

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Bernie Co. and Bernhardt Rosenberg,

Claimants,

and

No. 95-01751

Piper Jaffray, Inc. and James J. Ingram,

Respondents,

REPRESENTATION OF PARTIES

Claimants Bernie Co. and Bernhardt Rosenberg were represented at the hearing in this matter by Joel Hanover, Esquire of Vero Beach, Florida. Claimants were also represented at various times throughout this proceeding by the following representatives: Albert A. Rapoport, Esq., Boca Raton, Florida; Securities Arbitration Specialists, Inc., Vero Beach, Florida; George Hoffman, Esq., West Palm Beach, Florida; Daniel L. Goldberg, Esq., St. Charles, Missouri; and Thomas A. Shaffer, Esquire of Clearwater, Florida.

Respondents Piper Jaffray, Inc. and James J. Ingram were represented by Edward J. Plumier, Esquire of Dorsey & Whitney LLP, located in Minneapolis, Minnesota.

CASE INFORMATION

Claimants Bernie Co. and Bernhardt Rosenberg's Statement of Claim was filed on or about April 10, 1995. Claimants Bernie Co. and Bernhardt Rosenberg's Reply to Respondents' Affirmative Defenses was filed on or about September 5, 1995. Claimants Bernie Co. and Bernhardt Rosenberg's Response to Respondents' Motion to Dismiss was filed on or about August 21, 1995. Claimant Bernie Co.'s Submission Agreement was signed on May 3, 1995 by Bernhardt Rosenberg, of Bernie Co. Claimant Bernhardt Rosenberg's Submission Agreement was signed on May 3, 1995.

Respondents Piper Jaffray, Inc. and James J. Ingram's Statement of Answer was filed on or about July 20, 1995. Respondents Piper Jaffray, Inc. and James J. Ingram's Motion to Dismiss was filed on or about July 20, 1995. Respondent Piper Jaffray, Inc.'s Submission Agreement was signed on July 12, 1995 by Mark S. Reed, Vice President and Assistant General Counsel of Piper Jaffray, Inc. Respondent James J. Ingram's Submission Agreement was signed on July 13, 1995.

HEARING INFORMATION

A pre-hearing conferences was held on March 4, 1996 for one (1) session.

The hearing was held on: February 10, 1997 for two (2) sessions; and February 11, 1997 for two (2) sessions.

The hearing was held in Kansas City, Missouri.

CASE SUMMARY

Claimants Bernie Co. and Bernhardt Rosenberg (hereafter collectively referred to as "Claimants") brought this action to recover losses incurred in tax free unit trusts due to respondent Piper Jaffray, Inc.'s branch manager James J. Ingram's failure to notify Claimants that these unit investment trusts had short call profiles and that the bonds in the trust would be called if interest rates continued to fall, which they did.

According to Claimant Bernhardt Rosenberg ("Mr. Rosenberg"), he had no prior training, education or experience in investments and was dependent on income from investments for his retirement. Mr. Rosenberg stated that when he sold his business, he told Mr. Ingram that he wished to purchase tax-free municipal bonds. Mr. Rosenberg further stated that based on Mr. Ingram's recommendation, tax-free unit trusts were purchased on the secondary market. Mr. Rosenberg asserted that Mr. Ingram invested in these trusts at a substantial premium and did not tell him (Mr. Rosenberg) that these investment trusts had short call profiles and that the bonds in the trust would be called if interest rates continued to fall. Mr. Rosenberg reported that the bonds were called and that he lost the large premium that he had paid. Claimants asserted that respondents Piper Jaffray, Inc. and Mr. Ingram failed to provide Mr. Rosenberg with the yield to maturity on municipal bonds or the yield to call, whichever was less, or a profile of the trust that would have shown the percentage of the portfolio subject to call within a stated number of years. Claimants also asserted that Mr. Ingram failed to explain and disclose the inherent risks when he knew or should have known that Mr. Rosenberg would rely on him for this information.

Claimants made the following claims: (1) unsuitability; (2) broker ignorance; (3) misrepresentation and omissions; and (4) fraud and deceit. In addition, Claimants asserted that respondents Piper Jaffray, Inc. and Mr. Ingram are subject to the laws and statutes of the state of Florida.

