

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Michael L. Kincaid, and
Anne M. Kincaid, as Trustees for
the Michael and Anne Kincaid Living Trust,
and as Custodians for Samuel L. Kincaid and
Matthew M. Kincaid,

Claimants,

v.

No. 96-00280

Prudential Securities, Inc., and
Lawrence D. Adelman,

Respondents.

REPRESENTATION OF PARTIES

Michael L. Kincaid, and Anne M. Kincaid, as Trustees for the Michael and Anne Kincaid Living Trust,
and as Custodians for Samuel L. Kincaid and Matthew M. Kincaid ("**Claimants**") were represented
by John J. Miller, Esq., of the Law Offices of John J. Miller, P.A., Overland Park, Kansas.

Prudential Securities, Inc. ("**PSI**") was represented by Robert S. Getman, Esq., Prudential
Securities, Inc., New York, New York.

Lawrence D. Adelman ("**Adelman**") was represented by Richard G. Himelrick, Esq., of Byrnes &
Himelrick, PLLC, Scottsdale, Arizona.

CASE INFORMATION

The Statement of Claim was filed on or about January 17, 1996. Claimants' Submission Agreements
were signed on January 15, 1996 and January 22, 1996.

PSI's Statement of Answer and Counterclaim for costs was filed on or about July 8, 1996. PSI's
Submission Agreement was signed on or about July 8, 1996.

Adelman's Statement of Answer was filed on or about March 26, 1996. Adelman's Submission
Agreement was signed on March 21, 1996.

HEARING INFORMATION

A pre-hearing conference was held on September 30, 1996 for one (1) session.

The hearing was held on October 14, and 15, 1996 for two (2) sessions each day, and October 16, 1996 for three (3) sessions in Kansas City, Missouri for a total of seven (7) sessions.

CASE SUMMARY

Claimant alleged that Respondents PSI and Adelman: Committed fraud and misrepresentations through concealing material information, and making false representations or made representations they should have known were false; were negligent due to their failure to determine whether the investments were suitable for the Claimants and completely disregarded their duties to Claimants as financial advisors; made negligent misrepresentations of material fact and negligent omissions of the speculative nature of the securities traded in Claimants' accounts; breached their contract by inducing and directing unsuitable transactions and by failing to follow appropriate supervisory procedures; breached their fiduciary duty to the Claimants; violated A.R.S. § 44-1991 to 44-2005; and violated K.S.A. § 17-1268. Claimants also alleged that PSI failed to use reasonable diligence in supervising Adelman and monitoring Adelman's abusive practices. The allegations arose out of the purchase of convertible subordinated debentures of Jamesway Corporation ("Jamesway") and subordinated debentures of Comtronix Corporation ("Comtronix").

PSI denied each and every allegation contained in the Statement of Claim, and asserted a Counterclaim for costs. PSI asserted the following affirmative defenses: Claimants' accounts were handled properly and in accordance with the "Know your Customer" Rule of the New York Stock Exchange, Inc. and the "Suitability Rule" of the National Association of Securities Dealers as well as with other applicable rules and regulations; there is no private right of action allowing damage awards for violations of NASD rules; Claimants ratified or acquiesced in the contested trades, and waived, or is estopped from making claims concerning them; Claimant failed in his duty to mitigate his damages; Claimants' account wasn't invested in contradiction to his investment aims; any losses sustained by Claimants are attributable to market conditions and to his own investment decisions, and any action or inaction on PSI's part was not the proximate cause of any losses; at all material times, and in all material matters, PSI and Adelman acted in good faith, with no intent or device to act recklessly with respect to Claimant; PSI and Adelman did not conspire or scheme to defraud Claimants, or aid and abet any other persons to make any untrue statement of material fact, employ any device, scheme or artifice to defraud or engage in any deception, manipulation, act, practice or course of business which operated as a fraud in connection with the transactions alleged in the Statement of Claim; Claimants' claims are barred by their own contributory negligence in connection with the investments; even if Claimants were entitled to any damages, such damages must be mitigated and reduced by the proportion which Claimants' own negligence and culpable conduct caused the damages; Claimants' claims are time-barred by the statutes of limitations and the doctrines of laches, waiver and estoppel; Claimants agreed, in several Customer Agreements, that they would have no claim for any error or omission or other claim unless they promptly notified PSI in writing of any complaint, which they did not do; Claimants' demand for punitive damages is barred by the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and Claimants failed to state a claim upon which relief may be granted.

