

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Ann M. Ledet

and

Case Number 96-00060

Names of Respondents

Everen Securities, Incorporated and
Patricia B. Clark

REPRESENTATION OF PARTIES

Claimant Ann M. Ledet was represented by Gerald S. Siegmyer, Esq. and David Sharp, Esq. of Greenberg, Peden, Siegmyer & Oshman located in Houston, TX.

Respondent Everen Securities, Inc. was represented by A. Brad Busscher, Esq. of Everen Securities, Inc. located in Chicago, IL.

Respondent Patricia B. Clark did not appear at the hearing.

CASE INFORMATION

Claimant Ann M. Ledet's Statement of Claim was filed on or about January 4, 1996.

The Submission Agreement of Claimant Ann M. Ledet was signed on December 29, 1995.

An amendment to the Statement of Claim was filed by Claimant Ann M. Ledet on or about January 22, 1996.

The first Request for Dismissal of Respondent Everen Securities, Inc. was filed on or about February 28, 1996.

The Statement of Answer of Respondent Everen Securities, Inc. was filed on or about May 21, 1996.

The Submission Agreement of Respondent Everen Securities, Inc. was signed on May 28, 1996 by A. Brad Busscher, Senior Vice President and Senior Attorney.

The Response of Claimant Ann M. Ledet to the Motion to Dismiss and Amended Statement of Claim was filed on or about September 3, 1996.

The Reply of Respondent Everen Securities, Inc. to Claimant's Response to the Motion to Dismiss was filed on or about September 13, 1996.

The Supplemental Response of Ann M. Ledet to the Motion to Dismiss was filed on or about October 18, 1996.

Respondent Everen Securities, Inc.'s Amended Statement of Answer was filed on or about November 11, 1996.

HEARING INFORMATION

A pre-hearing conference was held: -October 24, 1996 by telephone conference call before three arbitrators for one (1) hearing session.

The hearing was held: -November 21, 1996 for two (2) hearing sessions; and
-November 22, 1996 for one (1) hearing session.

The hearing location was: -Houston, Texas.

CASE SUMMARY

Ann M. Ledet ("Ledet" or "Claimant") alleged that Everen Securities, Inc. ("Everen"), by and through its agent Patricia Clark ("Clark")(hereafter collectively referred to as "Respondents"), breached their fiduciary duty to the Claimant. Claimant alleged that in June of 1989, Clark (who was then employed

by Underwood, Neuhaus & Co., Inc.) induced Claimant and her husband, Sidney Ledet, to purchase \$362,500 in Gemini Income Fund XVIII ("Gemini" or the "Fund"), a speculative equipment leasing limited partnership. According to the Claimant, Clark urged Sidney Ledet to sell shares of a closed end mutual fund called PLM Equipment Growth Fund ("PLM") to invest the proceeds in Gemini although Gemini was illiquid and PLM and Gemini had similar investment objectives of paying monthly or quarterly income. Ledet stated that Clark said Gemini was a solid investment which would yield a good return and told the Claimant and her husband that when the Gemini partnership dissolved, all of their investment would be returned to them. However, Clark's main purpose in soliciting the Gemini Fund was to generate commissions as alleged by Claimant. Gemini made distributions to Claimant and other partners until December of 1995, at which time the Fund ceased operation. According to the Claimant, she received approximately 63% of her original investment back without interest equaling \$229,000 in total distributions, resulting in a loss of \$132,820. Claimant contended that she was unaware that the Fund would fall far short of meeting its investment objectives and would not return to the partners all of their original investment until receipt of a 1993 10K Report in 1994. Claimant further contended that since the Claimant filed the arbitration case on or about December 29, 1995, the claim was within the jurisdictional time limitation established by Section 10304 of the Code of Arbitration Procedure (the "Code"). Finally, Claimant contended that the Respondents had a continuing fiduciary duty to disclose the unsuitability of the transaction to Claimant and to get the Claimant out of the position as well as that such duties were continuing, ongoing and continuously violated less than six years before the filing of this arbitration case. Claimant and her husband, who passed away in 1990, allegedly had little investment experience and relied on Clark to select appropriate investments. After investing in Gemini, approximately 80% or \$552,500 of their retirement funds was invested in income partnerships. On or about November 15, 1989, Underwood, Neuhaus & Co., Inc. ("Underwood, Neuhaus") allegedly sold its assets to Lovett, Underwood, Neuhaus & Webb, Inc. ("Lovett, Underwood") pursuant to an Asset Purchase Agreement (the "Agreement") which provided that Lovett, Underwood not only purchased the accounts of Underwood, Neuhaus but also assumed full liability arising after the sale relating to transferred costs. Claimant asserted that Lovett, Underwood which later became Kemper Securities, Inc. and subsequently, Everen Securities, Inc. was the successor in interest and, therefore, liable for all liabilities and claims arising after the date of sale associated with the transferred assets including the account of Ann and Sidney Ledet.

Respondent Everen Securities, Inc. denied the allegations made against it by the Claimant. Respondent specifically stated the Claimant in her initial claim challenged the suitability of four limited partnership investments and tax-free unit trusts purchased between 1983 and 1989. These transactions were allegedly executed through Underwood Neuhaus, an independent brokerage firm while its predecessor firms were inaccurately named in the Statement of Claim as the successor to Underwood, Neuhaus. Respondent filed a Request for Dismissal on or about February 28, 1996 on the grounds that the Claimant had improperly named Everen as a party to this arbitration. Respondent maintained that pursuant to the Asset Purchase Agreement, Everen bought the assets of Underwood, Neuhaus but did not succeed to its liabilities. On or about May 21, 1996, Respondent

filed its Answer along with a Request for Dismissal on the grounds that the Claimant's claim was also ineligible for arbitration pursuant to Section 15 of the Code. Respondent alleged that Clark was never employed or supervised by Everen or its predecessors since she voluntarily resigned from employment with Underwood, Neuhaus in October of 1989. According to the Respondent, Claimant unilaterally amended her claim without seeking the Panel's consent through her Response to Everen's Motion to Dismiss wherein she withdrew three of the prior limited partnership claims and unit trust claims since either the investments were either not purchased at Underwood, Neuhaus and/or were profitable, leaving only the allegations relating to the Gemini investment. Respondent maintained that it never assumed or succeeded to the liabilities of Underwood, Neuhaus and that the Claimant and her husband never opened an account with Everen or its predecessors. Respondent contended that the Asset Purchase Agreement at Section 1.09 confirmed that Everen and its predecessors had no responsibility for the acts and liabilities of Underwood, Neuhaus pre-dating the Agreement (November 15, 1989) including the acts and liabilities relating to Claimant's purchase and ownership of the Gemini Fund. According to the Respondent, since Underwood, Neuhaus continued to exist as an entity under the name 909 Corporation following the asset purchase, Claimant's allegation that Lovett Underwood was the successor of Underwood, Neuhaus was impossible. Respondent further contended that account statements confirmed: that the Claimant's husband owned an individual account at Underwood, Neuhaus which held no cash or securities as of November 9, 1989; that the limited partnership purchase was a direct investment jointly purchased by both the Claimant and her husband; that the Gemini investment was never held in the individual account owned by the Claimant's husband; and that the Claimant received unitholder communications and income distributions directly from the general partner of the Gemini Fund. Everen asserted the following affirmative defenses:

1. Claimant had no standing to pursue any claim against Everen and its predecessors;
2. Claimant had no capacity to pursue any claim against Everen and its predecessors;
3. The NASD Regulation, Inc. had no jurisdiction over Everen and its predecessors concerning this matter;
4. Claimant failed to state any claim against Everen and its predecessors;
5. Claimant's claims were barred by the relevant statutes of limitations;
6. Claimant's claim was ineligible for arbitration pursuant to Section 10304 of the Code of Arbitration Procedure;
7. Claimant had no damages and allegedly losses were purely unrealized;
8. Claimant failed to state a claim against Everen; and
9. Claimant's losses, if any, were not proximately caused by any action or inaction of Everen and its predecessors.

RELIEF REQUESTED

In the Response to the Motion to Dismiss and Amended Statement of Claim, Claimant Ann M. Ledet requested an award in the undisclosed amount. In the original Statement of Claim, Ann M. Ledet

requested an award in the amount of \$342,500 in actual damages for the principal lost in the Gemini Fund as well as an award in the amount of \$120,000 in attorneys' fees.

Respondent Everen Securities, Inc. requested that the claims asserted against it be denied in its entirety and that it be awarded its costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

On or about August 8, 1996, the NASD Regulation, Inc. Office of Dispute Resolution informed Claimant Ann M. Ledet that it was unavailable to serve the Statement of Claim on Respondent Patricia B. Clark due to an insufficient address. Upon review of the file at the hearing, the undersigned arbitrators determined that Respondent Patricia Clark had not been properly served with the Statement of Claim pursuant to Section 10314 of the Code of Arbitration Procedure (the "Code"). Claimant Ann M. Ledet stated that she wished to dismiss her claims against Respondent Patricia Clark without prejudice and proceed with her claims against Respondent Everen Securities, Inc. The Panel granted Claimant's request to dismiss without prejudice her claims against Respondent Patricia Clark and determined that arbitration of the matter would proceed pursuant to Section 10318 of the Code.

On or about February 28, 1996, Respondent Everen Securities, Inc. filed a Motion to Dismiss pursuant to Section 10305 of the Code of Arbitration Procedure asking that the NASD Regulation, Inc. Office of Dispute Resolution administratively dismiss the claims against it stating that it had been inappropriately named as a party. On or about May 8, 1996, the NASD Regulation, Inc. Office of Dispute Resolution notified the parties that the Motion was denied since the Code does not contain a provision allowing the NASD Regulation, Inc. Office of Dispute Resolution to dismiss an inappropriately named party.

Pursuant to the request of Respondent Everen and with the agreement of the Panel, a pre-hearing conference by telephone conference call was held on October 24, 1996 in order for the Panel to hear oral arguments from the parties on the Respondent Everen Securities, Inc.'s Motion to Dismiss. Following their review of the Motion, the pleadings and all related submissions and after hearing the oral arguments of the parties during the pre-hearing conference, the Arbitrators decided on or about October 25, 1996 that Respondent Everen Securities, Inc.'s Motion to Dismiss was denied. At the hearing, Respondent Everen Securities, Inc. orally requested that the Panel reconsider their ruling. The Arbitrators heard additional oral arguments on the Motion to Dismiss. The Panel decided to deny the Respondent Everen Securities, Inc. request for reconsideration.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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 and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Everen Securities, Inc. is hereby liable for and shall pay to Claimant Ann M. Ledet the sum of \$230,812.50 in actual damages;
2. Respondent Everen Securities, Inc. is hereby liable for and shall pay to Claimant Ann M. Ledet the amount of \$56,318.25 in attorneys' fees. In determining to award attorneys' fees, the arbitrators considered the pleadings, the evidence and the testimony presented by the parties as well as the legal authority provided by the Claimant which included the Texas Deceptive Trade Practices - Consumer Protection Act and the Texas Securities Act;
3. The parties shall bear their own costs except for forum fees which are specifically addressed below; and
4. Any relief not specifically granted herein is hereby denied in its entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session. There were four (4) hearing sessions x \$1,000 = \$4,000 in forum fees. Pursuant to Section 10332(b) of the 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 Section 10332(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASD Regulation, Inc.") Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant Ann M. Ledet.

In accordance with Section 10332(c) of the Code, Claimant Ann M. Ledet is hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,000 in additional forum fees.

Pursuant to Section 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$500 member surcharge previously paid by Respondent Everen Securities, Inc.

In accordance with Section 10332(c) of the Code, Respondent Everen Securities, Inc. is hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$2,000 in forum fees.

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

Signed:

Dated:

Raymond L. Britton, Esq.

April 8, 1997

Raymond L. Britton, Esq.
Public Arbitrator, Presiding Chair

Eli Bensky

March 23, 1997

Eli Bensky
Industry Arbitrator

Leonard Bajork

March 28, 1997

Leonard Bajork
Public Arbitrator

Date served by the NASD Regulation, Inc.: April 9, 1997