

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Dorotha M. Perkins,

Claimant,

v.

No. 95-01124

PaineWebber, Inc.,
Barry L. Harris, and
Richard Fellows,

Respondents.

REPRESENTATION OF PARTIES

Claimant Dorotha M. Perkins was represented by Thomas F. Sedberry, Esquire of Small, Craig & Werkenthin, P.C. located in Austin, Texas.

Respondents PaineWebber, Inc., Barry L. Harris, and Richard Fellows were represented by Lisa Catalano Tillem, Esquire of PaineWebber, Inc. located in Weehawken, New Jersey.

CASE INFORMATION

Claimant Dorotha M. Perkins' ("Claimant") Statement of Claim was filed on or about March 6, 1995. Claimant's Amended Statement of Claim was filed on or about June 24, 1996. Claimant's Submission Agreement was signed on March 2, 1995.

Respondents PaineWebber, Inc. and Barry L. Harris' Statement of Answer was filed on or about May 30, 1995.

Respondent Richard Fellows' Statement of Answer was filed on or about May 26, 1995.

Respondents PaineWebber, Inc., Barry L. Harris' Response to Claimant's Amended Statement of Claim was filed on or about July 30, 1996.

Respondent PaineWebber, Inc.'s Submission Agreement was signed on May 23, 1995 by Romaine Gardner of PaineWebber, Inc.

Respondent Barry L. Harris' Submission Agreement was signed on January 26, 1996.

The NASD Regulation, Inc. Office of Dispute Resolution has no record of a properly executed Submission Agreement from Respondent Richard Fellows.

HEARING INFORMATION

The hearing was held on August 20, 1996 for two (2) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

Claimant Dorothea M. Perkins ("Claimant") alleged that Respondent Barry L. Harris, as account executive, and respondent Richard Fellows, as branch manager, both employees of respondent PaineWebber, Inc., (hereinafter collectively referred to as "Respondents") misrepresented costs associated with recommended investment changes, and improperly and illegally placed Claimant in an annuity program without her permission and without advising her that the annuity was a proprietary one of Respondent PaineWebber, Inc. Claimant asserted: that Respondents failed to inform her that her previous investments were in mutual funds in which she could transfer and move funds with minimal costs; that Respondents sold 78% of her previous portfolio and purchased closed end funds, which were fully loaded and represented a cost to Claimant that could have been avoided; that Respondents invested her funds in Integrity Life Pinnacle, which was a tax free annuity sponsored by Respondent PaineWebber, Inc., without her permission; and that Respondents informed her that dividends from the Dean Witter Government Trust Closed End Fund could not be reinvested with Dean Witter. According to the Claimant, as a result of these misrepresentations and failures to advise, Respondents invested Claimant's funds in more expensive investments for the purpose of generating excessive and unnecessary commissions, which failed to generate earnings and growth like the investments she had previously.

Claimant made the following legal claims against Respondents: (1) violation of the duty to recommend suitable investments; (2) violation of fiduciary duties; (3) common law fraud and violation of state and federal securities laws; (4) violation of the Texas Deceptive Trade Practices Act; (5) sold securities in violation of securities laws of the United States and Texas; (6) sold annuities in a deceptive and unfair manner; and (7) destroyed personal property in violation of numerous state statutes and common law.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Claimant was fully informed about her investments and their respective commissions, and the Claimant never complained about the commissions or any other aspect of her account for over one year. Respondents further stated that Claimant's allegations with respect to the annuity contract are without merit because Claimant authorized the purchase of the annuity after extensive consultation in order to accomplish her stated objective to increase the value of her account.

Respondents made the following affirmative defenses: (1) Claimant's claims were barred in whole or in part by applicable statutes of limitations; (2) Claimant failed to state a claim upon which relief could be granted; (3) PaineWebber, Inc. and Richard Fellows acted in good faith and did not knowingly or intentionally violate any of the laws alleged; (4) Claimant failed to mitigate her damages; (5) Claimant approved, authorized, participated in and ratified the acts and transactions complained of, and was precluded from recovery; (6) Claimant's claims were barred by the doctrine of laches; (7) Claimant's alleged losses were proximately caused by her own conduct or negligence, which precludes her from recovery; (8) Claimant failed to seasonably complain of or disaffirm the transactions complained of, which barred her from recovery; (9) Claimant's damages, if any, were caused or contributed by persons, conditions or events beyond Respondent's control; (10) Claimant's claims were barred by the doctrines of waiver and estoppel; (11) Claimant was not entitled to attorneys' fees; and (12) Claimant was not entitled to punitive damages.

RELIEF REQUESTED

Claimant Dorothea M. Perkins requested: an award in the amount of \$57,803 for loss of value; an award in the amount of \$15,121 for commissions; an award in the amount of \$14,250 for management fees; an award of attorneys' fees; an award of punitive damages in an undisclosed amount; and an award for costs.

Respondents PaineWebber, Inc., Barry L. Harris, and Richard Fellows requested that the claims asserted against them be dismissed in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Richard Fellows 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 at the hearing is bound by the determination of the arbitration panel on all issues submitted.

At hearing, Respondents PaineWebber, Inc., Barry L. Harris, and Richard Fellows orally moved for expungement and dismissal. After considering the testimony and evidence presented with respect

to this motion, the undersigned arbitrators denied the motion to dismiss and deferred their decision on the motion for expungement.

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 Statement of Claim is hereby dismissed in its entirety with prejudice;
- (2) That the parties shall bear their own costs including attorneys' fees except for those fees specifically enumerated herein; and
- (3) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session. There were two (2) hearing sessions x \$500 = \$1,000 in forum fees. Pursuant to §10332(b) of the 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 NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Dorothea M. Perkins.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$300 previously paid by Respondent PaineWebber, Inc.

Respondent PaineWebber, Inc. is hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$500 in forum fees.

Respondent PaineWebber, Inc. is liable for and shall pay claimant Dorothea M. Perkins \$500 as reimbursement for her hearing session deposit.

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

Signed:

Dated:

Douglas F. Pierce, Esquire
Douglas F. Pierce, Esquire
Public Arbitrator, Presiding Chair

October 14, 1996

Peter D. Tonyan, Esquire
Peter D. Tonyan, Esquire
Public Arbitrator

October 15, 1996

Amir H. Ahanchian, Ph.D.
Amir H. Ahanchian, Ph.D.
Industry Arbitrator

October 29, 1996

Date served by NASD Regulation, Inc.: November 4, 1996