

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 04-02026

Joan Cutuly, Claimant v. Walter Harroll, Respondent

ATTORNEYS:

Claimant Joan Cutuly ("Claimant") appeared *pro se*, Netarts, OR.

For Respondent Walter Harroll ("Respondent") appeared Jonathan Robbins, Esq., in-house counsel, Morgan Stanley DW, Inc., San Francisco, CA.

NATURE OF DISPUTE: Customer v. Associated Person.

DATE FILED: March 25, 2004.

CASE SUMMARY: Claimant alleged that Respondent provided her with incorrect tax advice that resulted in a loss in her account. Claimant's claim involved unspecified annuities.

Addendum to Award: See Exhibit A

Claim Data

Claim: \$6,500.00
Punitive: \$3,500.00
Interest: Unspecified

Costs: \$3,848.55
Other: \$.00

Award Data

Award: \$6,500.00
Punitive: \$.00
Interest: 9% from date of award to
Date of payment
Costs: \$.00
Other: \$.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Respondent is liable and shall pay to the Claimant \$6,500.00. 2) Respondent is liable and shall pay Claimant interest at the rate of 9% per annum from the date of the award to the date of payment of the award. 3) All requests for punitive damages are denied. 4) All other relief requests are denied. 5) NASD Dispute Resolution previously waived the \$75.00 filing fee and \$250.00 hearing session deposit. 6) Respondent is liable and shall pay NASD Dispute Resolution \$325.00 for the filing fee previously waived.

OTHER FEES: Pursuant to Rule 10333 of the Code, Morgan Stanley DW, the Respondent's firm at the time the dispute arose, has paid to NASD Dispute Resolution the \$325.00 Member Surcharge previously invoiced.

Nancie K. Potter, Esq.

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Sole Public Arbitrator

AFFIRMATION

I, Nancie K. Potter, Esq., do hereby affirm, upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.

Nancie K. Potter
Nancie K. Potter, Esq.

11/29/04
Signature Date

January 21, 2005
Date of Service (For NASD-DR office use only)

Joan Cutuly vs. Walter Harroll
Case Number 04-02026

Addendum to Award

If it were within my power, I would have treated this as an action against both Walter Harroll and Morgan Stanley because Morgan Stanley acknowledged it as such. (See, e.g., Respondent Walter Harroll's Answer and Affirmative Defenses, p. 3, ¶1.) Given that Morgan Stanley itself interpreted the case as a *respondeat superior* claim, I would have done the same. I do believe that would have been the proper result, and that the case would have been brought in that fashion if the claimant had been represented by a lawyer.

The evidence I received from Respondent Harroll included an excerpt from Morgan Stanley's compliance guide; the front page only of its form DWR9488-3, "Retirement Support Services"; and Jonathan Robbins' June 9, 2004 letter to the claimant. Although there was reference to Mr. Harroll's "record" and "his affirmation" in Respondent's Answer and Affirmative Defenses (p. 4), I did not receive a copy of either the claims record or an affirmation. As a practical matter, I attached little weight to the compliance guide and would have given no weight to the claims record.

Had I received an affirmation from Mr. Harroll, I would have weighed it against the claimant's testimony through her submission. Since this is essentially a swearing match, though, I would have had to make a credibility judgment based solely upon written statements. Giving to Respondent the assumption that Mr. Harroll would have stated that he complied with Morgan Stanley's prohibition on giving tax advice, I still find the claimant's testimony as to the alleged representation credible.

This is a close case. I was particularly mindful that Claimant would only be entitled to seek a remedy if she had a right to rely upon the respondent's representation about the tax effects of her proposed transaction. But given that Mr. Harroll was her "financial advisor" (Answer and Affirmative Defenses, p. 1), I find that it was reasonable for Claimant to rely upon his statement as to the tax consequences of her proposed transaction.

I also looked to other evidence concerning reliance.

The only other evidence I see in the record is the alleged written advice Morgan Stanley gave to the claimant, "that she should consult with a tax advisor before making the distribution request at issue." (Answer and Affirmative Defenses, p. 1, ¶2.) I find that statement, which appears on the Retirement Support Services document (Respondents' Exhibit B), to be ambiguous. It provides that certain distributions must be made after the IRA owner attains or would have attained age 70½, which does not apply to this claimant, as reflected in Claimant's Exhibit H. It then goes on to advise that "**I understand that this computation is my responsibility with the aid of a tax advisor.**" (Emphasis added by Respondents.) Under the circumstances, I find that the reference to "this computation" most likely relates to a computation that the claimant would reasonably believe does not apply to her. Accordingly, I determined that the "written warning"

did not clearly advise the claimant that she should consult with a tax advisor as to her proposed transaction, and that she therefore acted reasonably in relying upon Mr. Harroll's statement.