Respondents Piper Jaffray, Inc. and Mr. Ingram (hereinafter collectively referred to as "Respondents") denied the allegations set forth in the Statement of Claim. Respondents specifically denied that Claimants' claims are governed by the laws and statutes of the state of Florida and asserted that the majority of the transactions in question took place while Claimants resided or were located in the State of Iowa, and that Claimants were doing business with Piper Jaffray, Inc.'s office in Iowa.

According to Respondents, Mr. Rosenberg had investment experience prior to conducting business with Mr. Ingram that involved real estate and commodities, taxable and tax-free bonds, equities and certificates of deposit. Respondents reported that Mr. Rosenberg was not solely dependent on income from his securities investments for his retirement. Respondents contended that Mr. Rosenberg reviewed, approved and determined all investments. Respondents further contended that

Claimants were provided with prospectuses containing information with respect to the specific bonds held in each portfolio, including the bonds' ratings, the remaining asset values, estimated current yields, call features, and other pertinent information relating to risk. Respondents asserted that Claimants recognized the potential for loss of any principal amount and decided to make the purchase given the sizable monthly federally-tax-free income received. Respondents maintained that Claimants were provided with complete information related to each purchase of an interest in the Unit Investment Trust. Respondents also contended that Mr. Rosenberg was aware of the risk that higher yielding bonds could be called prior to maturity, as well as other risks such as default.

Respondents made the following affirmative defenses: (1) The NASD lacks jurisdiction to consider any claims related to investments purchased by Claimants with or through Respondents more than six years prior to the filing of the Statement of Claim, pursuant to § 15 of the NASD Code of Arbitration Procedure. (2) Part of the Claims set forth in the Statement of Claim are barred by the applicable statute of limitations that apply to claims based on § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, the securities statutes of Iowa or Florida, or the common law of Iowa or Florida. (3) Claimants have waived, and are estopped from asserting, the claims set forth in the Statement of Claim. (4) Claimants are barred from pursuing their claims based on their ratification and approval of the transactions now complained of. (5) Claimants' alleged damages are barred or reduced by their failure to mitigate damages, and by the doctrine of avoidable consequences. (6) Claimants' claims are barred by the equitable doctrines of laches which precludes waiting as much as thirteen years and securing significant benefits from investments prior to asserting any claims. (7) Claimants' claims for damages are not attributable to any wrongdoing on the part of Respondents, but rather to economic events (such as lower interest rates and increased calls for bonds) over which Respondents had no control and for which they have no responsibility. (8) Claimants knowingly and voluntarily assumed any risks attendant with the investments complained of and are therefore barred from asserting the claims set forth in the Statement of Claim. (9) Claimants' claims and losses, if any, were caused or contributed to by their own fault or contact, or by the acts of others over whom Respondents have no control and for which they have no responsibility. Respondents' liability (if any) must be reduced to take into account the degree of fault or responsibility assumed by Claimants or others. (10) On information and belief, Claimants are not the owners or purchasers of all the securities identified in the Statement of Claim, and therefore lack standing to assert any claims or seek any damages with respect to any securities not owned or purchased by the named Claimants.

RELIEF REQUESTED

Claimants Bernie Co. and Bernhardt Rosenberg requested an award for: compensatory damages in the approximate amount of \$391,273; punitive damages in the amount of three times compensatory damages or \$1,173,819; "pre" and "post" interest at 12% of \$445,417; costs, filing fees and expenses in the amount of approximately \$16,250; reasonable attorney's fee for a total request of damages in the amount of \$2,026,759.

Respondents Piper Jaffray, Inc. requested that the claims asserted against them be rejected and that they be awarded their costs and attorney fees incurred in this matter.

OTHER ISSUES CONSIDERED & DECIDED

On or about July 20, 1995, respondents Piper Jaffray, Inc. and James J. Ingram moved for the dismissal of substantial portions of the Statement of Claim. After careful consideration of this motion and Claimants Bernie Co. and Bernhardt Rosenberg's response thereto, and the parties' additional responses, the undersigned panel of arbitrators decided to postpone a decision on this motion until conclusion of the hearing.

