

12/9/95 961218
N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

James R. Kellam, Executor of the
Estate of Eleanor H. Kellam

95-03287

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith Inc.
Thomas A. French
David Ruckman-

REPRESENTATION

For claimant James R. Kellam, Executor of the Estate of Eleanor H. Kellam ("claimant") appeared James R. Kellam, Esq.

For respondents Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill") and David Ruckman ("Ruckman") appeared John J. **Kilkenny**, Esq., Vice President and Senior Counsel of Merrill Lynch, Pierce, Fenner & Smith Inc.

For respondent Thomas A. French ("French") **appeared** Stewart D. Roll, Esq. of the law firm of **Persky, Shapiro, Salim, Esper, Arnoff & Nolfi Co., L.P.A.**, located in Cleveland, Ohio.

CASE INFORMATION

Statement of Claim was filed on July 7, 1995. Claimant's Submission Agreement was signed on June 28, 1995.

Joint Statement of Answer was **filed** by Merrill and Ruckman on September 11, 1995. Merrill's Submission Agreement was signed on September 11, 1995. Ruckman's Submission Agreement was signed on September 21, 1995.

French's Statement of Answer was filed September 27, 1995. French's Submission Agreement was signed on September 8, 1995.

HEARING MATION

Pm-Hearing Conference:	April 25, 1996	One Arbitrator
Hearing Dates/Sessions:	May 6, 1996	Two Sessions
	October 18, 1996	Two Sessions

The hearing conducted on May 6, 1996 was held at the offices of the National Association of Securities Dealers, Inc. located in Cleveland, Ohio. The hearing conducted on October 18, 1996 was held at the Embassy Suites Hotel located in Cleveland, Ohio.

CASE SUMMARY

Claimant alleged that, between 1983 and 1987, the account of Mrs. Kellam was a quiet income oriented account and that, in August 1988, French began to frequently trade mutual fund shares. Claimant asserted that the funds purchased went from conservative utility fixed-income type investments to junk bonds and tax-free bond funds. Claimant further asserted that the change to give Mrs. Kellam additional diversification by restructuring her account towards growth and tax-free income instead of income was made without updating her investment objectives and was contrary to the standard investment strategy that is typically recommended for an eighty year old widow on fixed income.

Claimant contended that the investment performance of Mrs. Kellam's account from the end of 1988 through March 1992 was substandard. Claimant further contended that respondents churned Mrs. Kellam's account. Claimant alleged that French bought and sold twenty-one different mutual funds from August 1988 through March 1992 and that these investments generated \$18,052.00 in commissions for respondents and losses of \$10,990.00 for Mrs. Kellam. Claimant also alleged that Ruckman failed to adequately supervise French and acquiesced in French's actions by initialing his trade tickets and signing off on his books annually.

Merrill and Ruckman denied any and all allegations of wrongdoing or liability in the Statement of Claim. Merrill and Ruckman maintained that Mrs. Kellam established her account with French in May 1983. Merrill and Ruckman further maintained that she approximated her annual income at \$25,000.00 and her net worth at \$50,000.00 and indicated that her investment objective was income with a risk tolerance for good quality investments. Merrill and Ruckman contended that, in December 1987, Mrs. Kellam's account was converted into a Cash Management Account and that she stopped taking dividend income in order to reinvest in money funds shares. Merrill and Ruckman further contended that Mrs. Kellam knew and understood what dividend reinvestment meant to her because her monthly income was immediately reduced.

Merrill and Ruckman maintained that Mrs. Kellam became concerned about diversification and total return and wanted income to increase her yield and that she was also concerned with her tax burden. Merrill and Ruckman further maintained that Merrill's records reflect that Mrs. Kellam received a contemporaneous trade confirmation for every transaction and a monthly statement detailing the transactions and the account's performance. Merrill and Ruckman also contended that, upon information and belief, French discussed every transaction, risks, rewards

and economic justification with Mrs. Kellam prior to entering each order and met personally with Mrs. Kellam at least annually and that she never expressed any misunderstanding.

French denied all allegations of wrongdoing or liability contained in the Statement of Claim. French maintained that Mrs. Kellam was competent and made her own fully informed decisions about the trading complained of in the Statement of Claim.

French alleged that Mrs. Kellam was competent, understood the investment decisions which she made and directed trading in her account accordingly. French also asserted that the investments chosen by Mrs. Kellam were suitable and he denied that the investments exposed her to a level of risk and earning uncertainty which was unacceptable to her. French also denied that the performance of Mrs. Kellam's account was substandard, that Mrs. Kellam paid exorbitant commissions to him or Merrill and that the account was churned.

