

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimant**

Donald Fach

96-01761

**Name of Respondents**

Dean Witter Reynolds Inc.  
Michael Flemming

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**REPRESENTATION**

For Claimant: Stephen Murphy, Esq. of the law firm of Pino & Dicks, Longwood, FL.

For Respondent Dean Witter Reynolds, Inc. ("Dean Witter"): Allison Barry Doneghey, Esq., in-house counsel at Dean Witter Reynolds, Inc.

For Respondent Michael Flemming: Frederick S. Schriels, Esq. of the law firm of Holland & Knight, Tampa, FL.

**CASE INFORMATION**

Statement of Claim filed: April 23, 1996.

Claimant's Submission Agreement signed on: February 6, 1996.

Joint Statement of Answer filed by Respondents on: July 16, 1996.

The Respondents did not execute Submission Agreements as required pursuant to Section 10314 of the Code of Arbitration Procedure.

**HEARING INFORMATION**

Two hearing sessions were conducted in this matter on January 24, 1997 in Tampa, Florida.

## **CASE SUMMARY**

Claimant alleged that the Respondents informed him that the stocks he had inherited were not performing well and recommended that they be sold and the Claimant was told there would be a capital loss on the sale and the Claimant, therefore, would not have to pay any taxes. Claimant next alleged that Mr. Fleming informed him that the proceeds would be used to purchase mutual funds. Claimant next alleged that approximately one week later he received a confirmation in the mail indicating that Mr. Flemming had made a \$110,000.00 purchase of an annuity using the money from the sale of the stocks and \$20,000.00 from a Liquid Asset Fund which the Claimant had not consented to. Claimant next alleged that the information he received from Respondents was incorrect and he had to pay \$13,000.00 in capital gains tax and was forced to sell off a portion of the annuity in order to raise money to pay his tax bill and, as a result of taking a premature distribution from the annuity, the Claimant had to pay a penalty. Claimant next alleged that Respondents' actions were reckless, fraudulent and violated the Florida Securities Act. Claimant further alleged the Respondents acted in a negligent fashion; breached the fiduciary duty owed to the Claimant; breached the contract with the Claimant; engaged in fraudulent behavior and the Respondent Dean Witter failed to adequately supervise its employee.

Respondents maintained that they did not violate any duty, obligation or responsibility to the Claimant and they acted at all times at the Claimant's instructions and with his best interests in mind. Respondents next maintained that Mr. Flemming provided Mr. Faeh with commission information, research reports on the stocks the Claimant owned and, at the Claimant's request, information on investment alternatives, in particular, tax advantaged investments. Respondents maintained that after reviewing this information, Mr. Faeh instructed Mr. Flemming to liquidate his stocks and purchase a variable annuity. Respondents next maintained that any tax liability Mr. Faeh incurred was not the responsibility of Dean Witter or Mr. Flemming and Mr. Flemming never gave Mr. Faeh any tax advice. Respondents maintained that in an effort to assist Mr. Faeh they referred him to an accounting firm. Respondents next maintained that no misrepresentations or omissions of a material fact were made by the Respondents concerning the investment transactions at issue and the Claimant was thoroughly advised of all pertinent aspects of the investment transactions. Respondent Dean Witter next maintained that at all times it had reasonable and adequate supervisory procedures of its account executives which it reasonably and diligently implemented and followed.

## **RELIEF REQUESTED**

Claimant requested damages in the sum of \$34,000.00; he requested that the unauthorized purchase of the variable annuity be cancelled; damages based on the increase in value and dividends earned on the stocks which the Respondents sold; pre-award and post-award interest from the date of the original investment, calculated at the maximum rate allowed by law; costs of arbitration, including all fees, expenses of an expert witness and other costs deemed fair and reasonable; attorneys' fees pursuant to Section 517.211(b), and the inherent power of the arbitrators to fully compensate Claimant by a "make-whole award;" and, such other relief as the arbitrators deemed appropriate under the circumstances.

Respondents requested that all claims asserted by the Claimant be denied in their entirety and that they be reimbursed their attorneys' fees incurred in defending this action. Respondent Flemming requested that all references to this arbitration proceeding be expunged from his CRD record.

### **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 original(s) 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. All claims by the Claimant against the Respondents are hereby denied in all respects.
2. The Claimant be and hereby is liable and shall pay to the Respondents their attorneys' fees as determined by a court of competent jurisdiction.
3. All references to this arbitration proceeding shall be expunged from Robert Flemming's CRD record.

### **FORUM FEES**

Pursuant to Section 10332 of the Code of Arbitration Procedure, the arbitration panel has assessed Forum Fees in the sum of \$800.00 (2 sessions x \$400.00) as follows:

1. Claimant is assessed the sum of \$800.00 for which the NASD shall retain the \$400.00 previously deposited in partial satisfaction thereof leaving a balance due to the NASD of \$400.00.
2. The NASD shall retain the \$120.00 claim filing fee previously paid by the Claimant to the NASD.

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

Concurring Arbitrators' Signatures

Name

/s/  
Harold M. May

Public/Industry

Public

/s/  
Stanley Lampert, Esq.

Public

/s/  
Richard M. Kowalske

Industry

Date of Decision: \_\_\_\_\_