

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Sandra Jones,

Claimant,

v.

No. 95-01155

**Dean Witter Reynolds, Inc., and
Merrill Lynch, Pierce Fenner & Smith, Inc.,**

Respondents.

REPRESENTATION OF PARTIES

Claimant Sandra Jones was represented by Seth Lipner, Esquire and Herbert M. Deutsch, Esquire both of Deutsch & Lipner located in Garden City, New York.

Respondent Dean Witter Reynolds, Inc. was represented by Michelle Bryan Oroschakoff, Esquire of Dean Witter Reynolds, Inc. located in San Francisco, California.

Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. was represented by Brian Hellberg, Esquire of Secore & Waller, L.L.P. located in Dallas, Texas.

CASE INFORMATION

Claimant Sandra Jones' Statement of Claim was filed on or about March 6, 1995. Claimant Sandra Jones' Amended Statement of Claim was filed on or about July 19, 1995.

Claimant Sandra Jones' Submission Agreement was signed on February 28, 1995.

Respondent Dean Witter Reynolds, Inc.'s Statement of Answer was filed on or about January 2, 1996.

Respondent Dean Witter Reynolds, Inc.'s Submission Agreement was signed on December 29, 1995 by Michelle Bryan Oroschakoff, Vice President & Senior Attorney of Dean Witter Reynolds, Inc.

Respondent Merrill Lynch, Pierce Fenner & Smith, Inc.'s Statement of Answer was filed on or about September 25, 1995. Respondent Merrill Lynch, Pierce Fenner & Smith, Inc.'s First Amended Statement of Answer was filed on or about April 1, 1996.

Respondent Merrill Lynch, Pierce Fenner & Smith, Inc.'s Submission Agreement was signed on September 21, 1995 by John K. Shannon, Jr., Vice President & Senior Counsel of Merrill Lynch, Pierce Fenner & Smith, Inc.

HEARING INFORMATION

The hearing was held on: July 16, 1996 for two (2) sessions; and July 17, 1996 for two (2) sessions. The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Sandra Jones ("Claimant") alleged that:

Claimant had an account with Dean Witter from February 1992 through July 1993 and an account with Merrill Lynch from June 1993 to present.

From February 1991 through May 1991, the broker at Dean Witter was Hans Backlund and when Mr. Backlund left Dean Witter, Ed Hall became Claimant's broker and continued to be Claimant's broker at Dean Witter. Ed Hall left Dean Witter for Merrill Lynch and claimant then transferred the account to Merrill Lynch.

Claimant further alleged that:

1. She told Backlund that she was recently married with a young family; the funds were irreplaceable; she was dependent upon the funds for income; she was not a knowledgeable or experienced investor; that she was invested in a Government fund; her investment goals were income with capital appreciation; and she depended upon Backlund for recommendations of suitable investments.
2. Backlund recommended sale of the Government Funds and purchase of MFS Income Trust and by the end of the first month she made purchases which produced a margin debit balance of \$8,179.00.
3. By the end of the 2nd month purchase had been made in EuroDisney and the margin debit balance was \$39,000.00.
4. During the next 9 months there was a withdrawal of \$11,000.00.
5. In January 1992, Hall recommended purchase of \$200,000 Disney Zero coupon bonds on margin but did not explain the risks. The margin balance increased to \$240,000.

6. In March 1992, Hall recommended purchase of more MFS to increase income and offset declines in Disney and explained the MFS yield was 8% and the margin cost was 3%.

7. In July, 1992, claimant sold the MFS to eliminate the margin and used the remaining cash to buy Putnam Mutual Fund.

8. In August 1992, Claimant deposited \$54,000 from sale of her house into the account and \$84,000 of MFS was purchased.

9. In October 1992, Hall recommended repurchase of MFS to restore the income and established a margin balance of \$347,000.00 in the process of purchasing MFS.

10. In February 1993, Hall recommended sale of Disney at a loss of \$24,927 and purchased more MFS funds and two stocks for a total of \$145,000.00.

11. In June 1993, the account was transferred to Merrill Lynch.

12. In October 1993, 2/3 of the Putnam Fund and one MFS fund were sold to buy stock and L.P. units. Some stock was sold in November and repurchased in December.

13. In February 1994, Putnam Master Income was sold and Alliance Class B bought.

14. In April some stock and mutual funds were sold.

15. In the first year at Merrill Lynch, Claimant and Hall had discussion where she urged him to find a solution to margin calls and the interest paid on the margin account. Hall urged her not to sell the bonds and wait for a rebound in prices.

