

**MSRB**  
MUNICIPAL SECURITIES RULEMAKING BOARD

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In the Matter of the Arbitration between :  
:   
JOHN A. SULLIVAN and CAROLYN M. SULLIVAN, : AWARD  
Claimants, :   
v. :   
: MS91-37  
HARVEY DANIELS and JOHNSTON, BROWN, BURNETT : SC1-016  
& KNIGHT, INC., :   
Respondents. :   
:

The Undersigned, pursuant to Section 31 of MSRB Rule G-35, hereby states as follows:

CASE SUMMARY

Claimants allege in their Statement of Claim that Respondent Harvey Daniels ("Respondent Daniels"), while a representative of Respondent Johnston, Brown, Burnett & Knight, Inc. ("Respondent Johnston, Brown"), failed to perform specific services for Claimants which Respondent Daniels represented to Claimants that he would perform in consideration of Claimants' doing business with him at Respondent Johnston, Brown: namely, notifying Claimants of early calls on bonds that they owned. Claimants allege that Respondent Daniels assured them that he could, and would, catch such calls if Claimants provided him with the following information: (1) description of the issue; (2) dated date; (3) interest rate; (4) bond numbers; (5) CUSIP numbers; and (6) maturity date. Claimants allege that they prepared a ten page list of the bonds that they owned which included the requested information as well as Claimants' own notation "Call Alert" beside certain bonds that Claimants felt were very likely to be called. Claimants allege that they provided this list to Respondent Daniels in November 1989 and Respondent Daniels again assured them that he would not miss an early call on their bonds, and that, as a double check, he would enter Claimants' bonds on his company's master computer. Claimants allege that over the next five months, while Claimants were in Florida, Claimants spoke with Respondent Daniels many times and bought bonds from him on four separate occasions, and that they would always ask Respondent Daniels about any early calls or notices of prerefunding on their bonds. Claimants allege that they returned to Kentucky from Florida in mid-April 1990 and were informed by Respondent Daniels that his employer would not allow him to enter Claimants' bonds into the company computer because Claimants did not disclose their purchase price on the bonds. Claimants allege

that Respondent Daniels told them not to worry, that he would catch any early calls without the computer. Claimants allege that they returned to Florida in October, 1990, and on November 24, 1990, received a letter from their bank in Kentucky advising them that the coupons they deposited November 1, 1990 on \$150,000 Edmonson County Kentucky School Building Revenue Bonds ("the Bonds") had been called, and that the bank had to charge the amount of the coupons (\$6725), representing six months' interest on the Bonds, back to Claimants' account. Claimants allege that they subsequently called the paying agent and were advised that the Bonds had been called on April 1, 1990. Claimants also allege that they wrote to Respondent Johnston, Brown about their loss and were advised, among other things, that the Bonds had been prerefunded in May 1987, for call on April 1, 1990.

Claimants contend that Respondent Daniels had about five months in which to check his company's records or other sources which, Claimants allege, should show that this issue had been prerefunded; if his company did not have this information, Claimants allege that a prudent bond salesman with an obligation to a client, seeing bonds yielding 9% and more in approximately a 7% market, with the notation "Call Alert," should have called the paying agent or fiscal agent for that bond. Claimants maintain that Respondent Daniels gave Claimants complete assurance that income from the bonds on their list was safe from loss due to missed calls. Claimants also maintain that they named Respondent Johnston, Brown as a party because it was their employee who committed the error and he was acting for them. Claimants also allege that Respondent Johnston, Brown failed to train their employee in its policy regarding bond calls, and that Respondent Johnston, Brown could have prevented exposure to this type of claim by a printed disclaimer to be acknowledged by each customer.

Respondent Daniels contends that Claimants' claim is unjustified and that at no time during any conversation did he or Respondent Johnston, Brown guarantee or imply that each and every call of the Claimants' bonds would be covered. Respondent Daniels maintains that what he did was offer to help Claimants watch for call notices on the bonds included on their list. Respondent Daniels contends that there was no written contract or guarantee that each and every call would be discovered.

