

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Estate of Margaret G. Eyler

95-04839

Name of Respondent(s)

Buckhead Financial Corporation
David Blackwood

REPRESENTATION

Claimant, the Estate of Margaret G. Eyler ("the Estate"), was represented by Robert M. Weinberger, Esq. of Cohen Chernay Norris Weinberger & Harris, North Palm Beach, Florida.

Respondent Buckhead Financial Corporation ("Buckhead") was originally represented by Gregory R. Crochet, Esq. of Kutak Rock, Atlanta, Georgia who subsequently withdrew as counsel for Buckhead. The representative for Buckhead for the remainder of the case was Brent E. Hippert of Buckhead in Atlanta, Georgia.

Respondent David Blackwood ("Blackwood") was pro se.

CASE INFORMATION

Statement of Claim filed: November 16, 1995. Claimant's Submission Agreement signed on: November 7, 1995 by Maria Armour as trustee of the Estate.

Statement of Answer filed by Respondent Buckhead on: January 16, 1996. Respondent Buckhead failed to file a Submission Agreement as required by Rules 10301 and 10314 of the NASD Code of Arbitration Procedure (see "Other Issues").

Statement of Answer filed by Respondent Blackwood on: January 17, 1996. Respondent Blackwood's Submission Agreement signed on: January 16, 1996.

HEARING INFORMATION

On January 8, 1997 in Ft. Lauderdale, Florida, a hearing lasting one session was conducted.

CASE SUMMARY

Claimant alleged that Respondents were liable for: failure to exercise due diligence; recommending an unsuitable investment; and, breach of fiduciary duty. Claimant alleged that Margaret Eyler ("Eyler") was an elderly individual who, before becoming involved with Respondents, had limited experience in investments. Claimant maintained that Respondents solicited Eyler to invest in the Continental Capital Income Fund II limited partnership ("Continental") which was to use the proceeds of the investors' money to fund mortgage loans to a company that was owned by the principals of the general partner of the partnership. Claimant further maintained that on September 19, 1994, the SEC filed a complaint which alleged wrongdoing by the partnership, the general partner and the owners thereof, including misrepresentations in the private placement memorandum and misappropriation of funds. Claimant alleged that the entire offering was fraudulent and that the deficiencies in the partnership, as well as the underlying fraud on the part of the principals, should have been readily apparent to a reasonably prudent account executive and to Respondents if they had exercised due diligence.

Respondent Buckhead denied all allegations of wrongdoing and alleged the following: Buckhead, as a selling agent, did not have a duty to conduct due diligence and was not in a fiduciary relationship with Eyler; the investment was suitable for Eyler and was appropriately presented by Blackwood; and, any losses occurred as a result of the conduct on the part of Continental and its principals.

Buckhead further maintained the following: Eyler first became a client of Blackwood in 1972; Eyler's investment objectives included a diversified portfolio which was consistent with the objectives of the limited partnership investment at issue; Eyler understood the risks involved in the investment; and, Eyler was financially suitable for the investment. Respondent Buckhead asserted affirmative defenses including: failure to timely complain about the transaction; ratification; assumption of risk; statute of limitations; statute of frauds; economic loss rule; res judicata; estoppel; and, Eyler made all of her own investment decisions.

Respondent Blackwood denied all allegations of wrongdoing and alleged the following: Eyler was a highly experienced investor who had managed her investments for decades; Eyler sought increased income with some growth potential to offset the effects of inflation and also achieve some tax benefits and was willing to sacrifice liquidity to obtain same; and, the investment at issue was in accord with Eyler's investment philosophy. Blackwood further alleged the following: he was not legally responsible for performing due diligence; the Statement of Claim failed to state a legal basis for the claim; and, Claimant was estopped from denying the representations made in the private placement memorandum.

RELIEF REQUESTED

Claimant requested damages in the amount of \$50,000.00, plus punitive damages and such other

relief as the panel deemed just and proper.