Respondents maintained that the Statement of Claim failed to state a claim upon which relief could be granted; that claimant was barred from recovery because Mrs. Kellam directed, authorized, consented to, acquiesced in, and/or ratified all transactions; that Mrs. Kellam made **all** of the investment decision with regard to her accounts and any losses which may have been suffered were caused by her informed decisions and due to market conditions outside of their control; and that they were not liable to claimant because, at all times, they acted properly and in good faith. Merrill and Ruckman further maintained that the Statement of Claim failed to plead fraud with the requisite particularity.

RELIEF REQUESTED

Claimant requested total damages of \$61,123.00, itemized as follows:

1. \$32,081 .00 for mismanagement and improper investment strategy and for respondents' failure to earn an adequate rate of return calculated as the difference between the performance actually realized and that which would have been realized at a rate of return of 13 % per year.
2. Commissions paid to Merrill and French in the amount of \$18,052.00.
3. **Losses** in excess of gains earned by Merrill and French for Mrs. **Kellam's** estate in the amount of \$10,990.00.

Claimant also requested punitive damages in a like amount, costs incurred in processing the claim, and that Ruckman and French be personally fined and barred.

Merrill and Ruckman requested that claimant's claims for damages be denied in all respects **and** that the costs of this action, including attorney's fees, be assessed against claimant.

French requested that claimant's prayer for damages and relief be denied in all respects and that the costs of this action, including attorney's fees be assessed against claimant.

OTHER ISSUES CONSIDERED & DECIDED

Respondents moved to dismiss certain claims pursuant of Section 15 of the Code of Arbitration Procedure and a preliminary administrative ruling was issued by the NASD. The panel of arbitrators considered this motion *de novo* and has determined that claims pertaining to sales occurring more than six years prior to claimant's **filing** of the Statement of Claim are ineligible and are hereby dismissed.

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. Merrill and French be and hereby are jointly and severally liable and shall pay claimant the sum of **\$12,500.00**, **specifically** excluding interest.
2. All claims against Ruckman are dismissed in their entirety.
3. Claimant's request for punitive damages is hereby denied.
4. Each party shall bear their own costs, including attorneys' fees.
5. All other claims are hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 non-refundable **filing** fee previously paid by claimant and have assessed the following forum fees:

1 pm-hearing conference	= \$ 300.00
4 hearing sessions x \$750.00	= <u>\$3,000.00</u>
Total forum fees	= \$3,300.00

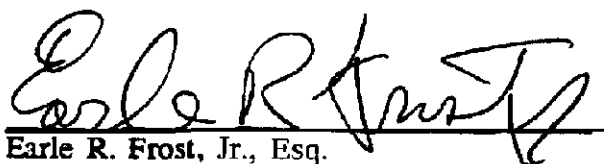
Forum fees assessed against:

1. Claimant be and hereby is liable for the sum of **\$1,650.00**, representing one-half of the total amount of forum fees assessed. Claimant previously submitted a hearing session deposit of \$750.00 which shall be applied toward the amount assessed. Therefore, claimant is liable and shall pay \$900.00 to the NASD.

2. **Merrill** and French be and hereby are jointly and severally **liable and shall** pay the sum of **\$1,650.00** to the **NASD**, representing one-half of the total amount of **forum fees** assessed.

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

Concurring Arbitrators' Signatures



Earle R. Frost, Jr., Esq.
Chairperson-Public Arbitrator

Joseph W. Grossner
Public Arbitrator

John N. Stamatis, Esq.
Industry Arbitrator

Date of Decision: December 30, 1996

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2. Merrill and French be and hereby are jointly and severally liable and shall pay to the NASD of \$1,650.00 to the NASD, representing one-half of the total amount of damages assessed,

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

~~Consent to Arbitration~~ 12/23

Charles R. Stone, Jr., Esq.
Chairperson-Public Arbitrator



Joseph W. Grossner
Public Arbitrator

John N. Starnatis, Esq.
Industry Arbitrator

Date of Decision: December 30, 1996

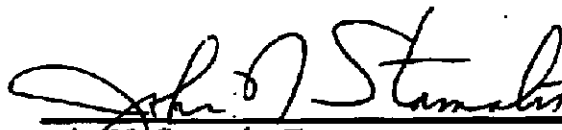
2. **Merrill and French be and hereby are jointly and severally liable and shall pay the sum of \$1,650.00 to the NASD, representing one-half of the total amount of forum fees assessed:**

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

Concurring Arbitrators' Signatures

Harle R Frost, Jr., Esq.
Chairperson-Public Arbitrator

Joseph W; Grossner
Public Arbitrator



John N. Stamatidis, Esq.
Industry Arbitrator

Date of Decision: December 30, 1996