

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Bernardi Securities, Inc.

v.

Name of Respondents

96-01626

J. F. Hartfield & Co., Inc.; PaineWebber
Incorporated; and Kidder Peabody & Co., Inc.

REPRESENTATION OF PARTIES

For Claimant: Claimant Bernardi Securities, Inc. ("Bernardi") was represented by Ronald P. Bernardi of Bernardi Securities, Inc. in Chicago, Illinois.

For Respondents: Respondent J. F. Hartfield & Co., Inc. ("Hartfield") was represented by Jeremy D. Richardson, Esq. of Selverne, Flam & Mandelbaum, LLP in New York, New York. Respondent PaineWebber, Inc. ("PaineWebber") was represented by Robert A. W. Boraks, Esq. of Boraks & Jamnback in Washington D. C.

CASE INFORMATION

Statement of Claim filed on or about: April 12, 1996.

Bernardi's Submission Agreement signed on: April 12, 1996, by Ronald P. Bernardi, President of Bernardi Securities, Inc.

Bernardi's Amended Statement of Claim naming additional Respondents PaineWebber Incorporated and Kidder Peabody & Co., Inc. filed on: July 3, 1996.

Hartfield's Statement of Answer filed on: June 25, 1996.

Hartfield's Third Party Claim against Respondent PaineWebber Incorporated, successor in interest to Kidder Peabody & Co., Inc., filed on: June 25, 1996.

Hartfield's Submission Agreement signed on: June 26, 1996, by Frank O'Brien, Chairman of J. F. Hartfield & Co., Inc.

Respondent PaineWebber's Third-Party Response filed on: December 31, 1996.

HEARING INFORMATION

Prehearing Conference: None Held.
Hearing Dates/ Sessions: March 18, 1997 for Two (2) Sessions; and
March 19, 1997 for Two (2) Sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Bernardi alleged that Hartfield, Kidder Peabody and/or PaineWebber improperly advertised bonds as unredeemable. Bernardi specifically alleged that:

1. On January 4, 1994, Hartfield solicited bids on ten blocks of municipal bonds. The solicitation was accomplished by facsimile and described the rates, maturities and call features of the bonds being offered for sale;
2. Bernardi bid for and ultimately purchased a block of \$200,000 par value industrial revenue bonds issued by the City of Joliet, Illinois for Peoples Gas Light & Coke, Co. The bonds were trading at a premium over par and were described in Hartfield's facsimile as noncallable. Hartfield was acting as agent for Kidder Peabody, the seller of the bonds. Bernardi's bid specifically described the bonds as noncallable;
3. Bernardi purchased the block for \$233,218 plus accrued interest. Bernardi offered the bonds to their retail clients as noncallable bonds as noncallable and sold the bonds at a premium reflecting current market conditions;
4. On December 5, 1995, a Bernardi client notified it of receipt of a notice from the Trustee of the bonds stating that they would be redeemed at par on December 29, 1995. The call was occasioned by the exercise of issuer's rights of extraordinary optional redemption if the project became economically unfeasible for certain reasons stated in the offering circular dated May 20, 1986; and
5. Bernardi was forced to refund to its customers the sum of \$21,448.00.

Hartfield denied the allegations set forth in the Statement of Claim. Hartfield specifically stated that it does not dispute that some entity improperly labeled the bonds, but Hartfield relied upon Kidder Peabody for the call classification. Therefore, any claim made against Hartfield should, instead, be instituted against Kidder Peabody.

Respondents Kidder and PaineWebber denied the allegations set forth in Bernardi's Amended Statement of Claim and Hartfield's Third-Party claim, asserting that:

1. While PaineWebber purchased certain Kidder Peabody assets, PaineWebber cannot be held liable for the actions of Kidder Peabody;
2. A financial services reporting agency committed the call reporting error, not Kidder Peabody;
3. All subsequent users of such financial information are under identical duties to verify such information;
4. Bernardi may not seek lost-profit damages here, nor may Bernardi recover attorneys' fees.

RELIEF REQUESTED

Claimant Bernardi requested an award in the amount of \$25,748.00 including interest, costs and attorneys' fees.

