

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Heather Campbell

and

93-04909

Name of Respondents

Dean Witter Reynolds, Inc.,
Robert Magel

REPRESENTATION OF PARTIES

Heather Campbell ("Claimant") was represented by Gerald L. Bader, Esq and Renee B. Taylor, Esq., Bader & Villanueva, P.C., Denver, Colorado.

Dean Witter Reynolds, Inc. and Robert Magel ("Respondents") were represented by Janet T. Epstein, Esq., Dean Witter Reynolds, Inc., San Francisco, California.

CASE INFORMATION

The Statement of Claim was filed on or about November 30, 1993. Submission Agreement of Claimant Heather Campbell was signed on November 19, 1993.

Statement of Answer was filed by Respondents Dean Witter Reynolds, Inc. and Robert Magel on or about February 14, 1994. Submission Agreement of Respondent Dean Witter Reynolds, Inc. was signed on February 11, 1994 by Janet T. Epstein. Submission Agreement of Respondent Robert Magel was signed on February 10, 1994.

HEARING INFORMATION

The hearing was held on Thursday, October 6, 1994 in Denver, Colorado for a total of two (2) sessions.

CASE SUMMARY

Claimant alleged that Robert Magel ("Magel"), an account executive employed by Dean Witter Reynolds, Inc., withheld material information and made untrue statements of material facts in order to induce Claimant to invest in an unsuitable investment. The Claimant specifically alleged:

- ▶ Magel had knowledge that Claimant was not a sophisticated investor; Magel also knew that Claimant was retired and most concerned with security and regular income;
- ▶ Claimant contacted Magel to discuss investments which would bring about a steady return superior to the prime rate; Magel recommended the Allstate Municipal Income Opportunity Trust II ("Allstate II");
- ▶ Magel represented that the interest paid by the fund was "not going to vary much" from 8%; Magel also failed to explain the risks of bond investments to the Claimant; Magel did not tell Claimant that bonds could default;
- ▶ Magel also failed to provide Claimant with negative information regarding the fund; failed to explain to Claimant that the fund contained unrated and unsafe bonds; and did not provide a prospectus to the Claimant; and
- ▶ Both the value of the fund and the interest paid by the fund fell until Claimant finally sold the fund at a loss.

Based on the above allegations, Claimant asserted claims for violation of Section 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. §78, *et seq.*) and Rule 10b-5 promulgated thereunder; Section 12(2) of the Securities Act of 1933; §§ 11-51-501, 11-51-604(3), and 11-51-604(5)(b) and (c) of the Colorado Securities Act of 1981; C.R.S. §§ 11-51-501(1)(b), 11-51-604(4), and 11-51-604(5)(b) and (c) of the Colorado Securities Act; suitability standards; negligence; negligent supervision; breach of fiduciary duty; and *respondeat superior*.

Respondents denied the material allegations of the Statement of Claim, alleging that:

- ▶ The fund recommended by Magel met all of the investment objectives stated by Claimant and was in no way unsuitable for the Claimant; Magel extensively discussed and informed Claimant and her father of all available options including the Allstate II fund before the investment was made;
- ▶ Claimant was an experienced investor and able to understand the risks of the fund;
- ▶ Claimant had stated that she had a net worth of \$350,000.00 and that her liquid assets were \$80,000.00; she also had extensively traded in stocks and bonds prior to this investment;
- ▶ Claimant did not rely solely on the advice of Magel; in fact, she was heavily dependent on the advice of her father and would make no trade without his approval; both Claimant and her father approved the purchase of the Allstate II fund; and
- ▶ Dean Witter Reynolds adequately supervised Magel and his investment recommendations.

Respondents asserted the following affirmative defenses:

- ▶ Claimant was fully informed of all risks and assumed any such risks associated with her investments;
- ▶ Claimant's injury, if any, was caused by her own conduct, act or omission and/or acts, conduct or omissions of persons over whom Respondents have no control;
- ▶ Claimant's claims are barred by the doctrine of estoppel;
- ▶ Claimant's claims are barred by the doctrine of ratification;
- ▶ Claimant's claims are barred by the doctrine of waiver;
- ▶ Claimant's claims are barred by the doctrine of laches.