Adelman agreed with the Answer filed by PSI and adopted it by reference. Adelman specifically stated that: Claimants took an active interest in the market and maintained accounts at both PSI and

a discount brokerage firm; Claimants also speculated in the new issues market; during the time Claimants maintained their accounts at PSI, Claimants followed the market through a computer software system, and frequently called Adelman to discuss news or financial information they received through the computer's on-line service; during the time the accounts were open, Claimants purchased several unrated bonds and traded for sizeable profits; Claimants were fully aware that in buying bonds such as Jamesway and Comtronix, they were purchasing lower quality bonds that offered substantial gains at commensurate risk; and Claimants were knowledgeable investors who made their own investment decisions with full understanding of what they were doing.

RELIEF REQUESTED

Claimant requested an award of the following: Actual losses net of sales in the joint account of Michael and Anne Kincaid, in the amount of \$227,616 on the Jamesway bonds and \$88,503 on the Comptronix bonds; rescission of the Comptronix bond sales in the accounts of Samuel and Matthew Kincaid in the amounts of \$30,630 and \$38,205 respectively; damages in the amount that Claimants' invested assets would have earned had they been suitably managed in accordance with the Claimants' investment objectives; such interest as allowed by law; punitive damages to punish PSI and Adelman and to deter others from similar misconduct; Claimants' costs and expenses, including attorneys' fees; and such other relief as the arbitration panel deemed just and proper.

PSI requested that this claim be dismissed in its entirety, and that all costs and fees be assessed against the Claimants.

Adelman requested that this claim be dismissed in its entirety, and that all costs and fees be assessed against the Claimants.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the appointment of a panel, Respondents Adelman and PSI requested that the Director of Arbitration change the venue of this arbitration from Kansas City, Missouri to Phoenix, Arizona. After reviewing the request, the response from Claimants, and the pleadings, the requests were denied.

On September 30, 1996, a pre-hearing conference was set for the parties to present their relative positions on the following topics: Adelman's and PSI's Motion to Change Venue from Kansas City, Missouri to Phoenix, Arizona; PSI's and Adelman's Requests for Consolidation of this arbitration with NASD Arbitration number 96-01662, captioned William Kincaid v. Prudential Securities, Inc. and Lawrence D. Adelman; outstanding discovery matters; and PSI's and Adelman's Motion to Strike Portions of the Statement of Claim. After hearing argument from the parties, review of the relevant documents and deliberation, the undersigned arbitrators denied PSI's and Adelman's motions set forth above.

Respondent PSI did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the

NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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:

Respondents Prudential Securities, Inc. and Lawrence D. Adelman are jointly and severally liable for, and shall pay to the Claimants the sum of \$217,000, as an award of compensatory damages, together with interest at the rate of 9% per annum commencing October 16, 1996 until paid.

Respondents Prudential Securities, Inc. and Lawrence D. Adelman are jointly and severally liable for, and shall pay to the Claimants the sum of \$10,000 as an award of Claimants' attorneys' fees. The authority for the award of attorneys' fees is §17-1268, Kansas Statutes Annotated.

Respondents Prudential Securities, Inc. and Lawrence D. Adelman are jointly and severally liable for, and shall pay to the Claimants the sum of \$950 as reimbursement for filing fees and hearing session deposit paid by the Claimants to initiate this arbitration.

Except as expressly set forth in this Award, each party shall bear its own costs and expenses associated with this arbitration.

All other claims/requests for relief not specifically set forth herein are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were seven (7) regular sessions x \$750 and one (1) pre-hearing session x \$300 = \$5,550 in forum fees. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, PSI is liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the sum of \$500 for the filing fee associated with its Counterclaim for costs.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously paid by PSI.

Additional forum fees in the amount of \$4,800 are assessed by the arbitrators jointly and severally against PSI and Adelman.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

Donald B. Clark
Hon. Donald B. Clark
Public Arbitrator, Presiding Chair

/s/

November 7, 1996

Richard D. Sewell
Richard D. Sewell
Public Arbitrator

/s/

November 5, 1996

Bruce Keplinger
Bruce Keplinger
Industry Arbitrator

/s/

November 11, 1996