

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Victor H. Fink and Sheila G. Fink

95-00220

Name of Respondents

Richard N. Fredette;
Thomas F. Reilly;
Philip J. Eitman;
Steven Leslie Eitman;
Glenn Edward Essert

REPRESENTATION

For Claimants: Victor H. Fink and Sheila G. Fink ("Fink") were represented by Arne R. Rode, Esq. of Chicago, Illinois.

For Respondents: Richard N. Fredette ("Fredette") appeared pro se. Thomas F. Reilly ("Reilly") was represented by Craig R. Thorstenson, Esq. of Matkov, Salzman, Madoff & Gunn, located in Chicago, Illinois. Philip J. Eitman ("P. Eitman") appeared pro se. Steven Leslie Eitman ("S. Eitman") appeared pro se. Glenn Edward Essert ("Essert") appeared pro se.

CASE INFORMATION

Statement of Claim filed: January 16, 1995.

Claimants' Submission Agreement signed on: January 10, 1995.

Second Amended Statement of Claim filed on: April 12, 1995.

Statement of Answer filed by Respondent Fredette on: March 7, 1995.

Statement of Answer filed by Respondent Reilly on March 15, 1995.

Statement of Answer filed by Respondent P. Eitman on: July 12, 1995.

Statement of Answer filed by Respondent S. Eitman on: August 2, 1995.

Statement of Answer and Motion to Dismiss filed by Respondent Essert on: June 19, 1995

Respondent Fredette's Submission Agreement signed on: March 6, 1995

Respondent Reilly's Submission Agreement signed on: March 9, 1995.

Respondent P. Eitman's Submission Agreement signed on: June 29, 1995.

Respondent S. Eitman's Submission Agreement signed on: August 1, 1995.

Respondent Essert's Submission Agreement signed on: June 19, 1995.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: March 14, 1996 for Two (2) sessions; and
March 15, 1996 for Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants alleged that Respondent Fredette, while employed by or acting as an agent for HYM Financial Management, Inc. ("HYM"), formerly known as High Yield Management Securities, Inc., misrepresented the risks and qualities of investments in collateralized mortgage obligations, inducing Claimants' purchase of securities which were unsuitable given Mr. Fink's imminent retirement and the Claimants' age. Based upon the above allegations, the Finks alleged violation of Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. §77j(b)] and Rule 10b-5 thereunder [17 C.F.R. §240.10(b)5]; violation of the Illinois Securities Act [815 ILCS 5/12, §§12.F, G and I]; violation of the Illinois Consumer Fraud and Deceptive Practices Act [815 ILCS 505/2]; common law fraud; and breach of fiduciary duty. Claimants asserted claims against Respondent Reilly because he had direct supervisory responsibility over Fredette and was a controlling person within the meaning of Section 20(a) of the Securities Exchange Act of 1934.

Respondent P. Eitman, as sole shareholder of HYM, was a controlling person within the meaning of Section 20(a) and was allegedly liable for violation of the Exchange Act. Liability was asserted against Respondents S. Eitman and Essert because of their positions as HYM Operations and Compliance Officers.

Respondent Fredette denied the material allegations of the Claim, alleging that:

1. Dr. Fink was an experienced investor whose investment objectives were the presentation of capital with maximum yield;
2. Dr. Fink conducted his own investigation of the investment recommendations and selected the collateralized mortgage obligations;
3. Dr. Fink received written materials describing the characteristics of CMOs and was aware of the possible adverse effects of downward moves in the interest rates; and

4. When presented with alternative investments, Dr. Fink would state his preference for CMOs, citing their credit quality and high yields.

In addition, Fredette asserted several affirmative defenses.

Respondent Reilly denied the material allegations made against him by the Claimants, asserting that he had no authority to approve or disapprove transactions for the Finks' accounts, no authority to determine the suitability of the investments and no contact with the Finks. Based upon these allegations, Reilly claimed that he was not a controlling person. In addition, Reilly asserted several affirmative defenses.

Respondent P. Eitman denied the allegations brought against him, alleging that he had no contact with the Finks and did not directly supervise their accounts. In addition, it was alleged that he established a comprehensive system of training, supervision, and compliance for all registered reps. In addition, he asserted six affirmative defenses.

Respondent S. Eitman denied being a control person, stating that he did not have the authority, responsibility or function in that regard. S. Eitman asserted three affirmative defenses.

Respondent Essert denied the allegations made against him, asserting that he was not the compliance officer at HYM and did not review or sign individual trades or tickets. Essert denied being a control person.

RELIEF REQUESTED

Claimants requested the following relief:

1. A declaration that the sales to the Claimants' accounts (the Victor H. Fink IRA, the Sheila Fink IRA and the Victor H. Fink account) were fraudulent and voidable under §13 of the Illinois Securities Act;
2. An award against Respondents S. Eitman, Essert, Fredette and Reilly, jointly and severally, consisting of the purchase price of collateralized mortgage obligations purchased for Claimants' accounts with a maturity of more than five years at date of purchase, plus interest from the date of investment at the statutory rate of ten percent per annum, contingent upon Claimants tendering to Respondents those securities;
3. In the alternative, compensatory damages from Respondents P. Eitman, S. Eitman, Essert, Fredette and Reilly for losses in the accounts of approximately \$390,000.00, or whatever sum the panel deemed appropriate based upon the difference between the cost basis of the investments and the current value, together

with opportunity costs;

4. Punitive damages sufficient to deter a recurrence of the Respondents activity;
5. Attorneys' fees and costs; and
6. Such other relief as the panel deemed just.

Respondent Fredette requested that the Statement of Claim be dismissed in its entirety and that Claimants be assessed all costs.

Respondent Reilly requested that the claims against him be dismissed and that the Claimants reimburse him for the costs and attorneys fees he expended.

Respondent P. Eitman requested that the claims be dismissed.

Respondent S. Eitman requested that the claims be dismissed against him in their entirety.

Respondent Essert requested that he be dismissed from the arbitration.

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 originals 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 claims asserted by Claimants Victor H. Fink and Sheila G. Fink are dismissed with prejudice and denied in their entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed: Four (4) hearing sessions x \$750.00 per hearing session = \$3,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 non-refundable claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimants, Victor H. Fink and Sheila G. Fink. Respondent Philip J. Eitman is liable for and shall pay to the NASD the sum of \$750.00 as forum fees. Respondent Steven Leslie Eitman is liable for and shall pay to the NASD the sum of \$750.00 as forum fees. Respondent Richard N. Fredette is liable for and shall pay to the NASD the sum of \$750.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Thomas P. Ward, Esq.

May 31, 1996

Thomas P. Ward, Esq.

Public Arbitrator

Chairperson

/s/ Mary A. Duffy

June 5, 1996

Mary A. Duffy

Public Arbitrator

/s/ Charles E. Staley

May 31, 1996

Charles E. Staley

Industry Arbitrator

For NASD Use Only

Date of Decision: June 10, 1996