

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Donald E. and Marjory P. Pillar
June Chechile
Raymond G. and Emma S. Homburg

96-02307

Name of Respondent

Calton & Associates, Inc.

REPRESENTATION

For Claimants, June Chechile ("Chechile"); Raymond J. Homburg and Emma S. Homburg ("Homburg"), and Donald E. Pillar and Marjory P. Pillar ("Pillar"): Joel A. Goodman, Esq. of the law firm of Goodman & Nekvasil, P.A., Safety Harbor, Florida.

For Respondent, Calton & Associates, Inc. ("Calton"): Robert Persante, Esq. of Albinson & Persante, P.A., of Clearwater, Florida.

CASE INFORMATION

Statement of Claim filed: May 29, 1996.

Claimants Donald and Marjory Pillar's Submission Agreement signed on: January 29, 1996.

Claimant June Chechile's Submission Agreement signed on: February 12, 1996.

Claimants Raymond and Emma Homburg's Submission Agreement signed on: May 29, 1996.

Statement of Answer filed by Respondent on: July 29, 1996.

Respondent's Submission Agreement signed on: July 3, 1996.

HEARING INFORMATION

Twelve hearing sessions were conducted in this matter on March 3, 4, 5, 6 and 7, 1997 in Tampa, Florida.

CASE SUMMARY

Claimants alleged that they have little if any investment experience, and that Respondent improperly recommended that each of them invest a significant portion of their life savings in high-risk, high-commission, long-term limited partnerships, including, inter alia, Capital Preferred Yield Fund, Datronic Equipment Income Fund XVII, XIX, and XX, Fidelity Leasing Income Fund, Jetfleet Aircraft 2, and Textainer Equipment Income Funds 3 and 4. Claimants alleged that these limited partnership recommendations were unsuitable, that Respondent made false representations to Claimants in connection with these recommendations including, inter alia, that these limited partnerships were conservative, safe investments that would generate distributions in the form of income, and that Respondent failed to disclose certain material facts and failed to perform an adequate due diligence investigation of these limited partnerships. Claimants further alleged that Respondent failed to adequately supervise its brokers with regard to the opening of Claimants' accounts, the representations made to Claimants, and the approval of these limited partnership recommendations. Claimants also alleged that Respondent failed to establish an adequate system of supervision whereby the firm could determine the concentration of limited partnerships in a customer's account and to implement procedures to oversee producing managers' and stockbroker' oral and written representations regarding the limited partnerships. Claimants asserted that Respondent is liable under the principle of agency and respondeat superior and as a result of Respondent's independent obligations to supervise and adequately monitor the limited partnerships and to adequately "know its customer" and "know its products" e.g., the limited partnership recommendations. Claimants alleged that the providing of a prospectus to investors does not alter a stockbroker's liability for violating legal and industry rules and regulations governing the conduct of Respondent. Claimants asserted that the statutes of limitation and NASD eligibility rule were "tolled" as a result of fraudulent concealment/inducement, the continuing professional relationship (e.g., stockbroker/customer relationship), and that Claimants were blamelessly ignorant, and the doctrine of the continuing wrong. Finally, Claimants further alleged that they were properly joined in one case and that Respondent's actions constituted breach of contract, common law fraud, breach of fiduciary duty, negligence and gross negligence, and unjust enrichment.

Respondent Calton denied each and every allegation of wrongdoing contained in the Statement of Claim. Further, Calton asserted a number of defenses, namely, (1) Claimants' Statement of Claim failed to state a claim upon which relief can be granted; (2) no basis whatsoever exists for any claim of punitive damages against Respondent; (3) Claimants are equitably estopped from suing upon any of the purported claims; (4) the Claimants are barred from recovery because they assumed the risk in entering into the transactions at issue; (5) Claimants are barred from any recovery or their recovery must be reduced because of their comparative negligence; (6) Claimants failed to mitigate their damages; (7) the Claimants met or exceeded all suitability requirements for the limited partnerships; (8) Claimants understood their investments and were accordingly barred from any recovery; (9) Claimants are barred from recovery because of the applicable statutes of limitation and/or the NASD six-year rule; (10) the economic loss rule bars any claim for common law fraud; and, (11) Claimants are barred from recovery for failing to plead with particularity the claim for fraud or misrepresentation. Respondent further alleged that the evidence showed that there were no actual damages sustained by Claimants.

Respondent further maintained that three sets of Claimants brought an action against the broker dealer, but not the broker, for alleged unsuitability and overconcentration of limited partnerships within their portfolios. Respondent next maintained that the evidence showed that there were no actual damages sustained by the parties and asserted that counsel for the plaintiffs used an inappropriate 12% rate on all purchases dating back to 1989 and requested damages, attorney's fees and punitive damages for a total amount in excess of \$750,000.00. The plaintiff's expert was Doug Shultz and the defense experts were William Collison and Dr. Eugene Dunham, Jr., Ph.D.

RELIEF REQUESTED

Claimants requested damages including interest thereon as follows: (a) June M. Chechile \$33,865.46; (b) Raymond and Emma Homburg \$171,598.67; and (c) Donald and Marjory Pillar \$33,976.55. Claimants also requested an additional \$100,000.00 for Respondent's negligent supervision plus attorneys' fees, costs, and punitive damages, all of which Claimants agree the arbitrators are empowered to award, and such other relief as was deemed proper and necessary.

~~Respondent requested dismissal of the claim plus costs, attorneys' fees, and expenses.~~
~~Respondent further requested such other relief as was deemed proper and necessary.~~

OTHER ISSUES CONSIDERED & DECIDED

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.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Respondent be and hereby is liable and shall pay to the Claimants Raymond and Emma Homburg the sum of \$86,494.88, inclusive of pre-judgment interest.
2. The Respondent be and hereby is liable and shall pay to the Claimant June Chechile the sum of \$14,850.29, inclusive of pre-judgment interest.
3. The Respondent be and hereby is liable and shall pay to the Claimants Donald and Marjory Pillar the sum of \$16,919.84, inclusive of pre-judgment interest.
4. The Claimants' requests for punitive damages are denied.

5. Each party shall bear their respective costs including attorneys' fees.

FORUM FEES

Pursuant to Section 10332 of the Code of Arbitration Procedure, the arbitration panel has assessed forum fees in the sum of \$9,000.00 (12 sessions x \$750.00) as follows:

1. The Claimants are hereby assessed, jointly and severally, the sum of \$4,500.00 for which the NASD shall retain the \$750.00 previously deposited in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. in the sum of \$3,750.00.
2. The Respondent is assessed the sum of \$4,500.00.
3. NASD Regulation, Inc. shall retain the \$200.00 claim filing fee previously paid by the Claimants to NASD Regulation, Inc.

Fees are payable to the National Association of Securities Dealers Regulation, Inc.

Concurring Arbitrators' Signatures

Name

Public/Industry

/S/

George S. Colt, Jr., Esq.

/S/

William F. Glaser, Jr.

/S/

Patrick D. King

Date of Decision: April 8, 1997