16. Between the summer 1993 and the winter of 1994, Claimant withdrew funds to start her own business twice. Hall told her that there was enough money to cover the withdrawals.

17. Between Spring 1994 and November 1994, there were some sales and in October 1994 there was a margin call. Claimant asked for Hall's opinion of a stock called Mobile Mini and how much would be left if they settled the margin account. Hall said they would get \$150,000.00. Hall reported that Mobile Mini was a good move and on November 3, 1994, Claimant told Hall to liquidate the account, pay off the margin, put \$10,000 in money market and use the rest to buy Mobile Mini. Hall did not sell all of the Alliance Trust but did buy \$101,000.00 of Mobile Mini and left a small margin balance.

18. A few weeks after November 3, 1994, Claimant got a margin call and Hall promised to sell the remaining Alliance Trust.

19. On December 27, 1994 Claimant received confirmation of the sale of 1,000 Alliance and a margin call for \$1,400.00.

20. Claimant found out there was no cash in the account and ordered the sale of the remaining Alliance Trust. Claimant called Hall's supervisor to freeze the account and transferred to another firm.

21. At Merrill Lynch, margin interest was \$23,780 and Claimant withdrew \$94,000 while Dividends and Interest totalled \$51,500.00.

22. The value of the account declined from \$253,000 to \$95,000 at Merrill Lynch.

23. Claimant alleges trades made without authorization.

Claimant alleged that the Respondents Dean Witter Reynolds, Inc. and Merrill Lynch, Pierce Fenner & Smith, Inc. ("Respondents") are liable on the following causes of action:

24. Common Law Fraud and Misrepresentation bases upon material representation and omission of facts by the broker as an agent of the Respondents;

25. Improper use of discretion by the broker as an agent of Respondents in control the account;

26. Breach of Fiduciary duty by Respondents in failing to inform them of the true nature and character of the investments and trading in the accounts;

27. Negligent supervision in failing to use reasonable care in supervising the broker;

28. Breach of Contract in failing to exercise the same standard of care as exercised by other investment professionals with Respondent's expertise under similar circumstances; and

29. The investments and trading in the account were not suitable for Claimant.

Respondent Dean Witter Reynolds, Inc. denied all the material allegations of wrongdoing and alleged that:

1. Claimant opened the account in February 1993 at the age of 43 with \$40,000 annual income and a net worth of \$200,000.00 with 3 years of experience and desired income and capital appreciation;

2. Claimant deposited \$364,000 and received \$353,880 in MFS which paid \$3,989 per month. Claimant later withdrew \$12,500 and bought small positions in Biomet and Microhealth Systems (growth stocks);

3. A margin account was opened on March 26, 1991. Between March 1991 and June 1993 Claimant bought and sold stock and withdrew funds;

4. Claimant maintained the account in California and moved to Texas in August 1992;

5. Most of Claimant's claims are time barred in that:

a) the statute of limitations for breach of fiduciary duty is four years limiting claims under this cause to claim arising after March 6, 1991;

b) the statute of limitations for fraud (including "suitability") and unauthorized trading claims is three years limiting Claimant to claims arising after March 6, 1992;

c) the statute of limitations for negligent misrepresentation is one year and all negligence claims are time barred;

d) the only written margin agreement is not alleged to be breached and the statute of limitations for oral contracts is two years limiting claimant to claims arising after March 6, 1993.

6. Claimant has no basis for a fraud claim based on the facts of the matter;

7. Claimant has no basis for "suitability" claims in that a private right of action is not established by the NASD rules; no standing to sue; and that unsuitability is actionable only to the extent it is tantamount to fraud and Dean Witter had no intent to defraud and Dean Witter did not control Claimant's account;

8. There is no basis for a claim of unauthorized trades; Claimant ratified all transactions; Claimant waived her right to object to and the decision to move to Merrill Lynch without complaint was an intentional relinquishment of the right to complain about trades at Dean Witter; Claimant is estopped to objecting to the brokers actions because of her failure to timely object with knowledge to the trades;

9. There was no fiduciary duty with a non-discretionary account controlled by Claimant and Dean Witter did not breach any fiduciary duty;

10. Dean Witter performed under the margin agreement which as the only contract with the Claimant;

11. Claimant's damages are incorrect because Dean Witter is not responsible for market losses and even if responsible that responsibility terminated with the transfer to Merrill Lynch and the equity of the account decreased by only \$10,000.00 while at Dean Witter.

