CASE SUMMARY

John Doe
v.
Full-Service Brokerage Firm

Claimant's Attorney: David E. Robbins, Esquire
Kaufmann, Feiner, Yamin, Gildin & Robbins, LLP
777 Third Avenue
New York, NY 10017

Defense Attorneys: withheld

Claimant's Expert: Harold J. Bursztajn M.D.
Director,
Harvard Medical School Program in Psychiatry & the Law
96 Larchwood Drive
Cambridge, MA 02138

Total Award: A lump-sum settlement. [Amount withheld by confidentiality agreement.]

Case Summary:

The claimant was an aging Polish-born child survivor of the Holocaust who had made millions of dollars in the taxicab business in New York City before being disabled by neuropsychiatric impairments in the early 1990s. Thereafter, no longer able to work, he invested most of his life savings with a well-known full-service brokerage firm. When Doe initiated this relationship, he told the brokers that he was a conservative investor concerned about safeguarding his assets and, as a result, his opening account forms indicated such. However, toward the end of the decade, at the recommendation (according to him) of the firm's brokers, increasingly risky stock trading occurred.

Dr. Harold Bursztajn, a forensic neuropsychiatric expert, was retained by Doe's attorneys to analyze the fact pattern and to examine Doe. Subsequent to completing his forensic neuropsychiatric evaluation he prepared a report wherein he opined that he was prepared to testify that Doe had severely diminished neuropsychiatric capacity to engage in or consent to trading. Thus it was an irrational, inconsistent, erratic, and frenetic pattern of trading contrary to his clearly stated self-identification as a conservative investor which resulted in the losses in question. Over $200 million of largely speculative securities, on margin, were traded, which resulted in millions of dollars of losses and over $700 thousand of margin interest, until the firm finally told Doe he must close his accounts. By contrast, when Doe went to a second brokerage firm, his trading lasted less than two weeks before that firm closed his accounts.

Dr. Bursztajn's detailed forensic neuropsychiatric analysis of how Doe's abnormal mental condition made him unable to make informed investment decisions supported Doe's attorney's case development. On examination it emerged that Doe was chronically distracted by the haunting voices of relatives murdered in the Shoah, relatives he had never met yet whose voices he lived with every day. Doe lived with constant fear, pain, and helplessness. At times his suffering became so excruciating that he needed to be hospitalized. A man of great courage, he struggled with his suffering valiantly and, although severely debilitated, was able to avoid the endpoints of patients who otherwise reach their limits and become at high risk for long-term hospitalization, institutionalization, or suicide. Further support for this analysis was obtained when comparing trading records with medical records; that is, a pattern of irrational trading was evident at the same time he was under the care of psychiatrists, institutionalized, or hospitalized. For example, while he was institutionalized for a full month, his accounts engaged in over $7 million of transactions.

Doe sued the brokerage firm in arbitration for breach of fiduciary duty, claiming that his initial instructions, together with his evident mental impairment, created a duty on the part of his brokers to safeguard his investments and only to recommend a suitable investment strategy and appropriate investments.

The case proceeded on the controversial principle of "economic suicide" that is examined by the claimant's New York City attorney, David E. Robbins, in his two-volume treatise, *Securities Arbitration Procedure Manual* (5th ed., 2003, Matthew Bender). While the claimant insisted that his purchases were the result of recommendations from his brokers, the brokers contended that the millions and millions of dollars of trading were strictly "unsolicited," the idea of the customer alone, and that they had no obligation to question the propriety of "his" self-directed trading, even if its nonsensical patterns would lead to inevitable financial ruin.

Normally, an investor who engages in self-directed trading is considered responsible for his actions. However, a number of factors may create a duty on the part of a brokerage firm to prevent an investor from engaging in strategies that expose him to intolerable risk. Among these factors are the customer's expressed investment objectives, in this case conservative ones. In addition, personal characteristics of the customer, in this case mental impairment, may increase the customer's dependence on the broker and imbue the broker with *de facto* control of the account. The question becomes: Who was, in reality, making the investment decisions? If the customer evidences his dependence on the broker by consenting to all of the broker's recommendations, then many commentators argue that a fiduciary relationship has been established, which can then be breached by the broker if the recommendations are inconsistent with the customer's stated investment objectives. Viewed as either unsuitable recommendations or the broker's knowing assistance in a customer's economic suicide (where the customer is reliant on the broker), the result is the same: breach of fiduciary duty. In the latter instance, some arbitration panels have ruled that the broker may have a duty to warn the investor of the likely consequences of his investment decisions and to even refuse to carry out clearly unsound orders. The internal Compliance Manuals of some brokerage firms even impose those obligations on their brokers.

