

SOUTHEAST

GALVESTON COUNTY

DECEPTIVE TRADE PRACTICES

Consumer Protection

Estate planners advised client to sell Berkshire Hathaway stock

SETTLEMENT **\$7,290,000**

CASE Nelda Fay Merck, Individually and as Executrix of the Estate of Dorothy Merck; the Estate of Dorothy Merck; The Dean E. and Dorothy F. Merck Family Limited Partnership; Mark Edward Merck; William Russell Merck; and James Galen Merck v. Transamerica Occidental Life Insurance Company; Transamerica Life Insurance and Annuity Company; Jackson National Life Insurance Company; Midland Life Insurance Company; Manufacturers Life Insurance Company; Standard Insurance Company; Security Life of Denver Insurance Company; their agents Michael Anthony Petter and David Alan Bridgforth, Individually and d/b/a South Texas Assurance for Retirees; and Duckett, Bouligny & Collins LLP, No. 51,039 Galveston County Court at Law No. 3, TX Roy Quintanilla
COURT JUDGE
DATE 1/26/2006

PLAINTIFF ATTORNEY(S)
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S O U T H E A S T

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FACTS & ALLEGATIONS In the 1940s, the husband of plaintiff 's Dorothy Merck paid \$6,600 for stock in Hathaway Shirt Co. By the time his death on Jan. 23, 1997, that investment had become 500 shares of Berkshire Hathaway stock, which Merck inherited and which was worth about \$17 million. Berkshire Hathaway is an investment vehicle managed by billionaire Warren Buffett.

Merck, then 89, and her adult son, Dean, then 65, obtained estate-planning advice from their insurance agents and the law firm of Duckett, Bouligny & Collins, Houston. The insurance agents were Michael Anthony Petter and David Alan Bridgforth of South Texas Assurance for Retirees.

The insurance agents recommended selling the stock and buying insurance products and annuities. Doing so would avoid saddling Merck's heirs with estate taxes of up to 55% of the stock's value. The plaintiffs followed this recommendation, selling the stock in November 1997 for about \$22.5 million and purchasing various insurance products and annuities that were then put into a family limited partnership set up by the Duckett firm. Dean died in 2001, and Merck died six or seven months later.

Alleging that the advice to sell the stock was terrible advice and that the insurance products and annuities were not necessary for the estate plan, Merck's estate; Dean's widow, Nelda; and Dean and Nelda's children, all adults, sued Duckett, Bouligny & Collins; Petter and Bridgforth, individually and operating as South Texas Assurance for Retirees; and seven insurance companies whose products were involved in the transactions: Transamerica Occidental Life Insurance Co., Transamerica Life Insurance and Annuity Co., Jackson National Life Insurance Co., Midland Life Insurance Co., Manufacturers Life Insurance Co., Standard Insurance Co., and Security Life of Denver Insurance Co.

The plaintiffs alleged negligence, gross negligence, fraud, and DTPA and insurance code violations. Against the seven insurance companies, besides alleging vicarious liability on a theory of agency, the plaintiffs alleged direct liability, on the grounds that these companies were directly involved in structuring the estate plan. Also, the plaintiffs took the deposition of the CEO of Transamerica Occidental, alleging that he was personally involved in structuring the estate plan.

The plaintiffs alleged that from the time the stock was sold until the trial, its value doubled. At nearly \$90,000 a share, it is the most expensive stock in the world, in part because Buffett does not split the stock, according to the plaintiffs' attorneys.

The plaintiffs also alleged that purchasing the insurance

products and annuities generated more than \$2 million in commissions for Petter, Bridgforth and South Texas Assurance in less than six months.

The defense argued that the stock sale was appropriate, considering Ms. Merck's age and the fact that the stock comprised 85% to 90% of her assets. Recommending that someone her age keep almost all her assets in the stock market would have been inappropriate, they said. Also, the defense contended, the estate plan did what it was supposed to: the plaintiffs' heirs received about \$21 million upon the plaintiffs' deaths, and the estate taxes were significantly reduced.

The seven insurance companies denied that they were involved in structuring or designing the estate plan and argued that the two agents were acting independently.

According to the counsel for the Duckett firm, defense expert Stanley Johanson said that the family limited partnership and other tax strategies in the plan were not only suitable and appropriate but a "grand slam."

INJURIES/DAMAGES The plaintiffs sought the difference between the benefit promised from the estate plan and the benefit received. They alleged that the defendants promised them about \$23 million from the insurance products and annuities, but that they received only about \$16 million. The plaintiffs also sought punitive damages and, for knowing violations of the DTPA and insurance code, trebling of actual damages.

The defense contended that the plaintiffs received about \$21 million from the insurance products and annuities and saved \$8 million to \$10 million in estate taxes.

RESULT Standard Insurance settled in summer 2005. Several other defendants then settled after the jury was seated, and the remaining defendants settled after opening statements. The settlements totaled \$7.29 million.

The litigation was long and complex. More than 50 depositions were taken, and almost 100 motions were filed and responded to. The court of appeals and supreme court had denied mandamus petitions by the defendants seeking to quash notice of Transamerica's CEO's deposition.

INSURER(S) Columbia Casualty for Petter
Zurich for Duckett, Bouligny & Collins
National Union Fire Insurance Co. of Pittsburgh, Pa. for Bridgforth and Security Life of Denver

**PLAINTIFF
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EDITOR'S NOTE Counsel for Midland Life and Petter did not respond to a faxed draft of this report and a phone call.

-John Schneider