

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

Ralph L. and Nancy D. Cotton
Woodridge Orthopedic Profit Sharing Plan

and

93-02377

Name of Respondents

CIGNA Securities, Inc.
Thomas C. Fead

REPRESENTATION OF PARTIES

Ralph L. and Nancy D. Cotton and Woodridge Orthopedic Profit Sharing Plan ("Claimants") were represented by Steve A. Miller, Esq., Steve A. Miller, P.C., Denver, Colorado.

CIGNA Securities, Inc. now known as CIGNA Financial Advisors, Inc. ("Respondent CIGNA") was represented by Kevin McCall, Esq. and Jeff Pitzer, Esq., Jenner & Block, Chicago, Illinois.

Thomas C. Fead ("Respondent Fead") was represented by Richard Silverstein, Esq., Denver, Colorado.

CASE INFORMATION

The Statement of Claim was filed on or about December 7, 1993. Submission Agreement of Claimants Ralph L. and Nancy D. Cotton was signed on December 7, 1993. Submission Agreement of Claimant Woodridge Orthopedic Profit Sharing Plan was signed on December 7, 1993 by Ralph L. Cotton.

Statement of Answer was filed by Respondent CIGNA on or about March 9, 1994. Submission Agreement of Respondent CIGNA Securities, Inc. now known as CIGNA Financial Advisors, Inc. was signed on March 8, 1994 by Karen R. Matheson.

Statement of Answer was filed by Respondent Thomas C. Fead on or about March 4, 1994. Submission Agreement of Respondent Thomas C. Fead was signed on March 2, 1994.

HEARING INFORMATION

The hearing was held on Tuesday, November 8, 1994 for two (2) sessions, Wednesday, November 9, 1994 for one (1) session, Thursday, November 10, 1994 for three(3) sessions and Wednesday, November 16, 1994 for one (1) session in Denver, Colorado for a total of seven (7) sessions.

CASE SUMMARY

Claimants alleged that Respondent Thomas C. Fead, a Registered Representative employed by Respondent CIGNA Securities, Inc., presented literature to the Claimants containing patent misrepresentations and made oral misrepresentations to the Claimants. The Claimants specifically alleged that:

- ◆ Fead presented Claimants with investment literature concerning Hedged-Investments Associates Limited Partnership, a hedged fund, which contained material misrepresentations regarding the past performance of the fund and the expected future performance of the fund;
- ◆ Fead arranged a meeting between the Claimants and the operator of the fund (Donahue) in order to induce the Claimants to make a sizable investment; at no time did Fead or the fund operator reveal that the representations in the literature were materially false;
- ◆ Both Fead and CIGNA personally assisted the Claimants in making their investments in Hedged-Investments; Fead and CIGNA also made representations regarding the various services and investments that CIGNA could provide in order to convince the Claimants to invest;
- ◆ Fead, as an agent of CIGNA, represented that he could place the Claimants in any number of investment opportunities because of his employment with CIGNA; Fead monitored and administered the Claimants' investments while employed by CIGNA.

Based on the above allegations, Claimants asserted Claims against Respondents for misrepresentation pursuant to C.R.S. §11-51-125(3); statutory fraud pursuant to C.R.S. §11-51-125(5)(b); failure to supervise in violation of NASD Rules of Fair Practice, Art. III, §27; negligence; and that Respondent CIGNA failed to maintain an adequate system of internal supervision and control.

Respondent CIGNA Securities, Inc. denied the material allegations of the Statement of Claim, alleging that:

- ◆ CIGNA had no connection whatsoever in the Claimants' decision to invest in the Hedged-Investments; CIGNA received no commissions, fees or any other benefit from the Claimants or from Hedged-Investments; CIGNA, in fact, did not sell the Claimants any investments;

- ◆ Claimants were sophisticated investors who had several investment advisors; according to a Federal suit earlier filed by the Claimants, they allege that they relied upon the representations of Donahue in their decision to invest, and in no way did they rely on CIGNA;
- ◆ Claimants were never told that Fead or CIGNA would monitor or administer their investments; the Claimants, in fact, did not keep Fead or CIGNA informed of all of their transactions with Donahue and Hedged-Investments; Claimants invested directly with Donahue;
- ◆ Claimants never signed any CIGNA forms or applications; no Hedged-Investment literature mentioned CIGNA; Claimants continued to invest with Fead after he left the employ of CIGNA.

