

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Cheryl Moher,

Claimant.

v.

No. 93-02527

James Stuart Burg,
Allan Jay Feldman,
Hyman Klieback,
Calvert Securities Corp.,
Financial Planners Equity Corp.,
Total Services Investments, Inc./
Contemporary Financial Planning, Inc.
Respondents.

REPRESENTATION OF PARTIES

Claimant Cheryl Moher ("Claimant") was represented by Raymond S. Heyman, Esq. and Timothy Bolden, Esq. of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A., Phoenix, Arizona.

Respondents Total Services Investments, Inc./Contemporary Financial Planning, Inc. ("CFP"), Calvert Securities Corp. ("CSC"), James Stuart Burg ("Burg"), and Hyman Klieback ("Klieback") (collectively referred to as "Respondents") were represented by Timothy J. Thomason, Esq., and Russell O. Farr, Esq. of Streich Lang, Phoenix, Arizona.

Respondent Allan Jay Feldman ("Feldman") was represented by Joel P. Hoxie, Esq. and Brian J. Campbell, Esq. of Snell & Wilmer, Phoenix, Arizona.

Financial Planners Equity Corp. failed to appear at the hearing.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about June 24, 1993. Claimant's Submission Agreement was signed on July 22, 1993.

Feldman's Statement of Answer was filed on or about October 14, 1993. Feldman's Submission Agreement was signed on October 13, 1993.

Burg's and Klieback's Answer to the Statement of Claim was filed on or about October 13, 1993. Burg's Submission Agreement was signed on September 27, 1993. Klieback's Submission Agreement was signed on September 23, 1993.

CFP's Answer to the Statement of Claim was filed on or about October 14, 1993. CFP's Submission Agreement was signed on or about September 27, 1993.

CSC's Statement of Answer was filed on or about October 21, 1993. CSC's Submission Agreement was signed on October 20, 1993.

HEARING INFORMATION

Hearing dates: February 6, 1995. Two (2) sessions.
February 7, 1995. Two (2) sessions.
February 8, 1995. Two (2) sessions.
February 9, 1995. Two (2) sessions.
February 10, 1995. Two (2) sessions.

Hearing Location: Scottsdale, Arizona.

CASE SUMMARY

Claimant alleged that Respondents and Feldman: Violated A.R.S. Section 44-1991 through their numerous omissions and material misrepresentations made to Claimant regarding her investments; violated A.R.S. Sections 13-2301 et seq. ("AZRAC"); violated A.R.S. Section 13-2301 (A) through the illegal control of an enterprise by and through racketeering; violated A.R.S. Section 13-2312 (B); committed common law fraud through their misrepresentations to the Claimant; made intentional misrepresentations to the Claimant relating to her investments; made negligent misrepresentations to the Claimant concerning her investments; breached their fiduciary duty owed to the Claimant; and violated the NASD's Rules of Fair Practice. Claimant further alleged that Burg continued to make misrepresentations concerning her investments through 1992. Claimant also alleged that it was not until receiving Burg's December 1992, correspondence that she finally realized that Burg could not guarantee the performance of a particular mutual fund or partnership investment, and that it was the first time she had heard anything about risk from Burg. Lastly, Claimant alleged that it was not until after the December 1992 letter from Burg that she discovered the valuations of her investments were misstated and misleading. The allegations arose out of transactions in securities more fully presented during the course of the hearing in this matter.

In their Statement of Answer, Burg and Klieback unless specifically admitted therein, denied the

allegations contained in the Statement of Claim. In addition, Burg and Klieback asserted the following affirmative defenses:

1. Burg and Klieback affirmatively alleged that California law applies to this matter due to the choice of law provision in the Financial Planning Agreement signed by the Claimant.
2. Burg and Klieback affirmatively allege that Claimant's claims are barred because Burg and Klieback operated in good faith at all times material hereto. All of the advice given by Burg and Klieback was made in the utmost good faith, following sufficient due diligence. Burg and Klieback made no false statements about the investments Claimant invested in, let alone statements they knew were false.
3. Burg and Klieback affirmatively alleged that the legal claim for relief in the Statement of Claim fails to state claims upon which relief may be granted.
4. Burg and Klieback affirmatively alleged that Claimant's claims are barred because all material facts and risks attendant to the transactions at issue were disclosed to Claimant.
5. Burg and Klieback affirmatively alleged that Claimant's claims are barred because Burg and Klieback complied with the standard of care in the industry.
6. Burg and Klieback affirmatively alleged that Claimant's claims are barred by the applicable statutes of limitations.
7. Burg and Klieback affirmatively alleged that they are entitled to their costs and reasonable attorneys' fees incurred herein.
8. Burg and Klieback affirmatively alleged that Claimant has incurred no cognizable damage as a result of the allegations in the Statement of Claim. Claimant has an opportunity to recoup most, if not all, of her investments in the various limited partnerships and may, in fact, make a profit. Moreover, Claimant has made an excellent return on many of her investments, particularly those in Oppenheimer funds. At a minimum, the damages as alleged in the Statement of Claim are greatly excessive.

