

## NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Gloria H. Gibson, and  
Susan T. Poldino,  
Claimants,

v.

No. 93-02774

Dean Witter Reynolds, Inc.,  
Respondent

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### **REPRESENTATION OF PARTIES**

Gloria H. Gibson, and Susan T. Poldino ("**Claimants**") were represented by Michael Salcido, Esq., Scottsdale, Arizona.

Dean Witter Reynolds, Inc. ("**Respondent**") was represented by David P. Restaino, Esq., of Dean Witter Reynolds, Inc., San Francisco, California.

### **CASE INFORMATION**

Claimants' Statement of Claim was filed on or about July 13, 1993. Claimants' Submission Agreement was signed on July 13, 1993.

Respondent's Statement of Answer was filed on or about October 15, 1993. Respondent's Submission Agreement was signed on October 13, 1995.

### **HEARING INFORMATION**

The hearing was held on October 31, 1995 for two (2) sessions and November 1, 1995 for two (2) sessions in Scottsdale, Arizona for a total of four (4) sessions.

### **CASE SUMMARY**

Gibson alleged that Respondent: Committed securities fraud in violation of the Securities Act of Arizona, A.R.S. §44-1991, as well as other state statutes that might apply; conducted a scheme or artifice to defraud in violation of A.R.S. §13-2310; violated A.R.S. §13-2301 (D)(4); committed fraud; made unsuitable recommendations; made negligent misrepresentations; breached its fiduciary duty; breached its contract; committed negligence and negligent supervision and/or failed to supervise the activities in Claimants' account. The allegation arose out of investments in the following securities: Dean Witter High Yield Securities; and Franklin AGE High Income Fund, Inc..

Respondent denied the allegations set forth in the Statement of Claim. Respondents specifically asserts that Claimants' claims are barred or reduced by: The applicable statutes of limitation; the doctrines of waiver, estoppel, laches, assumption of risk; and the failure to mitigate damages. Respondent also asserted that: Claimants cannot sustain an unsuitability claim; Claimants cannot establish an actionable misrepresentation; Claimant cannot establish any breach of fiduciary duty; and that Claimants' claims are ineligible for arbitration under the NASD Code of Arbitration Procedure.

### **RELIEF REQUESTED**

In their statement of Claim, Claimants requested an award of: Compensatory damages in an amount to be determined at the hearing, but in no way less than \$45,000.00; trebling the amount specified for compensatory damages, pursuant to A.R.S. § 13-2314; punitive damages in an amount to be determined at the hearing; Gibson's costs and attorneys' fees incurred herein, including all NASD and expert witness fees, pursuant to §§12-341.01, 13-2314, and 44-2001; pre and post judgement interest as allowed by law; and such other and further relief as is deemed just and proper.

In its Answer, Respondent requested that the claims asserted against it be denied in their entirety and that no damages be awarded therefor.

### **OTHER ISSUES CONSIDERED & DECIDED**

On or about October 15, 1993, Respondent filed a Motion to Dismiss pursuant to Section 15 of the NASD Code of Arbitration Procedure (the "Code"). On or about November 11, 1994, After review of the motion, and response, the Director of Arbitration made the following determination: That Claimants' date of filing was on July 14, 1993; that the six (6) year period immediately proceeding filing began on July 14, 1987; that claims regarding purchases made prior to July 14, 1987 will be permitted to go to the panel of arbitrators but only as to the allegations of wrongdoing made on or after July 14, 1987; and that all allegations of wrongdoing prior to July 14, 1987 were not eligible. The motion was re-raised before the arbitrators. After review of the parties' filings, the pleadings, and deliberation, the arbitrators allowed the Claimant two (2) weeks from November 1, 1995 to file a brief addressing the eligibility requirement of the Code, and Respondent one (1) week to reply. After review of the parties briefs, and further deliberation, the arbitrators denied Respondent's motion.

On or about November 17, 1995, Respondent made a Motion to Strike the portions of Claimants' post-hearing brief, filed on or about November 15, 1995, that did not relate to eligibility. Respondent filed its reply brief on or about November 27, 1995. After review of the briefs, and deliberation, the arbitrators denied Respondent's motion.

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

The record of this matter was closed on April 2, 1996.

### **AWARD**

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

Respondent is liable for, and shall pay to Gloria H. Gibson the sum of \$54,517.85 as satisfaction of her claims for damages and \$18,172.61 for attorneys' fees. Respondent is also liable for, and shall pay to Gloria H. Gibson the sum of \$950.00 as an award of filing fees for this arbitration.

Claimant's claims for punitive damages, and treble damages are, and each of them, denied with prejudice.

Unless otherwise specifically set forth in this award, each party shall bear its own costs and expenses, including attorneys' fees, associated with this arbitration.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were four (4) sessions x \$750 = \$3,000 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD by the Claimants.

Additional forum fees in the amount of \$2,250 are assessed against the Respondent.

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

Dated:

J. Noland Franz  
J. Noland Franz  
Public Arbitrator, Presiding Chair

s/s

April 23, 1996

Louise R. Wakem  
Louise R. Wakem  
Public Arbitrator

s/s

April 25, 1996

Raymond R. Wallage  
Raymond R. Wallage  
Industry Arbitrator

s/s

April 26, 1996