Respondent Johnston, Brown denies that it or Respondent Daniels have any liability in this matter given Respondent Daniels' response to Claimants' allegations and because, among other things, the list of bonds provided to Respondent Daniels in late 1989 contained approximately \$1,500,000 of Kentucky Bonds, only two of which (\$65,000) were purchased from Respondent Johnston, Brown in 1984 through another registered representative. Respondent Johnston, Brown claims that the

remainder of the bonds, including the Bonds at issue, were not purchased from Respondent Johnston, Brown. Respondent Johnston, Brown also contends that it did not hold any of Claimants' bonds in safekeeping, that it had not contracted with Claimants in any way to safekeep their securities, and that it was not compensated for such services. Respondent Johnston, Brown contends that Respondent Daniels offered to put Claimants' bonds on the firm's computerized Municipal Bond Portfolio Analysis system, but that Claimants did not provide Respondent Daniels with the cost of each bond which made it impossible for them to be entered into the program. Respondent Johnston, Brown further notes that this Analysis is simply a listing of municipal securities with a "'grid type'" pricing, which is done on a quarterly basis, but is not programmed to pick up bond calls. In addition, Respondent Johnston, Brown contends that the Notice of Redemption providing for the call of the Bonds on April 1, 1990 was published one time only, in May 1987.

#### RELIEF REQUESTED

Claimants seek to recover \$9340.

#### AWARD

The undersigned arbitrator reviewed the controversy between the parties set forth in submissions to the arbitrator signed by Claimants on May 21, 1991 (filed with the MSRB on May 23, 1991); by Respondent Daniels on June 11, 1991; and, by Respondent Johnston, Brown on June 12, 1991. The undersigned, having considered the matter solely upon the pleadings and evidence submitted by the parties, pursuant to section 34 of MSRB rule G-35, and having consented to the submission of Claimants' August 13, 1991 letter and Respondent Johnston, Brown's August 27, 1991 letter responding to same, has determined, in full and final resolution of the issues submitted for determination, as follows:

Ordinarily, absent any contractual assumption of a duty to notify his customer of calls of particular bonds, no such duty on the part of a broker exists. In the matter at hand, however, Claimants allege, and Respondents do not convincingly deny, that as part of the new broker-customer relationship established between Claimants and Respondent Daniels in the fall of 1989, Claimants made clear that they were concerned about the potential for calls with respect to the bonds in their portfolio; sought Respondent Daniels' assurance that he would notify Claimant John A. Sullivan of such calls; and at Respondent Daniels' invitation, furnished him with a detailed list of their bonds. Thereafter, Claimants in fact bought more bonds from Respondent Johnston, Brown through Respondent Daniels.

Thus, Respondents did not do what Respondent Daniels contracted on Respondent Johnston, Brown's behalf to do, and Claimants have suffered a loss. The amount of this loss is equal to the income which could have been earned by Claimants had the redemption price of the Bonds--\$154,500--been invested from April 1, 1990, to December 4, 1990, at a yield of 7.33%. Calculated on a 360-day basis, the reinvestment loss, and, thus, the award, is \$7,675.73. Since Claimants submitted no reliable evidence as to the tax status of the award, and no evidence as to their 1991 marginal federal tax rate, no adjustment for tax purposes is warranted.

I find that both Respondents are equally culpable, and assess fifty percent of the award against each of them. I also find that the \$200 filing fee deposited by Claimants shall be retained by MSRB as costs of this proceeding.

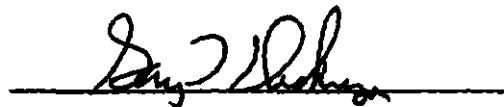


Frederick O. Kiel

Dated: 9/9/91

STATE OF *Ohio* ss.:  
COUNTY OF *HAMILTON*

On this *9<sup>th</sup>* day of *September*, 19*91*, before me personally appeared Frederick O. Kiel to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



GARY L. DIEKMEYER  
Notary Public, State of Ohio  
My Commission Expires Aug. 15, 1995