

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Jerome Eckenthal, Substitute-Trustee for
the Testamentary Trusts of Carl L. Schweinler, Sr.
and the Inter Vivos Trusts created by Anna
T. Schweinler

93-00168

Name of Respondent

Smith, Barney, Harris, Upham & Company, Inc.

REPRESENTATION

For Claimant Jerome Eckenthal, Substitute-Trustee for the Testamentary Trusts of Carl L. Schweinler, Sr. and the Inter Vivos Trusts created by Anna T. Schweinler, hereinafter referred to as ("Claimant"), appeared Paul A. Sandars, III, Esq. of the law firm of Lum, Danzis, Drasco, Positan & Kleinberg located in Roseland, New Jersey.

For Respondent Smith, Barney, Harris, Upham & Company, Inc. ("Respondent") appeared Brian F. McDonough, Esq., of the law firm of Shanley & Fisher, located in New York City, New York.

CASE INFORMATION

The Statement of Claim was filed on March 5, 1993.
Claimant's Submission Agreement was signed on February 4, 1993.

A Statement of Answer was filed by Respondent on April 27, 1993.
Respondent's Submission Agreement was signed on April 26, 1993.

HEARING INFORMATION

Hearing Dates/Sessions:	January 24, 1994	1 sessions
	September 28, 1994	2 sessions
	September 29, 1994	2 sessions
	December 28, 1994	2 sessions
	December 29, 1994	2 sessions
	January 13, 1995	2 sessions
	March 20, 1995	2 sessions
	March 21, 1995	2 sessions
	May 22, 1995	2 sessions
	November 27, 1995	2 sessions
	November 28, 1995	2 sessions

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in New York City, New York.

CASE SUMMARY

Claimant maintained that two trusts, A and B, were created pursuant to Carl Schweinler Sr.'s Will. In 1971, Anna Schweinler created five irrevocable inter vivos trusts. Respondent further maintained that the assets of trusts A and B were combined with Trust #1, which Anna Schweinler had created. Claimant further alleged that Carl L. Schweinler, Jr. ("Schweinler"), an Account Representative employed by Respondent, designated himself as the Account Representative who would be responsible for the trading activity for trusts of which he was both a beneficiary and/or a co-trustee. Claimant also alleged that Respondent knew of Schweinler's role with respect to the trusts, and that such role, without prior judicial approval, was unlawful as it created both self-dealing and conflict of interest problems. Claimant contended that Respondent did not fill out the Trustee Certification of Investment Powers violating regulations and its own policy.

Claimant alleged that upon opening securities accounts with the Respondent, Schweinler and Respondent entered into securities account agreements with respect to the above trusts. Claimant further alleged that the agreements, in part, provided for the resolution of disputes by the use of arbitration. Claimant further alleged that these account agreements are invalid as the documents do not contain the requisite authority which permits the parties to enter into such agreements. Claimant also alleged that the validity of these agreements must be determined by the arbitrators as a threshold matter in this proceeding.

Claimant contended that Schweinler made inappropriate investment choices such as the purchase of highly speculative securities, Real Estate Investment Trusts, oil and gas limited partnerships, and the use of a margin account and options. Claimant further contended that Schweinler traded excessively. Claimant also contended that the trust agreements did not empower Schweinler to take the actions he did, therefore, the transactions are void ab initio. Claimant alleged that upon

learning of the improprieties, Respondent wilfully and wantonly covered up the problems thus perpetuating the fraud and increasing the losses.

Claimant alleged that around June 20, 1989, an action requesting a formal final accounting was initiated in the Superior Court of New Jersey, Probate Part, on behalf of certain beneficiaries of the aforementioned trusts. Claimant further alleged that as a result of the hearings, the prior Trustees were found liable for an amount in excess of \$2,000,000.00. Claimant also alleged that he was appointed as Substitute-Trustee and that the hearings revealed Respondent's wrongdoing.

Respondent denied all allegations of wrongdoing asserted against it in the Statement of Claim. Respondent maintained that the creation and subsequent combination of the trusts was done before Schweinler joined the firm in 1984. Respondent contended that after Schweinler joined the firm, he opened several accounts for the trusts. Respondent further contended that it was unaware that the assets of A and B had been joined with trust #1, and could not have known since the securities were delivered to it through a clearing house.

Respondent maintained that the Claimant is misguided because although Schweinler was its employee, he was also the son of the grantors, the former trustee, and was a beneficiary of one of the trusts. Respondent further maintained that 90% of the alleged losses were not caused by respondent, but were due to a dispute between Schweinler and other beneficiaries over his handling of the investments.

