

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between

Name of Claimants

Robert D. Dean and Lillian G. Dean

Case No. 00-05553

Name of Respondents

Investors Security Co., Inc.  
E. Geary Crist

Hearing Site: Norfolk, VA

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**REPRESENTATION OF PARTIES**

Claimants, Robert D. Dean and Lillian G. Dean, hereinafter collectively referred to as "Claimants" represented themselves at the hearing.

Respondent, E. Geary Crist, hereinafter referred to as "Respondent Crist" represented himself at the hearing.

Respondent Investors Security Co., Inc., hereinafter referred to as "Respondent Investors Security" did not appear at the hearing.

**CASE INFORMATION**

Statement of Claim filed on: December 15, 2000.

Claimants signed the Uniform Submission Agreement: December 30, 2000.

Respondent Crist did not file a Statement of Answer.

Respondent Crist did not sign the Uniform Submission Agreement.

Statement of Answer filed by Respondent Investors Security: April 2, 2001.

Respondent Investors Security signed the Uniform Submission Agreement: February 12, 2001.

Respondent Crist filed a Motion to Dismiss the Proceedings on: May 24, 2001.

**CASE SUMMARY**

Claimants asserted the following causes of action: negligence; failure to supervise; breach of fiduciary duty; misrepresentation and/or non-disclosure; omission of fact; and,

suitability. The claim involved the purchase of common stock of Virginia Diaper Service, Inc.

Unless specifically admitted in its Answer, Respondent Investors Security denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim is not eligible for arbitration as more than six (6) years have elapsed since the investment was made; the claim is barred by the statute of limitations;

#### **RELIEF REQUESTED**

Claimants requested:

Compensatory Damages	\$ 222,187.50
Punitive Damages	\$ 222,187.50
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondent Investors Security Co., Inc. requested that the claim be denied in its entirety, and that Respondent Investors Security Co., Inc. be awarded its costs and expenses incurred in defending this arbitration.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

On April 10, 2001, Claimants indicated by letter to NASD Dispute Resolution, Inc. that Respondent Investors Security Co., Inc should be dismissed from this action. Accordingly, Respondent Investors Security Co., Inc. was dismissed from this action, leaving only the claim between Claimants and Respondent Crist.

On September 4, 2001, the Arbitration Panel (Panel) issued an Order indicating that Respondent Crist's Motion to Dismiss would be reserved for determination following the taking of testimony and evidence at the hearing.

Respondent Crist did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

#### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claim is dismissed in its entirety;
2. Claimant's claim for compensatory damages is denied in its entirety;

3. Claimant's claim for punitive damages is denied in its entirety;
4. The parties shall bear their respective costs and expenses, except as Fees are specifically addressed below; and,
5. Any request for relief not specifically addressed herein is denied in its entirety.

**Majority Opinion:**

Claimants, Robert D. Dean and Lillian G. Dean, husband and wife ("the Deans"), seek an award against their former account representative, E. Geary Crist ("Crist"), for damages arising from investments that he recommended to them and that they purchased in 1992. The investments in a small corporation known as Virginia Cotton Diaper Service, Inc. ("VCDS") were described in the investment documents and by Mr. Crist as a loan. However, from the face of the "notes" evidencing the transactions, which occurred on January 1, 1992, and on July 21, 1992, the investments were clearly securities that would ultimately result in an equity position in the company.

The Deans' claim was originally filed against Crist and against the investment firm for which he worked, Investors Security Co., Inc., as co-respondents. Investors Security filed an Answer on April 2, 2001 (see Arbitrators Ex. 1), which raised the issue of the Statute of Limitations, under the Code of Arbitration Procedure ("the Code") Rule 10304. No legal action of any kind had ever been filed against Investors Security by the Deans, and Investors Security was dismissed from these proceedings by the Deans.

Likewise, Respondent Crist raised the issue of the Statute of Limitations in his response to the Deans' claim, filed by him on May 24, 2001. By order dated July 24, 2001, this Panel directed the parties who were both proceeding *pro se*, to file briefs, memoranda or cases addressing the issues of the Statute of Limitations. Respondent Crist's memorandum was filed July 31, 2001, and the Deans filed a memorandum on August 3, 2001. The Panel deliberated by conference call on September 5, 2001, and reserved ruling on the Motion to Dismiss until the arbitration hearing, in order that the Panel might hear evidence relating to the Statute of Limitations.

Having heard the evidence, a majority of the Panel finds that the Statute of Limitations has run, dismissing the Statement of Claim filed by the Deans against Respondent Crist arising from the transactions that occurred on January 1, 1992, and July 21, 1992.

