
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Names of the Claimants

William R. and Marion Eggers
William R. Eggers IRA

Case Number: 01-02052

Names of the Respondents

Morgan Stanley DW, Inc.
f/k/a Dean Witter Reynolds, Inc.
Daniel Ruffier

Hearing Site: Tampa, Florida

REPRESENTATION OF PARTIES

William R. and Marion Eggers (the "Claimant Eggers"), and William R. Eggers IRA (the "Claimant Eggers IRA"), hereinafter collectively referred to as the "Claimants": Robert Dyer, Esq., Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., Orlando, Florida.

Morgan Stanley DW, Inc. f/k/a Dean Witter Reynolds, Inc. ("MSDW") and Daniel Ruffier ("Ruffier"), hereinafter collectively referred to as "Respondents": Joseph C. Coates, III, Esq. and Jon A. Jacobson, Esq., Greenberg Traurig, P.A., West Palm Beach, Florida.

CASE INFORMATION

Statement of Claim filed on or about: April 19, 2001.

Claimants signed the Uniform Submission Agreement: May 12, 2001.

Statement of Answer filed by Respondents on or about: July 23, 2001.

Supplemental Answer filed by Respondents on or about: July 10, 2002.

Respondents MSDW and Ruffier signed Uniform Submission Agreements: July 17, 2001.

CASE SUMMARY

Claimants asserted causes of action for: 1) violation of Section 517.301, Florida Statutes; 2) common law negligence; and 3) breach of fiduciary duty arising out of contract. The cause of action relate to investments in the Dean Witter Government Securities Trust and the Dean Witter High Yield Fund.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various defenses.

RELIEF REQUESTED

Claimants requested: 1) compensatory damages in the amount of \$98,322.00 for the IRA account; 2) unspecified compensatory damages on Claimants' joint account; 3) interest; 4) costs and expenses in the amount of \$11,286.18, exclusive of forum fees and conference calls; and 5) punitive damages.

Respondents requested that all claims be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

On or about March 7, 2002, Respondents filed their Dispositive Motion to Dismiss and Request for Telephonic Hearing. Respondents moved for dismissal of the Statement of Claim as time barred pursuant to Section 95.11(4)(e), Florida Statutes, and under the "bespeaks caution" doctrine. On or about April 1, 2002, Claimants filed their written response and opposition to the motion. On or about April 8, 2002, the Panel ordered that Respondents' motion to dismiss on the grounds of statute of limitations is denied without prejudice. Respondents were granted leave to raise the same issues at the evidentiary hearing after a more complete evidentiary presentation.

On or about April 18, 2002, Respondents filed their Motion in Limine to Preclude Irrelevant Witnesses. Respondents moved in limine to preclude the appearances of Peter Avelar, Steven Esser, Robert Angednie, Gordon Loery, and Deanna Loughmane at the final evidentiary hearing. On or about April 18, 2002, Claimants filed their written response to Respondents' motion and Motion to Compel Telephonic Testimony from Peter Avelar. On or about April 24, 2002, the Panel denied Respondents' motion and the Panel granted Claimants' motion.

On or about June 3, 2002, Respondents filed their Memorandum Regarding Rouseff and Renewed Motion to Dismiss. Respondents renewed their request for dismissal of Claimants' Chapter 517 claim as barred by the statute of limitations under Section 95.11(4)(e), Florida Statutes. The Panel heard oral argument from the parties at a telephonic conference held on June 11, 2002.

Based on the evidence presented at the evidentiary hearing held on April 29 and 30, 2002, the Panel determined that Section 95.11(4)(3) bars any cause of action from Claimants under Chapter 517, Florida Statutes, and all such claims are dismissed with prejudice. The Panel ordered that: 1) the Statement of Claim is deemed amended to add claims for common law negligence and breach of fiduciary duty in accordance with Claimants' comments in their April 1, 2002 written opposition to the Respondents' Dispositive Motion to Dismiss; 2) Respondents are granted leave until July 10, 2002 to file their Answer and Affirmative Defenses to the added claims; 3) the added claims will not require new or supplemental factual development from Claimants since the added claims require less evidentiary proof than the dismissed statutory claim; and 4) the evidentiary hearing will resume on July 23, 2002.

In its June 22, 2002 Order on Respondents' Renewed Motion to Dismiss, the Panel dismissed all statutory claims as barred by the statute of limitations but granted Claimants' prior request to consider the matter as a

"garden variety" negligence/breach of fiduciary duty case. Respondents then moved to dismiss on the grounds of the Florida Economic Loss Rule. Based on oral argument and case authorities presented at the hearing, the Panel amends its June 22, 2002 Order to confirm that it is treating the case as based on a breach of a duty arising out of a contract and not as a tort.

The Panel acknowledges the factual disputes concerning events of September 1997 but concludes that, although unsolicited by the broker, the transfer of the IRA money into the Dean Witter High Income Securities Fund was the result of a recommendation which would trigger the "suitability rule." No suitability analysis was performed.

