

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Terry Kay McCurdy, Trustee of the
Scott M. McCurdy Family Trust,

Claimant,

and

Case Number: 96-04943

Leonard VandenBerg, Steven M.
VandenBerg, VandenBerg &
Associates, Inc. and Mutual Service
Corporation,

Respondents.

REPRESENTATION OF PARTIES

Claimant Terry Kay McCurdy, Trustee of the Scott M. McCurdy Family Trust ("Claimant") was represented by Shawn Michael Gotch, Esq. of Damon & Damon located in Grand Rapids, Michigan.

Respondents Leonard VandenBerg, Steven M. VandenBerg, VandenBerg & Associates, Inc. and Mutual Service Corporation (collectively referred to as "Respondents") were represented by Lawrence S. Schultz, Esq. and Michael T. Reid, Esq. of Driggers, Schultz & Herbst located in Troy, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about November 5, 1996.

Claimant's Submission Agreement was signed on November 4, 1996 by Terry Kay McCurdy, Trustee of the Scott M. McCurdy Family Trust.

Respondents' Joint Statement of Answer was filed on or about March 14, 1997.

Respondent Leonard Vandenberg's Submission Agreement was signed on March 10, 1997.

Respondent Steven M. Vandenberg's Submission Agreement was signed on March 7, 1997.

Respondent Vandenberg & Associates, Inc.'s Submission Agreement was signed on March 7, 1997.

Respondent Mutual Service Corporation's Submission Agreement was signed on January 27, 1997.

HEARING INFORMATION

The pre-hearing conferences were held on October 20, 1997 for one (1) session and October 28, 1997 for one (1) session.

The hearing in this matter was held on December 9, 1997 for two (2) sessions, December 10, 1997 for two (2) sessions and December 11, 1997 for two (2) sessions. The hearing location was Grand Rapids, Michigan.

CASE SUMMARY

Claimant alleged that Terry McCurdy met with Respondents Leonard and Steven Vandenberg, representatives of Vandenberg & Associates, Inc. and Mutual Service Corporation, in the spring of 1994 to discuss her financial situation and responsibilities as trustee of the Scott M. McCurdy Family Trust (the "trust"). Claimant contended that, during the fall of 1994, Respondents Leonard and Steven Vandenberg sold almost all of the trust's stock and used the proceeds from the sale to purchase a single premium annuity from Jackson National Life Insurance Company. Claimant maintained that, as a direct result of Respondents' recommendation to liquidate almost all of the trust's stock, the grantors of the trust incurred substantial capital gains tax liability in the amount of \$130,688 consisting of additional federal, state and city income taxes. Claimant alleged that Terry McCurdy had to use the trust's money market account and certificates of deposit in order to pay the additional taxes from the sale of the stock. Claimant contended that Respondents' advice that the trust would eventually pay taxes on the sale of the stock was untrue because the stock receives a stepped up basis that eliminates any capital gain tax on the sale of stock upon the death of the grantors. Claimant asserted that Respondents' recommendation to purchase a single premium annuity was unsuitable because the annuity did not prudently diversify the trust assets and did not serve the primary purpose of the trust to provide for growth

in value for the beneficiaries. Claimant made various claims against Respondents including: negligence; malpractice; breach of fiduciary relationship; and respondeat superior and vicarious liability

Respondents denied all liability to Claimant in the Joint Statement of Answer. Respondents alleged that Claimant met with Leonard and Steven Vandenberg and told them that the income from the trust was not adequate to meet expenses, and that Claimant had been required to use trust principal to satisfy the trust's obligations. Respondents contended that Claimant was conservative and wanted assurance that the trust principal was safe. Respondents asserted that, in response to Claimant's concerns, Leonard and Steven Vandenberg made an appropriate recommendation to sell most of the trust's stock and invest the proceeds from the sale in a guaranteed fixed income annuity which would protect the principal of the trust while, at the same time, provide cash flow for the beneficiaries. Respondents maintained that although Leonard Vandenberg advised Claimant that a substantial capital gains tax would be involved, Claimant still decided to sell the trust's stock and buy the annuity. Respondents alleged that their recommendation met all of Claimant's conservative and safe investment objectives. Respondents contended that Claimant regrets the decision to liquidate the securities in hindsight because the stock market went up, rather than down. Respondents asserted affirmative defenses including: that Claimant has failed to state a claim upon which relief may be granted; and Claimant is barred by the applicable statutes of limitation.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested an award in an amount between \$298,536.88 and \$396,738.88, plus compensation for mental anguish and emotional distress, plus attorney fees and the costs of arbitration.

In the Statement of Answer, Respondents requested that the Statement of Claim be dismissed and that Respondents be awarded costs and attorney fees wrongfully incurred.

OTHER ISSUES CONSIDERED & DECIDED

Claimant's Motion to Change Venue to Grand Rapids, Michigan from Southfield, Michigan was granted.

Respondents' Motion to Bar was denied.

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 Respondents Leonard Vandenberg, Steven M. Vandenberg, Vandenberg & Associates, Inc. and Mutual Service Corporation are jointly and severally liable for and shall pay to Claimant Terry Kay McCurdy, Trustee of the Scott M. McCurdy Family Trust damages in the amount of One Hundred Thirty Three Thousand Seven Hundred Thirty Two Dollars and Seventy Three Cents (\$133,732.73);
- (2) That no award is made with respect to Claimant's claims for mental anguish and emotional distress;
- (3) That other than forum fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- (4) That any relief not specifically enumerated is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 per pre-hearing session, if any. There was one (1) pre-hearing session before a single arbitrator x \$300 = \$300 in forum fees. There were seven (7) hearing session before the full panel, including a pre-hearing before the full panel x \$750 = \$5,250 in forum fees. Total forum fees = \$5,550. 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 with NASD Regulation, Inc. by the

Claimant.

Pursuant to §10332(c) of the Code, Respondents are hereby jointly and severally liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution all forum fees incurred in this action which is the amount of \$5,550. Pursuant to §10333 of the Code, Respondent Mutual Service Corporation is hereby assessed and shall pay the Member Surcharge in the amount of \$350. Pursuant to §10319(b) of the Code, Respondents are hereby jointly and severally liable for and shall pay postponement fees in the amount of \$750.

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

Concurring Arbitrators' Signatures

\s\ Stephen James Nagy, Esq.

Stephen James Nagy, Esq.
Chairperson
Public Arbitrator

December 15, 1997

Dated:

\s\ Frederick F. Fordon

Frederick F. Fordon
Panelist
Public Arbitrator

December 16, 1997

Dated:

\s\ Joseph H. Mizzi

Joseph H. Mizzi
Panelist
Industry Arbitrator

December 16, 1997

Dated:

For NASD Regulation use only:

Date award served on the parties: December 17, 1997