At the suggestion of Respondent Crist, and against the advice of his accountant, Mr. Dean liquidated the sum of \$37,500 from his Individual Retirement Account (IRA) in order to invest in VCDS, which he did on behalf of himself and Mrs. Dean on January 1, 1992. Six months later, the principals of VCDS solicited an additional \$75,000 from his IRA to add to the Deans' investment in VCDS. Respondent Crist received a six percent commission on both transactions.

On May 4, 1993, the Deans received a letter confirming that they would receive an annual payment of 1/2% of VCDS gross annual sales, as also stated in the January 1, 1992 "note." However, in the fall of 1993, the Deans ceased receiving the "interest" payments, and by September 29, 1993, they had consulted an attorney, Ross A. Weinstein of Ashe and Weinstein. Subsequently, the Deans consulted the law firm of Pender & Coward, on or before January 19, 1994. They filed a Motion for Summary Judgment against Respondent Crist in the Virginia Beach Circuit Court on March 30, 1995. By letter dated May 30, 1995, Pender & Coward advised the Deans that it appeared that Respondent Crist did not have any assets, and that it was probably not economically advantageous to continue to pursue legal action against Respondent Crist. A letter dated June 1, 1995 advised the Deans that the suit would remain on the docket for two years, at which time it would be dismissed under Virginia's two-year rule due to inactivity. These arbitration proceedings were instituted on December 15, 2000, over five years and four months after the suit was dismissed.

Rule 10307 (Tolling of Time Limitations) does contain a tolling provision which states that the "six (6) year time limitation shall not run for such period as the court shall retain jurisdiction of the matter submitted." Accordingly, the statute was not running from March 30, 1995, through August 11, 1995. Therefore, in order to prevail, Respondent Crist must establish that the Deans' claim arose (approximately) eight months prior to March 30, 1995, and was not otherwise tolled during that period.

The Deans' claims are based on events that occurred on January 1, 1992 and July 21, 1992, when the two investments were made by them. At that time, all the events had occurred which gave rise to the claims set forth in their Statement of Claim filed on December 15, 2000. Accordingly, Rule 10304 applies:

No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

As noted above, Rule 10307 would toll the running of the Statute during the period that the suit was pending in the Virginia Beach Circuit Court, March 30, 1995 to August 11, 1995. However, having subtracted the approximately four (4) months that their suit was pending against Respondent Crist, their claims against him remain over eight (8) years old.

The Deans assert that they had no knowledge of the fact that they had claims against Respondent Crist until on or about March 30, 1995, when they filed suit against Respondent Crist in the Virginia Beach Circuit Court. They further assert that they were never advised that Respondent Crist received commissions for soliciting their investments in VCDS until about the time that they filed suit, having recently learned that Respondent Crist received a commission in connection with their purchase of the "notes" on January 1, 1992, and July 21, 1992, and that the statute of limitations would not begin

to run until they discovered their claims at that time.

The Deans claims against Respondent Crist clearly arose no later than July 21, 1992. At that time all necessary elements of their claims had occurred, and they were entitled to seek redress against Respondent Crist for any claims they might have arising from the sale of the unregistered securities. Although the Code does provide for tolling of the statute of limitations while legal action is pending, the Code does not make any provision for using the date of discovery of the claim as the date from which the Statute of Limitations begins to run. Rule 10304 expressly states that, "This Rule shall not extend applicable statutes of limitations..." Accordingly, the Panel is unwilling to extend the statute of limitations contained in Rule 10304 by adopting a discovery rule relating to the date on which the claim arose.

Furthermore, even if the Panel were to apply a date of discovery rule, a majority of the Panel is convinced that the discovery of the claims arose no later than September 29, 1993, when the Deans first sought counsel concerning the failure of their investment in VCDS. By that date, the Deans knew or should have known of their claims against Respondent Crist. The Motion for Summary Judgment filed by the Deans on March 30, 1995 makes it clear that all of their claims for fraud and misrepresentation should have become known to them by then. Mr. Dean testified that while playing golf approximately two years after he made the investments, he learned for the first time that Respondent Crist had received a six percent commission for obtaining him as an investor in VCDS. Learning of Respondent Crist's receipt of commissions at a subsequent date is not an "occurrence or event giving rise to the act or dispute, claim, or controversy," of which they complain, but was simply at most discovery of an additional fact related to their claim. The claim was already in existence. Furthermore, learning of the commissions approximately two years from the second investment, i.e. by July 21, 1994, would mean that over eight months passed between the alleged discovery and filing suit on March 30, 1995 in the Virginia Beach Circuit Court, which when added to the five years four months that passed after the suit was dismissed on August 11, 1995, would likewise exceed six years.

