

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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*In the Matter of the Arbitration Between*

Name of Claimant

Lucille Smith

93-01268

Name of Respondents

Stifel, Nicolaus & Company, Inc.

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**REPRESENTATION**

For Claimant: Lucille Smith ("Smith") was represented by Harry O. Moline, Esq. and Sherri C. Strand, Esq. of Moline & Shostak, located in St. Louis, Missouri.

For Respondent: Stifel, Nicolaus & Company, Inc. ("Stifel") was represented by Thomas M. Newmark, Esq. and Dan Vogel, Esq. of Gallop, Johnson & Neuman, located in St. Louis, Missouri.

**CASE INFORMATION**

Statement of Claim filed: March 31, 1993.

Claimants' Submission Agreement signed on: March 27, 1993.

Statement of Answer filed by Respondent on: June 11, 1993.

Respondent's Submission Agreement signed on: April 27, 1993 by Forrest M. Smith, Vice President, Stifel, Nicolaus & Company, Inc.

**HEARING INFORMATION**

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: December 2, 1993 for Two (2) sessions;  
December 3, 1993 for Three (3) sessions.

Hearing Location: St. Louis, Missouri.

### CASE SUMMARY

Claimant Smith alleged that Respondent Stifel failed to properly open her account as an IRA account, causing her to pay unnecessary taxes and penalties. Smith specifically alleged that:

1. Smith was set to retire December 31, 1991. Beginning in September of 1991, Smith began planning for her retirement by investigating the alternative plans available for the approximately \$400,000.00 in her retirement plan. After attending a seminar provided by her employer, she decided to withdraw a certain sum and roll the balance of the pension plan over to an Individual Retirement Account and withdraw a series of substantially equal life time periodic payments;
2. Sometime in the fall of 1991, Smith decided to use the services of Stifel and told the broker who interviewed her that she planned to roll her pension plan into the IRA;
3. In February of 1992, Smith received her lump sum withdrawal from the pension plan and was required to roll the entire amount into an IRA within 60 days. Efforts were made to have the account fully invested within this time period;
4. Stifel failed to establish the account as an IRA account, instead opening the account as a regular joint account with her children. The error was not discovered until January of 1993 when Smith's accountant was preparing her taxes. Smith and Stifel were notified immediately of this discovery by the accountant;
5. As a result of this failure, Stifel caused Smith to pay unnecessary taxes and penalties and destroyed her ability to take advantage of the retirement benefits of an IRA, thereby reducing her present and future retirement benefits.

Based upon these allegations, Smith asserted claims for breach of fiduciary duty, negligence and recklessness. In addition, Smith claimed that Stifel failed to use due diligence to learn the essential facts relative to their customer and failed to follow Smith's instructions.

Respondent Stifel denied the material allegations of the Statement of Claim, alleging that:

1. Claimant did not advise that the account was to be created from her "retirement funds", nor did she ever request that Stifel establish an IRA Rollover Account, but advised her broker that she wished to establish a personal account. In addition, shortly after establishing the account, Smith changed the account into a joint account, which is inconsistent with the concept of an IRA since an IRA can only be owned by the party contributing to the account. Smith also notified her broker that she needed to generate income for her present use which is not a characteristic of an IRA;
2. The checks used to establish the account did not indicate that the source or purpose was for a tax-advantaged retirement fund, but did indicate that the funds were to be used for the purchase of specific investments or investments in general;
3. After every transaction, Smith received a confirmation reflecting that either she, or she with her children, were the owners of her account and which clearly indicated that the trades were not in an IRA account. Smith also received monthly statements reflecting that the account was in joint tenancy with her children and not an IRA;
4. Smith was independently informed and advised with respect to the creation of the IRA account, yet still created a joint tenant account to create "income";
5. Smith's broker has been employed in the securities industry for over 50 years, was licensed as a broker in approximately 1955, and began handling customer accounts in approximately 1969. No complaints have ever been made against the broker;
6. Stifel and its brokers know how to establish IRA accounts and would have given Smith materials describing the creation and purpose of an IRA account; and
7. Smith has failed to take measures to mitigate damages.

**RELIEF REQUESTED**

Claimant requested entry of an award against Respondent in the sum of \$140,466.00 plus additional amounts to cover tax cost, attorneys' fees and costs.

Respondent requested that the Panel deny Claimant's claim.

**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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Stifel, Nicolaus & Company, Inc. is liable for and shall pay to the Claimant, Lucille Smith, the sum of \$140,000.00;
2. In addition, Respondent Stifel, Nicolaus & Company, Inc. is liable for and shall pay to Claimant Lucille Smith the sum of \$200.00 as reimbursement of the non-refundable claim filing fee paid by Claimant;
3. The parties shall each bear any additional costs they have incurred in arbitration, including attorneys' fees, except for those specifically enumerated herein; and
4. 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: Five (5) Hearing Sessions x \$750.00 per Hearing Session = \$3,750.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing and refund the \$750.00 hearing session deposit previously deposited by the Claimant, Lucille Smith. Respondent Stifel, Nicolaus & Company, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$3,750.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Michael L. Lyons  
Michael L. Lyons  
Public Arbitrator  
Chairperson

February 3, 1994

/s/ James L. Breckenridge  
James L. Breckenridge  
Public Arbitrator

February 3, 1994

/s/ Richard L. Johannesman  
Richard L. Johannesman  
Industry Arbitrator

February 1, 1993

For NASD Use Only

Date of Service of Award: 2-9-94