

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between	)	
	)	
<u>Name of Claimant(s)</u>	)	
	)	
Elda Tindiglia	)	
	)	
	)	Case No. 91-00660
	)	
<u>Name of Respondent(s)</u>	)	
	)	
Dean Witter Reynolds, Inc.	)	
David M Kee	)	
Earl C. McCrary	)	
	)	

REPRESENTATION

For Claimant, Elda Tindiglia ("Tindiglia"): Adam Doner, Esq. of McGee, Jordan, Shuey, et al.

For Respondents, Dean Witter Reynolds, Inc. ("Dean Witter"), David Kee ("Kee") and Earl McCrary ("McCrary"): George Sullivan, Esq. of Dean Witter Reynolds, Inc.

CASE INFORMATION

Statement of Claim filed: March 18, 1991. Claimant's Submission Agreement signed: February 14, 1991.

Respondents' Dean Witter, Kee and McCrary's, Statement of Answer filed: April 8, 1992. Respondents' Submission Agreements signed by McCrary and Kee on April 16, 1992, and by George Sullivan on behalf of Dean Witter on April 16, 1992.

HEARING INFORMATION

On April 16, and May 11, 1992, in Fort Lauderdale, Florida, hearings lasting five (5) sessions were conducted.

CASE SUMMARY

Claimant alleged that Respondents were liable for breach of fiduciary duty; negligent misrepresentation; innocent misrepresentation; violation of federal securities laws and, as it relates to Dean Witter, negligent supervision; negligent hiring; and negligent retention. Claimant alleged that Kee misrepresented the risks and safety of certain mutual funds and that said investments were unsuitable for Claimant in light of her investment objectives.

Respondents denied all allegations of wrongdoing and alleged that Claimant was provided with prospectuses which disclosed the risks involved in the purchases and Kee did not recommend or encourage Claimant to sell her utilities stocks.

Respondents alleged the affirmative defenses of assumption of risk; the transactions were suitable for Claimant and were consistent with her investment objectives; Claimant failed to complain in a timely manner; all transactions were effectuated with Claimant's knowledge and consent; estoppel; ratification; no misrepresentations were made; lack of intent to defraud; there was no reckless disregard of the financial consequences; Dean Witter had adequate supervisory procedures; failure to state a claim; market conditions caused Claimant's losses; common law tort claims are barred by the Economic Loss Rule; statute of limitations; and New York law does not allow recovery of punitive damages.

#### RELIEF REQUESTED

Claimant requested damages in the amount of \$57,812.00, plus interest, costs, attorney's fees and punitive damages in the amount of \$50,000.00.

Respondents requested dismissal of the claim.

#### OTHER ISSUES CONSIDERED & DECIDED

1. Respondent, McCrary, was dismissed, with prejudice, by the Claimant.
2. 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.

#### AWARD

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

1. Respondents, Dean Witter and Kee, are found liable, jointly and severally, and shall pay to the Claimant the amount of \$22,665.00, plus interest at the legal rate of 12% per annum from November 16, 1990, to May 11, 1992, in the amount of \$4,046.00 for a total due to the Claimant of \$26,711.00.
2. Respondent, Dean Witter, is also found liable for an additional \$17,684.00, plus interest at the legal rate of 12% per annum from November 16, 1990, to May 11, 1992, in the amount of \$3,157.00 for a total due to Claimant of \$20,841.00.
3. Claimant's request for attorney's fees, costs and punitive damages is denied.

OTHER COSTS

1. Of the \$1,100.00 previously deposited by Claimant, \$200.00 was applied towards the non-refundable filing fee and \$5.00, was applied towards the copying costs which Claimant owed the NASD, leaving a balance paid by Claimant of \$895.00.
2. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$3,750.00 (five sessions x \$750.00 per session). Respondent, Dean Witter, is hereby assessed \$3,750.00, \$895.00 of which shall be paid directly to the Claimant, and \$2,605.00 of which shall be paid to the National Association of Securities Dealers, Inc. The NASD shall retain the \$895.00 previously deposited by Claimant and the \$250.00 which Dean Witter overpaid for its postponement fee in partial satisfaction of such fees.

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

Concurring Arbitrators' Signatures

/s/  
Robert Herachmann, Esq.

Public

/s/  
Jack L. Ratzkin, Esq.

Public

/s/  
Glen E. Borregard

Industry

Date of Decision: June 9, 1992