Respondent CIGNA also asserted the following affirmative defenses:

- ◆ The Statement of Claim fails to state a claim upon which relief may be granted;
- ◆ There is no private cause of action for an alleged violation of the NASD Rules of Fair Practice;
- ◆ Claimants' action is barred under the applicable Statutes of Limitation;
- ◆ CIGNA acted reasonably, in good faith and with the same skill, prudence and diligence exercised by others in its profession;
- ◆ CIGNA maintained a reasonable and adequate system of supervision;
- ◆ CIGNA has fully and substantially performed all duties and obligations owed to Claimants;
- ◆ Claimants are barred from recovering all or some of their alleged damages by virtue of their own negligence;
- ◆ Claimants ratified their investment decisions and are barred from recovery by the doctrines of ratification, estoppel and/or waiver;
- ◆ Claimants' claims are barred by failure to mitigate damages;
- ◆ Claimants cannot recover damages that are speculative and not susceptible to proof;
- ◆ CIGNA is not liable for any investments purchased after December 1, 1988, because Fead was no longer a registered representative of CIGNA at that date; and
- ◆ Punitive damages are not recoverable.

Respondent Thomas C. Fead denied the material allegations of the Statement of Claim, alleging that:

- ◆ Fead did not know and in the exercise of reasonable care could not have known of any untruths or omissions made by Donahue or any Hedged-Investments literature; Fead had no knowledge of any fraud; and
- ◆ Fead exercised reasonable care in his dealings with the Claimants; furthermore, any alleged negligence by Fead did not proximately cause any damages to the Claimants;

Respondent Fead asserted the following affirmative defenses:

- ◆ Claimants' claims are barred by the applicable statutes of limitation;
- ◆ Respondent Fead was not the actual and proximate cause of any damages incurred by the Claimants;
- ◆ Claimants were contributorily negligent and such negligence was equal to or greater than any negligence on the part of Fead;
- ◆ Respondent Fead was not a seller of securities under Colorado Securities Law;
- ◆ Claimants' damages, if any, were caused by the acts and/or omissions of other persons over whom Fead had no control; and
- ◆ Claimants' claims are barred by reason of their own unjustifiable or unreasonable reliance upon information received by them;

RELIEF REQUESTED

Claimants requested an award of joint and several liability in an aggregate amount of approximately \$675,000, loss of expected profits, and interest and attorneys' fees.

Respondent CIGNA requested an award that the Claimants take nothing by their Statement of Claim; that the action be dismissed and an award entered in its favor and against the Claimants; an award of its costs; and for such other and further relief as the arbitrators deem just.

Respondent Fead requested that the Claimants take nothing by their Statement of Claim; that the action be dismissed and an award entered in his favor and against the Claimants; that he be awarded his costs incurred in this matter; that he be awarded his attorneys' fees incurred in connection with this matter; and such other and further relief as the arbitrators deem just.

OTHER ISSUES CONSIDERED & DECIDED

Respondents asserted a Motion to Dismiss the claims asserted by Claimants based upon the applicable statutes of limitations. After considering the submissions filed on behalf of the parties, the arbitrators denied the motion.

At the commencement of the hearing, Respondent CIGNA requested leave to file an Amended Answer. After considering the submissions and arguments of the parties, the panel denied the motion. Upon reconsideration, the panel later granted the motion and accepted the Amended Answer.

At the conclusion of the Claimants' case in chief, Respondent CIGNA asserted a Motion for Directed Verdict. After hearing the arguments presented by the parties, the undersigned arbitrators denied the motion.

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 original(s) 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. All claims asserted against CIGNA Securities, Inc. shall be and hereby are dismissed and denied in their entirety.
2. Respondent Thomas Fead shall be and hereby is liable for and shall pay to the Claimant Nancy Cotton the sum of **Twelve thousand one hundred seventy seven dollars (\$12,177)**.
3. Respondent Thomas Fead shall be and hereby is liable for and shall pay to the Claimant Ralph Cotton IRA the sum of **Five thousand nine hundred eighty five dollars (\$5,985)**.
4. Respondent Thomas Fead shall be and hereby is liable for and shall pay to the Claimant Woodridge Orthopedic Profit Sharing Plan the sum of **Seventy one thousand eight hundred thirty eight dollars (\$71,838)**.
5. Respondent Thomas Fead shall be and hereby is liable for and shall pay to the Claimants the sum of **Eighteen thousand dollars (\$18,000)** as attorneys' fees. This award of attorneys' fees is made pursuant to C.R.S. § 13-17-101 *et seq.*
6. Respondent Thomas Fead shall be and hereby is liable for and shall pay to the Claimants the sum of **One thousand dollars (\$1,000)** as reimbursement for the hearing session deposit previously made to the NASD.
7. Each party shall bear its own costs, expenses and fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each prehearing conference, if any. There were seven (7) sessions x \$1,000 = \$7,000 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by the Claimants Ralph L. and Nancy D. Cotton and Woodridge Orthopedic Profit Sharing Plan. Respondent Thomas C. Fead shall be and hereby

is liable for and shall pay to the NASD the sum of \$6,000 as the balance due for forum fees.
Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

/s/ Daniel C. Himelspach, Esq.
Daniel C. Himelspach, Esq.
Public Arbitrator, Presiding Chair

December 7, 1994

/s/ Harry Roger McConnell
Harry Roger McConnell
Public Arbitrator

December 7, 1994

/s/ Richard M. Reider
Richard M. Reider
Industry Arbitrator

December 7, 1994