

**Award
NASD Dispute Resolution**

In the Matter of the Arbitration Between:

Name of the Claimant
Jay Engelman

Case Number: 05-04904

Names of the Respondents
Legg Mason Wood Walker, Inc.
Western Asset/Claymore

Hearing Site: Washington, DC

Nature of the Dispute: Customer vs. Member and Non-member.

REPRESENTATION OF PARTIES

Claimant, Jay Engelman, hereinafter referred to as "Claimant", appeared *pro se*.

Respondent Legg Mason Wood Walker, Inc ("Legg Mason"), was represented by Jason W. Gaarder, Esq., Legg Mason, Baltimore, Maryland.

Respondent Western Asset/Claymore ("Western Asset"), was represented by Gregory B. McShea, Western Asset/Claymore U.S., Pasadena, California.

CASE INFORMATION

Statement of Claim filed on September 15, 2005.

Claimant signed the Uniform Submission Agreement on October 16, 2005.

Statement of Answer filed by Respondent Legg Mason on November 21, 2005.

A representative of Respondent Legg Mason executed Respondent's Uniform Submission Agreement on November 21, 2005.

CASE SUMMARY

Claimant asserted the following causes of action, among others: unsuitability, misrepresentation and probable fraud by Respondent Legg Mason and its agents in recommendation of the February 24, 2004 purchase of 6666 shares of Western Asset/Claymore U.S. Treasury Protected Securities Fund 2 (the "fund") for \$100,000.00. On June 5, 2005, Claimant sold the entire amount of the fund, which then consisted through dividend reinvestment of 7,703 shares worth \$87,156.30, through T. Price Rowe where he had transferred his account.

Unless specifically admitted in its Answer, Respondent Legg Mason denied the allegations made in the Statement of Claim.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$ 10,000.00, interest, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Western Asset declined to voluntarily submit to arbitration in a letter addressed to the NASD dated December 13, 2005.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has made the following findings.

The following facts are not controverted:

Claimant originally opened his Legg Mason account more than 35 years previously; he has currently and in the past had several other brokerage accounts and owned extensive amounts of stocks, bonds, money market and other investments; and has a current liquid net worth probably in excess of \$1.6 million.

Claimant's Legg Mason Financial Advisor at the time of purchase was Anne Fink a Registered Representative since 1981. Previously, her father had served Claimant for many years at Legg Mason. On or about February 4, 2004, Ms. Fink telephoned Claimant to introduce him to the fund.

The Western Asset/Claymore U.S. Treasury Inflation Protected Securities Fund 2 is (summarized) a closed-end mutual fund with a targeted 80% allocation of U.S. Treasury Inflation Protected Securities ("U.S. TIPS") and a primary investment objective of income and a secondary objective of protection against inflation and stability of principal. It was initially issued in late February, 2004. Western Asset is affiliated with Legg Mason.

Almost immediately after purchase the sales price of the fund, traded on a daily basis, fell dramatically.

The circumstances surrounding the purchase of the fund and the reasons for the subsequent drop in price are in substantial conflict. Claimant alleges he was not informed of the prospect of volatility in the fund's prospective price, but rather was assured of protection against inflation and price volatility. Further, he was never sent a prospectus that, he alleges, would have warned him of the possible price volatility. Claimant further maintains that the fund, since it actually contained some "junk" bonds misrepresented the safety of its investments. Claimant alleges that the very fact that the price for the fund went down immediately after his purchase substantially supports his position. In his complaint filing and later documents and testimony, Claimant uses such strong words as "conned" and "fraudulent" to suggest Respondent's actions may be more than mere misrepresentation.

Respondent Legg Mason contends that Ms. Fink advised Claimant that the fund was a newly organized, closed-end fund with an objective of income that would be suitable for his portfolio. She initially suggested the fund would be appropriate for his "idle" funds, then amounting to slightly in excess of \$1,000.00, but in later conversations agreed with Claimant's "offer" to purchase \$100,000.00 worth. Ms. Fink alleges she specifically explained that as a closed-end mutual fund it might trade at a discount to the net asset value (NAV). Respondent Legg Mason contends that Claimant was sent a prospectus which is demonstrated by two documents forwarded by Respondent to Claimant that specifically noted "Prospectus under separate mail". This procedure was done "automatically" by Legg Mason and was not dependent on Ms. Fink's action.

I found Claimant to be an honest, admirable and engaging person with, in most instances a sophisticated knowledge of investments, including stocks and bonds. I found him a credible witness. I, also, found Ms. Fink to be an honest person, and sophisticated broker, though not claiming exceptional expertise in any particular area of equities. I, also, found her a credible witness.

Suitability

It is Claimant's burden to prove by a preponderance of the evidence that the recommended purchase was unsuitable. I find as a legal matter he has not.

As generally agreed, interest rates on such instruments as money markets at the time of purchase were at approximately 1%, or even less. A 5% plus income as promised and subsequently provided by the fund, was therefore, a suitable, indeed, very enticing prospect, for a 74 year old, with a large net worth, but small pension. Moreover, Claimant's portfolio with Legg Mason at the time seemed overweighted with stocks which are generally considered riskier than bonds and provide less income. Even considering that Claimant had substantial bonds, bond funds and other income producing instruments with other brokers (which may but more probably was not known by Ms. Fink at time of purchase) I find the

fund an appropriate, suitable recommendation for Claimant's portfolio. In so finding, I reject Claimant's argument that including emerging country bonds in the 20% of the fund's portfolio that is not invested in TIPS in order to obtain higher percentage interest rates is too risky. Moreover, whether or not the risk of declining value in principal due to prospective interest rate rises in purchasing a bond fund should be assumed and, if so, whether a closed-end fund and a new issue should be chosen are, I find matters of judgment rather than suitability. The law is settled that an investor cannot recover from a broker merely because an investment declined in value. Olkley v. Hyperion 1999 Term Trust, Inc. (98 F. 3d 2nd Cir. 1996).

