

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Names of Claimants

Wilda Faye Mays  
Carolyn J. Scott  
M.C. McCoy  
Cecil Lance  
Nan Robinson  
Herman Collier  
Marjorie Collier  
Lois Stooksbury  
Robert Worrell  
Grover T. Crosslin  
Irby Lightner  
Guy J. Gardner

90-00010

Name of Respondent

Dean Witter Reynolds, Inc.

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REPRESENTATION

Claimants were represented by David N. Burn, Esq. and Michael A. Meyer, Esq. of Sidwell & Barrett, P.C., Nashville, Tennessee.

Respondent, Dean Witter Reynolds, Inc. was represented by George D. Sullivan, Esq. of Dean Witter Reynolds, Inc., Tampa, Florida.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on December 28, 1989.

Claimant, Wilda Faye Mays' Submission Agreement was signed on October 30, 1989.

Claimant, Guy J. Gardner's Submission Agreement was signed on May 1, 1990.

Claimant. Grover T. Crosslin's Submission Agreement was signed on October 30, 1989.

Respondent, Dean Witter Reynolds, Inc. did not file an executed Submission Agreement with the NASD.

An Amended Statement of Claim was filed with the NASD by Claimants on May 21, 1990.

A Statement of Answer was filed with the NASD by Respondent, Dean Witter Reynolds, Inc. on March 18, 1991.

A Reply Memorandum was filed with the NASD by Claimants on June 8, 1992.

A Motion to Consolidate was filed with the NASD by Claimants on January 19, 1990.

A Motion for Pre-hearing conference was filed with the NASD by Respondent Dean Witter Reynolds, Inc. on March 25, 1991.

A Response to Respondent's Motion for Pre-hearing Conference was filed with the NASD by Claimants on March 18, 1991.

A Motion to Preclude was filed with the NASD by Claimants on February 11, 1991.

A Motion for Severance was filed with the NASD by Respondent Dean Witter Reynolds, Inc. on March 25, 1991.

A Response to Respondent's Motion for Severance was filed with the NASD by Claimants on March 21, 1991.

A Motion for Severance was filed with the NASD by Respondent Dean Witter Reynolds, Inc. on January 29, 1992.

A Response to Respondent's Motion for Severance was filed by Claimants on February 18, 1992.

A Motion for Enforcement of Section 15 of the NASD Code of Arbitration for Caroline Scott, M.C. McCoy, C. Cecil Lance, Nan C. Robinson, Herman E. Collier, Marjorie Collier, Lois S. Stooksbury, Robert O. Worrell and Irby C. Lightner was filed with the NASD by Respondent, Dean Witter Reynolds, Inc. on May 8, 1992.

A Response to Dean Witter Reynolds, Inc.'s Motion for Enforcement of Section 15 of the NASD Code of Arbitration was filed with the NASD by Claimants on May 26, 1992.

A Reply to Claimants' Response to Dean Witter Reynolds Inc.' Motion for Enforcement of Section 15 of the NASD Code of Arbitration was filed with the NASD by Respondent, Dean Witter Reynolds Inc. on June 1, 1992.

A Reply Memorandum was filed with the NASD by Claimants on June 8, 1992.

An Order granting the Stipulation of Dismissal for the appeal of Dean Witter Reynolds Inc. v. McCoy, et al. CA No. 92-5542, was filed in the United States Court of Appeals for the Sixth Circuit, on July 16, 1992.

A Motion for Reconsideration of Motion for Determination of Eligibility for Arbitration was filed with the NASD by Respondent, Dean Witter Reynolds, Inc. on June 17, 1992.

A Response to the Motion for Reconsideration was filed with the NASD by Claimants on June 23, 1992.

#### **HEARING INFORMATION**

The hearing dates for Wilda Faye Mays v. Dean Witter Reynolds Inc. were November 10, 11, and 12, 1992 and the hearing lasted for five (5) sessions.

The hearing location was Nashville, Tennessee.

The hearing date for Guy Gardner v. Dean Witter Reynolds Inc. was November 12, 1992 and the hearing lasted for one (1) session.

The hearing location was Nashville, Tennessee.

The hearing dates for Grover Crosslin v. Dean Witter Reynolds Inc. was January 12, 1993 and the hearing lasted for two (2) sessions.

The hearing location was Nashville, Tennessee.

A telephonic pre-hearing conference was held on March 4, 1992 and lasted for one (1) session.

#### **CASE SUMMARY**

Claimants, Wilda Faye Mays, ("Mays"), Guy Gardner ("Gardner") and Grover Crosslin ("Crosslin") alleged that Respondent Dean Witter Reynolds Inc. ("Dean Witter"), through its

agent, Jeffrey Hayden ("Hayden") breached its fiduciary duty by pursuing investment strategies intended to enrich Hayden and Dean Witter through larger commissions at the expense of Claimants' best interests.

