

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Rhea Bierman

94-01080

Names of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
and Diana L. Read

REPRESENTATION

Claimant, Rhea Bierman was represented by Robert N. LeMay, Esq. of Kane, Russell, Coleman & Logan, P.C., Dallas, Texas.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. was represented by Russell L. Reid, Jr. and Kenneth E. Johns, Jr., Esq. of Vinson & Elkins, Dallas, Texas.

Respondent, Diana L. Read was represented by Richard A. Rohan, Esq. of Carrington Coleman Sloman & Blumenthal, Dallas, Texas.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on March 21, 1994.

Claimant, Rhea Bierman's Submission Agreement was signed on September 3, 1993.

A Statement of Answer was filed with the NASD by Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. on April 29, 1994.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement was signed on April 8, 1994 by Michael J. Stewart, First Vice President.

A Statement of Answer was filed with the NASD by Respondent, Diane L. Read on May

26, 1994.

Respondent, Diana L. Read's Submission Agreement was signed on May 25, 1994.

Claimant, Rhea Bierman filed a First Amended Statement of Claim with the NASD and a Second Amended Statement of Claim with the NASD on March 28, 1995.

Respondent, Merrill Lynch, Pierce, Fenner and Smith, Inc. filed an Answer to the Second Amended Statement of Claim with the NASD on May 15, 1995.

Respondent, Diana L. Read filed an Answer to the Second Amended Statement of Claim with the NASD on May 11, 1995.

HEARING INFORMATION

Pre-hearing conferences were held on:

January 3, 1995 for one (1) hearing session;
and May 1, 1995 for one (1) hearing session;

The hearing was held on:

July 17, 1995 for two (2) hearing sessions;
July 18, 1995 for two (2) hearing sessions;
July 19, 1995 for two (2) hearing sessions;
July 20, 1995 for two (2) hearing sessions;
July 21, 1995 for two (2) hearing sessions;
September 5, 1995 for two (2) hearing sessions;
September 6, 1995 for two (2) hearing sessions;
October 18, 1995 for two (2) hearing sessions; and,
October 19, 1995 for two (2) hearing sessions.

The hearing location was Dallas, Texas.

CASE SUMMARY

Claimant, Rhea Bierman ("Bierman") alleged that she placed the insurance proceeds from her husband's death with Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Diana L. Read ("Read") in a cash management account for conservative

investment. Bierman alleged that Merrill Lynch and Read intentionally mishandled her account. Bierman alleged that Read induced Bierman to vest the day-to-day control over Bierman's account with Read. Bierman alleged that she made none of the investment decisions in the account and Read made all of them. Bierman asserted that Read and Merrill Lynch excessively traded the account by purchasing and selling unsuitable and speculative securities, which trades were excessive in size and frequency in light of Bierman's investment needs and objectives. Bierman asserted the trading in the account was solely to generate commissions and profits for Merrill Lynch and Read. Bierman alleged that Read and Merrill Lynch engaged in improper "in and out" trading in mutual funds, and purchased speculative limited partnership interests (and other Merrill Lynch investment products) which were not suitable for Bierman's investment objectives, and quickly sold some of such investments for losses, solely to increase commissions and other fees and profits to Merrill Lynch and Read.

Based upon the foregoing allegations, Bierman asserted statutory claims, among others, under Section 10(b) of the Securities Exchange Act, Rule 10b-5 promulgated thereunder, Section 17(a) of the Securities Act of 1933, causes of action for gross negligence, breach of contract, churning, failure to supervise, breach of fiduciary duty, common law fraud, violations of the Texas Deceptive Trade Practices Act and violations of the Texas Securities laws.

Merrill Lynch acknowledged that Bierman had limited investment experience at the time she opened her account at Merrill Lynch but denied the allegations set forth in the statement of claim. Merrill Lynch asserted that Bierman had independent investment counsel at the time she opened her account and with respect to the investments she made from time to time. Merrill Lynch asserted that Read communicated with Bierman prior to making trades and that such communication evidenced Bierman's consent to the trades which were made on her behalf. Merrill Lynch asserted that contrary to Bierman's claims, the account while domiciled at Merrill Lynch had a profit of \$246,477.00 over its life.

Read categorically denied the allegations of the claim. Read denied that she made any misrepresentations or omissions to Bierman and denied that she committed any fraud in the handling of Bierman's account. Read also denied that she engaged in any other manipulative and fraudulent activities including churning. Read asserted that Bierman consulted with independent investment counsel, while the account was open at Merrill Lynch. Read asserted that this was made known to her and that she felt comfortable that Bierman would make an educated decision about her investments. Read asserted that Bierman received monthly account statements and never complained of any activity which took place in her account. Read alleged that if any fault could be taken with her handling of the account, it was in following Bierman's investment objectives too closely which served to reduce the return Bierman's account generated. Read also asserted that the account performed despite the fact that Bierman continued to withdraw money on margin for use outside the account.

RELIEF REQUESTED

Bierman requested damages of \$403,496.50, treble damages, attorney's fees, arbitration expenses and pre-judgment interest.

Merrill Lynch requested dismissal of the claim and assessment of costs against Bierman.

Read requested dismissal of the claim and an award of her reasonable attorney's fees and costs to defend against the claim.

OTHER ISSUES CONSIDERED & DECIDED

In a pre-hearing conference on May 1, 1995, the arbitration panel, which had previously granted Claimant leave to file a first amended statement of claim, ruled to allow the filing of a second amended statement of claim. The panel also allowed Respondents to file answers to the second amended statement of claim.

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 claims asserted by Bierman against Merrill Lynch and Read are denied and dismissed in their entirety;
2. The parties shall each bear their respective costs, expenses and attorney's fees incurred in this matter;

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. Forum Fees in this matter were calculated at \$1000.00 per hearing session for

eighteen (18) hearing sessions and \$300.00 per hearing session for two (2) pre-hearing conferences. Total Forum Fees accrued in this matter are \$18,600.00.

The NASD shall retain the \$250.00 claim filing fee and the \$1,000.00 hearing session deposit made with the NASD by Bierman. The NASD shall also retain the \$200.00 Section 45 surcharge paid to the NASD by Merrill Lynch.

The balance of \$17,600.00 in Forum Fees is assessed against Merrill Lynch. Additional Forum Fees assessed to the parties are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

/s/ Charles P. Aberg
Charles P. Aberg, Esq.
Presiding Chairperson
Public Arbitrator

October 25, 1995
Dated

/s/ Winston Fournier
Winston Fournier
Panelist
Public Arbitrator

October 25, 1995
Dated

/s/ David L. Baker
David L. Baker
Panelist
Industry Arbitrator

October 25, 1995
Dated

For NASD Use Only
Date Award Served on the Parties: October 30, 1995