

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Charles M. Bennett

91-03135

Name of Respondent(s)

Dean Witter Reynolds, Inc.

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REPRESENTATION

For Claimant: Charles M. Bennett was represented by Charles Wist, Esq. of Wist Boyd Holland & Dailey, located in Houston, Texas.

For Respondent: Dean Witter Reynolds, Inc. was represented by Wendy R. Robinson, Esq. of Dean Witter Reynolds Inc., San Francisco, California.

CASE INFORMATION

Statement of Claim filed: October 8, 1991.

Claimant's Submission Agreement signed on: August 9, 1991.

Motion to Dismiss pursuant to Section 15 of the Code of Arbitration Procedure filed by Respondent Dean Witter Reynolds, Inc. on: October 31, 1991.

Statement of Answer and Request for Dismissal filed by Respondent Dean Witter Reynolds, Inc. on: January 17, 1992.

Respondent Dean Witter Reynolds, Inc.'s Submission Agreement signed on: January 3, 1992 by Wendy R. Robinson, Vice President & Senior Attorney, Dean Witter Reynolds, Inc.

Response to Motion to Dismiss pursuant to Section 15 of the Code of Arbitration Procedure filed by Claimant Charles M. Bennett on: November 20, 1991.

Response to Request for Dismissal filed by Claimant Charles M. Bennett on: March 23, 1992.

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Dates/Sessions: May 6, 1992 for one (1) session

Hearing Location: Houston, Texas

### CASE SUMMARY

Claimant Charles M. Bennett ("Bennett") alleged that Lance Berg, who was an account executive at Respondent Dean Witter Reynolds, Inc. ("Dean Witter"), recommended an investment in the Dean Witter High Yield Securities, Inc. fund in April of 1983, but failed to give him a prospectus and did not advise him of the risk associated with the fund. Bennett further alleged that the securities were not investment grade and that the investment was unsuitable given Bennett's known desire to preserve capital.

In addition, Bennett alleged that after the investment, he relied on Dean Witter to inform him of any necessity to liquidate the investment in order to stop losses in value, but that Dean Witter failed to advise Claimant of the decline in value until September of 1990 and changed its statement of account format so that declines in value were not readily apparent.

Respondent Dean Witter denied the material allegations of the Statement of Claim, alleging that:

1. Bennett actually invested in the High Yield fund in November of 1983, at which time Lance Berg had not been his account executive for approximately two months, having left Dean Witter's employment in September of 1983;
2. Pursuant to normal business practice, Bennett was given a High Yield prospectus to review prior to his decision to invest in the fund;
3. Bennett wanted an investment that offered an aggressive rate of return and never told his account executive that his objective was to preserve capital;
4. Bennett received a prospectus with his confirmation of purchase notice prior to settlement, which is the only legal requirement, the prospectus clearly stating that the fund, "may be subject to greater risk of loss of income and principal and greater risk of increases and decreases in net asset value due to market fluctuations.";
5. Bennett received updated prospectuses at least annually from the fund;
6. Bennett received account statements periodically from Dean Witter from 1983 to 1990 which clearly reported in writing the diminished values of the High Yield units, yet he never voiced one word of complaint; and
7. After 1985, Bennett's account executive often discussed the decline in value of high-yielding corporate bond funds with Bennett and advised Bennett to consider selling his units to avoid any further loss, but Bennett would respond that he preferred the characteristics and rate of return of the High Yield units and was considering purchasing more if the price dropped further.

Dean Witter further asserted that:

1. The Statement of Claim was time barred by the applicable statute of limitations;
2. The claim was inadequate and lacking in merit and should be dismissed;
3. The claim was barred by the doctrines of ratification, waiver, estoppel and laches;
4. Bennett failed to mitigate his damages;
5. Bennett is barred from recovery by the principle of contributory, or comparative, negligence because any alleged loss was proximately caused by Bennett's own conduct or negligence as to his own affairs; and
6. The loss calculation in the Statement of Claim ignored the dividends paid and Bennett actually profited from his High-Yield investment.

#### RELIEF REQUESTED

Claimant Bennett requested entry of an award against Respondent Dean Witter for the sum of \$23,586.00.

Respondent Dean Witter requested that the Claim be dismissed in its entirety and that Dean Witter be awarded reasonable costs of defending the complaint.

#### OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that a handwritten, signed Award may be entered. In this case, the parties have agreed to receive a conformed copy of the Award while the original remains on file with the NASD.

On December 13, 1991, the Director of Arbitration denied Dean Witter's Motion to Dismiss pursuant to Section 15 of the Code of Arbitration Procedure, further stating that the issue could be raised with the arbitrator.

At hearing and prior to the introduction of evidence, Respondent Dean Witter requested dismissal of the Statement of Claim based upon the applicable Statute of Limitations and Section 15 of the Code of Arbitration Procedure, as presented in its Answer and Request for Dismissal filed January 17, 1992. After hearing argument from the parties, the arbitrator denied the motion and heard the evidence and testimony of the parties.

At the close of hearing, Dean Witter requested a specific finding that Lance Berg, even though not a Respondent, was not guilty of any wrongdoing in this matter. Upon review of the evidence, the arbitrator finds that there was no evidence of wrongdoing on the part of Lance Berg.

AWARD

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

1. The Statement of Claim is hereby dismissed and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: One (1) session x \$300.00 = \$300.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$100.00 and \$150.00 of the \$300.00 initial hearing session deposit previously deposited by the Claimant Charles M. Bennett. The NASD shall refund \$150.00 to Claimant Charles M. Bennett. Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$150.00.

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

ARBITRATOR'S SIGNATURE

Dated:

Leighton E. Moss  
Leighton E. Moss, Esq.  
Public Arbitrator

June 26, 1992

Date of Service: June 30, 1992