A key arbitration case before high court
Dean Witter argues over forum.

By Marcia Coyle
STAFF REPORTER

WASHINGTON--The United States Supreme Court, strongly pro-arbitration in many of its recent rulings, soon will take up the tricky and recurring question of who decides--a court or the arbitrator--whether a claim is arbitrable in a securities case with potential implications beyond that industry.

The high court on Oct. 9 will hear arguments in Howsam v. Dean Witter Reynolds Inc., No. 01-800, which asks whether a court or an arbitrator should determine if a securities claim is time-barred by a rule in the National Association of Securities Dealers (NASD) Code of Uniform Arbitration.

Somewhat ironically, because the securities industry sought mandatory arbitration of disputes, Dean Witter seeks court jurisdiction over the time issue by arguing that it would be "fundamentally unfair" to allow arbitration of stale claims. And the consumer, Karen Howsam, wants arbitration as a faster, less expensive resolution of her claim.

The justices' decision could affect commercial and employment arbitrations where there are issues of time limits and arbitration agreements do not state clearly who decides those issues, says Jay E. Grenig of Marquette University Law School and author of West's Alternative Dispute Resolution with Forms (2d edition).

"Whichever way the decision goes," he adds, "it's likely other areas of arbitration will follow that lead."

By the rules
Howsam was a customer of Dean Witter Reynolds, a securities broker-dealer, in the spring of 1986, when she purchased interests in four limited partnerships. In late 1994, she closed her accounts and moved her funds to another investment firm.

As a Dean Witter customer, she had signed a client-services agreement with a mandatory arbitration clause. In March 1997, Howsam initiated arbitration before the NASD, alleging that Dean Witter, through its agents, made material misrepresentations to her about her investments.

The NASD's arbitration code contains a provision that bars a claim from arbitration after a lapse of six years from the occurrence or event giving rise to the claim. Relying on that provision, Dean Witter tried to enjoin Howsam in federal court from arbitrating her dispute on the ground that the dispute was time-barred.

The court dismissed Dean Witter's suit after finding that the parties had "clearly and unmistakably" agreed to arbitrate all disputes, not just the merits of the claim, but also threshold questions about whether the claim itself actually was arbitrable. But the 10th U.S. Circuit Court of Appeals reversed, joining a sharp split among the circuits.

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The 10th Circuit said the NASD rule was a substantive limit on claims that could be submitted to arbitration, and courts, not arbitrators, determine the scope of an arbitrator's subject-
matter jurisdiction—unless the arbitration agreement "clearly and unmistakably" provides for a decision by the arbitrator. Howsam's agreement did not contain any such clear statement, said the court.

The "clear and unmistakable" language is derived from the Supreme Court's ruling in *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995). The justices said that the question of who has the power to decide if a claim is arbitrable depends on what the parties agreed to on that question. If the agreement is ambiguous or silent, the justices held, the usual presumption in favor of arbitration is reversed and courts will decide.

"People who say the judge should decide say this issue is like subject-matter jurisdiction," explains Grenig. "The other side says this isn't about whether the subject is arbitrable but whether or not procedures were followed. It's one of those games where it's about semantics: If it's procedural, the arbitrator does it; if it's substantive, the courts do it."

**Arguing semantics**

In her high court brief, Howsam, represented by Alan C. Friedberg of Denver's Pendleton, Friedberg, Wilson & Hennessey, argues that Dean Witter agreed to arbitrate all controversies between them arising from her accounts as well as "the construction, performance or breach of this or any other agreement between us."

The timeliness issue, argues Friedberg, is not an issue of arbitrability, but is a defense similar to statutes of limitations. If Dean Witter's position prevails, he adds, that firm and others will be able to discourage claims against them by prolonging the dispute-resolution process with expensive litigation.

"Had I filed a complaint in court and tried to get a jury trial for Karen Howsam, there would have been a motion to compel arbitration," says Friedberg. "We tried to play by the rules. Here we are years later in the U.S. Supreme Court on an issue that isn't going to resolve the ultimate case."

But Dean Witter, represented by Kenneth W. Starr of Kirkland & Ellis, insists the parties did not "clearly and unmistakably" agree to arbitrate the timeliness question. The NASD itself, says Starr, has said the time rule is a "jurisdictional time limitation on the dispute[s] that could be arbitrated." As a threshold restriction on the arbitrability of particular disputes, he says, the rule must be enforced by a court.

"Arbitral consideration of [long-stale] claims is fundamentally unfair to parties that may no longer have access to materials needed to defend themselves because of the passage of time," says Starr in his high court brief.

The Bush administration has filed a brief supporting Howsam; the Securities Industry Association and the Competitive Enterprise Institute are supporting Dean Witter. A brief in support of neither party was submitted by the AARP Foundation and *Trial Lawyers for Public Justice.*