

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Francis Yarbrough

95-01491

Names of Respondents

Prudential Securities, Inc. and
Michael S. McLean

REPRESENTATION

For Claimant: William S. Shepherd, Esq. of
William S. Shepherd & Associates
located in Houston, TX.

For Respondents: Donald R. Littlefield, Esq. of
Prudential Securities, Inc. located
in Dallas, TX.

CASE INFORMATION

The Statement of Claim was filed on or about March 24, 1995.

Claimant's Submission Agreement was signed on April 17, 1995.

The Joint Statement of Answer was filed on or about June 5, 1995.

Respondent, Prudential Securities, Inc.'s Submission Agreement signed on June 5, 1995 by Donald R. Littlefield, Vice President and Assistant General Counsel.

HEARING INFORMATION

The hearing was held in Houston, TX on the following dates:

- January 23, 1996 for two (2) hearing sessions
- January 24, 1996 for two (2) hearing sessions

CASE SUMMARY

In the Statement of Claim, Francis Yarbrough ("Yarbrough") alleged that, based upon the recommendations of Respondent, Michael S. McLean ("McLean") to the Claimant's son, Clinton K. Yarbrough ("Kraig"), Claimant and Kraig opened a joint account

using Yarbrough's tax I.D. number, so McLean could execute orders without having to contact the Claimant. As alleged, the majority of the Claimant's funds were initially invested in tax-free mutual fund

NASD Award 95-01491

Page 2 fo 5

shares yet, on McLean's recommendation, those shares were margined and purchases of stock began. Yarbrough contended that the stock purchases started with a small purchase of IBM then became larger and more speculative. According to the Claimant, the tax-free mutual funds were sold within a few months but other shares of similar mutual funds were bought and, only months later, also sold. Yarbrough further contended that before the end of the year, put and call option contracts were made in the account, all of which expired worthless. Yarbrough claimed that during the approximate thirteen months that the account was open with an average equity of \$200,000.00, Prudential Securities, Inc. and McLean entered into dozens of transactions in mutual funds, speculative stocks and options totaling more than \$2.2 million while earning Respondents more than \$35,000.00 in commissions and over \$10,000.00 in margin interest leaving Claimant with losses and costs. According to the Claimant, the Respondents knew of Yarbrough's and Kraig's lack of sophistication and experience. Yarbrough further claimed that the Respondents misrepresented their capabilities and intentions with the assets and that they employed excessive trading, churning or overtrading in the account. The Claimants made many specific allegations against the Respondents including, but not limited to, breach of contract and warranties, promissory estoppel, failure to supervise, intentional and negligent misrepresentations of material fact and various violations of the Texas Deceptive Trade Practices Act, the Federal Securities Exchange Act, Texas Securities Statutes and Section 27.01 of the Texas Business and Commerce Code.

In their Statement of Answer, Prudential Securities, Inc. and Michael S. McLean denied all allegations of wrongdoing alleging that Kraig authorized every transaction and made several unsolicited purchases and sales in the account. The Respondents contended that the purchases and sales in the account met the objectives of Kraig and Yarbrough and any loss incurred was due to market and economic forces beyond the control of Respondents. The Respondents asserted the following affirmative defenses:

1. The Statement of Claim failed to state a claim for which relief could be granted;
2. Claimant's transactions were appropriately entered and confirmed in accordance with industry, legal and regulatory requirements;
3. All or part of Claimant's damages were barred by applicable statutes of limitations;
4. Claimant was barred from recovery because she and or Kraig authorized, approved of and/or ratified all transactions of which sh complains;

5. Claimant was barred from recovery because she failed to timely complain;
6. Claimant was barred from recovery by the doctrines of laches, waiver and estoppel;
7. Any losses allegedly sustained by Claimant were caused by her or Kraig's own decisions to buy, hold or sell the securities

