



U.S. COMMODITY FUTURES TRADING COMMISSION

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BETTY PRICE,
Complainant,

v.

NATIONAL COMMODITIES CORP., INC.,
STUART ROSS MARKS, and
ERIC RICHARD TEMPLE,
Respondents.

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* CFTC Docket No. 08-R43
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INITIAL DECISION

As explained below, the complaint has been dismissed on grounds that it is barred by the statute of limitations in Section 14(a)(1) of the Commodity Exchange Act.

Factual background

Betty Price is a resident of Mississippi. When she opened her account with respondents in early March 2004, she had limited investment experience, ten years with a mutual fund, and no previous experience with commodity futures or options. At the relevant time she worked as a manager for the U.S. Department of Agriculture

National Commodities Corporation was a registered futures commission merchant from 1997 to 2004. Executive Commodity Corporation was a registered introducing broker from 1999 to 2006. Eric Temple was registered as an associated person with Executive from 2000 to 2006. Stuart Marks was registered as an associated person with Executive from February to October 2004. None of these individuals or firms is currently registered.

On March 8, 2004, Price opened a non-discretionary account introduced by Executive and carried by NCC, and deposited \$3,000. Sometime between March 29 and April 2, 2004, she noticed that her account liquidation value had climbed to \$4,000, and called Executive to liquidate the open position. However, her order was not executed, and by the time that she discovered that her instructions had not been followed, the market had moved against her position. An Executive agent conceded that Executive had acted too slowly. Price apparently did not press a complaint or seek an adjustment from Executive or NCC, and otherwise dropped the matter.

Price would not file her reparations complaint for another four years and three months, on July 9, 2008. When asked why she had waited until then to file her complaint, she replied that earlier in 2008 she had seen “something on TV regarding unscrupulous brokers scamming people, and started making phone calls” to find the appropriate agency for recourse.¹ Thus, it appears that she took no steps to ascertain her rights and available remedies from spring 2004 to summer 2008.

Discussion and Conclusions

A cause of action accrues, and the two-year limitations period under Section 14(a)(1) of the Act begins to run, when a complainant discovers the wrongful conduct underlying her claim, or in the exercise of reasonable diligence, should have discovered the wrongful activity.

McGough v. Bradford, et al., Comm. Fut. L. Rep. (CCH) ¶ 28,265, at 50,601-50,603 (CFTC 2000). A determination of when wrongful activity should have been discovered is based on the particular facts and circumstances of the case, including: one, the relationship of the parties; two, the nature of the wrongful activity; three, the complainant’s opportunity to discover the wrongful activity; and four, the actions taken by the parties subsequent to the wrongful activity.

¹ Price’s statement, filed in response to *sua sponte* discovery order.

Id. Here, Price fully comprehended within a day or two that her instructions to sell had been ignored or botched. Thus, Price knew in early April 2004 -- when she discussed the non-execution of the order with the agent for Executive -- that Executive had failed to follow her instruction. Therefore, Price's claim that respondents disregarded or mishandled her instruction accrued no later than April 2, 2004.

The date that Price filed her complaint, July 9, 2008, is over four years past the two-year deadline. Price has not alleged that any conduct by respondents or their agents caused her to delay filing her complaint. More importantly, Price's inaction between spring 2004 and summer 2008 cannot fairly be characterized as an exercise of reasonable diligence. Therefore, Price's complaint is barred by the statute of limitations.

ORDER

The evidentiary record supports the conclusion that complainant did not timely file her complaint, and that no basis exists for application of principals of equitable tolling or estoppel. Thus, it is concluded that the complaint is barred by the statute of limitations, and the complaint is hereby dismissed.

Dated July 22, 2009.


Philip V. McGuire,
Judgment Officer