

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

James Messenger and Lois Messenger, (Claimants) vs. Biltmore Securities, Inc., Rand Alan Heckler, David Ledoux, and FAS Wealth Management Service, (Respondents)

Case Number: 99-02295

Hearing Site: New York, New York

REPRESENTATION OF PARTIES

Claimants, James Messenger ("J. Messenger") and Lois Messenger ("L. Messenger"), hereinafter collectively referred to as "Claimants": Paul T. Vink, Esq., Paul T. Vink, PC, White Plains, NY.

Respondents, Biltmore Securities, Inc. ("Biltmore"), Rand Alan Heckler ("Heckler"), and David Ledoux ("Ledoux"): Delmer C. Gowing, III, Esq., Delmer C. Gowing, P.A., Delray Beach, FL.

Respondent, FAS Wealth Management Service ("FAS"): Gaeton Della Penna, FAS Wealth Management Service, Sarasota, FL. Previously represented by: W. Andrew Clayton, Jr., Esq., The Clayton Law Firm, P.A., Sarasota, FL.

CASE INFORMATION

Statement of Claim filed on or about: May 13, 1999.

J. Messenger signed the Uniform Submission Agreement: May 13, 1999.

L. Messenger signed the Uniform Submission Agreement: May 13, 1999.

Joint Statement of Answer filed by Biltmore, Heckler, and Ledoux on or about: November 8, 1999.

Biltmore signed the Uniform Submission Agreement: October 5, 1999.

Heckler signed the Uniform Submission Agreement: November 19, 1999.

Ledoux signed the Uniform Submission Agreement: November 16, 1999.

Statement of Answer filed by FAS on or about: December 7, 1999.

FAS did not sign a Uniform Submission Agreement.

CASE SUMMARY

Claimants asserted the following causes of action: improper investment recommendations; misrepresentations; and guaranteed profits. Claimants' claim involved the stocks of Casco International, Inc., Flemington Pharmaceutical, Worldwide Equipment Corp., Colmena Corp., Genesis Direct, Terrace Holdings, and TMCI Electronics, Inc.

Unless specifically admitted in their Answer, Biltmore, Heckler, and Ledoux denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants' claims are barred by the doctrine of unclean hands due to the acts and omissions of Claimants relating to their investment objectives, financial status, understanding of the risks associated with the investments complained of, and willingness to assume such risks; Claimants' claims are barred by the doctrines of waiver, estoppel, ratification, and assumption of risk; all risks involved were fully explained to Claimants, who thereafter, knowingly, willingly, and voluntarily assumed the market risks inherent in such investment activities; Claimants failed to use the requisite due diligence in monitoring, managing, and handling their account and investments; Claimants' demand for damages must be denied on the grounds that they failed to reasonably and/or properly mitigate their damages after Claimant knew or should have known of the investment activities and/or losses complained of; the damages for which Claimants seek to hold Respondents liable resulted in whole, or in part, from Claimants' acts and omissions; Claimants' alleged damages were caused by their own conduct or negligence, for which they are more than 50% responsible; Claimants through their own conduct have waived any and all entitlement to relief against Respondents; Claimants were sent written confirmation statements of every transaction in their account and monthly statements which summarized all activities therein; Claimants failed to timely notify Biltmore of any complaint as required by the Client Agreement they executed; any breach of contract by Respondents did not constitute a substantial deviation from the applicable contract or contracts so as to constitute a legal violation or default thereunder; and there is no cause of action for breach or violation of the rules and regulations of the NYSE, the NASD, or any of the other self-regulatory organizations.

Unless specifically admitted in its Answer, FAS denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants' claim is barred by laches and/or any applicable statutes of limitation; Claimants' claim for breach of fiduciary duty, if any, fails to state a cause of action in that no such claim will lie when it arises solely from breach of the contractual agreements between the parties especially where, as here, there was no close and confidential relationship between the parties; Claimants' claim for negligence, if any, fails to state a cause of action where the predicate action lies in contract; Claimants' claim for negligence fails to state a cause of action in that such an action cannot be based or grounded upon a breach of contract; Claimants assumed the risks of investing in the securities that resulted in Claimants' loss and thus they have no basis for a claim against any other entity;

Claimants approved, authorized, ratified, and/or acquiesced in the alleged acts, omissions, and misrepresentations which form the basis of the subject complaint; Claimants are estopped from recovering in this action because they were aware, or should have been aware; of the transactions in their account, approved the type of transactions that were performed, and ratified the specific transactions which occurred; Claimants are barred from recovery under the doctrine of waiver because Claimants received timely reports of individual transactions and monthly account statements, and waived any cause of action against FAS by accepting these confirms and monthly statements without objection; Claimants' cause of action based on alleged misrepresentations or fraudulent conduct by Respondents is barred because they did not exercise reasonable care to discover the alleged wrongful conduct and therefore failed to correct, cure, or mitigate nor did they reasonably rely on such alleged representations, nor were the losses complained of the direct and proximate result of any such representations; any losses sustained by Claimants were the result in whole or in part of their own contributory or comparative negligence; Claimants cannot recover against FAS because it did not intend to deceive or defraud Claimants and did not act with "scienter" or in a reckless or negligent manner; Claimants cannot recover from FAS because the handling of their accounts was in accordance and compliance with applicable brokerage industry standards, guidelines, and regulatory requirements, as well as their own stated investment objectives; any injury, loss, or damage to Claimants was the result of superseding or intervening causes beyond the control of FAS; Claimants failed to mitigate the consequences of any alleged misrepresentation, negligence, or wrongdoing by Respondents and are therefore barred from recovery; in good faith, FAS exercised reasonable and prudent supervision of the accounts in question based upon the information available to it; Claimants have failed to allege all required statutory and common law elements, or cite facts sufficient to put Respondents on notice as to the basis of his claims; FAS is not liable for any claims Claimants assert as to the handling of their account with Biltmore, as it acquired only certain of the assets, and none of the liabilities, of Biltmore; and FAS cannot be held liable for any damages which occurred to Claimants once their account was transferred to another brokerage firm.

