

N.A.S.D.R. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the matter of the Arbitration Between

Name of Claimant

Francis P. Finnegan, Jr.
Ida Marie Finnegan

vs.

NASDR Arbitration
No.96-00475

Name of Respondent

May Toy

REPRESENTATION

For Claimant: Nancy Loo, Concord, California.

For Respondent: Jeanne M. Chamberlin, Esq., Tonkon, Torp, Galen, Marmaduke & Booth,
Portland, Oregon.

CASE INFORMATION

Statement of Claim filed: February 1, 1996.

Claimants' Submission Agreement signed: January 17, 1996.

Respondent's Statement of Answer filed: July 1, 1996.

Respondent's Submission Agreement signed: June 26, 1996.

HEARING INFORMATION

The evidentiary hearing was held in San Francisco, California, on November 12, 1996, and lasted 1 session.

CASE SUMMARY & RELIEF REQUESTED

Claimants' primary contentions are as follows: (1) claimants are novice investors who have no previous investment experience; (2) respondent did not disclose that the Stagecoach U.S. Government Allocation mutual fund could go up or down in value based upon economic conditions; (3) respondent did not disclose that the mutual fund was subject to a commission charge of 4.5%; and (4) the mutual fund was unsuitable for claimants because they wanted an investment with no risk of losing principal.

Claimants seek recovery of their loss. Claimants purchased the investment for \$20,000.00 in April 1993. Claimants sold the investment in January 1995 for approximately \$16,327.99. They received dividends and capital gain distributions totalling \$3,576.42. Their out-of-pocket loss was \$95.59 (\$20,000.00 minus \$16,327.99, plus \$3,576.42). Claimants contend that they should have stayed in their savings account which would have paid 2% interest; their lost interest from their savings account totals approximately \$733.33. Thus, claimants' total loss is approximately \$828.92.

Respondent denied the charges. Respondent contended that the risk of loss and the sales commission were explicitly stated in the one page New Account Application which the claimants signed and in the prospectus. Respondent also contends the investment was suitable and that the claim is barred by a one-year statute-of-limitation, presumably under Rule 10b-5.

Respondent requested dismissal of the claim and an award of costs of arbitration.

OTHER ISSUES CONSIDERED AND DECIDED

None.

AWARD

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

Respondent adequately disclosed the risk that the fund was subject to economic conditions and adequately disclosed the commission. The New Account Application contained plain written disclosures stating that the securities "are subject to market fluctuations." The application also stated that the investments "are not deposit accounts of Wells Fargo Bank and are not insured by any depository insurance such as FDIC, the NCUSIF or a private share insurance or guaranty arrangement." The application also contained an acknowledgement that the investors had received an explanation of sales charges or commission of 4.5%.

Both claimants signed the application containing the disclosures. More importantly, both claimants initialled the clauses quoted above, indicating their understanding of the clauses. The prospectus contained much more elaborate disclosures, but claimants could not be expected to understand the prospectus. The application disclosures, however, were contained in a short one-page document which set forth seven easy to read sentences addressing the specific issues raised in the claim.

The arbitrator also determines that the Stagecoach Fund was suitable for the claimants. It is a plain-vanilla mutual fund which owns long-term U.S. Treasury bonds, intermediate-term U.S. Treasury notes, and short-term money market instruments. The fund was liquid in that it could be easily sold on the New York Stock Exchange without a sales charge on the redemption. It met claimants' investment objective of providing a relatively stable source of monthly income. The fund dropped in value due to market conditions. No investment is totally risk free.

The arbitrator is troubled by respondent's exhibit A-2, which lists the daily cash reserves, short-term savings, and long-term savings, together with the monthly income and expenses of the investor. Part of the financial information appearing on this form is in error. The monthly income, expenses, and commitment were also left blank by respondent. The form has a place for the customer to sign, but respondent did not obtain claimants' signature on the form. Had claimants signed the form, they may have been able to correct the erroneous financial information. These facts raise an issue concerning whether respondent violated the "Know Your Customer" rule of the NASD, and whether respondent had enough information about claimants to make a suitable investment recommendation.


Had the investment amount been larger than \$20,000.00 or the investment been more risky than a U.S. Government allocation mutual fund, the problems found in this form would have resulted in an adverse award against respondent. The arbitrator, however determines that the errors and omissions in the form are not material given the size and nature of the investment. If the correct information would have been inserted into the form, the investment would still have been suitable for claimants.

The arbitrator determines that claimants' claim shall be dismissed. The parties shall bear their respective costs, including attorney's fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the NASDR shall retain the \$75.00 non-refundable filing fee and the \$200.00 hearing session deposit as an assessment of forum fees for 1 session. These fees are assessed to Respondent, who is directed to reimburse claimants directly in the amount of \$275.00

Date signed:



Douglas W. Oldfield
Presiding Arbitrator

12/4/96

Date served: 12/16/96