

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Rita Mizell; Rita's, Inc.; Rita's, Inc. Money Purchase  
Pension Plan; and Rita's Inc. Profit Sharing Trust

93-01366

Name of Respondents

Prudential Securities Incorporated;  
Gerald A. Kissner

**REPRESENTATION**

For Claimant: Rita Mizell; Rita's, Inc.; Rita's Money Purchase Pension Plan; and Rita's Inc. Profit Sharing Trust ("Mizell") were represented by Gerald S. Siegmyer, Esq. of Greenberg, Peden, Siegmyer, Oshman & Soussan, P.C., located in Houston, Texas.

For Respondents: Prudential Securities Incorporated ("Prudential") and Gerald Kissner ("Kissner") were represented by Gabriel Loubier, Esq. of Prudential Securities Incorporated, New York, New York.

**CASE INFORMATION**

Statement of Claim filed: April 5, 1993.

Claimants' Submission Agreement signed on: March 29, 1993.

Statement of Answer filed by Respondents Prudential and Kissner on: June 10, 1993.

Respondents Prudential and Kissner did not file executed submission agreements, but are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

**HEARING INFORMATION**

Pre-Hearing Conference: November 30, 1993 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: December 14, 1993 for Two (2) sessions;  
February 7, 1994 for Three (3) sessions; and  
February 8, 1994 for Two (2) sessions.

Hearing Location: Houston, Texas.

**CASE SUMMARY**

Claimants alleged that Respondent Kissner, while employed by or acting as an agent for Respondent Prudential, churned her accounts in order to generate excessive commissions. Mizell specifically alleged that:

1. Mizell opened six accounts with Kissner in 1980 when he was with E.F. Hutton with money received in a divorce settlement. Mizell had no prior investment experience and Kissner suggested that she place her money in conservative investments;
2. In 1988, Kissner began mishandling 5 of the 6 accounts after he left Hutton to work for Prudential.
3. From the inception of the account, all investment decisions were left to Kissner, who often purchased and sold securities in the account without the prior approval or knowledge of Mizell. Mizell relied on Kissner to handle the accounts. Without exception, Mizell acceded to Kissner's suggestions and often only learned of the trades after she received the confirmations or the monthly statements;
4. With a few exceptions, the funds were placed in appropriate investments, but the account was churned from approximately May, 1988 to September, 1991. When Mizell would question any of the transactions, Kissner always assured her that the trade was proper. When she expressed concern with her inability to read the monthly statements, Kissner assured her that everything was in order. In the meantime, Kissner was making short-term purchases in normally long-term investment such as mutual funds and bonds, often selling one fund to purchase others after a short holding period;
5. Mizell learned of the inappropriate trading level when her new tax preparer questioned the trading activity and Kissner failed to answer the questions satisfactorily;
6. The accounts failed to earn profits comparable to what other major stock and bond indexes earned during the years which are the subject of this claim due to Kissner's actions. While the accounts did earn interest and dividends in excess of the loss, the amount of the net gain was not equal to the gain the accounts should have earned;
7. Mizell could not accurately assess the status of her accounts because

Prudential would sometimes not reflect the mutual fund balance on the statements, the bonds transaction did not reflect commissions on the confirmation slips, and GNMA's purchased for the account paid interest and dividends monthly, making it difficult to figure out the account balance; and

8. Prudential is liable under them principals of respondeat superior and control person liability, as well as for negligently supervising Kissner.

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

1. Kissner discussed all trades with Mizell and received specific authorization to do the transaction before doing any trade. Kissner did not have power of attorney over the accounts and could not initiate transactions on his own. On occasion, Mizell would insist on particular trades even when Kissner recommended against them;
2. Mizell received all confirmations and monthly account statements listing each trade and was certainly aware of the trading in her account;
3. Mizell discussed various alternatives with Kissner before each trade. On occasion, Mizell purchased a product that could be profitable with the understanding that, should market conditions work against the product, the product would be sold and the funds invested elsewhere;
4. The trading objectives in the various accounts would, on occasion, change;
5. Kissner's actions with regard to Mizell's accounts were not done with the intent to defraud or with willful and reckless disregard for Mizell's interest; and
6. Mizell's attempt to recover alleged lost profits on the basis of gains in major stock and bond indexes is speculative.

In addition, the Respondents asserted several affirmative defenses, including:

1. The claims are barred by the applicable statutes of limitations;
2. Mizell's failure to act or object when allegedly unauthorized trading occurred is proof that Mizell accepted and ratified the way the accounts were handled;
3. Claimants have waived their claims of unauthorized trading by failing to object within a reasonable period of time;
4. The claims are barred under the doctrines of laches and estoppel;

5. The Claimants were contributorily negligent by failing to review their account statements and bring the alleged improper actions to Prudential's attention; and
6. The arbitrators have no authority to award punitive damages.

### **RELIEF REQUESTED**

Claimants requested entry of an award against Respondents for actual damages in an amount equal to the unreasonable commissions charged to the accounts, plus an amount equal to what the accounts should have earned when compared to major stock and bond indexes; interest on the above sum as provided by the Securities and Exchange act of 1934 and the Texas Securities Act; attorneys' fees as provided by the Texas Securities Act; and punitive damages under the Federal Arbitration Act and the Texas Arbitration Act in an amount considered reasonable by the arbitrators.

Respondents requested that the claim be denied in its entirety and the costs associated with defending the claim be assessed against the Claimants.

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

Respondent Prudential and Kissner did not file executed submission agreements, but answered, appeared, and testified at the hearing. In addition, Prudential and Kissner are an NASD member firm and associated person, respectively, and are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

During hearing on December 14, 1994, the Respondents orally presented a Motion to Dismiss based upon testimony adduced during the Claimants' case. After hearing argument, the Panel determined that the Motion would be denied.

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. The Statement of Claim is hereby dismissed and denied in its entirety; and
2. The parties shall bear their own costs, including attorneys' fees, except for

those specifically enumerated herein.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One Prehearing Conference session with an arbitrator x \$300.00 per session = \$300.00; Seven (7) Hearing sessions x \$600.00 per session = \$4,200.00; Total Forum fees = \$4,500.00.

The National Association of Securities Dealers, Inc. shall retain the \$250.00 claim filing fee and the \$600.00 hearing session deposit previously deposited by the Claimants. Claimants Rita Mizell; Rita's, Inc.; Rita's, Inc. Money Purchase Pension Plan; and Rita's Inc. Profit Sharing Trust are liable for and shall pay to the NASD additional forum fees in the sum of \$1,650.00. In addition, Respondent Prudential Securities Incorporated is liable for and shall pay to the NASD forum fees in the sum of \$2,250.00.

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

Concurring Arbitrators' Signatures  
Name

Date

/s/ Leighton E. Moss, Esq.  
Leighton E. Moss, Esq.  
Public Arbitrator  
Chairperson

April 8, 1994

/s/ Robert L. Bundschuh  
Robert L. Bundschuh  
Public Arbitrator

April 12, 1994

/s/ Mark S. Utkov  
Mark S. Utkov  
Industry Arbitrator

April 15, 1994

For NASD Use Only

Date of Decision: April 18, 1994