

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Marcella M. Branch,

Claimant,

and

No. 96-05765

Stifel, Nicolaus & Co., Inc., and John Benefiel,

Respondents.

REPRESENTATION OF PARTIES

Claimant, Marcella M. Branch, was represented by Randall K. Calvert, Esquire, located in Oklahoma City, Oklahoma.

Respondents, Stifel, Nicolaus & Co., Inc. and John Benefiel, were represented by Bart A. Boren, Esquire of Williams, Luttrell & Boren, P.C., located in Oklahoma City, Oklahoma.

CASE INFORMATION

Marcella M. Branch's Statement of Claim was filed on or about December 24, 1996.

Marcella M. Branch's Amended Statement of Claim was filed on or about March 14, 1997.

Marcella M. Branch's Submission Agreement was signed on December 24, 1996.

Stifel, Nicolaus & Co., Inc. and John Benefiel's Statement of Answer was filed on or about February 7, 1997.

Stifel, Nicolaus & Co., Inc.'s Submission Agreement was signed on January 13, 1997 by Forrest M. Smith, Vice President and Legal Counsel of Stifel, Nicolaus & Co., Inc.

John Benefiel's Submission Agreement was signed on January 28, 1997.

HEARING INFORMATION

The hearing was held on June 19, 1997 for two (2) sessions.

The hearing was held in Oklahoma City, Oklahoma.

CASE SUMMARY

Claimant, Marcella M. Branch ("Claimant"), brought this action to recover losses in excess of \$37,000 allegedly sustained from the misrepresentations and omissions of material facts by John Benefiel ("Mr. Benefiel"), a registered representative of Stifel, Nicolaus & Co., Inc. ("Stifel").

Claimant alleged that under state and federal securities laws and the rules of the NASD and the NYSE, Mr. Benefiel and Stifel (hereinafter collectively referred to as "Respondents") had a duty to determine her investment needs and to provide her with investment advice that was prudent in light of her stated investment goals. Rather, according to Claimant, Mr. Benefiel failed to fill out her customer information form correctly, made misrepresentations concerning the amount of return on and of her investments, and did not respond to her requests for additional information on her investments. Claimant asserted that on May 29, 1990 she initially invested \$40,000 with Mr. Benefiel, which he used to purchase 160 units of Capital Preferred Yield Fund ("Capital"), an equipment leasing limited partnership interest, on May 31, 1990. Claimant further asserted that she invested an additional \$5,000 in Capital on December 31, 1990. Additionally, Claimant asserted that, through Mr. Benefiel, she invested \$42,400 in American Income Fund-1B on February 27, 1991, and \$100 in American Income Fund-1C on March 13, 1991. Finally, Claimant asserted that she transferred \$34,293.60 on December 30, 1991, and \$52,500 on April 18, 1994, to Mr. Benefiel to invest.

Claimant specifically alleged that Stifel violated its fiduciary duty to her by failing to provide her with accurate statements and information regarding her account and investments. Claimant further alleged that Respondents' actions in connection with her account violated § 10B-5 and 10B-16 of the Securities Act of 1934, § 15 of the Securities Act of 1933, § 408(a)(2) of the Oklahoma Securities Act, and constitute negligence, breach of fiduciary duty, fraud and misrepresentation.

Respondents denied the allegations set forth in the Statement of Claim as they related to any wrongdoing on their part. Respondents stated that Claimant informed Mr. Benefiel that she was licensed to sell annuities and insurance and had extensive knowledge of investments, and that she needed and wanted much higher income than her current investments were providing her. Respondents argued that each of the two limited partnerships met Claimant's demands for as high an income as she could obtain. Respondents argued that Mr. Benefiel explained the risks and rewards to Claimant, gave her the prospectuses to read, and told her to read them. Respondents also asserted that Mr. Benefiel informed Claimant that the income was not guaranteed, that the value of the equipment that was being leased by the limited partnerships was not guaranteed, that the income from the leases of the equipment was not guaranteed, and that how much Claimant would get back at the end of the programs was not guaranteed nor was the time period involved. Respondents contended that the financial information pertaining to Claimant on the customer information forms and

subscription agreements were filled out according to the information provided by Claimant and if it was incorrect, then Claimant could have made any corrections before she signed the forms.

