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**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Jayendra D. Patel, MD, Minakshi J. Patel, MD, Patel, MD, P.A. Employees MMPP and Patel & Patel, MD, Profit Sharing Plan (Claimants) v. Everen Securities, Inc., (a.k.a. Kemper Securities), Morgan Stanley Dean Witter Reynolds, Inc., and Har Gouri Pathak (Respondents)

Case Number: 99-00292

Hearing Site: Houston, Texas

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**REPRESENTATION OF PARTIES**

Claimants, Jayendra D. Patel, MD, Minakshi J. Patel, MD, ("the Patels"), Patel MD, P.A. Employees MMPP (the "MMPP") and Patel & Patel, MD, Profit Sharing Plan, (the "PSP Plan"), hereinafter collectively referred to as "Claimants": Hartley Hampton, Esq., Fibich, Hampton, Leebron & Garth, LLP, Houston, Texas.

Respondent, Morgan Stanley Dean Witter Inc. ("Morgan Stanley"): David D. Sterling, Esq., Baker & Botts, Houston, Texas.

Respondent, Everen Securities ("Kemper/Everen") and Har Gouri Pathak ("Pathak"): Jack D. Ballard, Esq., The Ballard Law Firm, Houston, Texas.

**CASE INFORMATION**

Statement of Claim filed on or about: January 22, 1999.

Claimant, Jayendra D. Patel, individually and as trustee for the PSP Plan and the MPPP signed the Uniform Submission Agreement: March 11, 1999.

Claimant, Minakshi J. Patel signed the Uniform Submission Agreement: March 11, 1999.

Joint Statement of Answer filed by Respondents, Kemper/Everen and Pathak, on or about: May 17, 1999.

Brad Busscher, Senior Vice President and Senior Attorney for Everen Securities Inc. signed the Uniform Submission Agreement on: May 10, 1999.

Respondent, Pathak signed the Uniform Submission Agreement: May 11, 1999.

Joint Statement of Answer filed by Respondent Morgan Stanley and Pathak on or about: May 13, 1999.

Morgan Stanley Dean Witter signed the Uniform Submission Agreement on May 13, 1999.

### CASE SUMMARY

Claimants asserted the following causes of action: Suitability, Churning, Breach of Fiduciary Duty, Negligence and Fraud, Failure to Supervise, Violation of the 1934 Securities Exchange Act, Violation of the 1933 Securities Act and the Texas Blue Sky Act, Excess markups and other Violations of NASD Rules.

All Causes of action relate to the trading of securities in Claimant's retirement accounts.

Unless specifically admitted in its Answer, Respondents Kemper/Everen and Pathak denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants' are barred, in whole or part, by the applicable statutes of limitation.
2. Respondents allege contributory negligence on the part of Claimants Jayendra D. Patel, MD and Minakshi J. Patel, MD for alleged failed to discharge their duties as trustees of the P.A. Employees MMPP and Patel & Patel, MD, Profit Sharing Plan.
3. Claimants are estopped, by their conduct, from complaining about the transaction in their Kemper account.
4. Claimants, through their conduct, ratified the investments made in the accounts at Kemper or, alternatively, waived their right to complain about them.
5. Claimants failed to mitigate damages by bringing their complaints to the attention of the Everen Respondents in a timely fashion.
6. Award of Punitive Damages in this case is completely unwarranted. If permitted, such damages constitute a violation of the due process, equal protection, and excessive fines clauses of the United States and Texas Constitutions.

Unless specifically admitted in its Answer, Respondents Morgan Stanley and Pathak denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants claims are barred by doctrine of ratification, waiver and estoppel and by the applicable statute of limitations.

### RELIEF REQUESTED

Claimant requested:

Compensatory Damages	\$ 6,000,000.00
Punitive Damages	\$10,000,000.00
Interest	\$ Unspecified
Attorneys' Fees	\$ Unspecified
Other Costs	\$ Unspecified

Respondents Kemper/Everen, Pathak and Morgan Stanley requested that the Statement of Claim be dismissed in its entirety and that Claimants be ordered to pay Respondents' costs.