For its Answer, CFP, unless specifically admitted therein, denied the allegations of wrongdoing and liability set forth in the Statement of Claim. In addition, CFP set forth the following affirmative defenses:

1. CFP affirmatively alleged that California law applies to this matter due to the choice of law provision in the Financial Planning Agreement signed by the Claimant.
2. CFP affirmatively alleged that Claimant's claims are barred because CFP, through

Burg and Klieback, operated in good faith at all times material hereto. All of the advice given by CFP was made in the utmost good faith, following sufficient due diligence. CFP made no false statements about the investments Claimant invested in, let alone statements they knew were false.

3. CFP affirmatively alleged that the legal claim for relief in the Statement of Claim fails to state claims upon which relief may be granted.

4. CFP affirmatively alleged that Claimant's claims are barred because all material facts and risks attendant to the transactions at issue were disclosed to Claimant.

5. CFP affirmatively alleged that Claimant's claims are barred because CFP, through Burg and Klieback, complied with the standard of care in the industry.

6. CFP affirmatively alleged that Claimant's claims are barred by the applicable statutes of limitations.

7. CFP affirmatively alleged that they are entitled to their costs and reasonable attorneys' fees incurred herein.

8. CFP affirmatively alleged that Claimant has incurred no cognizable damage as a result of the allegations in the Statement of Claim. Claimant has an opportunity to recoup most, if not all, of her investments in the various limited partnerships and may, in fact, make a profit. Moreover, Claimant has made an excellent return on many of her investments, particularly those in Oppenheimer funds. At a minimum, the damages as alleged in the Statement of Claim are greatly excessive.

For its Answer to the Statement of Claim, CSC denied all allegations of wrongdoing including, without limitation, allegations that it made any misrepresentations to Claimant, that it conspired with anyone in any way against Claimant, that it aided or abetted anyone in damaging Claimant, that it defrauded Claimant, or that it failed to adequately supervise Respondents Burg and Klieback in connection with their dealings with Claimant. In addition, CSC asserted the following affirmative defenses:

1. The Statement of Claim fails to state any claim against CSC upon which relief can be granted.

2. The inclusion of CSC in Claimant's claim is not well grounded either in law or in fact.

3. Claimant's account agreement with CSC, at paragraph 11 specifies that: "This Agreement and its enforcement shall be governed by the laws of the State of New York."

4. To the extent that Arizona law applies to Claimant's claims against CSC at all,

Claimant's prayers for relief under the prior version of the Arizona RICO and securities fraud statutes are untimely and not allowed by the current versions of those statutes. CSC joined Section II of Feldman's Motion to Dismiss re: Inapplicability of Outdated Arizona Law.

5. Any claims against CSC are barred by the applicable statute of limitations.

6. Claimant has suffered no cognizable damage as the result of any actions or failures to act for which CSC might be responsible.

For his Answer to the Statement of Claim, Feldman denied all allegations of wrongdoing including, without limitation, allegations that it made any misrepresentations to Claimant, that it conspired with anyone in any way against Claimant, that it aided or abetted anyone in damaging Claimant, that it defrauded Claimant, or that it failed to adequately supervise Respondents Burg and Klieback in connection with their dealings with Claimant. In addition, CSC asserted the following affirmative defenses:

1. Feldman affirmatively alleged that the Statement of Claim fails to state any claim against CSC upon which relief can be granted.

2. Feldman affirmatively alleged that California law applies to this matter pursuant to the choice of law provision in the Financial Planning Agreement signed by the Claimant. In the alternative, if Arizona law applies, Feldman alleges that the recent amendments in Arizona's Securities fraud and racketeering statutes govern these allegations--not the former version of the statutes upon which Claimant relies in her Statement of Claim. Claimant initiated this proceeding with the NASD after the date the amendments to the statutes took place.

3. Feldman affirmatively alleged that Claimant's claims are barred because all material facts and risks attendant to the transactions at issue were disclosed to the Claimant.

4. Feldman affirmatively alleged that Claimant's claims are barred because Feldman complied with the applicable standard of care in the industry.

5. Feldman affirmatively alleged that Claimant's claims are barred by the applicable statutes of limitations.

6. Feldman affirmatively alleged that he is entitled to his costs and reasonable attorneys' fees incurred herein.

7. Feldman affirmatively alleged that Claimant has incurred no cognizable damage as a result of any alleged wrongdoing by Respondents Burg and Klieback while at FPEC. Moreover, Claimant has an opportunity to recoup most, if not all, of her investments in the various limited partnerships and may, in fact, make a profit. Finally, Claimant has made a good return on many of

her investments, particularly her Oppenheimer investments.

