

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Margaret C. Bodkin

91-00454

Name of Respondent(s)

Dean Witter Reynolds, Inc.
PaineWebber Incorporated
Steven Grau

REPRESENTATION

For Claimant: Margaret C. Bodkin was represented by Roland J. Santoni, Esq. of Erickson & Sederstrom, P.C., Omaha, Nebraska.

For Respondents: Dean Witter Reynolds, Inc. and Steven Grau were represented by C. L. Robinson, Esq. of Fitzgerald, Schorr, Barnettler & Brennan, Omaha, Nebraska.

PaineWebber Incorporated and Steven Grau were represented by Peter Byar, Esq. of PaineWebber Incorporated, Weehawken, New Jersey.

CASE INFORMATION

Statement of Claim filed: February 12, 1991

Claimant's Submission Agreement signed on: February 8, 1991

Joint Statement of Answer filed by Respondents Dean Witter Reynolds, Inc. and Steven Grau on: May 27, 1991

Joint Statement of Answer filed by Respondents PaineWebber Incorporated and Steven Grau on: May 23, 1991

Respondent Dean Witter Reynolds, Inc.'s Submission Agreement signed on: May 24, 1991 by Abe Lampart, First Vice President and Assistant General Counsel, Dean Witter Reynolds, Inc.

Respondent Steven Grau's Submission Agreement signed on: May 22, 1991

Respondent PaineWebber Incorporated's Submission Agreement signed on: May 20, 1991 by Joseph F. Generelli, Corporate Vice President, Assistant General Counsel, PaineWebber Incorporated.

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Dates/Sessions: November 5, 1991 for two (2) sessions
November 6, 1991 for two (2) sessions

Hearing Location: Omaha, Nebraska

CASE SUMMARY

Claimant Margaret C. Bodkin ("Bodkin") alleged that Respondent Steven Grau ("Grau"), while employed by Respondent Dean Witter Reynolds, Inc. ("Dean Witter") and/or Respondent PaineWebber Incorporated ("PaineWebber"), engaged in the following acts:

1. Pursued an inappropriate and unsuitable investment strategy given Bodkin's age, her income in 1987 and 1988, and her stated objectives of investing in safe, marketable, income-producing securities;
2. Breached the fiduciary duty to Bodkin by pursuing an investment strategy designed to produce commission income and margin interest rather than serve the best interests of the client;
3. "Churned" or excessively traded in Bodkin's account without consulting with or receiving prior approval from Bodkin;
4. Negligently failed to properly advise Bodkin;
5. Failed to timely deliver a prospectus for securities purchased for Bodkin's account which were subject to the prospectus delivery requirements of the Security Act of 1933 and the Nebraska Securities Act;
6. Breached his fiduciary duty of trust and confidence by borrowing money from Bodkin and refusing to repay.

The liability of PaineWebber and Dean Witter was alleged under the doctrine of respondeat superior and as the control persons of Grau pursuant to the securities laws. The acts complained of allegedly constituted a breach of fiduciary duty owed to Bodkin and constituted manipulative and deceptive devices in violation of Section 10b and Rule 10b-5 of the Securities and Exchange Act of 1934 and Section 8-1102 of the Nebraska Securities Act.

Respondents Dean Witter and Grau denied the material allegations of the Statement of Claim, alleging that:

1. Bodkin had not lost money since the account was transferred to Dean Witter from PaineWebber on or about February 5, 1990, but increased \$26,082.10 during that period;
2. The establishment of the Margin account was at the specific request and direction of Bodkin;
3. Bodkin either initiated or was consulted about and directed each transaction at Dean Witter;
4. No churning occurred as the program of covered call writing was initially suggested by Bodkin and was continued while she was

investing at Dean Witter;

5. Bodkin's investments at Dean Witter were suitable, and furthermore, the securities laws do not provide a private remedy for an unsuitability claim;

6. The claims for failure to provide proper advice and provide a prospectus are not applicable to Dean Witter (or Grau for the period after February 5, 1990) since the incidents occurred prior to the transfer of assets to her account at Dean Witter; and

7. The claim for the failure to repay the loan is not applicable to Dean Witter because the incident occurred prior to the transfer of the account to Dean Witter and the payments to Grau were stated by her to be wedding gifts and accepted by Grau on that basis.

