UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

DAVID S. LEDERSTEIN, Complainant,	*	
v.	*	CFTC Docket No. 02-R011
IRA EPSTEIN & COMPANY, and MAN FINANCIAL, INCORPORATED d/b/a ED&F MAN INTERNATIONAL, INC., Respondents.	*	

INITIAL DECISION

This dispute arises from an "odd-tick" limit order to buy two Dow Jones futures contracts that was not filled, after the market briefly traded through the limit price by one tick. Lederstein claims that the order should have been filled because regular trading conditions were prevailing when the market traded through his limit price. Therefore, Lederstein asserts, the failure to execute the order in these circumstances is evidence of negligence or recklessness by respondents or their floor broker agent. In reply, respondents assert that their floor broker agent acted with due diligence despite the fact that he was unable to fill the order after Lederstein's order had traded through by only one tick on an odd tick. According to respondents, the market was trading in five-point increments, and it is "notoriously difficult for brokers in stock index futures contracts to fill an order on a one-tick print-through, where the limit is an odd tick and the print-through is on the nickel." Respondents assert that this problem is exacerbated in the Dow Jones pit, where only a very small number of brokers regularly handle customer trades. As explained below, after reviewing the parties' documentary evidence,[1] it has been concluded that Lederstein has failed to establish that he is entitled to an award.

Factual Findings

1. David S. Lederstein, a resident of Brooklyn New York, is employed as an accountant. When Lederstein opened his Ira Epstein account, he was 41 years old and had traded futures for ten years.

2. Ira Epstein & Company, located in Chicago, Illinois, is a registered introducing broker, guaranteed by Man Financial, Incorporated. Man Financial, also located in Chicago, Illinois, is a registered futures commission merchant that executes orders and clears transactions on behalf of customers of Ira Epstein.

3. About two years before the disputed trade, Lederstein opened his non-discretionary account with Ira Epstein. When Lederstein opened the account, he had a choice between three types of customer accounts offered by Ira Epstein: discount brokerage accounts; broker-assisted accounts; and managed accounts.

Ira Epstein's promotional brochure stated: that discount brokerage accounts offer "deeply discounted round-turn commission rates," and "efficient courteous service;" that discount accounts were for "those who make their own trade decisions and place their own orders;" and that discount customers "should regularly monitor the markets, apply his or her trading techniques, and keep abreast of margin requirements and the like."

The brochure stated that broker assisted accounts "may suit you whether you're a beginner or experienced trader needing help in fine-tuning your goals or guidance in your futures

[1] The documentary record consists of the complaint and answer, and affidavits and documents produced by the parties in response to a *sua sponte* discovery order.

trading." The brochure also stated that with a broker-assisted account the broker will:

> Help track your trading position and equity.
>
> Watch the markets for you.
>
> Help you with timing for your trading.
>
> Aid in decisions that rely on an experienced broker. For example, which markets are liquid, seasonal trends, etc.
>
> Follow your specific instructions when placing orders for your account.

Thus, when Lederstein chose to open a discount account, rather than a more expensive broker-assisted account, he chose to forgo receiving specialized assistance when placing orders.

4. For most trades, Lederstein used Ira Epstein's browser-based Internet order entry system. Orders placed on this system were routed through TOPS, the Chicago Mercantile Exchange's automated order routing system, directly to Man Financial. In turn, Man Financial used an independent floor broker group headed by John Zawaski to fill orders in the Dow Jones ("DJ") pit of the Chicago Board of Trade.

Lederstein never received any advice about placing trades, and typically had no direct contact with the order desk, except to "call them if an order had not been routed properly or an error had been made." According to Lederstein, "there were many more instances" where he was unhappy with fills. However, he was sufficiently satisfied to continue trading over Ira Epsteins' trading system for more than two years. [*See* Lederstein statement in reply to the *sua sponte* discovery order.]

During the two years before the disputed trade, Lederstein had actively traded a wide variety of futures and options contracts, including the Dow Jones futures contract. During these two years, Lederstein realized an overall net loss of approximately $42,400 on his futures trading and an overall net profit of approximately $16,940 on his options trading.

