

NASD REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION

In the Matter of the Arbitration Between

Name of Claimants

Mark D'Andrea
Dino D'Andrea

CASE NO.
95-03845

Name of Respondents

PaineWebber, Inc.
Smith Barney, Inc. (f/k/a Smith Barney Shearson, Inc.)
Mercer Securities
Stephen J. Schappell
Richard T. Carlin
Richard Allen Connell
Correspondence Services Corporation

REPRESENTATION

Claimants Mark and Dino D'Andrea ("Claimants"): Howard M. Cyr, Esq. and Denis C. Dice, Esq. of the law firm of Harvey, Pennington, Herting & Renneisen, Ltd., Philadelphia, PA

Respondents Smith Barney, Inc. ("Smith Barney"), Richard Allen Connell ("Connell") and Richard Carlin ("Carlin") were represented by Harry T. Walters, Senior Vice President and Associate General Counsel, Smith Barney, Inc., New York, NY

Respondent PaineWebber, Inc. (PaineWebber) and Correspondence Service Corporation ("CSC") were represented by Elizabeth Hoop Fay, Esq. of the law firm of Morgan, Lewis & Bockius, Philadelphia, PA

Mercer Securities, Inc. was not represented.

Estate of Steven J. Schappell ("Schappell") was represented by Bruce Schappell. Bruce Schappell did not appear.

CASE INFORMATION

Statement of Claim filed: August 10, 1995
Amended Statement of Claim filed: December 26, 1995
Claimant's Submission Agreement signed on: August 4, 1995

Joint Statement of Answer filed by Respondents Smith Barney, Carlin and Connell on: October 30, 1995

Respondents Smith Barney, Carlin and Connell did not execute submission agreements.

Joint Motion to Dismiss and Answer of PaineWebber and CSC filed January 24, 1996
PaineWebber's Submission Agreement executed by Evan Charkes, Corporate Vice President on: September 6, 1995

- Mercer Securities did not file and answer or a uniform submission agreement.

Schappell did not file and answer or a uniform submission agreement

HEARING INFORMATION

Pre-Hearing Conference with Chairman -
August 5, 1996 - one session

Hearing Dates/Sessions:

August 19, 1996 - 2 sessions
August 20, 1996 - 2 sessions
November 25, 1996 - 2 sessions
November 26, 1996 - 2 sessions
December 4, 1996 - 2 sessions
December 5, 1996 - 2 sessions
December 6, 1996 - 2 sessions
January 6, 1997 - 2 sessions
January 7, 1997 - 2 sessions
January 8, 1996 - 2 sessions
March 12, 1996 - 2 sessions
March 13, 1996 - 2 sessions
April 23, 1996 - 1 session
Total = 25 hearing sessions

Hearing Location: NASD Regulation, Inc. District Office No. 9, Philadelphia, PA

CASE SUMMARY

Claimants, two retirees opened accounts with Smith Barney's account executive, Stephen Schappell. Claimants transferred their accounts to Smith Barney from Merrill Lynch when their broker Schappell left Merrill Lynch to join Smith Barney. Claimants' alleged that Schappell began to purchase riskier securities, such as Anacomp, Inc., Micropolis corporate bonds, Kelley Oil Co., Datapoint Corp., Akers Research, L.A. Gear, Inc. and Interlogic, Inc. Claimants alleged that the complexion of their port folios continued to change from a conservative port

folio to a speculative one. Claimants alleged, among other things, that the losses sustained in their accounts were due to the fraudulent, negligent, unlawful and improper conduct of Respondents resulting from Respondents actions including, but not limited to, the following allegations:

1. Unsuitable Trades. Respondents effected purchases and sales of securities for the accounts which were unsuitable in view of the Claimants' investment objectives and financial situation.
2. Respondents made fraudulent misrepresentations and omissions of material facts made in connection with the purchase and sale of securities particularly with regard to the risks associated with the speculative investments purchased by Schappell and these misrepresentations and omissions occurred on an ongoing and continual basis:
- iii. Respondents Smith Barney and Carlin made fraudulent misrepresentations and omissions as to the violations committed by Schappell in the management of Claimants' accounts as well as general problems and/or violations Schappell committed in the securities industry.
- iv. Churning Accounts. Schappell effectuated short-term purchase and sale transactions many of which generated losses and were for the primary purpose of benefitting Respondents through the production of substantial commissions rather than for the purpose of fulfilling Claimants' investment objections.
- v. Respondents Carlin and Smith Barney have control person liability for failure to supervise Schappell and prevent security violations from occurring.

