

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Edward H. & Carolyn L. Magin

94-00690

Name of Respondents

Smith Barney Harris Upham & Co., Inc.
Sandra J. Bender

REPRESENTATION

Claimants Edward H. Magin and Carolyn L. Magin ("the Magins") were represented at the hearing by Ted Levine, Esq. of Somerville, New Jersey.

Respondent Smith Barney Harris Upham & Co., Inc. ("Smith Barney") did not appear at the hearing. (See "Other Issues").

Respondent Sandra J. Bender ("Bender") appeared at the hearing pro se.

CASE INFORMATION

The Statement of Claim was filed with the NASD by Claimants Edward H. and Carolyn L. Magin on February 23, 1994. The Uniform Submission Agreement was signed by the Magins on February 9, 1994.

A Statement of Answer was filed by Respondent Smith Barney on May 24, 1994, and a amended answer was filed on June 6, 1994. The Uniform Submission Agreement was signed by Ellen Slipp, Vice President, on behalf of Smith Barney on June 7, 1994.

A Statement of Answer was filed by Respondent Sandra J. Bender on July 13, 1994. The Uniform Submission Agreement was signed by Bender on September 12, 1994.

A First Amended Statement of Claim was filed with the NASD by Claimants on January 30, 1995. (See "Other Issues").

HEARING INFORMATION

A Preliminary Hearing was held on January 25, 1995 at the Holiday Inn-Downtown-Center City Hotel in Philadelphia, Pennsylvania with the full panel for one (1) hearing session.

The hearing was held on January 25, 1995 and February 24, 1995, at the Holiday Inn-Downtown-Center City Hotel in Philadelphia, Pennsylvania for a total of three (3) hearing sessions.

CASE SUMMARY

Claimants Edward H. Magin and Carolyn L. Magin stated in their Statement of Claim that in April 1986 they opened an account with Respondent Bender while she was employed at another broker dealer, and continued to maintain an account with Bender as she moved to another firm in 1988, and to Respondent Smith Barney in 1989. Claimants alleged that on or about January 9, 1990 Respondents Smith Barney and Bender fraudulently induced Claimants to invest \$27,603.31 in Texas Air Corp 14.25% Feb. 15, 1993 senior notes ("Texas Air"), a high risk investment that was touted as being extremely safe and guaranteed. Claimants further alleged that Respondents intentionally made material misrepresentations and omissions to Claimants regarding the safety of the investment for the purpose of generating commissions, fees and profits. Claimants asserted that they were financially unsophisticated and relied upon the expertise of Respondents, and that their investment objectives were low risk, safety, growth and income. Claimants stated that subsequently Texas Air went into bankruptcy and was acquired by Continental Airlines which itself went bankrupt, and that the notes ceased interest payments and were called in exchange for stock worth \$1,516.12 as of August 31, 1993.

Claimants alleged that the actions of Respondents Smith Barney and Bender constitute: violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder, Article III Sections 1 and 2 of the NASD Rules of Fair Practice, and the New Jersey securities laws; breach of contract; and negligence. Claimants further alleged that Respondent Smith Barney failed to inadequately supervise Respondent Bender in violation of Article III Section 27 of the NASD Rules of Fair Practice.

Respondent Smith Barney in its Answer denied any liability for Claimants' losses. Respondent Smith Barney stated that Claimants are experienced investors with considerable net worth, and had the sophistication and resources to undertake an investment in Texas Air as part of a diversified portfolio. Smith Barney further stated that Claimants' account was positioned for both income and growth, consistent with the investment objectives stated in the account application. Respondent Smith Barney stated that Claimants held their Texas Air notes investment in their account until the account was transferred to another broker on June 15, 1990, that Claimants' investment had declined in value to \$20,182.50 by that date, and that Smith Barney should not be held responsible for any losses experienced after the account was transferred. In addition, Respondent Smith Barney denied that any misrepresentations were made to Claimants by Respondent Bender while she was employed with them.

Respondent Bender in her Answer stated that the investment in the Texas Air notes was made in accordance with and was consistent with Claimants' stated and demonstrated investment objectives, and was suitable given Claimants' ages, income and net worth. Respondent Bender stated that prior to the Texas Air purchase, Claimant Edward H. Magin visited her office and informed Bender of his interest in shifting his portfolio from 100% income to income and growth, and requested that she arrange a balanced portfolio ranging from blue chip stocks to aggressive issues. Respondent Bender denied making any misrepresentations, misstatements or omissions with respect to the Texas Air notes purchase, and stated that the fee charged for the purchase was within the NASD's 5% policy. Respondent Bender further asserted that Claimants' losses were the result of a corporate reorganization that could not have been foreseen.

RELIEF REQUESTED

Claimants requested damages in an amount of at least \$26,087.19, punitive damages, legal fees, expert fees, hearing expenses, and such other relief the panel deems just and proper.

Respondent Smith Barney requested that the Statement of Claim be dismissed in its entirety. In the alternative, Smith Barney requested that its liability be limited to \$5,497.06, the amount lost by Claimants up until the time Claimants' account was transferred from Smith Barney.

Respondent Bender requested that the Statement of Claim be dismissed in its entirety and that all forum fees be assessed against Claimants.

OTHER ISSUES CONSIDERED & DECIDED

On January 23, 1995, Claimants entered into a settlement agreement with Respondent Smith Barney whereby all claims were dismissed as to Respondent Smith Barney, and whereby Claimants withdrew their request for damages against Respondent Bender for that period in which she was employed by Smith Barney. Claimants filed a First Amended Statement of Claim with the NASD on January 30, 1995 reflecting the settlement with Respondent Smith Barney and amending their request for damages against Respondent Bender.

On October 5, 1994, Claimants filed a Motion in Limine to bar Respondent Bender from using or relying on any evidence not provided to Claimants in response to Claimants' discovery requests, pursuant to Section 32 of the NASD Code of Arbitration Procedure ("the Code"). On January 19, 1995, Respondent Bender responded to Claimants' motion. At hearing, after due deliberation, the Panel denied Claimants' Motion.

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 remains 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 Claimants Edward H. and Carolyn L. Magin, is denied and dismissed in its entirety.
2. Each of the parties shall bear their own costs and expenses incurred, other than those specifically provided for herein.
3. Any relief not specifically provided for herein is denied.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed:

- 1 pre-hearing with full panel x \$400 = \$400.
- 3 hearing sessions x \$400 = \$1,200.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$100, and the hearing session deposit in the amount of \$400 previously paid to the NASD by Claimants.

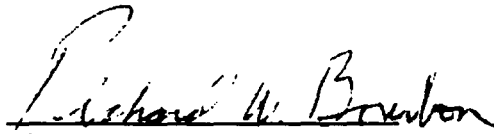
The panel has ordered that the Claimants pay additional forum fees to the NASD in the amount of \$ 400 and Respondent Sandra J. Bender, pay \$800 to the NASD.

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

By The Arbitration Panel:


Dated:

31 March, 1995


Richard W. Bourbon, Esq., Presiding
Public Arbitrator

Victoria E. Johnson
Public Arbitrator

3/31/95


Malcolm J. Irving
Industry Arbitrator

Date Award Served By the NASD: April 3, 1995