

NASD REGULATION, INC. AWARD

NASD REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimants

Helena Jani
Mary Jani Englert
Helena Jani Hurley
Frances Jani Neville

NASD Case No.
95-02193

Name of Respondents

Dean Witter Reynolds Inc.
John M. Carrick

REPRESENTATION

For Claimants Helena Jani, Mary Jane Englert, Helena Jane Hurley and Frances Jane Neville ("claimants") appeared Richard B. Cohen, Esq. of Akabas & Cohen, New York, NY.

For Respondents Dean Witter Reynolds ("Dean Witter") and John M. Carrick ("Carrick") (collectively "respondents") appeared John V. McCambley, Esq., Wycoff, NJ.

CASE INFORMATION

Statement of Claim filed on May 5, 1995.

Claimant's Submission Agreement signed on May 1, 1995.

Respondents' Statement of Answer filed on August 1, 1995.

Respondent Dean Witter's Submission Agreement signed on July 17, 1995.

Respondent Carrick's Submission Agreement signed on July 31, 1995.

HEARING INFORMATION

| | | | |
|-------------------------|--------------------|---|----------------------------------|
| Pre-Hearing Conference: | September 5, 1996 | - | One Session |
| Hearing Dates/Sessions: | September 18, 1996 | - | Two Sessions |
| | September 19, 1996 | - | Two Sessions |
| | February 6, 1997 | - | Two Sessions |
| | February 7, 1997 | - | (Deliberations/ (One Session) |

The hearings on September 5 and 6, 1997 were held at the offices of the NASD, 33 Whitehall Street, New York, NY.

The hearings on February 6 and 7, 1997 were held at the Club Quarters, 52 William Street, New York, NY.

CASE SUMMARY

Claimants alleged that, in or about 1986, respondents Carrick induced claimant Helena Jani ("Jani") to invest in limited partnerships which were unsuitable for her, and thereafter made repeated fraudulent misrepresentations regarding the investment.

Claimants alleged that, prior to 1986, Jani had always invested in high quality, investment grade, blue chip securities. Claimants also alleged that Jani had never invested in limited partnerships prior to the transactions at issue in this dispute.

Claimants alleged that, in or about 1986, Jani was 82 years old and sought to gift her three daughters \$10,000. Claimants also alleged that Jani's plan was to gift \$10,000 per year for each of them in 1986 and 1987. Claimants alleged that, since Jani had always trusted Carrick to recommend suitable investments, Jani asked Carrick to recommend safe, tax free investment grade securities with some liquidity suitable to implement the gifts.

Claimants asserted that Carrick was well aware of Jani's conservative investment philosophy, objectives and history and also alleged that he was informed of Jani's specific investment and gift objectives in this situation. Claimants alleged that Carrick recommended that \$80,000 be invested exclusively in Dean Witter/Coldwell Banker Tax Exempt Mortgage Fund ("the Fund"). Claimants alleged that Carrick told Jani that the Fund was a good tax free investment which would distribute a good yearly return with the principal remaining secure and which could be liquidated in a maximum of six to eight years.

Claimants asserted that in October 1986, Carrick purchased \$50,000 worth of the Fund's units for Jani's account and deposited \$10,000 cash in each of Jani's daughters' accounts. Claimants also alleged that Carrick purchased \$10,000 worth of the Fund for each account. Claimants alleged that Carrick purchased the Fund for each daughter without their prior knowledge or authorization.

Claimants also alleged that, in 1987, Carrick transferred \$30,000 of the Fund units out of Jani's account and deposited \$10,000 worth of the fund units into each of Jani's daughters' accounts. Claimants alleged that this transfer was purportedly made to accomplish Jani's intent to make a gift of \$10,000 to each of her three daughters.

Claimants contended that Carrick's purchase of the fund was a risky and speculative investment and contrary to Jani's investment experience and objectives. Claimants also alleged that Carrick concealed the fact that the investment was illiquid and asserted that Carrick misrepresented the length of time the Fund was required to be held before it could be liquidated. Claimants contended that Carrick also concealed the amount of commissions he earned from the sale to Jani of units of the Fund.