RELIEF REQUESTED

Claimant requested damages in an amount to be proved at the hearing of at least \$23,000, punitive and exemplary damages in an amount to be proved at the hearing, prejudgment interest, post-judgment interest, moratory interest, attorneys' fees, expert witness fees, and such other and further relief as is deemed just and proper.

Respondents requested that the claims asserted in this matter be dismissed in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

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.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing, and Claimant's and Respondents' post-hearing briefs on such legal issues as they deemed relevant, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's first claim for relief based on violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder is denied.

The testimony is directly contradictory regarding whether Respondent Magel informed Claimant that the bonds held by the Allstate Municipal Income Opportunity Trust II were of "medium quality" and "unrated." While in general the arbitrator found the testimony of Claimant and Respondent Magel to be equally credible, the arbitrator found the testimony of Claimant more credible on the issue of whether an omission was made. A claim under Section 10(b) and Rule 10b-5

requires more than a mere showing of omission, however. The purchase and sale of a security, scienter, reliance, causation, and materiality must also be proved. The arbitrator heard no credible evidence of scienter. In addition, the arbitrator was not persuaded by Claimant's contention of reliance--that she would have been influenced not to purchase shares in the Trust had she known that the bonds were of medium quality or unrated. The arbitrator concluded, on the evidence as a whole, that Claimant was motivated to invest in more risky securities by her strong desire to earn a higher return. The arbitrator further concluded that Claimant's investment decision was driven primarily by a desire to weaken her emotional dependence on her father and was influenced little, if any, by the statements of Respondent Magel.

2. Claimant's second claim for relief based on violations of Section 12(2) of the Securities Act of 1933 is denied. Claimant conceded at the hearing that this claim does not involve violations of the registration provisions of the Securities Act of 1933.
3. Claimant's third claim for relief based on violations of Sections 11-51-501, 11-51-604(3), 11-51-604(5)(b), and 11-51-604(5)(c) is denied for the reasons set forth in paragraph 1 above.
4. Claimant's fourth claim for relief based on violations of Sections 11-51-604(5)(b) and 11-51-604(5)(c) is denied.
5. Claimant's fifth claim for relief based on the unsuitability rules in the NASD Rules of Fair Practice, Article III, Section 2 is denied.

Based on Claimant's investment experience and disclosure regarding her financial situation, the arbitrator concluded that Respondent Magel had reasonable grounds to believe that an investment in shares of the Trust was suitable for Claimant. Claimant demonstrated at the hearing that she understood the risk-reward pyramid, that she appreciated the diversification strategy behind purchasing pools of securities in a mutual fund rather than individual securities, that she knew in general when to ask questions, that she followed her investments with interest, and that she held definite opinions on emerging capital markets. When asked at the hearing why she failed to ask questions about information she claimed not be understand, Claimant testified that she "didn't want to appear too stupid." Whether or not Claimant really is a professional investor as her tax returns proclaim, the weight of the evidence confirms her suitability for the investment recommended.

6. Claimant's sixth claim for relief against Respondent Magel based on professional negligence is denied.
7. Claimant's seventh claim for relief against Respondent Dean Witter Reynolds, Inc. based on professional negligence and negligent supervision is denied.
8. Claimant's eight claim for relief based on breach of fiduciary duty is denied.
9. Claimant's ninth claim for relief based on *respondent superior* is denied.
10. Each party shall bear its own costs, expenses and attorneys' fee incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$300 per hearing session and \$300 for each prehearing conference, if any. There were two (2) sessions x \$300 = \$600 in forum fees. Pursuant to §43(b) 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 NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$100 and shall retain as forum fees the hearing session deposit in the amount of \$300 previously deposited with the NASD by the Claimant. Respondent Dean Witter Reynolds, Inc. shall be and hereby is liable for and shall pay to the NASD the sum of \$300 as the balance due for forum fees. 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 22, 1994