

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Michael Winer and Kim Winer, individually and as
Trustees of The Arizona Spine Care Alliance, P.C.
Profit Sharing Plan and Trust

and

99-01139
Scottsdale, Arizona

Name of Respondents

Simmons & Bishop Co., Inc.
Jerry Herbert Shulak

REPRESENTATION OF PARTIES

Michael Winer and Kim Winer, individually and as Trustees of The Arizona Spine Care Alliance, P.C. Profit Sharing Plan and Trust ("**Claimants**") were represented by David R. Jordan, Esq. and Christopher D. Lonn, Esq., Titus Brueckner & Berry, P.C., Scottsdale, Arizona.

Simmons & Bishop Co., Inc. ("**Respondent Simmons & Bishop**") and Jerry Herbert Shulak ("**Respondent Shulak**") were represented by at the hearing by John R. Augustine, Jr., Esq., Phoenix, Arizona.

CASE INFORMATION

The Statement of Claim was filed on or about March 10, 1999. Submission Agreement of Claimant Michael Winer and Kim Winer, individually and as Trustees of The Arizona Spine Care Alliance, P.C. Profit Sharing Plan and Trust was signed on March 5, 1999.

Statement of Answer was filed by Respondents Simmons & Bishop Co., Inc. and Jerry Herbert Shulak on or about June 23, 1999. Submission Agreement of Respondent Jerry Herbert Shulak was signed on May 28, 1999.

CASE SUMMARY

Claimants submitted the following summary:

In their statement of claim, Claimants Michael Winer, Kimberly Winer and the Arizona Spine Care Alliance, P.C. ("**Claimants**") allege that Respondents: are liable to Claimants

under ERISA; committed Arizona Securities Fraud by violating A.R.S. § 44-1991 and 1992; breached the suitability rule and the "know your customer rule;" negligently supervised the activities of Respondent Shulak; committed breaches of fiduciary duty, trust and agency; committed constructive fraud; negligently misrepresented numerous facts to Claimants; were negligent in handling Claimants' accounts; breached their contract with Claimants; are liable for Claimants' attorneys' fees in pursuing this arbitration proceeding and are liable for Claimants' attorneys' fees in this arbitration proceeding. As set forth in the statement of claim, Claimants were public customers of Respondents.

Respondents submitted the following summary:

In this arbitration, Claimants generally alleged that Respondents engaged in unauthorized transactions, violated various ERISA provisions, committed securities fraud by "Churning" claimants' accounts, Negligence ("Suitability"), breach of Fiduciary Duty, and Breach of Contract. Additionally, Claimants alleged that Respondent failed to properly supervise Respondent Shulak.

Respondents denied Claimants' allegations in toto and affirmatively asserted that the securities purchased in Claimants' accounts were approved by respondents; that, based upon the documentation provided by Claimants and/or their counsel, all ERISA provisions were properly carried out; that, based upon the aggressive nature of the accounts (to wit: Speculative Capital Appreciation/Trading) that no churning had occurred; that, based upon Claimants' financial circumstances, the small percentage of assets involved and the reported account objectives, the transactions and pattern of trading were not unsuitable for claimants; that no breach of fiduciary duty occurred (except possibly by Claimants themselves); and that no contract with Claimants was breached. Respondent Simmons & Bishop Co., Inc. specifically denied that it failed to supervise respondent Shulak.

RELIEF REQUESTED

Claimants respectfully requested the following Award: actual damages in an amount to be determined by the arbitration panel and market opportunity losses in an amount to be determined by the arbitration panel; for rescission of all contracts with Respondents; for interest on the principal invested at the legal rate of 10% per annum from the dates of Claimants' investments until paid in full; for Claimants' reasonable attorneys' fees, costs and other expenses incurred and accruing herein; for punitive damages against Jerry Shulak and Simmons & Bishop, jointly and severally, to deter such intentional conduct and to set an example; for pre-judgment and post-judgment interest; and other relief as the arbitration panel may deem appropriate.

