

**NATIONAL ASSOCIATION OF SECURITIES DEALERS
AWARD**

In the Matter of the Arbitration Between

Irwin V. Frankel

Claimant

v.

NASD No. 92-2864

***Bear Stearns & Co., Inc. and
Jonathan Fink***

Respondents

Representation

For Claimant: Peter Kindem, Esq. of Berman, Blanchard, Mausner & Kindem of Los Angeles, CA

For Respondent Bear Stearns: Steve Goldberg, Esq. and Anthony Pacheco, Esq. of McCambridge, Deixler, Marmaro & Goldberg of Los Angeles, CA

For Respondent Jonathan Fink: Ellen Palmer, Esq. of Palmer & Fink of Los Angeles, CA

Case Information

Statement of Claim filed: August 25, 1992

Claimant's Submission Agreement signed: Irwin Frankel on May 5, 1992, and Irwin Frankel as Trustee for Defined Benefit Pension Plan on October 14, 1992

Statement of Answer for Respondent Bear Stearns filed on: December 30, 1992

Statement of Answer for Respondent Jonathan Fink filed on: December 30, 1992

Respondents Bear Stearns and Jonathan Fink Submission Agreement signed on:
December 29, 1992

Hearing Information

Prehearing Conference Date(s)/Sessions: November 30, 1993/one
January 21, 1994/one

Hearing Date/Sessions: February 22, 1994/two, February 23, 1994/two,
February 24, 1994/two, February 25, 1994/two,
March 24, 1994/two

Hearing Location: Los Angeles, CA

Case Summary

Claimant alleged:

Petitioner Irwin Frankel is a 62 year old OB/GYN practicing through his own professional corporation. Dr. Frankel first met Respondent Jonathan Fink while acting as Fink's wife's physician. Fink persuaded Dr. Frankel to open a personal account with Fink at Dean Witter, where Fink was employed as a registered representative. Dr. Frankel's stated investment objectives were growth, and the investments that were made at Dean Witter were conservative in nature. At that time, Frankel had no extensive experience in the stock market, and his personal investments were mostly in utility dividend reinvestment plans.

In the mid-1970's, a defined benefit pension plan that had been created for Frankel's professional corporation was funded. The trustee of the plan was Trust Services of America, Inc. and the investments were generally conservative in nature. In 1983, Fink left Dean Witter to become a broker at Bear Stearns and persuaded Dr. Frankel to move his personal account, to Bear Stearns. Fink also persuaded Dr. Frankel to terminate Trust Services of America as trustee of his pension plan and to open an account for the Plan at Bear Stearns. Dr. Frankel was persuaded by Fink's representations that he was a bond expert, that he would follow Dr. Frankel's stated investment objectives of conservative growth, and that by following such objectives, he could easily obtain a return of 7 or 8% a year.

When Fink took control of Frankel's pension account, it was worth approximately \$350,000. Fink controlled the trading in Dr. Frankel's pension account at Bear Stearns until Fink was forced to resign in January of 1989 as a result of claims that had been made against him for fraud and unsuitable trading and for becoming associated with a NASD firm that engaged in trading in low-priced speculative securities. During this approximately six year period, all of the trading in the account was solicited by Fink.

Fink violated Bear Stearns Own Suitability Standards. At least as early as January of 1987, Bear Stearns adopted its own suitability policy with respect ERISA plans. The evidence will show that Fink purchased numerous securities for Frankel's account in violation of Bear Stearns own suitability standards and procedures. Bear Stearns is liable for Fink's wrongful conduct under principles of respondeat superior.

Damages at Bear Stearns Although Dr. Frankel's account at Bear Stearns ended up providing a positive return, such return did not result from the substantial trading effected by Fink. In fact, Fink's trading, which generated over \$150,000 in commissions to Fink and Bear Stearns, resulted in trading losses of over \$90,000.00. If the account had been properly managed and invested, using the average, conservative return of "A" rated industrial and utility bonds, the account should have returned a profit of an additional \$141,000.00. Looking only at the indisputably unsuitable securities themselves, and employing a rescissionary measure of damages, Dr. Frankel's damages were over \$169,000.00.

Damages at Price Raffel When Fink moved to Price Raffel, his unsuitable trading continued unabated, and in fact became worse. During the two and a half years Dr. Frankel's account was at Price Raffel, it lost over \$345,000.00, and was filled with highly illiquid, worthless securities when Frankel discovered Fink's wrongdoing and transferred it to Prudential. The turnover rate was almost 3.5, and Fink's trading, which generated commissions to Price Raffel and Fink of over \$150,000.00, resulted in capital losses of over \$400,000.00. If the account had been properly managed and invested, using the average, conservative return of "A" rated industrial and utility bonds, the account should have returned a profit of \$172,000.00, rather than a loss of \$345,000.00. Thus, Dr. Frankel's lost profits were \$517,000.00. Viewing the indisputably unsuitable securities themselves, and employing a rescissionary measure of damages, Dr. Frankel's damages were over \$466,000.00.