However, for the reasons stated above, the date of discovery of their claim is irrelevant. Their right to pursue the claims set forth in the Statement of Claim expired as a matter of law approximately six years and four months from July 21, 1992, when their claims arose, the running of the statute being tolled for slightly over four months while their suit was pending from March 30, 1992 until August 11, 1992.

The Statement of Claim is accordingly DISMISSED.

#### **Dissenting Opinion**

1. Respondent Crist made a Motion to Dismiss this proceeding based on the operation of Rule 10304.
2. The Motion to Dismiss is an affirmative defense, which must be clearly established

- by Respondent Crist.
3. The Code, in Rule 10304, provides under the heading Time Limitation Upon Submission as follows: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction."
  4. Complainants Robert and Lillian Dean (the Deans) and Respondent Crist appeared in this proceeding *pro se*.
  5. The Deans, who are unsophisticated investors, established that, on January 1, 1992 at the recommendation of Respondent Crist, they invested \$37,500 for 1% ownership in Virginia Cotton Diaper Service, a new venture, for which the Deans were to receive 12% simple interest monthly and curtailment of unpaid principal of 25% at the end of 24 months and 75% at the end of 48 months. As additional compensation, the Deans were to receive ½% of the company's gross annual sales.
  6. The Deans established that on July 21, 1992 they invested an additional \$75,000 in Virginia Cotton Diaper Service at the same interest rate, and with the same curtailment provisions as in (5) above. At pay off of this loan, the Deans were to receive an additional 2% of the ownership equity in the aforesaid company.
  7. Respondent Crist, who introduced this opportunity to the Deans, did not provide them information with respect to the risks attributable to the new venture. However, he represented to Mr. Dean it was an excellent investment opportunity.
  8. Respondent Crist did not disclose to the Deans that he received a 6% fee from the aforesaid company on the \$112,500 invested by them.
  9. At the time of the aforesaid investments, Respondent Crist had been the Deans' broker for 8 to 10 years.
  10. The Deans trusted Respondent Crist and acted on Respondent Crist's suggestion that they diversify their IRA by investing in the aforementioned new venture in spite of a recommendation by the Deans' accountant that they not do so.
  11. Respondent Crist raised \$187,000 for the new venture from his clients including the Deans and received a 6% fee on all the money he raised.
  12. The Deans so trusted Respondent Crist that they loaned him \$30,000 to help him purchase a house.
  13. The aforementioned new venture paid the Deans interest for a short period of time. It failed without repaying the principal and remaining interest due.
  14. Respondent Crist asserts: (1) he was not selling a security; (2) he cleared the money raising activities for the new venture with the brokerage firm with which he was employed; and, (3) he made no representations to the Deans other than the new venture was an interesting business opportunity, which they should explore. He acknowledges that he did not tell the Deans that he was receiving a 6% fee in connection with their investment.
  15. The operative date for commencing a review of the Rule 10304 question is July 21, 1992, the date of the last investment by the Deans.
  16. Mr. Dean asserts and established that he only learned of the undisclosed "bird dog" fee of 6% some 2 years or so after the investment while playing golf with a friend of

Respondent Crist.

17. On May 4, 1993, Mr. Dean received a letter from the new venture indicating that for his capital investment he would receive ½% of the venture's gross annual sales, which were \$171,773.65 in 1992.
18. In approximately September and October of 1993, Mr. Dean consulted with Ashe and Weinstein attorneys.
19. On January 19, 1995, Mr. Dean engaged Pender and Coward attorneys to pursue his claim against Respondent Crist.
20. On March 30, 1995, the Deans filed suit in Virginia Beach Circuit Court against Respondent Crist and a principal in the new venture alleging actual and constructive fraud in inducing the Deans to invest in the venture. On August 11, 1995, the suit was dismissed without prejudice.
21. The Deans filed this action with NASD Dispute Resolution, Inc. on December 30, 2000.
22. The Deans assert that taking into account the period before they learned of the fraud committed against them and the period tolled by the action in the Virginia Beach Circuit Court and by this proceeding that this action was brought within the 6 year period set forth in Rule 10304.
23. I find that in a continuing fraud such as this, discovery of the fraud controls. How else can the victim be protected from the cover up of the miscreant? Otherwise, the wrongdoer could walk free from his wrongdoing if able to maintain a trusting relationship with his victim.
24. It is uncontroverted that at least by January 19, 1995 the Deans had discovered what had happened. It is possible they knew earlier, but I cannot say with certainty when or if that was the case.
25. I find that the statute of limitations was tolled between January 19, 1995 and August 11, 1995 during the pendency of the Virginia Beach Circuit Court action and from December 30, 2000 to the present time during the pendency of this action.
26. Based on No. 25 above, the elapsed period is 5 years, 4 months and 19 days, well within the 6 year period referred to in Rule 10304.
27. Did the Deans have knowledge of what had occurred sometime before mid-1994 and so be foreclosed from bringing this action? If so, it was not proven by Respondent Crist.
28. It may be argued that the concept of discovery is not applicable to an arbitration action citing Rule 10304. It is clear to me the language, "...giving rise to the act or dispute, claim or controversy" in that rule leaves room for the application of the concept of discovery. The act giving rise to the claim in this case was the discovery of the fraud by the Deans.
29. I conclude that Respondent Crist has not carried his burden of proof in establishing the applicability of the six-year period of limitations in Rule 10304.
30. I further find that the Deans have established that they were defrauded and the fiduciary duty owed them was breached by Respondent Crist's connection with the sale of the security.
31. I find that Respondent Crist owes the Deans \$112,500 plus the legal rate of interest from the time of their investment until this obligation is paid.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$300 (waived)
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#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the event giving rise to the dispute. In this matter, the member firm is Investors Security Co., Inc..