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

Respondent Morgan Stanley settled with Claimants before the commencement of the Arbitration and did not appear at the hearing.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Everen Securities Inc., (as Successor in Interest to Kemper Securities) and Har Gouri Pathak are jointly and severally liable for and shall pay to the Patel & Patel MD Profit Sharing Plan, identified as Account No. 6090-5225, the sum of \$32,357.11 (Thirty Two Thousand, Three Hundred and Fifty Seven Dollars and Eleven Cents) as compensatory damages for trading losses.
2. Respondents Everen Securities Inc. (as Successor in Interest to Kemper Securities, Inc.) and Har Gouri Pathak are jointly and severally liable for and shall pay to the Patel & Patel MD Profit Sharing Plan, identified as Account No. 6090-5225, the sum of \$37,595.33 (Thirty Seven Thousand, Five Hundred and Ninety Five Dollars and Thirty Three Cents) as Compensatory Damages for commissions paid.
3. Respondents Everen Securities Inc. (as Successor in Interest to Kemper Securities, Inc.) and Har Gouri Pathak are jointly and severally liable for and shall pay to the Patel & Patel MD Profit Sharing Plan identified as Account No. 6090-5225, interest on the trading losses in the sum of 10% per annum calculated from October 1993 through December 7, 2001 in the amount of \$25,885.69 (Twenty Five Thousand, Eight Hundred and Eighty Five Dollars and Sixty Nine Cents).
4. Respondents Everen Securities Inc. (as Successor in Interest to Kemper Securities, Inc.) and Har Gouri Pathak are jointly and severally liable for and shall pay to the Patel & Patel MD, P.A. Employees MMPP, Account No. 6090-5226, the sum of \$123,788.10 (One Hundred and Twenty Three Thousand, Seven Hundred and Eighty Eight Dollars and Ten Cents) as compensatory damages for trading losses.

5. Respondents Everen Securities Inc. (as Successor in Interest to Kemper Securities, Inc.) and Har Gouri Pathak are jointly and severally liable for and shall pay to the Patel & Patel MD, P.A. Employees MMPP, Account No. 6090-5226, the sum of \$89,691.60 (Eighty Nine, Six Hundred and Ninety One Dollars and Sixty Cents) as compensatory damages for commissions paid.
6. Respondents Everen Securities Inc. (as Successor in Interest to Kemper Securities, Inc.) and Har Gouri Pathak are jointly and severally liable for and shall pay to the Patel & Patel MD, P.A. Employees MMPP, Account No. 6090-5226, interest on the trading losses in the sum of 10% per annum calculated from October 1993 through December 7, 2001 in the amount of \$99,030.48 (Ninety Nine Thousand, Thirty Dollars and Forty Eight Cents).
7. The Panel awarded no damages to Jayendra D. Patel, MD and Minakshi J. Patel, MD relating to their Joint Account No. 6090-4012.
8. Respondents Everen Securities Inc. and Har Gouri Pathak will reimburse Claimants Jayendra D. Patel, MD & Minakshi J. Patel, MD, for the \$300.00 Initial Filing Fee.
9. Except as otherwise specified herein, each party shall bear its own costs and attorney's fees.
10. Any and all relief not specifically addressed herein is denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$300.00
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#### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person at the time of the event(s) giving rise to the dispute. In this matter, the member firms are Everen Securities Inc. (a.k.a. Kemper Securities Inc.) and Morgan Stanley Dean Witter Inc.

Member surcharge	= \$3,600.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$5,000.00

**Adjournment Fees**

Adjournments requested during these proceedings:

August 20, 2001 – August 24, 2001, adjournment by Morgan Stanley Dean Witter Inc. = \$1,000.00 (waived)

June 12, 2000- June 17, 2001, adjournment requested by Morgan Stanley Dean Witter Inc. = \$ 15,000.00 (waived)

September 18, 2001- September 22, 2001, adjournment requested by Claimants = 1,500.00 (waived)

**Forum Fees and Assessments**

The Panel has the authority to assess forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with the panel arbitrator x \$1,500.00 = \$ 1,500.00  
Pre-hearing conference: May 9, 2000 1 session

Two (2) Pre-hearing sessions with a single arbitrator x \$ 300.00 = \$ 600.00  
Pre-hearing conference(s): November 16, 1999 1 session  
February 23, 2001 1 session

Eight (8) Hearing sessions x \$1,500.00 = \$12,000.00  
Hearing Date(s): December 11, 2001 2 sessions  
December 12, 2001 2 sessions  
December 13, 2001 2 sessions  
December 14, 2001 2 sessions

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Total Forum Fees = \$14,150.00

The panel has assessed \$14,150.00 of the forum fees jointly and severally against Respondents Everen Securities Inc. (a.k.a Kemper Securities Inc.) and Har Gouri Pathak.