Negligent Hiring and Negligent Supervision. Dr. Frankel contends that Bear Stearns and Price Raffel negligently supervised Fink and further contends that Price Raffel negligently hired Fink, knowing of his problems in the past, and that Fink and Price Raffel fraudulently concealed such information from Dr. Frankel.

Punitive Damages, Interest, and Attorney's Fees Based on Respondents' fraud, negligent misrepresentation, negligent investment advice, breach of fiduciary duty and intentional and negligence infliction of emotional distress, and the other wrongs committed by Respondents, claims have been asserted against Dr. Frankel by beneficiaries of the pension plan, which have caused him to incur attorney's fees and have caused great emotional distress. Based on Respondents' wrongful actions, Dr. Frankel, in addition to his penuniary damages, is requesting damages for emotional distress, punitive damages, interest to the extent not taken into consideration already, and attorney's fees.

Respondent Bear Stearns alleged:

Claimant Dr. Irwin H. Frankel ("Frankel") seeks damages for lost potential profits as a result of the alleged misconduct of Mr. Jonathan Fink ("Fink") and Bear, Stearns & Co., Inc. ("BSC"). Frankel contends that, although his account at BSC was profitable, it would have been more profitable but for the misconduct of BSC.

BSC's responses are as follows: (1) BSC did not violate its standard of care in supervising Frankel's account; (2) Fink handled Frankel's account at BSC appropriately; (3) Frankel has effectively released Fink, and therefore BSC derivatively, by agreeing not to enforce any judgment against him in exchange for \$175,000 from Soll, Rowe; (4) the alleged misconduct of Fink and BSC did not proximately cause any damage to Frankel; (5) the statute of limitations bars all of Frankel's claims except for his cause of action for breach of fiduciary duty arising from activity in his account after May 5, 1988 (four years before Frankel's claim was submitted to arbitration); (6) Frankel's failure to object to the handling of his account bars his claim now pursuant to the doctrines of waiver and estoppel.

BSC requests that Frankel be awarded nothing and that the costs of arbitration be imposed against Frankel.

Respondent Jonathan Fink alleged:

In his defense of the above referenced Action, Respondent Jonathan Fink has denied generally and specifically each and every allegation of the Statement of Claim, and has alleged various affirmative defenses including, without limitation, that Claimant, through his conduct, approved, authorized and ratified all transactions in the account, voluntarily assumed the risks of the transactions in the account and further failed to mitigate any losses in the account. Respondent Fink further alleged that Claimant and his advisers controlled and made all investment decisions for the account, that Claimant had at least fifteen (15) years of prior investment experience and desired that a portion of the account be invested in short term speculative securities. Respondent Fink alleged that Claimant desired an aggressive trading

strategy, in which the account could realize, on a regular basis, short term capital gains. Respondent Fink further alleged that Claimant knew at all times the positions in the account and the risks associated therewith. Finally, Respondent Fink alleged that Claimant fully understood and endorsed the trading strategy in the account.

Respondent Fink requested that the Statement of Claim be dismissed, that Claimant take nothing by his claim and that the costs of the proceedings, including reasonable attorney's fees, be assessed against Claimant.

Relief Requested

Claimant requested:

1. Compensatory and general damages in an amount to be determined;
2. Punitive damages according to proof;
3. Costs;
4. Such further relief as deemed proper.

Respondent Bear Stearns alleged a counterclaim against claimant with respect to the issue that if the panel finds a duty to the Irwin Frankel Medical Corporation Defined Benefit Plan was breached, that breach was that of the trustee, Dr. Irwin Frankel.

Other Issues Considered and 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.

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. Bear Stearns & Co. and Jonathan Fink are jointly and severally liable for and shall pay Claimant Irwin V. Frankel, trustee, the sum of \$75,000;
2. Respondent Jonathan Fink is liable for and shall pay Claimant Irwin V. Frankel, trustee, the sum of \$37,000 as and for punitive damages arising from his fraudulent conduct, pursuant to California Civil Code Section 3294;
3. All other claims and counterclaims are denied;

4. The parties shall each bear their respective attorney's fees;
5. The parties shall each bear their respective costs.

Other Costs

None.

Forum Fees

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The National Association of Securities Dealers, Inc., shall retain the \$1,000 hearing session deposit previously paid by the claimant, (although the correct hearing deposit is \$500 for the amount in controversy "in excess of \$50,000") to be applied against the following assessment of forum fees:

Claimant for \$2,650, minus \$1,000 already paid, equals balance due of \$1,650;
Respondents Bear Stearns and Co. and Jonathan Fink, jointly and severally, for \$2,650.

calculated as follows: two prehearing sessions at \$300/per prehearing session, plus 10 hearing sessions at \$500/per hearing session, equals \$5,300, minus \$1,000 already paid by the claimant as a hearing deposit.

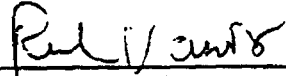
Fees are payable to the National Association of Securities Dealers, Inc.

Arbitration Panel

Name	Public/Industry
George Wiener	Public Chairperson
Ruben Vassolo	Public
Milton Bennett	Industry

Concurring Arbitrators' Signatures

George Wiener



Ruben Vassolo

Milton Bennett

Date of Decision:

Served 5/11/94