Respondents PaineWebber and Grau denied the allegations of the Statement of Claim, alleging that:

1. Bodkin was a knowledgeable, intelligent person who, at all times, was fully aware of the activity in her account and the implications of the various types of investments and trading strategies which occurred in the account;

2. Any account losses were due to the market forces over which Respondents had no control;

3. Each and every transaction that occurred in the account was discussed with Bodkin and approved by her;

4. Bodkin's account was an income-generating account utilizing covered call writing and the turnover ratio alleged by Bodkin would not constitute churning in this type of account;

5. If, in fact, a prospectus was not timely delivered to Bodkin, this would not have resulted in any financial damage to Claimant; and

6. The \$15,000.00 "loan" represented wedding gifts to Grau and his wife and were not a loan.

RELIEF REQUESTED

Claimant Bodkin requested entry of an award against Respondents as follows:

1. A rescission of the purchase of the illiquid PaineWebber sponsored products: PaineWebber Independent Living Mortgage Fund (\$80,000.00); Geodyne Investment Partnership Fund 4 (\$70,000.00); Corporate Associates Partnership 9 (\$70,000.00); PaineWebber Retail Property Investments (\$38,000.00). In return, Bodkin requests the costs of the securities less any distribution of profits she received;

2. Securities losses in the amount of \$99,545.14;

3. Reimbursement of Commissions paid in the amount of \$39,910.00;
4. Reimbursement of margin interest paid in the amount of \$26,521.00;
5. Payment of \$52,914.00 for the excess federal and state income taxes paid by Bodkin;
6. Repayment of the loan made in the sum of \$15,000.00;
7. The amount of any excessive profits made by Grau, PaineWebber and Dean Witter in trading bonds as principal;
8. The amount that a properly managed account would have earned;
9. A reasonable attorney fee, interest and the cost of arbitration.

Respondents Dean Witter, PaineWebber and Grau requested that the Statement of Claim be dismissed and denied in its entirety. In addition, Dean Witter requested that Bodkin pay the costs of arbitration.

OTHER ISSUES CONSIDERED & DECIDED

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.

On May 8, 1991, Bodkin filed a motion in accordance with Section 25(b)(2)(iii) of the NASD Code of Arbitration Procedure requesting that Respondent PaineWebber be barred from presenting any matter, arguments or defenses at the hearing due to the failure to file an answer within twenty (20) business days from receipt of service of the claim, and that Respondent Grau be barred from presenting any matter, arguments or defenses at the hearing with respect to activities which arose during his employment at PaineWebber. At hearing, Claimant withdrew the motion after representing that the matter had been resolved with counsel for PaineWebber.

AWARD

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

1. In regard to Claim I as alleged in the Statement of Claim, Respondents PaineWebber Incorporated and Steven Grau are jointly and severally liable for and shall pay to Claimant Margaret C. Bodkin the sum of \$27,081.34;
2. In addition, Respondents Dean Witter Reynolds, Inc. and Steven Grau are jointly and severally liable for and shall pay to Claimant Margaret C. Bodkin the sum of \$16, 138.74;
3. In regard to Claim V as alleged in the Statement of Claim, Respondents PaineWebber Incorporated and Steven Grau are jointly and severally liable for and shall pay to Claimant Margaret C. Bodkin the sum of \$10,000.00 plus interest in the amount of \$2,390.00;

4. In addition, Respondent Steve Grau is liable for and shall pay to Claimant Margaret C. Bodkin the sum of \$5,000.00 plus interest in the amount of \$1,092.00;

5. Respondent Dean Witter Reynolds, Inc. is dismissed from Claim V;

6. Claims II, III, and IV as alleged in the Statement of Claim are hereby dismissed and denied in their entirety;

7. The parties shall bear their own costs of arbitration, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the total Forum Fees assessed are Four (4) hearing sessions x \$750.00 equals \$3,000.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and shall refund the hearing session deposit previously deposited by the Claimant Margaret C. Bodkin. Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$1,500.00. Furthermore, Respondent PaineWebber Incorporated is liable for and shall pay to the NASD forum fees in the sum of \$1,500.00.

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

BY THE ARBITRATION PANEL

Dated:

Robert Berkshire
Robert Berkshire, Esq.
Public Arbitrator
Chairperson

January 14, 1992

Samuel Van Pelt
Samuel Van Pelt, Esq.
Public Arbitrator

January 13, 1992

Steven R. Christensen
Steven R. Christensen
Industry Arbitrator

January 14, 1992

Date Served: _____