

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

BEFORE THE
SECURITIES COMMISSIONER

In the Matter of Harvey Senn and)
Lutheran Brotherhood Securities)
Corporation, and their officers,)
directors, agents and employees.)
Respondents)

OPINION AND ORDER

**TO: HARVEY SENN AND LUTHERAN BROTHERHOOD SECURITIES
CORPORATION, RESPONDENTS.**

On July 21, 1997, the office of the North Dakota Securities Commissioner received a complaint from David Drovdal of Arnegard, North Dakota, for variable annuities that Harvey Senn of Sidney, Montana sold to David Drovdal's retired parents, Olaf and Margaret Drovdal of Watford City, North Dakota. The office of the Securities Commissioner investigated the complaint, conducted a hearing on November 3, 1997, and gathered information to make the following Findings of Fact and Conclusions of Law and to issue an order in this matter.

FINDINGS OF FACT

1. On December 9, 1992, Harvey Senn accompanied a Lutheran Brotherhood agent to sell a \$20,000 variable annuity to Olaf Drovdal. Senn did not sign documents for the sale because he was new in the business and he was not registered to sell securities in December 1992. Senn was approved for salesman registration with the National Association of Securities Dealers (NASD) on June 15, 1993, with the Montana Securities Division on June 18, 1993 and with the North Dakota Securities Commissioner on June 21, 1993.

2. Except for a few transactions, there was not significant activity in Olaf Drovdal's account with Lutheran Brotherhood from December 1992 until the fall of 1995. On September 27, 1995, Senn filled out a Portfolio Allocation Questionnaire which described 77-year-old retired Olaf Drovdal as an "aggressive" investor, which was not consistent with his financial background. The same form listed Drovdal's previous investments as entirely cash and bonds but no stocks or other riskier investments and categorized Drovdal as an aggressive investor with a "long-term" investment time horizon. Another page of the same form listed Olaf Drovdal's assets as \$240,000 in savings, \$234,000 in a business, \$70,000 in a residence and only \$14,000 (approximately 2%) in mutual funds. The lines for "stocks" and "bonds" were blank. The four categories of "Risk Temperament" on the form included "saver, conservative, moderate, and aggressive." Despite the large proportion of assets in savings and conservative investments, Olaf Drovdal was described as an investor with a "moderate" risk temperament rather than a "saver" or "conservative." This description was not consistent with the Portfolio Allocation Questionnaire dated on the same day that described Olaf Drovdal as an "aggressive" investor. The same Questionnaire also categorized Olaf Drovdal as an investor with "growth" rather than "income" as his investment objective.
3. Two weeks later on October 12, 1995 Olaf Drovdal was hospitalized for confusion, congestive heart failure, diabetes, and plural effusion. Senn visited Olaf Drovdal in the hospital. On October 30, 1995, Olaf Drovdal

executed a comprehensive and detailed General Durable Power of Attorney to appoint his son David Drovdal as his attorney-in-fact. Among other powers, the Power of Attorney included the transfer to David Drovdal of the power "to forgive, request, demand, recover, collect, receive, or hold all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interest, stock certificates, bonds, dividends, certificates of deposit, annuities . . .," the power "to purchase private, public or governmental securities," the power "to acquire, purchase, exchange, grant options to sell, and sell and convey real or personal property," and the power "to maintain, repair, improve, invest, manage, insure, rent, lease, encumber, and in any manner deal with any real or personal property" owned by Olaf Drovdal.

4. Olaf Drovdal has continued to be confused and in poor health since his 1995 hospitalization and he has received medical care in nursing homes in Watford City, North Dakota and New Brighton, Minnesota. After Olaf's October 1995 hospitalization, Harvey Senn visited Olaf Drovdal once or twice a month and executed five securities transactions for a total of \$50,000. In the Spring of 1996 David Drovdal asked Senn not to conduct any transactions for Olaf unless he notified David Drovdal, and Senn promised David Drovdal that he would notify him of any transactions involving Olaf Drovdal. After that promise, Senn sold seven variable annuities to Olaf and Margaret Drovdal for a total of \$80,000 without notifying David Drovdal about any of the transactions. Several of the transactions were not suitable investments for

Olaf Drovdal because Senn sold long-term and high-yield (high-risk) investments to a confused elderly investor who should have been described as a "saver" or "conservative" investor rather than an "aggressive" investor on Lutheran Brotherhood forms. Furthermore, Senn's breach of his promise to inform David Drovdal of any transactions involving Olaf Drovdal was unethical, deceptive, and unconscionable under the particular circumstances.

