

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Daniel S. Allen

94-00005

Name of Respondent(s)

Dean Witter Reynolds, Inc.
Shearson Lehman Brothers, Inc.

REPRESENTATION

For Claimant: John R. Kiefner, Esq. of the law firm of Riden, Earle & Kiefner, P.A., St. Petersburg, FL.

For Respondent: Shearson Lehman Brothers, Inc. ("Shearson"): Pete S. Michaels, Esq., in-house counsel at Shearson.

For Respondent Dean Witter Reynolds, Inc. ("Dean Witter"): Glenn D. Kelley, Esq. of the law firm of Kelley, Aldrich & Warren, P.A., West Palm Beach, FL.

CASE INFORMATION

Statement of Claim filed: January 3, 1994.

Amended Statement of Claim filed on: May 5, 1997

Claimant's Submission Agreement signed on: January 7, 1994

Statement of Answer filed by Respondent Shearson Lehman Brothers, Inc. on: April 14, 1994.

Respondent Shearson's Submission Agreement signed on: April 25, 1994.

Statement of Answer filed by Respondent Dean Witter Reynolds, Inc. on: March 25, 1994.

Dean Witter Reynolds, Inc.'s Answer to Amended Statement of Claim filed May 9, 1997.

The Respondent Dean Witter did not execute a Submission Agreement as required pursuant to Section 10314 of the Code of Arbitration Procedure ("Code").

HEARING INFORMATION

A pre-hearing conference lasting two sessions was conducted with the panel on April 26, 1995. In addition, hearings lasting eleven sessions were conducted on February 11, 12, and 13, 1997 and April 28 and 29, 1997 in Tampa, Florida.

CASE SUMMARY

Claimant Daniel S. Allen alleged he is self-employed, owning a used car business in the Tampa area which he opened in the late 1970's and from 1979 through 1984, Mr. Allen had some, although limited, stock market experience with no substantial portion of his assets being at any degree of undue risk. Claimant next alleged that his consistent investment objective at all relevant times herein, was to make money with a moderate degree of risk but he did not want a "crap shoot." Claimant alleged he opened an account at Dean Witter in 1982 and James Bochenek served as Mr. Allen's registered representative at Dean Witter from 1982 through 1988. Claimant next alleged in 1988, he moved the subject account to Shearson Lehman when Mr. Bochenek changed employment and Mr. Bochenek continued to be his registered representative from 1988 through 1993, although most of the activity in the subject account ceased in 1988. Additionally, Claimant alleged that Mr. Allen and Mr. Bochenek developed a friendship over the years and at all times material to this action, Mr. Allen relied exclusively on Mr. Bochenek's advice with respect to his investments, and Mr. Bochenek assumed de facto control over Mr. Allen's account.

Claimant next alleged in 1986 Mr. Bochenek began discussing the purchase of Western Savings and Loan with Mr. Allen, and began an aggressive purchase program as strategy in the account and Mr. Allen purchased large amounts of the Western stock, much of which was purchased using margin. Claimant alleged at no time did Mr. Bochenek discuss the high risks associated with the Western stock, including the large concentration of Western being amassed and the substantial turnover of the average annual portfolio value of the account. Claimant next alleged on the day of the market crash, October 19, 1987, Mr. Bochenek called Mr. Allen to advise him of a \$150,000 margin call on the Western stock and Mr. Allen questioned Mr. Bochenek about the wisdom of holding on to the stock, and Mr. Bochenek urged him to "protect Western at any cost" and in fact, Mr. Bochenek encouraged Mr. Allen to make additional purchases well into 1988. Claimant next alleged Mr. Allen continued to follow Mr. Bochenek's recommendations. Claimant contended that quarter-ending analyses of the account from December 31, 1987 through March 31, 1989, show a total portfolio valuation well over \$500,000.00 and a large margin debt, demonstrating that Western constituted a range of 75 % to 100 % of the total dollar holdings in the account. Claimant alleged that ultimately, the Western stock became almost worthless, and Mr. Allen sustained astronomical losses and at no time did Mr. Bochenek ever recommend other than to hold and buy more Western.

Claimant alleged violations of Sections 517.211 and 772.102, Florida Statutes, in connection

with churning of the account at Dean Witter and Shearson, and concentration of Western in the account from December 27, 1987 throughout the ultimate closing of the account.

