

7/95

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Robert L. Warsh

93-00742

Name of Respondent

Prudential Securities, Inc.

REPRESENTATION

For Claimant Robert L. Warsh ("Warsh") appeared Richard L. Burstein, Esq., Fernandez & Burstein, P.C., Albany, New York.

For Respondent Prudential Securities, Inc. ("Prudential") appeared Miriam G. Bahcall, Esq., Skadden, Arps, Slate, Meager & Flom, Chicago, Illinois.

CASE INFORMATION

The Statement of Claim was filed on February 26, 1993.

Claimant's Submission Agreement was signed on February 25, 1993.

Respondent's Statement of Answer was filed by Respondent on September 29, 1993.  
Respondent did not execute a Submission Agreement.

HEARING INFORMATION

Pre-Hearing Conference:	May 17, 1995	-	One Session
Hearing Dates/Sessions:	February 13, 1995	-	Two Sessions
	February 14, 1995	-	Two Sessions
	February 15, 1995	-	Two Sessions
	February 16, 1995	-	Two Sessions
	February 17, 1995	-	Two Sessions

The hearing was held at the Albany Marriott located at 189 Wolf Road, Albany, New York.

## CASE SUMMARY

Claimant Robert L. Warsh alleged that respondent, Prudential Securities, Inc. (at the time of the alleged misconduct, Prudential-Bache) engaged in a course of conduct constituting breach of contract, breach of fiduciary duty, violations of the Rules of Fair Practice of the NASD and violations of the Securities Exchange Act as well as common law fraud and concealment. Claimant alleged that he contacted Prudential seeking to invest proceeds from the sale of his family business. Claimant spoke with a registered representative in Prudential's employ whom he advised that he sought investments that were "very conservative and very safe which also should be producing income by the fifth year" to provide income for he and his family; that the registered representative recommended investing proceeds of the business sale in limited partnerships which were "conservative, safe and good investments, and capable of meeting investment objectives" which Claimant had mentioned to him; and that although Claimant was given a prospectus, Claimant was not advised of any special risks associated with the investments. The purchases of the 3 limited partnerships (Jefferson Hotel Associates, 680 Fifth Avenue Associates and South West Mall Associates) were executed by the Claimant between October 7, 1983 and November of 1983 at a cost of \$433,000. During the Spring of 1984, Respondent's representative recommended the purchase of Polaris 5A and B PVT, a limited partnership which would meet Claimant's stated objectives and which was "a conservative and safe investment which would provide income after five years," and that based on this recommendation, Claimant invested \$120,000 in this limited partnership. Claimant alleged that Prudential fraudulently concealed material facts by sending monthly statements to the Claimant showing the value of his limited partnership investments to be worth what he had paid when the investments were actually worth far less. Further, it was not until December, 1991 that the monthly statement from Prudential contained a disclaimer that the amount shown does not represent market value.

Claimant also alleged that in a prior lawsuit against Prudential, a District Court ruled that Prudential's failure to disclose the convictions of a principal for embezzlement, misapplication of bank funds and mail fraud was a material omission and awarded the plaintiff rescission, return of purchase price and interest on their investment, attorney's fees and costs; that Prudential has failed to disclose this information which was relevant in this instance since this principal was at all relevant times the principal behind American Capital Partners, which held an effective 50% interest in the general partner of 680 Fifth Avenue Associates. Claimant alleges that Prudential knew, or should have known, that this failure to reveal was a material omission; that had Claimant been aware, he would not have made such investment; and that he initially learned such information only after reading a Business Week article. The other 50% principal, in November 1991 was indicted and convicted of tax fraud, which similarly was not disclosed to Claimant. Claimant alleges that in an effort to remove these principals from investor scrutiny, Prudential arranged to have a new general partner; that information on this person's background was not provided as required by the relevant partnership agreements and New York Partnership law; and that Claimant alleges this fraudulent concealment entitles a tolling of any applicable statute of limitations.

Claimant also alleged that the aforesaid conduct, in addition to breach of contract, constitutes

common law fraud and fraudulent concealment, violates the Securities and Exchange Act of 1934, 15 USC section 10(b), 20(a), 78(j)(b), 78(t)(a), constitutes a breach of fiduciary duty and violation of the NASD Rules of Fair Practice.

Respondent claims the allegations of wrongdoing are ineligible for submission to arbitration because the claims are time-barred pursuant to section 15 of the Code of Arbitration Procedure, as all investments were made more than six years prior to the filing of the statement of claim. Alternatively, Respondent maintains all claims are time barred by the applicable statute of limitations. Respondent denied that their representative in any way misrepresented the characteristics of (including the income producing characteristic) or risks associated with his investment and in no way breached whatever limited duties Respondent may have owed Claimant. Respondent further claims that the accuracy of the disclosures in the offering materials indicating the associated risks for each of the limited partnerships precludes the Claimant from recovering; that Claimant's financial advisor reviewed each of the Private Placement Memorandums (PPMs); and thus Claimant's financial advisor is responsible to Claimant. Respondent asserts Claimant had over twenty years of investment experience; that Claimant had taken courses in finance and management; that Claimant did not indicate that safety of principal was a goal; that Claimant signed several documents indicating he met financial requirements for investing in the limited partnerships; and that Claimant represented that he had adequate means of providing for current needs and personal contingencies in view of the fact that this is not a liquid investment.

