

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

James O. Collins & Ann T. Collins

94-00923

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

REPRESENTATION

For Claimants: James O. Collins and Ann T. Collins ("Collins") were represented by James O. Collins of Lubbock, Texas.

For Respondent: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") was represented by Spencer Reid, Esq. of Keleher & McLeod, P.A., located in Albuquerque, New Mexico.

CASE INFORMATION

Statement of Claim filed: March 10, 1994.

Claimants' Submission Agreement signed on: March 4, 1994.

Statement of Answer filed by Respondent Merrill Lynch on: April 27, 1994.

Respondent Merrill Lynch's Submission Agreement signed on: April 27, 1994 by Dennis M. Pape, Vice-President, Private Client Group, Merrill Lynch, Pierce, Fenner & Smith, Inc.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Date/Sessions: November 2, 1994 for Two (2) sessions.

Hearing Location: Albuquerque, New Mexico.

CASE SUMMARY

The Collins alleged that Merrill Lynch misrepresented a bond position in their portfolio as "non-

callable", which resulted in a loss when the bonds were called in February of 1994. The Claimants specifically alleged that:

1. The Collins purchased \$100,00 Spring Branch, Texas, ISD tax free "non-callable" municipal bonds through Thomson McKinnon;
2. The Collins followed there broker to Merrill Lynch in approximately October of 1989. After about a year, the Collins were placed in the Key Client Program which provided a concise, easy to read, comprehensive monthly statement. The statement contained, among other items, notice of impending events which affected the client's holdings, including, "The maturity of bond positions." The statements specifically specified a no call date for the Spring Branch bonds;
3. On January 22, 1994, Mr. Collins received a notice that the bonds would be called at par on February 1, 1994. On February 1, 1994, the Collins received confirmation that they had been called, resulting in the loss of unrealized gain of \$10,302.00 that appeared on the statement of December 31, 1993; and
4. The Collins' attempts to recover the amount were refused by Merrill Lynch.

The Collins' claims were based upon Merrill Lynch placing the incorrect valuation on the monthly statements; the lack notice on the statement of the call; the portfolio report never mentioned a call feature; the Collins lost a chance at a capital gain and took a \$1,608.00 loss; the Collins' loss of a 6.86% tax free yield on the investment which was irreplaceable.

Respondent denied the material allegations of the Statement of Claim, asserting that:

1. The bonds were callable and were clearly identified as callable on Mr. Collins' Statement of Account from Thomson McKinnon dated July 26, 1985;
2. Merrill Lynch is not responsible for any misrepresentations made by the firm of Thomson McKinnon;
3. In November, 1985, the bonds were refunded and subject to call on February 1, 1994 at par;
4. The descriptive and pricing information pertaining to municipal bonds on the monthly account statements is provided to Merrill Lynch by J.J. Kinney. J.J. Kinney failed to note that the bonds were refunded and callable on February 1, 1994, and incorrectly described the bonds to Merrill Lynch as non-callable, resulting in the bonds being priced and traded at approximately \$200 per bond over par;

5. The account statements warned that the prices provided may not reflect the value at which the securities could be sold; and
6. The Collins received a windfall profit of approximately \$9,712.00 in February 1993 when they sold half the bonds when they were priced substantially over par.. Merrill Lynch, while entitled to the overpayment, has not debited the Collins' account.

Merrill Lynch asserted several affirmative defenses, including the following:

1. The Statement of Claim fails to state a claim upon which relief can be granted;
2. The claim is barred by the equitable principles of unjust enrichment; and
3. Merrill Lynch did not breach any contract with, or duty owed, to Claimants.

RELIEF REQUESTED

Claimants requested entry of an award against Respondent for damages in the sum of \$10,302.00 plus \$500.00 for the costs of arbitration

Respondent requested that the arbitrators dismiss in full Claimants' arbitration claim and assess all costs against them.

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. 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. All relief requests not specifically granted are hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) hearing sessions x \$400.00 per session = \$800.00.

The National Association of Securities Dealers, Inc. shall retain the \$100.00 claim filing fee and the \$400.00 hearing session deposit previously deposited by the Claimants, James O. Collins and Ann T. Collins. Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$400.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Eugene W. Bronski, Esq.
Eugene W. Bronski, Esq.
Public Arbitrator
Chairperson

January 16, 1995

/s/ Thomas Smidt, II
Thomas Smidt, II
Public Arbitrator

January 12, 1995

/s/ Mike Edward Mimovich
Mike Edward Mimovich
Industry Arbitrator

January 12, 1995

For NASD Use Only
Date of Decision: January 30, 1995