

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Gustavo G. and Rosalinda G. Gomez

No. 91-01457

Name of Respondents

Metlife-State Street Service Center  
Craig Kolak  
MetLife Securities, Inc.  
Metropolitan Life Insurance Company

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REPRESENTATION OF PARTIES

For Claimants: Richard Wynn appeared on behalf of the Claimants. Claimants also appeared.

For Respondents: Mitchell Elberg, Esq., Associate Counsel, Metropolitan Life Insurance Company.

CASE INFORMATION

Statement of Claim filed: June 3, 1991.

Claimant's Submission Agreement signed on: May 29, 1991.

Statement of Answer filed by Respondents, Craig Kolak, Metlife Securities, Inc., and Metropolitan Life Insurance Company on: August 14, 1991.

Respondent Craig Kolak's Submission Agreement signed on: October 30, 1991.

Respondent Metlife Securities, Inc's Submission Agreement signed on: August 14, 1991.

Respondent Metropolitan Life Insurance Company's Submission Agreement signed on: August 14, 1991.

Respondent Metlife-State Street Service Center has failed to file a Submission to Arbitration.

Respondent Metlife-State Street Service Center's Motion to Dismiss filed: June 28, 1991.

Claimants' response to the Motion to Dismiss filed on or about: July 18, 1991.

Amended Statement of Claim filed on or about: July 18, 1991.

Respondent Metlife-State Street Service Center's response to the Amended Statement of Claim filed: August 12, 1991.

Respondent Metlife-State Street Service Center's Statement of Answer filed: October 10, 1991.

Respondent Craig Kolak's separate Statement of Answer filed: July 15, 1991.

#### HEARING INFORMATION

Hearing date: April 1, 1992. 1 session.

Hearing Location: Chicago, Illinois.

#### CASE SUMMARY

Claimants Gustavo G. and Rosalinda G. Gomez ("Claimants") alleged breach of fiduciary duty, and unsuitability arising out of a transaction with Craig Kolak ("Kolak"), an employee of Metropolitan Life Insurance Corporation ("Metropolitan") and an agent of Metlife Securities, Inc. ("MLS"), involving the MetLife High Income Bond Fund ("the Fund"). Claimants further alleged that the recommendations concerning the fund were contrary to the Claimants' stated investment goal of safety. Moreover, Claimants stated that Kolak did not explain the risks of the Fund. Claimants also alleged that they were unsophisticated, and did not understand the investment they had been placed in, and also that they did not understand that the dividends from the Fund were to be reinvested. Finally, Claimants alleged that despite the heavy losses, they relied on Kolak's recommendation to keep the investment.

For their joint Statement of Answer, Kolak, Metropolitan, and MLS denied any and all allegations of wrongdoing or liability to the Claimants. In addition, Respondents stated the following affirmative defenses:

1. Claimants fail to state a claim for which relief may be granted. Claimants have brought this claim more than two years after making the complained of investment. Claimants were advised verbally of the risks associated with this mutual fund investment and were provided with a prospectus which informed Claimants of that which they now claim to have been ignorant.

2. The mutual fund investment made by Claimants was not unsuitable for their stated and disclosed objective for long-term capital appreciation. The Claimants precipitously changed their objective concerning this investment when, upon information and belief, Claimants required immediate liquidity in order to engage in a real estate transaction.

3. Each and every claim directed against Respondents is barred by the doctrine of waiver. Claimants were given a prospectus before the purchase was made and were advised of the risks with this mutual fund investment.

4. Each and every claim directed against Respondents is barred by the doctrine of laches.

5. Each and every claim directed against Respondents is barred by the doctrine of estoppel. Claimants are estopped from making the claims set forth in the Statement of Claim because they failed to take any action or were silent and without any complaint whatsoever for a period exceeding two years.

6. Each and every claim directed against Respondents is barred by the doctrine of avoidable consequences. Claimants liquidated their interest in the mutual fund investment suddenly, and against the advice of Kolak, and without regard to then current market conditions. If Claimants had not deviated from the investment strategy and objectives which they had adopted, the redemption of the shares of the mutual fund could have taken place at a time when the price was considerably higher.

7. Any damage, injury or loss Claimants have incurred was due solely to the intervening and superceding negligence and/or fault of Claimants, and were not proximately caused by Respondents.

