

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Roger A. & Irene L. Carter

vs.

Case #
95-00215

Name of Respondent

Fidelity Brokerage Services, Inc.

REPRESENTATION

For Claimants, Roger & Irene L. Carter, Ralph A. Dyer, Esq., of Law Offices of Ralph A. Dyer, located in Portland, Maine.

For Respondent, Fidelity Brokerage Services, Inc., Robert A. Buhlman, Esq. of Bingham, Dana & Gould, located in Boston, Massachusetts..

CASE INFORMATION

Statement of Claim was filed February 21, 1995.

Claimant's Submission Agreement was signed on January 13, 1995.

Statement of Answer was filed by Respondent on March 27, 1995.

Respondent's Submission Agreement was signed on March 24, 1995.

HEARING INFORMATION

Hearing Dates/Hearing Sessions: April 16, 1996 - Two sessions

Hearing Location: National Association of Securities Dealers, Inc.'s offices located at 260 Franklin Street, 16th Floor, Boston, Massachusetts.

CASE SUMMARY

Claimants, Roger and Irene L. Carter, allege that they are husband and wife who are retired and live on their savings and social security benefits. Claimants allege that on or about September 1, 1992, induced by advertisements of Respondent, Fidelity Investments, they decided to invest their savings in mutual funds and other investment instruments offered by Respondent.

Claimants allege that on September 9 and 11, 1992, they cashed their savings and Individual

Retirement Accounts (IRA) and received three checks totalling \$89,694.78. Claimants aver that two of the checks in the amounts of \$4,486.85 and \$54,578.89 represented the IRA accounts of Mr and Mrs Carter, respectively. Claimants further allege that on or about September 23, 1992, they met with Mr. Michael Walp, an employee in Respondent's Portland, Maine office. Claimants allege that Mr. Walp held himself out to be a customer representative who was thoroughly knowledgeable about Respondent's products and services, and qualified to advise customers.

Claimants contend that Mr. Walp recommended that they invest in various Fidelity Select Portfolios, without inquiring or advising them of the nature of the risks involved. Claimants assert that it was not until January 1993, that their accountant discovered that the Fidelity Select Portfolios did not qualify for IRA protection and that the resultant tax liability could consume as much as 30 percent of their total investment, a loss which would jeopardize their modest lifestyle. Claimants allege that on January 20, 1993, they communicated with Niel Stanton, manager of Respondent's Portland office and he agreed to reverse the transaction with the necessary corrections, in order to avoid the tax liability. Claimants contend that subsequent attempts to communicate with either Messrs. Walp or Stanton were unsuccessful until May 11, 1993, when they received application forms to establish IRA accounts in their names.

Claimants assert that on May 4, 1993, the Internal Revenue Service wrote to advise them that their funds had not been reinvested as required and that taxes were therefore, due. Claimants allege that on or about May 16, 1993, Mr. Stanton was advised of this development and agreed to write to the Internal Revenue Service admitting that the funds had not been rolled-over as a result of Respondent's error.

In a five-count Statement of Claim, Claimants allege breach of contract, negligent misrepresentation, breach of fiduciary duty, negligent supervision and negligent infliction of emotional distress. Claimants seek relief for expenses they incurred to resolve their tax problems, and for their pain and suffering as a consequence of Respondent's negligence.

Respondent allege that Claimants elected to invest in Fidelity Select Portfolios mutual funds. Respondent also allege that there is no evidence that the Claimants ever indicated that some of their funds had been previously invested in IRA accounts, or requested separate IRA account applications. Respondent further states, that since the checks were made payable to the Claimants without restrictions or reference to an IRA account, they provided no basis for assuming they had originally been invested in IRA accounts. Respondent maintains that it did not counsel Claimants regarding the choice of investments, but in fact, invested the funds in precisely the manner that Claimants indicated. Respondent contends that based on the information provided and the documents signed, it acted reasonably when it opened non-retirement joint accounts for the Claimants.

Respondent also assert that once it was made aware of the problem, it assured the Claimants that despite the numerous exchanges that occurred in the interim, and despite the difficulty involved in making the

redesignation, the accounts would be and were, in fact, adjusted in June 1993. Respondent further, notes that as soon as it was advised of the IRS tax notice, it contacted the IRS confirming the status of Claimants' accounts.

Respondent therefore argues that Claimants' allegations should be dismissed, since it acted with reasonable diligence to eliminate the tax liability caused by Claimants' failure to properly designate the funds, and that diligence should effectively have reduced any claims for emotional distress.

RELIEF REQUESTED

Claimants request that the panel award them the following relief:

- a) \$1,000.00 as compensation for out-of-pocket expenses incurred as a result of Respondent's negligence.
- b) indemnification from any and all income tax obligations assessed as a result of Respondent's failure to properly invest their funds.
- c) an award of \$25,000.00 in compensatory damages for emotional distress and pain and suffering.

OTHER ISSUES CONSIDERED & DECIDED

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 original remains on file with the NASD.

AWARD

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

All claims for relief asserted by Claimants are denied in their entirety.

FORUM FEES

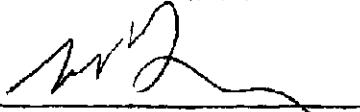
Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fee are assessed.

Non-refundable Filing Fees:	\$100.00
Hearing Session Fees:	\$800.00 (2 hearing session @ \$400.00 per session)
Total Fees:	<hr/> \$900.00

- 1) All fees are assessed against Respondent.
- 2) Claimants previously deposited \$100.00 and is entitled to a refund in that amount.
- 3) Respondent shall satisfy the fees assessed by reimbursing Claimants \$100.00 and by remitting the balance \$800.00 to the NASD.

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

Sole Public Arbitrator

A handwritten signature in dark ink, appearing to read 'MJL', is written over a horizontal line.

Mark J. Levinson, Esq.

NASD's Date of Decision: May 30, 1996