Respondent further maintained that the PPM for 680 Fifth Avenue Associates clearly indicates persons having substantial financial obligations. As related to this claim, SEC rule 401 requires only that convictions within the past five years be disclosed in an offering memorandum; that the District Court opinion finding Prudential liable was vacated; and that the statute of limitations should not be tolled as Claimant was aware of a serious problem in the management of 680 Fifth Avenue yet made no inquiry as to the alleged misrepresentations regarding safety or suitability, thus constituting a failure to exercise due diligence sufficient so as not to toll the statute of limitations.

Respondent asserts that monthly statements sent to the Claimant as early as 1985 included a symbol indicating the value shown on the statement was for informational purposes only and is valued at the initial purchase price; that Claimant's assertion that the Statute of Limitations should be tolled due to fraudulent concealment is unreasonable; and that Claimant has the burden of alleging facts to show the alleged concealment did in fact prevent discovery of the cause of action; that the explicit disclosures in the PPMs preclude such a finding.

Respondent asserts that courts have recognized that investors cannot reasonably rely on oral misrepresentations that are clearly to the contrary disclosures made in the PPMs; that the breach of fiduciary duty claim is meritless since claimant was a sophisticated investor who retained an independent Certified Public Accountant to advise him, that a broker of a non-discretionary account has no continuing duty to monitor the performance of customers securities after the purchase; that the NASD regulations claimed to have been violated were without foundation, and do not alone serve as independent grounds for recovering damages from their broker; and that punitive damages may not be awarded by the arbitrators pursuant to a New York Court of

Appeals decision and the agreement that New York law governs the construction of the customer agreement.

### **RELIEF REQUESTED**

Claimant requested an award against the Respondent demanding actual losses sustained by diminution in the value of \$553,000.00 together with interest and damages as measured by a "well managed" portfolio of \$553,000.00 together with punitive damages, forum fees, arbitrator fees, attorney fees, filing fees, printing fees, expert witness fees, together with any and other further costs and disbursements and relief which the panel deems just and appropriate under the circumstances.

Respondent requested that the panel enter a judgment in its favor on the claims advanced by the Claimant.

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

This panel finds that Respondent Prudential Securities, Inc. were required to sign a Submission Agreement pursuant to Sections 12 and 25 of the Code of Arbitration Procedure, Respondent Prudential Securities, Inc. being an NASD member firm at the time this controversy arose.

### **AWARD**

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

1. Respondent be and hereby is liable and shall pay to the Claimant the sum of \$220,000;
2. All claims for interest be and hereby are denied;
3. All claims for punitive damages be and hereby are denied;
4. Each party shall bear their respective costs, including attorneys fees; and
5. All other claims be and hereby are denied.

### **FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed:

1 pre-hearing session x \$300 .	= \$ 300.00
10 sessions X \$1,000.00	= \$ 10,000 minus hearing session deposit of \$1,000.00 =
\$9,000.00 due	

**TOTAL OUTSTANDING FORUM FEES = \$9,300.00**

Respondent Prudential Securities, Inc. be and hereby is liable and shall pay to the NASD the sum of \$9,300.00 representing outstanding forum fees. However, Prudential previously deposited \$1,250.00 with the NASD. Therefore, the amount due and owed to the NASD is \$8,050.00.

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

Concurring Arbitrators' Signatures  
Name



Donald G. Hatt, Esq.  
Public Chairperson

\_\_\_\_\_  
John L. Barry, III  
Industry Arbitrator

\_\_\_\_\_  
Paul W. Van Ryn, Esq.  
Public Arbitrator

STATE OF NEW YORK  
COUNTY OF ALBANY

On this 29th day of June, 1995, before me personally appeared  
DONALD G. HATT known to me to be the individual described in and who executed  
the foregoing instrument and duly acknowledged to me that he executed the same.




NOTARY PUBLIC

**WILLIAM P. FORTNER**  
Notary Public, State of New York  
Residing in Rensselaer County  
Commission Expires 6 30, 1996

Date of Decision: July 11, 1995

Concurring Arbitrators' Signatures  
Name

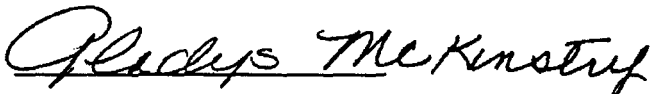
\_\_\_\_\_  
Donald G. Hatt, Esq.  
Public Chairperson

  
\_\_\_\_\_  
John L. Barry, III  
Industry Arbitrator

\_\_\_\_\_  
Paul W. Van Ryn, Esq.  
Public Arbitrator

STATE OF Vermont  
COUNTY OF Windham

On this 3rd day of July, 1995, before me personally appeared John L. Barry known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

  
\_\_\_\_\_  
Gladys McKinstuf

NOTARY PUBLIC  
My Commission Expires 2/10/99

Date of Decision: July 11, 1995

Concurring Arbitrators' Signatures  
Name

Donald G. Hatt, Esq.  
Public Chairperson

John L. Barry, III  
Industry Arbitrator

Paul W. Van Ryn, Esq.  
Public Arbitrator

STATE OF NEW YORK  
COUNTY OF ALBANY

On this 10<sup>th</sup> day of July, 1995, before me personally appeared Paul W. Van Ryn known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

John F. Maxwell

JOHN F. MAXWELL  
NOTARY PUBLIC, STATE OF NEW YORK  
QUALIFIED IN ALBANY COUNTY  
NO. 488888  
MY COM. EXPIRES 7-31-97

Date of Decision: July 11, 1995