

## **NASD AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

---

In the Matter of the Arbitration Between

Grace M. Cowling,  
Claimant

v.

No. 95-00574

Merrill Lynch, Pierce, Fenner & Smith, Inc., and  
Jean A. Gonsalo,  
Respondents.

---

### **REPRESENTATION OF PARTIES**

Grace M. Cowling ("**Claimant**") was represented by Joseph R. Colantuano, Esq., of Posenilli, White, Vardeman & Shalton, Overland Park, Kansas.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), and Jean A. Gonsalo ("**Gonsalo**") ("**Respondents**") were represented by Gordon Gee, Esq., of Seigfreid Bingham Levy Selzer & Gee, Kansas City, Missouri.

### **CASE INFORMATION**

Claimant's Statement of Claim was filed on or about February 3, 1995. Claimant's Submission Agreement was signed on February 2, 1995.

Respondents' joint Statement of Answer was filed on or about April 4, 1995. MLPFS' Submission Agreement was signed on April 4, 1995. Gonsalo's Submission Agreement was signed on March 30, 1995.

### **HEARING INFORMATION**

The hearing was held on October 10, 1995 for two (2) sessions and October 11, 1995 for one (1) session in Kansas City, Missouri for a total of three (3) sessions.

### **CASE SUMMARY**

Claimant alleged that on or about September 30, 1993 and October 1, 1993 Respondents transferred funds from her IRA account to an account that did not qualify as an IRA account and which subjected Claimant to state and federal taxes which she would not have been obligated to pay if the funds had either remained in the IRA or rolled-over into an account owned by the Claimant that would have entitled her to tax benefits and protection that was not available in the non-qualifying

account. Claimant further alleged that: Mr. Cowling's IRA account could have been converted into an IRA account for Claimant; Respondents did not explain the IRA distribution form which they provided to her would result in a distribution with substantial taxes which would otherwise have been avoided; Respondents did not explain the IRA distribution form which they provided to her could have been filled in a different manner to avoid the tax consequences; Respondents allowed the distribution form to be processed even though it was incomplete and contained marks that were not consistent with the distribution of the funds into the non-IRA account; Respondents breached and violated reasonable standards of care to the claimant by transferring the funds without Claimant's informed authorization or consent; and Respondents breached their fiduciary duties including but not limited to their deliberate and intentional failure to provide documents and information to the Claimant.

Respondents denied the allegations set forth in the Statement of Claim particularly the allegations that Respondents breached any fiduciary duty, and breached or violated reasonable standard of care, or made any transfer without Claimant's authorization or consent. Respondents also asserted the following affirmative defenses: The Statement of Claim failed to allege claims upon which relief can be granted; Claimant is estopped from asserting the claims set forth in the Statement of Claim due to her own acts and conduct; Claimant, with full knowledge of the facts, ratified, approved, accepted, acquiesced and confirmed in all respects the acts complained of in the Statement of Claim; Claimant failed to exercise due diligence and was reckless in the supervision of her financial affairs and in particular the operation of her Merrill Lynch account; Claimant was negligent in the supervision of her financial affairs and in particular the operation and transfer of her Merrill Lynch account; Claimant suffered no damages by reason of the acts complained of in the Statement of Claim; and Claimant failed to mitigate her damages, if any.

#### **RELIEF REQUESTED**

Claimant requested an award against the Respondents, jointly and severally, in an amount in excess of \$165,000.00, plus such other relief as the arbitration panel believed to be appropriate, including Claimant's filing fees and costs.

Respondent requested that the claims asserted against it be denied in its entirety and that it be awarded its' costs and such other relief that the panel deemed appropriate.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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:

All of Claimant's claims made against the Respondents not specifically set forth in this Award are, and each of them, denied and dismissed with prejudice.

Respondents are jointly and severally liable for, and shall pay to the Claimant the sum of \$950.00 as return of her filing fees and hearing session deposit paid to the NASD upon filing of this arbitration.

Each party shall bear its own costs and expenses, including attorneys' fees, associated with this arbitration.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300 for each prehearing conference, if any. There were three (3) sessions x \$750.00 = \$2,250.00 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure (the "Code"), the NASD shall **retain** the non-refundable filing fee in the amount of \$250.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant.

Additional forum fees in the amount of \$1,500.00 are assessed against MLPFS.

Pursuant to §45 of the Code, MLPFS is liable for, and shall pay to the NASD the sum of \$350.00 for the assessment of its member surcharge. **Fees are payable to the National Association of Securities Dealers, Inc.**

Dated:

Charles E. Jones

s/s

November 14, 1995

Charles E. Jones

Public Arbitrator, Presiding Chair

**Concurring Arbitrator**

Lawrence L. Downs

s/s

November 14, 1995

Lawrence L. Downs

Public Arbitrator

**Dissenting Arbitrator**

James D. Swope

s/s

November 20, 1995

James D. Swope

Industry Arbitrator

**Concurring Arbitrator**