

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Gladys R. Berger

95-01925

Name of Respondent(s)

Merrill Lynch Pierce Fenner & Smith Inc  
Michael Hellman

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REPRESENTATION

For Claimant Gladys R. Berger ("Claimant") appeared Gerald D. Fischer, Esq. from the law offices of Opton, Handler, Gottlieb, Feiler & Katz in New York, New York.

For Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), and Michael Hellman ("Hellman") appeared Theodore A. Krebsbach, Esq. from the law offices of Kittay, Gold & Krebsbach located in White Plains, New York.

CASE INFORMATION

Statement of Claim was filed on: April 11, 1995.

Claimant's Submission Agreement was signed on: May 2, 1995.

Joint Statement of Answer was filed by Merrill Lynch and Michael Hellman on: July 18, 1995.

Respondent, Merrill Lynch's Submission Agreement was signed on: June 26, 1995.

Respondent, Michael Hellman's Submission Agreement was signed on: June 22, 1995.

HEARING INFORMATION

Pre-Hearing Conference:	July 17, 1996 -	One Session
Hearing Dates/Sessions:	January 20, 1997 -	One Session
	April 16, 1997 -	Two Sessions
	April 17, 1997 -	One Session
	June 18, 1997 -	Two Sessions

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York, New York.

### CASE SUMMARY

Claimant alleged that in September 1993, she and her husband contracted to sell their home for \$2,700,000.00 taking back a 3 year self-amortizing purchase money mortgage of \$300,000.00, on which home they owed \$300,000.00 on a home equity mortgage, back real estate taxes and real estate commissions, all payable at closing. Claimant further alleged that after the sale an estimated \$400,000.00 in capital gains taxes would be payable on April 15, 1994.

Claimant alleged that in early September 1993, after signing the contract of sale and before closing, Claimant and her husband entered the office of Merrill Lynch in Manhasset and were introduced to Michael Hellman ("Hellman"), the broker of the day.

Claimant alleged that she explained to Hellman their financial and personal circumstances and need for financial planning advice. Claimant alleged that she explained that beside the proceeds from the sale of their home, the only other source of income for the Berger's was social security of approximately \$20,000.00 per year and a factory building which was expected to be sold in about three years from which they expected to receive approximately \$100,000.00 to \$150,000.00.

Claimant alleged that Hellman was informed that the Berger's intended to build a new home with the proceeds of the sale of the home to use the balance of the funds to generate income to live on. Claimant further alleged that Hellman was told that because of Claimant's age and lack of pension or outside income, Claimant wished to pursue a very conservative, low risk approach to any investments and keep fees and commissions to a minimum. Claimant contended that based upon confidences instilled by Hellman and the integrity of Merrill Lynch name, Claimant opened an account in November 1993 depositing \$1,324,937.00 and an additional \$607,213.00 in December 1993.

Claimant alleged that Hellman invested all of the funds in various securities and mutual funds, except for \$241,572.00 initially left in money market funds, which was then invested in mutual funds and securities within a few weeks. Claimant maintained that after receipt of her February 1994 statement, which reflected losses of approximately \$64,000.00, Claimant discussed her concerns about the losses and risks of further losses on the investments. Claimant alleged Hellman responded by stating that Claimant should stay invested as the market would surely correct itself.

Claimant alleged that by April 15, 1994, there were insufficient funds in Claimant's money market funds to pay the capital gains taxes incurred on the sale of the house and Hellman advised Claimant to either borrow the needed funds on margin or sell some mutual funds or securities at a loss. Claimant maintained that she borrowed \$368,879.00 on margin to pay federal and state income taxes.

Claimant alleged that Hellman invested substantially all of Claimant's funds in an inappropriate manner, in unsuitable securities, contrary to Claimant's goals. Claimant further alleged that as a result of Respondent's wrongful conduct Claimant and her husband were unable to build their new home.