In its Statement of Answer, Metlife-State Street Service Center ("Metlife") denied any and all allegations of wrongdoing or liability to the Claimants. Furthermore, Metlife contested the jurisdiction of the NASD over it. In addition, Metlife stated the following affirmative defenses:

1. Metlife is not a member or in any manner subject to the authority of the NASD, this action is brought against Metlife without any jurisdictional basis and should therefore be dismissed.

2. In the alternative, the Claimants have failed to state a

claim against Metlife upon which relief may be granted. Metlife was not associated with Respondent Kolak. In addition, Metlife never had any contact with the Claimants. Consequently, no duty existed between Metlife and Claimants.

3. Claimants fail to state a claim against Respondent upon which relief may be granted. Claimants have brought this complaint more than two years after the making of the complained of investment. Upon information and belief, Claimants were, advised verbally of the risks associated with the mutual fund investment and were provided with a prospectus which informed Claimants of that which they claimed to have been ignorant.

4. Each and every claim against Metlife is barred by the statute of limitations.

5. The mutual fund investment made by Claimants was not unsuitable for their stated and disclosed objective for long-term capital appreciation. The Claimants precipitously changed their objective concerning this investment when, upon information and belief, Claimants required immediate liquidity in order to engage in a real estate transaction.

6. Each and every claim directed against Respondents is barred by the doctrine of waiver. Claimants were given a prospectus before the purchase was made and were advised of the risks with this mutual fund investment.

7. Each and every claim directed against Respondents is barred by the doctrine of laches.

8. Each and every claim directed against Respondents is barred by the doctrine of estoppel. Claimants are estopped from making the claims set forth in the Statement of Claim because they failed to take any action or were silent and without any complaint whatsoever for a period exceeding two years.

9. Each and every claim directed against Respondents is barred by the doctrine of avoidable consequences. Claimants liquidated their interest in the mutual fund investment suddenly, and against the advice of Kolak, and without regard to then current market conditions. If Claimants had not deviated from the investment strategy and objectives which they had adopted, the redemption of the shares of the mutual fund could have taken place at a time when the price was considerably higher.

10. Any damage, injury or loss Claimants have incurred was due solely to the intervening and superceding negligence and/or fault of Claimants, and were not proximately caused by Respondents.

### RELIEF REQUESTED

Claimants requested that they be awarded the sum of \$10,688.00 as compensatory damages.

Respondents Kolak, MLS, and Metropolitan requested that Claimants' claim for damages be denied in all respects and that the costs of this proceeding be assessed against the Claimants.

Respondent Metlife requested that Claimants' claim for damages be denied in all respects and that the costs of this proceeding be assessed against the Claimants.

### OTHER ISSUES CONSIDERED & DECIDED

On June 27, 1991, Respondent Metlife filed a motion to dismiss itself from this arbitration under Section 12 (b) of the Code of Arbitration Procedure. After consideration of the motion, and response, the Director of Arbitration denied the motion to dismiss, and required Respondent Metlife to submit a Statement of Answer. However, the Director of Arbitration allowed Metlife to re-raise this issue with the panel of arbitrators ultimately selected to decide this case by incorporating its position in its Statement of Answer.

Respondent Metlife-State Street Service Center did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the Code of Arbitration Procedure and having answered the claim, appeared at the hearing and is bound by the determination of the arbitrator on all issues submitted.

The parties have agreed that the Award in this matter may be executed by a counterpart copy 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 original remains on file with the NASD.

### AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Craig Kolak, Metlife Securities, Inc., and Metropolitan Life Insurance Company are jointly and severally liable for, and shall pay to Claimants Gustavo G. and Rosalinda G. Gomez the sum of \$10,688.00 as satisfaction for all of Claimants' claims herein; and

2. Respondent Metlife-State Street Service Center's motion to dismiss is hereby granted.

FORUM FEES

Pursuant to Section 43 (c) of the NASD Code of Arbitration Procedure, the following forum fees are assessed:

1 hearing session X \$200.00 = \$200.00

Pursuant to Section 43 (c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$75.00, and shall retain the hearing session deposit in the amount of \$200.00 previously paid to the NASD by the Claimant.

Dated:

April 8, 1992

/s/Steven A. Bloomberg  
Steven A. Bloomberg  
Presiding Chair