

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Robert V. Shoemaker & Marjorie L. Shoemaker

94-00147

Name of Respondents

Prudential Securities Incorporated;
W. C. Skinner;
Mark Trevillian

REPRESENTATION

For Claimants: Robert V. Shoemaker and Marjorie L. Shoemaker ("Shoemaker") were represented by Donald M. Feferman, Esq. of Feferman & Rehler, L.L.P., located in Corpus Christi, Texas.

For Respondents: Prudential Securities Incorporated ("Prudential"), W.C. Skinner ("Skinner"), and Mark Trevillian ("Trevillian") were represented by Gabriel Loubier, Esq. of Prudential Securities Incorporated, New York, New York.

CASE INFORMATION

Statement of Claim filed: January 14, 1994.

Claimant's Submission Agreement signed on: January 12, 1994..

Statement of Answer filed by Respondents on: March 29, 1994.

Respondents did not file executed submission agreements.

HEARING INFORMATION

Pre-Hearing Conference: December 9, 1994 for One (1) session before One (1) arbitrator.

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Hearing Dates/Sessions: February 14, 1995 for Two (2) sessions;
February 15, 1995 for Two (2) sessions;
February 16, 1995 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimants alleged that Skinner and Trevillian, while employed by or acting as agents for Respondent Prudential, engaged in an unconscionable number of purchase and sales of stocks and mutual funds in the Shoemakers' IRA and joint accounts. The Shoemakers specifically alleged that:

1. The Shoemakers opened separate IRA accounts with Prudential on April 14, 1987, with Skinner and Trevillian listed as joint account executives. A joint account was opened in January 1991 with Skinner. The stated investment objectives for all accounts were long-term growth and income;
2. The New Account Forms showed that Mr. Shoemaker was retired, that the Shoemakers would need steady income and that no risks could be taken with their retirement funds;
3. An examination of the trading activity reveals that the accounts were managed for the benefit of the Respondents and not the Shoemakers; the Shoemakers account instructions were ignored; and the accounts were over-traded and churned;
4. From August 26, 1987 through October 6, 1992, there were in excess of 100 trades in Mr. Shoemaker's retirement account which had average balance of approximately \$380,000. From February 3, 1991 through January 29, 1992, there were over 30 trades in the joint account which had an average balance of \$32,000; and
5. From April 1987, through September 1992, there were 34 purchases and 33 sales of mutual funds in Mr. Shoemaker's retirement account and the joint account, with the average holding period for a fund position being less than nine months. The Respondents traded in and out of the same funds, as well as in and out of funds with like investment objectives. In addition, from January 1, 1991 through April 9, 1992, there were approximately 58 purchases and sales of stocks in Mr. Shoemaker's retirement account, with trades in excess of

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\$1,000,000 in volume and an annualized turnover rate for the stock trading of approximately 400%.

Based upon the above allegations, Claimants asserted claims for violation of the Securities Act of 1934 (15 USC Sections 78a-78dd), particularly Section 10b and Rule 10b-5 promulgated thereunder; violation of Section 33 of the Texas Securities Act; violation of Sections 12(1) and 12(2) of the Securities Act of 1933 (15 USC Section 77a-77aa); violation of Title 2, Sections 17.41 et seq. of the Texas Deceptive Trade Practices-Consumer Protection Act; common law fraud under the law of the State of Texas; violations of Title 3, Sections 27.01 et seq. of the Texas Business and Commerce Code; breach of fiduciary duty as measured by the standards contained in NASD Rules of Fair Practice, the Rules of the New York Stock Exchange and the trust and reliance the Shoemakers placed upon the Respondents; negligence; violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 USC Section 1961, et. seq; and breach of contract.

Respondents denied the material allegations of the Statement of Claim, asserting that;

1. Claimants retained control of their accounts and all trades were discussed with Claimants before they were made. The Shoemakers received account documents, including monthly statements and confirms, and made informed decisions with respect to their accounts;
2. In making any investment recommendations, the Respondents considered the Shoemakers' investment objectives and did not generate trades solely to generate commission;
3. Respondent Trevillian left Prudential's employment in May, 1988, and during the period he was on the account, only three purchases were made by Claimants. Trevillian is not a proper party to the arbitration; and
4. After removing the losses related to limited partnerships (which are no longer a part of this arbitration) and adding the distributions the Claimants received the benefit of, the account reflects gains and not losses;

In addition, the Respondents asserted numerous affirmative defenses, including the following:

1. The Statement of Claim fails to state a claim upon which relief can be granted;
2. The Shoemakers directed and authorized all transactions and are estopped from bringing this action;

3. The Claimants ratified all activity in their accounts;
4. Respondents are not liable for any losses because they are within the risks the Claimants chose to assume;
5. Claimants' claims are barred, in whole or in part, by the applicable statute of limitations;
6. Respondents purported wrongdoing was not the proximate cause of the losses Claimants seek to recover;
7. Claims relating to transactions prior to January 12, 1988 are not eligible for submission to the NASD under Section 15 of the NASD Code of Arbitration Procedure;
8. Claimants' comparative fault, lack of diligence, and failure to conduct their own affairs reasonably, prudently and responsibly bar any recovery of damages;
9. Claimants are barred from recovery because they failed to mitigate their losses;
10. The Claimants have failed to state a cause of action under the RICO statute;
11. The Texas Deceptive Trade Practices Act is inapplicable to securities transactions; and
12. There is no private cause of action for violations of the NASD Rules of Fair Practice and the rules of the New York Stock Exchange.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for actual damages of not less than \$140,000.00, taking into account (i) the redemption fees incurred as the result of churning mutual funds, (ii) the excessive commissions earned from churning the accounts, and (iii) a reasonable return on the retirement funds invested, and taking into accounts the funds returned via dividends, interest and distributions; treble damages because of the nature of the violations of Texas and federal laws including RICO; attorneys' fees and costs.

