

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION

In the Matter of the Arbitration Between

Name of Claimant

Alfreda Catalano by POA/Dennis Catalano

95-05272

Name of Respondents

Dean Witter Reynolds Inc.
Eugene J. Pessecow
Advantage Capital Corporation

REPRESENTATION

For Claimant Alfreda Catalano POA/Dennis Catalano ("claimant") appeared David Silverberg, Esq., of the law firm Silverberg, Yood, Sellers & McGorry located in Buffalo, New York.

For Respondent Dean Witter Reynolds, Inc. ("Dean Witter") appeared James Sonneborn, Esq. of the firm Dean Witter Reynolds, Inc. located in New York City, New York.

For Respondent Advantage Capital Corporation ("Advantage") appeared Michael McNeil, Esq., and Linda J. Clark, Esq., of the law firm Iseman, Cunningham, Riester & Hyde, L.L.P. located in Albany, New York.

Respondent Eugene J. Pessecow ("Pessecow") did not appear at the hearing.

CASE INFORMATION

The Statement of Claim was filed on November 7, 1995.
Claimant's Submission Agreement was signed on December 12, 1995.

Respondent Dean Witter's Statement of Answer was filed on August 30, 1996.
Respondent Dean Witter did not execute a Submission Agreement.

Respondent Advantage's Statement of Answer was filed on June 21, 1996.
Respondent Advantage's Submission Agreement was signed on September 9, 1996.

Respondent Advantage's Cross-Claim against Dean Witter was filed on June 21, 1996.

Respondent Dean Witter's Statement of Answer to Advantage's Cross-Claim was filed on August 30, 1996.

Respondent Advantage's first and second Cross-Claim against Pessecow was filed on June 21, 1996.

Respondent Pessecow did not file an Answer to the Statement of Claim nor did he execute a Submission

HEARING INFORMATION

Pre-Hearing Conference:	January 24, 1997	-	1 Session
Hearing Dates/Sessions:	February 4, 1997	-	2 Sessions
	February 5, 1997	-	2 Sessions

The hearings were held at the Raddison Hotel located in Buffalo, New York.

CASE SUMMARY

Claimant alleged that Ms. Catalano on or about August of 1991 in reliance upon the reputation of Dean Witter was induced by Pessecow to open an account with Dean Witter. Claimant further alleged that at the time Ms. Catalano opened the account, she was 75 years old and told Pessecow that she would be relying upon and trusting both he and Dean Witter. Claimant also alleged that it appears Pessecow terminated his relationship with Dean Witter on or about May 6, 1992. Claimant asserted that Dean Witter did not notify Ms. Catalano of this event nor did they advise her as to the basis for his termination. Claimant further asserted that Pessecow apparently transferred all of the securities previously held in Ms. Catalano's Dean Witter account to Advantage. Claimant also asserted that from May 1992 through at least June 1995, Dean Witter continued to send her monthly statements causing her to believe that she still had a relationship with them.

Claimant contended that in November 1992, Ms. Catalano received a statement from Advantage, which contained the same stocks she had at Dean Witter. Claimant further contended that in November 1992, Advantage in their submission to Ms. Catalano's attorney of account documentation indicated that the new account documents opening her account with Advantage were not signed by Ms. Catalano until February 4, 1994. Claimant also contended that Advantage failed in its obligation to know its customer, an obligation which, if honored, would have prevented the losses suffered by Ms. Catalano.

Claimant alleged that on or about December 7, 1992, Pessecow met with Ms. Catalano and persuaded her to make an investment in the stock market. Claimant further alleged that Ms. Catalano delivered over to Pessecow \$22,870.00 in checks. Claimant also alleged that noting that the checks were made payable to Ms. Catalano, Pessecow persuaded her to endorse the checks based on his representation that he would deposit the money with the company. Claimant asserted that in reliance upon Dean Witter's and Advantage's vouching for Pessecow's credibility and trustworthiness, Ms. Catalano complied with his request.

Claimant also asserted that on or about January 25, 1994, Pessecow met with Ms. Catalano and induced her to make an investment in the market and persuaded her to deliver him a check for over \$13,000.00. Claimant contended that noting that the check was made payable to Ms. Catalano, Pessecow persuaded her to endorse the check and delivered it to him, based upon the representation that he would deposit the money with the company.

Claimant also contended that on or about June 9, 1994, Pessecow persuaded Ms. Catalano to invest in the market again. Claimant alleged that noting that the check was made payable to Ms. Catalano, Pessecow persuaded her to endorse the check and deliver it to him, based on his representation that he would deposit the check with the company. Claimant also alleged that respondents Dean Witter and Advantage did not use reasonable diligence in supervise Pessecow by failing to conduct a reasonable investigation in relation to the claimant's account.

