

NOTICE AND ORDER

The undersigned judge intends to retire from active service on or about January 18, 2011. Because I will be on leave much of the time until my retirement, seven reparation cases that are currently on my docket will need to be reassigned.* This is my recommendation as to how those cases should be reassigned.

There are two administrative law judges at the Commodity Futures Trading Commission: myself and the Honorable Bruce Levine. On Judge Levine's first week on the job, nearly twenty years ago, he came into my office and stated that he had promised Wendy Gramm, then Chairwoman of the Commission, that we would never rule in a complainant's favor. A review of his rulings will confirm that he has fulfilled his vow. Judge Levine, in the cynical guise of enforcing the rules, forces *pro se* complainants to run a hostile procedural gauntlet until they lose hope, and either withdraw their complaint or settle for a pittance, regardless of the merits of the case. See Michael Schroeder, *If You've Got a Beef With a Futures Broker, This Judge Isn't for You - In Eight Years at the CFTC, Levine Has Never Ruled in Favor of an Investor*, Wall St. J., Dec. 13, 2000, at A1 (copy attached).

In light of these unfortunate facts, if I simply announced my intention to retire, the seven reparation cases on my docket would be reassigned to the only other administrative law judge at the Commission, Judge Levine. This I cannot do in good conscience. Accordingly, I recommend that the Commission request, pursuant to 5 C.F.R. § 930.208(a), from the Office of Personnel Management the services of an administrative law judge to be detailed to the Commission from an agency such as the Securities and Exchange Commission or the Federal Energy Regulatory Commission.

IT IS SO ORDERED.



GEORGE H. PAINTER
Administrative Law Judge
Commodity Futures Trading Commission

Issued this 17th day of September, 2010

* The seven cases are: *Magdy Aboelghar v. Richard Leyton Mulcahy*, 06-R043; *John Y. Aboulghar v. Richard Leyton Mulcahy*, 06-R044; *Sands LP v. MF Global, Inc.*, 09-R002; *Keith Rossignol v. Alaron Trading Corp.*, 09-R014; *Paul Connolly v. Gregory Cotter*, 09-R027; *Medhat Hedayet v. Gain Capital Group*, 09-R044; and *An Li v. Forex Capital Markets, LCC*, 09-R054

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2010 OCT 13 PM 12:01

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THE WALL STREET JOURNAL.

The Wall Street Journal

December 13, 2000 Wednesday

SECTION: Pg. A1**LENGTH:** 2728 words

HEADLINE: If You've Got a Beef With a Futures Broker, This Judge Isn't for You --- In Eight Years at the CFTC, Levine Has Never Ruled In Favor of an Investor

BYLINE: By Michael Schroeder, Staff Reporter of The Wall Street Journal

BODY:

WASHINGTON -- In his job as a federal administrative law judge, Bruce Levine decides whether aggrieved investors have been defrauded by commodity dealers and should get money back.

In nearly 180 cases over eight years at the Commodity Futures Trading Commission, he has a remarkable record. Except for a handful of cases in which defunct firms failed to defend themselves, Judge Levine has never ruled in favor of an investor.

Individual investors have flocked to the stock markets in recent years, and many have plunged into the risky world of commodities trading, often with disastrous results. For a filing fee of \$250, an unhappy investor can have a complaint heard by one of two CFTC judges in a formal court proceeding.

Woe to the investor who draws Judge Levine. The federal agency's other judge, George Painter, awards money about half the time in cases on which he rules. But Judge Levine has expressed disdain for the reparations program to agency officials and at times has been openly hostile to enforcement staff who bring fraud cases against commodity dealers. In June, he tried to throw the assistant enforcement chief off of a case but was overturned by the commission. In a scathing opinion, Commissioner Thomas Erickson noted "disturbing irregularities" in the judge's actions.

Judge Levine declined to discuss his work, saying through a spokesman he doesn't believe a judge should discuss his cases publicly. But there's a clear principle behind his approach: buyer beware. His written decisions send the unmistakable message that investors get plenty of warning about the risk of commodities trading when they open

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accounts. And he shows little sympathy for those who claim they didn't understand the risks, considering the multipage disclosure statement that all commodity investors are required to sign.

