

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Medical Center Anesthesiologists FBO Jam

93-03215

Name of Respondents

Merrill Lynch, Pierce Fenner & Smith Inc
Thomas J. Clark

REPRESENTATION

Claimant Boatmen's National Bank of Des Moines (Formerly First Interstate Bank of Des Moines, N.A.) Trustee for Medical Center Anesthesiologists FBO James D. German, D.O. ("Claimant") was represented by John R. Perkins, Esq. and Lawrence L. Marcucci, Esq. of Shearer Templar Pingel & Kaplan, P.C. located in West Des Moines, Iowa.

Respondents Merrill Lynch, Pierce, Fenner & Smith and Thomas J. Clark were represented by Kathleen M. Quinn, Esq. of Kutak Rock located in Omaha, Nebraska.

CASE INFORMATION

Statement of Claim filed: August 17, 1993.

Claimant's Submission Agreement signed on: September 7, 1993 by Eric L. Gardner, Trust Officer of Boatmen's National Bank of Des Moines.

Statement of Answer filed by Respondents on: November 3, 1993.

Respondent, Merrill Lynch, Pierce, Fenner & Smith's Submission Agreement signed on: November 3, 1993 by William J. Crowe, Jr., Vice President and Senior Counsel, Merrill Lynch, Pierce, Fenner & Smith.

Respondent, Thomas J. Clark's Submission Agreement signed on: October 14, 1993.

HEARING INFORMATION

Pre-Hearing Conference: June 2, 1994 before One (1) Arbitrator; and
June 27, 1994 before One (1) Arbitrator.

Hearing Dates/Sessions: September 28, 1994 for Two (2) Sessions; and
September 29, 1994 for Three (3) Sessions.

Hearing Location: Omaha, Nebraska.

CASE SUMMARY

Claimant Boatmen's National Bank of Des Moines, (Formerly First Interstate Bank of Des Moines, N.A.) Trustee for Medical Center Anesthesiologists FBO James D. German, D.O., alleged that Thomas J. Clark ("Clark"), a financial consultant employed by Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") placed funds it had received from the Claimant in the Merrill Lynch Ready Asset Trust instead of the Engemann Managed Account Fund in willful disregard of the Claimant's orders. The Claimant specifically alleged that:

1. In October of 1990, at Clark's invitation, Dr. James D. German, the beneficiary of the trust, attended an investment seminar in Des Moines, Iowa. At the seminar, representatives from Roger Engemann and Associates made a presentation regarding Engemann's Managed Account Fund. Following the presentation, Dr. German made the decision to invest approximately Two-Hundred Thousand Dollars (\$200,000.00) from his pension and profit-sharing plan through Engemann for specific placement in their Managed Account Fund;
2. Clark and Merrill Lynch represented that they could expeditiously transfer the assets of the profit-sharing plan from the Claimant to Merrill Lynch for investment in the Managed Account Fund; on December 17, 1990, Claimant, as per Dr. German's orders, sent a check in the amount of \$209,470.27 to Clark for placement in the Managed Account Fund; at this point Clark and Merrill Lynch had actual control of the trust funds with specific instructions for investing those funds;
3. Dr. German contacted Clark several times in the fall and winter of 1990 requesting information regarding the investment. He was told by Clark initially the money was, in fact, placed with Engemann and Associates but would not show up on the Merrill Lynch reports until later. Finally, Dr. German was able to determine that the money was never placed with Engemann and Associates as he had requested and Clark had agree. Clark acknowledged this in a telephone conversation with Dr. German on March 21, 1991. Instead the money was placed in the Merrill Lynch Ready Assets Trust;

4. Because of this delay, Dr. German missed a large surge in the stock market during the time the funds were placed in the Ready Assets Trust rather than the Managed Account Fund.

Based on the above allegations, Claimant asserted claims for the violation of the Iowa Uniform Securities Act (Iowa Code § 502.401), misrepresentation, and common law fraud.

Respondents deny any wrongdoing or liability, alleging that:

1. Dr. German desired to invest the assets of his pension and profit-sharing plan using the ML Consults Service of Merrill Lynch, whereby a customer chooses an Investment Advisor who had discretion as to which investments are made; Dr. German chose Roger Engemann and Associates;
2. It was determined that the Trust Agreement did not allow creation of discretionary investment authority; therefore, Dr. German could not use the ML Consults Service without a proper amendment to the trust agreement. Dr. German was notified of this circumstance, and chose not to amend the trust;
3. In view of the fact that the investments could not be made by Roger Engemann and Associates, the funds were instead temporarily held in a money market fund earning interest. Dr. German subsequently closed the account and the funds were transferred back to the Trust;
4. Dr. German did not refer to or indicate a preference for any Managed Account Fund in a portfolio questionnaire which he completed.

RELIEF REQUESTED

Claimant requested on behalf of Dr. German the entry of an award against Respondents for \$60,000.00 representing the difference between what the funds in Engemann's Managed Account Fund should have earned, and what the funds in the Merrill Lynch Ready Asset Trust did earn, less any reasonable fees; punitive damages in the amount of \$180,000.00; and attorney's fees, costs, and expenses.

Respondents requested that the Statement of Claim be dismissed in its entirety and that the Respondents be awarded all costs and attorney's fees that they have incurred in this matter.

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 Merrill Lynch, Pierce, Fenner & Smith is liable for and shall pay to Claimant the sum of \$40,697.32 for compensatory damages, plus 12 % interest which shall begin to accrue on November 1, 1994; no award is entered against Respondent Thomas J. Clark.
2. The parties shall bear their own costs of arbitration, including attorney's fees, except for those specifically enumerated herein;
3. Any relief not specifically granted is hereby denied.

OTHER COSTS

Respondent, Merrill Lynch, Pierce, Fenner & Smith, is liable for and shall pay to the NASD the sum of \$750.00 as a continuance fee which has yet to be paid.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay to Claimant the sum of \$750.00 as reimbursement of Claimant's hearing session deposit.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed: One (1) Pre-hearing Conferences x \$300.00 per session = \$300.00; Five (5) Hearing Sessions x \$750.00 per session = \$3,750.00; Total Forum fees = \$4,050.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and \$750.00 hearing session deposit previously deposited by Claimant. Claimant is liable for and shall pay to the NASD additional forum fees of \$1,700.

Additional forum fees in the amount of \$1,600.00 are assessed against Merrill Lynch, Pierce, Fenner & Smith, Inc..

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

Concurring Arbitrators' Signatures

Name

Date

Sam Brower /s/

October 28, 1994

Sam Brower, Esq.

Public Arbitrator

Chairperson

Stephen E. Gehring/s/

October 27, 1994

Stephen E. Gehring

Public Arbitrator

Richard L. Mitchell/s/

October 27, 1994

Richard L. Mitchell

Industry Arbitrator

For NASD Use Only

Date of Decision: 11/9/94