By September 1999 at the latest, Claimants had been provided with sufficient information that they knew or should have known what was in the account, including the nature and volatility of the fund. Nevertheless, they chose to remain and, at that point, on the basis of either the "second investment" rule or the duty to mitigate, their entitlement to any recovery ends.

In arriving at the damages amount of \$17,500.00, the Panel accepts the two-year (September 1997-September 1999) data on performance of corporate bonds as an appropriate benchmark.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant Eggers' claims are denied in their entirety.
2. Claimant Eggers IRA' claims against Respondent Ruffier are denied in their entirety.
3. Respondent MSDW is liable and shall pay to Claimant Eggers IRA compensatory damages in the amount of \$17,500.00, pre-judgment interest denied. The Panel awards compensatory damages for Respondent MSDW's breach of fiduciary duty arising out of contract. The Panel does not award compensatory damages on any other claim.
4. Claimants' request for punitive damages is denied.
5. Any and all relief not specifically addressed herein is denied.

FEES

Pursuant to the NASD Code of Arbitration Procedure (the "Code"), the following fees are assessed:

Filing Fees

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

| | |
|--------------------------|------------|
| Initial claim filing fee | = \$225.00 |
|--------------------------|------------|

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Respondent MSDW is a party.

| | |
|-------------------------|--------------|
| Member surcharge | = \$1,000.00 |
| Pre-hearing process fee | = \$ 600.00 |
| Hearing process fee | = \$1,500.00 |

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

There were no adjournments granted during these proceedings for which fees were assessed.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

There were no injunctive relief fees assessed during these proceedings.

Forum Fees and Assessments

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

| | |
|---|---------------|
| Four (4) Pre-hearing sessions with Panel @ \$750.00 | = \$ 3,000.00 |
|---|---------------|

| | | |
|--------------------------|------------------|-----------|
| Pre-hearing conferences: | February 7, 2002 | 1 session |
| | April 4, 2002 | 1 session |
| | June 11, 2002 | 1 session |
| | July 22, 2002 | 1 session |

| | |
|-------------------------------------|--------------|
| Six (6) Hearing sessions @ \$750.00 | = \$4,500.00 |
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| | | |
|----------------|----------------|------------|
| Hearing Dates: | April 29, 2002 | 2 sessions |
| | April 30, 2002 | 2 sessions |
| | July 23, 2002 | 2 sessions |

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| Total Forum Fees | = \$7,500.00 |
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The Panel has assessed \$3,750.00 of the forum fees to Claimant Eggers IRA.

The Panel has assessed \$3,750.00 of the forum fees to Respondent MSDW.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred during these proceedings.

Fee Summary

Claimants are jointly and severally liable for:

| | |
|-------------------------------------|-------------|
| <u>Initial Filing Fee</u> | = \$ 225.00 |
| Total Fees | = \$ 225.00 |
| <u>Less payments</u> | = \$ 225.00 |
| Balance Due NASD Dispute Resolution | = \$ 0.00 |

Claimant Eggers IRA is solely liable for:

| | |
|-------------------------------------|--------------|
| <u>Forum Fees</u> | = \$3,750.00 |
| Total Fees | = \$3,750.00 |
| <u>Less payments</u> | = \$ 750.00 |
| Balance Due NASD Dispute Resolution | = \$3,000.00 |

Respondent MSDW is solely liable for:

| | |
|-------------------------------------|--------------|
| Member Fees | = \$3,100.00 |
| <u>Forum Fees</u> | = \$3,750.00 |
| Total Fees | = \$6,850.00 |
| <u>Less payments</u> | = \$3,100.00 |
| Balance Due NASD Dispute Resolution | = \$3,750.00 |

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

| | | |
|-------------------------------------|---|---|
| <i>Edith N. Dinneen, Esq.</i> | - | <i>Public Arbitrator, Presiding Chairperson</i> |
| <i>Nickolas F. Monteforte, Esq.</i> | - | <i>Public Arbitrator</i> |
| <i>Pamela Jeanne Rush, Esq.</i> | - | <i>Non-Public Arbitrator</i> |

Concurring Arbitrators' Signatures

/s/
Edith N. Dinneen, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

/s/
Nickolas F. Monteforte, Esq.
Public Arbitrator

Signature Date

/s/
Pamela Jeanne Rush, Esq.
Non-Public Arbitrator

Signature Date

NASD Dispute Resolution
Arbitration No. 01-02052
Award Page 6 of 6

August 19, 2002

Date of Service (For NASD Dispute Resolution use only)

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Public Arbitrator, Presiding Chairperson

Signature Date

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Public Arbitrator

Signature Date

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Non-Public Arbitrator

Signature Date

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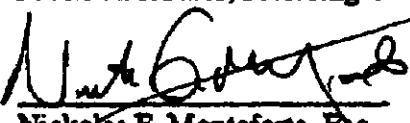
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Public Arbitrator

Pamela Jeanne Rush, Esq.
Non-Public Arbitrator

Signature Date

8-6-02

Signature Date

Signature Date

Fee Summary

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Signature Date

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Public Arbitrator

Signature Date

Pamela Jeanne Rush, Esq.

Non-Public Arbitrator

Signature Date

8/9/02