

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimant**

Richard C. Berliner

93-03731

**Name of Respondents**

David A. Noyes & Company, and  
Frank S. Colin

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**REPRESENTATION OF PARTIES**

Claimant Richard C. Berliner ("Berliner") was represented at the hearing by Dennis C. Waldon, Esq. of Lavin & Waldon, P.C., of Chicago, Illinois.

Respondents David A. Noyes & Company ("David A. Noyes") and Frank S. Colin ("Colin") were represented at the hearing by Phillip M. Goldberg, Esq. of Coffield, Ungaretti & Harris, of Chicago, Illinois, and by Robert L. Cram, Esq. of David A. Noyes & Company, of Indianapolis, Indiana.

**CASE INFORMATION**

The Statement of Claim was filed with the NASD by Claimant Berliner on September 20, 1993. The Uniform Submission Agreement was signed by Berliner on September 10, 1993.

A joint Statement of Answer was filed by Respondents David A. Noyes and Colin on December 14, 1993. The Respondents David A. Noyes and Colin did not execute a Uniform Submission Agreement. (See Other Issues).

**HEARING INFORMATION**

A pre-hearing conference was held on August 19, 1994 with two arbitrators for a total of one (1) hearing session.

The hearing was held on October 31, 1994 in Chicago, Illinois for a total of two (2) hearing sessions.

### **CASE SUMMARY**

Claimant Richard C. Berliner alleged in his Statement of Claim that during the period from October 1991 through July 1992 Respondent Colin recommended the purchase of certain tax-exempt municipal bonds guaranteed by Mutual Benefit Life Insurance Co. ("Mutual Benefit") representing them as safe insured investments when Colin knew or should have known that: the State of New Jersey had taken over Mutual Benefit and placed it into rehabilitation proceedings in the New Jersey Superior Court; the New Jersey Court had entered orders enjoining and restraining anyone from pursuing any claims against Mutual Benefit; and several of the bond issues recommended had already defaulted. Claimant asserts that other issues purchased have subsequently defaulted, and still others are in imminent danger of defaulting. Claimant further alleged that contrary to Respondent Colin's representations, the investments were unsuitable in light of Claimant's financial situation, investment objectives and needs. Claimant alleged that Respondent Colin's actions constituted: violations of §10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder, §12(f), 12(G) and 12(I) of the Illinois Securities Law of 1953 (the "Illinois Act"), and the Illinois Consumer Fraud and Deceptive Business Practices Act; common law fraud; breach of contract; breach of fiduciary duty; and negligence. Claimant alleged that the acts of Respondent Colin occurred within the scope of his employment with Respondent David A. Noyes, that at all times Colin was employed by David A. Noyes and acted as their agent, and therefore Colin's actions are attributable to David A. Noyes by the doctrine of respondeat superior.

Respondents David A. Noyes and Frank S. Colin in their joint Answer denied each and every substantive allegation contained in the Claim. Respondents set forth the following affirmative defenses in its Answer: failure to state a claim upon which relief may be granted; the Claimant's claims are barred by the doctrine of ratification and by the applicable statute of limitations; Claimant failed to identify any written contract to support the claim of breach of contract, and Claimant failed to mitigate his damages.

### **RELIEF REQUESTED**

Claimant requested damages of at least \$443,000, interest, punitive damages of \$500,000, filing fees and costs, reasonable attorney fees, and such other relief deemed just.

Respondents David A. Noyes and Frank S. Colin requested that the Statement of Claim be denied and that they be awarded their costs, including reasonable attorneys' fees.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondents David A. Noyes and Colin did not file with the NASD properly executed submissions to arbitration but are required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, are bound by the

determination of the arbitration panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed by counterpart copies. The parties have also 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. The Statement of Claim filed by Claimant Richard C. Berliner, is denied and dismissed in its entirety.
2. Each of the parties shall bear their own costs and expenses incurred, other than those specifically enumerated for herein.
3. Any relief not specifically provided for herein is denied.

### **FORUM FEES**

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

1 pre-hearing session (with full panel) x \$1,000 = \$1,000.  
4 hearing sessions x \$1,000 = \$4,000.

Pursuant to §43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$250, and the hearing session deposit in the amount of \$1,000 previously paid to the NASD by Claimant.

Pursuant to §43(c) of the Code, the NASD shall retain the postponement fee in the amount of \$750 previously paid to the NASD by Respondents.

The panel has ordered that the Claimant pay additional forum fees in the amount of \$1,500 and Respondents, jointly and severally, pay \$2,500 to the N.A.S.D.

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

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**By The Arbitration Panel:**

Dated:

11/25/94

s/s Jerome F. Crotty, Esq.  
Jerome F. Crotty, Esq., Presiding  
Public Arbitrator

12/7/94

s/s John D. Crawford, Esq.  
John D. Crawford, Esq.  
Public Arbitrator

11/19/94

s/s Robert Biondi  
Robert Biondi  
Industry Arbitrator

Date Award Served By The NASD: 12/7/94