

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Susan Litwer

93-02602

Name of Respondents

Josephthal Lyon & Ross, Inc.
Cronley E. Hardwick

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on July 2, 1993, Claimant Susan Litwer, who appeared Pro Se, alleged that on or about August 12, 1991, Respondent Cronley E. Hardwick telephoned her in order to convince her to purchase units of the Empire State Municipal Exempt Trust Series 33 from Respondent Josephthal Lyon & Ross, Inc. at which time Claimant informed Respondent Cronley E. Hardwick that she was interested in a conservative investment whereby she was a single mother with two children facing college in a few years and could not afford to make any risky investment. Claimant further alleged that Respondent Cronley Hardwick assured her that an investment in the Trust would suit her needs and that such an investment would be conservative and virtually risk-free. Claimant contended that Respondent Cronley E. Hardwick informed her that the Trust was composed of tax-free municipal bonds rated AAA or AA whereby he told her that the Trust offered a terrific tax-free effective yield of 10% plus, at which time, Claimant expressed her concern that the maturity of the bonds not be long term and Respondent Cronley E. Hardwick informed her that the bonds would be due in five to seven years; that the units in the Trust were being sold for \$886.130, and that the Trust was "a very prudent investment that offers safe dependable income". Claimant further contended that soon after, she purchased ten units of the Trust for a total price of \$8,861.30 whereby it was her understanding that she was purchasing the units at a discount price given the fact that the purchase price was \$886.130 per unit rather than what she understood to be the industry standard of \$1,000.00, in addition to the understanding that the bonds could be called at any time, but Claimant believed that she would receive a 100% return of her principal if the bonds were called prematurely. Claimant asserted that Respondent Cronley E. Hardwick did not explain to her that her net yield on her investment depended on how long the bonds remained uncalled and he did not provide her with any sample calculations

to give her an idea of how long the bonds would have to remain uncalled in order for her interest payments to offset her potential principal loss whereby Respondent Cronley E. Hardwick made no indication whatsoever that time was a significant risk factor in her investment. Claimant further asserted that in October, 1991 Respondent Cronley E. Hardwick contacted her again to purchase another ten units in the Trust, at which time, Claimant purchased an additional ten units for \$8,787.40 and during the months following her second purchase, Respondent Cronley E. Hardwick contacted her several more times in an attempt to convince her to buy additional units in the Trust; however, Claimant told Respondent Cronley E. Hardwick that she could not make any more purchases due to a lack of funds. Claimant further alleged that on or about November 1992, she was notified that due to the small size of the Trust, it would be terminated and final checks for final distributions would be made. Claimant further contended that after the final distributions were made, she realized that she had sustained a \$1,517.10 loss on her principal investment. Claimant further asserted that as a result of the advice of Respondents Josephthal, Lyon & Ross, Inc. and Cronley E. Hardwick, she invested in the Trust even though it was obviously an unsuitable investment for her needs whereby Respondent Cronley E. Hardwick knew that she had limited funds for investment and in spite of this, Respondents convinced her to invest in the Trust knowing it was risky, thus Respondents breached their duty of fair dealing requirements and are liable for her losses.

Respondent Josephthal, Lyon & Ross, Inc., by and through their in-house counsel Robert Moses, maintained that they deny knowledge or information sufficient to form a belief as to the truth or veracity of any allegations in the Statement of Claim alleged to have occurred prior to September 20, 1991. Respondent further maintained that it was at that time that they completed an asset purchase from Jesup, Josephthal Securities Group, Inc. ("JJS") and Josephthal & Co. ("J&C") whereby Rosenkrantz Lyon & Ross Incorporated changed its name to Josephthal, Lyon & Ross, Incorporated, the present name of this Respondent in October 1991. Respondent contended the Purchase Agreement dated September 20, 1991 with JJS and J&C as Seller and Respondent as Buyer provides in relevant part that: "...Seller shall be liable for any and all obligations, including without limitation, accounts payable, unsecured debits, and customer claims incurred, accrued or in any manner arising out of facts which occurred on or before the Closing Date". Respondent further contended that Claimant's account was transferred to Respondent from JJS in that certain asset purchase on September 20, 1991. Respondent asserted that Claimant was fully informed of the nature of her investment in the Trust units, the investment was consistent with Claimant's investment objectives and past account activity, and the alleged damages were sustained as a result of fluctuation in interest rates and the bond markets, not to any impropriety on the part of Respondent Cronley E. Hardwick or of Respondent Josephthal Lyon & Ross, Inc. and alleged losses are greatly overstated, whereby Respondent's liability, if any must be limited to damages arising in connection with investments made through Respondent Josephthal Lyon & Ross, Inc.

