

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Kay Barr Keran, Individually and as Trustee of the Lane E. Keran & Kay Barr Keran Family Trust UTD 9-27-95, Claimants v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Carolyn Colvin, Respondents

Case Number: 03-01161

Hearing Site: San Francisco, California

Nature of the Dispute: Customers vs. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

David Hollander, Esq.
Daniel R. Klein, Esq.
McCarty & Lieberman
Oakland, California

For Respondents:

Kenneth C. Mennemeier, Esq.
Mennemeier, Glassman & Stroud
Sacramento, California

CASE INFORMATION

Statement of Claim filed: February 14, 2003

First Amended Statement of Claim filed: March 19, 2004

Claimants' Arbitration Brief filed: March 26, 2004

Claimants' Uniform Submission Agreement signed: February 14, 2003

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Carolyn Colvin: May 12, 2003

Respondents' Response to Claimants' Motion For Leave to File First Amended Statement of Claim filed: March 24, 2004

Respondents' Hearing Brief filed: March 26, 2004

Respondent Merrill Lynch's Uniform Submission Agreement signed: April 8, 2003

Respondent Carolyn Colvin's Uniform Submission Agreement filed: May 12, 2003

CASE SUMMARY

Claimants alleged that the above-referenced dispute involves investments in two Manulife Venture Vantage Annuities. Claimants also alleged the following claims: 1) Breach of Fiduciary Duty and Breach of the Implied Covenant of Good Faith and Fair Dealing; 2) Violation of NYSE Rules and NASD Conduct Rules; 3) Professional Malpractice; 4) Common Law Fraud/Intentional Misrepresentation; 5) Negligent Misrepresentation; and 6) Violation of the Elder Abuse and Dependent Adult Civil Protection Act.

Respondents denied Claimants' allegations of wrongdoing and denied any liability to Claimants. Respondents also asserted various defenses.

RELIEF REQUESTED

Claimants requested:

1. Damages from losses to the value of the subject securities in the approximate amount of \$363,282.00, or according to proof;
2. Pre-award and post-award interest from the date of the original investments to apply at an annualized rate of 7%;
3. Disgorgement of all commissions, mark-ups and mark-downs paid;
4. Costs of arbitration and expenses including reasonable attorney fees, and any other costs deemed reasonable and just;
5. Punitive damages; and
6. Such other and further relief as the Panel deems just and equitable.

Respondents requested:

1. Dismissal of Claimants' claims;
2. Expungement of this matter from Respondent Colvin's records with the NASD; and
3. That the Panel assess all costs and forum fees to Claimants.

OTHER ISSUES CONSIDERED AND DECIDED

On March 21, 2003, Claimants and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On April 21, 2003, Respondents' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

During the hearing, the Panel permitted the filing of Claimants' First Amended Claim filed March 19, 2004.

During the hearing, the Panel considered the positions of the parties relative to Claimants' request to add a claim for constructive fraud. The Panel denied the request.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) The Panel determined that the following award is based on the Panel's finding of employee negligence, including but not limited to, a failure to suitably identify fiscal objectives and risk tolerances of Claimants' special circumstances. Accordingly, Respondent Merrill Lynch is solely liable for and shall pay to Claimants the sum of \$99,250.00.
- 2) Claimants' claims for punitive damages are denied.
- 3) During the hearing, Respondent Carolyn Colvin was dismissed as a party in this matter.
- 4) Respondents' request for expungement with respect to Respondent Colvin is denied.
- 5) Each party shall bear its own costs, including attorney's fees.
- 6) All other relief not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

| | |
|--------------------------|------------|
| Initial claim filing fee | = \$300.00 |
|--------------------------|------------|

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, Merrill Lynch is a party and the following fees are assessed:

| | |
|----------------------------|--------------|
| Member Surcharge | = \$1,700.00 |
| Pre-Hearing Process Fee | = \$ 750.00 |
| <u>Hearing Process Fee</u> | = \$2,750.00 |
| Total Member Fees | = \$5,200.00 |

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(1) Pre-hearing conference session with a single arbitrator @ \$450.00/session = \$450.00
Pre-hearing conference: November 17, 2003 1 session

(2) Pre-hearing conference sessions with the Panel @ \$1,125.00.00/session = \$2,250.00
Pre-hearing conferences: August 28, 2003 1 session
March 11, 2004 1 session

(7) Hearing sessions @ \$1,125.00/session = \$7,875.00
Hearing: April 5, 2004 2 sessions
April 6, 2004 2 sessions
April 7, 2004 2 sessions
April 8, 2004 1 session

Total Forum Fees = **\$10,575.00**

The Panel assessed \$5,287.50 in forum fees to Claimants.

The Panel assessed \$5,287.50 in forum fees jointly and severally to Respondents, Merrill Lynch and Colvin.

Fee Summary

1. Claimants are charged with the following fees and costs:

| | |
|----------------------|-----------------|
| Initial Filing Fee | = \$ 300.00 |
| <u>Forum Fees</u> | = \$ 5,287.50 |
| Total Fees | = \$ 5,587.50 |
| <u>Less Payments</u> | = \$ (1,425.00) |
| Balance Due NASD-DR | = \$ 4,162.50 |

2. Respondent, Merrill Lynch, is charged with the following fees and costs:

| | |
|----------------------|-----------------------|
| Member Fees | = \$ 5,200.00 |
| <u>Less Payments</u> | <u>= \$(5,200.00)</u> |
| Balance Due NASD-DR | = \$ 0.00 |

3. Respondents, Merrill Lynch and Colvin, are jointly and severally charged with the following fees and costs:

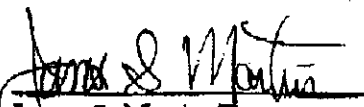
| | |
|----------------------|--------------------|
| Forum Fees | = \$ 5,287.50 |
| <u>Less Payments</u> | <u>= \$(0.00)</u> |
| Balance Due NASD-DR | = \$ 5,287.50 |

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

ARBITRATION PANEL

| | | |
|--------------------------|---|------------------------------------|
| James S. Martin, Esq. | • | Public Arbitrator, Presiding Chair |
| James H. Schilt | • | Public Arbitrator |
| Homer L. Davis, III, MBA | • | Non-Public Arbitrator |

Concurring Arbitrators' Signatures


James S. Martin, Esq.
Chair, Public Arbitrator

4-26-04
Signature Date

James H. Schilt
Public Arbitrator

Signature Date

Homer L. Davis, III, MBA
Non-Public Arbitrator

Signature Date

4/26/04
Date of Service

2. Respondent, Merrill Lynch, is charged with the following fees and costs:

| | |
|----------------------|-----------------------|
| Member Fees | = \$ 5,200.00 |
| <u>Less Payments</u> | <u>= \$(5,200.00)</u> |
| Balance Due NASD-DR | = \$ 0.00 |

3. Respondents, Merrill Lynch and Colvin, are jointly and severally charged with the following fees and costs:

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| <u>Less Payments</u> | = \$(5,200.00) |
| Balance Due NASD-DR | = \$ 0.00 |

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| <u>Less Payments</u> | = \$(0.00) |
| Balance Due NASD-DR | = \$ 5,287.50 |

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Chair, Public Arbitrator

Signature Date

James H. Schilt
Public Arbitrator

Signature Date



Homer L. Davis, III, MBA
Non-Public Arbitrator

4/20/04

Signature Date

4/26/04

Date of Service