Respondent Hartfield denied the claims asserted against them and asked the panel to award them costs and attorneys' fees. Respondents also requested indemnity from PaineWebber, successor in interest to Kidder Peabody, for any judgment against them.

Respondents PaineWebber and Kidder denied the claims asserted against them and requested that no forum fees be assessed against them.

OTHER ISSUES CONSIDERED & DECIDED

Respondents Kidder Peabody and PaineWebber did not file executed submission agreements, but are required to submit to arbitration pursuant to Section 10201 of the Code of Arbitration Procedure.

Based upon the evidence adduced at the hearing, the Panel found that the Joliet bonds at issue were improperly classified as noncallable by an electronic data service published by J. J. Kenny Drake, Inc., a non-party to this arbitration. The Kenny service is reasonably and customarily relied on by participants in the municipal bond business, including the parties to the trade at issue herein. No one was negligent or culpable for failing to discover the extraordinary call features associated with these particular bonds. Nevertheless, Bernardi's reliance on this inaccuracy contributed to the loss that was eventually incurred by its customers. The panel believes that Bernardi was legally required to reimburse its customers for the loss and that the ultimate responsibility for that loss should be equally apportioned between Bernardi, on the one hand, and the entities from whom Bernardi

purchased the securities, on the other. It is appropriate that Bernardi bear a portion of the loss because of its own independent duties to become fully informed and make appropriate disclosures to its retail customers. Equally significant are the duties described in the MSRB manual, which requires the seller of callable securities to identify extraordinary mandatory redemption features. As such, the Panel shall apportion responsibility to each party according to the terms below.

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 remains on file with 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 arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents J. F. Hartfield & Co., Inc. and Kidder Peabody & Co., Inc. are jointly and severally liable for and shall pay to Claimant Bernardi Securities, Inc. the sum of \$10,742.00 as compensatory damages, plus the additional sum of \$1,000.00 as interest;
2. In addition, Respondent J. F. Hartfield & Co., Inc. is liable for and shall pay to the Claimant, Bernardi Securities, Inc. the sum of \$900.00 as costs for the unnecessary adjournment of this arbitration from February 27, 1997 to March 19, 1997;
3. All other claims asserted by Bernardi Securities Inc. are hereby dismissed with prejudice;
4. Respondent J.F. Hartfield & Co., Inc. shall recover from Respondent Kidder Peabody & Co., Inc., on its cross-claim for principal-agent indemnity, any portion of the award described in paragraph 1 hereof which J. F. Hartfield & Co., Inc. pays to Bernardi Securities, Inc. All other claims asserted by J.F. Hartfield & Co., Inc. are hereby dismissed with prejudice;
5. All claims asserted against PaineWebber Incorporated are hereby dismissed with prejudice;
6. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and

7. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to Section 10205(c) of the Code of Arbitration procedure, the following forum fees are assessed: Four (4) hearing sessions x \$300.00 per session = \$1,200.00.

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$ 500.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$300.00 previously deposited with the Office of Dispute Resolution by Claimant Bernardi Securities, Inc. Claimant Bernardi Securities, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$100.00 as additional forum fees

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$100.00 and Bernardi Securities, Inc. is liable for and shall pay to the Office of Dispute Resolution the sum of \$100.00 as the balance due for the member surcharge of \$200.00.

Respondent J. F. Hartfield & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$500.00 as an initial filing fee, forum fees in the sum of \$400.00, and the member surcharge in the sum of \$200.00, for a total amount due \$1,100.00.

Respondent PaineWebber Incorporated is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$400.00 as forum fees plus \$ 200.00 as member surcharge due for a total amount due of \$600.00.

NASD Regulation, Inc. Office of Dispute Resolution shall retain postponement fees in the amount of \$ 300.00 previously deposited by Respondent J.F. Hartfield & Co., Inc.

All fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

/s/ Kurt L. Schultz, Esq.

Kurt L. Schultz, Esq.
Industry Arbitrator, Presiding Chair

April 30, 1997