

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Ethel Fraga

vs.

Case #
94-00548

Name of Respondent

Michael McNamara

REPRESENTATION

Claimant, Ethel Fraga ("Claimant"), represented herself at the hearing.

For Respondent, Michael McNamara ("Respondent"), Thomas G. Nicholson, Esq., from the firm of Finneran & Nicholson, P.C., located in Newburg Port, Massachusetts.

CASE INFORMATION

Statement of Claim was filed on February 15, 1994.

Claimant's Submission Agreement was signed on February 9, 1994.

Statement of Answer was filed by Respondent on

Respondent's Submission Agreement was signed on April 19, 1994.

HEARING INFORMATION

Hearing Date/Sessions: March 6, 1995 - 2 sessions

Hearing Location: American Arbitration Association, located at 133 Federal Street, Boston, Massachusetts, 02110.

CASE SUMMARY

Claimant alleges that Respondent behaved unethically and imprudently in transferring her money from three annuities with Beneficial Standard Life Insurance of Amarillo, Texas, paying 8% and 9% interest to American Pathway Funds CA Product which Respondent sells. Claimant also alleges that Respondent left all the money in a cash management, earning approximately 1.5%

for nearly a year.

Claimant further alleges that the original plan was to use cash management as a place to park the money before transferring it into higher yielding vehicles. Claimant also alleges that it was imprudent for Respondent to suggest that Claimant pay surrender fees to Beneficial Standard in view of the fact that Respondent placed the money in a vehicle which paid so little for the first year. Claimant alleges that other higher paying funds were available within American Pathway.

Claimant finally alleges that in transferring her money, some of the policies could have been co-mingled to avoid paying three annual contract fees.

Respondent maintains alleged that Claimant failed to state facts sufficient to state a cause of action against Respondent. Next, Respondent also maintains that Claimant was estopped from asserting her allegations by reason of her own wrongful acts, omissions and course of conduct. Respondent further maintains that Claimant at all times consented to all of Respondent's acts. Respondent alleges that Claimant expressly and/or impliedly waived all of her claims. Respondent alleges that Claimant failed to take reasonable steps to avoid the damages claimed so that any recovery should be reduced accordingly. Respondent alleges that Claimant, by operation of law, excused Respondent from any and all obligations. Next, Respondent alleges that Claimant failed to mitigate her damages, thus, her claims are barred. Respondent alleges that the claims were solely and proximately caused by Claimant or third parties, and therefore, Respondent is not liable to Claimant for any of the alleged damages.

Respondent alleges that Claimant failed to pursue her rights promptly, and the amount of damages, if any, should be reduced in proportion to Claimant's own comparative/contributory negligence. Respondent alleges that he fully disclosed all risk factors associated with any investment Claimant made and so Claimant assumed the risk in making her investment decisions. Next, Respondent contends that under M.G.L. Chapter 93A, Claimant's claims must fail because Claimant failed to comply with the statutory pre-requisites for filing such claims. Respondent alleges that Claimant's punitive damages claims must fail as such a remedy is not available to Claimant under the applicable law. Finally, Respondent contends that Claimant's alleged loss based upon surrender fees must fail as Claimant was not otherwise entitled to same.

RELIEF REQUESTED

Claimant requests a total of \$31,141 which includes for punitive damages, reimbursement, compensation and triple damages.

Respondent requests that all of the claims be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies and have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent shall pay Claimant **FIVE THOUSAND DOLLARS AND ZERO CENTS (\$5,000.00)**.
2. Respondent is also liable to reimburse Claimant fees as indicated in the Forum Fees section of this decision.

FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fees are assessed and shall be borne by both parties.

Non-refundable Filing Fee: \$120.00
Hearing Session Fee: \$400.00 (1 session @ \$400.00 per session)
Total Fees: \$520.00

1. Claimant is assessed \$260.00. Claimant previously paid \$520.00 and is owed a refund of \$260.00.
2. Respondent is assessed \$260.00 and shall satisfy this assessment by reimbursing Claimant \$260.00.

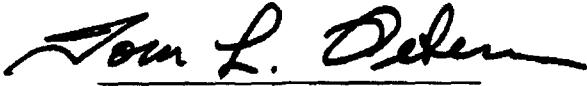
Case #94-00548

Page 4

ARBITRATION PANEL

Tom L. Peterson, Esq.	-	Public Chairperson
Howard I. Wilgoren, Esq.	-	Public Panelist
Roberta Duvarney	-	Industry Panelist

Concurring Arbitrator's Signature


Tom L. Peterson, Esq.

Date of Decision: April 27, 1995

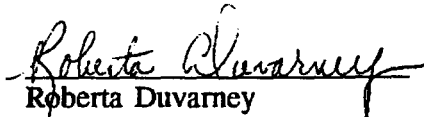
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Page 4

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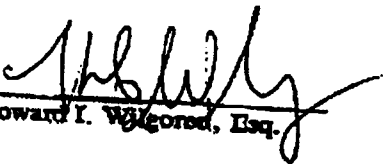

Roberta Duvarney

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Howard I. Wilgoren, Esq.

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