Respondent Dean Witter Reynolds, Inc. denied all allegations of wrongdoing in connection with the handling of the Claimant's account. Respondent Dean Witter Reynolds, Inc. asserted that the Claimant was a knowledgeable, successful businessman with extensive experience in the stock market and was an aggressive investor with a clear investment objective-speculation.

Respondent Dean Witter Reynolds, Inc. further maintained that the investment strategy implemented at Dean Witter Reynolds, Inc. was consistent with the Claimant's objective and all of the risks associated with that strategy were explained to, and known by the Claimant. Respondent Dean Witter Reynolds, Inc. asserted that the losses suffered by the Claimant were the result of market conditions, including the stock market crash of 1987, and were not the result of any wrongdoing by the Respondent Dean Witter Reynolds, Inc.

Respondent Dean Witter Reynolds, Inc. next asserted that the claims submitted to arbitration by the Claimant are limited by an order entered by the United States District Court for the Middle District of Florida in an action styled Dean Witter Reynolds, Inc. v. Daniel S. Allen Case No. 95-1640-CIV-T-24 which declares certain claims to be ineligible under former NASD Code of Arbitration Procedure Section 15. Respondent Dean Witter Reynolds, Inc. next alleged that all claims made by the Claimant are barred by the applicable statute of limitations and/or statute of repose.

Respondent Shearson Lehman Brothers, Inc. urged the dismissal of the allegations brought by the Claimants. Specifically, Shearson Lehman Brothers, Inc. contended that Mr. Allen was a sophisticated investor with a history of speculating. Moreover, Shearson Lehman Brothers, Inc. alleged that they, in conjunction with co-respondent Dean Witter Reynolds, Inc., presented uncontested evidence showing that Mr. Allen engaged in speculation at over fourteen brokerage houses. Additionally, Respondent Shearson Lehman Brothers, Inc. maintained that they presented evidence proving that Claimant had a history of suing brokerage firms when he lost money speculating. Respondent Shearson Lehman Brothers, Inc. further contended that the trading was suitable based upon Claimant's young age, his tremendous current income, his net worth, his investment experience, and his high level of sophistication.

Respondent Shearson Lehman Brothers, Inc. next maintained that the claims were statutorily barred due to the expiration of Florida's statute of limitations and repose. Respondent Shearson Lehman Brothers, Inc. alleged that they were able to prove that Claimant was represented by counsel in another securities matter against a separate brokerage firm when he allowed the matter to expire. Lastly, the Respondent Lehman Brothers, Inc. alleged they were able to show that Claimant has continued to speculate since sustaining his losses in Western Savings and Loan stock.

RELIEF REQUESTED

Claimant requested damages in the sum of \$1,792,519.00 representing trading losses, margin interest, and statutory interest. Further, the Claimant requested punitive damages, treble

damages under Section 772.104, Florida Statutes, as well as costs and attorneys' fees.

Respondent Dean Witter requested that all claims asserted by the Claimant be denied in their entirety and that an Award be entered in their favor and that all forum fees be assessed against the Claimant. Respondent Dean Witter Reynolds, Inc. further requested that the panel refer the issue of attorneys' fees to a court of competent jurisdiction.

Respondent Shearson Lehman Brothers, Inc. requested a dismissal of all claims against them and that all forum fees be assessed against the Claimant.

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 originals remain on file with NASD Regulation, Inc..

The parties agreed to accept the stenographic record of the proceedings as the official record and to share the related cost 1/3 each. The parties further agreed to provide one copy of the stenographic record to NASD Regulation, Inc. at their expense.

Each of the parties have agreed to submit one complete copy of their exhibits to NASD Regulation, Inc. directly.

AWARD

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

1. All claims by the Claimant against both Respondents be and hereby are dismissed in all respects.
2. The Claimant's requests for punitive damages, treble damages and costs are denied.
3. The panel did not make a determination concerning the entitlement to and amount of attorneys' fees, if any, and refer the parties to a court of competent jurisdiction for a determination on this issue.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitration panel has assessed forum fees in the sum of \$13,000.00 (two pre-hearing conferences-panel X \$1,000.00 plus 11 sessions X \$1,000.00) as follows:

The Claimant is assessed the sum of \$13,000.00 less the \$1,000.00 previously deposited in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. in the sum of \$12,000.00.

The Respondents Shearson and Dean Witter are each assessed the sum of \$500.00 representing the member surcharge pursuant to Rule 10333 of the Code of Arbitration Procedure.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/S/

Sam A. Giunta

/S/

Robert B. Hoffman

/S/

Gene G. Stern

Date of Decision: July 15, 1997