

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Nancy Smith

Claimant,

v.

No. 95-04191

Smith Barney, Inc., and
Erik Littlejohn

Respondents.

REPRESENTATION OF PARTIES

Claimant Nancy Smith ("Claimant") was represented by Michael Farrell, Esq. of The Kullman Firm located in Jackson, Mississippi.

Respondents Smith Barney, Inc. ("Smith Barney") and Erik Littlejohn ("Littlejohn") (collectively referred to as "Respondents") were represented by Ellen Slipp, Esq. of Smith Barney, Inc. located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about August 31, 1995. Claimant's Submission Agreement was signed on October 9, 1995.

Respondents' Joint Statement of Answer was filed on or about December 20, 1995.

Respondent Smith Barney, Inc.'s Submission Agreement was signed on December 19, 1995 by Ellen Slipp, Vice President of Smith Barney, Inc.

Respondent Littlejohn's Submission Agreement was signed on January 21, 1997.

Claimant's Motion to determine the applicability of Mississippi law was filed on or about January 21, 1997. Respondents' Response to Claimant's Motion to determine the applicability of Mississippi law was filed on or about February 10, 1997.

HEARING INFORMATION

The telephonic pre-hearing conferences were held on: April 25, 1996 for one (1) session; August 16, 1996 for one (1) session; and January 28, 1997 for one (1) session.

The Hearing was held on: August 20, 1996 for two (2) sessions; August 21, 1996 for two (2) sessions; August 22, 1996 for two (2) sessions; February 12, 1997 for three (3) sessions; February 13, 1997 for three (3) sessions; and February 14, 1997 for one (1) session.

The Hearing was held in New Orleans, Louisiana (August dates) and Baton Rouge, Louisiana (February dates).

CASE SUMMARY

Claimant Nancy Smith filed this claim against Respondents Smith Barney, Inc. and Erik Littlejohn for churning, the sale of unsuitable securities and unauthorized trading. Claimant alleged that she opened an account at Respondent Smith Barney in 1993, and that Respondent Littlejohn was her broker. Claimant contended that she told Respondent Littlejohn that she was a conservative investor who did not have time or expertise to manage her own account. Claimant asserted that Respondents embarked on an investment plan or strategy that was wholly unsuitable to her investment objectives. Claimant maintained that Respondents churned her account in order to generate commissions, rather than preserve capital and generate returns for Claimant, and that Respondents made 29 unauthorized trades.

Respondents denied all liability to Claimant in the Joint Statement of Answer. Respondents alleged that Claimant's account was handled in a professional manner throughout the time it was maintained at Smith Barney. Respondents contended that Respondent Littlejohn and his supervisors acted in an honest, competent and professional manner in dealing with the Claimant. Respondents asserted various defenses, including: failure to state a claim upon which relief may be granted; the claims premised upon rule 10b-5 are barred by the statute of limitation; that the Respondents did not make a material misrepresentation or omission upon which Claimant relied; that punitive damages may not be awarded; and that having received confirmations and monthly statements, and having failed to object thereto, Claimant is estopped from claiming against Respondents.

RELIEF REQUESTED

Claimant requested an award of \$111,793, plus legal fees and interest as provided by Mississippi law.

Respondents requested that the Claim be dismissed and that Respondents be awarded their costs, including reasonable attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

Claimant moved for sanctions against Respondents and Respondents' counsel for the alleged willful and fraudulent failure to produce documents adverse to Respondents' case which were requested in discovery and ordered produced by the panel in a preliminary conference held on April 25, 1996. After considering evidence and arguments from both sides regarding the Motion for Sanctions, the panel has concluded that the documents of the type in question were clearly and unambiguously ordered produced and counsel for Respondents indicated a clear understanding that such documents were to be produced. The panel also concludes that the written order issued on behalf of the panel following the discovery conference could not have been misunderstood by anyone participating in the conference. Therefore, the panel finds that Respondents' counsel was grossly negligent in failing to produce the document in question. However, the panel is unable to find that Respondents' counsel engaged in the intentional concealment of information damaging to Respondents' case. In considering the award of damages and attorney fees in this case and because it is clear that the Claimant has suffered no prejudice as a result of the failure to produce the document in question, the panel has chosen not to impose sanctions or make a disciplinary referral. Accordingly, the Motion for Sanctions is hereby denied.

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 have decided in full and final resolution of the issues submitted for determination as follows:

- (1) That Respondents Smith Barney, Inc. and Erik Littlejohn are jointly and severally liable for and shall pay to Claimant Nancy Smith compensatory damages in the amount of Ninety One Thousand Two Hundred Eight Dollars and No Cents (\$91,208.00), plus interest at the rate of 8% which shall begin to accrue on August 31, 1995 and shall continue to accrue until the date this Award is paid in full;

- (2) That Respondents Smith Barney, Inc. and Erik Littlejohn are jointly and severally liable for and shall pay to Claimant Nancy Smith attorney fees in the amount of Thirty Seven Thousand Five Hundred Dollars and No Cents (\$37,500.00). In deciding to award attorney fees, the panel considered the arguments of the parties and authority cited, including MS Code Section 75-71-717, and determined that authority existed for an award of attorney fees;
- (3) That Respondents Smith Barney, Inc. and Erik Littlejohn shall reimburse Claimant Nancy Smith for the NASD filing fee in the amount of Two Hundred Dollars and No Cents (\$200.00); and
- (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, hereby dismissed 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 three (3) pre-hearing sessions x \$300 = \$900 in forum fees. There were thirteen (13) hearing session x \$750 = \$9,750 in forum fees. Total forum fees are \$10,650. 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 \$200 and shall retain the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant as payment of outstanding postponement fees.

Pursuant to 10332(c) of the Code, Respondents Smith Barney, Inc. and Erik Littlejohn are liable for and shall pay forum fees in the amount of \$10,650.

Pursuant to 10332(c) of the Code, Respondent Smith Barney, Inc. is liable for and shall pay its Member Surcharge in the amount of \$350.

Fees are payable to the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

\s\ Edward J. Gay, III, Esq.
Edward J. Gay, III, Esq.
Chairperson
Public Arbitrator

February 20, 1997
Dated:

\s\ S. David Holladay, Esq.
S. David Holladay, Esq.
Panelist
Public Arbitrator

February 21, 1997
Dated:

\s\ Charles E. Melancon
Charles E. Melancon
Panelist
Industry Arbitrator

February 21, 1997
Dated:

For NASD Regulation use only:
Date Award Served on the Parties: February 27, 1997