

N.A.S.A. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Harold C. Milinsky and Tova Milinsky

92-03453

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.;
Sidney Kogan

REPRESENTATION

For Claimants: Harold C. Milinsky and Tova Milinsky ("Milinsky") were represented by Anthony V. Trogan, Esq., of Weisman, Trogan, Young & Schloss, P.C., located in Birmingham, Michigan.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Sidney Kogan ("Kogan") were represented by Clarence L. Pozza, Jr., Esq., and Thomas R. Cox, Esq., of Miller, Canfield, Paddock & Stone, located in Detroit, Michigan.

CASE INFORMATION

Statement of Claim filed by Claimants on: October 12, 1992.

Claimant's Submission Agreement signed on: September 30, 1992.

Joint Statement of Answer filed by Respondents Merrill Lynch and Kogan on December 21, 1992.

Respondents' Submission Agreements signed on: November 12, 1992.

Respondents' Motion to Dismiss filed on: December 21, 1992.

Claimants' First Amended Statement of Claim filed on: September 9, 1994.

HEARING INFORMATION

Hearing Dates/Sessions: September 21, 1994 for Two (2) sessions.
September 22, 1994 for Two (2) sessions.

Hearing Location: Detroit, Michigan

CASE SUMMARY

Claimants alleged that Respondents Merrill Lynch and Kogan breached their obligations to the Milinskys by:

1. Engaging in the recommendation of speculative, high risk products which Respondents had to sell, including stocks and various forms of limited partnerships;
2. Failing to fully disclose the risks associated with the types of investments recommended;
3. Recommending wholly unsuitable investments given the circumstances of Claimants;
4. Failing to monitor investments purchased by Claimants at Respondents' insistence, and recommending continued ownership of these products long after they should have been sold;
5. Failing to diversify Claimants' portfolio and recommending only products which are almost entirely real estate related and dependent on the health of the real estate market;
6. Selling Claimants' products in which Respondents had a financial interest, providing Respondents with a substantial benefit with no corresponding benefit to Claimants;
7. Actively concealing from Claimants the illiquidity of many of the products sold to Claimants; and
8. Actively concealing and misrepresenting the true value of certain limited partnership products by affirmatively publishing stated values which were false, fraudulent and meaningless.

Based upon the above allegations, the Milinskys asserted claims for violation of NASD

Organizational Rules; for committing fraud under federal securities laws, state securities laws and the common law; for breach of fiduciary duties owed to Claimants; for engaging in excessive trading; and for violating the federal RICO statute.

Respondents Merrill Lynch Pierce Fenner & Smith and Sidney Kogan denied each and every allegation in the Statement of Claim. Respondents asserted that they accurately described the investments, disclosed the nature and scope of all risks, made a determination of suitability where required, and disclosed commissions and all other material information. Respondents claimed that all necessary documentation was provided, that the investments were suitable and that Merrill Lynch exercised proper supervision in all respects.

In addition, Respondents set forth several affirmative defenses, including the following:

1. The Statement of Claim failed to state a claim upon which relief can be granted;
2. The claim is barred by the applicable statute of limitations or other period of limitations;
3. The claim is barred by reason of Claimants' negligence, comparative negligence and contributory negligence; and by the negligence, comparative negligence and contributory negligence of third parties who are not related to Respondents or whose acts or actions are not attributable to Respondents;
4. Claimants ratified the actions complained of in the Statement of Claim;
5. The claim is barred by the doctrines of waiver, estoppel and release;
6. Claimants did not rely on any alleged acts, misrepresentations or omissions in the Statement of Claim;
7. Claimants exercised active control over their accounts with Respondents and all investments related thereto;
8. The alleged actions of Respondents were not the proximate cause or the cause in fact of any alleged injury;
9. Respondents exercised due care and acted in good faith with respect to Claimants' accounts;
10. Claimants failed to give timely notice of the acts complained of to Respondents; and

11. Any punitive and/or exemplary damages are unconstitutional per the United States Constitution and the Michigan Constitution because such damages deprive Respondents of due process of law and equal protection of the laws;

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for actual damages in the amount of \$425,000.00 for out-of-pocket losses resulting from investments made through Respondents; a suggested rate of 12% upon the loss amount; \$950.00 for the filing fee and \$400.00 for related out-of-pocket costs; attorney fees totaling \$141,665.00; exemplary and punitive damages; all other damages determined by the panel; the rescission of all transactions; and payment of all monies necessary to make the Claimants whole.

Respondents requested that the claim be dismissed in its entirety and that they be awarded costs, attorney fees and other expenses related to defense of the claim.

OTHER ISSUES CONSIDERED & DECIDED

On December 21, 1992, Respondents filed a Motion to Dismiss or For a More Definitive Statement. Respondents asserted that the Statement of Claim does not refer to the specific investments complained about; does not set forth particular facts and circumstances in support of the allegations; and does not present a specification of damages. Respondents further alleged that Claimants' allegations of NASD rules violations and fraud do not set forth basic specific facts required by fundamental fairness and due process of law.

In response, Claimants filed an Amended Statement of Claim that listed the losses from their investments placed through Respondents. Included in the listing were the various investments purchased by Claimants, the number of units purchased, the attendant costs at purchase and the values at the time of the action.

At the close of Claimants' testimony and evidence, Respondents presented a Motion to Dismiss the Claim. After hearing the arguments of parties and discussing the Motion in executive session, the Panel determined that the Motion to Dismiss would be granted.

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 post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the

issues submitted for determination as follows:

1. Respondents' Motion to Dismiss is granted and the Statement of Claim is hereby dismissed with prejudice;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for specifically enumerated herein;
3. Any relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Four (4) hearing sessions x \$750.00 per session = \$3,000.00.

The National Association Of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimants, Harold C. Milinsky and Tova Milinsky. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Sidney Kogan are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$2,250.00. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures
Name

Date

/s/ Donald A. Edwards, Esq.
Donald A. Edwards, Esq.
Public Arbitrator
Chairperson

December 12, 1994

/s/ Gordon F. Knight, Ph.D.
Gordon F. Knight, Ph.D.
Public Arbitrator

December 9, 1994

/s/ Rose C. Ruble
Rose C. Ruble
Industry Arbitrator

December 19, 1994

For NASD Use Only

Date of Decision: December 20, 1994