Respondent Advantage maintained that on or about May 4, 1992, Pessecow submitted an application to become a registered representative with them. Respondent Advantage further maintained that they conducted an investigation of Pessecow's background consistent with or exceeding industry standards. Respondent Advantage also maintained that they contacted Pessecow's three previous employers, including Dean Witter. Respondent Advantage contended that Dean Witter knew, but withheld information indicating Pessecow's potential untrustworthiness. Respondent Advantage further contended that Dean Witter misrepresented that Pessecow had voluntarily terminated his association with them and made no mention of the misconduct that had been reported to Dean Witter by Pessecow's customers.

Respondent Advantage also contended that when Pessecow left Dean Witter and became affiliated with Advantage, Ms. Catalano executed a consent form directing that her securities position be transferred to Advantage. Respondent Advantage maintained that their records indicate that this was the only activity in claimant's Advantage account, as shown on her account statements. Respondent Advantage further maintained that claimant does not assert that they mishandled her account. Respondent Advantage also maintained that claimant does not claim to have delivered any funds to Advantage or made any checks payable to them. Respondent Advantage contended that claimant never received any indication, oral or written, that the December 7, 1992 transaction had been invested through Advantage, contrary to her experience following the transfer of her account. Respondent further contended that claimant's monthly account statements clearly indicated that no additional purchases had been added to her portfolio since her account was transferred.

Respondent Advantage in their Cross-Claim against respondent Dean Witter alleged that Dean Witter knew or should have known that Pessecow was engaged in wrongful and fraudulent conduct similar to that alleged by claimant. Respondent Advantage further alleged that Dean Witter failed to report Pessecow's conduct to the NASD. Respondent Advantage also alleged that upon Pessecow's departure, Dean Witter became aware of additional facts and circumstances indicating that Pessecow engaged in wrongful and fraudulent conduct while employed by Dean Witter. Respondent Advantage asserted that had they been warned of the nature and circumstances of Pessecow's prior wrongful conduct while at Dean Witter, it would not have permitted him to become a registered representative with their firm. Respondent also asserted that as a result of Dean Witter's failure to comply with NASD rules concerning the prompt reporting of misconduct, they are entitled to complete indemnification and/or contribution from Dean Witter.

Respondent Advantage in their first Cross-Claim against respondent Pessecow alleged that if it is found liable to claimant for damages, such damages were caused by the negligence and wrongful conduct of Pessecow, without any active negligence of Advantage. Respondent Advantage further alleged that if found liable, Pessecow should be liable to indemnify it for the amount thereof.

Respondent Advantage in their second Cross-Claim against respondent Pessecow alleged that Pessecow agreed to conduct himself in accordance with its compliance procedures. Respondent Advantage further alleged that Pessecow further agreed to refrain from taking any action not in the best interest of his customers and to refrain from making unauthorized transactions. Respondent Advantage also maintained

that Pessecow agreed to indemnify and hold harmless Advantage for any losses, expenses, or damages resulting from unauthorized acts or transaction by him.

Respondent Dean Witter maintained that they had absolutely no involvement when Pessecow took funds from claimant. Respondent maintained that Pessecow had left on May 6, 1992, seven months before the misconduct claimant sets forth allegedly began. Respondent also maintained that Pessecow left on his own accord and that there were no complaints brought against him while at Dean Witter. Respondent

contended that claimant's account was properly handled at all times while at their firm. Respondent further contended that in November 1992, claimant had all of her holding delivered out and she had no further transaction at Dean Witter.

Respondent Dean Witter in response to Advantage's Cross-Claim maintained that any damages that may have been caused to the claimant were caused by the action or inaction of Pessecow and/or Advantage. Respondent Dean Witter further maintained that it made all the appropriate filings of amendments to Pessecow's U-5 in a timely manner. Respondent also maintained that even the lack of filing of a U-5 amendment would not relieve Pessecow and Advantage of the full responsibility for the activity of Pessecow while he was employed at Advantage.

RELIEF REQUESTED

Claimant Alfreda Catalano POA/ Dennis Catalano requested (1) \$22,870.34 with interest from December 7, 1992; (2) \$13,000.00 with interest from January 24, 1994; (3) \$11,500.00 with interest from June 9, 1994; (4) plus such further and different relief as the arbitrators deem just, proper and appropriate in the circumstances.

Respondent Advantage Capital Corporation requested judgment in its favor, and an award against claimant, Pessecow and Dean Witter, for all costs and fees, including its allocated expenditures for the services of an attorney, travel to and from the NASD hearing, reimbursement of the NASD member fee, and to grant any other relief as the arbitrators deem appropriate.

Respondent Dean Witter Reynolds, Inc. requested that the claims of claimant and Advantage should be dismissed in their entirety, with costs being assessed against them.

OTHER ISSUES CONSIDERED & DECIDED

The arbitration panel made the following rulings concerning respondent Pessecow, who did not file a Statement of Answer and a Submission Agreement and who failed to appear at the hearing conducted in this matter.

