

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

A.D. Sylvester and Agnes Sylvester,

Claimants,

and

No. 95-00570

Philip Jonathan Eitman,

Respondent,

REPRESENTATION OF PARTIES

Claimant A.D. Sylvester and Agnes Sylvester were represented by William S. Shepherd, Esquire of Houston, Texas.

Respondent Philip Jonathan Eitman was represented pro se.

CASE INFORMATION

Claimants A.D. Sylvester and Agnes Sylvester's Original Statement of Claim was filed on or about February 3, 1995. Claimants A.D. Sylvester and Agnes Sylvester's First Amended Statement of Claim was filed on or about February 12, 1996. Claimants A.D. Sylvester and Agnes Sylvester's Second Amended Statement of Claim was filed on or about February 24, 1997. Claimant A.D. Sylvester's Submission Agreement was signed on September 28, 1994. Claimant Agnes Sylvester's Submission Agreement was signed on September 28, 1994.

Respondent Philip Jonathan Eitman's Statement of Answer and Motion to Dismiss was filed on or about February 24, 1997. The NASD Regulation, Inc. Office of Dispute Resolution has no record of a properly executed submission to arbitration from respondent Philip Jonathan Eitman.

HEARING INFORMATION

A pre-hearing conference was held on February 5, 1997 for one (1) session.

The hearing was held on February 25, 1997 for two (2) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

Claimants A.D. Sylvester and Agnes Sylvester ("Claimants") brought this action to recover losses sustained on the contentious purchase of derivative securities through an account opened at National Financial Services Corp through High Yield Management Securities, Inc., whose principles are respondent Philip Jonathan Eitman and Steven Leslie Eitman, and through its broker, Thomas Reilly (hereinafter collectively referred to as "Respondents").

According to Claimants, by misrepresentation and unauthorized investments, Respondents sold them more than \$500,000 of unsuitable derivative securities, partially on margin. Claimants, who reported having no extensive experience in investing or any knowledge of derivative securities, stated that on or about May 26, 1993, \$50,000 of 7% GNMA REMIC pass through Certificates were purchased, and two months later an additional \$100,000 of similar securities were purchased. Claimants added that in late November 1993, they purchased \$200,000 in par value of Fannie Mae's at an interest rate of 8.5%, not realizing that they were highly volatile principal only derivative securities which paid no interest. Claimants asserted that shortly thereafter, \$200,000 of principal only derivative securities were purchased in their account on margin without their permission. Claimants also asserted that they attempted to cancel, then liquidate, these securities, but High Yield Management Securities, Inc. refused to do either. Claimants alleged that when they were finally able to liquidate the positions, they received less than 20% of the face value, a loss in excess of \$300,000, plus interest and costs.

Claimants made the following legal claims: (1) breach of contract and warranties, and promissory estoppel; (2) violation of the Texas Deceptive Trade Practices Act; (3) violation of the Federal Securities Exchange Act; (4) violation of the Texas Securities Statute; and (5) violations of common law.

Respondent Philip Jonathan Eitman ("Mr. Eitman") denied the allegations set forth in the Statement of Claim. Mr. Eitman stated that Claimants failed to state a claim upon which relief may be granted. Mr. Eitman contended that he did not and could not involve himself in the direct supervision of accounts and registered representatives. Mr. Eitman further contended that he had no contact with Claimants and was not involved with the management or direct supervision of their account, he was not familiar with Claimants' investment objectives, did not make investment recommendations, and did not have any knowledge of any alleged misrepresentations or omissions regarding Claimants' accounts. According to Mr. Eitman, he acted in good faith at all times, and was not liable for Claimants' losses.

RELIEF REQUESTED

Claimants A.D. Sylvester and Agnes Sylvester requested an award in the amount of between \$100,000 and \$500,000, plus costs and interest.

Respondent Philip Jonathan Eitman requested that the claims asserted against him be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Philip Jonathan Eitman did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified by telephone at the hearing is bound by the determination of the arbitration panel on all issues submitted.

On or about February 21, 1997, claimants A.D. Sylvester and Agnes Sylvester moved for leave to amend their Statement of Claim. The undersigned arbitrators considered the motion and determined that the motion was granted.

On or about February 24, 1997, respondent Philip Jonathan Eitman requested permission to appear at the hearing and testify by telephone. After careful consideration of the request and the Claimant's objection, the panel of arbitrators decided that the request was granted.

Claimants originally named Fidelity Brokerage Services, Inc., High Yield Management Securities, Inc., Thomas F. Reilly, National Financial Services Corp., and Steven Leslie Eitman as co-respondents. Pursuant to their letter dated January 17, 1996, Claimants dismissed Thomas Reilly with prejudice. Pursuant to their letter dated February 11, 1997, Claimants dismissed Steven Leslie Eitman with prejudice. Pursuant to their letter dated February 14, 1997, Claimants dismissed National Financial Services Corp. and Fidelity Brokerage Services, Inc. with prejudice. Pursuant to their Second Amended Statement of Claim, Claimants dismissed High Yield Management Securities, Inc. due to its filing for protection under the Federal Bankruptcy Act.

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(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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. That the claims against respondent Mr. Philip Jonathan Eitman submitted by claimants A.D. Sylvester and Agnes Sylvester are denied in their entirety and dismissed with prejudice;
2. That the parties shall bear their own costs and expenses including attorneys' fees except for forum fees which are specifically addressed below; and
3. Any other claims and requests for relief not specifically awarded here are, and each of them, hereby denied in their entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 and there were two (2) hearing sessions x \$750 = \$1,500 in forum fees. Total forum fees are thus \$300 + \$1,500 = \$1,800. Pursuant to §10332(b) of the NASD Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimants A.D. Sylvester and Agnes Sylvester.

NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimants A.D. Sylvester and Agnes Sylvester.

Claimants A.D. Sylvester and Agnes Sylvester are liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$150 ($= \frac{1}{2} \$1,800$ total forum fees - \$750 hearing session deposit).

Respondent Philip Jonathan Eitman is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$900 ($= \frac{1}{2} \$1,800$ total forum fees).

NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Fidelity Brokerage Services, Inc.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators:

Franklin Anthony Arnold, Esquire
Franklin Anthony Arnold, Esquire
Chairperson
Public Arbitrator

April 9, 1997
Dated:

Antoinette M. Romano
Antoinette M. Romano
Panelist
Public Arbitrator

April 15, 1997
Dated:

Nick Sacaris
Nick Sacaris
Panelist
Industry Arbitrator

April 8, 1997
Dated:

Date served by the NASD Regulation, Inc.: April 15, 1997