

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

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In the Matter of the Arbitration Between

Name of Claimant

William Hutchins

and

04-01637  
Nashville, Tennessee

Name of Respondent

Merrill Lynch Pierce Fenner & Smith, Incorporated

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

William Hutchins ("**Claimant**") was represented by Jeffrey Musslewhite, Esq., Woska & Hayes, L.L.P., Kingwood, Texas.

Merrill Lynch Pierce Fenner & Smith, Incorporated ("**Respondent**") represented by Joshua D. Jones, Esq. and Peter S. Fruin, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama.

**CASE INFORMATION**

The Statement of Claim was filed on or about March 9, 2004. Submission Agreement of Claimant William Hutchins was signed on March 1, 2004

Statement of Answer was filed by Respondent Merrill Lynch Pierce Fenner & Smith, Incorporated on or about May 18, 2004. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith, Incorporated was signed on May 25, 2004.

**CASE SUMMARY**

Claimant summarized the claim as follows:

As described below, this is a case of negligence, misrepresentations, and grossly unsuitable investment recommendations by Respondent to an inexperienced investor, which resulted in losses in Mr. Hutchin's investments that ultimately destroyed his savings.

The Investment Advisors Act of 1940 was the last in a series of acts designed to eliminate certain abuses in the securities industry, which were found to have contributed to the stock

market crash of 1929 and the depression of the 1930s. It was preceded by the Securities Act of 1933, the Securities Exchange Act of 1934,... and the Investment Company Act of 1940. A fundamental purpose, common to these statutes, was to sub that substitute the philosophy of full disclosure for the philosophy of *caveat emptor* and thus, to achieve a high standard of business ethics in the securities industry.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically stated as follows:

The claims asserted in the Statement of Claim are absolutely baseless and should be dismissed. While Claimant alleges a myriad of claims against Respondent, his core allegations are that Respondent recommended unsuitable mutual funds for his IRA account and misrepresented the risks associated with Claimant's investments. Claimant also alleges that Merrill Lynch failed to supervise Claimant's financial advisor, James Conklin. Claimant seeks compensatory damages plus punitive damages, costs, fees and expenses, from Respondent.

Claimant's Statement of Claim paints a grossly inaccurate portrait. The actual course of dealing between Claimant and Respondent is completely different, and it involves no impropriety at all on the part of Merrill Lynch. Specifically, contrary to Claimant's ludicrous allegations, Merrill Lynch did not "suggest...and place[] Mr. Hutchins in mutual funds Class B share", and Merrill Lynch did not fail to place Claimant in "more conservative investments ...without the imposition of penalties or commissions." In fact, the very opposite is true – Merrill Lynch did not place Claimant in any Class B mutual funds at all. Rather, Claimant transferred Class B fund shares of another firm and transferred them into his Merrill Lynch account shortly after he opened the account. Furthermore, any transactions within the account thereafter were exchanges from one fund to another fund within the same family so that Claimant did not incur any charges, penalties or commissions. Moreover, the mutual funds Claimant acquired by virtue of these exchanges were suitable in light of Claimant's stated objective and risk tolerance for the account. Additionally, Respondent accurately *represented the risks associated with Claimant's investments*. Finally, Claimant's failure to supervise claim fails because Mr. Conklin did not commit any securities violations with respect to Claimant's account, and Merrill Lynch had in place adequate supervisory procedures, which it reasonably implemented and followed.

Claimant's Statement of Claim represents a blatant effort to recover alleged losses that resulted from the investment strategy that Claimant employed before he ever transferred his assets to Merrill Lynch. Specifically, with respect to the Class B mutual funds held by Claimant that allegedly decreased in value, the plain fact is that Claimant bought the funds at a different firm, transferred these mutual funds to Merrill Lynch when he opened his account, and Respondent sought to minimize both Claimant's losses in these funds as well as eliminate any charges, penalties, and commissions Claimant could have incurred as a result

of exchanging these investments. Furthermore, Claimant's account declined – together with the rest of the market – in the prolonged bear market that began in mid-March 2000. Such decline was not, as Claimant now alleges, a result of any wrongdoing by Respondent.

### **RELIEF REQUESTED**

Claimant requested that the Respondent be ordered to reimburse him for:

- A. All direct losses in the accounts;
- B. All charges to the accounts;
- C. The lost earnings that the accounts would have earned if they had been properly invested;
- D. Pre-judgment and post-judgment interest at the maximum statutory rate on all losses sustained from the date of the transactions until the date of the award by the Arbitration Panel pursuant to Tennessee law;
- E. All costs of these proceedings, including forum fees, hearing session fees and costs in bringing this action to protect Claimant's rights and best interests;
- F. Reasonable attorney's fees in bringing this action under Tennessee statutory law and common law as well as under the NASD and NYSE Rules of Fair Practice. Claimant also requests costs and expenses including expert witness fees, in an amount to be determined at the arbitration hearing;
- G. Punitive damages to be assessed by the Arbitrator to ensure the investing public that, in the future, Respondent and their financial consultants will conduct their affairs to the highest integrity required of financial advisors;
- H. That Claimant be granted all other and further relief to which he may be entitled.

Respondent requested that the claims asserted against them be denied in their entirety and that costs of this proceeding be assessed against Claimant.

### **OTHER ISSUES CONSIDERED & DECIDED**

At the conclusion of the Claimant's case in chief on Tuesday, June 7, 2005, Respondent moved for a directed verdict. Following argument by counsel for Claimant and Respondent, the Panel went into Executive Session at the conclusion of which it granted in part and denied in part the Respondent's Motion for a Directed Verdict. Specifically, the Panel granted Respondent's Motion for Directed verdict in the following manner:

- Claimant's Tennessee Securities Act cause of action.
- Claimant's Tennessee Consumer Protection cause of action.
- Claimant's allegation of a failure on the part of the Respondent to diversify Claimant's portfolio as compared to asset allocation.
- Claimant's cause of action for Respondent's failure to develop a "hedging strategy" on behalf of Claimant.

Those portions of the Claimant's cause of action for which the Motion for Directed Verdict was denied and remained for resolution as a result, were as follows:

- Claimant's allegation of securities and regulatory/industry rule violations.
- Claimant's allegation of an intentional and negligent misrepresentation by the Respondent.
- Claimant's allegation of unjust enrichment by Respondent.
- Claimant's allegation of a breach of fiduciary duty by Respondent.
- Claimant's allegation of a breach of the duty of good faith and fair dealing by Respondent.
- Claimant's allegation of common law negligence.

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 the NASD Dispute Resolution (the "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. The Panel decided the remaining issues before it in the following manner:

- The Claimant did not meet his burden of proof in terms of his allegations of securities and regulatory/industry rule violations by Respondent; the Panel found it unnecessary to rule as to whether a private cause of action exists for such violations in light of the failure of the Claimant to reach his evidentiary burden.
- As to the Claimant's allegation of intentional and negligent misrepresentation the panel finds no evidence was introduced into the record to sustain a finding Respondent and/or its agent, Conklin, engaged in any intentional or negligent misrepresentation.
- As to the Claimant's allegation Merrill Lynch was unjustly enriched, the Panel finds the claim not only to be without merit but bordering on the frivolous and offensive. Specifically, the Panel finds that all times material Merrill Lynch and/or its representative Conklin engaged in activities which had the goal and intent of preserving assets and enhancing income to Claimant and thereby reducing income to the firm. This course of conduct by Respondent resulted in reduced cost to the Claimant during the period of his relationship with Merrill Lynch when compared to the Claimant's relationship with other brokers before and after Merrill Lynch's handling of his account.
- As to the allegation of the Claimant that Respondent breached a fiduciary duty owed to the Claimant, the Panel finds no evidence to support such a finding.

- As to the claimant's allegation of breach of good faith and fair dealing by the Respondent, Claimant has failed to carry his evidentiary burden that Merrill Lynch did not satisfy its duty of dealing openly and honestly with Claimant at all times material.
  - As for the Claimant's allegation of common law negligence, the Panel finds no evidence to support a finding of negligence or that Merrill Lynch breached a duty of care owed Claimant or that it conducted its activities in any manner which caused Claimant's losses suffered during the period he had his account with Respondent.
  - All other matters not specifically addressed hereinabove, the Panel finds that the Claimant has failed to meet his burden of proof and that his claim should stand **DISMISSED** with prejudice.
2. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees, not specifically awarded or otherwise provided for above.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$175.00

#### **Member Fees**

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

Member surcharge	\$ 875.00
Pre-hearing process fee	\$ 750.00
Hearing process fee	\$ 1,000.00
Total Member Fees	\$ 2,625.00

#### **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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

1	Pre-hearing session(s) with Panel	x	600.00	\$	600.00
	September 14, 2004	1 session			
3	Hearing sessions	x	600.00	\$	1,800.00
	June 7, 2005	2 sessions			
	June 8, 2005	1 session			
	Total Forum Fees			\$	2,400.00

The Arbitration Panel has assessed \$1,200.00 of the forum fees to William Hutchins.  
The Arbitration Panel has assessed \$1,200.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Incorporated.

### Fee Summary

Claimant, William Hutchins, shall be and hereby is liable for:

Initial Filing Fee	= \$	175.00
<u>Forum Fees</u>	= \$	1,200.00
Total Fees	= \$	1,375.00
<u>Less payments</u>	= \$	-625.00
Balance Due NASD Dispute Resolution	= \$	750.00

Respondent, Merrill Lynch Pierce Fenner & Smith, Incorporated, shall be and hereby is liable for:

Member Fees	= \$	2,625.00
<u>Forum Fees</u>	= \$	1,200.00
Total Fees	= \$	3,825.00
<u>Less payments</u>	= \$	-3775.00
Balance Due NASD Dispute Resolution	= \$	50.00

All balances are due to NASD Dispute Resolution

### ARBITRATION PANEL

D. Bruce Shine, Esq. - Public Arbitrator, Presiding Chair  
Arthur L. Tepper, Esq. - Public Arbitrator  
George Michael Cross - Non-Public Arbitrator

Concurring Arbitrators:

/s/ D. Bruce Shine  
D. Bruce Shine, Esq.  
Public Arbitrator, Presiding Chair

July 25, 2005  
Signature Date

/s/ Arthur L. Tepper  
Arthur L. Tepper, Esq.  
Public Arbitrator

July 28, 2005  
Signature Date


/s/ George Michael Cross  
George Michael Cross  
Non-Public Arbitrator

July 25, 2005  
Signature Date

7/28/05  
Date of Service (For NASD office use only)

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Concurring Arbitrators

  
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Public Arbitrator, Presiding Chair

Arthur L. Tepper, Esq.  
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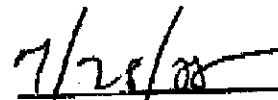
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