

**NASD REGULATION, INC.**

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In the Matter of the Arbitration Between

Name of Claimants

Dean Witter Reynolds Inc.

NASD Case No.  
96-02818

Name of Respondent

Mark A. Roberts

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**REPRESENTATION**

For Claimant Dean Witter Reynolds, Inc. ("claimant") appeared James A. Vollins, Esq. of Nilmer & Bernes, Cleveland, Ohio.

For Respondent Mark A. Roberts appeared Joseph J. Dehner, Esq., of counsel Frost & Jacobs, Cincinnati, Ohio. (Mr. Dehner withdrew as counsel for respondent by letter dated December 6, 1996.)

**CASE INFORMATION**

Statement of Claim filed on July 1, 1996.

Claimant's Submission Agreement signed on June 13, 1996.

Respondent's Statement of Answer filed on September 18, 1996.

Respondent did not execute a Uniform Submission Agreement as required pursuant to Rule 10314 of the Code of Arbitration Procedure.

**HEARING INFORMATION**

Hearing Date/Sessions: January 23, 1997 - Two Sessions

Hearing Location: Marriott Hotel, 11320 Chester Rd., Cincinnati, OH.

**CASE SUMMARY**

Claimant alleged respondent, while employed as a registered representative with claimant, consistently referred claimant's customers to purchase insurance from companies with which claimant had no fee agreement. Claimant alleged that respondent was licensed by the state of Ohio to sell insurance for the other companies and also alleged that respondent presumably received a commission for each transaction directly from the other insurance companies.

Claimant alleged that, on May 2, 1996, respondent abruptly resigned his employment with claimant. Claimant asserted that it was upon respondent's resignation that claimant discovered that respondent was

not furthering claimant's business interests. Claimant alleged that it discovered that, prior to resigning, respondent solicited claimant's customers to transfer their funds from claimant. claimant further alleged that respondent had at least 21 of claimant's customers request distribution from their Individual Retirement Accounts in the form of direct payments in order to avoid detection of the scheme by claimant. Claimant contended that the Distribution Request Forms and the cover letters were dated May 6, 1996, only two business days after respondent's resignation. Claimant asserted that these factors clearly indicated that respondent must have begun processing these distributions while still employed by claimant.

Claimant also alleged that respondent violated his duty of loyalty to claimant entitling claimant to damages. Claimant further alleged that respondent's disloyalty violated Rule 2200C of the NASD's Rules of Fair Practice which specifically prohibits a registered representative from benefiting from outside business activities.

Respondent maintained that he began work for claimant in 1987 after moving from another brokerage firm. Respondent asserted that he brought many clients with him. Respondent alleged that, to induce respondent to move to claimant, claimant promised client support and a specific payout scale averaging 41%. Respondent maintained that he believed claimant would offer his clients a broad range of investment alternatives. Respondent alleged that he later learned that claimant would not honor its commitment to a 41% payout and would not offer the expected range of investments to his clients.

Respondent claimed that claimant encouraged its account executives to sell a narrow range of insurance products and also encouraged its account executives to sell proprietary products offered by a firm with a lower than average renewal rate history. Respondent claimed that he placed loyalty to his clients above loyalty to claimant and therefore resisted claimant's persistent efforts to induce respondent to sell its proprietary products to his clients when respondent considered them unsuitable for his clients.

Respondent alleged that, in 1989, claimant lowered the payout structure for respondent. Respondent also alleged that claimant maintained a higher payout structure for sales of its proprietary products. Respondent also claimed that he is no longer a broker and does not intend to have any further association with the NASD. Respondent contended that he is a financial planner who advises clients on investment alternatives and financial matters on a fee-only basis.

#### **RELIEF REQUESTED**

Claimant requested that the panel declare that respondent, while employed by claimant, breached his duty of loyalty to claimant under Ohio law and that respondent engaged in conduct in violation of Rule 2200C of the NASD Rules of Fair Practice. Claimant also requested that the panel order respondent to do an accounting of all commissions he received from any entity other than claimant. Claimant requested that the panel order respondent to pay claimant damages in an amount to be determined at the arbitration, but believed to be in excess of \$50,000, and that the panel order respondent to reimburse claimant for costs and attorney's fees. Respondent requested dismissal of the Statement of Claim in its entirety.

#### **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.

Respondent did not appear at the hearing. On December 6, 1996, Joseph J. Dehner, Esq. advised NASD Regulation, Inc. that he was withdrawing as counsel for respondent and that respondent did not intend to participate in the hearing. Mr. Dehner further advised NASD Regulation, Inc. that respondent did not intend, in the future, to be affiliated with any NASD member firm.

### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing including any post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The respondent engaged in unlawful outside business activities in violation of Rule 3030 of the NASD Rules of Fair Practice;
2. The panel hereby declares that respondent, while employed by claimant, engaged in conduct in breach of his duty of loyalty to claimant under Ohio law;
3. Respondent be and hereby is ordered to conduct an accounting of all insurance commissions he received from insurance companies not registered with claimant while respondent was employed with claimant from 1987 through May 2, 1996 and respondent is further ordered to pay claimant two-thirds of the gross commissions earned from these transactions;
4. Respondent be and hereby is liable and shall pay claimant \$10,000 in punitive damages; and,
5. Respondent be and hereby is liable and shall pay claimant the costs and attorney's fees incurred with this arbitration.

### FORUM FEES

Pursuant to Rule 10205 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the non-refundable \$500 filing fee and have assessed the following forum fees:

2 sessions x \$600.00	=	\$1200.00
minus claimant's hearing session deposit		<u>-600.00</u>
Total Outstanding		\$ 600.00

Respondent be and hereby is liable for the sum of \$1200.00 representing 100% of the forum fees assessed. Respondent owes claimant \$600.00. Respondent owes NASD Regulation, Inc \$600.00.

Fees are payable to the NASD Regulation, Inc.

Scott Litwin

W. F. Lawrence

W. Pat Conners

John A. Whalen

I, W. Pat Conners, do hereby certify that this is my decision in the above-referenced matter.

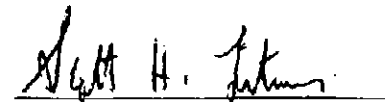
W. F. L. L. L. L.

W. Pat Conners

NASD Date of Decision: March 19, 1997

Concurring Arbitrators' Signatures

Name

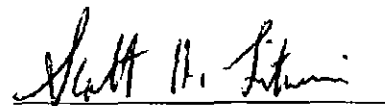


Scott Litwin

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W. Pat Conners

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John A. Whalen

I, Scott Litwin, do hereby certify that this is my decision in the above-referenced matter.



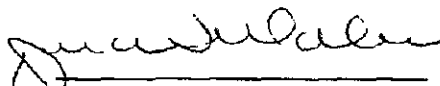
Scott Litwin

NASD Date of Decision: March 19, 1997

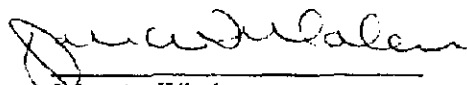
Concurring Arbitrators' Signatures  
Name

\_\_\_\_\_  
Scott Litwin

\_\_\_\_\_  
W. Pat Conners

  
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John A. Whalen

I, John A. Whalen, do hereby certify that this is my decision in the above-referenced matter.

  
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John A. Whalen

NASD Date of Decision: March 19, 1997