Dr. Bursztajn, Director of the Harvard Medical School Program in Psychiatry and the Law, opined that, during the years in question, John Doe, first as a child and then as an adult, suffered from a severe psychosis and panic disorder, which impaired his ability to make sound investment decisions. These conditions may have been caused in part by an early life history of overwhelming dislocation, discontinuity, and loss, compounded by subsequent losses of loved ones, and in part by brain damage resulting from brutal beatings Doe endured in his teens in Israel and as a professional boxer, thereafter, in the United States. Dr. Bursztajn referred to his published work on the neuropsychiatric assessment of competence. Both cognitive and affective factors need to be considered, as illustrated in his chapter on "Competence and Insanity" in Jacobson and Jacobson's text, ***Psychiatric Secrets*** (2nd ed., Philadelphia: Hanley & Belfus, 2000; 485-498).

This opinion was supported by Dr. Bursztajn's forensic neuropsychiatric examination of Doe, the observations of Doe's long-time psychiatrist and internist, and psychological testing. In his extensive history of medical and psychiatric treatment, no clinician had ever suspected Doe of faking, malingering, or exaggerating. In the arbitration, the brokerage firm initially took the position that Doe was faking his illness and that none of its employees ever saw him evidence such illness. However, both the claimant's expert and Doe's treating physicians found his neuropsychiatric impairment to be so evident to laymen and doctors alike that his brokers *should have known* that he was profoundly disorganized, driven by pervasive fear and anxiety, incapable of elementary reality testing, unable to concentrate and focus attention, incapable of engaging in complex financial decision making, and totally trusting of such authority figures as brokers who worked at large, international brokerage firms. He could not have understood the nature of the securities in his accounts or the risks of trading speculative stocks on margin. Besides his demeanor (in particular, his pressured, incoherent speech), a clear indication of Doe's incompetence was his drastic, unexplained shift from conservative to high-risk investments. Trading profits was unnecessary to maintain a lifestyle that was being more than adequately funded through the income generated from conservative investments. Trading losses, however, dislodged his fragile mental state. In Bayesian terms, given the expectations Doe had set up for his brokers, the probability that such a radical departure was based on an informed, considered decision on his part was very low. This behavior instead should have given his brokers grounds for questioning whether Doe really knew what he wanted to do. Anyone could see that Doe was a very troubled person.

Doe's life history made him especially susceptible both to the undue influence of his brokers and to the emotionally devastating consequences of the loss of his life savings. His survival as a Jewish infant in Nazi-occupied Poland depended on his mother's having the resourcefulness and financial wherewithal to provide false identities for her and for him. Money was a condition of survival. Even so, his life also depended on his mother's being able to trust unreservedly the people in whose care she placed him while she was shipped off to a labor camp. These early experiences left him pathologically trusting of people who were in charge of his financial security - his brokers. Moreover, his emotional dependence on having money heightened his confusion and distress when faced with financial decisions. The subsequent repeated head trauma he suffered resulted in further impairment of executive functions, including being able to bear loss without compounding it to avoid overwhelming helplessness and fear.

According to the "bankroll effect," articulated most recently by the Nobel Prize-winning economic psychologist Daniel Kahneman, the more assets one has, the more one can afford to lose. Given his feeling that his life depended on his having a secure financial cushion, John Doe did not have the psychological wherewithal to take large financial risks, as he recognized when he presented himself to the brokerage firm as a conservative investor. Thus, his extensive and debilitating monetary losses, compounded by the feeling that "his friends" at the brokerage firm betrayed his trust, exacerbated his mental disorder and made it less likely that he could reconstitute himself.

Dr. Bursztajn also provided litigation consultation during discovery and mediation. Fortunately, Doe's attorneys, working with Dr. Bursztajn, were able to settle the case in mediation, which has allowed Doe to regain a semblance of control over his financial affairs and avoid the risk of a complete loss if the arbitrators had ruled against him. Indeed, after the settlement was negotiated, Dr. Bursztajn was asked by Doe for his opinion as to whether to complete the settlement process or to proceed to arbitration. Rather than telling Doe what to do, the doctor asked: "What would you have done if you had gone forward with the case and lost it?" Doe responded: "I would have killed myself." On reflection, Doe accepted the settlement, satisfied that what happened to him had been meaningfully understood.