

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Names of Claimants

Louise M. Bergen
Leonard A. Bergen TTEES

92-02411

Names of Respondents

Shearson Lehman Brothers, Inc.
Rick Ban

REPRESENTATION

Claimants, Louise and Leonard Bergen were represented by Roger C. Decker, Esq. of Kempton, Jarvis, Decker, Jenkins & Walker, Mesa, Arizona.

Respondents, Shearson Lehman Brothers, Inc. and Rick Ban were represented by Bradley Balson, Esq. of Lewis and Roca, Phoenix, Arizona.

CASE INFORMATION

A Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") by the Louise M. Bergen Trust on July 20, 1992.

A Statement of Claim was filed with the NASD by the Leonard A. Bergen Trust on July 20, 1992.

Claimant, Louise M. Bergen's Submission Agreement was signed on July 8, 1992.

Claimant, Leonard A. Bergen's Submission Agreement was signed on July 8, 1992.

Respondent, Shearson Lehman Brothers, Inc.'s Submission Agreement was signed on August 31, 1992 by William a. Hohauser.

Respondent, Rick Ban's Submission Agreement was signed on September 23, 1992.

A Joint Statement of Answer to the Statement of Claim filed by the Louise M. Bergen Trust was filed with the NASD by Respondents, Shearson Lehman Brothers, Inc. and Rick Ban on September 17, 1992.

A Joint Statement of Answer to the Statement of Claim filed by the Leonard A. Bergen Trust was filed with the NASD by Respondents, Shearson Lehman Brothers, Inc. and Rick Ban on September 17, 1992.

HEARING INFORMATION

The hearing date was February 16, 1993 and the hearing lasted for two (2) hearing sessions.

The hearing location was Scottsdale, Arizona.

CASE SUMMARY

Claimants, Louise M. Bergen ("Louise Bergen"), and Leonard A. Bergen ("Leonard Bergen") alleged fraud, negligence and violations of Securities Rules and Regulations on the part of Respondent, Shearson Lehman Brothers, Inc. ("Shearson") through its employee, Respondent, Rick Ban. ("Ban") These allegations arose out of Louise and Leonard Bergen's trust accounts with Shearson which Ban was assigned to after Louise and Leonard Bergen's previous broker quit Shearson. According to Louise and Leonard Bergen, Ban indicated that he gave a discount when buying investments and further stated that there were a lot of junk bonds on the market and urged Louise and Leonard Bergen to bring in all of their securities and papers so he could review them. Louise and Leonard Bergen alleged that they realized that the net effect of their transactions with Ban and Shearson was a substantial loss of principal, loss of income and the expenditure of significant amounts of commission.

Specifically, Louise Bergen claimed that she should not have been charged any commission on the sales of her Franklin Fund ("Franklin"), and purchases of the Flagship Arizona Tax Exempt Funds ("Flagship"). Since Franklin had both a national and Arizona insured, it could have been exchanged at no sales charge. In addition, Louise Bergen claimed that Ban should have been fully aware that Flagship allows purchases at a net asset value by an investor with proceeds from the liquidation of another mutual fund within the previous sixty days if the investor had paid either a front end sales commission or a surrender fee. Louise Bergen alleged that Ban did not take advantage of this opportunity.

Furthermore, Louise Bergen alleged that Ban had no logical reason for selling her Scottsdale Memorial Hospital bond prior to its call date. Louise Bergen also claimed that Ban omitted to advise Louise Bergen that her Trust's shares in the Franklin Tax Free High Yield

Fund could have been exchanged into other Franklin funds and accomplished Louise Bergen's stated objectives, without any commission costs to the Trust. Lastly, Louise Bergen contended that Ban omitted to inform her that the purchase of Flagship could have been done at net asset value with no commission costs, as outlined in the Flagship prospectus, since the investment was made with proceeds from the liquidation of another mutual fund.

Specifically, Leonard Bergen claimed that he was not advised that Massachusetts Financial Services has a high grade municipal fund which the Massachusetts Financial Services high yield shares could have been exchanged for without incurring a sales charge. Also, Leonard Bergen alleged that his concerns were not met in connection with the sale of the Massachusetts Financial Services high yield and the purchase of Eaton Vance high yield and. Leonard Bergen was unaware that Eaton Vance was a high yield fund. Leonard Bergen also claimed that he should not have been charged any commission for the sales of the Franklin Fund and purchases of the Flagship Arizona Tax Exempt Funds. Leonard Bergen maintained that since Franklin had both a national and Arizona insured, the fund could have been exchanged at no sales charge and Leonard Bergen's proposed objectives would have been taken care of. In addition, Leonard Bergen alleged that Ban should have been fully aware that Flagship allows purchases at a net asset value by an investor with proceeds from the liquidation of another mutual funds within the previous sixty days if the investor had paid either a front end sales commission or a surrender fee. According to Leonard Bergen, Ban failed to take advantage of this opportunity.

