

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

District 65 Retirement Trust for Members
of the Bureau of Wholesale Sales Representatives
NBA Residual Benefit Fund
The Bureau Foundation
NBA Special Purpose Fund
Bureau of Deferred Compensation Fund

93-00200

Name of Respondent(s)

Prudential Securities Inc
William L. Kicklighter, Jr.

Name of Third Party Respondents

Sherwyn Syna
David Livingston
Al Dicker (Deceased)
Frank Brown (Deceased)
Al Bernknopf (Deceased)
Sol Marcus
Robert L. Dreyer

REPRESENTATION

For Claimants: Marion Smith, II, Esq. and Linda S. Pacer, Esq. of the law firm of Smith, Howard and Ajax, Atlanta, GA.

For Respondent Prudential Securities, Inc.: David G. Russell, Esq. of the law firm of Parker Hudson Rainer and Dobbs, Atlanta, GA.

For Respondent William L. Kicklighter, Jr.: Jo Lanier Meeks, Esq. of the law firm of Pursley Howell Lowery and Meeks, Atlanta, GA.

For Third Party Respondents Robert L. Dryer, Sol Marcus and Sherwyn Syna:
Frank A. Lightmas, Jr., Esq. of the law firm of Lightmas & Delk, Atlanta, GA.

For Third Party Respondent David Livingston: Franklin Moss, Esq. of the law
firm of Spivak, Lipton, Watanabe, Spivak & Moss, New York, NY.

CASE INFORMATION

Joint Statement of Claim filed: January 20, 1993.

Response to Motion to Dismiss pursuant to Section 25(a) and Clarification of
Claimants' Joint Statement of Claim filed: February 8, 1994.

Claimants' Submission Agreements signed on:

Bureau of Deferred Compensation Fund: May 3, 1993

NBA Residual Benefit Fund: May 3, 1993

NBA Special Purpose Fund: May 3, 1993

District 65 Retirement Trust for Members of the Bureau of Wholesale Sales
Representatives "District 65": April 12, 1993

The Bureau Foundation: April 26, 1993

The Third Party Respondents did not sign Submission Agreements as required
pursuant to Section 25 of the Code of Arbitration Procedure.

Statement of Answer and Third Party Claims filed by Respondent Prudential
Securities, Inc. "Prudential" on: December 17, 1993.

Respondent Prudential Securities, Inc.'s Submission Agreement signed on:
December 16, 1993.

Statement of Answer filed by Respondent William L. Kicklighter, Jr.
"Kicklighter" on: December 17, 1993.

Motion to Dismiss filed by Respondent William L. Kicklighter, Jr. on: December
17, 1993.

William L. Kicklighter, Jr.'s ("Kicklighter") Submission Agreement signed on:
June 16, 1993.

HEARING INFORMATION

May 12, 1994 two pre-hearing conferences.

Hearing Location: NASD offices located in Atlanta, GA.

CASE SUMMARY

Claimants alleged that they seek the recovery of substantial damages resulting from commissions paid in connection with their accounts being churned, breach of the contracts under which their accounts were managed by Prudential, breach of the fiduciary duty owed to the Claimants by both Prudential and Mr. Kicklighter, violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and other fraudulent activity, all of which resulted in losses in each of their accounts and the payment of grossly excessive commissions to Prudential. Claimants further alleged during the period in which the claimants maintained these accounts with Prudential, both Mr. Kicklighter and Prudential engaged in fraudulent and manipulative practices including, but not limited to, the following:

1. Directing and effecting excessive trades which resulted in churning the Claimants' accounts in order to generate sizeable commissions;
2. Directing and effecting unauthorized and de facto discretionary trades in the Claimants' account without obtaining express written discretionary authority, and without implementing the proper procedures for managing discretionary accounts;
3. Directing and effecting unsuitable trades in the Claimants' accounts, which included purchasing interests in various direct investments and other Prudential proprietary products, including limited partnerships;
4. Misrepresenting and/or failing to disclose material facts to the Claimants;
5. Directing and effecting excessive trades in securities in which Prudential was either an underwriter or market maker. These trades carried substantially higher than normal commission rates which profited Prudential rather than its customers;
6. Directing and effecting unauthorized margin and option trading in the Claimants' accounts;
7. Failing to supervise or intentionally improperly supervising Claimants' accounts; and

