

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Marjorie A. Minor, Claimant vs. Everen Securities, Inc., formerly known as Kemper Securities, now known as First Union Securities, Inc.; and James Brian Panenka, Respondents.

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Case Number: 99-04914 Hearing Site: Milwaukee, Wisconsin

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**REPRESENTATION OF PARTIES**

Claimant, Marjorie A. Minor, "Minor", hereinafter referred to as "Claimant", was represented by Paul Erickson, Esquire, and Colleen M. Fleming, Esquire, of Gutglass, Erickson & Bonville, S.C., Milwaukee, Wisconsin.

Respondents, Everen Securities, Inc., "Everen", and James Brian Panenka, "Panenka", hereinafter collectively referred to as "Respondents", were represented by Bruce Lewitas, Esquire, Chicago, Illinois.

**CASE INFORMATION**

Statement of Claim filed on or about: November 1, 1999.

Claimant signed the Uniform Submission Agreement: October 15, 1999.

Joint Statement of Answer filed by Respondents, Everen and Panenka, on or about: January 25, 1999.

A. Brad Busscher, Senior Vice President for Respondent, Everen Securities, Inc., signed the Uniform Submission Agreement: January 24, 1999.

Respondent, James Brian Panenka, did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: violations of Sections 10(b) and 20 of the Securities Exchange Act of 1934; violations of Rule 10b-5; intentional and negligent misrepresentation; breach of fiduciary duty; breach of the implied covenant of good faith and fair dealing; and violations of New York Stock Exchange rules.

Unless specifically admitted in their Joint Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: unclean hands; ratification; contributory and comparative negligence; assumption of the risk; estoppel; laches; waiver; and failure to mitigate.

### **RELIEF REQUESTED**

Claimant requested:

Compensatory Damages	\$54,870.65
Punitive Damages	unspecified
Attorney's Fees	unspecified
Other Costs	unspecified

Respondents requested that Claimant's Statement of Claim be dismissed in its entirety, with prejudice.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondent, James Brian Panenka, did not sign the Uniform Submission Agreement. However, he is bound by the decision of the Panel in this matter pursuant to Rule 10301 of the Code of Arbitration Procedure. Additionally, he filed an Answer and appeared in his own defense at the hearing.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's Third Party Trading authorized agent placed an option trade which was not permitted under the Option Agreement and Respondents caused said trade to be consummated.
2. Claimant was not approved for margin on her New Account Form, nor was any separate margin agreement ever signed. Nevertheless, margin was used from shortly after the account was opened until the account was closed.

3. After the Claimant terminated her agent's trading authority, the Claimant's portfolio at Everen consisted of one stock, Homestake Mining - a gold stock - which was held on about 50% margin. The gross amount of this position exceeded her net worth exclusive of family residence as disclosed on her New Account Form. At no time following said termination did Respondent Panenka discuss any of the following with Claimant:

- (1) The risks of owning stock on margin. (No evidence was presented that such a discussion occurred when margin was first used or at any time thereafter.)
- (2) The fact that he had never recommended a gold mining stock to any of his customers.
- (3) The fact that in his opinion the ownership of one stock on about 50% margin, which constituted Claimant's entire portfolio with Everen, was not suitably diversified.

4. Respondents, Everen Securities, Inc., formerly known as Kemper Securities, now known as First Union Securities, Inc.; and James Brian Panenka, are held to be jointly and severally liable under the doctrine of *respondeat superior*, and shall pay to Claimant, Marjorie A. Minor, the amount of **Nine Thousand Two Hundred Twenty Dollars and Forty Three Cents (\$9,220.43)**, representing an award of compensatory damages. Any claims for attorneys' fees, costs and pre-award interest are dismissed with prejudice.

5. Any and all relief not specifically addressed herein, including punitive (treble) damages, is hereby denied with prejudice.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

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

Initial claim filing fee = \$ 225

**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 event giving rise to the dispute. In this matter, the member firm is First Union Securities, Inc.

Member surcharge	= \$1,000
Pre-hearing process fee	= \$ 600
Hearing process fee	= \$1,500

**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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Four (4) Hearing sessions x \$750	= \$ 3,000
Hearing Dates:   October 10, 2000   2 sessions	
October 11, 2000   2 sessions	
<b>Total Forum Fees</b>	<b>= \$ 3,000</b>

The Panel has assessed the entire \$3,000 in Forum Fees to Respondents, Everen and Panenka, *jointly and severally*.

**Fee Summary**

1. Claimant, Minor, be and hereby is solely liable for:

<u>Initial Filing Fee</u>	= \$ 225
<b>- Total Fees</b>	<b>= \$ 225</b>
<u>Less payments</u>	<u>= \$ 975</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ (750)
NASD Dispute Resolution, Inc. will refund this \$750 to Claimant.	

2. Respondent, Everen, be and hereby is solely liable for:

Member Fees	= \$ 1,000
Pre-Hearing Process Fees	= \$ 600
<u>Hearing Process Fees</u>	<u>= \$ 1,500</u>
<b>Total Fees</b>	<b>= \$ 3,100</b>
<u>Less payments</u>	<u>= \$ 3,100</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 0

3. Respondents, Everen and Panenka, be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 3,000
<u>Total Fees</u>	= \$ 3,000
<u>Less payments</u>	= \$ 3,000
<u>Balance Due NASD Dispute Resolution, Inc.</u>	= \$ 3,000

All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**

Philip P. Rummel  
Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

November 29, 2000  
Signature Date

Gary L. Grolle  
Gary L. Grolle, Esq.  
Public Arbitrator

November 30, 2000  
Signature Date

Elise M. Neils  
Elise M. Neils, JD  
Industry Arbitrator

November 20, 2000  
Signature Date

November 30, 2000  
Date of Service (For NASD office use only)

3. Respondents, Everen and Panenka, be and hereby are jointly and severally liable for:

Forum Fees	= \$ 3,000
Total Fees	= \$ 3,000
Less payments	= \$ 3,000
Balance Due NASD Dispute Resolution, Inc.	= \$ 3,000

All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**

Philip P. Rummel  
Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

November 27, 2006  
Signature Date

Gary L. Grolle, Esq.  
Public Arbitrator

Signature Date

Elise M. Neils, JD  
Industry Arbitrator

Signature Date

Date of Service (For NASD office use only)

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Less payments	= \$ 3,000
Balance Due NASD Dispute Resolution, Inc.	= \$ 3,000

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

Gary L. Grotte, Esq.  
Public Arbitrator

11/30/00  
Signature Date

Elise M. Neils, JD  
Industry Arbitrator

Signature Date

Date of Service (For NASD office use only)

## NASD-DR Award

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Balance Due NASD Dispute Resolution, Inc.	= \$ 3,000

All balances are due to NASD Dispute Resolution, Inc.

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\_\_\_\_\_  
Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Gary L. Grolle, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date



\_\_\_\_\_  
Elise M. Neils, JD  
Industry Arbitrator

11-20-00  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD office use only)