

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Christine Lybrand

vs.

Case #
93-01708

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc
Norman T. Covar

REPRESENTATION

For Claimant: Randal Johnson, Esq., located in Charleston, South Carolina.

For Respondent: Jessica J-M Hagen, Esq. of Rogers & Hardwin, located in Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed: April 28, 1993.

Claimant's Submission Agreement signed on: March 4, 1993.

Statement of Answer filed by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc., and Norman T. Covar on: July 26, 1993.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Incorporated's Submission Agreement signed on: August 12, 1993.

Respondent, Norman T. Covar's Submission Agreement signed on: July 1, 1993.

HEARING INFORMATION

Pre-Hearing Conference: February 16, 1994.

Hearing Dates/Sessions: February 24, 1994 -- 2 Sessions.
February 25, 1994 -- 2 Sessions.

Hearing Location: The Guest Quarters, 6300 Morrison Blvd., Charlotte, N.C.

CASE SUMMARY

Claimant, Christine Lybrand ("Lybrand"), maintained that the executor of her father's estate opened a securities account with Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., ("Merrill Lynch"), in favor of Lybrand sometime after July of 1977. Claimant stated that on March 14, 1981, Lybrand became the sole principal of the account which was handled by Respondent, Norman T. Covar ("Covar"), of Merrill Lynch. The Claimant also maintains that the investments in the account prior to 1983 were conservative where the risk of loss of principal and income were low; that from 1983 to 1987, Covar recommended to Lybrand, without informing her of any potential risks, that she sell part of her portfolio and buy interests in five different limited partnerships; and that from 1983 to 1987 Covar sold Lybrand's conservative investments and purchased these limited partnerships.

Claimant alleged that the Respondents' conduct with respect to the purchase and maintenance of the limited partnerships investments constituted a violation of the South Carolina Uniform Securities Act.

In addition, the Claimant alleged fraud in connection with the purchase and the sale of the limited partnership investments, in that, Respondents made misrepresentations and omissions in order to induce the Claimant to buy and then maintain her investments so that the Respondents might earn commissions and profits from the trades; and that Claimant relied on the representations when she agreed to purchase and maintain the five limited partnership investments. Claimant also alleged that she was not aware of the fraudulent actions of the Respondents until they changed their method of valuation for limited partnerships which resulted in a decrease in value of Claimant's account in excess of \$50,000.

Furthermore, the Claimant alleged a fiduciary relationship existed between the Respondents and Lybrand; and that through their fraudulent acts and representations the respondents committed constructive fraud upon Claimant and breached their fiduciary duty.

Lastly, the Claimant alleged the Respondent negligently supervised the account, in that, they allowed unsuitable investments that were contrary to of Lybrand's investment objectives. Claimant also alleged that Merrill Lynch had a duty to supervise Covar and that Merrill Lynch negligently and carelessly exercised that duty.

Respondents alleged that before purchasing the limited partnership interests for Claimant's account Covar discussed the merits and risks of such an investment with Claimant; and made the decision to purchase the limited partnership on her own; that Merrill Lynch's prior method of listing such investments market value made clear that this was merely a statement of the cost basis of the investment; and that Claimant received quarterly reports on each investment and still continued to invest in them.

Respondents maintained that Covar adequately investigated these investments and that at the time of investment, the track record of similar limited partnership investments were good.

Respondents further alleged that the Claimant never complained that Respondents misrepresented the nature or the value of the five limited partnerships at the time of investment or anytime afterwards but maintain that Lybrand brought this claim in order to liquidate her limited partnership investments.

The Respondents moved for dismissal of Claimant's Statement of Claim on the grounds that the Claimant is barred from bring this action pursuant to (1) Section 15 of the NASD Code of Arbitration, prohibiting Claimant from asserting claims as to transactions occurring more than six years prior to the filing of the Statement of Claim; and (2) applicable statutes of limitation.

