

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Robert M. & Florine R. Morgan Revocable Trust,
Robert M. Morgan, as Trustee

93-05395

Name of Respondent

Merrill Lynch, Pierce Fenner & Smith Inc

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. ("NASD") on December 28, 1993, Claimant Robert M. and Florine R. Morgan Revocable Trust, Robert M. Morgan, as Trustee ("Morgan"), who appeared pro se, alleged that the Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") made unsuitable and unauthorized sales and purchases of securities in their cash management account. Since he was 82 years of age and because Florine M. Morgan had no desire to make investment decisions, Mr. Morgan asserted that he contacted Merrill Lynch in order to appoint a successor trustee who could manage the trust in the event of his death or incapacity. In May, 1992, Connie Thomason ("Thomason"), an employee of the Respondent, allegedly recommended opening a cash management account after Robert Morgan explained he wanted to retain control of investment decisions until his death or incapacity. Morgan asserted that Thomason directed him to list the names, Lord Abbett and Furman Selz, on the account agreement informing him that those persons would make recommendations. Claimant further asserted that he was not informed that they would be making purchases and sales without the Claimant's approval. Morgan alleged that he explained to Thomason his portfolio consisted primarily of tax-free municipal bonds with some income stocks and conveyed his concerns for preservation of principal and income and minimizing income taxes and that Merrill Lynch had sold most of the trust's bond and stock investments purchasing other stocks for the account with the proceeds. Morgan further alleged that, due to these transactions, he had to report capital gains of \$7,723.00, his tax-free interest income and dividends declined and the value of the portfolio declined from \$224,863 on June 30, 1992 to \$200,423 on March 31, 1993.

In the answer, Merrill Lynch, by and through their in-house counsel Michael E. Olney, Esq., generally denied all of the allegations of unsuitable trading or any other basis of liability set forth in the claim. Merrill Lynch asserted that the Claimant was an experienced and sophisticated investor and, prior to 1992, had been a client of the Respondent for two decades. On more than one occasion in 1992, Merrill Lynch alleged that Morgan was advised by Thomason that they offered three distinct options for management of the trust's assets: (1) to appoint Merrill Lynch as a trustee but Claimant would retain decision-making authority over the account; (2) appoint Merrill Lynch as trustee, giving it full discretionary authority to manage the trust's assets; or (3) to open a consults account, whereby the Claimant would be able to choose a money manager who would have discretionary authority over the account subject to any restrictions the Claimant wished to impose. Merrill Lynch asserted that, after meeting with Peter Monzares, a Merrill Lynch trust representative, Claimant opened a consults account by completing a questionnaire, selecting a money manager and executing an account agreement. As alleged, Thomason had several discussions with the Claimant concerning which securities were to be held and which were to be liquidated to generate cash to be managed in the account. Respondent further asserted that it received no reply to a letter it sent to Claimant dated February 26, 1993 which confirmed the account was being reviewed and solicited comments and concerns. The account was liquidated and the proceeds were transferred upon receipt of a written request from the Claimant dated April 27, 1993. Merrill Lynch asserted thirteen affirmative defenses, including, but, not limited to, failure to state a claim, failure to mitigate damages, waiver, estoppel and ratification.

RELIEF REQUESTED

Claimant Robert M. Morgan and Florine R. Morgan Revocable Trust requested \$1,619.47 for reimbursement of taxes, \$2,532.00 in lost income and dividends, \$21,405.19 for the decline in the portfolio, \$3,035.00 in commissions and fees and \$1,000.00 in punitive damages.

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. requested that the claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

In the claim and the answer, the Claimant and Respondent waived their right to a hearing and requested the matter be decided by a sole arbitrator based on written submissions in accordance with Section 13 of the NASD Code of Arbitration Procedure.

AWARD

Pursuant to Section 13 of the NASD Code of Arbitration Procedure, a single Public Arbitrator William M. Howard, Esq., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on December 15, 1993 and by the Respondent on March 16, 1994.

The Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is liable for and shall pay to the Claimant, Robert M. and Florine R. Morgan Revocable Trust, the sum of \$21,405.19.00 in damages.
2. Claimant's requests for attorney's fees, punitive damages and interest are denied in their entirety.
3. The \$100.00 filing fee and the \$400.00 hearing session deposit previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Robert M. and Florine R. Morgan Revocable Trust shall be retained by the NASD. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is liable for and shall pay to the Claimant the sum of \$500.00 as reimbursement.

AFFIRMATION

I, William M. Howard, Esq., do hereby affirm upon my oath as the arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

Date:

August 30, 1994

William M. Howard, Esq.
William M. Howard, Esq.

Date of service by NASD: August 31, 1994