

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Lawrence E. Lee, MD, and Edward Alpert, MD,
Trustees of the Allergy Clinic of South Macomb, PC,
Employees Profit Sharing Trust

91-00993

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.;
David A. Stulberg

REPRESENTATION

For Claimants: Lawrence E. Lee, MD, and Edward Alpert, MD, Trustees of the Allergy Clinic of South Macomb, PC, Employees Profit Sharing Trust ("Trustees") were represented by Laurence S. Schultz, Esq. of Driggers, Schultz, Herbst & Patterson, located in Troy, Michigan.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and David A. Stulberg ("Stulberg") were represented by Clarence L. Pozza, Jr., Esq., of Miller, Canfield, Paddock and Stone, P.C., located in Detroit, Michigan.

CASE INFORMATION

Statement of Claim filed: April 1, 1991.

Claimant's Submission Agreement signed on: April 11, 1991 by Lawrence E. Lee and Edward Alpert, Trustees, Allergy Clinic of South Macomb, PC, Profit Sharing Trust.

Statement of Answer filed by Respondents on: July 17, 1991.

Respondent Merrill Lynch's Submission Agreement signed on: July 17, 1991 by John R. Cummings, First Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc.

Respondent Stulberg's Submission Agreement signed on: July 5, 1991.

HEARING INFORMATION

Pre-Hearing Conference: May 19, 1992 for One (1) session; and
October 21, 1994 for One (1) session.

Hearing Dates/Sessions: November 17, 1994 for Two (2) sessions;
November 18, 1994 for Two (2) sessions;
February 9, 1995 for Two (2) sessions;
February 10, 1995 for Two (2) sessions;
April 28, 1995 for Two (2) sessions.

Hearing Location: Southfield, Michigan.

CASE SUMMARY

Claimants alleged that Respondent Stulberg, while employed by or acting as an agent for Respondent Merrill Lynch, misrepresented and induced Claimants to purchase securities which were unsuitable given the Claimant's investment objectives. The Claimants specifically alleged that:

1. On behalf of the Trust, The Claimants opened their account with the Respondents in the late 1970s. The Claimants advised Respondents that they had conservative investment objectives and that as trustees, their primary objective was the preservation of principal plus generating a reasonable income. The account remained in mostly conservative investments until 1986 when Stulberg began to broaden the type of investments. The Claimants believed that Stulberg was recommending only conservative investments based upon the investment guidelines established earlier;
2. In 1986 and 1987, Stulberg recommended the purchase of the following investments: Franklin Savings Association of Topeka bonds; One Bancorp bonds; Hills Department Stores, Inc. bonds; and the ML Lee Acquisition Fund Limited Partnership. Stulberg assured the Claimants that these were safe conservative investments, consistent with the investment objectives of the Trust;
3. The Claimants were unaware that the bonds were highly speculative junk bonds, which Respondents became aware of, but failed to inform Claimants. In addition, Claimants were unaware that the ML Lee investment was a highly speculative limited partnership engaged in providing mezzanine financing in connection with leveraged buyouts, requiring the purchase of junk bonds and caused the value of the partnership to decline with the junk bond market; and
4. Respondents failed to inform the Claimants of the characteristics of the investments, including the declining condition of the entities, and that Merrill Lynch was involved as an investment banker in connection with the entities.

Based upon the above allegations, the Claimants asserted claims for breach of fiduciary duty; misrepresentation and common law fraud; violation of the federal and state securities laws; violation of the Michigan Consumer Protection Act; negligent violation of the NYSE and NASD Rules; violation of the fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA); breach of contract; violation of the federal RICO Act, 18 USC §§ 1961-1968.

