

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration BetweenName of Claimant

William D. Berner

93-00987

Name of RespondentsPrudential Securities, Inc.
Robert Tonnesen

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on March 15, 1993, Claimant William D. Berner, who appeared Pro Se, alleged that in April, 1985 he started investing \$2,000.00 per year in an Individual Retirement Account ("IRA") with Robert Tonnesen, Account Executive at E.F. Hutton and through April, 1988, Claimant invested in Certificates of Deposit ("CD"), Zero Coupon Bonds and Government Securities, which were all save investments, whereby Claimant never sold, which creates additional commissions. Claimant further alleged that Respondent Robert Tonnesen left Shearson Lehman Hutton, Inc. formerly E.F. Hutton, in April, 1988 and Claimant gave Respondent Robert Tonnesen permission to open an account at Respondent Prudential Securities, Inc., at which time, Claimant transferred his portfolio. Claimant contended that Respondent Robert Tonnesen used his transferred funds to buy 700 shares of VMS Mortgage Investment Fund stock at \$10.00 per share without Claimant's permission or consent whereby he became aware of this transaction when he received the confirmation and prospectus in the mail. Claimant further contended that when he questioned Respondent Robert Tonnesen about the investment, Respondent Robert Tonnesen assured him it was a good investment. Claimant asserted that in July, 1989 his monthly statement for VMS showed a share price of \$8.125 with a yield of 7.38% and when he questioned Respondent Robert Tonnesen about the loss, Claimant was assured that it was a mistake and the yield should be 14.8%. Claimant further asserted that in July, 1991 VMS went bankrupt and became Banyon Mortgage, whereby in October, 1991 a class action suit was brought against VMS with Respondent Prudential Securities, Inc. as a limited partner and up until this time Claimant was unaware that Respondent Prudential Securities, Inc. was affiliated with VMS. Claimant argued that Respondent Robert Tonnesen should have known that the suitability of VMS in an IRA was questionable and Respondent Prudential Securities, Inc. pressured their brokers to sell VMS, thus Respondents should be held liable.

Respondents Prudential Securities, Inc. and Robert Tonnesen by and through their in-house counsel, Renee Kwait-Rettig, Esq., maintained that Respondent Robert Tonnesen has been Claimant William D. Berner's broker since 1985 and prior to every transaction that was made from 1985 to the present, Respondent Robert Tonnesen and Claimant have discussed the transaction in his office or on the telephone, in fact, Claimant and his wife made an annual appointment with Respondent Robert Tonnesen to discuss their IRA contribution. Respondents further maintained that this was done each of the years Respondent Robert Tonnesen was their broker and trades were done only after the annual discussion. Respondents contended that the purchase of VMS Mortgage Investment Fund on June 13, 1988 was in fact an authorized trade, which occurred after a two hour discussion in Respondent Robert Tonnesen's office, at which time, this investment was explained to Claimant prior to its purchase and was then authorized by Claimant. Respondents further contended that subsequent to Claimant's authorization of this purchase, the confirmation slip dated June 13, 1988 and prospectus were mailed to Claimant. Respondents asserted that Claimant does not deny that he in fact received a confirmation slip and a prospectus after the trade was completed. Respondents argued that even assuming, for the sake of argument, that the purchase was not initially authorized, Claimant's failure to object after receiving the confirmation and subsequent statements constitutes ratification.

RELIEF REQUESTED

Claimant William D. Berner requested \$7,000.00 in actual damages.

Respondents Prudential Securities, Inc. and Robert Tonnesen requested the claim be dismissed.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Arnold Linsky, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on March 10, 1993, by the Respondent Prudential Securities, Inc. on April 22, 1993 and by the Respondent Robert Tonnesen on April 19, 1993.

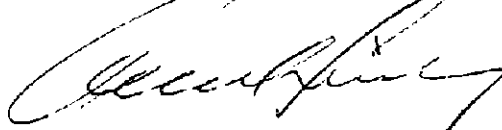
And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claim of Claimant William D. Berner against Respondents Prudential Securities, Inc. and Robert Tonnesen is dismissed.
2. The parties shall bear their respective costs.

3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant William D. Berner shall be retained by the NASD, Inc.

AFFIRMATION

I, **ARNOLD LIMSKY**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

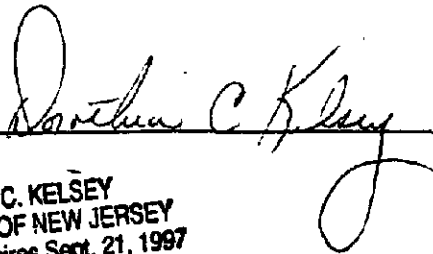
DATE OF DECISION: July 14, 1993

STATE OF: *N.J.*

ss:

COUNTY OF: *MORRIS*

On this 9 day of July 1993, before me personally appeared Arnold Limsky to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



DOROTHEA C. KELSEY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Sept. 21, 1997

William D. Berner v. Prudential Securities and Robert Tonnesen

William D. Berner (CLAIMANT) had an I.R.A. account with E. F. Hutton Inc. which was transferred to Shearson Lothrop Inc. by his broker (Robert Tonnesen) [RESPONDENT] with Claimant's permission. In April 1988 Respondent transferred to Prudential Bache [RESPONDENT] and again transferred Claimant's portfolio with permission. Without Claimant's knowledge or permission 700 shares in VMS INC were purchased for Claimant by Respondent using funds that accrued in the portfolio. Claimant became aware of this transaction when he received a confirmation slip of the purchase and a PROSPECTUS in June 1988. The claimant called and spoke to the Respondent who assured him that this was a good investment. Claimant was satisfied and took no action.

The monthly statement for July 1989 for VMS INC showed a lower share price than original purchase and a yield that was questionable. Claimant again spoke to Respondent, was satisfied and took no action.

July 1991 VMS Inc. went bankrupt. Claimant took no action.

October 1991 a class action was brought against Prudential Bache. The Claimant excluded himself in November 1991.

Claimant filed for arbitration with NASD in MARCH 1993 naming Prudential Bache and his broker Robert Tonnesen as respondents.

Claimant writes that he received a PROSPECTUS and a CONFIRMATION of the VMS INC. purchase from Respondent in June 1988, spoke to Respondent and was reassured. While Claimant writes that he was unaware that Prudential Bache was a limited partner with VMS INC. there are at least 10 references about this item in the prospectus if Claimant had read or examined it. The Claimant who is a very conservative investor was best suited to know if this was of the type of a investment that he should have been in and not taken advice on a subject that he had not researched or read even the prospectus. Approximately four years had passed before Claimant took action to repudiate the VMS INC purchase by his broker. The length of time elapsed appears to show ratification of the purchase and only after it went bad was disaffirmance shown. Claimant could have sold out of his position on the American Stock Exchange and mitigated his loss except (as shown by his own writing) he was unwilling to pay the commission. The fact that Mr. Berner and Mr. Tonnesen are friends thus delaying this claim has no weight in evidence.

Claim Number 93-00987 is dismissed in its entirety.

Arnold Limsky, Public Arbitrator

*Respondent's Motion to consolidate claims #93-00987 & #93-00988 IS DENIED.