8. **Intentionally or negligently training its account executives, including Mr. Kicklighter, to manage the accounts of their customers for the purpose of generating large commissions solely for the benefit of Prudential and not for the benefit of Prudential's customers.**

Claimants further alleged in addition to fraud and misrepresentation, Prudential's actions constitute breach of contract, breach of duty and breach of fiduciary duty, as well as violations of the federal and Georgia securities laws, ERISA and breach of the Rules of the New York Stock Exchange, Inc. ("NYSE"), National Association of Securities Dealers, Inc. ("NASD"), and the Chicago Board of Options Exchange, Inc. ("CBOE"). Claimant's further alleged that the Respondents violated the Georgia RICO act.

Respondent Prudential Securities, Inc. maintained the documented evidence will show and the panel will find:

1. **Prudential followed investment advisor's orders.**
Prudential fully satisfied its duty to follow its client's investment instructions, which were delivered by an independent SEC-registered investment advisor who controlled the accounts with the District 65 trustees' express authorization, upon which Prudential relied;
2. **Investment goals included high income and speculation.**
The investment advisor directed trading to achieve District 65's investment goals, which were principally the generation of high income and also included long-term growth and speculation; these goals are evidenced by the new account documents at Prudential and by District 65's trading at other securities firms on margin in speculative securities (including "junk" bonds and limited partnerships);
3. **Authorization by trustees.** The trustees authorized the trading directed by the advisor, as evidenced by the trustees' signing margin and option agreements and a certification of powers;
4. **Ratification by trustees.** The trustees and the advisor ratified all trading (a) by not objecting after admittedly receiving confirmations and monthly statements, (b) by their contemporaneous acknowledgements of approval to Prudential's brokers and branch manager; and (c) by continuing to direct the same basic course of trading even after the accounts lost \$5 million in the October 1987 crash;

5. Failure to identify improper trades. District 65's failure, many years after the fact, to identify a single unauthorized trade evidences the utter absence of any factual basis for this illogical claim. Its failure to identify allegedly unsuitable investments likewise shows their claim is specious;
6. Ineligible and barred claims. All claims are either ineligible for NASD arbitration or are categorically barred from any damage award due to the NASD's six-year rule, ERISA and securities laws' statutes of limitation and repose, and class actions in which District 65 participated;
7. Offset income received. Any capital losses must be offset by the extraordinary amount of dividends and interest received (\$4.0 million), because high income generation was the Trust's paramount investment goal; and
8. Trustees and advisors, not Prudential, should bear loss. The trustees and the advisor, not Prudential, proximately caused any losses -- they came to Prudential with an annual shortfall of income and chose investments to yield high income. If the trading level was too high, if the securities were unsuitable, or if the investment advisor was incapable, any damages are not the responsibility of Prudential, but are the responsibility of the advisor and the trustees, who had clear-cut ERISA and other duties to act prudently with the accounts.

Respondent William J. Kicklighter, Jr. adopted and incorporated by reference the Introduction and Statement of Facts in the Answer Submitted by Respondent Prudential Securities, Inc. Respondent William J. Kicklighter, Jr. further maintained William J. Kicklighter, Jr. spoke daily with Marshall Mantler, the person the trustees had hired to manage the accounts and Kicklighter further maintained Mr. Mantler was an experienced, capable and "hands on" manager, and he directed the investing with express authority from the trustees and Kicklighter met or spoke with the District 65 trustees and the Bureau trustee from time to time in 1987 and 1988 regarding the account. Respondent William J. Kicklighter, Jr. further maintained while desiring to reduce margin levels in the accounts after the stock market crash, the trustees never raised concerns about the types of investments in the accounts or Mantler's capability to direct investments and Mantler, with the knowledge and approval of the trustees, pursued a course of trading designed to maximize income to the accounts which were required to meet increasing benefit payment obligations while membership receipts stagnated or decreased and the trustees sought and received legal advice from their own attorney that the use of margin was not prohibited in the accounts, and they specifically authorized options transactions in the accounts and