Judge Levine also holds investors to the letter of the law, often throwing out cases on technical grounds, or when investors can't produce a paper trail to prove their case. The 51-year-old judge strongly believes most cases should be settled before they get to his courtroom, and he goes to great lengths to see that they are.

Frequently, the judge cajoles investors to settle disputes with dealers for a fraction of their trading losses, according to several plaintiffs and people at the CFTC with knowledge of Mr. Levine's judicial approach. Sometimes, he goes further: Two investors in recent cases say the judge or his clerk called personally to urge them to settle.

One was Megegheh Taman, a doctor at St. Joseph Hospital for Specialty Care in Providence, R.I., who says the judge called him early this year to advise a settlement. He says that in a conversation without the brokerage firm's lawyer on the line, Judge Levine told him, "you don't have anything illegal on them, no records of conversations proving fraudulent claims." Dr. Taman settled for a fraction of his roughly \$30,000 loss but wouldn't disclose details of the settlement because of a confidentiality agreement.

Rules governing the conduct of administrative law judges prevent a judge or his staff from discussing specifics of a case in conversations with just one side, known as ex parte communication, unless it has been cleared by the other side. Leaning on one side or the other to settle for a specific amount also is considered improper, legal experts say.

Scott Russell, Judge Levine's 29-year-old law clerk, responded on behalf of the judge. "Judge Levine views any case that has to go to a final hearing as one that failed," Mr. Russell says. "A final adjudication happens to be the most costly and most lengthy method of resolving the dispute."

He also questions Dr. Taman's recollection of the judge's call. "There's nothing wrong with ex parte communication if the conversation involves generic, procedural information or scheduling. You don't discuss the merits, and I don't think that was the case [with Dr. Taman]."

Lawrence Bonner, an attorney for Winner Group Inc. of Fort Lauderdale, Fla., the brokerage firm involved in the case, declined to comment on the settlement.

Mike Lenartz, an accountant in California, also says he was called from the judge's chambers earlier this year, by Mr. Russell, who urged him to settle his \$61,000 claim. "He told me one-third to one-half [of the claim] was the most I could ever hope for and that many cases settled for 10%," Mr. Lenartz says.

When it came time for the conference call with the judge and defendant's counsel, Mr. Lenartz says, he pressed for full reimbursement of his losses, rather than accepting the \$15,000 the brokerage firm, Prudential Securities Inc. in New York, was offering. "Mr. Levine whittled me down, making me feel like if the case proceeded that he would not be giving me much. He told me fraud was hard to prove and that I needed to settle," Mr. Lenartz recalls. Mr. Lenartz accepted \$20,000.

Mr. Russell challenges the plaintiff's account. "To call someone out of the blue and tell them to take [an offer] sounds like a bit of arm-twisting. I really don't think that's how it goes."

A Prudential Securities spokeswoman declined to comment.

Judge Painter, who is 73 and has served on the CFTC bench 25 years, takes a different tack on settlement than his colleague. About half of his cases end in settlement, compared with 70% for Judge Levine. Judge Painter says he doesn't encourage settlement and never discusses the merits of cases with either side. When both sides want to talk settlement, the judge says, he insists the dollar amount start at 50% of the customer's out-of-pocket losses -- and go up from there.

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"I think settlements disadvantage customers. They have been screwed so many times, I don't want to be part of that," Judge Painter says. Laying out a case in court gives the judge a sense of who's telling the truth, he adds. "It's far better to have a hearing. I like to hear what brokers and customers have to say."

Predicting the fluctuating price of such commodities as beef, foreign currencies or soybeans is difficult for professionals, let alone neophytes. It's a rule of thumb in the industry that about 85% of individual investors lose money, a trade group says. In reparations cases, most investors allege they were coerced to open accounts under false promises of profits at little risk, and then suffered losses when their brokers made frequent or unauthorized trades.