RELIEF REQUESTED

Claimant requested damages in an amount greater than \$50,000.00, with interest, Punitive damages in an amount to be determined by the panel. The Claimant also asked for reasonable attorneys' fees and costs associated with this action in addition to any further relief the panel may deem just and equitable.

Respondents requested that all claims made by the Claimant be dismissed and requested an award of all costs and expenses incurred in this action.

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 post hearing submissions, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondents' Motion to Dismiss asserted in the Answer to the Claim and re-asserted at the hearing is hereby denied.
- 2) Respondent, Merrill Lynch, is ordered to accept assignment of the limited partnerships that are the subject of this arbitration and presently held by Claimant. The Claimant is

ordered to assign said limited partnership to said Respondent. Merrill Lynch is ordered to pay the Claimant the sum of **EIGHTY THREE THOUSAND DOLLARS AND ZERO CENTS** (\$83,000.00) as consideration for such assignment. It is further ordered that said amount is not subject to any attorneys' fees by Claimant's attorney as it not compensatory damage but rather an exchange of property by Claimant for consideration.

- 3) Respondents, Merrill Lynch and Norman T. Covar, are hereby jointly and severally liable and are ordered to pay Claimant the amount of **TWO HUNDRED AND NINETY FOUR THOUSAND DOLLARS AND ZERO CENTS** (\$294,000.00) as compensatory damages. This amount is inclusive of interest.
- 4) Respondents, Merrill Lynch and Norman T. Covar, are hereby jointly and severally liable and are ordered to pay Claimant reasonable attorney's fees in the amount of **ONE HUNDRED SEVENTEEN THOUSAND SIX HUNDRED AND ZERO CENTS** (\$117,600.00), which sum shall constitute all of the fees owed to Claimant's attorney by Claimant.
- 5) Claimant's request for punitive damages is hereby denied.
- 6) Respondents request for reimbursement of costs and expenses is hereby denied.

FORUM FEES

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

Non-Refundable Filing Fee	\$ 200.00
Pre Hearing Conference Hearing Fee	\$ 300.00 (\$300 per Conference)
Hearing Session Fees	<u>\$3000.00</u> (\$750 per Session x 4 sessions)
Total Forum Fees	\$3500.00

Total forum fees are hereby assessed as follows:

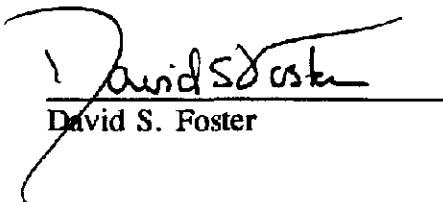
- 1) Claimant previously paid \$950.00 and is entitled to a refund in that amount.
- 2) All forum fees are assessed against the Respondents, jointly and severally, and are accordingly ordered to remit reimburse Claimant \$950.00 and remit the balance, \$2,550.00 to the NASD.

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

ARBITRATION PANEL

Hugh M. Eggan	-	Public Chairperson
R. Corson Rose	-	Industry Panelist
David S. Foster	-	Public Panelist

Concurring Arbitrator's Signature


David S. Foster

Date of Decision: May 11, 1994

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

ARBITRATION PANEL

Hugh M. Eggan	-	Public Chairperson
R. Corson Rose	-	Industry Panelist
David S. Foster	-	Public Panelist

Concurring Arbitrator's Signature

R. Corson Rose
R. Corson Rose

Executed on:
~~Date of Decision~~ 5/06/94
Date of Decision: May 11, 1994

Award #93-01708

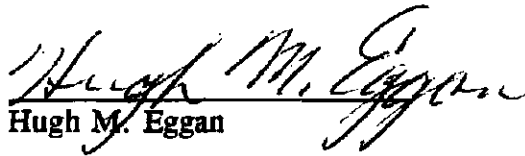
Page 5

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

ARBITRATION PANEL

Hugh M. Eggan	-	Public Chairperson
R. Corson Rose	-	Industry Panelist
David S. Foster	-	Public Panelist

Concurring Arbitrator's Signature


Hugh M. Eggan

Date of Decision: May 11, 1994