

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

---

In the Matter of the Arbitration Between

John W. Holley Grantor Trust, Barbara Wilson Holley,  
Mildred A. Pidgeon Revocable Living Trust,  
Article V Barbara Pidgeon Holley Trust,  
Article VII Barbara Pidgeon Holley Trust,  
John Holley and Elizabeth Holley, and Phillip Scott Holley,

Claimants,

and

No. 95-02804

Kidder, Peabody & Co., Inc. and Thomas William Bodine,

Respondents,

---

### **REPRESENTATION OF PARTIES**

Claimants John W. Holley Grantor Trust, Barbara Wilson Holley, Mildred A. Pidgeon Revocable Living Trust, Article V Barbara Pidgeon Holley Trust, Article VII Barbara Pidgeon Holley Trust, John Holley and Elizabeth Holley, and Phillip Scott Holley were represented by Timothy E. Hayes, Esquire, of Coburn & Croft, located in St. Louis, Missouri.

Respondents Kidder, Peabody & Co., Inc. and Thomas William Bodine, were represented by Richard Kelly, Esquire, of Kidder, Peabody & Co., Inc., located in New York, New York.

### **CASE INFORMATION**

Claimants John W. Holley Grantor Trust, Barbara Wilson Holley, Mildred A. Pidgeon Revocable Living Trust, Article V Barbara Pidgeon Holley Trust, Article VII Barbara Pidgeon Holley Trust, John Holley and Elizabeth Holley, and Phillip Scott Holley's Statement of Claim was filed on or about June 9, 1995. Claimants John W. Holley Grantor Trust, Barbara Wilson Holley, Mildred A. Pidgeon Revocable Living Trust, Article V Barbara Pidgeon Holley Trust, Article VII Barbara Pidgeon Holley Trust, John Holley and Elizabeth Holley, and Phillip Scott Holley's First Amended Statement of Claim was filed on or about May 21, 1996. Claimant John W. Holley Grantor Trust submitted Submission Agreements signed on June 20, 1995 by John W. Holley as Co-Trustee of the John W. Holley Grantor Trust, and on June 22, 1995 by David Holley as Co-Trustee of the John W. Holley Grantor Trust. Claimant Barbara Wilson Holley's Submission Agreement was signed on June 5, 1995. Claimant Mildred A. Pidgeon Revocable Living Trust submitted Submission Agreements signed on June 22, 1995 by John David Holley as Co-Trustee of the Mildred A. Pidgeon Revocable Living Trust, and on June 22, 1995 by Mildred A. Pidgeon as Co-Trustee of the Mildred A. Pidgeon Revocable Living Trust. Claimant Article V Barbara Pidgeon Holley Trust submitted Submission Agreements signed on June 20, 1995 by John W. Holley as Co-Trustee of the Article

V Barbara Pidgeon Holley Trust, and on June 22, 1995 by John David Holley as Co-Trustee of the Article V Barbara Pidgeon Holley Trust. Claimant Article VII Barbara Pidgeon Holley Trust submitted Submission Agreements signed on June 20, 1995 by John W. Holley as Co-Trustee of the Article VII Barbara Pidgeon Holley Trust, and June 22, 1995 by John David Holley as Co-Trustees of the Article VII Barbara Pidgeon Holley Trust. Claimant John Holley's Submission Agreement was signed on June 3, 1995. Claimant Elizabeth Holley's Submission Agreement was signed on June 3, 1995. Claimant Phillip Scott Holley's Submission Agreement was signed on June 2, 1995.

Respondents Kidder, Peabody & Co., Inc. and Thomas William Bodine's Statement of Answer and Motion to Dismiss was filed on or about September 12, 1995. Respondents Kidder, Peabody & Co., Inc. and Thomas William Bodine's supplement to their Statement of Answer was filed on or about June 18, 1996. Respondent Kidder, Peabody & Co., Inc.'s Submission Agreement was signed on September 1, 1995 by Richard Kelly, Vice President and Associate General Counsel of Kidder, Peabody & Co., Inc. The NASD Regulation, Inc. Office of Dispute Resolution has no record of a signed agreement to submit to arbitration from respondent Thomas William Bodine.

### HEARING INFORMATION

Pre-hearing conferences were held on:                      June 17, 1996 for one (1) session;  
   July 15, 1996 for one (1) session; and  
   August 8, 1996 for one (1) session.

The hearing was held on:                                      January 14, 1997 for two (2) sessions;  
   January 15, 1997 for two (2) sessions; and  
   January 16, 1997 for two (2) sessions.

The hearing was held in St. Louis, Missouri.

### CASE SUMMARY

Claimants John W. Holley Grantor Trust, Barbara Wilson Holley, Mildred A. Pidgeon Revocable Living Trust, Article V Barbara Pidgeon Holley Trust, Article VII Barbara Pidgeon Holley Trust, John Holley and Elizabeth Holley, and Phillip Scott Holley ("Claimants") alleged that respondent Thomas William Bodine, as their broker through respondent Kidder, Peabody & Co., Inc., (hereinafter collectively referred to as "Respondents") engaged in fraudulent conduct including excessive, unauthorized, and unsuitable trades in their dealings with Claimants. Claimants stated that when they opened their accounts with Respondents in or about 1990, which had a cumulative worth of almost \$8,000,000, they informed Respondents that their investment objectives were conservative, but Respondents controlled the activities in Claimants' accounts and disregarded this objective in order to generate investment income from commissions in excess of \$1,000,000. Claimants asserted that between January 1991 and October 1994, Respondents made at least 5,000 buys or sells with a dollar volume in excess of \$100,000,000 in Claimants' accounts, which resulted in a decline of Claimants' portfolios in excess of \$400,000. Claimants made the following legal claims: (1) unauthorized trading, in violation of NYSE Rule 408 and Art. III § 15 of the NASD