Respondents requested that the claims be dismissed and that the Panel award them costs and

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fees. In addition, the Respondents requested sanctions against Claimants for the "frivolous" action brought against him.

OTHER ISSUES CONSIDERED & DECIDED

The Respondents failed to file executed submission agreements, but pursuant to Section 12 of the NASD Code of Arbitration Procedure, Respondents Prudential Securities Incorporated and W. C. Skinner are required to submit to arbitration, and appeared and testified at hearing.

On April 26, 1994, the Director of Arbitration ruled on Respondents' Motion to Dismiss pursuant to Section 12(d)(2) and Section 15 of the NASD Code of Arbitration Procedure. The Director determined that pursuant to Section 12(d)(2), the Claimant would proceed with the claim with the exception of the claims relating to Centacor, unless the claimants could provide documentation which clearly showed that they were not members of the litigation class. In addition, the Director determined pursuant to Section 15 that the Motion to Dismiss was denied in full regarding all purchases made on or after January 12, 1988 and those claims would be considered by the arbitrators. Furthermore, claims regarding purchases made prior to January 12, 1988 were ineligible for submission and the claim contained no allegations of wrongdoing regarding the purchases made on or after January 12, 1988. The parties were allowed to reassert these issues to the arbitrators.

By letter dated June 16, 1994, the Claimants advised the NASD that the parties had agreed that certain claims involving limited partnerships would not be a part of the arbitration, but that the Claimant would make those claims part of the Prudential Settlement Fund. Any claims involving the limited partnerships were not considered during this matter. An Amended Claim was filed August 18, 1994 removing those claims.

On December 16, 1994, a pre-hearing conference was held to discuss certain discovery issues. At the pre-hearing, the Claimants withdrew their claims against Respondent Trevillian and all claims under the Racketeer Influenced and Corrupt Practices Act. The Claimants confirmed the withdrawal of these claims by letter dated December 20, 1994.

At beginning of the hearing, the Respondents reasserted their Motion to Dismiss. Upon review, the Panel determined that the Motion would be denied.

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

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determination as follows:

1. Respondents Prudential Securities Incorporated and W.C. Skinner are jointly and severally liable for and shall pay to Claimants Robert V. Shoemaker and Marjorie Shoemaker the sum of \$126,300.00, plus interest at the rate of 6% per annum from February 17, 1995 until the award is paid in full;
2. In addition, Respondents Prudential Securities Incorporated and W.C. Skinner are jointly and severally liable for and shall pay to the Claimants, Robert V. Shoemaker and Marjorie Shoemaker the sum of \$100,000.00 as punitive damages. In determining to award punitive damages, the panel considered the arguments of the parties, and took judicial notice of *Miley v. Oppenheimer*, 637 F.2d 318 (5th Cir. 1981) and determined that authority existed for an award of punitive damages to the Claimants, Robert V. Shoemaker and Marjorie Shoemaker;
3. Furthermore, Respondents Prudential Securities Incorporated and W. C. Skinner are jointly and severally liable for and shall pay to the Claimants, Robert V. Shoemaker and Marjorie Shoemaker the sum of \$38,700.00 as attorneys' fees. In determining to award attorneys' fees, the Panel considered the arguments of the parties and determined that authority existed for an award of attorneys' fees to Claimants, Robert V. Shoemaker and Marjorie Shoemaker;
4. The claims pursuant to the Racketeer Influenced and Corrupt Organizations Act are hereby dismissed with prejudice and denied in their entirety;
5. The claims against Respondent Mark Trevillian are hereby dismissed with prejudice and denied in their entirety;
6. All other costs of arbitration shall be borne by the party incurring the cost, including any remaining attorneys' fees; and
7. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) pre-hearing conference with One (1) arbitrator x \$300.00 per session = \$300.00; Six (6) hearing sessions x \$1,000.00 per session = \$6,000.00; Total forum fees =

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\$6,300.00.

The Panel of Arbitrators has determined that the National Association of Securities Dealers, Inc. shall retain the \$250.00 claim filing fee and the \$1,000.00 hearing session deposit previously deposited by the Claimants, Robert V. Shoemaker and Marjorie Shoemaker. Respondents Prudential Securities Incorporated and W.C. Skinner are jointly and severally liable for and shall pay to Claimants Robert V. Shoemaker and Marjorie Shoemaker the sum of \$1,250.00 as reimbursement of the claim filing fee and hearing session deposit paid. In addition, Respondents Prudential Securities Incorporated and W.C. Skinner are jointly and severally liable for and shall pay to the NASD the sum of \$5,300.00 as forum fees.

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

Concurring Arbitrators' Signatures
Name

Date

/s/ Brantly Harris, Esq.
Brantly Harris, Esq.
Public Arbitrator
Chairperson

April 26, 1995

/s/ James P. Hoefling
James P. Hoefling
Public Arbitrator

April 27, 1995

/s/ Charles Zivney
Charles Zivney
Industry Arbitrator

May 3, 1995

For NASD Use Only
Date of Decision: May 3, 1995