Member surcharge	= \$1,500
Pre-hearing process fee	= \$ 600
Hearing process fee	= \$ 2,500

#### **Forum Fees and Assessments**

The panel has the authority to assess forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel x \$ 1,125	= \$ 1,125
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Pre-hearing conference: July 20, 2001	1 session
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One (1) Hearing sessions x \$ 1,125	= \$ 1,125
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Hearing Date: September 11, 2001	1 sessions
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Total Forum Fees	= \$ 2,250
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The panel has assessed \$ 2,250 of the forum fees to Respondent Crist.

#### **Fee Summary**

Claimants are assessed and shall pay:



Initial Filing Fee	= \$ 00
Forum Fees	= \$ 00

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Total Fees	= \$ 00
Less payments	= \$ 00

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Balance Due NASD Dispute Resolution, Inc.	= \$ 00
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Respondent Crist is assessed and shall pay:

Forum Fees	= \$ 2,250
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Total Fees	= \$ 2,250
Less payments	= \$ 00

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Balance Due NASD Dispute Resolution, Inc.	= \$ 2,250
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Respondent Investors Security Co., Inc is assessed and shall pay:

Member Fees	= \$ 4,600
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Total Fees	= \$ 4,600
Less payments	= \$ 5,600

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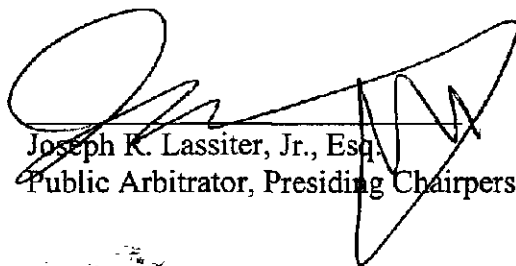
Refund owed to Respondent Investors Security Co., Inc.	= \$ 1,000
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All balances are due to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

<i>Joseph R. Lassiter, Jr., Esq.</i>	-	<i>Public Arbitrator, Presiding Chairperson</i>
<i>Stanley H. Ragle, Esq.</i>	-	<i>Public Arbitrator, Panelist</i>
<i>C. Gregory Ellison</i>	-	<i>Non-Public Arbitrator, Panelist</i>

**Concurring Arbitrators' Signatures**

  
Joseph K. Lassiter, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

10/10/01  
Signature Date

\_\_\_\_\_  
C. Gregory Ellison  
Non-Public Arbitrator, Panelist

\_\_\_\_\_  
Signature Date

**Dissenting Arbitrator's Signature**

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Stanley H. Ragle, Esq.  
Public Arbitrator, Panelist

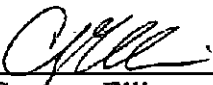
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October 15, 2001  
Date of Service (For NASD-Dispute Resolution office use only)

**Concurring Arbitrators' Signatures**

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Joseph R. Lassiter, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

  
\_\_\_\_\_  
C. Gregory Ellison  
Non-Public Arbitrator, Panelist

10-10-01  
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Signature Date

**Dissenting Arbitrator's Signature**

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Stanley H. Ragle, Esq.  
Public Arbitrator, Panelist

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Signature Date

October 15, 2001  
Date of Service (For NASD-Dispute Resolution office use only)

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Joseph R. Lassiter, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
C. Gregory Ellison  
Non-Public Arbitrator, Panelist

\_\_\_\_\_  
Signature Date

**Dissenting Arbitrator's Signature**

Stanley H. Ragle  
Stanley H. Ragle, Esq.  
Public Arbitrator, Panelist

October 10, 2001  
Signature Date

October 15, 2001  
Date of Service (For NASD-Dispute Resolution office use only)