Leonard Bergen alleged Ban made the following omissions in connection with his trust account:

1. Ban omitted to inform him that the Trust's Massachusetts Financial shares could have been exchanged into other Massachusetts Financial Fund shares without incurring any commission costs;
2. Ban omitted to advise him that the Trust's shares in the Franklin Tax Free High Yield Fund could have been exchanged into other Franklin funds;
3. Ban omitted to inform him that the purchase of the Flagship funds could have been done at net asset value with no commission costs, as outlined in the Flagship prospectus, since the investment was made with proceeds from the liquidation of another mutual fund;
4. Ban omitted to inform him that the Eaton Vance High Yield Tax Free Fund, which Ban purchased to replace the Massachusetts Financial High Yield shares, was also invested in "junk bonds" which was the very reason Ban gave Leonard Bergen for liquidating the Massachusetts funds in the first place; and
5. Ban failed to deliver a prospectus prior to the time the Eaton Vance Fund was

purchased.

In their Answer to Louise Bergen's Statement of Claim, Respondents, Shearson and Ban responded that Ban's placement of Louise Bergen's trust account funds from junk bonds into higher quality investments, was in keeping with her investment objective of income with safety. Shearson and Ban further stated that all of Louise Bergen's trust account trades were approved by Louise, after a full disclosure of the consequences and after Ban made Louise Bergen fully aware of the fact that some of the principal would be lost in the sale of those investments and that the tremendous increase in the quality of investments bought might result in a lower income from the investments. In particular, Shearson and Ban alleged that the sale of the high-yield investments was in keeping with her investment objectives and the loss of principal is simply a possible consequence of investing in the market. Shearson and Ban maintained that Ban invested in Flagship and not Franklin because he was more comfortable with that fund and Louise Bergen was interested in that fund.

In their Answer to Leonard Bergen's Statement of Claim, Shearson and Ban responded that it was with Leonard Bergen's informed approval that Ban upgraded the quality of Leonard Bergen's trust portfolio by selling the junk bonds investments and purchasing investments of higher quality. According to Shearson and Ban, Ban's transactions in connection with Leonard Bergen's trust account were in keeping with Leonard Bergen's investment objective of income with safety. Shearson and Ban claimed that all of Ban's transactions were approved by Leonard Bergen, after a full disclosure of the consequences and Leonard Bergen was fully aware of the fact that some principal would be lost in the sale of the investments and that the tremendous increase in the quality of investments bought might result in a lower income from the investments. Additionally, Shearson and Ban maintained that the sale of the high-yield investments was what Leonard Bergen wanted and in keeping with his investment objectives. In regard to the commissions Leonard Bergen paid, Shearson and Ban contended that Ban invested in the manner he did because Leonard Bergen was interested in those investments and in the investments that Ban was comfortable with.

RELIEF REQUESTED

Claimant, Louise M. Bergen requested an award of \$15,932.54, statutory damages authorized by statute and/or punitive damages found to be appropriate by the arbitration panel, any surrender fees, unknown commission charges and attorney's fees and costs.

Claimant, Leonard A. Bergen requested an award of \$20,797.00, statutory damages authorized by statute and/or punitive damages found to be appropriate by the arbitration panel, any surrender fees, unknown commission charges and attorney's fees and costs.

Respondents, Shearson and Ban requested that both of the Statements of Claim be

dismissed in their entirety and that Shearson and Ban be awarded their costs and attorney's fees and that Louise and Leonard Bergen be required to pay all forum fees.

OTHER ISSUES CONSIDERED & DECIDED

At the close of the Claimants' case in chief, Shearson and Ban made a Motion for Directed Verdict on the unauthorized trade claims. Counsel for Shearson and Ban argued that the evidence presented the claim could not be sustained because the Bergen's ratified all trades. The Arbitration Panel took the Motion under advisement.

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. Shearson and Ban's Motion for Directed Verdict which was originally taken under advisement by the panel is denied;

LOUISE BERGEN'S CLAIM

2. Respondents, Shearson Lehman Brothers, Inc. and Rick Ban, are jointly and severally liable for and shall pay to Claimant, Louise M. Bergen, the sum of Two Thousand Nine Hundred Thirty Five Dollars and Sixty Four Cents (\$2,935.64);

LEONARD BERGEN'S CLAIM

3. Respondents, Shearson Lehman Brothers, Inc. and Rick Ban are jointly and severally liable for and shall pay to Claimant, Leonard A. Bergen, the sum of Five Thousand Four Hundred Eighty Six Dollars and Sixty Nine Cents (\$5,486.69);

4. Claimants, Leonard and Louise Bergen's Claims for punitive and or treble damages are denied and dismissed in their entirety; and,

5. Other than Forum Fees which are addressed below, the parties shall each bear their respective costs, expenses and attorney's fees incurred in this matter.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the \$120.00 non-refundable claim filing fees and the \$400.00 hearing session deposit previously deposited with the NASD by the Claimants, Louise and Leonard Bergen. Shearson and Ban are directed to reimburse the Bergens for the sums they deposited with the NASD. Shearson and Ban are jointly and severally assessed additional Forum Fees in the amount of \$400.00.

Forum Fees were assessed at the rate of \$400.00 per hearing session for two (2) hearing sessions. Additional Forum Fees assessed to Shearson and Ban are to be paid to the NASD.

Concurring Members of the Arbitration Panel:

/S/ Glenn C. Johnson
Glenn C. Johnson, Esq.
Public Arbitrator
Chairperson

March 22, 1993
Dated

/S/ Robert A. Williams, Jr.
Robert A. Williams, Jr.
Public Arbitrator
Panelist

March 22, 1993
Dated

/S/ James Kaiser
James Kaiser
Industry Arbitrator
Panelist

March 22, 1993
Dated

Date Award served by the NASD: March 25, 1993