

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Tom George Mueller, and
Marsha Rose Mueller.

Claimants.

v.

No. 95-01395

Bear Stearns & Co., Inc., and
Ronald Scott Diamond.

Respondents.

REPRESENTATION OF PARTIES

Claimants Tom George Mueller and Marsha Rose Mueller ("Claimants") were represented by Gaar W. Steiner, Esq. and Heidi J. Zeeb, Esq. of Steiner & Schoenfeld located in Milwaukee, Wisconsin.

Respondent Bear Stearns & Co., Inc. ("Bear Stearns") was represented by Nicholas P. Iavarone, Esq. of Bellows and Bellows located in Chicago, Illinois.

Respondent Ronald Scott Diamond ("Diamond") was represented by Andrew B. David, Esq. of Suger Friedberg & Felsenthal located in Chicago, Illinois.

CASE INFORMATION

The Statement of Claim was filed on or about March 20, 1995.

Claimants' Submission Agreement was signed on March 13, 1995.

The Joint Statement of Answer of Respondents Bear Stearns and Diamond was filed on or about May 9, 1995.

Respondent Bear Stearns' Submission Agreement was signed on May 9, 1995 by Jeffrey Fisher, Managing Director of Bear Stearns & Co., Inc.

Respondent Diamond did not file a properly executed Submission Agreement.

Claimants' Post-Hearing Arbitration Brief was filed on or about July 31, 1997.

Respondent Bear Stearns' Post-Hearing Memorandum was filed on or about September 30, 1997.

Respondent Diamond's Post-Trial Brief was filed on or about October 16, 1997.

Claimants' Arbitration Surreply Brief was filed on or about October 31, 1997.

HEARING INFORMATION

The hearing was held on:

- January 17, 1996 for two (2) sessions;
- February 17, 1997 for two (2) sessions;
- February 18, 1997 for two (2) sessions;
- February 19, 1997 for two (2) sessions;
- April 30, 1997 for two (2) sessions; and
- May 1, 1997 for two (2) sessions.

The hearing was held in Milwaukee, Wisconsin.

CASE SUMMARY

Claimants' Statement of Claim related to alleged imprudent, excessive and abusive trading by a former Bear Stearns investment broker, Respondent Diamond, which occurred in two accounts held by the Claimants. Claimants contended that Diamond conducted a lengthy and vigorous campaign over a period of three years to solicit Claimants' business. Claimants asserted that Diamond extracted personal financial data throughout this process, including information about the Claimants' virtually non-existent prior investment experience. Claimants maintained that, through the on-going dialogue, the Claimants continually expressed their reluctance to put their retirement capital at risk. Claimants alleged that Diamond was eventually successful in convincing the Claimants to invest with Bear Stearns by assuring them of his dedication to the principal of capital preservation, the Claimants' stated investment objective. Claimants contended that what actually transpired in the Claimants' accounts at the direction of Diamond was high risk speculation and excessive trading. Claimants asserted that Diamond dissipated the Claimants' retirement funds almost in their entirety. Claimants maintained that of the approximately \$330,000 invested, roughly \$53,000 remains. Claimants alleged that Diamond capitalized on the Claimants' lack of sophistication and exercised control over the accounts. Claimants contended that, in the course of this asset dissipation, Respondents pocketed approximately \$84,000 in commissions. Claimants asserted claims, including: (1) violation of Section 10(b) of the Securities Exchange Act of 1934; (2) violation of Wisconsin Uniform Securities Law; (3) Common Law Breach of Fiduciary Duty; (4) Common Law Negligence; (5) Common Law Misrepresentation; (6) Common Law Fraud; and (7) Unjust Enrichment.

Respondents denied all liability to the Claimants in the Joint Statement of Answer. Respondents alleged that the Claimants were an extremely affluent couple who ultimately indicated to Bear Stearns that they enjoyed an annual income of \$100,000 and a net worth of \$3,000,000. Respondents contended that the Claimants were sophisticated investors who considered, at length, each and every factor that could effect either a particular transaction or their account in general, and after obtaining sufficient information, would then proceed to make an informed decision. Respondents asserted that when Claimants finally decided to open an account, they informed Diamond that they were interested in growth and some speculation. Respondents maintained that Bear Stearns properly supervised Claimants' account. Respondents asserted various affirmative defenses, including: (1) Claimants have failed to state a legally cognizable claim; (2) Claimants, by their actions and inactions, are estopped from seeking any relief against Respondents for the matter alleged in the Statement of Claim; (3) the causes of actions alleged by Claimants are time barred; (4) the Claimants assumed all the risks inherent with their account; (5) the Claimants are guilty of laches; and (6) the Claimants own negligence is the proximate cause of any and all losses incurred in their accounts.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested: (1) compensatory damages equaling the amount of the investment loss of approximately \$237,536.00; (2) compensatory damages equaling the amount of earnings and/or commissions earned by Respondents during the relevant time period; (3) compensatory damages equaling the amount of lost opportunity sustained by the Claimants; (4) for punitive damages in an amount to be determined; and (5) for all costs and fees, including actual attorney fees.

In the Statement of Answer, Respondents requested that the Statement of Claim be dismissed, with prejudice, and that all costs, including attorneys fees, be assessed against Claimants.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Diamond 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.

Pursuant to §10326(a) of the Code, Respondent Bear Stearns shall provide NASD Regulation, Inc. Office of Dispute Resolution with a complete copy of the stenographic record of the hearing.

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, as well as the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) Respondents Bear Stearns & Co., Inc. and Ronald Scott Diamond are jointly and severally liable for and shall pay to Claimants Tom George Mueller and Marsha Rose Mueller the amount of One Hundred Fifty Four Thousand Nine Hundred Seventy Eight Dollars and Two Cents (\$154,978.02), representing an award of compensatory damages, interest, costs and attorneys' fees;
- (2) The panel expressly disallowed Claimants' expert witness fees and expenses attributable to expert witness Doug Schultz, which is the aggregate amount of Twenty Seven Thousand Three Hundred Sixty Six Dollars and Eighty Five Cents (\$27,366.85); 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, her dismissed in their entirety 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 were twelve (12) hearing sessions x \$750 = \$9,000 in forum fees. Pursuant to §10332(b) of 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 **refund** the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to §10332 (c) of the Code, Respondents Bear Stearns & Co., Inc. and Ronald Scott Diamond are jointly and severally liable for and shall pay all forum fees incurred in this matter which is the amount of \$9,000.

Pursuant to §10333 of the Code, Respondent Bear Stearns & Co., Inc. is also liable for and shall pay the member surcharge fee in the amount of \$350.

Pursuant to §10332(c) of the Code, Respondent Diamond is also liable for and shall pay postponement fees in the amount of \$1,750 incurred in connection with Respondent Diamond's First and Second Requests for Adjournment.

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

Concurring Arbitrators' Signatures

\s\ Michael B. Laikin, Esq.
Michael B. Laikin, Esq.
Chairperson
Public Arbitrator

December 5, 1997
Dated:

\s\ William H. Levit, Jr., Esq.
William H. Levit, Jr., Esq.
Panelist
Public Arbitrator

December 5, 1997
Dated:

\s\ Richard P. Franz
Richard P. Franz
Panelist
Industry Arbitrator

December 8, 1997
Dated:

For NASD use only:

Date award served on the parties: December 9, 1997