

## **AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.**

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**In the Matter of the Arbitration Between**

**Names of Claimants**

**Charles Graml and Nancy Graml**

**and**

**Case Number 96-01192**

**Names of Respondents**

**Kidder Peabody & Company, Inc. and Celeste Kelley**

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### **REPRESENTATION OF PARTIES**

**Claimants Charles and Nancy Graml were represented by Robert E. Lapin, Esquire of Carrigan, Charles and Lapin, Landa & Wilde, L.L.P. located in Houston, Texas.**

**Respondents Kidder Peabody & Co., Inc. and Celeste Kelley were represented by Richard Kelly, Esquire of Kidder Peabody & Co., Inc. located in New York, New York.**

### **CASE INFORMATION**

**The Statement of Claim was filed by Claimants Charles and Nancy Graml on or about March 18, 1996.**

**The Submission Agreement of Claimants Charles and Nancy Graml was signed on March 4, 1996.**

**The joint Statement of Answer was filed by Respondents Kidder Peabody & Co., Inc. and Celeste Kelley on or about January 10, 1997.**

**The Submission Agreement of Respondent Kidder Peabody & Co., Inc. was signed on January 10, 1997 by Richard Kelly, Vice President/Associate General Counsel.**

**The Submission Agreement of Respondent Celeste Kelley was signed on May 23, 1996.**

### **HEARING INFORMATION**

**No pre-hearing conferences were held.**

components which did not meet Charles Graml's IRA investment objectives. From 1986 through 1994, Charles Graml invested a total of \$162,000 in five different annuities in his IRA account over a series of ten separate transactions. Claimants stated they first discovered in 1995 that Kelley deceived them and that they had paid heavy up-front sales loads or commissions for each municipal bond fund and bond unit trust purchase. With regard to Charles Graml's IRA account, Claimants asserted that the Respondents should have known the unsuitability of recommending the particular tax-deferred annuities in light of the investment objectives and should have disclosed material information to which Charles Graml was entitled. Claimants made specific allegations against the Respondents including, but not limited to, negligence, fraud, unsuitability, breach of fiduciary duty and breach of their duty of good faith and fair dealing.

In their Answer, Respondent denied the allegations set forth in the Statement of Claim. Respondents specifically stated that while Kelley told Claimants they were not paying any commissions as such on the closed end bond funds and the municipal bond unit trusts, she did not say there would be no sales charges. Over the course of about ten years, Claimants allegedly received over 25 prospectuses, each of which stated the sales charges and sales loads. Respondents maintained that if the Claimants had purchased the closed end bond funds and municipal bond unit trusts in the secondary market, the sales charges could have been higher or lower depending upon the secondary market performance. Respondents claimed that during the period 1986 through 1994, the total commissions, sales charges and allowances paid by Claimants to the Respondents was less than \$35,000. With respect to Charles Graml's IRA, Respondents contended that the variable annuities were appropriate for the account for the following reasons: the IRA monies were earmarked for more aggressive investing than Claimant's other funds; the annuities provided diversification; there was no up-front sale load for any of the funds within the annuities; none of the annuities were subject to seizure or confiscation; and the IRA monies would not be liquid. Respondents asserted that the claims were barred, in whole or in part, by the applicable statutes of limitations. Respondents stated that the unsuitability claim was time-barred because a claim under Section 10(b) of the Securities Exchange Act of 1934 must be commenced within one year of discovery of the violation. According to the Respondents, the Claimants' negligence, fraud and breach of fiduciary duty claims were all partially barred under Texas' applicable two and four year respective statutes of limitations. Finally, Respondents claimed that the Claimants did not suffer any losses and were not entitled to attorneys' fees or exemplary damages.

#### **RELIEF REQUESTED**

Claimants Charles and Nancy Graml requested an award in the amount between \$100,000 and \$250,000 in actual damages for commissions, loads, lost gains, lost value, attorney's fees and costs as well as pre-judgment and post-judgment interest.

Respondents Kidder Peabody & Co., Inc. and Celeste Kelley requested that the claims asserted against them be denied in their entirety.

### **OTHER ISSUES CONSIDERED & DECIDED**

On or about January 7, 1997, Claimants submitted a written motion to bar Respondents' defense pursuant to Section 25(b)(iii). The arbitrators following review of the motion and all related submissions decided to hold their ruling in abeyance until the hearing on the merits. At the hearing, the arbitrators listened to the oral arguments made by the parties. Following oral arguments, the Claimants decided to withdraw their motion.

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 pleading, 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:

The Statement of Claimant submitted by Claimants Charles and Nancy Graml against Respondents Kidder Peabody & Co., Inc. and Celeste Kelley is hereby denied in its entirety and dismissed with prejudice.

2. The parties shall bear their own costs, including attorneys' fees, except for forum fees which are specifically addressed below; and
3. Any relief not specifically granted is hereby denied in its entirety and dismissed with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750.00 per hearing session. There were six (6) sessions x \$750 = \$3,000 in forum fees. Pursuant to Section (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 \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants Charles and Nancy Graml.

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In accordance with Section 10332(c) of the Code, Respondent Kidder Peabody & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$2,250.00 in forum fees.

Pursuant to Section 10333 of the Code, Respondent Kidder Peabody & Co., Inc. is hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$350 for the member surcharge.

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

Signed:

Dated:

George A. Sellnau, Esquire

March 24, 1997

George A. Sellnau, Esquire

Public Arbitrator, Presiding Chair

Sherry R. Wetsch, Esquire

March 24, 1997

Sherry R. Wetsch, Esquire

Public Arbitrator

Charles E. Martin

March 24, 1997

Charles E. Martin

Industry Arbitrator

Date served by the NASD Regulation, Inc.: March 25, 1997