

NASD REGULATION, INC. AWARD

Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Town of Bay Harbor Islands

95-05778

Name of Respondents

First Union Brokerage Services, Inc.
Brian Hurse

REPRESENTATION OF PARTIES

For Claimant Town of Bay Harbor Islands ("Town"): Scott L. Warfman, Esq. of the law firm of Bloom & Warfman, P.A., Miami, Florida.

For Respondents First Union Brokerage Services, Inc. ("First Union") and Brian Hurse ("Hurse"): Angela G. Miele, Esq. and Michael K. Wolensky, Esq. of the law firm of Kutak Rock, Atlanta, Georgia.

CASE INFORMATION

Statement of Claim was filed on December 7, 1995 and the Amended Statement of Claim was filed on May 29, 1996. Submission Agreement of Claimant was signed on January 5, 1996.

Statement of Answer was filed by Respondents on March 28, 1996 and the Answer to the Amended Claim was filed on July 12, 1996. Submission Agreement of First Union was signed on April 5, 1996 by Barbara H. Wright and Submission Agreement of Hurse was signed on April 2, 1996.

HEARING INFORMATION

A pre-hearing conference was held on May 1, 1997 with the Chairperson presiding.

The evidentiary hearing was held on August 5, 6, and 7, 1997, in Fort Lauderdale, Florida for a total of six (6) sessions.

CASE SUMMARY

Claimant asserted claims for violation of Section 10(b) of the 1934 Securities Exchange Act, Rule 10b-5 thereunder, and Section 517.301, Florida Statutes as well as common law fraud, negligence, and breach of fiduciary duties.

Claimant alleged that the Town maintained two accounts at First Union, the Bay Harbor Islands FL Trust U/A Town and the Bay Harbor Islands FL Trust U/A Contingency, which were serviced by Respondent Hurse. Claimant further alleged that it advised Respondents that it required good quality investments which were consistent with the Town's need for liquidity and which possessed the essential characteristic of preservation of principal. Claimant contended that Respondents made misrepresentations of and omitted to disclose material facts in their recommendation of the purchase of Collateralized Mortgage Obligations ("CMOs") for the two accounts; that CMOs were not suitable for the Town's investment objectives and were contrary to the Town's investment policies, Florida statutes, and other regulations; and, that due to Claimant's reliance upon the Respondents' recommendations, the Town sustained losses including lost interest.

Respondents denied all liability and asserted that the investments were permitted by statute and by the Town's resolution; that the investments were suitable for the Town; that all losses resulting from the sale of the CMO investments were caused by, among other factors, the market downturn in 1994 and not by the actions of Respondents; that the Town failed to exercise due diligence as required by law; and, that the Town had failed to allege proof of scienter which is necessary to establish a claim for fraud. Respondents also asserted the affirmative defenses of failure to state a claim upon which relief can be granted; good faith and lack of intent; knowledge of and assumption of risk; estoppel and bar; lack of reasonable reliance; no proximate cause; contributory and comparative negligence; and, that claims other than breach of contract were barred by the economic loss rule.

RELIEF REQUESTED

Claimant requested damages in the amount of \$388,988.09, per diem interest at the statutory rate of 8%, treble damages, punitive damages, attorney's fees, costs, and other relief.

Respondents requested dismissal, litigation expenses, costs, attorney's fees, and that all filing and forum fees be assessed against the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

1. At the conclusion of the presentation of the Respondents' evidence and prior to closing arguments, the Town voluntarily dismissed Respondent Hurse with prejudice. Therefore, this panel made no determination regarding the liability of Respondent Hurse.
2. 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 the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. Respondent First Union is found not liable and, therefore, all claims against it are hereby dismissed.
2. Claimant's requests for per diem interest, treble damages, punitive damages, attorney's fees, costs, and other relief are denied.
3. Respondent First Union's requests for litigation expenses, costs, attorney's fees, and that all filing and forum fees be assessed against the Claimant are denied.

FORUM FEES

Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure ("Code"), a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the panel has assessed forum fees in the amount of \$8,300.00 (1 pre-hearing conference [\$300.00] plus 6 hearing sessions x \$1,000.00 per session).

1. Claimant is assessed the sum of \$3,150.00, for which NASD Regulation, Inc. shall retain the \$1,000.00 previously deposited in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. in the amount of \$2,150.00.
2. Respondent First Union is assessed the sum of \$3,150.00 payable to NASD Regulation, Inc.
3. NASD Regulation, Inc. shall retain the claim filing fee of \$250.00 paid by the Claimant.
4. Pursuant to Rule 10319 of the Code, Claimant is assessed a postponement fee in the sum of \$1,000.00, for which NASD Regulation, Inc. shall retain the \$500.00 previously deposited in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. in the amount of \$500.00.

Fees are payable to NASD Regulation, Inc.

Concurring Arbitrators Signatures

_____/s/
Alan Kilik, Esq.
Public Arbitrator, Presiding Chair

_____/s/
Norman L. Weiss
Public Arbitrator

_____/s/
Marc S. Piven
Industry Arbitrator

Date of Decision: August 26, 1997