

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Mary A. Pourciau,

Claimant,

v.

No. 96-04589

PaineWebber, Inc., and
Everett B. Gibson, Jr.,

Respondents.

REPRESENTATION OF PARTIES

Claimant Mary A. Pourciau ("Claimant") was represented by Louis L. Plotkin, Esq. of Gertler, Gertler, Vincent & Plotkin, L.L.P. located in New Orleans, Louisiana.

Respondent PaineWebber, Inc. ("PaineWebber") was represented by George C. Freeman, III of Stone, Pigman, Walther, Wittmann & Hutchinson, L.L.P. located in New Orleans, Louisiana.

Respondent Everett B. Gibson, Jr. ("Gibson") was represented by Everett B. Gibson of the Everett B. Gibson Law Firm located in Memphis, Tennessee.

CASE INFORMATION

The Statement of Claim was filed on or about October 15, 1996.

Claimant's Submission Agreement was signed on October 11, 1996.

The Statement of Answer of PaineWebber was filed on or about February 5, 1997.

The Submission Agreement of PaineWebber was signed on January 31, 1997.

The Statement of Answer of Gibson was filed on or about January 31, 1997.

Respondent Gibson did not file a properly executed Submission Agreement.

HEARING INFORMATION

The hearing was held on June 29, 1998 for two (2) sessions and June 30, 1998 for two (2) sessions and July 1, 1998 for two (2) sessions. The hearing location was held in New Orleans, Louisiana.

CASE SUMMARY

Claimant alleged that Respondent Gibson persistently solicited Claimant to transfer her account at Fidelity Investments ("Fidelity") to PaineWebber. Claimant contended that Gibson consistently reassured her that there would be no costs associated with liquidating her investments at Fidelity. Claimant alleged that, contrary to Gibson's representations, she incurred capital gains taxes of approximately \$94,195 as a result of liquidating her investments at Fidelity and transferring her assets to PaineWebber. Claimant asserted that she would have left her investments at Fidelity had she known that she would incur a substantial tax liability in transferring her account to PaineWebber. Claimant maintained that, in addition to the outstanding capital gains taxes, she may owe as much as \$45,195 in potential tax penalties and \$38,900 in interest. Furthermore, Claimant alleged that Respondents made highly speculative and risky investments in her PaineWebber account which were unsuitable based on her investment objectives.

Respondents denied all liability to Claimant in their Statements of Answer (Gibson adopted the Statement of Answer of PaineWebber). Respondents contended that Claimant sought a diversified portfolio that produced a steady stream of income, with less risk and liquidity, than her debt-laden, aggressive account at Fidelity. Respondents asserted that, in order to achieve her investment goals, Claimant had to sell her investments, thereby raising capital gains possibilities. Respondents alleged that Gibson discussed capital gains taxes with Claimant, but advised her to seek tax advice from an expert. Respondents asserted that Gibson told Claimant that he could not advise her on the subject of capital gains because he lacked expertise, and he had no knowledge concerning the cost basis of the securities at Fidelity. Respondents contended that all investments were suitable and consistent with Claimant's expressed investment objectives, risk tolerance, as well as her prior investment history.

RELIEF REQUESTED

Claimant requested an award of compensatory damages in the amount of \$178,000, plus interest, reasonable attorney fees and costs, punitive damages, and such other relief as deemed just and equitable.

Respondents requested that the Statement of Claim be dismissed in its entirety with prejudice,

plus an award of attorney fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

Claimant and Respondent PaineWebber, Inc. reached a settlement prior to the hearing.

Respondent Gibson did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed NASD Submission Agreement but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the arbitration panel on all issues submitted.

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 NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, 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:

- (1) That Respondent Everett B. Gibson, Jr. is liable for and shall pay to Claimant Mary A. Pourciau the sum of Forty Thousand Dollars and No Cents (\$40,000.00);
- (2) That other than forum fees which are specified below, the parties shall each bear their own costs, attorney fees and expenses incurred in this matter; and
- (3) That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were six (6) hearing sessions x \$750 = \$4,500 in forum fees. Pursuant to §10332(b) of 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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall refund the hearing session deposit in the amount of \$750 previously deposited by the Claimant.

Pursuant to §10332(c) of the Code, Respondent Gibson is liable for and shall pay forum fees in the amount of \$4,500 (all forum fees).

Pursuant to §10319 of the Code, any postponement fees assessed against Claimant are hereby waived.

Pursuant to Rule 10333 of the Code, Respondent PaineWebber shall pay to NASD Regulation, Inc. the \$350 past due member surcharge previously invoiced.

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

Concurring Arbitrators' Signatures:

/s/ Franklin Anthony Arnold, Esq.

Franklin Anthony Arnold, Esq.
Chairperson
Public Arbitrator

August 3, 1998

Dated:

/s/ Martha Failing, Esq.

Martha Failing, Esq.
Panelist
Public Arbitrator

August 3, 1998

Dated:

/s/ Robert C. Upton, Jr.

Robert C. Upton, Jr.
Panelist
Industry Arbitrator

August 4, 1998

Dated:

For NASD Regulation use only:

Date award served on parties:

August 5, 1998