

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of Arbitration Between

H.G. Bossley and Carole P. Bossley,

Claimants,

and

No. 95-05855

Mariner Financial Group, Inc., Joe F. Moore, Jr., and  
Brokers Transaction Services, Inc.,

Respondents.

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## **REPRESENTATION OF PARTIES**

Claimants H.G. Bossley and Carole P. Bossley were represented by Don K. Leufven, Esquire of Alonso & Cersonskym P.C., located in Houston, Texas.

Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr. were represented by Norman T. Reynolds, Esquire of Houston, Texas.

Respondent Brokers Transaction Services, Inc. was represented by Will S. Montgomery, Esquire of Jenkins & Gilchrist located in Dallas, Texas.

## **CASE INFORMATION**

Claimants H.G. Bossley and Carole P. Bossley's Statement of Claim was filed on or about December 13, 1995. Claimants H.G. Bossley and Carole P. Bossley's First Amendment to the Statement of Claim was filed on or about March 19, 1997. Claimant H.G. Bossley and Carole P. Bossley's Submission Agreement was signed on November 16, 1995.

Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr.'s Statement of Answer was filed on or about January 10, 1996. Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr.'s First Amended Statement of Answer was filed on or about July 12, 1996. Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr.'s Second Amended Statement of Answer was filed on or

about April 18, 1997. Respondent Mariner Financial Group, Inc.'s Submission Agreement was signed on January 10, 1996 by Patrick J. Arnett, President of Mariner Financial Group, Inc. Respondent Joe F. Moore, Jr.'s Submission Agreement was signed on December 21, 1996.

Respondent Brokers Transaction Services, Inc.'s Statement of Answer was filed on or about January 30, 1996. Respondent Brokers Transaction Services, Inc.'s Statement of Answer to the First Amendment to the Statement of Claim and Counterclaim was filed on or about April 18, 1997.

### **HEARING INFORMATION**

Pre-hearing conferences were held on:           August 2, 1996 for one (1) session;  
  September 6, 1996 for one (1) session; and  
  April 7, 1997 for one (1) session.

The hearing was held on:                        April 28, 1997 for two (2) sessions; and  
  April 29, 1997 for two (2) sessions.

The hearing was held in:                       Houston, Texas.

### **CASE SUMMARY**

Claimants H.G. Bossley and Carole P. Bossley ("Claimants") brought this action to recover losses they allegedly sustained from their investments with Respondent Joe F. Moore, Jr. ("Moore") and J. Terry Stewart, Jr. ("Stewart"), who passed away in January 1995, while they were both registered representatives of Rhodes Securities, Inc., Respondent Brokers Transaction Services, Inc. ("BTS"), and Respondent Mariner Financial Group, Inc. ("Mariner").

According to Claimants, after originally investing in "blue chip" stocks and high quality bonds, they gave Stewart discretionary authority to purchase and sell stocks in their account, which consisted of retirement funds. Claimants asserted that Stewart then began recommending low-priced stocks and transformed their "blue chip" portfolio into penny stocks such as Luxor Industrial Corporation, Sun Entertainment Holding Corporation, and National Healthcare Alliance, Inc. Claimants then asserted that Stewart and Moore joined BTS and continued to hold and accumulate speculative stocks for Claimants. Claimants stated that Moore formed Mariner in June of 1994 where he worked with Stewart until Stewart's death. Mariner, like the other brokerage firms, according to Claimants, did not obtain a new account form or suitability information concerning either the customers or the holding of penny stocks. Claimants alleged that Mariner's failure to comply with standard new account procedures and its failure to review the new account when it was opened was a cause of the losses to their account. Claimants further asserted that the account statements of all the firms showed

that their individual retirement account was maintained at about its initial value until the December 1994 Mariner statement showing their account, which was previously valued at \$135,077.43, fell suddenly to \$53,853.43 during the prior quarter. Claimants stated that they transferred their account to an unrelated firm and were able to recover \$35,803.87 by selling the three aforementioned penny stocks in August 1995.

Claimants alleged that Respondents Mariner, Moore, and BTS are liable for: unsuitable recommendations and sales; block trading and breach of fiduciary duty; misrepresentation; breach of contract; and failure to supervise. In addition, Claimants alleged that Respondents Mariner, Moore, and BTS, and others, engaged in a conspiracy to cover up securities transactions in restricted or privately held common stock that was held by a corporation owned by or for the benefit of one or more of the conspirators.

Respondents Mariner and Moore denied the allegations set forth in the Statement of Claim and First Amendment to the Statement of Claim as they related to any wrongdoing on their part. Mariner and Moore stated that Claimants elected to purchase penny stocks even though Stewart and the various brokerage firms where the trades were effected, gave Claimants notice of the risks associated with their investments in penny stocks. Moreover, Mariner and Moore contended, at no time when any of the alleged trades in the penny stocks were made by Stewart, was Stewart an employee of Mariner or Moore. In sum, Mariner and Moore asserted that the Statement of Claim and the First Amendment to the Statement of Claim failed to state a cause of action against either of them upon which relief could be granted and therefore the Statement of Claim and First Amendment to the Statement of Claim should be dismissed.