Misrepresentation

Claimant introduced as an exhibit (which he did not in pertinent part refer to in his testimony) the Claymore Securities prospectus for the fund issued "for fund advisors only, and not clients" which stated: "Net asset value will be reduced immediately following the initial offering by a 4.5% sales load charge..." I have thoroughly reviewed all of Respondent's 40 exhibits and the testimony of record and can nowhere find an acknowledgment by Respondent, his counsel or agents including Ms. Fink and Peter J. Ciliberti, Esq. Compliance Officer, who reviewed the entire matter with Claimant, that a 4.5% "sales charge" would be assessed by the fund. Respondent, consistently and repeatedly, orally and in writing alleged that the immediate drop in fund value after issuance was due *entirely* to market conditions and *not* by any action of Legg Mason. Nor did Claimant in constantly derogatorily discussing the immediate loss in value of the fund after his purchase discuss this sales charge. Thus the evidence is overwhelming that Respondent did not initially disclose, and repeatedly thereafter concealed and/or misrepresented this cost. Further, Claimant's purchase price for the fund left only \$10.00 for purposes of a commission, which for such a large purchase strongly suggests that Legg Mason and Ms. Fink knew in advance that a 4.5% "sales charge" would be made and that they would profit therefrom by what many would consider a "back door commission" since it stretches credulity to believe either would accept such a small amount as full commission, particularly from a client whose account had been almost dormant. Similarly, despite all of Claimant's numerous complaints, vague accusations, questioning and given his long standing market experience his failure to grasp the issue of commissions is perplexing.

I find, however, that this misrepresentation is directed solely at the hidden sales charge of 4.5%. The record does not demonstrate that the loss in value of the fund, otherwise, was due to anything other than market conditions. I find, therefore that Claimant should be awarded \$4,500.00 as restitution for this misrepresentation.

In that connection and primarily for the benefit of Claimant it may be useful to discuss the difference between NAV and sales price. As stated by the fund in its annual report to shareholders dated February 3, 2006: "To calculate [daily] the fund's net asset value per common share, the fund's assets are valued and totaled, liabilities are subtracted, and the remaining net assets are divided by the number of common shares outstanding." On the other hand, since the fund is traded on a national stock exchange its sale price on any particular day can be at a discount or a premium. The report addressing the issue stated: "The fund's market price is currently trading at a discount to the net asset value. This discount from NAV may be caused by numerous factors and highlights the fact that most closed-end funds have fallen out of favor with investors recently." At the time of sale, the fund's NAV was 13.07 as opposed to a sales price of 11.47. Thus the underlying value of Claimant's asset in the fund was \$100,678.21 despite the fact that it had been reduced at the outset by \$4,500.00.

Similarly, I reject Claimant's argument that he should be paid for actual losses since if he had known of the fund's volatility he would have not purchased the fund. To repeat, Legg Mason did not misrepresent the attributes of the funds, it misrepresented the costs of purchase. In turn, the loss of value was due to adverse market conditions and not the fund's actual performance.

Even though for obvious reasons the issue was not raised, I have considered but rejected subtracting from the award to Claimant a reasonable amount to Respondent for commission since the award made equals the profits formerly realized in the sale to Claimant. Respondent had ample opportunity to disclose to claimant pertinent information respecting the 4.5% sales charge and perhaps obtain a compromise commission but chose instead to further conceal the matter.

Based on the above findings the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Legg Mason is liable to and shall pay to Claimant compensatory damages in the amount of \$4,500.00, plus simple interest at a rate of 5% per annum from June 5, 2005 until the date of payment in full;
2. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and
3. Any and all relief not specifically addressed herein is denied in its entirety.

FEES

Pursuant to 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 = \$ 75.00

Member Fees

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

Member surcharge = \$ 325.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

June 20, 2006, adjournment by parties = Waived

Forum Fees and Assessments

The Arbitrator 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:

Three (3) Pre-hearing sessions with a single arbitrator @ \$ 250.00 = \$ 750.00

Pre-hearing conferences: February 24, 2006 1 session
May 19, 2006 1 session
June 16, 2006 1 session

One (1) Hearing session @ \$250.00 = \$ 250.00

Hearing Date: August 7, 2006 1 session

Total Forum Fees = \$1,000.00

1. The Arbitrator has assessed \$500.00 of the forum fees to Claimant.
2. The Arbitrator has assessed \$500.00 of the forum fees to Respondent Legg Mason.

FEE SUMMARY

1. Claimant is assessed and shall pay the following fees:

Initial Filing Fee	= \$ 75.00
Forum Fees	= \$ 500.00
Total Fees	= \$ 575.00
Less payments	= \$ 325.00
Balance Due NASD Dispute Resolution	= \$ 250.00

2. Respondent Legg Mason is assessed and shall pay the following fees:

Member Fees	= \$ 325.00
Forum Fees	= \$ 500.00
Total Fees	= \$ 825.00
Less payments	= \$ 325.00
Balance Due NASD Dispute Resolution	= \$ 500.00


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

SOLE ARBITRATOR

John C. Holmes, JD

- Public Arbitrator, Presiding Panelist

Sole Arbitrator's Signature


John C. Holmes, JD
Public Arbitrator, Presiding Panelist

Aug 15, 2006
Signature Date

August 17 2006
Date of Service (For NASD Dispute Resolution office use only)