RELIEF REQUESTED

Claimant requested an Award against Respondents and each of them, as follows:

A. As a result of the mandatory treble damages provision of AZRAC, Claimant prays for judgement for three-fold the amount of damages she has sustained in the amount of at least \$1,699,740.50 plus costs and attorneys' fees pursuant to A.R.S. Section 13-2314;

B. In the alternative, recessionary damages in the amount of \$774,068.38, which represent the consideration paid for the securities, with interest thereon, costs and attorneys' fees less the amount of income received. Claimant will tender the securities to Respondents in accordance with the judgement of the arbitration panel;

C. In the alternative damages in the amount of \$690,935.73 which represent the amount of loss of value of Claimant's investments due to the acts of Respondents, plus costs and attorneys' fees in an amount to be adduced;

D. Consequential damages of at least \$49,500.00 according to proof adduced;

E. Costs of this arbitration;

F. Reasonable attorneys' fees;

G. Punitive damages in the amount of \$500,00.00; and

H. Such other and further relief as the arbitration panel may deem just and equitable.

Burg and Klieback requested the following:

A. That the Statement of Claim be dismissed and denied, in full, and that the Claimant take nothing thereby;

B. For Burg and Klieback's costs and reasonable attorneys' fees incurred herein, together with interest thereon at the highest rate provided by law from the date of entry of judgement until paid; and

C. For such other and further relief as this tribunal deems just and appropriate.

CFP requested the following:

- A. That the Statement of Claim be dismissed and denied, in full, and that the Claimant take nothing thereby;
- B. For CFP's costs and reasonable attorneys' fees incurred herein, together with interest thereon at the highest rate provided by law from the date of entry of judgement until paid; and
- C. For such other and further relief as this tribunal deems just and appropriate.

CSC requested the following:

1. That the Statement of Claim be dismissed and denied, in full, and that the Claimant take nothing thereby;
2. For CSC's costs and reasonable attorneys' fees incurred herein, together with interest thereon at the highest rate provided by law from the date of entry of judgement until paid; and
3. For such other and further relief as may be just in these circumstances.

Feldman requested:

1. That the Statement of Claim be dismissed in full and that Claimant take nothing thereby as against them;
2. For the costs and reasonable attorneys' fees incurred by Feldman in this proceeding, together with interest at rate provided by law from the date of entry of judgement until paid; and
3. For such other and further relief as this panel deemed just and proper.

OTHER ISSUES CONSIDERED & DECIDED

Feldman filed a Motion to Dismiss Claimant's Claim relating to the inapplicability of Arizona law. Burg and Klieback joined in the motion. After reviewing the parties' Replies, and deliberation, the arbitrators denied the motion.

CSC filed a Motion to Dismiss asserting that Claimant's Statement of Claim failed to set forth factual allegations sufficient to demonstrate a claim against CSC. After reviewing the parties' Replies, and deliberation, the panel denied the motion.

Respondents CSC, CFP, Burg, and Klieback filed a Motion to Dismiss all of Claimant's claims because they are time-barred. Feldman joined in the Motion to Dismiss. After reviewing the parties' Replies, and deliberation, the arbitrators determined that they would hear argument on this motion at the start of the hearing on February 6, 1995.

At the beginning of the hearing on February 6, 1995, Respondents re-raised their Motion to Dismiss all of Claimant's claims because they are time barred. After hearing argument from the parties, and deliberation, the panel took the motion under advisement to be decided with the case.

The parties have agreed that the Award in this matter may be executed by 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. Respondents Total Services Investments, Inc./Contemporary Financial Planning, Inc., and James Stuart Burg, are jointly and severally liable for, and shall pay to the Claimant the sum of \$253,896.00 as satisfaction of her claims for costs and expenses interest, and damages for loss of value of investments. All other claims not specifically enumerated herein are, and each of them, denied and dismissed with prejudice.
2. Claimant's claims made against Respondents Calvert Securities Corp., , Allan J. Feldman, Financial Planning, Inc., and Hyman Klieback are, and each of them, denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

Respondents Total Services Investments, Inc./Contemporary Financial Planning, Inc., and James Stuart Burg, are jointly and severally liable for, and shall pay to the Claimant the sum of \$1,250.00 as an award of her filing fees incurred in connection with this arbitration.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

10 hearing sessions @ \$1,000.00 per session = \$10,000.00

Pursuant to Section 43(c) of the Code, the NASD shall **retain** the nonrefundable filing fee in the amount of \$250.00, and shall **retain** the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimant.

Additional Forum Fees in the amount of \$9,000.00 are assessed jointly and severally against Respondents Total Services Investments, Inc./Contemporary Financial Planning, Inc., and James Stuart Burg.

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

CONCURRING ARBITRATORS

Dated:

Name:

March 13, 1995

Eugene W. Bronski /s/
Eugene W. Bronski
Presiding Chair
Public Arbitrator

March 13, 1995

Robert A. Williams, Jr. /s/
Robert A. Williams, Jr.
Public Arbitrator

March 10, 1995

Raymond R. Wallage /s/
Raymond R. Wallage
Industry Arbitrator

Date of Service by the NASD: 3-20-95