Respondents denied the material allegations of the Statement of Claim, asserting that:

1. When Claimants opened the accounts, the investment objectives could not be described as conservative. While they desired to preserve their principal, their greater desire was to generate income. Therefore, they purchased securities with a view toward higher yield, many of which were below investment grade and included medium to lower quality utilities and financial issues;
2. Claimants were aware that not all the recommendations made by Stulberg were of high quality or conservative investments, but also knew that higher income would require greater risk. Claimants chose the higher risk securities to achieve the greater rate of return they desired;
3. The One Bancorp bonds were recommended primarily for their appreciation, but also for their income. The Claimants were aware of the type of investment and a prospectus was provided detailing the risks of the investment. The Franklin Savings bonds were explained to Claimants, and were recommended for income consistent with the Claimants desires and previous investments. The Franklin Savings bonds were unrated at the time of issue, but were rated just below investment grade and Merrill Lynch research was favorable by the end of 1986;
4. The One Bancorp bonds were sold in October 1989, but the Claimants insisted that the trade be busted because they would not accept the proceeds of the sale at a price of \$340.00. The position was reestablished in the account;
5. The Claimants received a prospectus detailing the risks associated with the purchase of Hills Department Store bonds. The bonds were recommended for income and appreciation, and were not represented as being similar to high grade corporate or government securities;
6. The Claimants received a prospectus for the ML Lee partnership which detailed the risks and characteristics of the investment in detail. The partnership was never described as an income fund which was conservative.

In addition, the Respondents asserted several affirmative defenses, including the following:

1. The Statement of Claim fails to allege claims upon which relief can be granted;
2. The Claimants are estopped from asserting the claims due to their own acts and conduct;
3. The Claimants, with full knowledge of the facts, ratified, approved and confirmed the acts complained of in the Statement of Claim;
4. The Claimants failed to exercise due diligence, were reckless and/or negligent in the supervision of their financial affairs;
5. The Claimants failed to mitigate their damages; and
6. The claims asserted in the Statement of Claim are barred by the applicable States of Limitations and the doctrine of laches.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for the losses incurred of \$245,000.00 in connection with the improper purchase of the bonds and limited partnership, plus interest, costs and attorneys' fees. In addition, Claimants sought treble damages pursuant to RICO.

Respondents requested that the Statement of Claim be dismissed in its entirety, that the cost of the proceeding be assessed against Claimants and that the Panel award Respondents such further relief as they deemed proper.

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.

AWARD

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

1. The claims asserted by Lawrence E. Lee, MD, and Edward Alpert, MD, Trustees of the Allergy Clinic of South Macomb, PC, Employees Profit Sharing Trust are hereby denied and dismissed with prejudice;

2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

OTHER COSTS

The NASD shall retain the \$1,000.00 postponement fee paid by the Claimants and apply the same toward the forum fees due.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Pre-Hearing sessions with an arbitrator x \$300.00 per session = \$600.00; Ten (10) hearing sessions x \$1,000.00 per session = \$10,000.00; Total Forum Fees = \$10,600.00.

The National Association of Securities Dealers, Inc. shall retain the \$250.00 non-refundable claim filing fee. In addition, the NASD shall retain the \$1,000.00 hearing session deposit previously deposited and the \$1,000.00 postponement fee paid by the Claimants. The Claimants, Lawrence E. Lee, MD, and Edward Alpert, MD, Trustees of the Allergy Clinic of South Macomb, PC, Employees Profit Sharing Trust are liable for and shall pay to the NASD the sum of \$3,300.00 as forum fees. Furthermore, Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David A. Stulberg are jointly and severally liable for and shall pay to the NASD the sum of \$5,300.00. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Date

/s/ Donald A. Edwards, Esq.

July 13, 1995

Donald A. Edwards, Esq.

Public Arbitrator

Chairperson

/s/ Hugh R. Kennedy

July 13, 1995

Hugh R. Kennedy

Public Arbitrator

/s/ Harold I. Gach, Esq.

July 13, 1995

Harold I. Gach, Esq.

Industry Arbitrator

For NASD Use Only/Date of Decision: July 24, 1995