Respondents Mariner and Moore asserted the following affirmative defenses: (1) Claimants' claims were barred by the relevant statute of limitations; (2) Claimants were estopped by their own conduct from complaining about their investment in the stocks in the Claimants' account; (3) Claimants waived their claims, or ratified the actions of which they complained; (4) Claimants assumed the risks of investing in penny stocks when they were notified of such risks and elected to go forward with the investment in same; (5) Claimants were guilty of laches in failing to take all necessary steps to protect their interests; (6) Claimants failed to mitigate their damages due to the fact that they sold the penny stocks in their account in such a manner as to exacerbate their losses; (7) because the law imposes upon investors an obligation to act with reasonable due diligence in the protection of their own interests, if Claimants failed to take steps to minimize their risks, or to inform themselves more fully of the stocks purchased for them by Stewart by reading the information available to them, then the responsibility for any losses rests with Claimants and no one else; (8) the purchase of the penny stocks complained of by Claimants were transactions exempt under the penny stock rules, inasmuch as Claimants were established customers of Stewart and the clearing broker; (9) at no time were either Mariner or Moore partners or joint venturers of Stewart; (10) Claimants failure to act with reasonable care barred their claims against Mariner and Moore; and (11) all purchases and sales with respect to the Claimants' account (other than the demanded liquidation in the spring of 1995), occurred while

Claimants were dealing with stockbrokers or brokerage firms other than Mariner and Moore and under circumstances when neither of the Mariner Parties had any supervisory duty.

Respondent BTS also denied the allegations set forth in the Statement of Claim and First Amendment to the Statement of Claim as they related to any wrongdoing on its part. BTS stated that Claimants had an account with it for only five months, from July through December 1992, and that during that time Claimants received confirmations of each transaction and monthly statements. BTS asserted that Claimants never made any objection or complaint to BTS regarding the manner in which their account was handled or the nature of their investments. According to BTS, Claimants' claims were barred by the relevant statutes of limitations, and by the doctrines of waiver, laches, estoppel, and ratification.

Additionally, BTS brought action under a counterclaim to recover its attorneys' fees from Claimants. BTS alleged that because Claimants' claims against BTS were groundless, § 21 of the Securities Exchange Act of 1934 allows the panel of arbitrators in this case, in its discretion, to assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

#### **RELIEF REQUESTED**

Claimants H.G. Bossley and Carole P. Bossley requested an award for: actual damages of at least \$100,000.00; interest at the legal rate of 10% per annum; attorney's fees and costs of at least \$15,000.00; filing fees and deposits of \$950.00; and a disciplinary referral to the NASD to deter the conduct exemplified by Respondents Mariner Financial Group, Inc., Joe F. Moore, Jr., and Brokers Transaction Services, Inc. and/or exemplary damages in an undisclosed amount.

Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr. requested that the claims asserted against them be denied and that they be awarded their costs and attorney's fees.

Respondent Brokers Transaction Services, Inc. requested that the claims asserted against it be dismissed and that it be awarded its attorneys' fees pursuant to § 21 of the Securities Exchange Act of 1934.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondent Brokers Transaction Services, Inc. did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

In the Statement of Claim, Claimants H.G. Bossley and Carole P. Bossley named Rhodes Securities, Inc. as a Respondent in this matter. Pursuant to Claimants H.G. Bossley and Carole P. Bossley's letter filed on or about April 8, 1996, Claimant withdrew their claims against Respondent Rhodes Securities, Inc. with prejudice.

On or about June 27, 1996, Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr. submit a motion for leave to file a first amended statement of answer. After reviewing the motion and considering the related submissions, the undersigned arbitrators granted the motion on or about October 31, 1996.

Claimants H. G. Bossley and Carole P. Bossley moved to file an amended statement of claim on or about March 19, 1997. The undersigned arbitrators reviewed the motion and all related documents and determined that the motion was granted.

On or about April 21, 1997, Claimants H.G. Bossley and Carole P. Bossley filed a motion to strike Respondent Brokers Transaction Services, Inc.'s counterclaim. Following oral arguments on the motion at the hearing, the undersigned panel of arbitrators decided to take said motion under advisement and defer its ruling until the conclusion of the hearing.

At the hearing in this matter, Respondents Mariner Financial Group, Inc. and Joe F. Moore, Jr. and Respondent Brokers Transaction Services, Inc. moved for a directed verdict. The undersigned panel of arbitrators overruled both of these motions.

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, 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 the Statement of Claim and the First Amendment to the Statement of Claim are hereby denied with prejudice;
2. That the parties shall bear their own costs including attorney's fees except for forum fees, which are addressed below; and

3. That all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied 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 conferences  $\times$  \$300 = \$900, and there were four (4) hearing sessions  $\times$  \$750 = \$3,000. Total forum fees are thus \$900 + \$3,000 = \$3,900. 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 § 10322(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants H.G. Bossley and Carole P. Bossley.

Rhodes Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution, pursuant to § 10333 of the Code, the non-refundable member surcharge in the amount of \$350.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by respondent Mariner Financial Group, Inc.

Respondent Brokers Transaction Services, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution, pursuant to § 10333 of the Code, the non-refundable member surcharge in the amount of \$350.

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Respondent Brokers Transaction Services, Inc.

Respondents Mariner Financial Group, Inc., Joe F. Moore, Jr., and Brokers Transaction Services, Inc. are jointly and severally liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$3,150 in forum fees.

Respondents Mariner Financial Group, Inc., Joe F. Moore, Jr., and Brokers Transaction Services, Inc. are jointly and severally liable for and shall pay to Claimants H.G. Bossley and Carole P. Bossley the amount of \$750 as reimbursement for their hearing session deposit.

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

Concurring Arbitrators' Signatures

A. Bentley Nettles, Esquire  
A. Bentley Nettles, Esquire  
Chairperson  
Public Arbitrator

May 11, 1997  
Dated:

William F. Erwin, Jr.  
William F. Erwin, Jr.  
Panelist  
Public Arbitrator

May 9, 1997  
Dated:

Wilma Dolores Martin  
Wilma Dolores Martin  
Panelist  
Industry Arbitrator

May 9, 1997  
Dated:

For NASD use only:  
Date Award was served on the parties: May 14, 1997