

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Wallace Edward Clayton & Muriel Clayton

91-00347

Name of Respondent(s)

Merrill Lynch, Pierce Fenner & Smith Inc.
Anne M. Cook

REPRESENTATION

For Claimant: Wallace Edward Clayton and Muriel Clayton were represented by Bruce R. Haurlin, Esq. of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beebears, P.A., in Tucson, Arizona.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. and Anne M. Cook were represented by Charles L. Henderson, Esq. of Merrill Lynch, Pierce, Fenner & Smith Inc., in New York, New York.

CASE INFORMATION

Statement of Claim filed: February 1, 1991

Amended Statement of Claim filed: March 27, 1991

Claimants' Submission Agreement signed on: March 8, 1991 and May 3, 1991

Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and Anne M. Cook on: July 10, 1991

Respondent Merrill Lynch, Pierce, Fenner & Smith Inc.'s Submission Agreement signed on: July 1, 1991 by George A. Schieren, First Vice President, Merrill Lynch, Pierce, Fenner & Smith Inc.

Respondent Anne M. Cook's Submission Agreement signed on: July 10, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: April 13, 1992 for Three (3) sessions

Hearing Location: Scottsdale, Arizona

CASE SUMMARY

Claimants Wallace Edward Clayton and Muriel Clayton ("Clayton") alleged that Respondent Anne M. Cook ("Cook"), while employed by or acting as an agent for Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"),

fraudulently misrepresented certain factors of the Lifetime Government Fund of MFS ("MFS") in order to induce the Claytons to purchase this security as a retirement investment in August of 1988. Cook's representations fraudulently led the Claytons to believe that MFS: 1) met the Claytons' basic investment needs of high-yield, low growth and secure principal; 2) would yield nearly 12% interest income guaranteed for the six-year term of the investment; 3) had a good performance record; 4) was popular among other Merrill Lynch customers; and 5) had "secure backing by U.S. Government Securities." It was determined in February of 1990 that the Claytons were receiving a return of only 6% and that the principal had been lost as a result of MFS taking money in order to pay part of the Claytons' monthly income. In addition, the Claytons alleged that the Respondents failed to inform them of the perilous mismanagement of this MFS until the Claytons had already suffered significant losses. Furthermore, the Claytons asserted that these acts of fraudulent misrepresentation constituted a breach of contractual, regulatory and statutory obligations imposed on Merrill Lynch to act in good faith and with high standards of business conduct in the handling of the Claytons' MFS investment.

Respondents Merrill Lynch and Cook denied each and every allegation of wrongdoing in the Statement of Claim, alleging that:

1. The Claytons had previously purchased U.S. Government income mutual funds;
2. Preservation of principal was not mentioned by Mr. Clayton as an objective;
3. Cook advised the Claytons that the principal valuation would fluctuate (to which the Claytons raised no objection) and that the fund had a contingent deferred sales charge which would decline over six years. In addition, the Claytons were furnished a prospectus for the fund which was enclosed with the trade confirmation of purchase sent to the Claytons;
4. No guarantees were made to the Claytons regarding the performance of MFS;
5. From September, 1988 to October, 1990, Clayton received monthly statements for his IRA showing all activity for the month and which clearly reflect the principal fluctuation;
6. The Claytons never questioned the investment until early 1990, when the investment declined in principal valuation and monthly income distribution, at which time Mr. Clayton was told that he had the option to transfer into another fund or cash out. While other high yield funds were investigated by Clayton, he continued to hold MFS until October 3, 1990 when the position was transferred out. As of that date, total distribution from this investment was \$83,946.37 which, along with the net asset value of MFS at \$301,702.62, gave Clayton a net gain of \$52,643.46, resulting in no realized losses.

In addition, Respondents asserted the following affirmative defenses:

1. The Statement of Claim fails to state claims upon which relief can be granted;
2. The Statement of Claim fails to particularize facts establishing a legal theory under which Respondents could be held liable for the alleged damages;
3. Clayton is barred from recovery because he directed, authorized, consented to, acquiesced in, and/or ratified all transactions in his account with Merrill Lynch;
4. Any losses which may have been suffered by the Claytons were caused by their investment decisions and due to market conditions outside Respondents' control;
5. Respondents acted properly and in good faith with regard to Clayton's account;
6. All transactions were properly conducted in accordance with applicable rules and regulations, were separately confirmed in writing and reflected on monthly statements, and no timely complaint or objection was ever made to Merrill Lynch by the Claytons; and
7. The Claytons failed to mitigate damages.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents in the sum of \$57,750.00, plus costs and attorneys' fees.

Respondents requested that the arbitration panel dismiss Claimants' claims against Respondents and, furthermore, that they be awarded attorneys' fees, costs, and expenses incurred in the defense of the action.

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.

At hearing, Respondents moved to remove Muriel Clayton as a party to the action. After hearing argument, the panel took the matter under advisement. Upon review, the panel determined that the motion would be denied.

At hearing, the panel withheld acceptance of an affidavit for attorneys' fees submitted by the Claimant pending discussion during deliberations. After deliberating, the panel determined that based upon its' decision, the issue of acceptance of the affidavit was moot.

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: Three (3) sessions x \$500.00 = \$1,500.00.

The National Association of Securities Dealers Inc. shall retain the Claim filing fee of \$150.00 and the hearing session deposit of \$500.00 previously deposited by the Claimants Wallace Edward Clayton and Marriel Clayton. Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. is liable for and shall pay to the NASD forum fees in the sum of \$1,000.00.

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

CONCERNING ARBITRATORS' SIGNATURES

Date:

William M. Howard
William M. Howard, Esq.
Public Arbitrator
Chairperson

May 26, 1992

Jay A. Gatlin
Jay A. Gatlin
Public Arbitrator

May 29, 1992

Mercedes G. Johnson
Mercedes G. Johnson
Industry Arbitrator

June 2, 1992

Date of Decision:

June 10, 1992