

**ADMINISTRATIVE PROCEEDING
FILE NO. 3-7534**

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**In the Matter of
ROGER J. HOUDEK**

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INITIAL DECISION

**Washington, D.C.
January 22, 1992**

**Warren E. Blair
Chief Administrative Law Judge**

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INITIAL DECISION

APPEARANCES: David R. Weiss and Lillian H. Filegar, of the Commission's Denver Regional Office, for the Division of Enforcement.

Roger J. Houdek, pro se.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

These public proceedings were instituted by an order of the Commission dated August 1, 1991 ("Order") issued pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether allegations made by the Division of Enforcement ("Division") against Roger J. Houdek ("Houdek" or "respondent") are true, and what, if any, remedial action would be appropriate in the public interest.

In substance, the Division alleged that on April 24, 1991 Houdek was permanently enjoined from violations of the securities registration provisions of the Securities Act of 1933 ("1933 Act"), and of the broker-dealer registration and the antifraud provisions of the Exchange Act. Additionally, the Division alleged that Houdek (1) wilfully violated the antifraud provisions of the 1933 Act and Exchange Act and Rule 10b-5 thereunder, (2) wilfully violated Section 5 of the 1933 Act by offering and selling unregistered securities of Colorado Planning Associates, Inc., and (3) wilfully aided and abetted violations of Section 15(a) of the Exchange Act by failing to register as a broker-dealer.

Upon Houdek's announcement at the outset of the hearing on September 4, 1991 that he was appearing and proceeding without counsel, he was advised of his right to counsel. He was also advised of his right to cross-examine witnesses called by the Division and of other rights to which he was entitled during the course of the hearing. ^{1/}

As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings were made by the parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

^{1/} Tr., at 3-5 (September 4, 1991).

RESPONDENT

From 1974 until 1982 Houdek, a resident of Englewood, Colorado, was employed as a registered representative by the Variable Annuity Life Insurance Company ("VALIC") and during those years offered and sold supplemental qualified annuity plans to public school employees. Houdek left VALIC and in July, 1982 joined Allred, Thomas and Associates ("ATA"), a Colorado corporation formed by Michael Thomas ("Thomas"), who had also sold annuity plans at VALIC while Houdek was there employed. Houdek became a 20% shareholder in ATA and continued as such after ATA changed its name to Colorado Planning Associates, Inc. ("Colorado Planning") in 1983. He also held the positions of vice-president and secretary of that company.

Since 1987, Houdek has worked as a general agent with Northern Life Insurance Company selling fixed annuities. Additionally, Houdek was associated as a registered representative with various broker-dealer firms from 1974 through 1990.

PERMANENT INJUNCTION

As a result of a complaint filed by the Commission, a permanent injunction was entered against Houdek on April 24, 1991 in the United States District Court for the District of Colorado 2/ enjoining him from violations of the antifraud provisions of the Exchange Act, 3/ the securities registration provisions of the 1933 Act, 4/ and the broker-

2/ SEC v. Roger J. Houdek, Civil Action No. 87-M-1434 (D.C. Colo., filed April 24, 1991).

3/ Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b) and Rule 10b-5 thereunder 17 CFR 240.10b-5.

4/ Section 5 of the 1933 Act, 15 U.S.C. 77e.

dealer registration provisions of the Exchange Act. 5/

VIOLATIONS

In addition to allegations that during the period from about July, 1982 to November, 1984 Houdek wilfully aided and abetted violations of Section 15(a)(1) of the Exchange Act, the Division alleged that over the same period of time Houdek wilfully violated the antifraud provisions of the 1933 Act and of the Exchange Act and Rule 10b-5 thereunder in the offer and sale of unregistered securities of Colorado Planning in the form of limited partnership interests and that in doing so he also wilfully violated the securities registration provisions of the 1933 Act. Allegedly the fraud involved abuse of pre-existing relationships of trust and confidence with former insurance clients by persuading them to change their investment strategies from conservative annuity investments for their retirement to highly speculative limited partnerships. In accomplishing his purpose, Houdek allegedly obtained commissions and fees from investors' funds without full disclosure, misrepresented the financial stability and earnings prospects of limited partnerships, and misrepresented his experience and understanding of the limited partnerships and tax consequences of his customers' investments.

