

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Estate of Lauren W. Wolfe

Case No. 00-03351

Name of Respondents

J.C. Bradford & Co., n/k/a PaineWebber, Inc.
Mark E. Considine
Martin J. Bannon III

Hearing Site: Baltimore, MD

REPRESENTATION OF PARTIES

Claimant, Estate of Lauren W. Wolfe, hereinafter referred to as "Claimant": Robert A. Kantas, Esq., Michie, Hamlet, Lowry, Charlottesville, VA.

Respondents, J.C. Bradford & Co. ("J.C. Bradford") and Martin J. Bannon, III ("Bannon"): Jeffrey H. Gray, Esq., Willcox & Savage, P.C., Virginia Beach, VA.

Respondent Mark E. Considine represented himself at the hearing.

CASE INFORMATION

Statement of Claim filed on: August 3, 2000

Claimant, Lauren W. Wolfe, signed the Uniform Submission Agreement: August 2, 2000

Statement of Answer filed by all Respondents on: October 20, 2000

Donald Davidson, First Vice-President of PaineWebber, Inc. signed the Uniform Submission Agreement on behalf of Respondent J.C. Bradford: October 23, 2000

Claimant filed and Amended Statement of Claim naming the Estate of Lauren W. Wolfe as the Claimant on: September 10, 2001

Respondents did not object to the Amended Statement of Claim

Respondent Considine filed a Motion to Dismiss Claimant's Claim for Repayment of Personal Loans on: September 21, 2001

Claimant filed Objections to the Respondent's Motion to Dismiss Claimant's Claim for Repayment of Personal Loans and Points and Authorities In Support Thereof on: October 11, 2001

Respondent Bannon filed a Motion for Expungement of Record on: December 3, 2001

CASE SUMMARY

Claimant asserted the following causes of action: churning; borrowing money from clients in violation of the NASD Code of Conduct; breach of fiduciary duty; unauthorized trading; unsuitability; misrepresentation and material omission in violation of SEC Rule 10b-5; violation of Section 13.1-522 et seq. of the Code of Virginia; and, failure to supervise. Among other things, the causes of action relate to the purchase of Imnet Systems, Inc. ("Imnet"), Zixit, and Ciber stock.

Unless specifically admitted in its Answer, Respondents J.C. Bradford, Considine, and Bannon denied the allegations made in the Statement of Claim and asserted, among other things, the following defenses: that all of Claimant's investments were part of an overall investment plan and strategy; that Claimant was an experienced investor and had previously invested in a variety of aggressive and speculative investment vehicles; that Claimant contributed to any loss sustained by refusing to sell stock that Respondent Considine recommended he sell; that Claimant approved all transactions made in his account; and, that Claimant failed to complain to Respondent Considine's supervisor about any alleged misconduct.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages
Punitive Damages
Interest
Attorneys' Fees
Other Costs

\$ 913,085
\$1,000,001
amount unspecified
amount unspecified
amount unspecified

Respondents requested that the Claim be dismissed in its entirety; and, that an expungement order be entered on behalf of Respondent Bannon.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel granted Claimant's Motion to Amend the Statement of Claim to reflect the Estate of Lauren W. Wolfe as the Claimant.

The Panel granted Respondent Considine's Motion to Dismiss Claimant's Claim for Repayment of Personal Loans.

On October 23, 2001, Claimant dismissed his claims against Respondent Bannon and reached a settlement agreement with Respondent J.C. Bradford, leaving Respondent Considine as the sole remaining Respondent.

On October 22, 2001, Jeffrey H. Gray of Willcox & Savage, P.C. withdrew as counsel for Respondent Considine.

The Panel denied Respondent Bannon's request for an expungement order.

Respondents Considine and Bannon did not file with NASD Dispute Resolution, Inc. ("NASD-DR") properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim, and in the case of Respondent Considine, appeared and testified at the hearing, are 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, 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:

The estate of Lauren W. Wolfe, as represented by his wife, Geraldine Wolfe, brought a claim against J.C. Bradford & Co. (now known as "USB PaineWebber, Inc."), Martin J. Bannon, III, and Mark E. Considine. Mr. Considine was the son-in-law of the Wolfes. The arbitrators identified below were selected to arbitrate these claims.