5. Lutheran Brotherhood failed to supervise Harvey Senn in designing and allowing the use of the Portfolio Allocation Questionnaire to categorize Olaf Drovdal as an "aggressive" investor and by processing unsuitable, high-risk, and inappropriately long-term transactions in 1995, 1996, and 1997. Harvey Senn acted as an agent for Lutheran Brotherhood when he engaged in unethical, deceptive, and unconscionable conduct for the sale of unsuitable investments to Olaf Drovdal and in the breach of his duty to inform David Drovdal of any financial transactions involving Olaf Drovdal after the spring of 1996.
6. On October 13, 1997, the office of the Securities Commissioner issued a subpoena duces tecum and interrogatories which compelled production of documents and answers to interrogatories on or before Monday, October 27, 1997. Harvey Senn and Lutheran Brotherhood refused to produce the requested documents before the hearing on Monday, November 3, 1997. The office of the Securities Commissioner still has not received a signed copy of the answers to the interrogatories. Harvey Senn and Lutheran Brotherhood are required by law to maintain books and records of the

requested information and to make the information immediately available for inspection by the office of the Securities Commissioner anytime during normal business hours. The substantial delay in producing basic information and documents involving Olaf Drovdal was a failure by Senn and Lutheran Brotherhood to maintain appropriate books and records and a failure to comply with the subpoena power of the office of the Securities Commissioner.

7. At the November 3, 1997 hearing, Senn and Lutheran Brotherhood declared an intention to take the deposition of Olaf Drovdal's wife, Margaret Drovdal, to question her memory of Olaf's transactions. On November 7, 1997, the office of the Securities Commissioner received a letter from Olaf's son, Dennis Drovdal. Dennis has explained that he told Harvey Senn he had a power of attorney for his mother Margaret Drovdal at the same time and place that David Drovdal told Harvey Senn he had a power of attorney for Olaf. On November 7, 1997, the office of the Securities Commissioner received a letter from Doctor Gary W. Ramage of the McKenzie County Clinic for Medcenter One in which Dr. Ramage has stated that Margaret Drovdal "is extremely hard of hearing and has poor visual acuity, secondary to bilateral cataracts." At the November 3, 1997 hearing, the attorneys expressed their intentions to prepare and present additional briefs, documents, arguments, issues, and witnesses.
8. The parties in this matter had sufficient notice before the November 3, 1997 hearing to present evidence, witnesses, documents, and issues that were

material and relevant to the complaint of David Drovdal for the alleged unsuitable and unauthorized sales of securities by Harvey Senn and Lutheran Brotherhood to Olaf Drovdal. In the opinion of the Commissioner, sufficient relevant evidence has been gathered to conclude the investigation of this matter and to issue an order for the complaint on file. If a different complaint is filed or if the parties request a more formal hearing in the Office of Administrative Hearings or in district court litigation under NDCC 10-04-15 for fraud or under NDCC 10-04-17 for rescission, then the parties might have an opportunity to present additional arguments and evidence.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, the office of the Securities Commissioner makes the following Conclusions of Law:

1. Based upon information in documents prepared by Harvey Senn and Lutheran Brotherhood, the description of Olaf Drovdal as an "aggressive" investor was false and the sales of higher-risk securities to Olaf Drovdal were unsuitable investments that violated Article III, Section 2 of the NASD Rules of Fair Practice. A violation of "any applicable provision of the Rules of Fair Practice" is a violation of North Dakota Securities laws (See NDAC §73-02-09-02(29), NDAC §73-02-09-03, NDCC §10-04-11 and NDCC §10-04-16). The commissioner has authority under NDCC 10-04-16 to assess a civil penalty of \$10,000 against Senn and Lutheran Brotherhood for their joint and several liability for each unsuitable sale.

2. Olaf Drovdal was elderly, confused and in poor health when Harvey Senn sold him securities in 1995, 1996, and 1997. Immediately after Olaf's hospitalization in October 1995, Olaf transferred a comprehensive power-of-attorney to his son David Drovdal. Harvey Senn breached his promise to inform David Drovdal about any financial transactions involving Olaf Drovdal when Senn continued to sell securities to Olaf Drovdal without telling David Drovdal. Harvey Senn acted as agent for Lutheran Brotherhood in a manner that was false, dishonest, deceptive, unethical, unconscionable, and in violation of NDCC 10-04-11(c). A violation of NDCC 10-04-11(c) may be the basis for the Securities Commissioner to suspend or revoke the salesman registration of Harvey Senn and the dealer registration of Lutheran Brotherhood.
3. It is an unlawful violation of North Dakota Securities law to "execute a transaction on behalf of a customer without authorization to do so" (See NDAC §73-02-09-02(4), NDAC §73-02-09-03, NDCC §10-04-11 and NDCC §10-04-16). Harvey Senn's sales of securities to Olaf Drovdal in 1995, 1996, and 1997 were unauthorized, unethical, and deceptive practices as defined in NDAC §73-02-09-02(4). Olaf Drovdal was not competent to authorize securities transactions in September 1995 or anytime thereafter. David Drovdal was authorized by a Power-of-Attorney to transact financial business for Olaf Drovdal. Harvey Senn has admitted that he breached a promise to tell David Drovdal about any financial transactions involving Olaf Drovdal after the ^{Spring} ~~spring~~ of 1996. Senn knew or reasonably should have known that he

would need authorization from David Drovdal for securities sales involving Olaf Drovdal. Senn and Lutheran Brotherhood have joint and several liability for the unauthorized sales of securities to Olaf Drovdal in 1996 and 1997. The Securities Commissioner is authorized by NDCC 10-04-16(1) to assess a civil penalty of \$10,000 against Senn and Lutheran Brotherhood for their joint and several liability for each unauthorized sale of securities to Olaf Drovdal.

4. Lutheran Brotherhood Securities Corporation violated Article III, Section 27 of the NASD Rules of Fair Practice by their failure to supervise salesman and agent Harvey Senn. A violation of "any applicable provision of the Rules of Fair Practice" is a violation of North Dakota Securities laws (See NDAC §73-02-09-02(29), NDAC §73-02-09-03, NDCC §10-04-11 and NDCC §10-04-16). In addition, the failures of Lutheran Brotherhood reasonably to supervise Harvey Senn were violations of NDCC §10-04-11(1)(m). The Securities Commissioner is authorized by NDCC §10-04-16 to assess a civil penalty of \$10,000 for each unsupervised transaction and the Commissioner is authorized by NDCC 10-04-11(1)(m) to suspend or revoke the dealer registration of Lutheran Brotherhood for a failure reasonably to supervise Harvey Senn.
5. The Portfolio Allocation Questionnaire on page 7 of the documents Harvey Senn completed for Olaf Drovdal on September 27, 1995 includes the following question: "To meet your long-term investment objectives and achieve your desired rate of return, how much fluctuation in the total value of your investment portfolio are you willing to assume in a given year?" The

Questionnaire includes four categories of response and assigns 0 points for the category of 0%, 10 points for a response of "Up to 5%," 20 points for a response of "Up to 10%," and 30 points for a response of "Up to 15%." The Questionnaire includes various other questions and point values, but the response of "Up to 15%" on a single question would yield 30 points toward the 32-42 points required for the highest-risk category of "aggressive" investor. At the November 3 hearing, Harvey Senn testified that most of his elderly clients are "aggressive" investors. The question designed by Lutheran Brotherhood is confusing because investors who hear the words "rate of return" and "total value of your investment portfolio" might automatically prefer a 15% rate of return rather than selecting a lower category. The question is inherently self-serving, unethical, and deceptive because Lutheran Brotherhood can use the category of "aggressive" investor to rationalize the sale of almost any type of high-risk investments to any investor who confuses the "rate of return" phrase of the question with the word "fluctuation." In this particular case, Senn's inappropriate conduct illustrated the consequences of Lutheran Brotherhood's inappropriate form of question. The deceptive form of the question and categorization of almost all elderly clients of Harvey Senn as "aggressive" investors might be the basis for violations of the NASD Rules of Fair Practice "Know Your Customer" Rules and the basis for payment of a \$10,000 civil penalty for each violation under NDCC 10-04-16(1).

6. The failure of Harvey Senn and the Lutheran Brotherhood Securities Corp. to produce documents and other information to the Commissioner as required by the Commissioner's Subpoena and Interrogatories were violations of NDCC §10-04-16.1 and may be the basis for the Commissioner to assess a civil penalty of \$10,000 for each violation under NDCC 10-04-16(1).

ORDER AND NOTICE OF CIVIL PENALTIES

Based upon the Findings of Fact and Conclusions of Law, it is hereby ordered that:

1. For the inappropriate categorization of Olaf Drovdal as an "aggressive" investor and the unsuitable sales of higher-risk securities to Olaf Drovdal, Harvey Senn and Lutheran Brotherhood Securities Corp. shall pay a civil penalty of \$5000 to the office of the Securities Commissioner for their joint and several liability;
2. For Harvey Senn's unethical and dishonest failure to inform David Drovdal about financial transactions involving Olaf Drovdal after Senn's promise in the spring of 1996, the salesman registration of Harvey Senn shall be suspended in North Dakota for a period of ten business days beginning the day after Harvey Senn receives notice of this Opinion and Order;
3. For the unauthorized sales of securities to Olaf Drovdal in 1996, Harvey Senn and Lutheran Brotherhood Securities Corp. shall pay a civil penalty of \$5000 to the office of the Securities Commissioner for their joint and several liability;
4. For the failure reasonably to supervise the conduct of Harvey Senn, Lutheran Brotherhood Securities Corp. shall pay a civil penalty of \$2000 to the office of the Securities Commissioner;

5. Lutheran Brotherhood Securities Corp. and Harvey Senn shall change the form of the confusing question about rate of return and investment portfolio fluctuation on page 7 of the Portfolio Allocation Questionnaire prepared for Olaf Drovdal on September 27, 1995 into a form acceptable to the office of the Securities Commissioner;
6. For the failure to produce books and records requested by subpoena before the November 3, 1997 hearing, the failure to present Answers to Interrogatories before the November 3, 1997 hearing, and the failure to present signed and authorized Answers to Interrogatories, Lutheran Brotherhood Securities Corp. and Harvey Senn shall pay a civil penalty of \$3000 to the office of the Securities Commissioner; and
7. For the failure to provide documents and an accounting of the financial transactions of Olaf Drovdal before the November 3, 1997 hearing Lutheran Brotherhood Securities Corp. and Harvey Senn shall pay a civil penalty of \$2000 to the office of the Securities Commissioner for their joint and several liability;
8. Lutheran Brotherhood Securities Corp. and Harvey Senn shall provide and explain a detailed accounting to David Drovdal for all of the financial transactions, documents, notes, memorandum, computerized and electronic information, checks, payments, withdrawals, interest, dividends, books and records, and all other information involving Olaf Drovdal from December 9, 1992 to the present time, including but not limited to an explanation of the disposition of \$82,467.37 of "growth, high-yield, opportunity, and world" funds

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listed with zero balances on Olaf Drovda's customer statement dated December 31, 1996. The accounting and detailed explanation shall be completed to the satisfaction of David Drovda on or before December 31, 1997; and

9. Lutheran Brotherhood Securities Corp. and Harvey Senn shall inform the Securities Commissioner immediately for any customer complaints about an unsuitable transaction, unauthorized transaction, unethical conduct, deceptive practice, or fraud involving Harvey Senn or any customer complaint about Harvey Senn involving more than \$5000 for a period of two years beginning the day after Harvey Senn receives notice of this Opinion and Order.

NOTICE OF RIGHT TO REQUEST HEARING

YOU ARE NOTIFIED that pursuant to §10-04-12 N.D.C.C. you may request a hearing for this matter if such a request is made in writing WITHIN FOURTEEN (14) DAYS AFTER THE RECEIPT OF THIS ORDER. The parties have the right to be represented by legal counsel at the hearing and the hearing may be conducted by the Office of Administrative Hearings.

Signed and Sealed this 7th day of November, 1997.

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