Specifically, Mays alleged that she informed Hayden that she wanted an investment that would provide sufficient proceeds for her sons' educations, and provide a modest amount of income while protecting her principal. Mays asserted that she surrendered control of the assets to Hayden based on his assurances that he would manage and invest the assets to meet those objectives. According to Mays, Hayden recommended that she invest in Balcor Equity Pension Investors-I, ("Balcor"), Harvest Variable, ("Harvest"), Universal Life policy or similar insurance product, Callon Income Fund 1983-3 and Phoenix Leasing VII ("Phoenix Leasing"). Mays alleged that all of these investments involved a relatively high degree of risk and were therefore unsuitable in light of her stated investment objectives. In regard to Balcor, Harvest and Phoenix Leasing, Mays stated that she failed to meet the issuer's suitability standards for each investment. Lastly, Mays claimed that as a result of these recommendations, Hayden breached the fiduciary duty he owed Mays and due to this breach, Mays suffered economic losses.

Specifically, Crosslin alleged that he informed Hayden that his investment objectives were to place his retirement proceeds in investments which would protect his principal investment, have the funds placed in highly liquid investments and he was interested in a reasonable rate of return. Crosslin alleged that Hayden placed Crosslin's funds in National Lease Income Fund 6 L.P., mutual funds. Crosslin maintained these funds were unsuitable as they involved a high degree of risk and that he did not meet the issuer's suitability standards. Crosslin also alleged that Hayden used Crosslin's funds to trade treasury bonds which had been stripped of their interest. Since these bonds did not generate any income, and involved a high degree of risk, these were also unsuitable for Crosslin. Lastly, Crosslin alleged that Hayden breached his duty to manage Crosslin's funds in Crosslin's best interests by recommending unsuitable investments.

Specifically, Gardner alleged that he informed Hayden that his investment objectives were to preserve his capital and generate income. Gardner claimed that Hayden's investment strategy consisted of making investments in government securities, equipment leasing, limited partnerships, oil and gas programs and mortgage limited partnerships. Gardner asserted that the investments Hayden invested Gardner's funds in did not possess a sufficient degree of safety and liquidity and Gardner did not meet the issuer's suitability standards. Lastly, Gardner alleged that Hayden breached the fiduciary duty he owed Gardner and Gardner suffered economic loss as a result of this breach.

In its Statement of Answer, Dean Witter denied each and every allegation of misrepresentation or wrongdoing. Specifically, Dean Witter asserted that the securities purchased by the Claimants were entirely consistent with the customer's stated investment objectives and were suitable and appropriate in light of the customer's financial resources and

understanding. In addition, Dean Witter alleged that various claims asserted by the Claimants were barred in whole or in part by applicable statutes of limitations and by reason of Claimants' execution of subscription agreements containing specific warranties and representations, inconsistent with the claims they asserted. Lastly, Dean Witter maintained that various claims asserted by the Claimants are barred by the doctrines of estoppel, laches and waiver.

### **RELIEF REQUESTED**

Claimant Wilda Faye Mays requested an award of \$89,000 plus interest, punitive damages and other general relief.

Claimant Grover Crosslin requested an award of \$86,000 plus interest, punitive damages and other general relief.

Claimant Guy J. Gardner requested an award of \$160,900 plus interest, punitive damages, interest and attorney's fees.

Dean Witter requested that the Statements of Claim for all Claimants be dismissed.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent, Dean Witter did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure, and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

Dean Witter filed a Motion for Severance pursuant to Section 25(d)(2) of the NASD Code of Arbitration Procedure ("NASD Code"), requesting severance of the twelve individual claims consolidated in this proceeding. Dean Witter claimed that only two of the claimants are related parties and the resolution of each claim is necessarily dependent on uniquely personal and individual factors which differed for each claimant. Dean Witter contended that the misrepresentations alleged by the twelve claimants are all different and oral in nature and the twelve claimants purchased a different mix of investment products at different times and have alleged widely divergent potential damages.

Claimants, in their Response to Dean Witter's Motion for Severance, asserted that all of the Claimants were in the same position when they purchased securities from Dean Witter in that they were retirees or dependents or survivors of retirees or employees of Arnold Development Center in Tullahoma, Tennessee. Additionally, Claimants stated that they purchased their securities through the same broker.

The Arbitration Panel denied Dean Witter's Motion for Severance. In its Order, the Arbitration Panel stated it would hear each Claimant's case sequentially and separately as agreed by the parties' counsel on the order of presentation and all witnesses and evidence regarding claimants not under hearing at the time would be excluded to avoid prejudice.

Dean Witter filed a Motion for Enforcement of Section 15 of the NASD Code of Arbitration. Respondents requested that the arbitrators declare the claims of Wilda Faye Mays and Guy J. Gardner, contained in the Statement of Claim, were ineligible for submission to NASD arbitration. Respondent based its request upon its allegation that the Claim was filed more than six years after the occurrence or event giving rise to the dispute.