Rules; (2) churning, in violation of NYSE Rule 435.1 and Art. III § 2 of the NASD Rules; (3) unsuitability, in violation of NYSE Rule 405(1) and Art. III § 2(a) of the NASD Rules; (4) failure to know your customer, in violation of NYSE Rule 405(1)(2) and Art. III § 2(b) of the NASD Rules; (5) negligent supervision, in violation of NYSE Rule 342.16 and Art. III § 27 of the NASD Rules; (6) sending out written documents before approval, in violation of NYSE Rule 243.16 and Art. III § 27 of the NASD Rules; (7) failure to engage in good and ethical business conduct, in violation of NYSE Rule 401 and Art. III § 1 of the NASD Rules; (8) failure to follow specific standards for communication, in violation of NYSE Rule 472 and Art. III § 35(d) of the NASD Rules; (9) breach of contract; (10) fraud; (11) breach of fiduciary duty; (12) negligence; (13) violation of Missouri Uniform Securities Act; and (14) violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder. The allegations arose out of transactions in securities more fully covered during the hearing in this matter.

Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that the Statement of Claim violated § 25(a) of the NASD Code of Arbitration Procedure (the "Code") by failing to specify the relevant facts. Respondents thus moved for dismissal of the Statement of Claim or an order requiring clarification as to which trades were supposedly unauthorized, which securities were allegedly unsuitable, and any details about the churning and fraud claims, in order to allow Respondents the ability to assert all available defenses and relevant facts pursuant to § 25(b)(1) of the Code. Nonetheless, according to Respondents, Claimants received confirmations and account statements in the normal course and made no objection until years after the fact, which confirms that they have ratified the trades. Respondents further contended that Claimants failed to specify a turnover rate because it was substantially less than that needed to prove the claim of churning. As to Claimants' unsuitability claim, Respondents argued that even if Claimants stated which securities are allegedly unsuitable, they cannot prove this claim. Furthermore, according to Respondents, Claimants' claims for violations of both state securities laws and federal securities law are partially barred by the applicable statutes of limitations. Finally, Respondents asserted that Claimants can only recover actual damages, which they have not suffered.

#### **RELIEF REQUESTED**

Claimants John W. Holley Grantor Trust, Barbara Wilson Holley, Mildred A. Pidgeon Revocable Living Trust, Article V Barbara Pidgeon Holley Trust, Article VII Barbara Pidgeon Holley Trust, John Holley and Elizabeth Holley, and Phillip Scott Holley ("Claimants") requested an award for: compensatory damages in an amount of at least \$2,850,000.00; exemplary damages; attorney fees and litigation costs incurred in this arbitration and resulting legal actions, if necessary; and pre-judgment and post-judgment interest.

Respondents Kidder, Peabody & Co., Inc. and Thomas William Bodine requested that either the claims asserted against them be dismissed or that Claimants be required to clarify the Statement of Claim by specifying the relevant facts to comply with § 25 (a) of the NASD Code of Arbitration Procedure. Respondents Kidder, Peabody & Co., Inc. and Thomas William Bodine also stipulated that the Statement of Claim should be denied in its entirety at the hearing.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent Thomas William Bodine 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.

Prior to the entry of this award, and after the parties post-hearing briefs were filed, Claimants filed a request to file a reply brief to the brief submitted by Respondents. After consideration of the request, the response, and deliberation, the arbitrators have determined not to permit the filing of reply briefs and sur-reply briefs.

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.

The record of this arbitration was closed on March 20, 1997.

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Kidder Peabody and Thomas Bodine are jointly and severally liable for, and shall pay the following as an award of compensatory damages to: John W. Holley and John David Holley, Trustees of John W. Holley Grantor Trust \$193,945; John W. Holley and John David Holley, Trustees of the Trust Created under Article V of the Barbara Pidgeon Holley Trust \$40,831; John W. Holley and John David Holley, Trustees of the Trust Created under Article VII of the Barbara Pidgeon Holley Trust \$127,596; Philip Scott Holley, Individually, \$20,415; Barbara Wilson Holley, Individually, \$56,142; John David Holley and Elizabeth P. Holley, his wife, \$15,311; Mildred A. Pidgeon and John David Holley, Trustees of the Mildred A. Pidgeon Revocable Living Trust \$56,142.
2. Respondents are jointly and severally liable for, and shall pay to the Claimants the sum of \$25,000 as an award of their attorneys' fees. The authority for the award of attorneys' fees can be found in Claimants' submissions filed in this case.
3. Respondent Kidder Peabody & Co. is liable for and shall pay to the Claimants the sum of \$1,000,000 as an award of punitive damages. In addition, Respondent Thomas Bodine is liable for and shall pay to the Claimants the sum of \$500,000 as an award of punitive

damages. The authority for the award of punitive damages can be found in Claimants' submissions filed in this case.

4. 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, 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 were three (3) pre-hearing conferences x \$300 and there were six (6) regular sessions x \$1,000 = \$6,900 in forum fees. 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 claimant.

Pursuant to §10333 of the Code, Respondent Kidder Peabody & Co. is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution a non-refundable member surcharge in the amount of \$500.

Additional forum fees in the amount of \$5,900 are assessed by the panel jointly and severally against the Respondents.

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

Dated:

William S. Rader  
William S. Rader  
Public Arbitrator, Presiding Chair

/s/

March 22, 1997

William R.H. Martin  
William R.H. Martin  
Public Arbitrator

/s/

March 21, 1997

Richard J. Zaegel  
Richard J. Zaegel  
Industry Arbitrator

/s/

March 31, 1997