RELIEF REQUESTED

Claimants requested:

- a. Compensatory damages in the amount of \$102,366.05 on the Biltmore/Heckler claims;
- b. Compensatory damages in the amount of \$44,123.75 on the FAS/Ledoux claims;
- c. Attorneys' fees in the amount of \$45,496.60;
- d. Punitive damages in the amount of \$250,000.00; and
- e. The costs of this proceeding, including filing fees, expert testimony fees, and other costs.

Biltmore, Heckler, and Ledoux requested that the Statement of Claim be dismissed in its entirety, and that they be awarded their costs and attorneys' fees incurred in the defense of this case.

FAS requested judgment dismissing the Statement of Claim, awarding FAS its attorneys' fees and costs, and for such further relief as the Panel may deem just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel decided to dismiss this arbitration in its entirety, due to the parties' failure to prosecute.

FAS did not file with NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure and, having answered the claim, is bound by the determination of the 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.

AWARD

After considering the pleadings, as well as the parties' failure to prosecute, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are hereby dismissed in their entirety.
2. All other requests for relief are hereby denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 300.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, Biltmore Securities, Inc. and FAS Wealth Management Service are parties.

Biltmore Securities, Inc.

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

FAS Wealth Management Service

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

Adjournment Fees

Adjournments requested during these proceedings:

Jan. 9 & 10, 2001, adjournment by Biltmore, Heckler & Ledoux = \$1,125.00

Forum Fees and Assessments

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

Three (3) Pre-hearing sessions with Panel x \$1,125.00	= \$3,375.00
Pre-hearing conferences:	
September 8, 2000	1 session
October 23, 2000	1 session
January 9, 2001	1 session
Total Forum Fees	= \$3,375.00

1. The Panel has assessed \$1,687.50 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$1,687.50 of the forum fees jointly and severally against Biltmore, Heckler, Ledoux, and FAS.

Fee Summary

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$1,687.50</u>
Total Fees	= \$1,987.50
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance Due NASD Dispute Resolution	= \$ 562.50

2. Biltmore is solely liable for:

<u>Member Fees</u>	<u>= \$4,600.00</u>
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$4,600.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. FAS is solely liable for:

<u>Member Fees</u>	<u>= \$4,600.00</u>
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$4,600.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

4. Biltmore, Heckler, and Ledoux are jointly and severally liable for:

<u>Adjournment Fee</u>	<u>= \$1,125.00</u>
Total Fees	= \$1,125.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$1,125.00

5. Biltmore, Heckler, Ledoux, and FAS are jointly and severally liable for:

<u>Forum Fees</u>	<u>= \$1,687.50</u>
Total Fees	= \$1,687.50
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$1,687.50

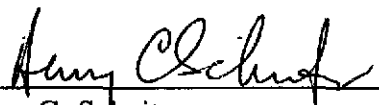
All balances are payable to NASD Dispute Resolution, and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Henry C. Schnitzer	-	Public Arbitrator, Presiding Chair
Edwin E. Albom	-	Public Arbitrator
Brian J. Neville, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



Henry C. Schnitzer
Public Arbitrator, Presiding Chair

April 4, 2003

Signature Date

Edwin E. Albom
Public Arbitrator

Signature Date

Brian J. Neville, Esq.
Non-Public Arbitrator

Signature Date

April 15, 2003

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Henry C. Schnitzer	-	Public Arbitrator, Presiding Chair
Edwin E. Albom	-	Public Arbitrator
Brian J. Neville, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Henry C. Schnitzer
Public Arbitrator, Presiding Chair

Signature Date



Edwin E. Albom
Public Arbitrator

April 3, 2003
Signature Date

Brian J. Neville, Esq.
Non-Public Arbitrator

Signature Date

April 15, 2003

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Henry C. Schnitzer	-	Public Arbitrator, Presiding Chair
Edwin E. Albom	-	Public Arbitrator
Brian J. Neville, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Henry C. Schnitzer
Public Arbitrator, Presiding Chair

Signature Date

Edwin E. Albom
Public Arbitrator

Signature Date


Brian J. Neville, Esq.
Non-Public Arbitrator

4/3/03
Signature Date

April 15, 2003

Date of Service (For NASD Dispute Resolution use only)