**FEE SUMMARY**

Claimants, Jayendra D. Patel, MD & Minakshi J. Patel, MD, are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
Adjournment request	= \$1,500.00 (waived)
<u>Less payments</u>	<u>= \$ 1,800.00</u>
Balance Refunded by NASD Dispute Resolution, Inc.	= \$ 1,500.00

Respondent, Everen Securities Inc. (a.k.a Kemper Securities Inc.), is solely liable for:

Member Fees	= \$ 9,200.00
<u>Less payments</u>	<u>= \$ 9,200.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 00

Respondent Morgan Stanley is solely liable for:

Member Fees	= \$ 9,200.00
Adjournment request	= \$ 1,500.00 (waived)
Adjournment request	= \$1,000.00 (waived)
<u>Less payments</u>	<u>= \$ 9,200.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 00

Respondents Everen Securities Inc. (a.k.a Kemper Securities) and Har Gouri Pathak are jointly and severally liable for:

Forum Fees	= \$14,150.00
<u>Less payments</u>	<u>= \$ .00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$14,150.00

All balances are due to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Raymond C. Kerr, Esq. -Public Arbitrator, Presiding Chair  
R. Lee Britton Jr., Esq.-Public Arbitrator  
Robert E. Otto -Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Raymond C. Kerr, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
R. Lee Britton Jr., Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Robert E. Otto  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD-Dispute Resolution office use only)

FEB. 18. 2002 5:57PM

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Balance Due NASD Dispute Resolution, Inc. = \$ 00

Respondent Morgan Stanley is solely liable for:

Member Fees = \$ 9,200.00

Less payments = \$ 9,200.00

Balance Due NASD Dispute Resolution, Inc. = \$ 00

Respondents Everen Securities Inc. (a.k.a Kemper Securities) and Har Gouri Pathak are jointly and severally liable for:

Forum Fees = \$14,150.00

Less payments = \$ .00

Balance Due NASD Dispute Resolution, Inc. = \$14,150.00

All balances are due to NASD Dispute Resolution, Inc.


**ARBITRATION PANEL**

Raymond C. Kerr, Esq. -Public Arbitrator, Presiding Chair

R. Lee Britton Jr., Esq.-Public Arbitrator

Robert E. Otto-Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Raymond C. Kerr, Esq.  
Public Arbitrator, Presiding Chair

2/18/02  
Signature Date

\_\_\_\_\_  
R. Lee Britton Jr., Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Robert E. Otto  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
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Balance Due NASD Dispute Resolution, Inc. = \$ 00

Respondent Morgan Stanley is solely liable for:

Member Fees	= \$ 9,200.00
<u>Less payments</u>	<u>= \$ 9,200.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 00

Respondents Everen Securities Inc. (a.k.a Kemper Securities) and Har Gouri Pathak are jointly and severally liable for:

Forum Fees	= \$14,150.00
<u>Less payments</u>	<u>= \$ .00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$14,150.00

All balances are due to NASD Dispute Resolution, Inc.

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Robert E. Otto -Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Raymond C. Kerr, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

  
R. Lee Britton Jr., Esq.  
Public Arbitrator

2-18-02  
Signature Date

Robert E. Otto  
Non-Public Arbitrator

Signature Date

Date of Service (For NASD-Dispute Resolution office use only)



NASD DR # 99-00292  
P. 6 of 6

Balance Due NASD Dispute Resolution, Inc. = \$ 00

Respondent Morgan Stanley is solely liable for:

Member Fees	= \$ 9,200.00
<u>Less payments</u>	<u>= \$ 9,200.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 00

Respondents Everen Securities Inc. (a.k.a Kemper Securities) and Har Gouri Pathak are jointly and severally liable for:

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Balance Due NASD Dispute Resolution, Inc.	= \$14,150.00

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