

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Bush & Bush Partners

95-01803

Name of Respondents

Prudential Securities, Inc.
Franklin L. Utermehle

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on April 12, 1995 Claimant Bush & Bush Partners ("Claimant"), a partnership, through its representative, James J. Eccleston, Esq., of Uscian & Eccleston, located in Chicago, IL, alleged that the partnership held account #OWA-132070-19 with Respondent Prudential Securities, Inc ("PSI"). Claimant further alleged that Respondent Franklin L. Utermehle ("Utermehle"), the account representative at PSI, advised Lewis Bush and Donald Bush (the "Partners") to place \$20,000.00 in Polaris V Limited Partnership ("Polaris") in April 1989 and another \$20,000.00 in November of 1989 which they followed to their detriment. Claimant contended that Utermehle was negligent in rendering unsuitable investment advice because the Partners had informed Utermehle that they wanted safe and conservative investments for their retirements. Claimant further contended that Utermehle made several misrepresentations and omissions of material facts on which the Partners relied and that his conduct constituted a breach of the fiduciary relationship. Claimant alleged that PSI was also negligent and should be held liable under Respondeat Superior theory for failing to properly supervise its employee who acted within the scope of his employment. Claimant further alleged that "as a direct and proximate result of the wrongful conduct" of the Respondents, it has suffered a loss for which Respondents should be held liable.

Respondents Franklin L. Utermehle and Prudential Securities, Inc., through their representative and in-house counsel, Joseph M. McGill, Esq., maintained the Partners represented to them that their investment objectives included income but they were interested in depreciation for tax write-off purposes and that Polaris was entirely consistent with those objectives. Respondents further maintained there were no misrepresentations in connection to Claimant's purchase of Polaris as Claimant was provided with the prospectus which clearly spelled out the risks. Respondents contended that Utermehle's recommendation of Polaris was reasonable and justifiable because of the Partners net worth and investment experience. Respondents further contended that the Partners have held Polaris without any objection and were solicited to file this claim hindsight based on a "no fee unless recovery basis." Respondents maintained that PSI consented to a settlement agreement concerning certain Polaris claims, of which the Claimant was not entitled, but it did not admit or deny any wrongdoing concerning Polaris. Respondents further maintained that the Claimant's alleged damages were not proximately caused by PSI but by the adverse market conditions and, therefore, as a result of the above, they should not be held liable.

RELIEF REQUESTED

Claimant Bush and Bush Partners, requested \$9,818.00 in actual damages plus costs, interest and attorney's fees.

Respondents Franklin L. Utermehle and Prudential Securities, Inc., requested that the claims of the Claimant Bush and Bush Partners be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

The arbitrator considered and reviewed all documentation submitted by the parties concerning Respondents' Motion to Compel Production of Documents regarding Claimant's Oppenheimer accounts. The arbitrator denied the request.

AWARD

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Dora M. Lassinger, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant Bush and Bush Partners on March 3, 1995 and by Respondents Franklin L. Utermehle and Prudential Securities September 1, 1995 and June 13, 1995, respectively.

And, the Arbitrator, Dora M. Lassinger, Esq., 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 Respondents Franklin L. Utermehle, and Prudential Securities Inc., are jointly and severally liable and shall pay to the Claimant Bush and Bush Partners, \$9,818.00 in actual damages.
2. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant shall be retained by the NASD, Inc. The Respondents Franklin L. Utermehle, and Prudential Securities Inc., shall pay to the Claimant Bush and Bush Partners, \$150.00 as reimbursement for the filing fee.
3. All other relief requests are denied.

AFFIRMATION

I, DORA M. LASSINGER, ESQ., do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.


Dora M. Lassinger, Esq.

DATE OF DECISION: February 28, 1996