

NATIONAL ASSOCIATION OF SECURITIES DEALERS

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Domenici Family Trust, dated July 20, 1992,
John Domenici, Trustee

Claimant,

No. 96-03960

ORDER/AWARD

v.

Bank of America Investment Services, Inc.,

Respondent.

REPRESENTATION OF PARTIES

Claimant was represented by Michael Salcido.

Respondent was represented by Brian J. Campbell.

CASE INFORMATION

Claimant Domenici Family Trust ("Domenici") filed the Statement of Claim in 1996.

Respondent BA Investment Services, Inc. ("BAIS"), incorrectly identified in the caption as Bank of America Investment Services, Inc., filed the Statement of Answer on or about December 31, 1996.

HEARING INFORMATION

A pre-hearing conference was held on April 29, 1997, in which the undersigned arbitrator participated.

BAIS requested a Prehearing Conference for the purpose of seeking dismissal of or limiting the claims in arbitration on the basis that they constitute an impermissible collateral

attack on an award issued in a previous proceeding; that the claims were extinguished by operation of law under the doctrine of *res judicata* based on that previous award; and/or, that the claims against BAIS are barred by the doctrine of collateral estoppel. BAIS also seeks an award of sanctions against claimant and its counsel on the basis of a spurious claim.

The arbitrator held a pre-hearing conference on April 29, 1996 for a total of one session, which lasted less than four hours.

CASE SUMMARY

Domenici's claim alleges that BAIS misrepresented certain charges on the sale of Colonial Utilities Fund shares. Domenici asserts that it, through John Domenici, its trustee, requested a recommendation for investment in a fund which was not subject to any commissions, sales charges or 12b-1 fees. BAIS allegedly recommended the investment in Class B shares of Colonial Utilities Fund, which Domenici purchased. Those funds were subject to fees, charges and other expenses and when such was discovered by Domenici, it requested that the transaction be rescinded. When the shares were ultimately exchanged for Class A shares in Colonial Utilities Fund Domenici allegedly incurred losses of \$6,699.57.

Domenici initially brought claims against BAIS representatives in an arbitration entitled Domenici v. Linda Bentley, et al., No. 95-01754 ("Domenici I") which were dismissed as to some respondents and denied as to one other respondent in an NASD Award dated March 26, 1996. Domenici then initiated the instant action against BAIS which was not a named respondent in Domenici I.

RELIEF REQUESTED

In the instant matter, Domenici alleges breach of fiduciary duties, unsuitability, dishonest and unethical conduct, fraud and securities fraud and negligence against BAIS and requests an award of punitive damages. Domenici requests compensatory damages of at least \$7,500.

BAIS asserts in Respondent's Statement of Answer and Request for Prehearing Conference that the arbitrator's award in Domenici I precludes Domenici's attempt to relitigate its claims in the instant arbitration on the basis that Domenici's claims are an impermissible collateral attack on Domenici I, the claims were extinguished by operation of law under the doctrine of *res judicata* and, the claims are barred by the doctrine of collateral estoppel. BAIS requests dismissal of this arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrator has determined that Respondent BAIS has been properly served with the Statement of Claim pursuant to §10302 and §10314 of the NASD Code of Arbitration Procedure (the "Code").

The undersigned arbitrator has also determined that a single arbitrator is appropriate under §10308(a) of the NASD Code of Arbitration Procedure because the amount in controversy does not exceed \$30,000.

The parties have agreed that a handwritten, signed Award may be entered. The parties have also agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

Domenici denies that any issue exists in regard to misrepresentation concerning the exchange of Class B shares for Class A shares or any basis that the Class A shares allegedly charged undisclosed fees.

AWARD

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

Domenici's Statement of Claim specifically alleges that

12. . . . BAIS offered to transfer Domenici's B Shares to A Shares at no charge to Domenici.

13. On September 21, 1994 Domenici sold the B shares at a loss of \$6699.57. Exh. B. This money reinvested in A shares. BAIS paid Domenici about \$980.00 to cover the expenses and fees associated with the switch. BAIS attempted to have Domenici sign a settlement agreement, releasing Domenici's claims in connection with the Colonial investments. Domenici refused, and the settlement agreement was never fully executed.

In Domenici I, the claimant's Claim was substantially identical to the Statement of Claim in the instant matter, with the exception that BAIS is now a named Respondent. The arbitrator

in Domenici I specifically found that the claimant and one of the respondents had entered into a settlement of claimant's dispute "when Claimant's Class B shares were sold and Class A shares of the Colonial Utilities Fund were purchased at no cost to the Claimant." (The claims against the remaining respondents were determined to be without merit and dismissed). Domenici I, NASD Award, dated March 26, 1996, p. 4. The arbitrator found "the forms used by Bank of America Investment Services . . . failed to adequately disclose the one (1%) 12B-1 fee associated with Claimant's purchase of the Colonial Utilities Fund Class B shares." However, the arbitrator in Domenici I specifically denied with prejudice any claims of misrepresentation in regard to the use of those forms. "Each claim/request for relief not specifically set forth herein are, and each of them, denied with prejudice." Id.

The claims made against BAIS in the instant Statement of Claim are no different than the claims made against the representatives of BAIS in Domenici I. The mere fact that the allegedly misleading forms and documents in Domenici I were not prepared by the respondents in that arbitration does not render the defense of *res judicata* inapplicable as argued by Domenici, for the reason that the arbitrator in Domenici I denied all claims of misrepresentation in regard to those same forms and documents. Domenici I, NASD Award, p. 4. Therefore, Domenici's claim against BAIS, relating to its alleged use of misleading forms, must be found to be *res judicata* based on the NASD Award in Domenici I.

BAIS argues that the transfer of shares from Class B to Class A, which the arbitrator in Domenici I found to constitute a settlement of Domenici's claims as against respondent Bentley,

also constitutes a settlement of Domenici's claims in the instant matter. In light of the facts asserted by Domenici in its Statement of Claim, as quoted above, and the NASD Award in Domenici I, the undersigned arbitrator must agree. The arbitrator in Domenici I specifically found that "[t]he claimant and Bentley had entered into a settlement of claimant's dispute in September of 1994 when claimant's Class B shares were sold and Class A shares of the Colonial Utilities Fund were purchased as no cost to the claimant. . . ." NASD Award, p. 3. Domenici acknowledges in its Statement of Claim that it was BAIS that offered the exchange of shares and BAIS that covered the expenses and fees associated with the switch. The arbitrator's finding in Domenici I must, therefore, constitute a finding of settlement of claimant's dispute with BAIS.

After consideration of the argument of counsel, the memoranda of law, the Statement of Claim and Answer, documents and evidence submitted, and the NASD Award in Domenici I, the undersigned arbitrator hereby orders as follows:

1. Claimant's claims against BAIS are dismissed as *res judicata*.
2. Respondent's request for sanctions is denied.
3. Each party shall bear its own costs and expenses, including attorneys' fees, associated with this arbitration.

FORUM FEES

Forum Fees are calculated at the rate of \$200 per hearing session. There was one session x \$200 = \$200 in forum fees. Pursuant to §10332(b) 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 §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$75 and shall retain as forum fees the hearing session deposit in the amount of \$200 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

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.

Dated

Michael W. Sillyman
Michael W. Sillyman
Public Arbitrator

/s/

June 18, 1997