

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Phyllis M. Day, et al.

91-03274

Name of Respondent(s)

Merrill Lynch Pierce Fenner & Smith Inc
Karen S. Smelker

REPRESENTATION

For Claimant Phyllis M. Day, D'Arcy Genereaux and Phyllis Shannon: Joseph Spiegel, Esq. of the law offices of Joseph Spiegel.

For Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc.: V. James Mann, Esq., in-house counsel.

For Respondent Karen Smelker: Clarence Pozza, Esq. of Miller Canfield Paddock and Stone.

CASE INFORMATION

Statement of Claim filed: September 12, 1991.

Claimant Phyllis Day's Submission Agreement signed on: September 22, 1991.

Claimant D'Arcy Genereaux's Submission Agreement signed on: September 22, 1991.

Claimant Phyllis Shannon's Submission Agreement signed on: September 22, 1991.

Statement of Answer filed by Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. on: January 17, 1992.

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Submission Agreement signed on: January 10, 1992.

Statement of Answer filed by Respondent Karen Smelker on: January 17, 1992.

Respondent Karen Smelker did not file a Submission Agreement.

HEARING INFORMATION

Hearing Date/Sessions: February 25, 1993 / Two Sessions

Hearing Location: Embassy Suites, Southfield, Michigan.

CASE SUMMARY

Claimants alleged that Claimant Day opened an account with Respondents subsequent to her divorce at which time she made clear to Respondents that the funds deposited represented all of her available funds and could not be subject to any risk of loss whatsoever. Claimants further alleged that D'Arcy Genereaux and Phyllis Shannon are daughters of Phyllis Day and appear as joint owner of the account only for the convenience of Claimant Day and as an estate planning device. Claimants further alleged that Respondents initially honored Claimants' request for conservative income producing investments by investing in Franklin Government securities, however, Respondents later recommended she purchase Franklin AGE High Income Fund and they made no disclosure to Claimants that the Fund represented a dramatic increase for the potential for loss of principal and was deeply involved in speculative trading in high risk junk bonds. Claimants further alleged that the Fund declined in value while the value of the government securities they were sold out of has retained its original value. Claimants alleged Respondents committed fraud, violated Federal and State Securities Laws, churning and breached fiduciary duty to Claimants.

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. maintained that Respondent Smelker advised Claimants to continue holding the government securities but also informed Claimants they could switch to the Franklin AGE Fund which was generating a higher yield, whereby, Claimants decided to pursue the Franklin AGE Fund. Respondent Merrill Lynch further maintained that Claimants were provided with a prospectus of both the government securities and the High Income Fund.

Respondent Smelker maintained that the decision to transfer Claimants' funds was made by the customer in order to obtain a higher yield after a complete discussion of alternatives, risks, relevant facts and prospectus.

RELIEF REQUESTED

Claimant requested \$100,000.00 in compensatory damages, interest, costs, attorneys fees, exemplary fees and punitive damages, and RTCO damages and rescission of all transactions.

Respondents requested all claims be dismissed in their entirety.

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. All claims by Claimants be and hereby are dismissed in their entirety.
2. Each party shall bear its own costs.
3. All claims for punitive, exemplary and RICO damages are dismissed in their entirety.
4. Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. be and hereby is liable and shall pay Claimant the sum of \$196.67 to represent forum fees.
5. Respondent Karen Smelker be and hereby is liable and shall pay Claimant the sum of \$191.67 to represent forum fees.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

2 sessions x \$750.00 = \$1,500.00 less hearing session deposit of
\$750.00 = \$750.00 net due.

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. be and hereby is liable and shall pay the NASD the sum of \$375.00 to represent forum fees.

Respondent Karen Smelker be and hereby is liable and shall pay the NASD the sum of \$375.00 to represent forum fees.

The NASD shall retain the \$200.00 filing fee and \$750.00 hearing session deposit previously deposited by claimant.

Fees are payable to the National Association of Securities Dealers.

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ARBITRATORS' SIGNATURES



Barry Goldman, Esq.
Public Arbitrator


Harold I. Gach, Esq.
Industry Arbitrator

Richard G. Porter, Esq.
Public Arbitrator

Date of Decision: April 7, 1993

ARBITRATORS' SIGNATURES

Barry Goldman, Esq.
Public Arbitrator


Harold I. Gach, Esq.
Industry Arbitrator

3/23/93


Richard G. Porter, Esq.
Public Arbitrator

Date of Decision: April 7, 1993

ARBITRATORS' SIGNATURES

Barry Goldman, Esq.
Public Arbitrator

W. Gach, Esq.
Industry Arbitrator



Richard G. Porter, Esq.
Public Arbitrator

Date of Decision: April 7, 1993