Mike McClain, Prudential Branch Manager, spoke periodically with Mantler and the trustees who repeatedly confirmed their satisfaction with performance and service. Respondent William J. Kicklighter, Jr. further maintained the NASD six-year-rule bars claims against William J. Kicklighter, Jr. based on trades made prior to January 14, 1987; claims based on the sale of securities that were the subject of putative or certified class actions are ineligible for arbitration; applicable statutes of limitations bar all of Claimants' causes of action against William J. Kicklighter, Jr. individually; William J. Kicklighter, Jr. is not liable for violations of fiduciary duties under ERISA; William J. Kicklighter, Jr. did not churn the accounts; the trustees ratified all allegedly unauthorized trades in the accounts; the account investments were suitable given the account objectives; Claimants have not pled a violation of Federal or Georgia RICO statutes; ERISA preempts all state law causes of action; Claimant is not entitled to attorneys' fees or other damages sought in the Joint Statement of Claim and no basis exists for the award of punitive damages and Claimants have failed to adequately plead their causes of action.

Respondent William J. Kicklighter, Jr. further maintained from the inception of the District 65 and Bureau accounts at Prudential through the end of 1988, both Kicklighter and Michael Bogoslawsky, another Prudential broker, serviced the District 65 and Bureau accounts and split commissions 50-50 and with Mantler as its investment manager, District 65 maintained other accounts with other brokerage houses and brokers and Kicklighter executed no purchases or sales in the four Bureau accounts after November, 1988 and as to the District 65 account, Kicklighter did not handle any trades in that account after February, 1989 and Bogoslawsky handled the accounts at Prudential after Kicklighter left.

OTHER ISSUES CONSIDERED AND DECIDED

The Respondents Prudential Securities, Inc. and William Kicklighter, Jr. asserted a Motion to Dismiss alleging the Claimants' claims are ineligible under Section 15 of the Code of Arbitration Procedure ("Code") and under Section 12 (d) of the Code because Claimants have participated or will participate in class actions. In addition, the Respondents alleged the applicable statutes of limitations and repose bar all claims and the claims are legally deficient as a matter of law for the following reasons:

- i. Prudential Securities, Inc. is not an "ERISA" fiduciary so it cannot be sued under ERISA;
- ii. the federal securities laws claims are barred because claimants did not exercise the requisite due diligence; and,
- iii. Claimants did not allege violations of RICO.

Furthermore, Respondents alleged ERISA preempts Claimants' state law claims of fraud, negligence, breach of contract and breach of fiduciary duty; state securities and RICO claims are inapplicable under the choice-of-law clause; no private right of action exists under the rules of the NASD, NYSE or CBOE and arbitrators do not have the authority to award punitive damages. Respondent Prudential Securities, Inc. further moved to dismiss under Section 25(a) of the Code for their failure to "specify the relevant facts" Respondent William Kickligher, Jr. further alleged the state law securities claims asserted by Claimant are time barred.

In response, Claimant requested that the motions be denied on all grounds and asserted the following:

- i. all the claims in Claimants' Joint Statement of Claim are timely and eligible for arbitration under Section 15;
- ii. Respondent Prudential Securities, Inc. has failed to carry its burden to establish that Claimants are a party to any class actions;
- iii. Claimants' claims are all timely and not barred by any statute of limitations or repose;
- iv. Claimants' ERISA and federal securities claims are valid;
- v. Claimants RICO claim is valid;
- vi. Claimants State law claims of fraud, negligence, breach of contract and breach of fiduciary duty and other state law claims relating to RICO and securities laws violations are not preempted under ERISA;
- vii. the New York Choice of law clause in Claimants' customer agreements with Prudential Securities, Inc. do not control their Georgia securities and RICO claims;
- viii. Claimants do have a private right of action under the rules of the NASD, NYSE and CBOE; and,
- ix. Claimants are entitled to punitive damages.