On or about January 17, 1997, Respondents filed their Second Request for Sanctions. In the request, Respondents stated that certain documents which were requested by Respondents and ordered produced by the panel, and had not yet been produced pursuant to the Order. After consideration of the Motion and the response thereto, the panel ordered, amongst other things, full and complete responses, pursuant to its prior order, to any requests not fully complied with. The panel took the sanctions issue under advisement.

On or about February 14, 1996, and on or about February 27, 1996 Claimant Bernhardt Rosenberg moved for a change of venue to the state of Florida. After careful consideration of this motion and respondents Piper Jaffray, Inc. and James J. Ingram's response thereto, the undersigned panel of arbitrators held that the hearing was to be held, as scheduled, in Kansas City.

On or about March 21, 1996, Respondents filed Motions for costs and expenses related to a continuance of the March 12, 1996 hearing date, and for further consideration of their Motion to Dismiss. After review of the motions and responses thereto, the arbitrators took the motions under advisement to be ruled on at the hearing.

On or about March 28, 1996, Claimant Bernhardt Rosenberg again moved for a change of venue to the state of Florida. After careful consideration of this motion and respondents Piper Jaffray, Inc. and James J. Ingram's response thereto, the undersigned panel of arbitrators overruled the motion.

On or about June 6, 1996, Claimant Bernhardt Rosenberg submitted a request to the Director of Arbitration for intervention on the issue of the venue of this arbitration. After careful consideration of this request and respondents Piper Jaffray, Inc. and James J. Ingram's response thereto, Claimant Bernhardt Rosenberg's request for intervention was denied and the matter transferred to the arbitrators for decision. After consideration of the positions of the parties, and deliberation, the arbitrators denied Claimants' request to change venue.

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 Mark D. Wasserstrom and Patricia W. Bottoms, by majority vote, decided in full and final resolution of the issues submitted for determination as follows:

1. On all of Claimants' claims, the arbitrators find against Claimants and in favor of Respondents.
2. On Respondents' Motion for Costs and Expenses Related to Continuance, the arbitrators find the issues in favor of Respondents and against Claimants. The sum of \$7,106.26 is hereby awarded to Piper, Jaffray, Inc.
3. The arbitrators hereby award Respondent Piper, Jaffray, Inc. attorneys' fees in the amount of \$7,500.00. This award is against Claimants jointly and severally.
4. On Respondents' Motion to Dismiss and Motion for Further Consideration of Motion to Dismiss, the issues are moot.
5. Other than the expenses set out in Paragraph 2, attorneys' fees set out in paragraph 3 above, and the forum fees addressed below, all other claims and requests for relief are hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 = \$300 and there were four (4) hearing sessions x \$1,000 = \$4,000 in forum fees. Total forum fees are thus \$300 + \$4,000 = \$4,300. 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 \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimants Bernie Co. and Bernhardt Rosenberg.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent Piper Jaffray, Inc.

Additional forum fees in the amount of \$3,300 are assessed by the arbitrators against the Claimants.

Pursuant to §10332(c) and §10319 of the Code, the arbitrators assess postponement fees in the amount of \$1,000 against the Claimants. The request relates to Claimants' request to postpone the March, 1996 hearing dates, and the panel's subsequent granting of the request.

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

Concurring Arbitrators' Signatures:

Mark D. Wasserstrom
Mark D. Wasserstrom
Chairperson
Public Arbitrator

/s/

May 15, 1997
Dated:

Patricia W. Bottoms
Patricia W. Bottoms
Panelist
Industry Arbitrator

/s/

May 16, 1997
Dated:

Concurring in part, and dissenting in part:

The undersigned Arbitrator, David A. Nixon dissents from the Award to Respondent Piper, Jaffray, Inc. of \$7,106.26 for expenses and \$7,500.00 for attorneys' fees, but joins in the remainder of the Award.

David A. Nixon
David A. Nixon
Panelist
Public Arbitrator

/s/

May 15, 1997
Dated: