

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

---

In the Matter of Arbitration Between

Bill S. Bales and Nancy T. Bales,  
and Unimed, Inc. Pension Trust,

Claimants,

and

No. 96-02211

Dean Witter Reynolds, Inc.,

Respondent.

---

### **REPRESENTATION OF PARTIES**

Claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust were represented by Clifford B. Faddis, Jr., Esquire, located in St. Louis, Missouri.

Respondent Dean Witter Reynolds, Inc. was represented by Tim A. VerDuin, Esquire of Dean Witter Reynolds, Inc., located in San Francisco, California.

### **CASE INFORMATION**

Claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust's Statement of Claim was filed on or about May 23, 1996. Claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust's Statement of Claim Amendment was filed on or about February 10, 1997. Claimants Bill S. Bales and Nancy T. Bales's Submission Agreement was signed on May 21, 1996. Unimed, Inc. Pension Trust's Submission Agreement was signed on May 21, 1996 by Bill S. Bales and Nancy T. Bales as Trustees of the Unimed, Inc. Pension Trust.

Respondent Dean Witter Reynolds, Inc.'s Statement of Answer was filed on or about August 19, 1996. Respondent Dean Witter Reynolds, Inc.'s Submission Agreement was signed on August 12, 1996 by Tim A. VerDuin, Vice President and Senior Attorney of Dean Witter Reynolds, Inc..

### **HEARING INFORMATION**

A pre-hearing conference was held on February 5, 1997 for one (1) session.

The hearing was held on:     March 18, 1997 for two (2) sessions;  
   March 19, 1997 for two (2) sessions; and

March 20, 1997 for two (2) sessions.

The hearing was held in St. Louis, Missouri.

### **CASE SUMMARY**

Claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust (hereinafter collectively referred to as "Claimants") brought this action to recover losses from their investments in partnerships purchased through Dean Witter Reynolds, Inc. ("Respondent").

Claimants stated that sometime in or before 1985, Bill S. Bales and Nancy T. Bales opened a joint account with Respondent and made the following purchases from Respondent's agent, Robert J. Hanlon ("Mr. Hanlon"): (1) in September 1984, one-half unit (\$104,461.50) of 1600 Market Street Associates; (2) in October 1985, one unit (\$77,600.00) of NHP Oaks Crossing Associates; (3) in June 1985, twenty units (\$20,000.00) of First Capital Income Properties Ltd.; and (4) in January 1986, four units (\$4,000.00) of Balcor Equity Pension Investors-III for their respective Individual Retirement Accounts. Claimants further reported that sometime in or before 1985, Bill S. Bales and Nancy T. Bales opened an account as Trustees of the Unimed, Inc. Pension Trust with Respondent and made the following purchases from Mr. Hanlon: (1) in May 1985, forty-five units (\$45,000.00) of First Capital Institutional Real Estate Ltd. 3; and (2) in January 1986, twenty-five units (\$25,000.00) of Balcor Equity Pension Investors-III.

According to Claimants, Mr. Hanlon was informed that they were interested in investing in low-risk investments and that their investment objectives were safety of principal, growth, and income, in that order of preference. Claimants regarded themselves as unsophisticated investors. Thus, Claimants asserted, they reasonably relied on Mr. Hanlon's representations that the investments that they purchased were safe and met their investment goals. Claimants further asserted that Mr. Hanlon never mentioned the risk involved and continued to represent that the investments were sound after he sold them. Claimants alleged that because the sale of partnership units typically produced fees and commissions for Respondent aggregating from 18% to 22% of the monies invested by clients, Respondent pressed its registered representatives to convince clients to purchase the units and/or shares notwithstanding the fact that the investments were not safe and were not suitable for investors seeking "capital preservation." Claimants further alleged that Mr. Hanlon actively discouraged the Claimants from reading the Prospectuses and employed uniform sales materials in a deliberate effort to circumvent the disclosure requirements of the federal and state securities laws and to pervert the prospectus rules.

Claimants reported that they did not discover the occurrence or event giving rise to the act or dispute, claim or controversy until the following dates in each of the investments: (1) 1600 Market Street - after April 1991 when the General Partners (Dean Witter Realty, Inc. and Pacific Coast Associates (1600) Ltd.) filed for Chapter XI Bankruptcy protection; (2) NHP Oaks Crossing Associates - after June 22, 1992 when the National Housing Partnership notified the investors that NHP will no longer fund the operating deficits and that there may be no economic return to the investors; (3) First Capital Institutional Real Estate, Ltd.-3 - after November 30, 1995 when an offer was made to purchase the \$1,000.00 unit for \$250.00; and (4) Balcor Equity Pension Investors-III -

after June 30, 1990 when the Dean Witter account statement still showed the value of the original \$2,000.00 investment as being worth \$2,080.32.

