

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between -

Name of Claimant

Rudolph & Vivian Kottemann

92-00950

Name of Respondents

Dean Witter Reynolds Inc.  
Jeffrey A. Hayden

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**REPRESENTATION**

For Claimant: Steven J. Gard, Esq. of the law firm of Page & Bacek.

For Respondent: George Sullivan, Esq.

**CASE INFORMATION**

Statement of Claim filed: March 16, 1992.

Claimants' Submission Agreement signed on: February 25, 1992.

Joint Statement of Answer filed by Respondents on: June 9, 1992.

The Respondent Dean Witter Reynolds, Inc. and Jeffrey Hayden did not sign submission agreements as required pursuant to Section 25 of the Code of Arbitration Procedure.

**HEARING INFORMATION**

Hearing Dates/Sessions: December 21, 1992, 2 Sessions.  
December 22, 1992, 2 Sessions.

Hearing Location: NASD offices located in Atlanta, Georgia.

### CASE SUMMARY

Claimants alleged that the Respondents engaged in various fraudulent and manipulative acts including directing and effecting unsuitable trades in the Kottemanns' accounts, including the excessive trading of closed-end bond funds, the excessive trading of Treasury securities, and the excessive concentration of Mr. Kottemann's retirement funds in highly illiquid and speculative limited partnerships; misrepresenting and omitting to disclose various material facts to the Kottemanns regarding the securities recommended to them and the trading strategies employed by Respondents; and, making unauthorized trades in the Kottemanns' accounts by effecting discretionary trades without having implemented the appropriate procedures for handling a discretionary account. Claimants further alleged Respondents' actions in this case constitute violations of federal and state securities laws, breach of fiduciary duty, negligence/violations of the rules of the NASD and NYSE, breach of contract, fraud and misrepresentation, and failure to supervise.

Respondents maintained the Claimants were fully advised of the risks inherent their investments and knowingly chose to assume those risks; all of the transactions which the Claimants effected in their Dean Witter Reynolds, Inc. accounts were suitable for their investment objectives and financial status and were entirely consistent with their expressed financial goals; all of the transactions which the Claimants effected in their Dean Witter Reynolds, Inc. account were thoroughly discussed with them, were authorized by them, and were effectuated with their full knowledge and consent; the Claimants have waived any objections they may have had to the subject transactions, their suitability or authorization or any alleged losses therefrom and should be estopped from asserting any claim regarding them at this time. Respondents further maintained by their numerous discussions with Dean Witter Reynolds, Inc., their authorization and instructions to proceed with the transactions at issue and their failure to complain after receiving confirmations and statements, the Claimants have ratified and approved the subject transactions; no misrepresentations or omissions of material fact have ever been made by Dean Witter Reynolds, Inc. or Jeffrey Hayden concerning the investment transactions at issue in this proceeding and the Claimants were thoroughly advised of all pertinent aspects of the investment transactions. Respondents further maintained there was no intent by Dean Witter Reynolds, Inc. or Jeffrey Hayden to defraud Claimants nor any reckless disregard of the financial consequences to the Claimants in connection with any of the transactions at issue; extraordinary market conditions and events not caused by or in the control of Dean Witter Reynolds, Inc. or Jeffrey Hayden existed to cause certain losses which have been alleged by the Claimants; at all times relevant to this proceeding, Dean Witter Reynolds, Inc. had reasonable and adequate supervisory procedures of its account executives which it reasonably and diligently implemented and followed and the claims set forth in the Statement of Claim are barred in whole or part by applicable statutes of limitations. Respondents further maintained as a matter of law, the Claimants are precluded from any recovery of punitive damages in this proceeding as the account opening documents executed by the Claimants and Dean Witter Reynolds, Inc.

specifically state that any dispute regarding -Claimants' accounts will be determined in accordance with the law of the State of New York and in Volt Information Sciences, Inc. v. Board of Trustee, 489 U.S. 468 (1989), the United States Supreme Court held that these choice of law provisions in contractual agreements are binding upon the parties and must be given legal effect and New York State law does not permit arbitration panels to award punitive damages.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in an amount in excess of \$63,469.47, or, alternatively, for rescissionary damages to be determined based upon proof presented before the arbitration panel; pre and post award interest; punitive damages in such amount as the arbitrators deem appropriate; all of Claimant's costs, expenses and disbursements including reasonable attorneys' fees in pursuing this claim.

Respondents requested that all claims asserted by the Claimants be denied in their entirety.

#### **AWARD**

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

1. The Respondents be and hereby are liable jointly and severally and shall pay to the Claimants the sum of \$60,000.00 inclusive of interest.
2. The Respondents be and hereby are liable jointly and severally and shall pay to the Claimants the sum of \$17,500.00 as reimbursement of attorneys' fees, expert witness costs and out of pocket expenses incurred by the Claimants pursuant to case law cited by the Claimants.
3. The Respondents be and hereby are liable jointly and severally and shall pay to the Claimants the sum of \$50,00.00 in punitive damages pursuant to case law submitted by the Claimants.

**FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed:

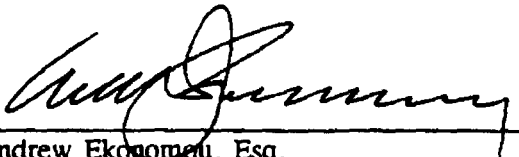
4 sessions X \$500.00 = \$2,000.00 minus Claimants' hearing  
session deposit \$500.00 = \$1,500.00 due.

The Respondents be and hereby are liable jointly and severally and shall pay to the NASD the sum of \$1,500.00 to represent forum fees.

The NASD shall retain the \$150.00 claim filing fee previously deposited by the Claimants.

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

**ARBITRATOR SIGNATURES**



Andrew Ekonomou, Esq.  
Public Arbitrator



James E. Giblin  
Public Arbitrator



M. Bruce Adelberg  
Industry Arbitrator

Date of Decision: February 2, 1993