

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Mary Ann Barragy, Individually and
as Trustee

91-00025

Name of Respondent(s)

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Logan D. Fitch

REPRESENTATION

For Claimant: Mary Ann Barragy, Individually and as Trustee, was represented by Carol A. Bavousett, Esq., San Antonio, Texas.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. and Logan D. Fitch were represented by Kathy D. Patrick, Esq. and Jennifer Josephson, Esq. of Gibbs & Ratliff, Houston, Texas.

CASE INFORMATION

Statement of Claim filed: January 3, 1991
Claimant Mary Ann Barragy's Submission Agreement, Individually and as Successor in Interest and prior Co-Trustee of the Trust under the Will of Edward Barragy FBO Mary Ann Barragy, and as Independent Co-Executor of the Estate of Mary T. S. Barragy signed on: January 31, 1991

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Logan D. Fitch on: June 13, 1991

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed on: June 28, 1991 by Michael J. Stewart, First Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc.

Respondent Logan D. Fitch's Submission Agreement signed on: June 25, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Dates/Sessions: January 29, 1992 for two (2) sessions

January 30, 1992 for two (2) sessions
January 31, 1992 for two (2) sessions
February 1, 1992 for two (2) sessions

Hearing Location: Houston, Texas

CASE SUMMARY

Claimant Mary Ann Barragy, Individually and as Trustee ("Barragy"), alleged that Respondent Logan D. Fitch ("Fitch"), while employed by or acting as an agent for Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), recommended unsuitable investments in illiquid limited partnerships given the age, health and specific investment objectives of Mary T. S. Barragy (Mother of Mary Ann Barragy) and Barragy's own investment objectives. In addition, Barragy alleged that Fitch failed to fully inform her of the illiquid nature of the investments. Furthermore, Barragy alleged that Fitch failed to execute the sale of certain securities in early October of 1987 for the purpose of paying the tax liability of the estate of Mary T. S. Barragy and that the accounts were churned for a period of time. Based upon the above allegations, Barragy asserted claims for violation of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; violation of Section 33A(2) of the Texas Securities Act and the Martin Act under New York statutory law; violation of Section 20 of the Securities and Exchange Act of 1934 by Merrill Lynch as a "control person"; and constructive fraud under both Texas and New York common law.

Respondents Merrill Lynch and Fitch denied the material allegations of the Statement of Claim, alleging that:

1. Mary Ann Barragy's investments were suitable;
2. Mary T. S. Barragy managed her own affairs and selected investments that were suitable given her investment objectives;
3. Merrill Lynch and Fitch made full disclosure to Mary Ann Barragy and Mary T. S. Barragy of all material facts related to their investments;
4. The accounts were not churned;
5. Merrill Lynch and Fitch did not fail to sell securities prior to October of 1987.

In addition, Merrill Lynch and Fitch alleged that Barragy is estopped from contending that they were deceived or misled due to the written disclosures made to the Claimant and Mary T. S. Barragy; the Barragys failed to act with due diligence by ignoring the written disclosures and in informing Fitch of information upon which to base his investment recommendations; the Barragys' agreements contained contractual limitations on the liability for losses due to market conditions; and the Barragys controlled the trading in their accounts.

RELIEF REQUESTED

Claimants requested that the arbitrators enter an award against Respondents for rescission of the partnership interests and return of the purchase price of \$198,000.00; actual damages for churning in the sum of \$31,820.00; punitive damages in the amount of \$100,000.00; interest at the rate of 7% compound interest per annum; costs and reasonable attorneys' fees.

Respondents requested the panel enter an award exonerating them of any wrongdoing and providing that Mary Ann Barragy shall take nothing by her claim against them.

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 originals remain on file with the NASD.

On or about January 22, 1992, Claimant filed a Request for Leave to Amend the Statement of Claim, which the Respondents objected to in a written reply. The Motion and Reply was forwarded to the arbitrators and the panel denied the Motion on January 24, 1992.

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 Statement of Claim is hereby dismissed and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: Eight (8) sessions x \$750.00 = \$6,000.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and refund the hearing session deposit of \$750.00 previously deposited by the Claimant Mary Ann Barragy, Individually and as Trustee. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable

for and shall pay to the NASD forum fees in the sum of \$6,000.00.

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

CONCURRING ARBITRATOR'S SIGNATURES

Dated:

Donald E. Fidler
Donald E. Fidler, Esq.
Public Arbitrator
Chairperson

March 25, 1992

Raymond Horn
Raymond Horn
Public Arbitrator

March 25, 1992

Robert M. Birenbaum
Robert M. Birenbaum
Industry Arbitrator

March 25, 1992

Date of Decision: April 6, 1992