Mr. Russell defends Judge Levine's record. The judge successfully encouraged most parties to settle, with some investors getting back all their losses. Roughly 40 of his 180 cases were decided in favor of brokers or were thrown out for a variety of reasons, ranging from lack of evidence to filing after the statute of limitations expired. In eight cases, investors brought suit against commodity-trading firms that had gone out of business and didn't respond to the allegations. Judge Levine had little choice but to issue so-called default judgments against the firms, directing them to pay customers the trading losses. Several CFTC officials said the rulings are hollow because the merits of the cases don't come into play, and, most importantly, the defunct firms never pay up.

Mr. Russell says that the judge "stands on his written record" and that all of the cases in which the judge was reversed by the commission resulted from mere "procedural" glitches.

But some clearly couldn't be described that way. In one of his first cases, Judge Levine considered a complaint filed by Mai T. Do, a California investor who spoke halting English. She wanted to recover losses of \$20,000 stemming from five allegedly improper trades by her broker, Lind-Waldock & Co. of Chicago. According to a court filing by Ms. Do, she later dropped three of the disputed trades from the complaint and sought the relatively small sum of \$4,625 because of pressure from Judge Levine.

But because of the smaller damages, the judge had the option to decide the case without any explanation at all -- and he did: He threw the case out.

CFTC legal staff raised questions about the ruling and brought it to the attention of commissioners. Although the case wasn't appealed, the commissioners took it upon themselves to review the decision anyway. "We take the extraordinary step . . . because uncontroverted evidence" in the record suggested violations had occurred at the brokerage firm, the opinion said. Acting in their role as an appeal board, the five-member commission overturned the judge's ruling, and awarded Ms. Do the \$4,625. Ms. Do couldn't be reached for comment.

Martin Doyle, general counsel for Lind-Waldock, says "We agree with the judge's decision that there was no violation. We respectfully disagree with the commission's decision [to overturn the judge]."

In some other cases in which Judge Levine was overturned, he had simply settled them. For instance, the commission -- again acting on its own -- overturned a case that had been dismissed by the judge involving David Hutchens, a Census Bureau budget analyst in Louisville, Ky. Mr. Hutchens, 48, and his wife, Rebecca, filed a complaint in late 1997 alleging that a broker with Tradeline Brokerage Services LLC of Irvine, Calif., got them involved in risky currency trading despite the couple's understanding that they were put into a more conservative and diversified trading account. While Mr. Hutchens lost \$45,775 of his retirement savings, his account produced \$70,000 in commissions for the firm, he says.

In May 1998, Judge Levine not only dismissed the case, he ordered Mr. Hutchens to pay Tradeline \$18,685 to cover a deficit in his trading account. A few weeks later, the commission said, it reversed the decision "to avoid manifest injustice." The commission said Mr. Hutchens and his wife should have had a better chance to lay out their case before the court. A new hearing was set for mid-June of that year.

A few days before the hearing, Mr. Hutchens says he was surprised in midafternoon to get a call at his office from

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Judge Levine and the defendants' lawyer to negotiate a settlement.

"The thing that really got me was when [the judge] told me his assumption going into any case like this is that the brokerage is blameless," Mr. Hutchens says. "The implication was that it's the investor's fault."

During the conference call, Mr. Hutchens says he argued for reimbursement of his \$45,000 in trading losses. The brokerage firm's best offer was to swallow the \$18,000 account deficit. Mr. Hutchens says the judge told him, "This is as good as you're going get." So he took it.

Speaking for the judge, his clerk, Mr. Russell, rejects the customer's recollection, calling it "clearly a mistake. It's flatly wrong."

Tradeline has gone out of business and couldn't be reached for comment.

Mr. Russell says his boss doesn't oppose reparations programs and that "allegations in the cases should be taken seriously."

Despite the growing controversy over the judge's approach, former CFTC Chairwoman Wendy Lee Gramm, director of regulatory studies at George Mason University's Mercatus Center in Arlington, Va., and the wife of Sen. Phil Gramm, gives Judge Levine high marks. And when she selected him in 1992 in the last days before she was succeeded by Clinton appointee Mary Schapiro, then-Chairwoman Gramm recalls that she was looking for a judge with "market perspective, someone who would not willy-nilly say a customer is always right."

She found one in Judge Levine, who got his law degree at the University of Chicago, a bastion of antiregulation, free-market philosophy. Before his appointment in late 1992, Judge Levine trained as an administrative law judge for one year with the Social Security Administration in Kansas City -- and before that spent 10 years as an attorney and administrator at the Federal Trade Commission in Washington.

