



N.A.S.D. AWARD

Arbitration

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of
Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, New York

In the Matter of the Arbitration Between

Name of Claimant

William P. Kirby

vs.

Case #
88-00322

Names of Respondents

Dean Witter Reynolds, Inc.
Gregory Peterson

Names of Third-Party Claimants

Dean Witter Reynolds, Inc.
Gregory Peterson

vs.

Francis Fraine

REPRESENTATION

For Claimant: Johnathan F. Atwood, Esq. of Zimble, Brettler & Allegretti.

For Respondent, Dean Witter Reynolds, Inc.: Gerald F. Rath, Esq. of Bingham, Dana & Gould.

For Respondent, Gregory Peterson: Pro se.

Third-Party Respondent, Francis Fraine: He appeared at the hearing with Morris Goldings, Esq. on January 29, 1991, March 11, 1991 and March 28, 1991.

CASE INFORMATION

Statement of Claim filed: February 02, 1988.

Claimant signed Submission Agreement on: May 10, 1988.

Dean Witter Reynolds, Inc.'s Statement of Answer and Third-Party Claim filed on: August 08, 1988.

Respondent signed Submission Agreement on: August 04, 1988.

Gregory Peterson's Statement of Answer and Third-Party Claim filed on: November 16, 1988.

No Submission Agreement was signed.

Francis Fraine did not file a Statement of Answer or a Submission Agreement.

HEARING INFORMATION

Hearing Dates and Hearing Sessions:

August 02, 1990	-	Two Sessions
August 03, 1990	-	Two Sessions
October 15, 1990	-	Two Sessions
October 16, 1990	-	Two Sessions
January 07, 1991	-	Two Sessions
January 28, 1991	-	Two Sessions
January 29, 1991	-	Two Sessions
March 11, 1991	-	Two Sessions
March 12, 1991	-	Two Sessions
March 28, 1991	-	One Session
June 26, 1991	-	One Session
June 27, 1991	-	One Session
August 01, 1991	-	Two Sessions
August 02, 1991	-	One Session.

Hearing Location: Boston, Massachusetts.

CASE SUMMARY

Claimant alleged that at the time of the filing of the claim he was ninety years of age and had been legally blind since the early 1980's. Claimant contended that the account agreement between him and Dean Witter was procured by the fraud and was therefore void and unenforceable. In the alternative, Claimant sought to recover damages resulting from and caused by Respondents' unlawful and negligent mismanagement of Claimant's investment account. Claimant contended that Respondents breached their agreement and was negligent in the handling of his account in light of Claimant's age, station in life and investment objectives. Claimant also contended that Respondents made unauthorized and fraudulent trading of naked options which resulted in great losses and churned the account in violation of Federal Securities laws, Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78J) and Rule 10-b-5 promulgated thereunder. Claimant further contended that they complained in writing to Dean Witter and that Dean Witter failed to supervise Peterson. Claimant also alleged that Respondents violated 18 U.S.C. Sec. 1961, et seq.

Respondent, Dean Witter Reynolds, Inc., denied the allegations of wrongdoing and fraud in the execution of the account agreement with the arbitration clause and denied liability. Respondent contended that Claimant signed other brokerage account agreements which had this clause and he signed two Dean Witter Option Trading Agreements which also had this clause and Claimant did not complain about the option agreements. Respondent alleged that Claimant was a highly sophisticated investor who ignored the advice of his account executive and expanded his investment strategy to include trading in options and "naked" OEX options. Respondent contended that Claimant's effort to

recoup losses resulted in further losses in his account. Respondent further denied the allegations of unauthorized trades and contended that Claimant gave his grandson, Francis Fraine, power of attorney and authority to execute trades. Respondent also alleged that they did not receive any complaints from the Claimant concerning his account despite requests that Claimant contact the branch. Additionally, Respondent contended that Peterson spoke with Claimant on at least a daily basis concerning the activity in his account and Claimant's comments amply demonstrated that he was familiar with the activities in his account. Respondent contended that if Claimant sustained damages in his account, those damages resulted from the acts or omissions of Fraine. Respondent asserted eight affirmative defenses and interposed a Third-Party Claim against Francis Fraine for indemnification and contribution on the grounds that Fraine's negligent and/or fraudulent conduct and breaches of fiduciary duty were the cause of the damages, if any, sustained by Claimant. Respondent contended that this Panel had jurisdiction over Fraine because he executed the second Option Trading Agreement on behalf of Claimant who also executed a power of attorney in favor of Fraine and on numerous occasions instructed Respondents to follow Fraine's instructions.

Respondent, Gregory Peterson, denied the allegations of wrongdoing and denied liability. He contended that the Securities Account Agreement was valid and therefore enforceable. Respondent alleged that Claimant raised the idea of investing in index options and Respondent provided him with disclosure documents and advised him of the risks as well as the rewards. Respondent further alleged that Claimant expressed satisfaction with the activities in his account. Respondent also alleged that he requested discretionary authority, and Claimant granted him authority, as to the time and price for making options trades. Respondent asserted eight affirmative defenses and interposed a Third-Party Claim against Francis Fraine for indemnification and/or contribution if Peterson is found liable for the damages, if any, sustained by Claimant. Respondent contended that Claimant relied on Fraine and other family member to read to Claimant confirmations and monthly statements and also instructed Respondents to follow whatever instructions Fraine gave Peterson concerning trading in Claimant's account.

RELIEF REQUESTED

Claimant requested that the Panel determine that the Securities Brokerage Agreement is void and unenforceable as against Claimant and that his claims may be pursued in a State or Federal Court of competent jurisdiction. Alternatively, Claimant requested an award on the merits of his claim against Respondents of \$1,000,000.00 plus treble damages.

Respondents, Dean Witter and Gregory Peterson, requested that the Panel:

- (a) grant Dean Witter indemnification of the full amount of any judgment which might be awarded against Dean Witter;
- (b) grant Dean Witter contribution in a sum to be determined after

trial;

(c) award Dean Witter its costs in this action including reasonable attorney's fees; and

(d) grant Dean Witter such other relief as the Panel deems just and proper.

OTHER ISSUES

This matter was previously scheduled for a hearing to be conducted starting on February 06, 1989. At the joint request of the parties on or about December 28, 1989, the hearing was held in abeyance pending the videotaped deposition of the Claimant who was in poor health. On April 06, 1990, the parties advised the NASD that the deposition was complete and a hearing was scheduled for July, 1990 and later rescheduled to August, 1990.

On August 02, 1990, the first day of hearing, counsel for Claimant advised this Panel that Claimant was deceased and that Geraldine Smith, was named the temporary executrix of the Estate of William P. Kirby.

Respondent, Gregory Peterson, and Third-Party Respondent, Francis Fraine, did not appear at the hearing as parties. However, they were called as witnesses. Based upon the fact that both parties were served and subpoenaed and failed to appear as parties, this Panel proceeded with the hearing in their absence.

This Panel granted Claimant's request and assessed fees to postpone the following hearing dates: August 10, 1990, September 17th and 18th, 1990, April 23rd and 24th, 1991, and May 15th and 17th, 1991. This Panel also granted Dean Witter's request and assessed fees to postpone the May 14, 1991, hearing date.

This Panel assessed interim forum fees of \$9,500.00 against Claimant and Dean Witter Reynolds, Inc. which were paid and will be applied to any fees assessed.

This Panel also allowed post-hearing submissions by the parties on the law that was applicable to this case. Dean Witter moved to strike reference to articles and the articles themselves that were included with Claimant's Trial Brief on the basis that the arbitrators disallowed those articles as evidence. The Panel granted the Motion to Strike those articles from Claimant's Brief.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrator has

decided in full and final resolution of the issues submitted for determination as follows:

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

1. This Panel finds that Claimant sustained a total loss of \$186,080.00. Because Francis Fraine was a culpable party in fraud along with Dean Witter and its agents, this Panel awards Claimant Ninety Three Thousand and Forty Dollars and Zero Cent (\$93,040.00);

2. Thus, Respondents, Dean Witter Reynolds, Inc. and Gregory Peterson, are jointly and severally liable to Claimant and shall pay Claimant Ninety Three Thousand and Forty Dollars and Zero Cent (\$93,040.00);

3. Respondents are also jointly and severally liable to Claimant for interest at a rate of six percent (6%) from February 01, 1988 to the date of this award;

4. The claim for punitive damages is denied;

5. The claim for attorney's fees is denied;

6. The Third-Party Claims asserted against Francis Fraine are denied based upon the fact that although he appeared at the hearing, he did not consent or submit to NASD jurisdiction.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed and any amount previously paid shall be applied to the fees assessed.

1. The NASD has received and shall retain \$1,000.00 filing fee paid by the Claimant;

2. The NASD has received and shall retain \$9,500.00 interim forum fees paid by the Claimant;

3. The NASD has received and shall retain \$9,500.00 interim forum fees paid by Dean Witter;

4. Claimant is assessed a non-refundable filing fee of \$250.00;

5. Dean Witter is assessed a non-refundable filing fee of \$500.00 for its Third-Party Claim;

6. Peterson is assessed a non-refundable filing fee of \$500.00 for the

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its Third-Party Claim;

7. Claimant is further assessed \$8,000.00 in forum fees.

8. Claimant is also assessed \$300.00 for three of the postponements which were granted and fees were assessed and for which no payment was made. Therefore, Claimant is entitled to a refund of \$1,950.00 as stated in paragraph 10;

9. Dean Witter is further assessed \$8,000.00 in forum fees. Therefore, Dean Witter is entitled to a refund of \$1,000.00 as stated in paragraph 10;

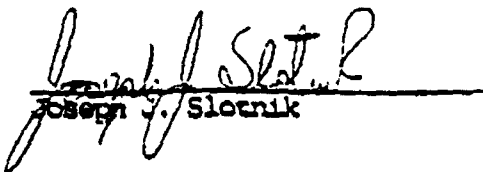
10. Peterson is further assessed \$8,000.00 which shall be satisfied upon reimbursing Claimant \$1,950.00 and Dean Witter \$1,000.00. The balance of \$5,550.00 shall be remitted to the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

Francis J. Feeney, Jr., Esq.	-	Chairperson/Public
Julien F. Begian	-	Public
Joseph J. Slotnik	-	Industry

Concurring Arbitrator's Signature


Joseph J. Slotnik

Date of Decision:

Dated by the NASD: October 18, 1991

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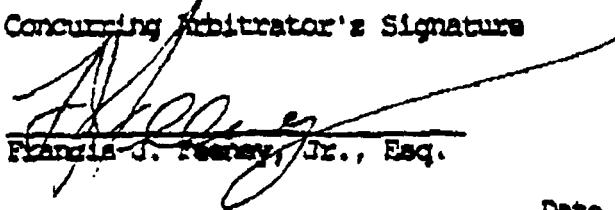
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