Respondents made the following affirmative defenses: (1) the Statement of Claim was barred by the applicable statute of limitations; (2) Claimant's claims were barred by the doctrines of estoppel, waiver, and laches; (3) Claimant failed to state a claim upon which relief can be granted; and (4) Claimant was barred from bringing various claims by virtue of the clear language of the prospectus regarding goals and risks.

RELIEF REQUESTED

Claimant Marcella M. Branch requested an award for: rescission together with interest at the statutory rate under Oklahoma law; actual damages in excess of \$37,000; sanctions against John Benefiel; punitive damages; costs, expenses and disbursements, including attorney's fees, associated with this proceeding; and pre-award and post-award interest.

Respondents Stifel, Nicolaus & Co., Inc. and John Benefiel requested that the claims asserted against them be denied any relief and requested an award of attorney's fees and costs of their defense.

OTHER ISSUES CONSIDERED AND DECIDED

At the request of the Claimant, the industry arbitrator, Bob J. Bollinger, CFP, assigned to this case recused himself at the commencement of the hearing in this matter. Pursuant to § 10313 of the Code of Arbitration Procedure, the parties agreed to proceed with the presentment of their case to the remaining panel of two public arbitrators.

At the hearing in this matter, Claimant, Marcella M. Branch, limited her claims to those relating to the purchases of the following investments: 160 units of Capital Preferred Yield Fund; 1,696 units of American Income Fund - 1B, and 4 units of American Income Fund - 1C.

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 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 Marcella M. Branch ("Claimant") may do either, but not both, of the following:
 - (i) Claimant may retain the investments in Capital Preferred Yield Fund (160 units) and American Income Fund I (1,696 units of I-B and 4 units of I-C), or
 - (ii) Claimant may elect to transfer those investments in total (only all of them - she may not be selective) to Respondents, Stifel, Nicolaus & Co., Inc. and John Benefiel (hereinafter collectively referred to as "Respondents"), jointly and severally. Such transfer, if elected by Claimant, must be initiated within ten (10) days of the date of this Award, and shall be initiated by Claimant's counsel notifying Respondents' counsel and the NASD Regulation, Inc. Office of Dispute Resolution, in writing, of Claimant's election to transfer and directing (within such ten-day period) the brokerage company currently holding such investments for Claimant to transfer same to Respondent Stifel, Nicolaus & Co., Inc. Respondents, Stifel, Nicolaus & Co., Inc. and John Benefiel, if such election to transfer is made by Claimant, are jointly and severally liable for and shall pay to Claimant the sum of \$35,000 immediately upon receipt of such investments. The \$35,000 to be paid may be reduced by Respondents by any amounts received by Claimant on said investments after June 2, 1997.
2. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were two (2) hearing sessions x \$400 = \$800 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (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 § 10322(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$120 and shall retain as forum fees the hearing session deposit in the amount of \$400 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Marcella M. Branch.

Pursuant to § 10333 of the Code, Stifel, Nicolaus & Co., Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the member surcharge in the amount of \$200.

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Respondents, Stifel, Nicolaus & Co., Inc. and John Benefiel, are jointly and severally liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$400.

Respondents, Stifel, Nicolaus & Co., Inc. and John Benefiel, are jointly and severally liable for and shall reimburse Marcella M. Branch for her hearing session deposit in the amount of \$400.

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

Concurring Arbitrators' Signatures

John R. Preston, Esquire
John R. Preston, Esquire
Chairperson
Public Arbitrator

July 3, 1997
Dated:

Thomas A. Bamberger, Esquire
Thomas A. Bamberger, Esquire
Panelist
Public Arbitrator

July 7, 1997
Dated:

For NASD use only:
Date Award was served on the parties: July 11, 1997