

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Name of Claimant

Judy Gray, Executrix for the Estate of Lella Dunkelberg

and

Case Number: 03-00053  
Hearing Site: Houston, Texas

Name of Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

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**NATURE OF DISPUTE**

Customer v. Member Firm

**REPRESENTATION OF PARTIES**

Judy Gray, Executrix for the Estate of Lella Dunkelberg ("**Claimant**") was represented by Royal B. Ilea, Esq., Bingham & Ilea, P.C., San Antonio, Texas.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondent**" or "**Merrill Lynch**") was represented by Jack Ballard, Esq., and Craig Clendenin, Esq., The Ballard law Firm, Houston, Texas.

**CASE INFORMATION**

The Statement of Claim was filed on or about January 3, 2003. The Submission Agreement of Claimant, Judy Gray, Executrix for the Estate of Lella Dunkelberg, was signed on or about December 10, 2002.

The Statement of Answer was filed by Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., on or about March 7, 2003. The Submission Agreement of Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., was signed on or about March 4, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty, omission of facts, suitability and misrepresentations. The causes of action related to the recommendation made for the sale of municipal bonds and the purchase of various securities, including but not limited to: Goldman Sachs Research Select Fund (Class B), Goldman Sachs Research Core U.S. Equity Fund (Class C), Lord Abbett Affiliated Fund

(Class B), and Alliance Premier Growth Fund (Class B). Claimant alleged that Respondent engaged in needless transactions in municipal bonds, misrepresented the benefits and omitted material facts regarding mutual funds purchased in her account, and misrepresented the disadvantages in continuing to hold the secure, income-producing bond portfolio. Claimant alleged that Respondent breached its duty of care and that the recommendations and purchases were not suitable for Claimant based on her age and investment objectives.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: the alleged damages, if any indeed existed, were the result of market forces, for which Respondent is not responsible; Claimant's claims are barred by the doctrines of ratification, waiver and estoppel; Respondent did not violate the state securities statutes and all of their recommendations were undertaken in good faith; and Claimant's request for attorneys' fees should not be granted because her claims lack merit.

#### **RELIEF REQUESTED**

Claimant requested an award in the amount of:

Actual/Compensatory Damages	\$210,354.00
Punitive/Exemplary Damages	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

#### **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 original(s) remain on file with NASD Dispute Resolution ("NASD").

#### **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:

- 1.) Claimant's claims, each and all, are hereby denied and dismissed with

prejudice;

- 2.) Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., is liable and shall pay to Claimant, Judy Gray, Executrix for the Estate of Lella Dunkelberg, the sum of \$862.50 in costs;
- 3.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 4.) Any relief not specifically enumerated, including punitive damages and attorney fees, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee = \$ 300.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 2,750.00

#### **Adjournment Fees**

Adjournments granted during these proceedings:

February 11-13, 2004, adjournment requested by the parties	= \$ 1,125.00
September 9-10, 2004, adjournment requested by Respondent (waived by the Panel)	= \$ 1,125.00

#### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$ 450.00  
Pre-hearing conference: August 21, 2003 1 session

Four (4) Pre-hearing sessions with Panel x \$1,125.00 = \$ 4,500.00  
Pre-hearing conferences: July 18, 2003 1 session  
December 17, 2003 1 session  
February 10, 2004 1 session  
November 30, 2004 1 session

Eight (8) Hearing sessions x \$1,125.00 = \$ 9,000.00  
Hearing Dates: September 8, 2004 2 sessions  
June 14, 2005 2 sessions  
June 15, 2005 2 sessions  
June 16, 2005 2 sessions

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Total Forum Fees = \$13,950.00

The Arbitration Panel has assessed \$13,950.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

### Fee Summary

Claimant, Judy Gray, Executrix for the Estate of Lella Dunkelberg, is liable for:

Initial Filing Fee	= \$ 300.00
Adjournment Fee	= \$ 562.50
Total Fees	= \$ 862.50
Less payments	= \$ 1,425.00
Refund Due to Claimant	= \$ 562.50

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., is liable for:

Member Fees	= \$ 5,200.00
Adjournment Fee	= \$ 562.50
Forum Fees	= \$13,950.00
Total Fees	= \$19,712.50
Less payments	= \$ 187.50
Balance Due NASD Dispute Resolution	= \$19,525.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Martha Failing, Esq. - Public Arbitrator, Presiding Chair  
Dave Haigler, Esq. - Public Arbitrator  
Christine W. Powell - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Martha Failing, Esq.  
Martha Failing, Esq.  
Public Arbitrator, Presiding Chair

July 12, 2005  
Signature Date

/s/ Dave Haigler, Esq.  
Dave Haigler, Esq.  
Public Arbitrator

July 12, 2005  
Signature Date

/s/ Christine W. Powell  
Christine W. Powell  
Non-Public Arbitrator

July 12, 2005  
Signature Date

July 12, 2005  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

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**Dave Haigler, Esq. - Public Arbitrator**  
**Christine W. Powell - Non-Public Arbitrator**

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*Martha Failing*  
Martha Failing, Esq.  
Public Arbitrator, Presiding Chair

JUL 12 2005  
Signature Date

**Dave Haigler, Esq.**  
**Public Arbitrator**

**Signature Date**

**Christine W. Powell**  
Non-Public Arbitrator

**Signature Date**

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Dave Haigler, Esq.  
Public Arbitrator

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7-12-05  
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Signature Date

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Christine W. Powell  
Non-Public Arbitrator

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