Claimants alleged that respondent Dean Witter sent monthly statements to claimants from 1986 until 1992 which fraudulently misrepresented the market value of the investment at \$80,000 when, in fact, the value was zero. Claimants asserted that Dean Witter had a duty to supervise Carrick's handling of claimants' accounts and that respondents participated in a continuing course of conduct to defraud claimants. Claimants contended that respondents breached their fiduciary duty to claimants, acted negligently and failed to provide claimants with competent professional services.

Respondents denied claimants' allegations in their entirety. Respondents maintained that Carrick and Jani discussed purchasing the Fund and further contended that Jani was familiar with real estate investments from prior

investments. Respondents alleged that Jani was advised that the investment was illiquid for a number of years but that this fact was of no concern to Jani since she wanted a long term investment for her daughters. Respondents maintained that Jani provided Carrick with instructions to purchase units of the Fund for her own account and the individual accounts of her daughters.

Respondents also maintained that the Statement of Claim was barred by the Statute of Limitations, that claimants had waived their rights, ratified the transactions and were estopped from bringing their claims. Respondents alleged that Jani's daughters had no standing to bring this action and that claimants had not sought to dispose of the securities for the past nine years.

RELIEF REQUESTED

Claimants demanded judgment for damages in an amount to be determined at the hearing but in any event in excess of \$100,000.00, prejudgment interest, attorneys fees, punitive damages, costs and disbursements and any other relief as may be just and proper. Respondents requested dismissal of the Statement of Claim in its entirety and costs.

OTHER ISSUES CONSIDERED & DECIDED

Respondents moved, pursuant to Section 10304 of the Code of Arbitration Procedure, to dismiss the Statement of Claim. The Director of Arbitration determined that the six year period preceding submission of the Statement of claim began May 4, 1989 and that the Statement of claim would be permitted to go to the panel of arbitrators as to the allegations of wrongdoing made on or after May 4, 1989.

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. Claimants will immediately return to respondent Dean Witter 4,000 units of Dean Witter Coldwell Banker Tax Exempt Mortgage Fund, L.P. ("the Fund").
2. Respondents Dean Witter and Carrick be and hereby are jointly and severally liable for the payment of \$80,000 to claimants upon receipt of the aforesaid units.
3. Transfer of ownership of the 4,000 units is to be completed within two weeks from the date of this award and payment of \$80,000 is to be made to claimants within two weeks thereafter.
4. All other claims are denied.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure the arbitrators have determined that NASD Regulation, Inc. shall retain the \$200.00 non-refundable filing fee and have assessed the following forum fees:

| | | |
|--|---|-----------------|
| Pre-hearing conference | = | \$ 300.00 |
| 7 hearing sessions x \$750.00 | = | <u>5250.00</u> |
| Sub Total | = | 5,550.00 |
| minus claimants' hearing session deposit | = | <u>- 750.00</u> |
| Total Outstanding | = | \$4800.00 |

Respondents be and hereby are jointly and severally liable for the sum of \$4800.005 representing 100 percent of the outstanding forum fees.

Fees are payable to the NASD Regulation, Inc.

Concurring Arbitrators' Signatures
Name


Evonne W.J. Tolbert, Esq.

James R. Madan

Murray E. Bovarnick

I, Evonne W. J. Tolbert, Esq., do hereby certify that this is my decision in the above-referenced matter.


Evonne W. J. Tolbert, Esq.

NASD Date of Decision: February 24, 1997

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure the arbitrators have determined that NASD Regulation, Inc. shall retain the \$200.00 non-refundable filing fee and have assessed the following forum fees:

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Concurring Arbitrators' Signatures
Name

Evonne W.J. Tolbert, Esq.

James R. Madan


Murray E. Bovarnick

I, Murray E. Bovarnick, do hereby certify that this is my decision in the above-referenced matter.


Murray E. Bovarnick

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Concurring Arbitrators' Signatures
Name

Eyonne W.J. Tolbert, Esq.

James R. Madan
James R. Madan

Murray E. Bovarnick

I, James R. Madan, do hereby certify that this is my decision in the above-referenced matter.

James R. Madan
James R. Madan

NASD Date of Decision: February 24, 1997