12. Dean Witter also allege affirmative defense of Laches, contributory and comparative negligence and assumption of the risk.

Respondent Merrill Lynch, Fenner Pierce & Smith, Inc. denied each and every allegation of wrongdoing and liability set forth in the Claim;

Respondent Merrill Lynch, Fenner Pierce & Smith alleged:

1) At the time the account was opened at Merrill Lynch, Claimant has married and her spouse played a significant role in the wife's account;

2) Claimant bought funds at Merrill Lynch to capture more income and growth;

3) the broker discounted commissions to the Claimant;

4) Class B shares of Alliance Income were purchased to alleviate commissions charged to the account;

5) In April, 1994 investor's shares were sold to reduce the margin balance;

6) Claimant's new account opening shows an income between \$50,000 and \$99,999 and a net worth between \$500,000 and \$999,999.

7) Margin calls were due to repeated withdrawal of funds above and beyond the income received from the investments;

8) In November, 1994 the broker checked at the request of Mr. Jones, a small company stock named Mobil Mini and reported to the Jones that the stock was a risky investment and paid no income and that the Claimant decided to liquidate investments in the account and invest the proceeds in the Mobil Mini stock;

9) In liquidating the investment, the broker inadvertently overlooked selling all of the Alliance shares and on December 27, 1994 Claimant decided to sell the 1000 share of Alliance stock to meet a margin call and kept some remaining shares;

10) When excluding the loss on shares delivered into Merrill Lynch from Dean Witter and the loss from an unsolicited purchase of Mobil Mini, Claimant made a profit of \$5,728.41 at Merrill Lynch;

11) Merrill Lynch stated it breached no duty to Claimant, made no misrepresentation nor omitted any material fact and was not defrauded in her dealings with Merrill Lynch; that Merrill Lynch was not negligent and any losses were due to Claimant's negligence and contributory negligence; all trades were authorized by Claimant and were suitable for her, Claimant is not entitled to attorney's fees and punitive damages are not called for by the facts of the case.

RELIEF REQUESTED

Claimant Sandra Jones requested an award against Dean Witter Reynolds, Inc. and Merrill Lynch, Pierce Fenner & Smith, Inc. in an amount between \$250,000 and \$300,000 for compensatory damages, an award in the amount of \$600,000 for punitive damages, interest, and an award for the costs of this arbitration.

Respondent Dean Witter Reynolds, Inc. requested that the Statement of Claim be denied in its entirety with prejudice.

Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. requested that the Statement of Claim be denied in its entirety with prejudice, and that costs be assessed against Claimant Sandra Jones.

OTHER ISSUES CONSIDERED & DECIDED

During the Hearing, Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. admitted a failure to execute a sale which caused a loss of \$4,000.00 in the value of the Alliance Trust Fund shares not sold at the time that Claimant Sandra Jones requested a sale of all of the Alliance Trust Fund shares. Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. offered to pay this amount to Claimant.

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:

(1) That Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. is liable and shall pay Claimant Sandra Jones \$4,000.00 pursuant to its offer;

(2) That Claimant Sandra Jones take nothing further under her claims against Respondents Dean Witter Reynolds, Inc. and Merrill Lynch, Pierce Fenner & Smith, Inc. and that the claims against them are dismissed with prejudice; and

(3) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each prehearing conference, if any. There were four (4) hearing sessions x \$600 = \$2,400 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a prehearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$600 previously deposited with the NASD by Claimant.

Pursuant to §45 of the Code, the NASD shall **retain** the partial member surcharge fee in the amount of \$200 previously paid by Respondent Dean Witter Reynolds, Inc.

Pursuant to §45 of the Code, the NASD shall **retain** the member surcharge fee in the amount of \$350 previously paid by Respondent Merrill Lynch, Pierce Fenner & Smith, Inc.

Additional forum fees in the amount of \$1,700 (= \$2,400 - \$600 hearing session deposit - \$100 overpayment) are assessed against Claimant Sandra Jones.

Respondent Dean Witter Reynolds, Inc. is liable and shall pay the balance of its member surcharge fee in the amount of \$150.

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

Dated:

/s/ Donald H. Fidler

Donald H. Fidler, Esquire
Public Arbitrator, Presiding Chair

8/9/96

/s/ George C. Witte

George C. Witte
Public Arbitrator

8/7/96

/s/ Marie A. Moore

Marie A. Moore
Industry Arbitrator

8-9-96

For NASD Use Only

Date of Service by the NASD: August 12, 1996