Claimants, in their response to Dean Witter's Motion for Enforcement of Section 15 of the NASD Code of Arbitration Procedure contended that the purpose of Section 15 was to allow the submission of any claim which would be considered to be timely filed under the applicable statute of limitations as if that claim had been prosecuted in court. Claimants maintained that these claims would have been timely had they been prosecuted in court, and the timeliness of claims is an issue which should be determined by the arbitrators.

In its Reply to Claimants' Response to Respondent's Motion for Enforcement of Section 15 of the NASD Code of Arbitration Procedure, Dean Witter alleged that Tennessee law makes it necessary that the arbitration panel rule on the Section 15 Motion before the arbitration begins. Additionally, Dean Witter claimed that Claimants' claims are not timely under Tennessee Law.

The Arbitration panel declined to grant the Respondent's Motion for Enforcement of Section 15 of the NASD Code of Arbitration Procedure as against the claims of Wilda Faye Mays and Guy J. Gardner and determined to take the motion with the case.

Dean Witter filed a voluntary dismissal of its Federal Court lawsuits at both the District Court and Appeals Court level against Claimants Wilda Faye Mays, Grover T. Crosslin and Guy J. Gardner. The dismissal was granted, which enabled those Claimants to have their claims adjudicated in arbitration hearings.

#### **AWARD**

Pursuant to the panel's order following the pre-hearing conference, the three cases of Mays v. Dean Witter, Gardner v. Dean Witter and Crosslin v. Dean Witter were heard separately and distinctly, from the beginning of each case to its completion.

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

**Wilda Faye Mays v. Dean Witter Reynolds, Inc.**

By majority decision of the panel of arbitrators, Respondent, Dean Witter's Section 15 Motion barring the claim of Claimant, Wilda Faye Mays is denied and she is awarded \$37,200.00 as compensatory damages against Respondent, Dean Witter. Mays' claim for punitive damages is denied and dismissed in its entirety and there is no award of attorney's fees or of interest. Forum fees are assessed against Respondent, Dean Witter and the waiver of deposit of a hearing session deposit by Claimant, Mays is affirmed by the panel.

Arbitrator Charles E. Jones dissents as follows: "I would hold that the claim of Wilda Faye Mays is rendered ineligible for arbitration by Section 15 of the NASD Code of Arbitration and the case of Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992) and authorities there cited. Absent the application of Section 15 I would concur with the decision of the majority."

**Guy J. Gardner v. Dean Witter Reynolds, Inc.**

By majority decision of the panel of arbitrators, Respondent, Dean Witter's Section 15 Motion barring the claim of Claimant, Guy J. Gardner is denied and he is awarded \$27,300.00 as compensatory damages against Respondent, Dean Witter. Gardner's claim for punitive damages is denied and dismissed in its entirety and there is no award of attorney's fees or of interest. Forum Fees are assessed against Respondent, Dean Witter and the waiver of the hearing session deposit by Claimant, Gardner is affirmed by the panel.

Arbitrator Charles E. Jones dissents as follows: "I would hold that the claim of Guy Gardner is rendered ineligible for arbitration by Section 15 of the NASD Code of Arbitration and the case of Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992) and authorities there cited. Absent the application of Section 15 I would concur with the decision of the majority."

**Grover T. Crosslin v. Dean Witter Reynolds, Inc.**

Claimant, Grover Crosslin is awarded \$9,400.00 as compensatory damages against Respondent, Dean Witter. Crosslin's claim for punitive damages is denied and dismissed in its entirety and there is no award of attorney's fees or of interest. Forum Fees are assessed against Respondent, Dean Witter and the waiver of the hearing session deposit by Claimant, Crosslin is affirmed by the panel.

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### **FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the Claimants are jointly and severally assessed and shall pay to the NASD the \$200.00 non-refundable claim filing fee. Respondent, Dean Witter is assessed Forum Fees in the amount of \$6750.00.

Forum Fees assessed to the parties are payable to the NASD and were assessed on the basis of \$750.00 per hearing session for eight hearing sessions and \$750.00 for the single session pre-hearing conference.

#### **Signatures of Arbitrators Concurring:**

**Dated:**

**/S/ Allen S. Bjork**

Allen S. Bjork  
Industry Arbitrator

**March 11, 1993**

**/S/ Norman W. Ginsberg**

Norman W. Ginsberg  
Public Arbitrator

**March 10, 1993**

#### **Signature of Arbitrator Dissenting in Part and Concurring in Part:**

**/S/ Charles E. Jones**

Charles E. Jones, Esq.  
Public Arbitrator  
Chairperson

**March 11, 1993**

Dissenting in part and Concurring in part

Date Award served by the NASD: **March 12, 1993**