Claimants asserted the following claims: (1) failure to supervise; (2) recommending unsuitable securities; (3) breach of fiduciary duty; (4) fraud; (5) negligent misrepresentation; (6) breach of contract; and (7) ERISA violations.

Respondent denied the allegations set forth in the Statement of Claim. Respondent stated that Claimants are and were wealthy and sophisticated investors who fully understood the characteristics and risks of real estate partnerships and who were attracted to those investments due to their anticipated tax benefits and potential for capital appreciation.

According to Respondent, prior to making the investments at issue, Claimants had already invested substantial amounts in similar partnerships through other brokerage firms. Respondent argued that Claimants did not inform Mr. Hanlon that they were interested only in low-risk investment, as they allege, but rather made their largest partnership investments in aggressive tax-shelter private placements that lacked the diversification of larger public partnerships. Respondent contended that Claimants were attracted to real estate investments during the period in question due to the superb track record that commercial real estate had established by that time. However, Respondent noted, the mere fact that completely unforeseen economic and tax developments later prevented those investments from performing up to the parties' expectations does not retroactively render their sale fraudulent or improper.

Respondent finally argued that the present claim, relating to investments all made over 10 years ago, is time-barred under both § 15 of the NASD Code of Arbitration Procedure and any conceivably applicable state or federal statutes of limitation.

Respondent also asserted the following defenses: (1) all claims alleged are barred by the doctrines of ratification, waiver, estoppel, and laches in light of Claimants' failure to bring this action until over ten years after the relevant investments were made; (2) Claimants failed to mitigate their damages, if any; (3) Claimants voluntarily and knowingly assumed the risks incident to the relevant investments and are therefore precluded from any recovery; and (4) Claimants themselves were negligent in and about the matters alleged in their Statement of Claim and, if Respondent's liability is determined to exist, then the degree of Claimants' own negligence should be determined and their damages reduced accordingly.

#### **RELIEF REQUESTED**

Claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust requested an award for: reimbursement of their original investment of \$258,061.50; return of six percent (6%) per year on their original investment, in an amount approximated to be \$154,836.90; punitive damages in the amount of \$75,000.00; and attorney's fees and costs.

Respondent Dean Witter Reynolds, Inc. requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and expenses in defending this claim.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Prior to the hearing in this matter, respondent Dean Witter Reynolds, Inc. moved for dismissal of the Statement of Claim pursuant to § 15 of the NASD Code of Arbitration Procedure on the ground that all of the occurrences or events giving rise to this arbitration took place over six years before it was filed. After careful consideration of this motion and all timely responses thereto, the undersigned panel of arbitrators decided to postpone their decision until the hearing in this matter.

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 Regulation, Inc. Office of Dispute Resolution.

### **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 claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust have failed to prove their claim and such claim is barred by limitations inasmuch as they have presented no evidence that would take this claim outside the six-year statute. Hence the arbitrators having determined to take respondent Dean Witter Reynolds, Inc.'s Motion to Dismiss based on limitations with the case, have also determined that the said motion is well taken. The Statement of Claim is hereby dismissed with prejudice.
2. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 = \$300 and there were six (6) hearing sessions x \$750 = \$4,500 in forum fees. Total forum fees are thus \$300 + \$4,500 = \$4,800. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to § 10322(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust.

Claimants Bill S. Bales and Nancy T. Bales, and Unimed, Inc. Pension Trust are jointly and severally liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution hearing session fees in the amount of \$4,050 (= \$4,800 total forum fees - \$750 hearing session deposit).

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by respondent Dean Witter Reynolds, Inc.

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by respondent Dean Witter Reynolds, Inc.

**Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures

C. J. McEnery, Jr.

/s/

April 18, 1997

---

C. J. McEnery, Jr.  
Chairperson  
Public Arbitrator

---

Dated:

Joseph W. Twombly

/s/

April 23, 1997

---

Joseph W. Twombly  
Panelist  
Public Arbitrator

---

Dated:

M. Eileen Dorsey

/s/

April 18, 1997

---

M. Eileen Dorsey  
Panelist  
Industry Arbitrator

---

Dated: