

Respondent R. G. Dickinson & Co.'s Submission Agreement signed on: August 25, 1992 by Thomas M. Swartwood, Vice-President, R. G. Dickinson & Co..

Statement of Answer filed by Respondent W. Kirk Smith on: October 2, 1992.

Respondent W. Kirk Smith's Submission Agreement signed on: October 2, 1992.

HEARING INFORMATION

Pre-Hearing Conference: December 17, 1992 with arbitrator presiding.

Hearing Dates/Sessions: January 12, 1993 for Two (2) sessions;
January 13, 1993 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant Sandra L. Schiermeier ("Schiermeier") alleged that Respondent W. Kirk Smith ("Smith"), while employed by or acting as an agent for Respondent R.G. Dickinson & Co. ("R.G. Dickinson"), made unsuitable recommendations, misrepresented the facts about certain limited partnerships purchased for her account, converted and churned the funds in her account. Schiermeier specifically alleged that:

1. Smith made unsuitable or negligent recommendations by advising Schiermeier to sell her investment bonds and purchase units in the Daleco/Star Partners, L.P. in December of 1988, and the Datronic Equipment Income Fund XVII, L.P. in February of 1989;
2. Respondents misrepresented or failed to inform Schiermeier of the partnership's track records, that the high commissions, fees and distributions would be deducted from her principal, and other high risk factors regarding the partnerships;
3. In June of 1989, Smith converted funds by endorsing and depositing in his own account an \$8,640.42 check payable to Schiermeier; and
4. On or about February 9, 1989, Smith began churning Schiermeier's account by continued short term trading of stocks in order to generate greater commissions.

Based upon the above allegations, Schiermeier asserted claims for violations of the NASD Rules of Fair Practice and SEC Rule 10b-5; state law claims for misrepresentation, fraud, gross negligence, conversion, bad faith conduct, breach of fiduciary duty and violation of the Texas Securities Act.

Respondent R. G. Dickinson denied the material allegations of the Statement of Claim, alleging that:

1. The limited partnerships were suitable for a person of her financial situation and needs because they were consistent with Schiermeier's need for income and Schiermeier received substantial tax deductions;
2. The purchase of the limited partnerships is inconsistent with Schiermeier's claim of "churning" because these securities are more illiquid and cannot be turned over as readily as other debt and equity securities;
3. Datronics did have a "track record", but the value was affected by the misappropriation of funds by the CEO of the company;
4. It is believed that the decline in Daleco's distributions are attributable to an overall downturn in the computer industry;
5. Schiermeier made no complaint until after her distributions began to decline; and
6. R.G. Dickinson has no knowledge regarding the converted funds and complaint was not received until August of 1991, almost two years after Smith transferred his registration.

In addition, R. G. Dickinson asserted the following affirmative defenses:

1. The claims for rescission are barred by ratification or by Schiermeier's participation as a member of a class of plaintiffs who have brought suit as a result of the defalcations of Datronics' management;
2. Each claim asserted under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 that is based upon a transaction completed more than three years prior to the commencement of the arbitration is barred by the absolute statute of repose applicable to such claims;
3. No liability for churning losses exists under Section 33 of the Texas Securities Act as liability thereunder is limited to affirmative misrepresentations and material omissions and does not extend to breach of fiduciary duty;
4. Schiermeier's claims for negligence do not state a claim for relief as Texas law does not recognize a cause of action sounding in negligence for the recovery of purely economic losses such as those in the claim;
5. Schiermeier's claims are barred, in whole or in part, by her contributory negligence;

6. Schiermeier's claims for negligence are barred by the two year statute of limitations provided in section 16.003(a) of the Texas Civil Practice and Remedies Code;

7. Schiermeier's "conversion" claim is barred by the two year statute of limitations provided in section 16.003(a) of the Texas Civil Practice and Remedies Code;

8. Any act by Respondent Smith in converting Schiermeier's funds was outside his actual and apparent authority as R.G. Dickinson's agent; and

9. Punitive or exemplary damages cannot be assessed against R. G. Dickinson.

Respondent Smith alleged that all transactions in Schiermeier's account were done in her best interests and were in securities he believed were suitable. Smith admitted transferring money from Schiermeier's account into his own, but alleged that he never intended to keep the money and planned on replacing the money when he was able to produce as he was able to do earlier.

RELIEF REQUESTED

Claimant Schiermeier requested entry of an award against Respondents for at least \$75,000.00 in actual damages (or an award of at least \$22,346.41 together with rescission of the partnership sales, whereby Claimant returns ownership of the partnerships to Respondents upon return to her of \$140,000.00 in invested funds, adjusted for a 9.5 % annual rate of return); legal interest at the rate of 9.5 % per annum (which is offset by any distributions of dividends received); at least \$10,000.00 in attorneys' fees and costs pursuant to the Texas Securities Act (Tex. Rev. Stat. Ann. art. 581-33 D (7)); \$950.00 in filing fees and deposits; exemplary damages of at least two times actual damages or an amount that the arbitrators find just and appropriate (as permitted under the Texas common law claims if Respondents' conduct is committed willfully, wantonly, or with conscious indifference to the consequences); and all other relief which is just and to which Claimant was entitled under the evidence.

Respondent R.G. Dickinson requested that Schiermeier's claims against R.G. Dickinson be dismissed and that forum fees be assessed against Schiermeier.

Respondent Smith did not specify any relief request.

OTHER ISSUES CONSIDERED & DECIDED

On December 10, 1992, Claimant Schiermeier filed a Motion for Leave to Amend the Statement

of Claim. Upon review, the Motion to Amend was denied pending the resolution of discovery as the Motion related to pending discovery motions. The Claimant could present the Motion again if discovery was inadequate. The Motion was not renewed.

Respondent Smith did not appear at hearing. Upon review, the panel determined that Smith had received due notice of the hearing as required under Section 26 of the NASD Code of Arbitration Procedure and determined that the arbitration would proceed pursuant to Section 29 of the NASD Code of Arbitration Procedure.

At the close of hearing, the panel allowed the filing of post-hearing submissions.

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 post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents R.G. Dickinson & Co. and W. Kirk Smith are jointly and severally liable for and shall pay to Claimant Sandra L. Schiermeier the sum of \$161,751.91;
2. Upon receipt of payment of the sums enumerated in paragraph one (1) above, Claimant Sandra L. Schiermeier shall immediately cause her interest in the limited partnership units in Daleco/Star Partners, L.P. and Datronic Equipment Income Fund XVII, L.P. to be transferred to Respondents R.G. Dickinson & Co.;
3. In addition, Respondents R.G. Dickinson & Co. and W. Kirk Smith are liable for and shall pay to Claimant Sandra L. Schiermeier the sum of \$60,000.00 as attorneys' fees. In making this award of attorneys' fees, the panel considered the arguments of the parties, the post-hearing briefs submitted by the parties and the provisions of the Texas Securities Act [Tex. Rev. Civ. Stat. Ann. art. 581-33(D)(7)], and determined that authority existed for an award of attorneys' fees to Claimant Sandra L. Schiermeier; and
4. The claims for exemplary damages are hereby dismissed and denied in their entirety;

5. The parties shall bear all other costs of arbitration 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: One (1) Pre-hearing x \$300.00 per pre-hearing = \$300.00; Four (4) hearing sessions x \$750.00 per hearing session = \$3,000.00; Total Forum Fees = \$3,300.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and refund the \$750.00 hearing session deposit previously deposited by the Claimant Sandra L. Schiermeier. Respondents R.G. Dickinson & Co. and W. Kirk Smith are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$3,300.00.

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

Concurring Arbitrators' Signatures

Name:

Date:

Charles D. Powell, Esq.
Charles D. Powell, Esq.
Public Arbitrator
Chairperson

March 22, 1993

Richard A. Hollenberg
Richard A. Hollenberg
Public Arbitrator

March 23, 1993

John C. Booth, Jr.
John C. Booth, Jr.
Industry Arbitrator

March 22, 1993

Date of Service on Parties: 3-24-93

N.A.S.D. DISCIPLINARY REFERRAL

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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Name of Claimant

Sandra L. Schiermeier

92-02019

Name of Respondents

R.G. Dickinson & Co.;
W. Kirk Smith

REPORT OF ARBITRATORS

During the course of the hearing in the above captioned arbitration, the undersigned arbitrators heard testimony and evidence which called into question the conduct of W. Kirk Smith. The undersigned arbitrators feel that the District Office of the NASD should investigate the conversion of Sandra L. Schiermeier's funds through Smith endorsing and depositing of a check drawn on the client's account into his own account without Schiermeier's knowledge or permission.

Concurring Arbitrators' Signatures

Name

Date:

Charles D. Powell, Esq.
Charles D. Powell, Esq.
Public Arbitrator
Chairperson

March 22, 1993

Richard A. Hollenberg
Richard A. Hollenberg
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March 22, 1993