



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

**OFFICE OF
PROCEEDINGS**

DONALD GREENHAW,
Complainant,

v.

BRESSERT INVESTMENT GROUP, LLC.,
BRESSERT MARKETING GROUP, LLC.,
JEROME EDWARD BRESSERT,
RITA KATHLEEN KARPEL, and
JEFFREY SCOTT ROY,
Respondents.

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CFTC Docket No. 99-R95

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INITIAL DECISION

Complainant alleges that respondents used false and deceptive tactics to convince him to open a discretionary account and to deposit additional funds, and that respondents "over-traded" the account. Respondents deny the allegations and raise the statute of limitations affirmative defense. After reviewing the parties' documentary submissions,¹ it has been concluded that the complaint is barred by the statute of limitations.

¹ The parties' principal submissions consist of the complaint with exhibits and addenda, the respondents' answers, and respondents' final verified statements. Greenhaw's counsel did not file a final verified statement addressing several specific factual matters relating to the statute of limitations issue, as directed by the Order dated March 29, 2000.

Factual Findings

1. Donald Greenhaw, a resident of Overland Park, Kansas, stated on his account application that he was 66 years old, that he was the owner of a plumbing, heating and air-conditioning business, that he had an annual income of \$48,000, a net worth of \$75,000, and \$35,000 in liquid funds, and that he had traded futures with Keystone Futures for about three years.

2. In late 1997, Greenhaw had purchased a trading system -- Cycle Trader -- from Bressert Marketing. Greenhaw has not produced any evidence concerning the Cycle Trader system, concerning respondents' representations about Cycle Trader, or concerning his own investment objectives and his decision to purchase Cycle Trader.

Greenhaw then determined that he would need the help of a broker to trade the system. Greenhaw alleges that Rita Karpel told him that Jeff Roy was an "expert" at using the Cycle Trader, and that she assured him that winning trades would "make up for any losses."

On December 6, he opened a discretionary account with Bressert Investment; and on December 16, 1997, the \$16,000 account balance from the Keystone account was transferred to the new Bressert account.

3. Trading activity in Greenhaw's account began on December 18, 1996, and ended on March 3, 1997. All of the trades for the entire life of the account involved S&P 500 Index futures.

Greenhaw routinely received -- without any alleged delay -- confirmation statements that reported trading activity, commissions and fees, and account status and monthly account statements that summarized the trading activity, as well profits and losses for the

month and for the year-to-date. [See ¶4 of Jerome Bressert's Verified Statement.] In December 1996, Greenhaw's net losses totaled \$3,871, and commissions totaled \$964. In January 1997, net trading losses totaled \$16,100, and commissions totaled \$10,826.

4. In late January or early February, Jerome Bressert and Greenhaw discussed the poor performance of the Cycle Trader, and they agreed that Bressert would use a Bressert Investment proprietary trading system rather than Cycle Trader. Greenhaw has not produced any evidence concerning Bressert's representations about the new system, or concerning his own investment objectives or expectations in connection with the new system. On February 7, Greenhaw would deposit another \$10,000, for a total investment of \$26,000.

In February 1997, Greenhaw's net trading losses totaled \$806, and commissions totaled \$3,092. In March 1997, net trading losses totaled \$5,645, and commissions totaled \$271. After the last trade on March 3, 1997, the account had a debit balance of \$421, which respondents eventually "ate." Also after March 3, respondents issued a series of account statements that reported a couple of keypunch errors, and minor corrections and adjustments to the debit balance, but that did not report any actual trades or significant adjustments.

Thus, after just ten weeks of trading, Greenhaw had paid a total of \$15,143 in commissions and fees, and had lost all of his \$26,000 investment.

5. Greenhaw claims that sometime after the last trade, Jerome Bressert "promised that he would deposit \$5,000 in [the] account because . . . he had incorrectly traded [the] account." [¶ 34 of complaint.] However, \$5,000 was never rebated. Despite this purported breach, Greenhaw never made any oral or written demand that Bressert

rebate the promised \$5,000, and otherwise never complained about respondents' handling of the account until he filed his reparations complaint, on April 4, 1999. Greenhaw has produced no explanation for why he waited until that date to file the complaint.

Conclusions

The statute of limitations set out in Section 14(a) of the Commodity Exchange Act requires that a reparations complaint be filed within two years after the cause of action "accrues." A cause of action accrues when a complainant knows, or should have known in the exercise of due diligence, that wrongful conduct has likely occurred resulting in monetary damages. The determination of when the cause of action accrues turns on when a customer discovers those facts enabling him to detect the general outlines of any violations, rather than when the customer grasps the full details of the violations or determines the available legal remedies.²⁷ Here, the record establishes that well before March 3, 1997, when the last trade was made, Greenhaw was well-aware of his trading losses and of the commissions paid; and thus was well-aware of any deficiencies, discrepancies or deceptions in respondents' conduct and statements. Upon receipt of the March 3, 1997 confirmation statement, Greenhaw knew that he had lost all of his \$26,000 investment and paid over \$15,143 in commissions. Therefore, by March 3, 1997, at the absolute latest, Greenhaw had enough information to form reasonable suspicions about respondents' purported misrepresentations and about their handling of the account.

²⁷ See, e.g., *Cook v. Money International, LTD.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. ¶22,532 (CFTC 1985), *reconsideration denied* [1986-1987 Transfer Binder] Comm. Feud. L. Rep. (CCH) ¶23,078 (CFTC 1986); *Martin v. Shearson Lehman Brothers/American Express*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,354 (CFTC 1986); and *Marraccini v. Conti-Commodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,793 (CFTC 1986).

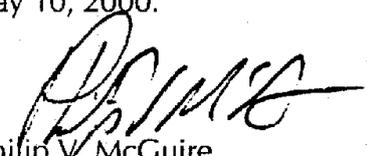
The date that Greenhaw filed his complaint, April 4, 1999, is clearly past the two-year statute of limitations deadline, and Greenhaw's claim will be time-barred unless he can invoke equitable estoppel or equitable tolling. Equitable estoppel focuses on any misleading actions by a respondent. To show that respondents should be estopped from raising the statute of limitations, Greenhaw must prove that he reasonably relied on an action or representation by them that forestalled him from filing a claim. Here, Greenhaw's vague, unsubstantiated allegation that Bressert promised to refund \$5,000 by itself is insufficient to establish a false promise, let alone reasonable reliance, especially where Greenhaw failed to protest Bressert's breach of the purported promise. Thus, Greenhaw has failed to show that respondents are estopped from asserting the statute of limitations defense.

Equitable tolling focuses on the reasonableness of the complainant's action or inaction. The factors considered in determining whether a late filing is excused by principles of equitable tolling include the reasonableness of a complainant's continuing ignorance of the filing requirement and his diligence in pursuing his rights. Here, Greenhaw has produced no evidence to support a conclusion that he acted diligently or otherwise excuse his late filing. Therefore, Greenhaw's claim is barred by the statute of limitations.

ORDER

The complaint is barred by the statute of limitations, and thus must be DISMISSED.

Dated May 10, 2000.


Philip Y. McGuire,
Judgment Officer