

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

PUBLIC

In the Matter of the Arbitration Between

Name of Claimant(s)

Raymond M. Weinstein

95-00481

Name of Respondent(s)

Southern Financial Group, Inc.
Brian C. Hutto
Pamela A. Wooten

REPRESENTATION

For Claimant Raymond M. Weinstein: Steven Kapustin, Esq., of the law firm of Connell and Bland, Columbia, SC.

For Respondents Southern Financial Group, Inc., Pamela A. Wooten and Brian C. Hutto: Barbara J. Mastin, Esq., Decatur, GA.

CASE INFORMATION

Statement of Claim filed: January 30, 1995.

Answer of Claimant Raymond Weinstein to Statement of Claim of Southern Financial Group, Inc. dated May 1, 1995.

Claimant's Submission Agreement signed on: January 25, 1995.

Statement of Answer of Respondent Brian C. Hutto filed on: May 2, 1995.

Statement of Answer filed by Respondent Southern Financial Group, Inc. on: April 4, 1995.

Respondent Brian C. Hutto's Submission Agreement signed on: May 2, 1995.

Statement of Answer filed by Respondent Pamela A. Wooten on: February 27, 1995.

Amended Exhibit A filed on: July 21, 1995.

Respondent Pamela A. Wooten's Submission Agreement signed on: February 27, 1995.

Respondent Southern Financial Group, Inc.'s Submission Agreement signed on: April 25, 1995.

HEARING INFORMATION

Hearing Date/Session: October 6, 1995 - One Session
November 15, 1995 - One Session

Hearing Location: NASD offices located in Atlanta, GA.

CASE SUMMARY

Claimant alleged that during the time period in question the Claimant was a Georgia resident, a fact known to the Respondents, as indicated on the Claimant's New Account form and the Respondent Brian C. Hutto was not registered as a securities broker in Georgia, a fact known to Respondent Pamela A. Wooten. Claimant further alleged that all trades involving losing positions were made through Mr. Hutto, an unregistered representative or through Ms. Wooten who acted on behalf of Mr. Hutto in his absence. Claimant further alleged because the trades in question were effectuated through an unregistered representative, acting in his capacity as an employee of Southern Financial Group, Inc., the brokerage firm must compensate the investor in the manner of restitution for his loss pursuant to the Official Code of Georgia Sections 10-5-3, 10-5-12 and 10-5-14 together with the costs for filing the action and reasonable attorneys' fees plus applicable interest and Respondents Brian C. Hutto and Southern Financial Group, Inc. are liable for all of the trade losses. Claimant further alleged Respondents Pamela A. Wooten and Southern Financial Group, Inc. bear liability in that they failed to adequately supervise Mr. Hutto in conducting the trades thereby violating the applicable laws of the New York Stock Exchange and the National Association of Securities Dealers, Inc. The Claimant further maintained that as a matter of fact or law the Respondents are not entitled to reimbursement as requested.

Respondent Pamela A. Wooten maintained she wrote most of the trade tickets herself and initialed all of the trade tickets for Claimant's account prior to the trade taking place. Respondent Pamela A. Wooten further maintained she had almost daily conversations with Claimant and there was no lack of supervision as Mr. Hutto entered orders after approval by Respondent Pamela A. Wooten and the orders were issued by Claimant. Respondent Pamela A. Wooten further maintained the Claimant had a net credit in his account and was a sophisticated investor and understood full well the risks inherent in the investments he made.

Respondent Southern Financial Group, Inc. maintained they incorporated by reference the Statement of Answer of Respondent Pamela A. Wooten and further maintained that the registration or failure to register of Respondent Brian C. Hutto was not relevant to any issue in the case as all trades of the Claimant were handled by Respondent Pamela A. Wooten and Brian C. Hutto. Respondent Southern Financial Group, Inc. further denied that there was any liability for failure to adequately supervise Respondent Brian C. Hutto and further asserted that the Statement of Claim has no merit in that (i) the trades were unsolicited; (ii) the Claimant is a sophisticated, experienced investor; (iii) the majority of the trades were straddles in which there was, of necessity, a loss on one side and a profit on the other; (iv) the Claimant had a net profit in his account for the year, having chosen only loss positions as the basis of his claim; and (v) a number of the trades were opened at another NASD firm and the Claimant's positions were closed by the Company at the Claimant's request. Respondent Southern Financial Group, Inc. further maintained that an investigation was conducted concerning the practices of Brian C. Hutto and Southern Financial Group, Inc. and as a result of the investigation they agreed to reimburse the amount of \$100.00 only, to the Commissioner of Securities of the State of Georgia as investigative costs.

Respondent Brian C. Hutto maintained in the summer of 1992 he passed the Series 7 and Series 63 examinations and that registered him with the NASD and the State of South Carolina to sell securities. Respondent Brian C. Hutto further maintained the Claimant's claim he was improperly supervised was ill-based as Ms. Wooten was very involved with the daily trades and activities of the firm and all of his dealings with the Claimant had to be approved by Ms. Wooten and Respondent Brian C. Hutto only wrote two of the Claimant's trades himself and the rest were written by Respondent Pamela A. Wooten. Respondent Brian C. Hutto next maintained at the time he left Respondent Southern Financial Group, Inc. the Claimant had a credit balance in his account. Respondent Brian C. Hutto further maintained when the Claimant opened his account he was informed by Respondent Brian C. Hutto that Southern Financial Group, Inc. was a discount brokerage firm and they did not advise clients as to what trades to make and the Claimant made it clear he was seeking low fees and not advice. Respondent Brian C. Hutto next maintained the Claimant was an astute investor and knew well the ramifications and consequences of his trades.

RELIEF REQUESTED

Claimant requested damages in the sum of \$16,030.22 plus interest, costs and reasonable attorneys' fees and a dismissal of Respondents' "Statement of Claim" for reimbursement of fees.

Respondent Pamela A. Wooten, Southern Financial Group, Inc. and Brian C. Hutto requested a dismissal of all claims against them, reimbursement from the Claimant for its costs and expenses incurred in proceeding with the arbitration, attorneys' fees and fees paid to the NASD.

AWARD

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

I find for the Respondents Southern Financial Group, Inc. Brian C. Hutto and Pamela A. Wooten:

Claimant suffered losses in certain transactions which he seeks to void on the ground that Brian C. Hutto, the salesman who conducted the transactions for Claimant, was not licensed to sell securities in Georgia. Like the other Respondents, Hutto's office was in South Carolina. He was licensed to sell securities in South Carolina. Pamela A. Wooten was licensed to sell securities in both South Carolina and Georgia. Claimant conducted a total of 28 transactions with Respondents. While some were profitable, some were losses. The losses totaled \$16,032.22. However, overall, when he closed his account with Respondents, Claimant had a net profit of \$1,700.00. Nevertheless he seeks damages in the amount of \$24,982.73, including attorneys fees and interest. Respondents' records indicate that only 8 of the entire 28 transactions were made by the Broker who did not possess a Georgia securities license.

Claimant's position that he is entitled to selectively void those transactions with Respondents in which he lost money, while keeping the proceeds from the transactions from which he profited is based upon his interpretation of Georgia Securities laws providing penalties against stockbrokers who are not licensed in Georgia, but who engage in the sales of securities in Georgia. See O.C.G.A. §§10-5-3, Georgia, 10-5-12 and 10-

5-14(a). Under §10-5-3, salesmen are prohibited from selling securities who are not registered to sell securities within the state. Under §10-5-12, the sale of a security in violation of § 1-5-3 is unlawful. And §10-5-14 provides the remedy of rescission of the transactions which are unlawful under §10-5-12.

While equity abhors a windfall, state securities laws may sometimes permit a windfall as a means of discouraging dealers from engaging in conduct prohibited by statute. Whether Georgia's statute provides for such a windfall is unclear. No Georgia cases answer the question. However, Georgia's securities laws also provide for fines to be levied against securities dealers who violate Georgia statutes. Hence, its laws are both remedial and punitive. It is not clear whether Georgia law countenances the levy against the errant securities dealer of both a civil fine, and a windfall profit in the form of a damage award equaling the losses which the Claimant accrued in the course of the dealings with the broker whose only arguable violation of Georgia law is a failure to become registered before selling registered securities to an individual who resides in Georgia. The Broker was fined a small sum for this alleged violation. He did not challenge the fine.

I find that it is unnecessary to plumb the Georgia Legislature's intent underlying these Code Sections. For, while Respondent did not originally raise this argument, it is clear that if Georgia's securities laws did not apply to the transactions then Claimant would have no claim against Respondents. Thus a determination of the choice of law is critical to the determination of the legal issues in this case.

Claimant admits that it was he who initiated the contact with the Broker in South Carolina. Claimant admits that it was he who decided to open the account with Respondents. They never solicited his business. Claimant, a sophisticated investor who lives in Augusta, but who teaches at a University in South Carolina, initiated every transaction in question. In the course of his dealings Claimant neither sought nor received any investment advice or suggestions from Respondents. Every transaction was carried out at Claimant's explicit initiation and according to his directions. Although he keeps his stock records in his home office, he candidly admitted that he could not state categorically that he was at his home when he placed every one of the transactions with Respondents. Respondents never left their offices in South Carolina to conduct any business with Claimant.

^{for clarity} ^{mae}
If it was unclear that federal or state law, or NASD regulations authorized or compelled such an award, this arbitrator would feel bound to comply with that law, even if it resulted in a windfall to a party. However, in the circumstances of this case I find that they do not compel such a result. Respondents' contacts with the state of Georgia were clearly minimal. Indeed, they might even be characterized as "accidental." These contacts are too minimal to warrant the application of Georgia's laws. There is no evidence that Respondents have ever conducted any business with any resident of Georgia other than Claimant. They do not advertise in Georgia. They do not solicit clients or business in Georgia. They do not hold themselves out as licensed to sell securities in Georgia. They do not advise Georgia resident clients on investments. The mere fact that Claimant may have been across the Georgia state line when he telephoned his instructions to Respondents should not compel Respondents to register as Georgia Securities Dealers. Considerations of practicality and equity compel a conclusion that Respondents should

not be double-penalized by Georgia law.

Accordingly the arbitrator finds for the Respondents. However, the arbitrator finds that the Claimant's argument was not frivolous nor brought in bad faith. Therefore, each party shall bear its own attorneys fees and costs, and the remainder of the forum fees will be paid by Respondents, who shall be jointly and severally liable for payment of any amounts remaining due to the NASD.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

claim filing fee:	\$100.00
hearing session fees: 2 sessions x \$300.00 =	\$600.00
Total fees:	\$700.00

The undersigned arbitrator has determined that the Respondents shall bear the balance of the cost of arbitration.

1. The Respondents are jointly and severally assessed the sum of \$300.00 [\$700 - Claimants payment \$400.00 = \$300.00].

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

ARBITRATORS' SIGNATURE



Michael A. Caldwell, Esq.
Public Arbitrator

Date of Decision: December 6, 1995