Respondent maintained that on October 8, 1991, it filed a motion in the United States District Court of New Jersey seeking to enforce the predispute arbitration clause signed when the accounts were opened. Respondent further maintained that the court granted the motion as to the Anna Schweinler trust #1, the trust which held the assets of trusts A and B. Respondent also maintained that the other four Anna Schweinler trusts had their claims dismissed as they had suffered no loss or damage while with Smith Barney. Respondent contended that the alleged losses are greatly exaggerated as the actual losses were only \$204,000.00. Respondent also contended that as a result of the above, it should not be held liable.

RELIEF REQUESTED

Claimant requested that the panel determine that the arbitration forum has no jurisdiction to hear this dispute, that arbitration of this claim is not mandated, and that this matter must be remanded to U. S. District Court for the District of New Jersey.

Claimant further requested compensatory damages and reimbursement to the extent that Smith Barney generated corpus loss, with interest thereon from June 5, 1984 to the date of the award, and then interest on the entire award from the date of the award until full payment.

Claimant also requested \$187,314.00 as reimbursement of commissions improperly charged by Respondent plus interest.

Claimant requested the refund of all unauthorized margin interest exacted by respondent, Smith Barney, in the amount of \$205,472.00 plus reasonable interest thereon.

Claimant further requested damages for loss of investment income which could have been earned, together with interest.

Claimant requested reimbursement for costs and disbursements incurred by Claimant in collection and reimbursement of the proceeds of these allegedly unsuitable investments due to respondent's allegedly wrongful conduct.

Claimant also requested punitive damages for Respondent's wilful and wanton misconduct; reimbursement of arbitration expenses; cost and disbursements incurred through the enforcement of any award entered in this proceeding; attorney's fees and expenses; and such other and further relief as may appear just and equitable to this Arbitration Tribunal.

Respondent requested that the claims be dismissed in their entirety and that it be awarded costs.

OTHER ISSUES CONSIDERED & DECIDED

Claimant filed a motion requesting that the panel determine that the NASD does not have jurisdiction over this matter. Claimant alleged that the predispute arbitration agreements are invalid because, as a matter of law, the trustee did not have the requisite authority to enter into such agreements. Respondent objected to the motion and requested that the panel find that the arbitration agreements are valid.

After reviewing and considering the respective positions of the parties on the issue of the NASD's jurisdiction to arbitrate this matter, the panel ruled that it had jurisdiction of this dispute pursuant to Sections 1 and 12 of the 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 post-hearing briefs, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Claimant, Jerome Eckenthal, Substitute Trustee, shall recover from Respondent, Smith, Barney, Harris, Upham & Co., Inc. the sum of \$299,801.00, together with interest from January 1, 1991 at 9% per annum until the date of the award.

2. Claimant's claim for punitive damages is hereby denied.
3. Each party shall bear their respective costs, including attorneys' fees, except that Respondent is hereby liable to the claimant in the amount of \$250.00 which represents a reimbursement of the NASD filing fee.
4. All other claims asserted herein are hereby denied.

OTHER COSTS

The Claimant was previously assessed a \$1,000.00 postponement fee and an additional fee of \$15.00 for administrative costs. Therefore, the Claimant shall pay to the NASD the sum of \$1,015.00.

The Respondent was previously assessed a \$15.00 fee for administrative costs. Therefore, the Respondent shall pay to the NASD \$15.00.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$250.00 non-refundable filing fee previously deposited by Claimant and have assessed the following forum fees:

21 sessions x \$750.00	= \$15,750.00
minus Claimant's \$250.00 deposit	= <u>\$ 250.00</u>
total outstanding	= \$15,500.00

Respondent be and hereby liable and shall pay to the NASD the sum of \$15,500.00 representing the total amount of forum fees assessed.

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

Public Chairperson

I, **ROBERT PINCUS, ESQ.**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that this is my decision in the above referenced matter.



Robert Pincus, Esq.

Date of Decision: August 15, 1996

ARBITRATORS' SIGNATURES


Marilyn J. Salzman, Esq.
Public Arbitrator

I, MARILYN J. SALZMAN, ESQ., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that this is my decision in the above referenced matter.


Marilyn J. Salzman, Esq.

Date of Decision: August 15, 1996

ARBITRATORS' SIGNATURES

Vicki R. Lawrence

Vicki R. Lawrence
Industry Arbitrator

I, **VICKI R. LAWRENCE**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that this is my decision in the above referenced matter.

Vicki R. Lawrence

Vicki R. Lawrence

Date of Decision: August 15, 1996