

## **NASD AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

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In the Matter of the Arbitration Between

Name of Claimant

Kenneth M. Seaton

and

92-00490

Name of Respondents

Prudential Securities, Inc.  
William McCall

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### **REPRESENTATION OF PARTIES**

Kenneth M. Seaton ("Claimant") was represented by James W. Parris, Esq., Bernstein, Stair & McAdams, Knoxville, Tennessee.

Prudential Securities, Inc. and William McCall ("Respondents") were represented by Gabriel Loubier, Esq., Prudential Securities, Inc., New York, New York.

### **CASE INFORMATION**

The Statement of Claim was filed on or about February 10, 1992. Submission Agreement of Claimant was signed on January 3, 1992.

Statement of Answer was filed by Respondents on or about July 17, 1992. Submission Agreement of Respondent Prudential Securities, Inc. was signed on July 16, 1992 by Richard Dziedziula.

### **HEARING INFORMATION**

A pre-hearing conference was held on Wednesday, October 5, 1994 for one (1) session.

The hearing was held on Wednesday, November 9, 1994 in Nashville, Tennessee for a total of two (2) sessions.

### **CASE SUMMARY**

*Claimant alleged that William McCall ("McCall"), an account executive employed by Prudential Securities Incorporated ("Prudential"), made untrue statements of material facts*

*and withheld material information in order to induce Claimant to purchase shares of the troubled First Executive Corporation, contrary to Claimant's investment objectives. The Claimant specifically alleged:*

- ▶ *Claimant, concerned about the safety of his investment, wanted to invest in Certificate of Deposits. McCall advised that Claimant instead purchase shares of First Executive Corporation, because it invested in government insured investments and therefore was a government regulated investment;*
- ▶ *McCall explained that "you won't lose." McCall never indicated any concern about the risks involved or the fact that Prudential was acting as a principal in the transaction;*
- ▶ *Claimant later learned that First Executive was in insolvency proceedings, and that, in fact, the stock was not secured with Certificate of Deposits nor was it guaranteed by the United States government.*

*Respondents denied the material allegations of the Statement of Claim, alleging that:*

- ▶ *Claimant was a sophisticated investor with years of experience in investing, and aware of the difference between preferred shares of a corporation and a Certificate of Deposit; furthermore, Claimant's accountant reviewed all account statements and confirmations;*
- ▶ *Respondents believed in good faith that First Executive was a stable and potentially profitable investment at the time the recommendation was made; also no misrepresentation was made with regard to Prudential's position as a principal in the transaction as this disclosed in the confirmation of the trade;*
- ▶ *Claimant was selective in his reliance upon the advice and knowledge of McCall, and even rejected McCall's recommendation that Claimant sell the stock at a profit.*

*Respondents also asserted the following affirmative defenses:*

- ▶ *The Statement of Claim is barred by applicable Statute of Limitations;*
- ▶ *Claimant's claims are barred or reduced by reason of his failure to mitigate any of his damages.*

#### **RELIEF REQUESTED**

*Claimant requested an award in the amount of \$195,000, interest and damages.*

*Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded its' costs and attorneys' fees.*

### **OTHER ISSUES CONSIDERED & DECIDED**

*Respondent William McCall did not file with the N.A.S.D. a properly executed submission to arbitration but is required to submit to arbitration pursuant to §12 of the N.A.S.D. Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.*

Respondents asserted a Motion to Dismiss based upon the applicable statutes of limitation. Upon the request of the panel, the parties submitted briefs on the issue. After considering the submissions of the parties, the undersigned arbitrators denied the motion.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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. Respondents Prudential Securities, Inc. and William McCall have no liability to the Claimant Kenneth M. Seaton for claims set forth in the Statement of Claim. The undersigned arbitrators find that the investment was suitable for the Claimant at the time it was offered in February, 1989. The undersigned arbitrators also found that the Respondents acted in good faith in recommending the investment to the Claimant and did not commit fraud. Finally, the undersigned arbitrators find that there were no special circumstances which created a fiduciary duty to the Claimant after the sale, and therefore no violation of a fiduciary duty to the Claimant.
2. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.
3. All relief not specifically addressed above shall be and hereby is denied.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There was one (1) session x \$300 and two (2) sessions x \$750 = \$1,800 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the5 arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") 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 by the Claimant. Claimant shall be and hereby is liable for and shall pay to the NASD the sum of \$1,050 as the balance due for forum fees.

The NASD shall retain postponement fees in the total amount of \$750 previously deposited with the NASD by the parties. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

/s/ Joe P. Lane, Esq.

Joe P. Lane, Esq.

Public Arbitrator, Presiding Chair

December 8, 1994

/s/ Edward B. Scott

Edward B. Scott

Public Arbitrator

December 9, 1994

/s/ William R. McCarty, Jr.

William R. McCarty, Jr.

Industry Arbitrator

December 9, 1994