

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Richard Fuscone, as Executor for the
Estate of Frank L. Gentile, Deceased,

and

95-04646

Name of Respondents

Kemper Securities, Inc., now known as
Everen Securities, Inc.;
Michael Kavanagh.

REPRESENTATION OF PARTIES

For Claimant: Claimant Richard Fuscone, as executor of the Estate of Frank L. Gentile ("Gentile"), was represented by Peter M. King, Esq. of Canel Davis & King, of Chicago, Illinois.

For Respondents: Respondents Kemper Securities Inc. ("Kemper"), now known as Everen Securities, Inc. and Michael Kavanagh ("Kavanagh") were represented by Nancy Hendrickson, Esq. and Christopher J. Barber, Esq. of Ungaretti & Harris, located in Chicago Illinois.

CASE INFORMATION

Statement of Claim filed on: October 18, 1995.

Claimant's Submission Agreement signed on: September 21, 1995 by Richard Fuscone as Executor for the Estate of Frank L. Gentile.

Statement of Answer filed by Kemper and Kavanagh on: January 15, 1996.

Kemper's Submission Agreement signed on: January 1, 1996 by Renan Sugarman, Vice President/
Senior Attorney for Kemper, Inc.

Kavanagh's Submission Agreement signed on: January 22, 1996.

Motion to Amend Statement of Claim filed: May 30, 1996.

Response to the Motion to Amend filed: June 10, 1996.

Amended Statement of Claim filed: May 30, 1996

Response to Amended Statement of Claim filed: September 3, 1996.

Claimant's Motion to Bar Pursuant to Section 10314(b)(2)(iii) filed: September 4, 1996.

Respondents' Response to the Motion to Bar filed: September 6, 1996.

Claimant's Reply Brief filed: September 6, 1996.

HEARING INFORMATION

Pre-Hearing Conferences: February 27, 1996 for One (1) session with staff;
June 20, 1996 for One (1) session with staff; and
July 31, 1996 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: September 25, 1996 for Two (2) sessions;
September 26, 1996 for Two (2) sessions;
September 27, 1996 for Two (2) sessions; and
September 30, 1996, for Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Gentile alleged that Kavanagh traded without authorization, churned Gentile's account, and breached his fiduciary duty to Gentile. Gentile also alleged that Kemper, Inc. negligently failed to supervise Kavanagh. Specifically, Gentile alleged that:

1. Kavanagh acted as Gentile's broker at PaineWebber from September 1989 until August 1992. Subsequently, Kavanagh worked for Kemper, Inc. and acted as Gentile's broker from August 1992 until Gentile's death in January 1994;
2. Because of their investment relationship, Kavanagh was aware of Gentile's alcoholism;
3. From 1992 through 1994, Gentile's alcoholism worsened resulting in repeated hospitalization, frequent employment absences and physical therapy;
4. In spite of Gentile's medical condition, Kavanagh traded in Gentile's account without authorization. Further, even if Kavanagh spoke with Gentile before trading, Gentile was incapable of making rational investment decisions;
5. In 1993 Kavanagh churned Gentile's account by turning over the account eleven times;
6. Kavanagh breached his fiduciary duty to Gentile by trading without authorization and churning Gentile's account. Kemper, Inc. breached their fiduciary duty to

Gentile by failing to supervise Kavanagh resulting in the unauthorized trading and churning; and

7. Finally, as agents of Gentile, Kavanagh and Kemper, Inc. owed Gentile a duty to exercise reasonable care and diligence in managing Gentile's account. Both Respondents were negligent in breaching this duty for the violations mentioned above.

Based upon the above allegations, Claimant asserted claims for breach of fiduciary duty and negligence.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that:

1. Gentile explicitly authorized all of Kavanagh's trades. Telephone records show that Gentile and Kavanagh talked frequently. Moreover, although Gentile suffered from several physical problems because of his alcoholism, there is no evidence to suggest that Gentile could not make investment decisions. Contrary to Gentile's allegations, evidence clearly showed that Gentile discussed his financial statement with his accountant as late as June 30, 1993;
2. Gentile and his son implicitly authorized all of Kavanagh's trades by failing to complain of any objectionable trading;
3. Kavanagh did not churn Gentile's account. First, Gentile was a wealthy, financially experienced customer who frequently traded aggressively and speculatively. Second, Gentile controlled his own account by approving or rejecting all of Kavanagh's trades. Third, Kavanagh did not intend to defraud Gentile; and
4. Gentile overstated his damage claim by alleging improper trading activity that occurred before Gentile transferring his account to Kemper, Inc. Moreover, there is no basis for punitive damages here.

In addition, Respondents asserted the affirmative defenses of waiver, ratification and estoppel.

RELIEF REQUESTED

Gentile requested an award of damages in excess of \$200,000 plus interest, attorneys' fees and punitive damages.

Respondents requested that the Panel enter an award denying the claim in its entirety, dismissing the Claim with prejudice and awarding Respondents such other relief as the Panel deems just and proper, including attorneys' fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

On July 29, 1996, the Panel granted Claimant's Motion to Amend the Statement of Claim.

On September 24, 1996, the Panel denied the Claimant's Motion to Bar, allowing Claimant to request the exclusion of any evidence which was offered in rebuttal to factual allegations which could have been denied in the Amended Answer, but were not.

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 originals remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, 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 Kemper Securities, Inc., now known as Everen Securities, Inc., and Michael Kavanagh are jointly and severally liable for and shall pay to Claimant Richard Fuscone, as executor for the Estate of Frank L. Gentile, the sum of \$77,000.00 as compensatory damages;
2. In addition, Respondent Michael Kavanagh is individually liable for and shall pay to the Claimant Richard Fuscone, as executor for the Estate of Frank L. Gentile, an additional sum of \$77,000.00 as compensatory damages;
3. The claims for punitive damages are hereby dismissed and denied;
4. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein;
5. Any relief not specifically granted is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$ 750.00 per hearing session and \$300.00 for each prehearing conference with arbitrators, if any. There was One prehearing conference x \$300.00 = \$300.00; Eight hearing sessions x \$ 750.00 = \$ 6,000.00; Total forum fees = \$6,300.00. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrators, including a prehearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$ 200.00 and shall **refund** as forum fees the hearing session deposit in the amount of \$ 750.00 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant. In addition, the Office of Dispute Resolution shall retain the \$350.00 extra member surcharge paid by Respondent Kemper and apply the sum towards the forum fees due. Therefore, Respondents Kemper Securities, Inc., now known as Everen Securities, Inc., and Michael Kavanagh are jointly and severally liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution the sum of \$6,300.00 as forum fees, minus the sum of \$350.00, for a total due in the amount of \$5,950.00.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350.00 paid by Respondent Kemper Securities, Inc., now known as Everen Securities, Inc.

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

Concurring Arbitrators' Signatures

Dated:

/s/ James L. Schwartz, Esq.
James L. Schwartz, Esq.
Public Arbitrator, Presiding Chair

February 7, 1997

/s/ Paul H. Thomas
Paul H. Thomas
Public Arbitrator

February 7, 1997

/s/ Carmen P. Michelotti
Carmen P. Michelotti
Industry Arbitrator

February 11, 1997