

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Aaron Harber

and

93-00096

Name of Respondents

Dean Witter Reynolds, Inc. and
Marc S. Daniels

REPRESENTATION OF PARTIES

Aaron Harber ("**Claimant**") was represented by Bill R. Mann, Esq., Boulder, Colorado.

Dean Witter Reynolds, Inc. ("**Dean Witter**") was represented by Paul D. Allen, Esq. of Dean Witter Reynolds, Inc., San Francisco, California.

Marc S. Daniels ("**Daniels**") was represented by David Goodman, Esq., Boulder, Colorado.

CASE INFORMATION

The Statement of Claim was filed on or about January 12, 1993. Submission Agreement of Claimant was signed on December 29, 1992.

Statement of Answer was filed by Respondent Dean Witter on or about March 22, 1993. Submission Agreement of Respondent Dean Witter was signed on March 15, 1993 by Paul D. Allen, Esq.

Statement of Answer was filed by Respondent Marc S. Daniels on or about March 2, 1993. Submission Agreement of Marc S. Daniels was signed on February 24, 1993.

HEARING INFORMATION

A pre-hearing conference was held on Monday, November 15, 1993 for one (1) session with Kathryn P. Beller, Esq. presiding.

The hearing was held on Monday, November 22, 1993 for two (2) sessions, Tuesday, November 23, 1993 for three (3) sessions and Wednesday, November 24, 1993 for two (2) sessions in Denver, Colorado for a total of seven (7) hearing and one (1) pre-hearing sessions.

CASE SUMMARY

Claimant alleged that Respondent Daniels incorrectly advised him that it would be possible to borrow money from his IRA for personal use without creating a taxable distribution. Claimant stated that after reasonable relying upon the representation of Respondent Daniels he was required to pay Federal and State income taxes and penalties. Additional allegations include that both Dean Witter and Daniels breached their fiduciary duty to him; that Daniels made a material misrepresentation; that Dean Witter was negligent in failing to exercise reasonable care in its hiring, training, and supervision of Daniels; and that Dean Witter failed to adequately train and supervise Daniels.

Dean Witter denied the allegations set forth in the Statement of Claim and stated that the Claimant knew exactly how IRA distributions worked and how they were regulated. Dean Witter further stated that the Claimant concocted a clever scheme to get around the regulations and drafted complex documents to implement his scheme and avoid paying taxes or to place the blame on Dean Witter. Dean Witter also stated that any representations signed by Respondent Daniels as "trustee" on behalf of Claimant's accounts were clearly beyond the course and scope of his employment and not binding on it. The following affirmative defenses were asserted: the claims are barred in whole or in part by the applicable statutes of limitations; failure to mitigate; the claims are barred under the doctrines of ratification, estoppel and laches; the claims are barred because the Claimant has expressly released Dean Witter and Marc S. Daniels from any claims or liability; and the damages, if any, were caused by the acts or omissions of the Claimant and not by the acts of Respondent Dean Witter or Marc Daniels.

Respondent Marc Daniels denied the allegations set forth against him and stated that each time the Claimant inquired he advised him that he may take money out of his IRA for a period of no longer than 60 days, at which time he must redeposit the funds into another IRA. Respondent Daniels also stated that he supplied the Claimant with IRA brochures which explained the rules regarding IRA distributions. Respondent Daniels further stated that he signed a document that the Claimant presented him with as he was leaving the office for an appointment, and that he did not read the document before he signed it.

RELIEF REQUESTED

Claimant requested an award of damages in the amount of the penalty of \$7,640.00 paid by Harber on his 1990 tax return, plus interest as provided by law; damages reflecting his loss of the benefit of tax-deferred compounding of \$76,400.00 from 1990 until his projected age of retirement, which amount is estimated to be approximately \$300,000.00; costs of this proceeding,

including reasonable attorney's fees; and punitive damages in an amount sufficient to bring the total award to \$500,000.00.

Respondent Dean Witter requested that the panel deny the damages requested by Claimant; dismiss the claim in its entirety; assess the cost of the proceeding against the Claimant; award it attorney's fees; and award it such other and further relief as the panel may deem just and proper.

Respondent Daniels requested that the claims asserted against him be dismissed.

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 original(s) remain on file with the N.A.S.D.

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. Respondent Marc S. Daniels shall be and hereby is liable for and shall pay to the Claimant Aaron Harber the sum of **\$1,986.40** (One thousand nine hundred eighty six dollars and forty cents).
2. Respondent Dean Witter Reynolds, Inc. shall be and hereby is liable for and shall pay to the Claimant Aaron Harber the sum of **\$1,986.40** (One thousand nine hundred eighty six dollars and forty cents).
3. The liability of Respondents for such amounts shall be several and **not** joint between Respondents.
4. All relief prayed for and granted herein, including without limitation all claims for costs, attorney's fees, and punitive damages, is expressly denied.
5. The above stated sums shall bear interest at the rate of 10% per annum from the date of this award until paid, except that no interest shall accrue on any amount paid within thirty (30) days of the entry of this award in accordance with §41(h) of the N.A.S.D. Code of Arbitration Procedure.

FORUM FEES

Pursuant to §43(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall **retain** the non-refundable filing fee in the amount of \$200.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the N.A.S.D. by the Claimant. Claimant is assessed and shall pay to the N.A.S.D. the sum of **\$1,914.00**. Respondent Dean Witter Reynolds, Inc. is assessed and shall pay to the N.A.S.D. the sum of **\$1,443.00**, and Respondent Marc Daniels is assessed and shall pay to the N.A.S.D. the sum of **\$1,443.00** as additional forum fees.

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each prehearing conference, if any.

The N.A.S.D. shall retain postponement fees in the amount of \$750.00 previously deposited with the N.A.S.D. by the Respondent Dean Witter. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

s/ Kathryn P. Beller, Esq.
Kathryn P. Beller, Esq.
Public Arbitrator, Presiding Chair

December 16, 1993

s/ Charles S. Chapman
Charles S. Chapman
Public Arbitrator

December 16, 1993

s/ Lynn Chapman Greene, Esq.
Lynn Chapman Greene, Esq.
Industry Arbitrator

December 23, 1993