

**N.A.S.D. AWARD**

**NASD Regulation, Inc. Office of Dispute Resolution**

**In the Matter of the Arbitration Between**

**Name of Claimants**

**Fred Susami and Sally Ann Susami**

**NASD CASE NO. 96-04729**

**Name of Respondents**

**Prudential Securities Incorporated,  
Cecil G. McGavern and  
Rod Olson**

**REPRESENTATION**

**For Claimants: Stephen Murphy, Esq. of Piro & Dicks, Longwood, Florida.**

**For Respondents: Janet V. McKenna, Vice President / Assistant General Counsel of Prudential Securities Incorporated. On November 25, 1997, NASD Regulation, Inc. received notice of substitution as counsel for Respondents by Frederick S. Schiela, Esq. of Holland & Knight LLP, Tampa, Florida.**

**CASE INFORMATION**

**Statement of Claim filed on October 24, 1996. Claimants' Submission Agreement signed on September 12, 1996.**

**Statement of Answer filed by Respondents Prudential Securities Incorporated ("Prudential"), Cecil McGavern ("McGavern") and Rod Olson ("Olson") on March 12, 1997. Respondent Prudential's Submission Agreement signed on March 10, 1998 by Jon C. Tomion. Respondent McGavern's Submission Agreement signed on March 10, 1998. Respondent Olson did not file an executed Submission Agreement.**

**HEARING INFORMATION**

**On July 14, 1997, a telephonic pre-hearing conference lasting one session was conducted with the arbitration panel. On March 9, March 10 and March 11, 1998, in Tampa, Florida, hearings lasting five sessions were conducted with the arbitration panel.**

**CASE SUMMARY**

**Claimants alleged the following: that in June of 1995, Mr. and Mrs. Susami deposited their entire retirement savings of \$430,000.00 with Prudential; that the Claimants felt at the time that they needed help managing their retirement savings, and therefore, they turned to Prudential for their professional money management expertise; that in exchange for Prudential's professional money management services, Claimants agreed to pay Prudential an annual management fee equal to 2.5% of the assets under**

management; that initially, Prudential presented Claimants with two different management programs, "Quantum Portfolio Management" ("Quantum") and "Prudential Securities Portfolio Management"; that Claimants elected the Quantum program because it included strict restrictions on the broker; that Quantum required Prudential brokers to sell stocks from an account which fell below the strict criteria imposed by Prudential's research department; that three months after the Claimant's account was opened, Respondent McGavern, the Prudential broker, contacted Claimants to encourage them to shift to a Prudential Securities Portfolio Management Account; that in a letter to Claimants, McGavern told them that the only difference between the Quantum and the Prudential Portfolio Management account was that the Prudential Portfolio Management account allowed for covered options writing; that Prudential and McGavern omitted to tell Claimants that the Prudential Portfolio Management account did not have the strict controls on the broker's discretion that the Quantum account imposed; that under the Prudential Portfolio Management account, the broker was not required to sell stock but instead had discretion to hold a stock in the account even after Prudential's research department rated a stock below the minimum acceptable standards required for a stock in the Quantum program; that this omission was extremely damaging for Claimants since the stocks selected for their account by McGavern and Prudential performed miserably and the value of the Claimant's retirement account declined precipitously while it was managed by Prudential; that Prudential managed the Claimant's account to a 14% loss; that this loss occurred during a period when the stock market, as measured by the S&P 500, was up over 23% for the same period, and therefore, Claimant's account while professionally managed by Prudential under performed the market by over 37%; that Prudential charged the Claimants over \$10,000.00 in management fees to lose their retirement savings in the midst of a "Bull" market; that Prudential misrepresented the type of management services they were providing for Claimants; that Claimants wanted an account with strict restrictions imposed, but Prudential invested their savings into an account that gave its broker substantial discretion; and, that Prudential's broker, against the wishes of the Claimants, utilized that discretion and created enormous losses in the Claimant's account.

Respondents denied each and every allegation in the Statement of Claim and asserted the following: that the accounts at issue were managed professionally, appropriately, and in accordance with the specific guidelines and parameters established not only by the managed account programs themselves but also by the Claimants when they opened the accounts; that every security recommended to Claimants was suitable, and every security selected for Claimants' accounts was consistent with Claimants' expressed desire for a portfolio of moderately aggressive stocks with good capital appreciation potential over a minimum investment time horizon of three to five years; that Respondents complied in all respects with the specific guidelines of the managed account programs selected by Claimants, and Claimants' losses were caused not by Respondents' actions, but instead by Claimants' decision to prematurely abandon the managed account programs roughly twelve months after Claimants fully funded their managed accounts; and, that had Claimants remained with the managed account programs for the period of time they selected when they opened their accounts, the accounts would have been profitable.

#### **RELIEF REQUESTED**

Claimants requested an award against Prudential, McGavern and Olson, jointly and severally, of compensatory damages in the amount of \$250,000.00 plus pre-award and post-award interest from the date of the original investment, attorneys' fees, costs and such other relief deemed appropriate under the circumstances.

Respondents requested that the Statement of Claim be dismissed in its entirety, and that they be awarded their attorneys' fees incurred in these proceedings.

### OTHER ISSUES CONSIDERED & DECIDED

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 NASD Regulation, Inc.

Prior to the commencement of the evidentiary hearing, by letter dated January 9, 1998, Claimants advised NASD Regulation, Inc. that all claims against Respondent Olson had been withdrawn.

At the conclusion of Claimants' case during the evidentiary hearing, Respondents Prudential and McGovern moved to dismiss the Statement of Claim, which motion was opposed by Claimants. The Panel denied the motion.

The issues of entitlement to and amount of attorneys' fees were not submitted to the Panel for determination.

### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post-hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants Statement of Claim is dismissed in its entirety.
2. All other claims for relief are denied.

### FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$4,500.00 (five sessions x \$750.00 per session, plus one pre-hearing conference with the Panel x \$750.00) as follows:

1. Claimants are hereby assessed the sum of \$2,250.00, for which NASD Regulation, Inc. shall retain the \$750.00 hearing session deposit as well as the balance of \$375.00 remaining from the \$750.00 postponement fee deposit previously paid by Claimants in partial satisfaction thereof, leaving a balance due in the amount of \$1,125.00.
2. Respondents Prudential and McGovern are hereby assessed, jointly and severally, the sum of \$2,250.00.
3. Respondent Prudential is liable and shall pay to NASD Regulation, Inc. the sum of \$375.00 representing its 50% share of the \$750.00 fee for the postponement of the January 5 - 9, 1998 scheduled hearing dates.
4. NASD Regulation, Inc. shall retain the \$200.00 claim filing fee and the \$375.00 postponement fee (for the postponement of the January 5 - 9, 1998 scheduled hearing dates) previously paid by Claimants, as well as the \$350.00 member surcharge previously paid by Respondent Prudential.

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

Concurring Arbitrators' Signatures  
Name

Public/Industry

/s/  
Albert R. Neville, Jr.  
Chairperson

Public

/s/  
Donald M. Macdonald

Public

/s/  
Robert W. Meyer

Industry

Date of Decision: May 18, 1998