Respondent Cronley E. Hardwick maintained that Claimant claims that on or about August 12, 1991, he telephoned her to convince her to buy Empire #33, which she says was unsuitable

whereby the facts are that on or about August 12, 1991, Respondent Cronley E. Hardwick never knew there was a Claimant Susan Litwer. Respondent Cronley E. Hardwick further maintained that Claimant telephoned him because her father, a client, had referred him to her, whereby she stated that she wanted to invest in tax-free income. Respondent Cronley E. Hardwick contended that he explained municipal bonds, muni bond funds and muni trusts, primary and secondary whereby Claimant wanted the highest current tax-free yield, at which time, Claimant's father also purchased Unit Investment Trust (U.I.T.'s). Respondent Cronley E. Hardwick further contended that based on the investment objectives stated by Claimant and after a review of the U.I.T.'s available on that day, Claimant was shown and decided to purchase the Empire Series #33. Respondent Cronley E. Hardwick asserted that as to Claimant's statement that she understood that the bonds in the U.I.T. could be called at any time, but that it was "her belief" that she was buying at a discount and "she thought" she would receive 100% of her principal no matter what, is an example of her partial and selective listening. Respondent Cronley E. Hardwick further asserted that he explained to Claimant bid-offer-par pricing, average life remaining, estimated long term yield whereby Claimant's concern then, and on several subsequent calls, was current yield and what would she receive if sold next day, at which time, Claimant was told that then and many times afterward that no one could project market value 2, 3, 5 years, etc. out. Respondent Cronley E. Hardwick further asserted that on two occasions, after interest payment reductions due to declining interest rates and bond calls, he got for Claimant the complete breakdown of the bid-offer-par pricing, average life, long term yield, at which time, Claimant chose to hold the units. Respondent Cronley E. Hardwick further maintained that it is not possible to predict the speed at which portions of the portfolio are called and the facts are Claimant was told that Respondents were surprised because on September 17, 1992 Empire #33 was being offered with an average life remaining in 7 years and as it turns out were offered for sale as late as October 10, 1992. Respondent Cronley E. Hardwick further contended that there has been a 56% drop in CD rates these past few years, U.S. Government bond yields are at 20 year lows; municipal bond yields are less than 1/2 those available in the early 1980's. Respondent Cronley E. Hardwick further asserted that Claimant was never promised, guaranteed or told anything that was not 100% factual.

RELIEF REQUESTED

Claimant Susan Litwer requested the sum of \$1,517.10 in actual damages.

Respondent Josephthal Lyon & Ross, Inc. requested the claim be dismissed in its entirety with costs assessed against the Claimant.

Respondent Cronley E. Hardwick requested the claim be denied.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration procedure, a single Public Arbitrator, Joan Stearns-Johnson, Esq., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on June 28, 1993, by the Respondent Josephthal Lyon & Ross, Inc. on September 28, 1993 and not by the Respondent Cronley E. Hardwick as required by Sections 12 & 13 of the NASD Code of Arbitration Procedure.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claim of the Claimant Susan Litwer against Respondents Josephthal Lyon & Ross, Inc. and Cronley E. Hardwick is dismissed.
2. The parties shall bear their respective costs.
3. The \$50.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Susan Litwer shall be retained by the NASD, Inc. Respondents Josephthal Lyon & Ross, Inc. and Cronley E. Hardwick are liable and shall pay to the Claimant the sum of \$25.00, as partial reimbursement.

AFFIRMATION

I, JOAN STEARNS-JOHNSON, ESQ., do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

DATE OF DECISION: December 29, 1993

STATE OF: New York

SS:

COUNTY OF: New York

On this 22 day of December 1993, before me personally appeared Joan Stearns-Johnson, Esq. to me known and known before me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

Mark O. Glut

MARK O. GLUT
Notary Public, State of New York
No. 4995193
Qualified in Queens County
Commission Expires April 20, 1994