

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Donald Cowan

92-01082

Name of Respondents

Dean Witter Reynolds, Inc. and
Joseph F. Boylan

REPRESENTATION

Claimant was represented by Richard E. King, Esq. Nashville, Tennessee.

Respondent, Dean Witter Reynolds, Inc. was represented by Carol B. Schachner, Esq. of Dean Witter Reynolds, Inc., New York, New York.

Respondent, James Boylan was represented by Amos Davis, Esq. of Waller Lansden Dortch & Davis, Nashville, Tennessee.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on March 25, 1992.

Claimant, Donald Cowan's Submission Agreement was signed on March 23, 1992.

Respondent, Dean Witter Reynolds Inc.'s Submission Agreement was signed on June 17, 1992 by William Peterson.

Respondent, Joseph Boylan did not file an executed Submission Agreement with the NASD but he is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure and accordingly, Respondent Boylan will be bound by the arbitrator's final determination on all issues submitted.

A Joint Statement of Answer was filed with the NASD by Respondents on June 10, 1992.

A Revised Joint Statement of Answer was filed with the NASD by Respondents on June 30, 1992.

HEARING INFORMATION

A pre-hearing conference was held on October 29, 1992 which lasted one (1) session, between the Chairman of the Arbitration panel and the parties' counsel.

The hearing date was November 4, 1992 and the hearing lasted for one (1) session.

The hearing location was Nashville, Tennessee.

CASE SUMMARY

Claimant, Donald Cowan, ("Cowan") alleged that Respondents, Dean Witter Reynolds Inc. ("DWR") and Joseph Boylan, ("Boylan") while employed as a Dean Witter Account Executive, breached their fiduciary duties, their responsibilities as licensed professionals, and engaged in professional and common law negligence and malpractice concerning the handling of Cowan's account at DWR. These allegations arose out of Cowan's investment in NEM Energy Company, L.P. ("NEM").

Cowan contended that he was unsophisticated with respect to oil and gas issues, yet due to Boylan's recommendation, he agreed in March of 1987 to purchase 2,000 units of NEM. According to Cowan, this security was quasi-discretionary. Cowan alleged that throughout 1987 and 1988, the security performed poorly. During this time, Cowan asserted that Boylan's continuing advice to Cowan was that the issue would recover when the managing partner "restructured." In addition, Cowan maintained that he was dependent on both Respondents to keep him apprised of fluctuations, general trends and timely recommendations concerning the investment. Cowan stated that in June, 1990, the security peaked, and Boylan allegedly stated "I told you it would come back, hang in there." In the end of the fourth quarter of 1990, Cowan alleged that the security had lost 40% of its value and his repeated attempts to contact Boylan failed. Lastly, Cowan asserted that both Respondents' actions constituted a violation of Rule 1 of the National Association of Securities Dealers' Rules of Fair Practice and DWR was negligent and breached its duty of supervision and control with respect to Boylan's conduct.

In their Revised Joint Statement of Answer, DWR and Boylan denied each and every allegation, claim and item of damages set forth in the Statement of Claim. DWR and Boylan alleged that Cowan authorized the purchase of 2,000 shares of NEM, after discussing the investment with Boylan and receiving a prospectus. As of December, 1989, NEM no longer existed and "Edisto" shares were traded in its place. DWR and Boylan denied that this was a "quasi-discretionary" account and further stated that Cowan was a sophisticated and experienced investor who had previously invested in an oil and gas stock. DWR and Boylan also alleged that Cowan was kept apprised of NEM's performance by Boylan, as well as from account statements routinely sent to him. DWR and Boylan maintained that Cowan opted to ignore Boylan's recommendation to sell Edisto in 1990. DWR responded that it adequately supervised Boylan at all times.

In addition, DWR and Boylan asserted the following affirmative defenses:

1. Respondents owed no fiduciary duty to Cowan;
2. Any duties owed were fully and faithfully carried out;
3. Cowan, and not Respondents, controlled his account;
4. Respondents did not act with any intent to defraud Cowan or recklessly disregard him;
5. Respondents made no misrepresentations or omissions of material fact;
6. Cowan ratified the transactions complained of;
7. Cowan waived his asserted claims;
8. Cowan, by his conduct, is estopped from asserting the claims made;
9. Events occurred not caused by Respondents which constituted a superseding or intervening cause of some or all of the loss of which Cowan complains;
10. Respondent DWR reasonably and diligently implemented its supervisory procedures;
11. The Statement of Claim failed to state a claim upon which relief may be granted and is time barred; and,
12. There can be no recovery for some or all of the items of compensatory damages claimed as a matter of law.

RELIEF REQUESTED

Cowan requested: \$14,900.00, plus the costs of this arbitration and reasonable attorney's fees.

Respondents, DWR and Boylan requested that the Statement of Claim be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

At the close of Cowan's proof, Respondent, Joseph Boylan's counsel moved to dismiss the Claim asserting that Cowan had failed to state a claim against the Respondents. The presiding arbitrator heard the arguments of counsel and granted the motion.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing and counsel's oral argument on the motion for directed verdict made by Respondent, Boylan's counsel following the close of Cowan's proof, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. The Claim asserted by Cowan against Respondents, DWR and Boylan is hereby dismissed on the motion for directed verdict; and,
2. The parties shall each bear their own costs, expenses and attorney's fees incurred in this matter.

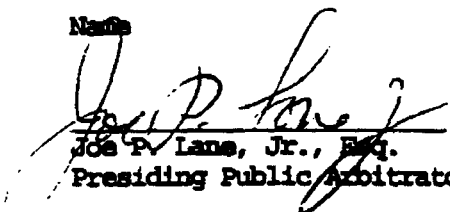
FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the NASD shall retain the \$100.00 non-refundable claim filing fee and the \$300.00 hearing session deposit previously deposited with the NASD by Cowan. Cowan is assessed additional Forum Fees in the amount of \$100.00 for the pre-hearing conference. Additional Forum Fees assessed to the parties are payable to the NASD and were assessed on the basis of \$300.00 per hearing session and \$100.00 for the pre-hearing conference.

Concurring Arbitrators' Signature

Name

Dated


Joe P. Lane, Jr., Esq.
Presiding Public Arbitrator

Nov 20, 1992

Date award served by the NASD: 12-2-92