

**Award**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Mildred E. Bierce, MLPF & S Cust FPO Mildred E. Bierce, IRA FBO Mildred E. Bierce,  
Claimants v. Merrill Lynch, Pierce, Fenner & Smith Incorporated, Respondent

Case Number: 06-01699

Hearing Site: San Francisco, California

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Nature of the Dispute: Customers v. Member

**REPRESENTATION OF PARTIES**

For Claimants:

James Jay Seltzer, Esq.  
Timothy D. Murphy, Esq.  
Law Offices of James Jay Seltzer  
Emeryville, California

For Respondent:

Eric J. Glassman, Esq.  
Mennemeier, Glassman &  
Stroud LLP  
Sacramento, California

**CASE INFORMATION**

Statement of Claim filed: March 31, 2006

Claimants' Uniform Submission Agreement signed: April 12, 2006

Statement of Answer of Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated  
("Merrill Lynch ") filed: June 28, 2006

Respondent's Uniform Submission Agreement signed: May 8, 2006

**CASE SUMMARY**

Claimant Mildred E. Bierce alleged the following claims with respect to the handling of her accounts: 1) Just and Equitable Principles of Trade; 2) Suitability; 3) Omissions and Misrepresentations of Material Fact; 4) Negligent Supervision and Failure to Supervise; 5) Violation of Corporations Code Sections 25401 and 25504.1; 6) Negligence; 7) Breach of Contract; 8) The Implied Covenant of Good Faith and Fair Dealing; 9) Breach of Fiduciary Duty; 10) Elder Abuse and Dependent Adult Protection

Act; and 11) Common Law Fraud. Claimants' dispute involved investments in two annuity contracts with American Legacy.

Respondent denied Claimant Mildred E. Bierce's allegations of wrongdoing and denied any liability to Claimants. Respondent also asserted various defenses.

### **RELIEF REQUESTED**

Claimants requested an award for the full amount of damages proved at hearing in addition to attorneys' fees, all costs associated with the prosecution of this matter, punitive damages, trebling of the final award, and the taking of any further action deemed just and appropriate in this matter. Claimants also requested a reasoned decision by the arbitrators.

Respondent requested that the Panel dismiss the Statement of Claim, enter an award in Merrill Lynch's favor, assess attorneys' fees and costs against Claimants, and grant such other and further relief as is deemed just and proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

On or about December 18, 2006, the Panel reviewed and considered the positions of the parties relative to Respondent's Motion to Dismiss. The Panel denied the Motion without prejudice.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

After considering the pleadings, testimony, and evidence presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. The Panel concludes that the Respondent failed to properly advise Claimant Bierce of all the risks at the time Ms. Bierce switched from fixed to variable annuities. However, the Panel also concludes that these investments generated a reasonable return and thus Claimants suffered no damages. Accordingly, all claims by Claimants, including the claim for punitive damages, are dismissed.
2. Respondent is liable to and shall pay Claimants the sum of \$250.00 as reimbursement for Claimants' filing fee.

3. Except as noted in paragraph 2 above, each party shall bear its own costs, including attorneys' fees.

4. All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$250.00

#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, Merrill Lynch is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,200.00</u>
Total Member Fees	= \$4,450.00

#### **Forum Fees and Assessments**

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

(3) Pre-hearing conference sessions with the Panel  
@ \$1,000.00/session = \$3,000.00

Pre-hearing conferences:	October 27, 2006	1 session
	December 18, 2006	1 session
	August 22, 2007	1 session

(11) Hearing sessions @ \$1,000.00/session = \$11,000.00

Hearing Dates:	August 28, 2007	2 sessions
	August 29, 2007	2 sessions
	August 30, 2007	2 sessions
	August 31, 2007	2 sessions



**ARBITRATION PANEL**

John J. Fitzpatrick, Jr.	-	Public Arbitrator, Presiding Chair
William Michael Samsel	-	Public Arbitrator
Mark Aaron Jones	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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John J. Fitzpatrick, Jr.  
Chair, Public Arbitrator

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Signature Date

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William Michael Samsel  
Public Arbitrator

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Signature Date

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Mark Aaron Jones  
Non-Public Arbitrator

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Signature Date

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Date of Service

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Chair, Public Arbitrator

11/21/07  
Signature Date

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William Michael Samsel  
Public Arbitrator

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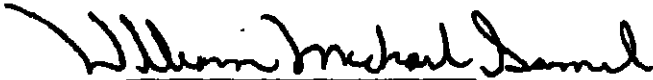
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