

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Brian G. Egbert, individually and as Trustee of the Brian G.
Egbert Revocable Trust,

Claimants,

vs.

No. 96-02494

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Respondent.

REPRESENTATION OF PARTIES

Claimant Brian G. Egbert, individually and as Trustee of the Brian G. Egbert Revocable Trust, was represented by John J. Miller, Esquire, of Law Offices of John J. Miller, P.A., located in Overland Park, Kansas.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. was represented by Marianne Bretton-Granatoor, Esquire, of Merrill Lynch, Pierce, Fenner & Smith, Inc., located in New York, New York.

CASE INFORMATION

Claimant Brian G. Egbert, individually and as Trustee of the Brian G. Egbert Revocable Trust, filed his Statement of Claim on or about June 11, 1996. Claimant Brian G. Egbert, individually and as Trustee of the Brian G. Egbert Revocable Trust, signed his Submission Agreement on June 6, 1996.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Statement of Answer was filed on or about August 16, 1996. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. did not submit a properly executed Submission Agreement.

HEARING INFORMATION

The hearing was held on: January 7, 1997 for two (2) sessions.

The hearing was held in Kansas City, Missouri.

CASE SUMMARY

Claimant Brian G. Egbert, individually and as Trustee of the Brian G. Egbert Revocable Trust, ("Claimant") alleged that respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent") was negligent and breached its fiduciary duty as his financial advisor and custodian of his retirement accounts. Claimant stated that during a debilitating and long standing physical condition, which Respondent was aware of, he withdrew retirement funds from his accounts. Claimant stated that he has been unable to recollect making the request to Respondent to liquidate the securities in his retirement accounts due to his condition at that time. Claimant further asserted that there was no indication that Respondent had ever advised him of the tax implications of the withdrawal of his retirement funds, or of the other gains and losses arising from the liquidation of the securities in his retirement accounts. Claimant alleged that it was obvious to Respondent that he could not comprehend the consequences of the liquidation and withdrawals, and that Respondent did not even advise him of the consequences of these actions in writing, which has resulted in the loss of his retirement funds and a substantial tax penalty for early withdrawal of the retirement funds.

Respondent denied the allegations set forth in the Statement of Claim. Respondent stated that it made every reasonable effort, orally and in writing, to advise Claimant of the adverse consequences of his legal and proper requests to liquidate his individual retirement accounts and to persuade him not to do so, but Claimant rejected this advice. Furthermore, according to Respondent, because Claimant acknowledged that he understood that he would owe taxes and penalties as the result of an early withdrawal of his funds and had executed all necessary documents to effect the withdrawals, Respondent had no alternative other than to comply with Claimant's requests. Respondent made the following affirmative defenses: (1) Claimant fails to state a claim upon which relief can be granted; (2) Claimant suffered no damages by reason of the acts complained of in the Statement of Claim; (3) Claimant failed to mitigate his damages, if any; (4) Claimant directed, approved and/or authorized each and every transaction in his accounts; (5) Claimant ratified, accepted, acquiesced and confirmed the acts complained of; (6) Claimant's claims are barred by the equitable doctrine of laches; (7) Claimant's claims are barred by the doctrine of estoppel; (8) all transactions complained of were properly conducted and no timely complaint or objection regarding Claimant's accounts were ever made to Respondent by Claimant; (9) Claimant failed to exercise due diligence and was reckless in the supervision of his financial affairs; (10) Claimant was negligent in the supervision of his financial affairs; (11) Claimant's claims for relief are barred because Respondent acted properly and in good faith with respect to Claimant's accounts; (12) Respondent, at all relevant times, maintained an adequate and reasonable system of supervision and control over its employees and did not directly or indirectly induce any act or acts constituting a cause of action against it by Claimant; and (13) Claimant is not entitled to an award of attorney fees, punitive damages, interest, or the cost of the instant proceeding.

RELIEF REQUESTED

Claimants Brian G. Egbert Revocable Trust and Brian G. Egbert requested awards in the sum of \$1,500,000 as follows: an award in the amount of \$520,000 for restitution of the retirement accounts; an award in the amount of \$250,000 for realized and anticipated tax penalties; an award for attorney fees and costs; and an award for punitive damages.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorney fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., at the close of Claimant's case, raised an oral motion to dismiss. After hearing argument from the parties, consideration of the record and the pleadings, and deliberation, the undersigned arbitrators granted the motion.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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:

Claimants Brian G. Egbert Revocable Trust's and Brian G. Egbert's claims are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session. There were pre-hearing conferences and there were two (2) sessions x \$1,000 = \$2,000 in forum fees. Pursuant to §10332(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 pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution 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 \$1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimants.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Respondent.

Additional forum fees in the amount of \$1,000 are assessed by the panel against the Claimants.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

Keith D. Patten
Keith D. Patten
Public Arbitrator, Presiding Chair

/s/

January 24, 1997

William L. Beedles
William L. Beedles, Ph.D
Public Arbitrator

/s/

January 24, 1997

Billy H. Ware
Billy H. Ware
Industry Arbitrator

/s/

January 28, 1997