

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

John Dominici,

Claimant,

v.

No. 95-01754

Linda Bently,
Karen Lighthizer,
Jeanne Carney, and
Erin O'Rourke.

Respondents.

REPRESENTATION OF PARTIES

The Dominici Family Trust ("Claimant") was represented by John Dominici, Phoenix, Arizona.

Linda Bently ("Bently"), Karen Lighthizer ("Lighthizer"), Jeanne Carney ("Carney"), and Erin O'Rourke ("O'Rourke") (collectively referred to as "Respondents") were represented by Brian J. Campbell, Esq., and Joel P. Hoxie, Esq., of Snell & Wilmer, Phoenix, Arizona.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about April 7, 1995. Claimant's Submission Agreement was signed on March 10, 1995. The Dominici Family Trust's Submission Agreement was signed on May 11, 1995. Claimant's Certificate of Trust and Authority dated July 20, 1992. Claimant's Amended Statement of Claim was filed on or about December 20, 1995.

Respondents' Statement of Answer was filed on or about August 8, 1995. Respondents' Submission Agreements were signed on June 30, 1995, July 5, 1995, July 5, 1995, and July 11, 1995, respectively.

HEARING INFORMATION

The hearing was held on March 6, 1996 in Phoenix, Arizona for a total of two (2) sessions.

CASE SUMMARY

Claimant alleged that: When he first contacted Bentley on April 22, 1993, he informed her that he wanted to purchase a no-load mutual fund, like the Fidelity Puritan Fund he showed her; BAIS does not offer any no-load funds; for Bentley to sell him a loaded fund on the pretense of being a no-load fund, she had to commit something dishonest, unscrupulous, and fraudulent which she accomplished by failing to disclose that there was a one (1%) percent 12B1 fee and also an exchange fee attached to the Colonial Utilities Class B shares; Bentley failed to give Claimant a prospectus; Bentley misappropriated Claimant's funds in that she placed \$30,000 in a loaded fund which was totally unsuitable to his request for a no-load fund; Bentley's main reason for selling him the Colonial Utilities class B shares was to make commissions for herself; Bentley misled him by indicating that a sales charge did not apply to the Colonial Utilities class B shares by using the symbol "N.A." under the heading "A sales charge applies to my purchase"; Bentley fraudulently manipulated the documents in that the white copy of the Investment Acknowledgement Form had been altered and information added that did not comply with Claimant's yellow carbon copy of the same document on the day Bentley and Claimant signed the document; Bentley used false and fraudulent schemes in her September 9, 1994 letter to the Arizona Securities Division; Lighthizer failed to settle the dispute on April 4, 1994 when he first had a meeting with Bentley; on May 4, 1994 Claimant had a meeting with Carney where she refused to return Claimant's \$30,000 or the transfer of Claimant's b shares into the A shares fund at no cost to him; Carney refused to admit that Bentley had done anything wrong; Carney told Claimant that there were no sales charges that apply to the Claimant even though there was a 1% 12B1 fee attached to the Colonial class B shares; O'Rourke, through her misleading, deceiving, and clever letters with complete distortion of truth and fabricated statements, she completely fooled, confused and beguiled the chief fraud investigator of the Arizona Commerce Commission Securities Division into dropping their investigation into Claimant's complaint; and Respondents violated the NASD and SEC Rule concerning the 12B1 fee.

Respondents denied that they recommended and sold an unsuitable investment to the Claimant. Respondents further denied that any material misrepresentations or omissions were made to the claimant, or that Respondents breached any duty owing to Claimant, as alleged or at all. Respondents also asserted the following affirmative defenses: Claimant's claims are completely without merit on the facts, and that they also are barred by the doctrines of accord and satisfaction, ratification, waiver, and estoppel; and claimant's investment losses, if any, were not proximately caused by any alleged wrongdoing on their part.

RELIEF REQUESTED

Claimant requested an award of the following: \$6,699.57 loss on the sale of Colonial Utilities B shares; \$4,800.00 time for researching, processing and assembling claim; and punitive damages against Bentley, Lighthizer, Carney, and O'Rourke in the amounts of \$1,500.00, \$750.00, \$750.00, and \$2,500.00 respectively; lawyer consultation fees of \$400.00; and miscellaneous expenses in the amount of \$100.00.

In their Answer, Respondents requested that the claims asserted against them be dismissed in its entirety and that they be awarded their costs and attorneys' fees incurred herein.

OTHER ISSUES CONSIDERED & DECIDED

On February 29, 1996, (received by the NASD on March 5, 1996) Claimant mailed an objection to the receipt, and use at the hearing, of Respondents exhibits for the hearing. Claimant asserted that the documents were received at 5:40 p.m. on February 28, 1996, 40 minutes after the deadline set in the undersigned arbitrator's prior Order, and he objected to their use. Due to his objection, Claimant did not open the package in which the documents were received. The matter was taken up at the beginning of the hearing. After hearing argument from the parties, and review of Claimant's February 29, 1996 objection, the arbitrator allowed the documents to be used at the hearing.

On March 6, 1996, Claimant requested a continuance because O'Rourke and Carney would only be available by telephone for the hearing. After hearing argument from the parties, and deliberation, arbitrator Whitaker denied the request. However, Claimant was allowed to re-raise the continuance request again if, after hearing their testimony, he felt he needed Carney and O'Rourke to be available in person to provide further testimony.

On March 6, 1996, at the close of the hearing, Respondents requested that the Statement of Claim filed against them be dismissed. After considering the pleadings, the evidence and testimony presented at the hearing, and argument from the parties, the undersigned arbitrator granted Respondents' request. In entering his decision, the undersigned arbitrator made the following findings: The Claimant and Bentley had entered into a settlement of Claimant's dispute in September of 1994 when Claimant's class B shares were sold and class A shares of the Colonial Utilities Fund were purchased at no cost to the Claimant; the claims against Lighthizer, O'Rourke and Carney are without merit and the claims against each of them should be expunged; and that the forms used by the Bank of America Investment Services, Respondents' employer, failed to adequately disclose the one (1%) 12B1 fee associated with Claimant's purchase of the Colonial Utilities Fund Class B shares.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD.

AWARD

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

Claimant's claims made against Respondents Lighthizer, O'Rourke and Carney are without merit and the claims made against each of them should be expunged.

Claimant's claims asserted against Respondent Bentley are, and each of them, denied with prejudice.

Each party shall bear their own costs and expenses, including attorneys' fees, associated with this arbitration.

Each claim/request for relief not specifically set forth herein are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$300 per hearing session. There were two (2) sessions x \$300 = \$600 in forum fees. Pursuant to §43(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 §43(c) of the Code, the NASD shall ~~retain~~ the non-refundable filing fee in the amount of \$100 and shall ~~retain~~ as forum fees the hearing session deposit in the amount of \$300 previously deposited with the NASD by the Claimant.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$200 previously paid by BA Investment Services, Inc..

Additional forum fees in the amount of \$300 are assessed against the Respondents.

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

Dated:

Philip B. Whitaker

s/s

March 26, 1996

Philip B. Whitaker

Public Arbitrator, Presiding Chair