

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)	
<u>Name of Claimant(s)</u>)
John R. Vaccaro, as personal)
representative of the estate of)
Ernest Whitaker)
)
<u>Name of Respondent(s)</u>)
Merrill Lynch, Pierce, Fenner)
& Smith, Inc., John A. Haley)
David B. Ellis)
)

Case No. 88-03912

Heard before the members of the Arbitration Panel:

Peter J. Forman, Esq.	Public
Leslie Bishop	Industry
W. Allen Schmitt	Public

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on December 23, 1988. Claimant, John R. Vaccaro ("Vaccaro"), as personal representative of the estate of Ernest Whitaker, deceased ("Whitaker"), alleged that Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), John A. Haley ("Haley") and David B. Ellis ("Ellis"), recommended certain investments purportedly in conformance with the decedent's estate planning needs; that Respondents made misrepresentations of and omitted to state material facts; recommended and induced the purchase of unsuitable securities including a charitable annuity, limited partnerships and junk bonds and the liquidation of conservative investments including "AAA" tax free bonds; that Ellis used undue influence on the then 92 year old decedent to obtain his agreement to the unsuitable transactions; that Respondents' actions constituted fraud, gross negligence, negligent misrepresentation, breach of fiduciary duty, negligent supervision, tortious interference with testamentary expectancy and violation of Section 517.301, Florida Statutes.

In a Statement of Answer filed with the NASD on September 6, 1989, Respondents, MLPFS and Haley, denied all allegations of wrongdoing and alleged that the investment decision were made by decedent; that no junk bonds were purchased in the account; that the annuity was purchased through another broker dealer; Ellis offered decedent the opportunity to cancel the limited partnership investment; Respondents acted properly in every respect

in the handling of this account; there are no allegations that any transactions resulted in a loss; and, Respondents owed no fiduciary duty to decedent.

Respondents alleged the affirmative defense of lack of standing of Vaccaro to assert the Claims.

Respondent, Ellis, did not file an Answer to the Claim.

RELIEF REQUESTED

Claimant requested damages in the amount of \$250,000.00, interest, costs, attorney's fees, punitive damages of \$1,000,000.00 and other relief.

Respondents, MLPFS and Haley, requested dismissal, costs and legal fees.

AWARD

On January 22, 1991 (pre-hearing conference), March 25 26 and 27, 1991, in Fort Lauderdale, Florida, during a hearing lasting nine (9) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on November 30, 1988, by Respondents, Haley and Ellis, on March 25, 1991, and signed on September 6, 1989 by Phillip M. Mandel on behalf of Respondent, MLPFS.

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

1. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.
2. Respondents are found liable to the Claimant for the amount of \$115,000.00, plus interest at the legal rate of 12% per annum (from September 11, 1987 to April 2, 1991) in the amount of \$48,300.00 for a total due to the Claimant of \$163,300.00. Haley is found liable and shall pay to the Claimant the amount of \$1,000.00. MLPFS and Ellis are found liable, jointly and severally, and shall pay to the Claimant the amount of \$162,300.00.
3. Claimant's requests for attorney's fees, costs, and punitive damages are denied.
4. Respondents' requests for costs and legal fees are denied.

FORUM FEES

1. Pursuant to Section 43c of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$8,300.00, (8 sessions x \$1,000.00 and 1 session with one arbitrator x \$300.00). Claimant is hereby assessed \$4,150.00 for which the NASD shall retain the \$1,000.00 previously deposited in partial satisfaction thereof. Respondents, MLPFS and Ellis, are hereby assessed \$4,150.00, jointly and severally, payable to the National Association of Securities Dealers, Inc.

2. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

Fees are payable to the National Association of Securities Dealers, Inc.

OTHER ISSUES

None.

Concurring Arbitrators' Signatures

/s/
Peter J. Forman, Esq.

/s/
Leslie Bishop

Dissenting Arbitrator's Signature

/s/
W. Allen Schmitt

Date of Decision: April 18, 1991