5. Lederstein has not disputed respondents' description of trading conditions that prevail in the Dow Jones pit. According to respondents, stock index futures pits generally are subject to frequent volatility and "choppiness." As these markets become more volatile, the bid-ask spreads widen, and trades tend to occur only in "round numbers" or "on the nickels", *i.e.*, 5-tick intervals at "x5's" and "x0's." Thus, in volatile conditions, brokers frequently cannot fill limit orders unless the market penetrates them by five ticks.

Filling limit orders is even more problematic in the Dow Jones pit where conditions are often "congested," because only a "very limited number of brokers" are interested in filling customer orders. As a result, the brokers in the DJ pit "typically handle extremely large volumes of small-lot order tickets, which makes it difficult for limit orders to be filled in general." [Gura affidavit.]

6. On October 13, 2000, the day that Lederstein placed the disputed order, the December Dow Jones Average future ("DJZ") opened (at 7:20 a.m.) at 101.<u>30</u>, and traded at five-tick intervals throughout the morning.

At approximately 9:37 a.m., Lederstein placed an order to purchase two DJZ at a limit price of 101.<u>81</u>. At 9:37:37, Ira Epstein entered the order over the TOPS electronic order entry system. At this time, the DJZ was trading at 102.<u>20</u> to 102.<u>25</u>.

About 12 minutes later, the DJZ traded down through Lederstein's 101.<u>81</u> limit price. The DJZ twice traded at 101.<u>80</u>, at 9:50:11 and 9:50:34. Then, at 9:50:37, the DJZ bounced up to 101.<u>85</u>, and continued to climb at five-tick increments. Soon afterwards, the floor broker reported that he had been unable to fill the order. [*See* CBT Time and Sales report, exhibit to complaint.]

7. Lederstein complained about the non-execution to Epstein's director of operations, Edward Thomas O'Malley. Jeff Mandel, the manager of Man's DJ order desk, and John Gura, Epstein's order desk manager, reviewed the time and sales report and spoke with the broker who confirmed that he had not been able to execute the order. Gura also reviewed other Man orders that the broker was working, and "found no inconsistencies."

Based on his interview with the broker, his review of the broker's order book and the time-and-sales reports, and his knowledge that it is not unusual to get "unables" on "odd-tick" limit orders when the market is trading in five-point increments, Gura concluded that the broker had handled the order diligently and thus that the order was legitimately "unable."

O'Malley reported back to Lederstein that since Epstein had concluded that the order had legitimately unable, Epstein would not adjust Lederstein to his limit price. Lederstein then placed a market order to exit the position. Lederstein would trade with respondents for another eight months.

Conclusions

Lederstein alleges that his limit order should have been filled because the market had traded through his limit price. However, Lederstein has failed to produce any evidence of any negligent, reckless or deliberate misconduct by respondents' or their agents in the handling of his order, and has otherwise failed to show that he is entitled to any recovery.

Lederstein's decision to open a discount account, coupled with the fact that he had traded for two years without receiving specialized broker assistance, establishes Lederstein did not expect to receive specialized advice when he placed the odd-tick limit order. Moreover, because Lederstein had been trading the Dow Jones futures contract for almost a year, it is not unreasonable to conclude that he was aware that the Dow Jones contract often traded in five-point increments. Nonetheless, Lederstein chose to place a limit order at an odd-tick price in a market that from the open had been trading in five-point intervals. Because respondents were not acting in an advisory capacity, they were merely required to exercise due diligence in accepting and handling Lederstein's limit order. Here, the non-execution of Lederstein's limit order on a print-through, by itself, is insufficient to establish a violation or to shift the burden of proof to respondents, particularly where Lederstein had picked an odd-tick price that assured that his limit order would be difficult, if not impossible, to fill under the prevailing market conditions.

ORDER

No violations having been established, the complaint in this matter is DISMISSED.

Dated October 16, 2003.

Philip V. McGuire,
Judgment Officer