

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION

In the Matter of the Arbitration Between

Name of Claimant

Sheldon S. Cohen, Trustee, of the
David H. Kushner Revocable Trust

96-01378

Name of Respondents

*Dean Witter Reynolds Inc.
David W. Pear

REPRESENTATION

Claimant Sheldon S. Cohen Trustee of the David H. Kushner Revocable Trust ("Claimant") was represented by Maurice R. Dunie, Esq. of the law firm of Bulman, Dunie, Burke & Feld, Bethesda, MD

Respondents Dean Witter Reynolds, Inc. ("Dean Witter") and David W. Pear ("Pear") were represented by Paul G. Thomas, Senior Attorney, Law Department Dean Witter Reynolds, Inc., New York, NY

CASE INFORMATION

Statement of Claim filed: March 25, 1996.

Claimant's Submission Agreement executed by Sheldon S. Cohen Trustee for the David H. Kushner Trust on: October 15, 1996

Joint Statement of Answer filed by Respondents Dean Witter and Pear (collectively referred to as "Respondents") on: June 19, 1996

Dean Witter's Submission Agreement executed by William Peterson, Executive Vice Present of Dean Witter Reynolds, Inc. on: June 19, 1996.

Pear's Submission Agreement signed on: July 10, 1996.

HEARING INFORMATION

Hearing Date/Session: November 20, 1996 - one session

Hearing Location: Washington, DC

CASE SUMMARY

Claimant alleged, among other things, that David H. Kushner ("Kushner") who was both the Grantor and Trustee of the David H. Kushner Revocable Trust ("Trust") until the time of his death, August 31, 1994, was a conservative investor. During Kushner's lifetime, the Trust's holdings were primarily treasury bills

and notes, municipal bonds and municipal bond funds. Claimant alleged that Pear, the account executive and advisor for the Trust account, recommended that the Trust sell Intercapital Insured Municipal Income Fund ("IIM") at a loss and purchase 63,034.919 shares of Dean Witter Utilities Fund ("Utilities Fund") for a cost of \$821,345.00. Claimant alleged that Kushner was 89 years old and in ill health at the time of the sale of IIM and purchase of the Utilities Fund. Claimant alleged that Kushner died 2 1/2 months after the purchase of the Utilities Fund. Claimant alleged that Pear knew that the Utilities Fund had a 5% redemption fee and that if the Estate needed to liquidate the Trust's assets, the redemption feature would result in a sales charge of \$40,594.48. Claimant alleged that after Kushner's death the Trustee needed to liquidate the Trust assets. Claimant alleged that Sheldon S. Cohen ("Cohen") became co-trustee of the Trust and that at the time of the redemption he informed Pear that he did not believe the redemption fee was appropriate. Claimant alleged that Pear's recommendation to sell IIM and purchase the Utilities Fund was inappropriate investment advice and that the Utilities Fund was unsuitable for Claimant.

Respondents categorically denied all allegations of wrongdoing asserted by Claimant. Respondent maintained, among other things, that the Trust was not only intended to provide for Kushner during his lifetime, but for certain designated beneficiaries upon his death, thus he sought long-term investments such as the Utilities Fund. Respondents noted that the Trust's Dean Witter account was approximately \$9.9 million during the relevant period. Respondents maintained that Kushner and Pear discussed all investments; that they agreed Trust portfolio needed to be positioned for growth; and, that the Utilities Fund was the appropriate investment. Respondent maintained that Kushner was fully informed of all aspects of the Utilities Fund and signed a letter acknowledging that the standard commission charge was deferred; that the fee would be charged if Claimant sold its holding early; and, that if Claimant held the fund for six years the deferred sales charge would disappear completely. Respondents maintained that after Kushner's death and against Pear's advice, Cohen decided to sell the Utilities Fund. Respondents maintained that they should not be held responsible for Cohen's actions, that Pear's investment advice was sound, and that the Utilities Fund was a suitable investment.

RELIEF REQUESTED

Claimant requested damages in an amount not less than \$40,594.48 plus accrued interest, costs, punitive damages, attorney's fees, and the costs of this proceeding, including forum fees.

Respondents requested that Claimant's claim be dismissed in its entirety and the costs of this proceeding assessed against it.

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 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. That Claimant's claim is denied in its entirety
2. That Claimant's claim for punitive damages is denied.
3. That the parties shall bear their respective costs and attorney's fees except as forum fees are specifically addressed below.
4. That all claims against David W. Pear are dismissed and any reference to Claimant's claim against him should be expunged from Mr. Pear's disciplinary records.
5. That any and all relief requested not specifically addressed is denied.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fee is assessed.

1 sessions X \$400 = \$400

Forum fees Assessed Against: Claimant

Claimant is assessed the forum fee of \$400, however, Claimant is entitled to offset this fee with its hearing session deposit of \$400 previously deposited so that no additional fees are due from Claimant.

Date Award Signed

December 18, 1996

Concurring Arbitrators' Signatures



Perry E. Wallace, Jr., Esq., Chairman
Public Arbitrator

Sharon T. Nelson, Esq., Panelist
Public Arbitrator

Wendie L. Wachtel, Panelist
Industry Arbitrator

Date Award Served by the NASD Regulation: December 18, 1996

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12/17/96

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