Judge Levine came to the FTC during the Reagan administration under FTC Chairman James Miller, a conservative economist. Susan Elliott, a CFTC lawyer who has known the judge for 20 years, including during his time at the FTC, recalls him as a man who enjoyed playing the devil's advocate and was eager to draw colleagues into debate. "He's like an old pit bull," she says. "When he feels he's right, he won't let go of something."

Mr. Levine, who earns \$120,609 annually, arrives at about 8 a.m. at his airy office at the CFTC's modern brown-brick headquarters in downtown Washington. Some of his colleagues say the lanky, 6-foot-4-inch judge confers throughout the day with his three-person staff but spends little time fraternizing with other CFTC personnel.

The scholarly judge, who always wears a suit and tie, works in his office with his door closed writing decisions, some as long as 200 pages. Judge Levine isn't alone in his apparent antipathy to the CFTC's reparations program. It's a view that has been embraced even by some commission chairmen in the past, because complaints clog up the agency's court docket and sap resources from the time-consuming cases brought by CFTC enforcement staff.

While the reparations program is an independent venue for investors to recover losses, CFTC enforcement attorneys scrutinize the investor cases closely for signs of fraud that might merit a separate disciplinary action. But Judge Levine often rules against the agency's cops in enforcement cases, CFTC records show.

Indeed, Judge Levine is as tough on enforcement staff as he is on investors. In a harsh 120-page decision in late 1999, the judge dismissed an enforcement fraud case against a gold trader, singling out the investigation methods of a 28-year CFTC veteran as "patently untrustworthy."

In June, the judge threw Dennis O'Keefe, the CFTC's assistant enforcement chief, off a case over an alleged misstatement in a filing about the schedule for turning over information in a brokerage firm's discovery request.

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The commission overturned the so-called debarment, an action that threatened to ruin the CFTC attorney's career. In a concurring opinion, Commissioner Erickson said he was "compelled to comment on some of the more disturbing irregularities in the judge's conduct of the hearing."

He raised questions about Judge Levine's possible "inappropriate" ex parte communication with the enforcement division staff and the erasing of part of a tape recording of the key hearing in the matter.

Mr. Levine "deserves notice of what the commission should expect of its administrative law judges. Moreover, these expectations apply beyond the debarment context to the conduct of hearings in general," Mr. Erickson wrote.

Mr. Russell says that the commission, in its unanimous decision, never addressed any possible "irregularities." He adds that Commissioner Erickson "didn't explain" exactly what troubled him about the debarment hearing.

Mr. O'Keefe, who announced on Nov. 29 that he was leaving the CFTC for a private-sector job, declined to comment.

None of the commissioners agreed to be interviewed for this article.

The commission hasn't taken any action to discipline Judge Levine. Agencies are reluctant to sanction a judge in all but the most egregious cases. The nation's 1,300 administrative law judges have lifetime appointments and operate independently within federal agencies. The CFTC, for instance, reviews all legal decisions, but doesn't try to influence its two judges' thinking, a CFTC spokesman says.

According to the Administrative Law Judge U.S. Merit Systems Protection Board, which hears disciplinary cases, only eight judges -- none at the CFTC -- have been dismissed in the 21-year history of the board. The reasons for dismissal range from repeatedly insulting supervisors to lewd comments to fellow employees.

An alternate approach to resolving commodity-trading disputes is through private arbitration sponsored by the National Futures Association. The group says it hears about 200 cases a year, with about 60% of customers getting some award. Like the National Futures Association, the Futures Industry Association, another trade group, also favors abolishing the agency's reparations program, in favor of having all complaints heard in the industry's arbitration program. But Judge Painter questions their real motives.

"They hate the reparations program because court records lay out in detail fraudulent schemes," he says. "There's no public record in the arbitration program."

(See related letter: "Letters to the Editor: CFTC Judge Mixes Economics and Law" -- WSJ Dec. 20, 2000)

NOTES:

PUBLISHER: Dow Jones & Company

LOAD-DATE: December 5, 2004