In addition, Claimants responded that Respondents' motion to dismiss pursuant to Section 25(a) should not be granted and provided a clarification of the Joint Statement of Claim.

The Claimants and third party Respondents Sherwyn Syna, Sol Marcus and Robert L. Dryer asserted a motion pursuant to Section 16 of the Code of Arbitration Procedure stating that given the complexity of the legal issues in the proceeding, as well as the number of parties and complications rendered as a result of the positions taken by Prudential Securities, Inc. the matter should be

referred to the court system for resolution.

In response, the Respondents maintained the Claimants contractually agreed to arbitrate their disputes and moved to deny the motion.

The third party Respondents asserted a motion to dismiss for lack of jurisdiction as they never agreed to submit to arbitration in their individual capacities and never intended to be personally bound. Claimants further asserted a Motion to Dismiss for failure to state a claim. In addition, the third party Respondent David Livingston alleged he has been denied the opportunity to elect the arbitration forum. In response, Respondent Prudential Securities, Inc. maintained the claims are sufficient and the third party Respondents should be held liable personally for their acts of misfeasance.

The Respondent Prudential Securities, Inc. asserted a third party claim against Marshall Mantler, the financial investment advisor for the Claimants. The Director of Arbitration determined that the NASD did not have jurisdiction over this individual.

RELIEF REQUESTED

Claimants requested damages for trading losses in the sum of \$8,708,747.00; damages for excessive commissions in the sum of \$4,779,753.00; damages for various brokerage fees and margin interest in the sum of \$1,845,800.00; prejudgment interest; lost investment opportunity in an amount to be determined by the Arbitration panel; rescission of the limited partnerships purchased plus interest from the date of purchase in an amount to be determined by the panel; punitive damages; treble damages; all of Claimants' costs, expenses and disbursements including attorneys' fees and for such other relief as the arbitration panel deems just and proper.

Respondent Prudential Securities, Inc. requested that the panel dismiss the Joint Statement of Claim and award to Prudential its costs including attorneys' fees. Respondent Prudential Securities, Inc. also requested that the panel grant its Third Party claims for contribution and indemnity.

Respondent William J. Kicklighter, Jr. requested that the panel dismiss the Joint Statement of Claim and award Respondent William J. Kicklighter, Jr. his costs including attorneys' fees. Respondent William J. Kicklighter, Jr. further reserved its right to assert third party claims in the event William J. Kicklighter, Jr. is deemed liable in any respect with regard to the accounts.

The third party Respondents Sherwyn Syna, David Livingston, Sol Marcus and Robert L. Dreyer requested a dismissal of all claims against them.

AWARD



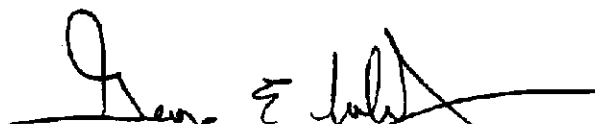
After considering the pleadings, the testimony and the evidence presented at the pre-hearing conferences, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Pursuant to Section 16 of the Code of Arbitration Procedure, the matter is dismissed without prejudice and the parties are referred to the remedies provided by applicable law.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the NASD shall retain all fees submitted by all parties.

ARBITRATORS' SIGNATURE


James R. McGuone, Esq.
Public Arbitrator
Sidney R. Barrett, Esq.
Public Arbitrator
George E. Coleman, Esq.
Industry Arbitrator

Date of Decision: July 7, 1994