Respondents actions constituted breach of contract, negligence, gross negligence, breach of fiduciary duty, breach of duty, conspiracy, violation of federal and state securities and consumer protection laws and violations of rules and regulations of the National Association Security Dealers, Inc. and the various security exchanges which Smith Barney and Mercer Securities are members.

Respondents Smith Barney, Carlin, and Connell ("Smith Barney Respondents") denied all allegations of wrongdoing asserted by Claimants. Smith Barney Respondents maintained that Claimants both expected that a portion of their accounts would be invested in stocks, and their investment objectives included growth. Smith Barney Respondents maintained that the accounts at Smith Barney were carefully supervised. Smith Barney Respondents maintained that in one instance, Mark D'Andrea persuaded the branch manager to let him "average down" in a stock after the manager had prohibited an additional purchase. Smith Barney Respondents maintained that the manager twice wrote to Dino D'Andrea to alert him to the costs, risks, and volatility of his account. Dino D'Andrea, well aware of these factors, acknowledged both letters. Smith Barney Respondents maintained that both accounts were profitable, they had total returns of at

least \$223,000 and \$151,000 when they left Smith Barney. Smith Barney Respondents maintained that the accounts lost money on purchases made at Mercer Securities, for which the Smith Barney Respondents cannot be liable.

Respondents PaineWebber and CSC contend that Claimants numerous allegations against PaineWebber and CSC amount to claims that they are liable for Claimants' losses on three theories. First, Claimants alleged that PaineWebber and CSC failed to supervise Schappell. Second, Claimants alleged that PaineWebber and CSC are liable because Schappell was their employee or "agent". Third, Claimants alleged that PaineWebber is liable to Claimants because PaineWebber allegedly was a market maker in certain securities they purchased and purportedly derived "substantial profits" from these sales. PaineWebber and CSC maintained that Claimants allegations fail as a matter of law. PaineWebber and CSC maintained that Claimants' claim should be dismissed because clearing firms have no direct or supervisory responsibilities to the customers of the brokerage firms to which they provide limited, specialized services.

RELIEF REQUESTED

Claimants requested that Respondents be jointly and severally liable for the following itemization of damages:

For Dino D'Andrea

- (1) The injuries for lost opportunity costs in the amount of \$582,685.
- (2) The imposition of 12% statutory interest from December 1994 to March 1997 in the amount of \$157,325.
- (3) Reimbursement for Dino D'Andreas' costs incurred and reasonable attorneys' fees and expert fees incurred in pursuing this proceeding pursuant to the New Jersey Unfair Trade Practices & Consumer Protection laws and Pennsylvania Unfair Trade Practices and Consumer Protection laws.

For Mark D'Andrea

- (1) The injuries for both realized and unrealized losses as well as lost opportunity costs in the amount of \$253,833.
- (2) The imposition of 12% statutory interest from December 1994 to March 1997 in the amount of \$68,535.
- (3) Reimbursement for Mark D'Andreas' costs incurred and reasonable attorneys' fees and expert fees incurred in pursuing this proceeding pursuant to the New Jersey Unfair Trade Practices & Consumer

Protection laws and the Pennsylvania Unfair Trade Practices and Consumer Protection laws.

Claimants Request for Punitive Damages

With respect to Smith Barney and Richard Carlin only, Claimants seek the imposition of punitive damages in the amount of \$3.4 million per Claimant.

Smith Barney Respondents requested, in their pleading, that the Statement of Claim be dismissed and that all costs of the arbitration be assessed against Claimants.

PaineWebber and CSC requested, in their pleading, that all claims against them be dismissed, and that the costs of this action be assessed against Claimants.

OTHER ISSUES CONSIDERED & DECIDED

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 the NASD Regulation.

Before the close of Claimants' case, the panel dismissed all claims against Connell. After the close of Claimants case, the panel granted Respondents PaineWebber's and CSC's Motion to Dismiss. The Panel also denied Respondents Carlin's Motion to Dismiss.

On August 14, 1995, Claimants' Statement of Claim was sent First Class Mail to the representative for Estate of Steven J. Schappell. On November 3, 1995 an warning letter advising the representative for Estate of Steven J. Schappell that Schappell's answer was overdue was mailed by certified mail. The certified mail was signed for by Jessica Schappell on November 13, 1995. These two letters are mark as Attachment A to this award.

On July 11, 1995 Mercer Securities terminated its membership with the NASD and filed a Form BDW.

Pursuant to Rule 10301 of the Code of Arbitration Procedure, the panel exercised its jurisdiction over Respondents Schappell and Mercer Securities. The panel determined that Schappell and Mercer were required to submit to this arbitration, notwithstanding their failure to appear, file answers or submit submission agreements. Respondents Schappell and Mercer Securities are bound by the panel's rulings and determination set forth in this award.

AWARD

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

1. Claimants' claims against Respondent Richard T. Carlin are denied in their entirety.
2. Respondent Smith Barney, Inc. is liable to Claimant Dino D'Andrea and shall pay to Dino D'Andrea the sum of \$69,684.00; inclusive of interest.
3. Respondent Smith Barney, Inc. is liable to Claimant Mark D'Andrea and shall pay to Mark D'Andrea the sum of \$24,762.00; inclusive of interest.
4. Respondents Mercer Securities and Estate of Steven J. Schappell are jointly and severally liable to Dino D'Andrea and shall pay to Dino D'Andrea the sum of \$181,965.00; inclusive of interest.
5. Respondents Mercer Securities and Estate of Steven J. Schappell are jointly and severally liable to Mark D'Andrea and shall pay to Mark D'Andrea the sum of \$71,668.00; inclusive of interest.
6. Claimants claims for punitive damages are denied in their entirety.
7. The parties shall bear their own costs and expenses, except as forum fees are specifically addressed below.
8. Any and all relief requests not address above are denied in their entirety.

OTHER COSTS

Any postponement fees deposited by the parties shall be retained by the NASD Regulation.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

$(25 \text{ hearing sessions} \times \$1,000) + (1 \text{ pre hearing session} \times \$300) = \$25,300$

Forum Fees Assessed Against: 1/4 to Claimants jointly and severally
1/4 to Smith Barney, Inc.
1/4 to Mercer Securities, Inc.
1/4 to Estate of Schappell

Claimants are jointly and severally assessed forum fees in the amount of \$6,325; however, Claimants are entitled to offset this amount with their hearing session deposit of \$1,000 and their overpayment of \$450 so that the amount due from Claimants is \$4,875.

Respondent Smith Barney, Inc shall pay forum fees in the amount of \$6,325.

Respondent Mercer Securities, Inc shall pay forum fees in the amount of \$6,325.


Respondent Estate of Stephen J. Schappell shall pay forum fees in the amount of \$6,325.

Fees are payable to NASD Regulation, Inc.

DATE

Concurring Arbitrators' Signatures

5/20/97



John J. Jordan, Esq. - Chairman
Public Arbitrator

Cynthia Turner, Esq. - Panelist
Public Arbitrator

Patricia Bird Reed - Panelist
Industry Arbitrator

Date Award served by NASD Regulation:

June 2, 1997

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1/4 to Mercer Securities, Inc.
1/4 to Estate of Schappell

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Fees are payable to NASD Regulation, Inc.

DATE

Concurring Arbitrators' Signatures

John J. Jordan, Esq. - Chairman
Public Arbitrator

5/21/97


Cynthia Turner, Esq. - Panelist
Public Arbitrator

Patricia Bird Reed - Panelist
Industry Arbitrator

Date Award served by NASD Regulation:

June 2, 1997

Forum Fees Assessed Against: 1/4 to Claimants jointly and severally
1/4 to Smith Barney, Inc.
1/4 to Mercer Securities, Inc.
1/4 to Estate of Schappell

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Respondent Estate of Stephen J. Schappell shall pay forum fees in the amount of \$6,325.


Fees are payable to NASD Regulation, Inc.

DATE

Concurring Arbitrators' Signatures

John J. Jordan, Esq. - Chairman
Public Arbitrator

Cynthia Turner, Esq. - Panelist
Public Arbitrator



Patricia Bird Reed - Panelist
Industry Arbitrator

Date Award served by NASD Regulation:

June 2, 1997

ATTACHMENT A

Case #95-03845

NASD Arbitration

National Association of Securities Dealers, Inc. • NASD Financial Center • 33 Whitehall Street • New York, NY 10004 • Fax 212-838-4389

August 14, 1995

Stephen J. Shappell
Estate of Stephen Schappell
c/o Executor Bruce Schappell
4234 Quail Springs Circle
Martinez, GA 30907

Subject: NASD Case Number 95-03845
Mark D'Andrea and Dino D'Andrea vs. Estate of Stephen
Schappell, Smith Barney, Mercer Securities, et al.

Dear Mr. Shappell:

The NASD provides a forum for the resolution of disputes involving public investors and broker-dealers. This Arbitration office administers that forum, according to the procedures set forth in the NASD Code of Arbitration Procedure ("Code").

Enclosed is a Submission Agreement and a copy of the Code. Since you were named as a party in this arbitration, the Statement of Claim is being sent to you. You are required by the rules of the NASD to arbitrate this dispute.

Since the claimant has requested damages totalling one million dollars or more, this case is eligible as a Large and Complex case. Section (46) of the Code outlines the special procedures that apply to Large and Complex cases.

Your Statement of Answer must specify all available defenses and all the relevant facts. (See Section 25(b) of the Code.) In addition, your Answer may include any related claim(s) that you may have against the Claimant or any other party subject to arbitration under the Code.

Pursuant to Section 25(b) of the Code, you are required, no later than September 19, 1995, (which is twenty business days from your receipt of this Claim), to send to the Claimant and all other parties, an executed Submission Agreement and your Answer. Claimant or claimant's counsel's address is provided at the end of this service letter.

The Code also requires that you send to the Director of Arbitration: (a) the original and one copy of the Submission Agreement, properly executed by you before a qualified notary public; (b) two copies of your Answer and (c) two

copies of any document(s) referred to in your Answer. When sending copies of your Answer to the Director of Arbitration, please indicate that you have served your Answer on all parties.

Remember, if your Answer is not served upon all parties, a motion to preclude your Answer may be made pursuant to Section 25(b) of the Code. In addition, failure to provide the NASD with copies of your Answer as described above will preclude it from inclusion in the package of pleadings provided to the arbitrator(s) for their use.

If after reading the enclosed "Guidelines for the Service of Pleadings" and the Code, you still have questions regarding NASD arbitration, please contact me. When contacting me, please refer to the case number assigned to this case. The case number is 95-03845.

Pursuant to Article IV, Section 2(c) of the NASD By-Laws, if you are a Registered Representative filed with the NASD, you are required to keep current your application for registration. You are therefore, advised to review the Form U-4 to determine if disclosure of this matter is required. If so, your failure to update your registration record could result in the filing of a formal complaint based on omission. Any questions regarding this disclosure requirement should be directed to the NASD Member Services Phone Center (301) 590-6500.

Very truly yours,

Ira Goldberg
Legal Assistant
212-858-4100

IG:DAN:LC39J 5/95
cc: Claimant(s)

NASD Arbitration & Mediation

National Association of Securities Dealers, Inc. • NASD Financial Center • 33 Whitehall Street • New York, NY 10004 • Fax 212-858-4429
Washington DC Satellite Office Located at: 1735 K Street, NW • Washington, DC 20006 • Fax 202-728-8925

November 3, 1995

CERTIFIED MAIL

FILE COPY

Subject: NASD Arbitration Number 95-03845
Mark D'Andrea and Dino D'Andrea vs. Estate of Stephen Schappell, Smith Barney,
Mercer Securities, et al.

Dear :

The NASD Arbitration has not received a copy of your Statement of Answer in the above captioned case as required by Section 25(b) of the NASD Code of Arbitration Procedure. This case will continue to be processed with or without your Statement of Answer. You should be aware that, notwithstanding your failure to answer, an Award may, in the arbitrators' discretion, be rendered against you.

If you require a second copy of the Statement of Claim previously served on you or if you have any questions concerning this matter, please contact Ira Goldberg.

Very truly yours,

Ira Goldberg
Legal Assistant
NY/212-858-4100

IG:DAN:LC28A
11/9/95

CC: Denis C. Dice, Esq., Mark D'Andrea

RECIPIENTS:
Stephen J. Shappell

Z 119 682 110



Receipt for
Certified Mail
No Insurance Coverage Pro
Do not use for International
(See Reverse)

Sent to	
Stephen J. Shappell	
Street and No.	
P.O., State and Zip Code	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	\$
Postmark or Date	
11/12/95	

01m 3800, March 1993

the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date.

I also wish to receive following services (for an extra fee):

- 1. ☐ Addressee's Address
 - 2. ☐ Restricted Delivery
- Consult postmaster for fees.

95-03845

4a. Article Number

7 119 682 110

Stephen J. Schappell
Estate of Stephen Schappell
c/o Executor Bruce Schappell
4234 Quail Springs Circle
Martinez, GA 30907

4b. Service Type

- ☐ Registered ☐ Insured
- ☒ Certified ☐ COD
- ☒ Express Mail ☐ Return Receipt Merchandise

7. Date of Delivery

11-13-95

Is your RETURN

5. Signature (Addressee)

James E. Schappell

6. Signature (Agent)

8. Addressee's Address (Only if required and fee is paid)

PS Form 3811, December 1991

U.S. GPO: 1993-352-714

DOMESTIC RETURN REC

UNITED STATES POSTAL SERVICE

Official Business



PENALTY FOR PRIVATE
USE TO AVOID PAYMENT
OF POSTAGE, \$300



Print your name, address and ZIP Code here

N.A.S.D. INC
ARBITRATION DEPT 8th FL.
33 WHITEHALL STREET
NEW YORK, NEW YORK 10004