

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Adeline D. Grossman

93-05217

Name of Respondents

Dickinson & Company
Warren H. Hamm

REPRESENTATION OF PARTIES

Adeline D. Grossman ("Claimant") was represented by John S. Lutz, Esq. and Otto K. Hilbert, II, Esq., LeBoeuf, Lamb, Leiby & MacRae, Denver, Colorado.

Dickinson & Company and Warren H. Hamm ("Respondents") were represented by David A. Zisser, Esq., Berliner Zisser Walter & Gallegos, P.C., Denver, Colorado.

CASE INFORMATION

The Statement of Claim was filed on December 20, 1993. Claimant's Submission Agreement was signed on December 19, 1993 by Adeline D. Grossman.

Statement of Answer filed by Respondents, Dickinson & Company and Warren H. Hamm on or about March 7, 1994. Submission Agreement of Respondent Dickinson & Company was signed on March 14, 1994 by Thomas M. Smartwood, Executive Vice President/General Counsel, Dickinson & Company. Submission Agreement of Respondent Warren H. Hamm was signed on February 28, 1994 by Warren H. Hamm.

HEARING INFORMATION

The hearing was held on Thursday, October 13, 1994 for two (2) sessions and Friday, October 14, 1994 for two (2) sessions in Denver, Colorado for a total of four (4) sessions.

CASE SUMMARY

Claimant alleged that Warren H. Hamm ("Hamm"), an account executive employed by Dickinson & Company ("Dickinson") made unsuitable trades in Claimant's account and put Claimant's account on margin without her full understanding. The Claimant specifically alleged that:

- * The Claimant was a 81-year old widow who had little investment or business experience and had very limited financial resources. Through the course of the relationship between Claimant and Hamm, Claimant relied on Hamm regarding all trades in her account. Hamm essentially had control to choose whether and how much of Claimant's resources to invest; he knew that Claimant was risk-averse and needed supplemental income to live and meet her investment goals;
- * Beginning in 1991, Hamm began taking greater risks with Claimant's account resulting in the purchase of a number of unsuitably risky stocks, specifically: 7,000 shares of El Paso Refinery, L.P.; 1,000 shares of Trimedyne, Inc.; 2,000 shares of Interactive Network, Inc.; and 1,000 shares of Alatech Resources, Inc. These stock purchases were below investment grade, non-profitable and did not pay a dividend. Claimant required conservative securities with income to supplement her nominal income; and
- * Hamm also placed Claimant's account on margin without her full understanding and delayed in closing this account after the objection of Claimant's son.

Based on the above allegations, Claimant asserted claims for violation of common law fraud; Colorado Securities Act of 1981 (C.R.S. §11-51-123); breach of fiduciary duty (C.R.S. §§15-1-301; 15-1-304); negligence; negligent supervision; *respondeat superior*; control person liability (15 U.S.C. §77o); and aiding and abetting liability.

Respondents denied the material allegations of the Statement of Claim, stating that:

- * Claimant was an active, informed investor who understood market risks and had a history of investing in a wide array of securities over a 10-year period, including margin transactions;
- * Claimant purported to have a net worth between \$400,000.00 and \$500,000.00 as well as an annual income of at least \$30,000.00; and
- * Claimant authorized all of her purchases based on information provide by Hamm to her and her son. No unauthorized transactions, misleading statements or unsuitable investment recommendations were made to Claimant.

Respondent asserted the following affirmative defenses:

- * The Statement of Claim fails to state a claim upon which relief may be granted;
- * Claimant's action or inaction bars recovery by reason of the doctrine of waiver;
- * Claimant's action or inaction bars recovery by reason of the doctrine of estoppel;
- * Claimant has suffered no damages as a result of any alleged wrongful action or inaction on the part of the Respondents;
- * Claimant's claims are barred or reduced by reason of her own negligence and failure to exercise diligence with respect to her investments as would be expected of a reasonable person under the same circumstances; and
- * Claimant's losses, if any, were caused or contributed to by the acts of parties over whom Respondents did not have control and for whom Respondents are not responsible.

RELIEF REQUESTED

Claimant requested damages from the Respondents, jointly and severally, in an amount to be proven at arbitration, but in no event less than \$50,000.00 plus punitive damages as determined by the arbitration panel; and reasonable attorney's fees, costs, and expenses.

Respondents requested that the Statement of Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

At the hearing on October 14, 1994, the Panel heard oral argument on Respondents' Motion To Prohibit Untimely De Facto Amendment of Claim. After considering the arguments asserted on behalf of the parties and considering the pleadings filed on this issue, the Panel has determined that the Motion shall be denied.

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 of file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, undersigned arbitrators have decided in full and final resolution of the issues submitted for deter-

mination as follows:

1. Respondents Dickinson & Company and Warren H. Hamm shall be and hereby are jointly and severally liable for and shall pay to the Claimant Adeline D. Grossman the sum of **Fifty one thousand dollars (\$51,000.00)** inclusive of pre-arbitration interest.
2. No punitive damages are awarded herein.
3. Respondents Dickinson & Company and Warren H. Hamm shall be and hereby are jointly and severally liable for and shall pay to Claimant Adeline D. Grossman attorney's fees and costs. Unless a sum is agreed to between the parties, Claimant's attorney is to submit to the NASD an affidavit of fees and costs within fourteen (14) days of receipt of this Award. Respondents' attorney will then submit her response within twenty-one (21) days of receipt of this Award to the NASD. The submissions of the parties will then be forwarded to the panel for its review and consideration. Attorney's fees and costs are awarded in accordance with the Colorado Securities Act.
4. Any relief not specifically granted is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each prehearing conference, if any. There were four (4) sessions x \$400 = \$1,600 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 \$120 and shall retain as forum fees the hearing session deposit in the amount of \$400 previously deposited with the NASD by the Claimant. Respondents Dickinson & Company and Warren H. Hamm shall be and hereby are jointly and severally liable for and shall pay to the NASD the sum of \$1,200.00 as additional forum fees.

Respondents are also directed to reimburse Claimant the sum of \$400.00 previously deposited with the NASD. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Dated:

/s/ Steven Meyrich, Esq.
Steven Meyrich, Esq.
Public Arbitrator, Presiding Chair

November 4, 1994

/s/ Malcolm T. Cleland
Malcolm T. Cleland
Public Arbitrator

November 9, 1994

/s/ Edward F. Altman, Jr.
Edward F. Altman, Jr.
Industry Arbitrator

November 12, 1994

For NASD Use Only

Date of Decision: November 21, 1994