

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

Name of Claimant

Martha Kelly

94-00108

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

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**REPRESENTATION**

For Claimant: Martha Kelly ("Kelly") was represented by William A. Whittle, Esq. of Whittle & Associates, P.C., located in Corpus Christi, Texas.

For Respondent: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") was represented by Amanda Nathan, Esq. of Gibbs & Bruns, L.L.P., located in Houston, Texas.

**CASE INFORMATION**

Statement of Claim filed: January 11, 1994.

Claimant's Submission Agreement signed on: January 6, 1994.

Statement of Answer filed by Respondent on: April 25, 1994

Respondent's Submission Agreement signed on: April 19, 1994 by Michael J. Stewart, First Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc.

First Amended Answer to Statement of Claim filed: June 29, 1994.

Claimant's Motion for Consent to File Amended Statement of Claim filed: December 29, 1994.

Respondent's Response to Motion for Consent to File Amended Statement of Claim filed: January 4, 1995.

### **HEARING INFORMATION**

Pre-Hearing Conference: None Held.  
Hearing Dates/Sessions: January 17, 1995 for Two (2) sessions;  
January 18, 1995 for Two (2) sessions.  
  
Hearing Location: Houston, Texas.

### **CASE SUMMARY**

Claimant Kelly alleged that Respondent negligently failed to place funds deposited by Kelly into an IRA Roll Over Account, resulting in heavy penalties and tax assessments. Kelly specifically alleged that:

1. On or about June 20, 1990, Kelly contacted Merrill Lynch to open two accounts. The funds to be deposited in the accounts were withdrawn from individual retirement accounts with First Investors. The Merrill Lynch representative was instructed by Kelly to invest all monies into accounts designated as "IRA Roll, Over Accounts" and was furnished information on the First Investors' accounts;
2. On June 26, 1990, the funds were deposited with Merrill Lynch. Merrill Lynch did not properly place the funds into an IRA Roll Over Account and failed to inform Kelly of the heavy penalty and tax assessments which would result because of the failure; and
3. As a result of Merrill Lynch's negligence, Kelly has been assessed taxes in excess of \$36,300.00, and will continue to be assessed income tax in future years on interest and dividends earned on funds in her account. In addition, Kelly has lost the ability to reinvest and receive dividends and interest on the monies used to pay income taxes and early withdrawal penalties.

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

1. Kelly did not state that the monies came from an IRA account, nor that she desired that the funds be deposited into an IRA rollover account;
2. Kelly signed documentation depositing the funds into a CMA account and immediately began spending money on the account;

3. Merrill Lynch handled the account properly in all respects, and at no time did Merrill Lynch do anything contrary to Kelly's instructions.

In addition, Merrill Lynch asserted several affirmative defense, including the following:

1. The claims are barred by the applicable statute of limitations;
2. Kelly is estopped from her own conduct from making the claims;
3. Kelly waived her claims and/or ratified the actions complained of by spending the monies in the account and failing to question the appropriateness of the account she knew she opened;
4. Kelly failed to use due diligence to question the appropriateness of the accounts and spending the monies in the account without raising any question as to the tax issues; and
5. The claims are barred by Kelly's comparative and contributory negligence.

#### **RELIEF REQUESTED**

Claimant Kelly requested entry of an award against Merrill Lynch for \$119,076.40 in actual damages, calculated as follows:

1. \$76,908.48 representing \$36,300.00 penalty and tax paid by Kelly, plus interest compounded quarterly at eight (8%) per annum for tax years 1990 through 2011;
2. \$2,226.32 representing \$1,101.00 paid by Kelly for income taxes in tax year 1991, plus interest compounded quarterly at eight (8%) per annum for tax years 1991 through 2011; and
3. \$39,901.60 representing \$20,220.00 in estimated income tax which will be assessed Kelly by the IRS for tax years 1992 through 2011, plus interest compounded quarterly at eight percent (8%) for tax years 1992 through 2011.

In addition, Kelly requested punitive damages; interest; reasonable attorneys' fees and costs.

Respondent requested that it have judgment in its favor; that it receive attorneys' fees and costs incurred in defending the action, and that it have any other relief to which it showed itself entitled.

**OTHER ISSUES CONSIDERED & DECIDED**

After review of Claimant's Motion for Consent to File an Amended Statement of Claim and the Response filed by Merrill Lynch, the Panel determined that the Motion would be denied on January 9, 1995.

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. The Statement of Claim is hereby dismissed with prejudice and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

**OTHER COSTS**

The NASD shall retain the \$750.00 postponement fee previously paid by the Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc.

**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 refund the \$750.00 hearing session deposit previously deposited by the Claimant, Martha Kelly. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimant Martha Kelly the sum of \$200.00 as reimbursement of the claim filing fee. In addition,

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Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the NASD the sum of \$3,000.00 as forum fees.

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

Concurring Arbitrators' Signatures

Donald H. Fidler, Esq.  
Donald H. Fidler, Esq.  
Public Arbitrator  
Chairperson

William M. Sandeen  
William M. Sandeen  
Public Arbitrator

James Mervin Benson, Jr., Esq.  
James Mervin Benson, Jr., Esq.  
Industry Arbitrator

For NASD Use Only  
Date of Service of Award: April 21, 1995