Respondent Buckhead requested dismissal of the claim, plus its litigation expenses, costs and fees.

Respondent Blackwood requested dismissal of the claim.

OTHER ISSUES CONSIDERED & DECIDED

1. The panel finds the Respondent Buckhead was required to sign a Submission Agreement as required by Rules 10301 and 10314 of the NASD Code of Arbitration Procedure, Buckhead being an NASD member firm at the time the facts giving rise to the controversy occurred.

2. Respondents Buckhead and Blackwood moved to dismiss the claim pursuant to Section 10301(d)(2) of the NASD Code of Arbitration Procedure on the grounds that said claim was believed to be encompassed by a putative or certified class action and Claimant had not elected to opt out of the class action. At the hearing, Claimant affirmatively stated on the record that she had not received any notice of any class action having been filed in connection with the investment at issue in this case but that, in the event that Claimant was included in any class action relating to the investment at issue in this matter, she would opt out of such class action. Based upon that representation, the panel hereby denies Respondents' Motions to Dismiss.

3. On December 31, 1996, the NASD received a letter from Paul E. DeFriece, Board Appointed Trustee for Respondent Buckhead, which referenced this arbitration proceeding and indicated that Buckhead submitted a form BDW to the NASD with an effective date of December 11, 1996. The letter stated that Buckhead had ceased its operations and was in the process of liquidation. The letter further stated that it had been determined that the assets of the firm were insufficient to satisfy the creditors of the firm and that the firm was attempting to negotiate non-bankruptcy settlements with their creditors. Additionally, the letter stated that Buckhead was thereby notifying the Claimant that, because of the lack of resources, it would not be able to appear or respond to this arbitration. This correspondence was included as part of Arbitrator's Exhibit #1 at the beginning of the hearing.

4. Based on the evidence contained in Arbitrator's Exhibit #1 and in the record of the proceedings, the panel finds that Buckhead received due notice of this proceeding as required by Rule 10318 of the NASD Code of Arbitration Procedure.

5. At the beginning of the hearing, Claimant announced that she was withdrawing her claim against Respondent Blackwood with prejudice. Consequently, Blackwood is hereby dismissed from this matter with prejudice and the panel has made no findings with respect to Blackwood.

6. The parties that appeared at the hearing 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, these parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.

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. Respondent Buckhead is found liable and shall pay to Claimant the sum of \$68,571.43, which includes damages in the amount of \$50,000.00 plus interest to be paid as set forth below:
 - a. Interest shall be paid at the rate of 10% per annum;
 - b. Interest shall be paid on the sum of \$30,000.00 from February 12, 1993 to January 8, 1997 in the amount of \$11,752.75; and,
 - c. Interest shall be paid on the sum of \$20,000.00 from August 16, 1993 to January 8, 1997 in the amount of \$6,818.68.
2. Claimant's request for punitive damages is denied.
3. Respondent Buckhead's request for litigation expenses, costs and fees is denied.
4. Respondent Buckhead shall reimburse to Claimant the amount of \$500.00 previously paid by Claimant to the NASD as a hearing session deposit.

OTHER COSTS

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Rule 10332 of the NASD Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$500.00 (one session x \$500.00 per session).

1. Respondent Buckhead is hereby assessed \$500.00 for which the NASD shall retain the \$500.00 previously deposited by Claimant in full satisfaction thereof.
2. The NASD shall retain the \$150.00 non-refundable filing fee previously paid by Claimant.

NASD Case Number 95-04839

Award

Page - 5 -

3. Respondent Buckhead is hereby assessed the \$300.00 member surcharge pursuant to Rule 10333 of the NASD Code of Arbitration Procedure which amount became due and owing when the NASD perfected service of the claim on Buckhead.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

 /s/
Garry O'Donnell, Esq.

Public/Chairman

 /s/
George L. Davis

Public

 /s/
David M. Levine

Industry

Date of Decision: February 14, 1997