NASD Award 95-01491

Page 3 of 5

- of which she complained;
8. Any losses allegedly sustained by Claimant were caused by her failure to mitigate her losses;
9. Any losses allegedly sustained by Claimant were caused by the sole actions and/or negligence of Claimant or Kraig;
10. Claimant assumed the risks of investing in the securities of which she complained;
11. Any injury or loss to Claimant was the result of superseding or intervening causes beyond the control of Respondents;
12. There was no breach of any duty by Respondents;
13. Respondents did not make any misrepresentations to Claimant or omit to state any material facts;
14. Prudential Securities, Inc did not fail to supervise, and acted in good faith in reliance on Claimants representations; and
15. Claimant was not entitled to attorneys' fees or punitive damages under the laws and/or facts of the case.

RELIEF REQUESTED

Claimant requested an award in an amount between \$50,000.00 and \$100,000.00 in actual damages as well as treble damages and punitive damages plus costs, interest and attorneys' fees.

Respondents requested that the Statement of Claim be dismissed and that they be awarded costs.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies. The parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.

Respondent, Michael S. McLean failed to execute a submission agreement yet having answered the claim and testified at the hearing is required to arbitrate in accordance with Section 12 of the Code of Arbitration Procedure (the "Code").

In addition, the arbitrators have made the following finding:

Respondents must bear a large part of the responsibility for the obviously unsuitable investments made with the Claimant's funds and for the lack of supervision of McLean's activities. Responsibility

for Yarbrough's losses also falls on her son,

Kraig, who is not a respondent in this proceeding and against whom no claim is made. Kraig Yarbrough knew, or should have known, that the investments being made were unsuitable for life insurance proceeds belonging to a widow with little personal earning power. Kraig Yarbrough and McLean both lost sight of, or exhibited a reckless disregard for, the true ownership of the funds they were dealing with.

NASD Award 95-01491

page 4 of 5

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. Prudential Securities, Inc. and Michael S. McLean are hereby jointly and severally liable for and shall pay to the Claimant, Francis Yarbrough the sum of \$52,959.60 in compensatory damages along with simple interest at an annual rate of 6% from January 1, 1994 until December 31, 1995;

2. Prudential Securities, Inc. and Michael S. McLean are hereby jointly and severally liable for and shall pay to Claimant, Francis Yarbrough the sum of \$20,573.86 in attorneys' fees. In determining to award attorneys' fees, the arbitrators considered the legal authority provided by the Claimant in the Statement of Claim, brief(s) and testimony such as the Texas Deceptive Trade Practices Act, the Texas Securities Act and the Texas Business and Commerce Code;

3. Any relief not specifically granted herein is hereby denied in its entirety; and

4. The parties shall bear their own costs except for those specifically enumerated herein.

FORUM FEES

In accordance with Section 43(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference, which lasts four (4) hours or less. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

4 sessions X \$500.00 + \$2,000.00

The National Association of Securities Dealers, Inc. ("NASD") shall retain the claim filing fee in the amount of \$150.00 and the hearing session deposit in the amount of \$500.00 previously submitted by the Claimant, Francis Yarbrough. The NASD shall also retain the member surcharge in the amount of \$300.00

previously submitted by the Respondent, Prudential Securities, Inc. Claimant, Francis is hereby liable for and shall pay to the NASD the sum of \$300.00 in additional forum fees. Respondents, Prudential Securities, Inc. and Michael S. McLean are hereby jointly and severally liable for and shall pay to the NASD the sum of \$1,200.00 in forum fees.

NASd Award 95-01491
page 5 of 5

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

Concurring Arbitrators' Signatures
Name

Date

David G. Beerbower, Esq.
1996
David G. Beerbower, Esq.
Public Arbitrator, Chair

February 20,

John W. Field
1996
John W. Field
Public Arbitrator

February 27,

James M. Alexander
1996
James M. Alexander
Industry Arbitrator

February 29,

Date served by the NASD: March 5, 1996