The charges in this proceeding parallel the charges against Houdek in the injunctive action which resulted in a permanent injunction against him 6/ and in the entry of the court's findings of fact, conclusions of law, and order for injunctive relief. 7/ The district court's having sustained the same charges of misconduct in the injunctive action as were

5/ Section 15(a)(1) of the Exchange Act, 15 U.S.C. §78o(a)(1).

6/ Division Exhibit 2.

7/ Division Exhibit 1.

alleged against respondent in this proceeding, the doctrine of collateral estoppel is applicable to preclude Houdek from relitigating here any issue resolved previously in the injunctive action. 8/

The district court's findings relating to the charges at issue in the injunctive action are summarized as follows:

While Houdek was employed by VALIC from 1974 until 1982, he offered and sold supplemental qualified annuity plans to employees of University of Colorado Medical Center, Denver Public Schools, the Adams County School District, and the University of Northern Colorado. Before joining Thomas at AT&A in July, 1982 Houdek was aware that Thomas was contacting persons with VALIC policies to sell them limited partnerships being marketed by ATA.

Colorado Planning's business was the formation, management, and sales of interests in limited partnerships. Although Thomas was the president and principal decision-maker, Houdek participated in investigating, analyzing, recommending, and deciding on the business activities of Colorado Planning. Houdek also directly sold interests in some of the partnerships to unsophisticated investors. Some of those sales were to persons with whom he had a long relationship of trust and confidence from his years at VALIC.

Colorado Planning sold interests in eight limited partnerships in which it served as general partner to more than 400 investors, who invested over \$3 million. The first limited partnerships offered by Colorado Planning after Houdek's employment began were unregistered "blind pool" investments named Heritage Properties and Diversified Properties. Colorado Planning also offered and sold interests in limited partnerships

8/ Blinder, Robinson & Co., Inc., 48 S.E.C. 624 (1986), remanded, 837 F.2d 1099 (D.C. Cir. 1988), cert. denied, 109 S.Ct. 177 (1988).

identified as Lone Star Ventures (LTV), CPA Ventures, Ltd., Cine Magic, Apache Wells, and General Ventures. Although some money received from investors in the limited partnerships was invested in a number of different projects, those investments did not generate any cash flow and almost all of the investors in the limited partnerships lost all of their money.

Houdek and Thomas, together with two other of their associates, Richard Sawyer and Dan Tamarexis, directly and indirectly participated in a course of conduct which operated as a fraud and deceit upon investors. They used pre-existing relationships of trust and confidence with former insurance clients to switch conservative annuity investments for retirement into highly speculative limited partnership interests. Commissions and fees were obtained from investors' funds without full disclosure, funds of the partnerships were commingled, and the financial stability and future earning prospects of the limited partnerships were misrepresented.

Houdek, in transactions with his customers, misrepresented his experience with and understanding of limited partnership offerings and also misrepresented his knowledge of tax laws and tax consequences of customers' investments. He also personally offered and sold interests in Heritage Properties and Diversified Properties after those limited partnerships had defaulted on mortgage payments required in connection with their investments in condominiums and had diverted rental monies to Colorado Planning. Those material facts were not disclosed by Houdek to investors and the offering documents for Heritage Properties and Diversified Properties, reprinted in October 1983, contained misleading financial information.

Colorado Planning did not maintain adequate books and records of account for the limited partnership investments. Checkbooks and notebooks containing subscription

agreements were the only books and records routinely kept. Houdek was one of the signatories on checks but disclaimed knowledge of any of the financial circumstances of the partnerships.

In July 1984, Thomas moved to Phoenix, Arizona, and Sawyer resigned in May, 1984. In November, 1984 Houdek formed Strategic Investments, Inc. of which he was sole owner. With Strategic Investments, Inc, ("Strategic") Houdek continued to sell limited partnership interests for an investment called Entertainment Ventures as a limited partnership to complete entertainment projects started with Colorado Planning.

These interests were not registered and material non-disclosures were involved in these sales. Strategic raised approximately \$135,000 for the Entertainment Ventures partnership whose entertainment projects have not been completed and whose investors have not received any payments.

Houdek has not sold nor offered limited partnership interests since 1986, and has a broker-dealer contract with a registered NASD broker-dealer which sells variable annuities and mutual funds.

From its findings, the district court determined that Houdek violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by his partnership in the fraudulent scheme shown. The district court also determined that Houdek violated Section 5(a) and 5(c) of the 1933 Act by the offer and sale of unregistered securities for which no exemption from registration under the 1933 Act was available and that Houdek aided and abetted the violations of Section 15(a) of the Exchange Act by the failure of Colorado Planning to register as a broker-dealer.

Because Houdek cannot by reason of the preclusive effect of the doctrine of collateral estoppel challenge or relitigate charges which were proved against him in the injunctive

action, it is found on the basis of the court's findings and conclusions that, as alleged by the Division, Houdek wilfully violated Sections 5(a) and 5(c) and Section 17(a) of the 1933 Act, wilfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and wilfully aided and abetted violations by Colorado Planning of Section 15(a) of the Exchange Act.

Houdek's argument that the district court "made no findings or offered no proof that the Respondent acted wilfully or with scienter..." 9/ cannot be accepted. Although the district court did not explicitly find that in committing the alleged violations Houdek acted with scienter or that his violations were wilful, those findings are implicitly part of the court's ultimate findings that the record before the court established that Houdek had committed the charged violations. Scienter is a necessary element to prove commission of a violation of Section 17(a)(1) of the Securities Act or Section 10b-5 under the Exchange Act. 10/ Accordingly, the district court's findings that those violations had been proved necessarily include therein a finding that Houdek had acted with scienter. Regarding the term "wilful" as used in connection with violations of the securities laws, it is not necessary for the district court to do more than find, as it clearly did, that Houdek consciously performed the acts constituting the violations. 11/

9/ Respondent's Reply to the Division's Proposed Findings and Conclusions, at 7, December 18, 1991.

10/ Aaron v. SEC., 446 U.S. 680 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

11/ Arthur Lipper & Co. v. SEC., 547 F.2d 171, 180 (2d Cir. 1976) cert. denied, 434 U.S. 1009 (1978); Tager v. SEC., 344 F.2d 5, 8 (2d Cir. 1965).

PUBLIC INTEREST

Having found that Houdek wilfully violated the antifraud provisions and securities registration provisions of the 1933 Act, that he wilfully violated the antifraud provisions and broker-dealer registration provisions of the Exchange Act, and that he had been permanently enjoined on April 24, 1991 by a United States District Court from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and the broker-dealer registration provisions of the Exchange Act and from violating the securities registration requirements of the 1933 Act, it is necessary to consider the remedial action appropriate in the public interest.

The Division argues that the public interest demands that Houdek be barred from association with any broker or dealer, pointing to the fact that Houdek while a 20% owner of Colorado Planning, not only personally defrauded investors but was a participant in a fraudulent course of conduct. The Division further refers to the evidence that over 400 investors bought \$3 million of United partnerships from Colorado Planning and that almost all of those investors, some of whom had a relationship of trust and confidence with Houdek, lost all of their money. Further the Division notes that after two years of fraudulent sales at Colorado Planning, Houdek continued the same fraudulent conduct through his own wholly-owned company. The Division emphasizes that the record demonstrates Houdek lacks appreciation or knowledge of standards applicable to persons engaged in the securities business and that respondent is trying to persuade the Commission to abdicate its primary responsibility of protecting all investors in suggesting a sanction that leaves him free to sell and to supervise selling of mutual funds and variable annuities.

Respondent tries to minimize his role in Colorado Planning and in the fraud in which he personally, as well as in concert with his associates at that firm, participated. He claims that he knew that many of his clients made investments other than retirement annuities, that he did not consider the clients unsophisticated, and offered the limited partnership interests as a form of diversification. Additionally, he states that he advised the Division in 1986 that he had no future plans to participate in the syndication and sales of limited partnerships and asserts that the injunction obtained against him has added further incentive to make his retirement from that aspect of the securities business permanent. Houdek, also refers to the absence of any disciplinary problems against him prior or subsequent to his experience with Colorado Planning and limited partnerships. As further assurance of future good conduct, Houdek calls attention to the heavy financial price, including bankruptcy and loss of his home, he has paid for his involvement in Colorado Planning.

Upon careful consideration of the record and the arguments and contentions of the parties, 12/ it is concluded that in the public interest Houdek should be barred from association with any broker-dealer except that after one year he may become employed by a registered broker-dealer in a non-proprietary and non-supervisory position as a registered representative restricted to the offering and selling of mutual fund shares and variable

12/ Conjoined in the Division's Reply brief, December 31, 1991, is a motion to strike from Houdek's brief certain counterstatements of findings or proposed findings on the grounds that they are either unsupported by the record or "are findings of the District Court that the Respondent is collaterally estopped to dispute." In the alternative, the Division moves for an order that the proposals in question shall be considered only to the extent otherwise supported by the record. Inasmuch as neither the proposals of the Division nor of the respondent have any binding effect upon decisional authority and may or may not be accepted in the formulation of a decision, there is no need to strike any of the proposals Houdek has offered for consideration.

annuities.

Respondent's excuses and explanations for the fraud in which he was found by the district court to have engaged over the course of over two years in the offer and sale of limited partnership do not mitigate the seriousness of his offenses nor negate the need for stern remedial action to protect public investors. The lack of Houdek's comprehension of the nature of his fraud and of an understanding of his responsibilities as a registered representative are clearly demonstrated by his complaint that: "Because the Court's findings are so narrowly written the Respondent is not sure as to how he misrepresented his knowledge of limited partnerships and related tax laws." 13/ Surely, having appeared pro se and having actively participated in his own defense at the injunctive trial, Houdek should be expected to have become aware of the nature of his shortcomings as a registered representative in connection with the offer and sale of limited partnerships. That the record reflects he has not makes manifest that he cannot be trusted to merchandise securities with which he is not familiar through experience.

Although the Division is understandably concerned that allowing Houdek to offer and sell mutual fund shares and variable annuities presents an unacceptable risk to the investing public, the chances appear slight that Houdek would not take to heart the problems, financial and otherwise, that he encountered in going beyond the familiar to venture into the merchandising of intricate securities. He has acknowledged that he is not interested in going beyond mutual funds and variable annuities, and refers to an unblemished record while he kept to that narrow field. Moreover, the injunction, which prohibits him from violations of Rule 10(b) of the Exchange Act and Rule 10b-5

13/ Respondent's Reply, supra, at 10.

thereunder, "by directly or indirectly, in connection with the purchase or sale of any securities whatsoever...." 14/ provides a further deterrent and reduces the likelihood of further harm to public investors when Houdek engages in an extremely circumscribed securities business activity. 15/

ORDER

IT IS ORDERED that Roger J. Houdek be barred from association with any broker-dealer except that after one year he may become employed by a registered broker-dealer in a non-proprietary and non-supervisory position as a registered representative restricted to transactions in mutual fund shares and variable annuities.


This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for

14/ Division Exhibit 2, at 1.

15/ All proposed findings and conclusions submitted by the parties have been considered, as have their contention. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.


Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
January 22, 1992