1. Pursuant to Section 10101 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy and specifically as it related to Pessecow.
2. The panel found that Pessecow was a person associated with a member of NASD at the time the controversy arose. Consequently, the panel found personal jurisdiction over Pessecow pursuant to Section 10301(a) of the Code.
3. The panel found that the Statement of Claim was properly served upon respondent Pessecow pursuant to Rule 10314(a) of the Code. Consequently, the panel found that Pessecow was required to file with NASD Regulation a Statement of Answer and Submission Agreement pursuant to Rule 10314(b) of the Code.
4. In accordance with Rules 10310, 10315, 10318 of the Code, the panel found that respondent Pessecow was provided with "due notice" of the hearing in this matter by regular and certified mail. The panel, therefore, determined to proceed with the hearing without Pessecow whose absence was unexcused.

Respondent Dean Witter moved to dismiss contending that NASD Regulation did not have jurisdiction over Dean Witter as it relates to this matter. The arbitration panel determined pursuant to Rule 10101 of the Code that it had subject matter jurisdiction over this entire controversy, specifically as it related to Dean Witter.

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 the NASD.

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 Pessecow be and hereby is liable and shall pay to claimant the sum of \$47,370.34 in actual damages.
2. Respondent Pessecow be and hereby is liable and shall pay claimant an interest rate of 9% from December 7, 1992 on \$22, 870.34.
3. Respondent Pessecow be and hereby is liable and shall pay claimant an interest rate of 9% from January 24, 1994 on \$13,000.00.
4. Respondent Pessecow be and hereby is liable and shall pay claimant an interest rate of 9% from June 9, 1994 on \$11,500.00.
5. Respondent Dean Witter be and hereby is liable and shall pay claimant the sum of \$24,500.00 in actual damages.
6. Respondent Dean Witter be and hereby is liable and shall pay claimant an interest rate of 9% from January 24, 1994 on \$13,000.00.
7. Respondent Dean Witter be and hereby is liable and shall pay claimant an interest rate of 9% from June 9, 1994 on \$11,500.00.
8. All claims asserted by the claimant against Advantage are dismissed in their entirety.
9. All other relief requests are denied.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators determined that NASD Regulation shall retain the \$200 non-refundable filing fee previously deposited by claimant. In addition, the arbitrators determined that NASD Regulation shall retain the \$500.00 non-refundable filing fee previously deposited by respondent Advantage. The arbitrators have also assessed the following forum fees:

1 Pre-Hearing Session X \$300.00	=	\$ 300.00
4 Hearing Sessions X \$400.00	=	\$1,600.00
minus Hearing Session Deposits	=	<u>\$ 900.00</u>
Total outstanding	=	\$1,000.00

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Claimant be and hereby is liable and shall pay NASD Regulation the sum of \$950.00, representing one-half of the total forum fees assessed. Claimant has previously deposited \$400.00 with NASD Regulation, therefore, claimant owes NASD Regulation \$550.00.

Respondents Dean Witter, Advantage and Pessacow be and hereby are jointly and severally liable and shall pay NASD Regulation the sum of \$950.00, representing one-half of the total forum fees assessed. Respondent Advantage previously deposited a hearing session deposit of \$500.00. Therefore, respondents owed NASD Regulation \$450.00.

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

Concurring Arbitrators' Signatures

I, David Buch, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules that this is my decision in the above-captioned matter.



David Buch, Esq.
Public Arbitrator - Chairperson

I, Richard A. Scalfani, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules that this is my decision in the above-captioned matter.

Richard A. Scalfani
Industry Arbitrator

I, Vincent J. Muffoletto, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules that this is my decision in the above-captioned matter.

Vincent J. Muffoletto
Public Arbitrator

Date of Decision: March 12, 1997

Claimant be and hereby is liable and shall pay NASD Regulation the sum of \$950.00, representing one-half of the total forum fees assessed. Claimant has previously deposited \$400.00 with NASD Regulation, therefore, claimant owes NASD Regulation \$550.00.

Respondents Dean Witter, Advantage and Pessecow be and hereby are jointly and severally liable and shall pay NASD Regulation the sum of \$950.00, representing one-half of the total forum fees assessed. Respondent Advantage previously deposited a hearing session deposit of \$500.00. Therefore, respondents owed NASD Regulation \$450.00.

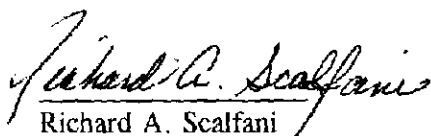
Fees are payable to the National Association of Securities Dealers Regulation, Inc.

Concurring Arbitrators' Signatures

I, **David Buch**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules that this is my decision in the above-captioned matter.

David Buch, Esq.
Public Arbitrator - Chairperson

I, **Richard A. Scalfani**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules that this is my decision in the above-captioned matter.



Richard A. Scalfani
Industry Arbitrator

I, **Vincent J. Muffoletto**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules that this is my decision in the above-captioned matter.

Vincent J. Muffoletto
Public Arbitrator

Date of Decision: March 12, 1997