Respondents maintained that Mr. Berger entered Merrill Lynch's office and inquired about opening a Cash Management Account ("CMA") and was referred to Hellman for assistance. Respondents maintained that Mr. Berger stated that he and Claimant were selling their home for approximately \$2,700,000.00 and would deposit approximately \$1,000,000.00 in the near future. Respondents alleged that Mr. Berger was given a CMA booklet and a few days later CMA account documentation for his review and signature. Respondents maintained that Mr. Berger returned with the executed forms and explained that the account was to be opened in Claimant's name.

Respondents maintained that before the money was deposited into the account he met with Mr. Berger

and Claimant on a number of occasions to learn their financial situation and objectives. Respondents alleged that the Bergers expressly stated that they did not need income from the Merrill Lynch account for living expenses. Respondents maintained that the Bergers investment objective was to obtain the maximum income possible with reasonable risk and that the Bergers would not make withdrawals from the account so that its growth potential could be realized. Respondents maintained that Hellman discussed various investments. Respondents maintained that an additional \$656,529.41 was deposited by the end of the month. Respondents further maintained that Claimant made additional deposits and bought other income oriented investments in December 1993 and January 1994.

Respondents maintained that in February 1994, Mr. Berger expressed concern that the cash in the portfolio was generating insufficient income to fuel the growth sought by Claimant. Respondent maintained that after discussing several alternatives, the Bergers agreed to earmark \$90,000.00 for investment in a diversified portfolio of mutual funds with the objective of growth.

Respondent maintained that no portion of the account was ever segregated for the purpose of paying capital gains taxes on the sale of the house nor was this discussed at the time the account was opened. Respondent maintained that in April 1994, Mr. Berger announced that he needed over \$400,000.00 to pay capital gains taxes. Respondents maintained that Mr. Berger and Hellman called the Berger's accountant to discuss the best way to handle the situation. Respondents maintained that the accountant suggested that Claimant margin the account rather than liquidate the portfolio and the Bergers agreed.

Respondents maintained that the equity in the account declined throughout 1994 due to the changes in Federal Reserve policy and that during this period the Bergers were in regular communication with Hellman and aware of the status of the account. Respondents further alleged that Claimant, contrary to her stated investment objective, consistently withdrew money from the account, which totaled \$811,096.92 through April 1995. Respondents maintained that Claimant also received \$143,983.99 in dividends and interest through April 1995 and that with the exception of \$4,585.51 incurred in connection with four unsolicited sales, Claimant sustained only unrealized losses.

#### **RELIEF REQUESTED**

Claimant requested actual damages in the amount of \$250,000.00, plus interest from March 1993, punitive damages in the amount of \$250,000.00, and the reimbursement of legal fees.

Respondents requested that all claims be dismissed and that all costs be assessed against Claimant.

#### **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 Regulation, Inc.

#### **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. All claims asserted by Claimant against Merrill Lynch and Michael Hellman are dismissed in their entirety;
2. The parties shall bear their respective costs, including attorneys fees; and,

3. All other requests for relief are denied.

**FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$200.00 filing fee and \$350.00 member surcharge and has assessed the following Forum Fees:

Pre-Hearing Session Fees:	\$300.00	(1 Session x \$300.00)
Hearing Session Fees:	\$4500.00	(6 Sessions x \$750.00)
Total Forum Fees:	\$4800.00	

1. Claimant is assessed the sum of \$2,400.00, representing one-half of the total forum fees assessed, less \$750.00 previously deposited, leaving \$1,650.00 due. Claimant is liable and shall pay to NASD Regulation the sum of \$1,650.00.
2. Respondents Merrill Lynch and Michael Hellman are jointly and severally assessed the sum of \$2,400.00 representing one-half of the total forum fees assessed. Respondents Merrill Lynch and Michael Hellman are jointly and severally liable and shall pay to NASD Regulation the sum of \$2,400.00.

Fees are payable to the NASD Regulation, Inc.

Concurring Arbitrators' Signatures  
Name

Public/Industry

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Krishna M. Vempaty, Esq.

Date of Decision: September 15, 1997.

RECIPIENTS:

Krishna M. Vempaty, Esq.