

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Brian Estes

93-01240

Name of Respondents

Shearson Lehman Brothers, Inc., n/k/a
Smith Barney Shearson Inc.;
James Magruder

REPRESENTATION

For Claimant: Brian Estes ("Estes") was represented by Firmin A. Puricelli, Esq. of St. Louis, Missouri.

For Respondent: Shearson Lehman Brothers, Inc., n/k/a Smith Barney Shearson Inc. ("Shearson") and James Magruder ("Magruder") were represented by Victor A. Machinski, Jr., Esq. of Smith Barney Shearson Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed: March 30, 1993.

Claimant's Submission Agreement signed on: January 29, 1993.

Joint Statement of Answer filed by Respondents Shearson and Magruder on: August 6, 1993.
Respondent Shearson's Submission Agreement signed on: August 6, 1993 by Victor Machinski, Vice President, Smith Barney Shearson Inc.

Respondent Magruder's Submission Agreement signed on: July 28, 1993.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Date/Sessions: January 12, 1993 for Two (2) sessions.

Hearing Location: St. Louis, Missouri.

CASE SUMMARY

Claimant Estes alleged that Respondent Magruder, while employed by or acting as an agent for Respondent Shearson, misrepresented the liquidity of an investment in limited partnership depositary units of Aetna Real Estate Associates, L.P. and failed to advise Estes of a secondary market where Estes could have received a discount of perhaps more than fifty percent (50%) of the price that Shearson charged for the investment. As alleged in the claim, Magruder repeatedly stated that the investment was fully liquid because Aetna Real Estate Associates, L.P. would buy back Estes' units at net asset value at any quarter. In fact, the remarketing program was only available to unit holders who had owned their units for at least twenty-seven months and the remarketing program could be cancelled at any time, making the investment illiquid. Based upon the allegations, Estes asserted claims for fraudulent misrepresentation; breach of fiduciary duty; and negligence.

Respondent Shearson and Magruder denied the material allegations of the Statement of Claim, asserting that:

1. Estes opened an individual account at Shearson with Magruder in December 1988. Magruder structured a high quality, diversified portfolio for Estes focusing on income and long-term growth with funds received by Estes as part of an insurance settlement;
2. In March 1989, Estes raised the issue of real estate investments with Magruder after learning in an investment class that a portion of one's assets should be in real estate. After consulting with his Divisional LP representative, Magruder, who was not familiar with the product, recommended Aetna to Estes. Magruder sent the prospectus and advised Estes to invest \$50,000.00 if he liked the investment, but Estes chose to invest \$100,000.00, returning the application on March 17, 1989. The investment represented approximately seven percent of his portfolio;
3. In August of 1989, Estes purchased an additional \$75,000.00 of Aetna after explaining to Magruder that his course work in college recommended a 15 percent investment allocation to real estate;

4. The investments in Aetna were fully discussed with Estes and Magruder explained to him that the remarketing required that the investor have held the investment for 27 months. In addition, the prospectus provided to Estes explained the remarketing opportunity and that there was no guarantee that it would be available when the investor became eligible under the holding period requirements;
5. The remarketing provision was discontinued on January 1, 1991. Estes learned of the cancellation when he decided to transfer his account to his new employer and inquired about liquidating the Aetna investment;
6. Estes purchased the interest in Aetna at net asset value, with no sales charge to him at the time of purchase. The price was a true value determined by independent third-party appraisers and there was no premium charged to or paid by Estes. Any "secondary market" may have been isolated liquidations or distress sales that Shearson, like other broker-dealers, did not do business in; and
7. Any losses to Estes attributable to a decline in net asset of the Aetna LP reflect economic and market risk which Estes knowingly and voluntarily assumed. In addition, Estes delay in complaining of the investment for three and one-half years after purchase constitutes ratification of the investment.

Respondents asserted several affirmative defenses, including the following:

1. The Statement of Claim fails to state any cause of action upon which relief can be granted;
2. The damages allegedly suffered have no causal relationship with any act committed by or legally attributable to Respondents;
3. Claimant's claims are barred because any representations made were expressions of opinion, not fact, and are not actionable;
4. The claims are barred by the principles of laches, waiver, estoppel and ratification;
5. The claims, in whole or in part, are time-barred; and
6. The Claimant's request for punitive damages violates the Due Process Clause of the United States Constitution, as well as applicable provisions of the New York Constitution and New York law.

RELIEF REQUESTED

Claimant requested that the Panel award him actual damages in the sum of \$175,000.00; punitive damages in the sum of \$600,000.00; and interests and costs to be determined.

Respondents requested that the Statement of Claim be dismissed and that Respondents be awarded their fees and expenses, including attorneys' fees, forum fees and all other costs of the proceeding.

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.

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., n/k/a Smith Barney Shearson, Inc., and James Magruder are jointly and severally liable for and shall pay to Claimant, Brian Estes, the sum of \$151,056.32;
2. The claim for punitive damages is hereby dismissed and denied in its entirety;
3. 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 \$1,000.00 per session = \$2,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$250.00 claim filing fee and refund the \$1,000.00 hearing session deposit previously deposited by the Claimant, Brian Estes. Respondent Shearson Lehman Brothers, Inc., now known as Smith Barney Shearson, Inc. is

liable for and shall pay to the NASD forum fees in the sum of \$2,000.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Albert Shawe Watkins, Esq.
Albert Shawe Watkins, Esq.
Public Arbitrator
Chairperson

March 18, 1994

/s/ William M. Holland
William M. Holland
Public Arbitrator

March 20, 1994

/s/ Walter A. Beckers
Walter A. Beckers
Industry Arbitrator

March 18, 1994

For NASD Use Only

Date of Service of Award: 3-25-94