The Amended Statement of Claim alleges, among other things, that the Respondents churned an account opened by Considine at Bradford, that the Respondents exercised unauthorized discretionary authority over Claimant's account, made unsuitable trades, breached their fiduciary duties to the Claimant, and violated the Federal securities law and the Virginia State law equivalent of Rule 10b-5. The Claimant also alleged that Bradford and Bannon failed to supervise Considine. The Claimant's claim for impermissible borrowing of money by Considine was excluded from the hearing on the merits.

Hearings on the merits were set for November 27-29, 2001 in Baltimore, Maryland. Several weeks before the hearing dates, Respondents Bradford and Bannon settled their claims with the Claimant, and Bradford and Bannon were dismissed from the arbitration. The panel was advised only of this fact, but not the amount, if any, paid by the Respondents to settle the Claimant's claims.

On the first hearing date, Claimant orally moved to strike Respondent Considine's exhibits because Considine had not filed his exhibit list or witness list timely with NASD-DR. That motion was reserved until each document at issue was presented at the hearing. At the hearing, twelve of fourteen of Respondent's exhibits were admitted; two were not admitted into evidence (Exhibits Nos. 7 and 8). As a result, the Claimant's motion to strike was denied in part and admitted in part.

The Claimant presented three (3) witnesses and thirty-two (32) exhibits. Geraldine Wolfe, surviving wife of Lauren W. Wolfe, expert witness Craig McCann, and adverse witness, Respondent Considine, were called to testify in Claimant's case. The Respondent, Mark E. Considine, represented himself and testified on his own behalf in

the Respondent's case. Mrs. Wolfe was also called as an adverse witness to testify in the Respondent's case. Twelve (12) of fourteen (14) of Respondent's exhibits were admitted.

The Claimant established convincingly through testimony and exhibits that their account had indeed been churned by Considine causing significant losses in the account. The Respondent's defense, in contrast, concentrated not on whether the account had been churned, but rather on the argument that the account was profitable and would have remained so had it not been for the inattention of the Wolfes. On the issue of liability, the panel finds that the account had been churned.

The Claimant also established that Considine invested in unsuitable stocks for their account. The account at issue was an IRA tax deferred account which, generally speaking, requires prudent and conservative investments. The Wolfes were both over sixty-five (65) at the time of the trading, further suggesting that the account should have been treated conservatively.

The Respondent, however, placed nearly 100% of the account in the stock of Zixit, an Internet account that any careful review would have revealed as a high risk, speculative stock that should have expected to have wild price swings. That anticipated result indeed occurred, as evidenced in Claimant's Exhibit 50, which tracked the stock's trading history. The Respondent counters by asserting that the stock traded up over the course of the time that he exercised control over the account, producing profits in the account. The Respondent also points to the Claimant's account opening forms, indicating that they wished to engage in speculative trading and that, in other accounts, the Claimant invested in Scios-Nova, at the time an unproven, speculative, pharmaceutical stock. While those assertions may be true in part, the fact remains that the Respondent placed the account in a stock unsuitable for his client's needs and the purpose of the account. In a word, the Respondent took advantage of the Claimant to enrich himself first, regardless of the consequences to his client. For these reasons, the Panel finds the Respondent liable to the Claimant for unsuitable investments.

As to damages, the Claimant presented its testimony largely through an expert witness, Craig McCann. Unfortunately for him – and while he did represent himself well otherwise – the Respondent was not able to cross-examine Mr. McCann effectively. While the Panel relied in part on testimony and exhibits from Mr. McCann, the Panel believes that Mr. McCann's damages estimates were inaccurate and/or overstated. For that reason, the Panel calculated damages based on the evidence that was presented by the Claimant, but also with an eye toward mitigation and a close examination of the Claimant's calculations. Based on its calculations, the Panel awards \$424,183.00 to the Claimant and against Respondent Considine, individually.