Respondents requested that Claimant's claims be denied in their entirety, that they be awarded their reasonable attorneys fees and costs in defending this matter, and, finally that Claimant be assessed all costs of hearing.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Simmons & Bishop Co., Inc. did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and presented evidence at the hearing is bound by the determination of the arbitration panel on all issues submitted.

The parties stipulated to the dismissal of claims asserted against Mrs. Shulak.

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 (the "NASD").

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. Respondents Simmons & Bishop Co., Inc. and Jerry Herbert Shulak, shall be and hereby are jointly and severally liable for and shall pay to Claimants Michael Winer and Kim Winer, individually and as Trustees of The Arizona Spine Care Alliance, P.C. Profit Sharing Plan and Trust the sum of \$95,000.00 (**Ninety Five Thousand Dollars**). In making this decision, the panel did not find it necessary to address Claimants' alternate theory of liability under ERISA.
2. 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.
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$200.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is Simmons & Bishop Co., Inc.

Member surcharge = \$1,500.00
Pre-hearing process fee = \$ 600.00
Hearing process fee = \$2,500.00

Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$300.00	= \$ 300.00
Pre-hearing conference(s): April 28, 2000 1 session	
One (1) Pre-hearing session(s) with Panel x \$750.00	= \$ 750.00
Pre-hearing conference(s): October 28, 1999 1 session	
Seven (7) Hearing sessions x \$750.00	= \$5,250.00
Hearing Date(s): May 15, 2000 2 sessions	
May 16, 2000 2 sessions	
May 17, 2000 1 sessions	
<u>May 18, 2000</u> <u>2 sessions</u>	

Total Forum Fees = \$6,300.00

The Arbitration Panel has assessed \$6,300.00 of the forum fees jointly and severally to Simmons & Bishop Co., Inc. and Jerry Herbert Shulak.

Fee Summary

Claimants, Michael Winer and Kim Winer, individually and as Trustees of The Arizona Spine Care Alliance, P.C. Profit Sharing Plan and Trust, shall be and hereby are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 200.00
Total Fees	= \$ 200.00
<u>Less payments</u>	= \$ 950.00
Balance to be refunded by NASD Regulation, Inc.	= \$ 750.00

Respondent, Simmons & Bishop Co., Inc., shall be and hereby is liable for:

<u>Member Fees</u>	= \$4,600.00
Total Fees	= \$4,600.00
<u>Less payments</u>	= \$3,100.00
Balance Due NASD Regulation, Inc.	= \$1,500.00

Respondents, Simmons & Bishop Co., Inc. and Jerry Herbert Shulak, shall be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$6,300.00
Balance Due NASD Regulation, Inc.	= \$6,300.00

All balances are due to NASD Regulation, Inc.

Dated:

/s/ Brian R. Warnock
Brian R. Warnock, Esq.
Public Arbitrator, Presiding Chair

May 19, 2000

/s/ William M. Howard
William M. Howard, J.D., Ph.D
Public Arbitrator

May 22, 2000

/s/ Daniel O. Birkle
Daniel O. Birkle
Industry Arbitrator

May 19, 2000

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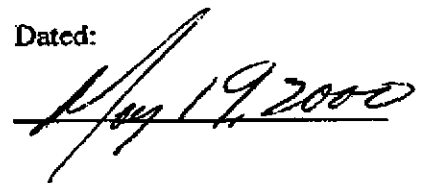
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Public Arbitrator, Presiding Chair

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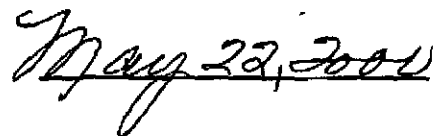
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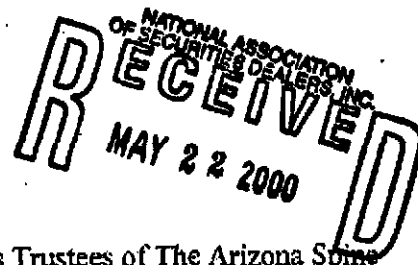
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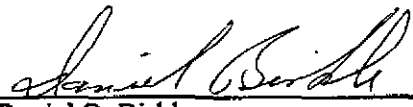
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5/19/00