Finally, after reaching the above decision, the Panel reviewed the documentary evidence supporting the request by Respondent Bannon to recommend an expungement

Unfortunately, Mr. Wolfe died before the hearings. The panel did not have the benefit of his testimony in person or by affidavit. The panel, therefore, heard from Mrs. Wolfe, but she did not seem to have had direct conversations with Mr. Wolfe about this particular investment. The panel also heard from the Respondent, and while credibility was not necessarily an issue, at best, the Respondent, with a motive to improve his case, simply did not provide direct testimony about conversations with Mr. Wolfe on this particular stock or on this particular account.

of the claims on his registration records maintained by the NASD Central Registration Depository ("CRD"). The Panel denies that request.

Thus, the Panel's Award is as follows:

1. Claimant is awarded \$424,183.00, to be paid by Respondent Mark E. Considine individually;
2. No interest on this amount is awarded;
3. Claimant's claim for punitive damages is denied in its entirety;
4. The parties shall bear their respective costs and expenses, including attorneys fees, except as Fees are specifically addressed below; and,
5. Any request for relief not specifically addressed herein is denied in its entirety.

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 = \$ 500

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firm is Respondent J.C. Bradford, a party.

Member surcharge = \$ 2,500
Pre-hearing process fee = \$ 600
Hearing process fee = \$ 4,500

Forum Fees and Assessments

The panel has the authority to assess 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 \$ 450 = \$ 450
Pre-hearing conference(s): September 28, 2001 1 session

One (1) Pre-hearing session with Panel x \$ 1,200 = \$ 1,200
Pre-hearing conference: July 31, 2001 1 session

Four (4) Hearing sessions x \$ 1,200 = \$ 4,800
 Hearing Dates: November 27, 2001 2 sessions
 November 28, 2001 2 sessions

Total Forum Fees = \$ 6,450

The panel has assessed \$3,225 of the forum fees to Claimant.
 The panel has assessed \$3,225 of the forum fees to Respondent Considine.

FEE SUMMARY

Claimant, The Estate of Lauren W. Wolfe, is assessed and shall pay:

Initial Filing Fee = \$ 500
 Forum Fees = \$ 3,225

Total Fees = \$ 3,725
 Less payments = \$ 1,800

Balance Due NASD Dispute Resolution, Inc. = \$ 1,925

Respondent, J.C. Bradford, is assessed and shall pay:

Member Fees = \$ 7,600

Total Fees = \$ 7,600
 Less payments = \$ 7,600

Balance Due NASD Dispute Resolution, Inc. = \$ 00

Respondent, Mark E. Considine, is assessed and shall pay:

Forum Fees = \$ 3,225

Total Fees = \$ 3,225
 Less payments = \$ 00

Balance Due NASD Dispute Resolution, Inc. = \$ 3,225

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

David B. Hamilton, Esq. - Public Arbitrator, Presiding Chairman
 Jeffrey M. Cohen - Public Arbitrator, Panelist
 Henry Friedman - Non-Public Arbitrator, Panelist

Henry Friedman

Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures



David B. Hamilton, Esq.
Public Arbitrator, Presiding Chairman

21 Dec 01

Signature Date

Jeffrey M. Cohen
Public Arbitrator, Panelist

Signature Date

Jeffrey M. Cohen
Public Arbitrator, Panelist

Henry Friedman
Non-Public Arbitrator, Panelist

Signature Date

December 31, 2001
Date of Service (For NASD-Dispute Resolution office use only)

Henry Friedman

Non-Public Arbitrator, Panelist

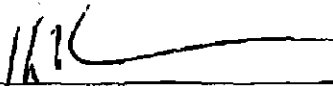
Concurring Arbitrators' Signatures

David B. Hamilton, Esq.
Public Arbitrator, Presiding Chairman

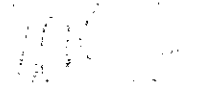
Signature Date

Jeffrey M. Cohen
Public Arbitrator, Panelist

Signature Date



Henry Friedman
Non-Public Arbitrator, Panelist



Signature Date

December 31, 2001
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Henry Friedman

Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

David B. Hamilton, Esq.
Public Arbitrator, Presiding Chairman


Signature Date



Jeffrey M. Cohen
Public Arbitrator, Panelist

12/21/01

Signature Date



Jeffrey M. Cohen
Public Arbitrator, Panelist

Henry Friedman
Non-Public Arbitrator, Panelist

Signature Date

December 31, 2001
Date of Service (For NASD-Dispute Resolution office use only)