

Lead Stories

October 21, 2005

Merrill Lynch liable for check abuse

by JEREMY HARRELL

Brokerage breaks fiduciary responsibility to a dying man

A Long Island attorney has won a \$148,000 arbitration ruling from brokerage house Merrill Lynch because the company failed to protect a Nassau County man's assets.

Last month, the New York Supreme Court upheld a 2004 NASD decision finding that Merrill Lynch improperly monitored a cash management account, allowing the dying man's home-health aide to write hundreds of thousands of dollars in checks against the account. Merrill Lynch declined to comment on the ruling, which the company can appeal.

Loretta Gastwirth, who represented the man's estate as a partner with Meltzer, Lippe, Goldstein & Breitstone in Mineola, said Merrill Lynch violated its own policies dealing with elderly clients.

"They should have taken action to stop this but didn't," she said.

In 2004, the NASD ruled in favor of customers in 47 percent of arbitration cases.

The dispute centers around Robert Graef, whom the court describes as an active securities trader who became ill in the last three years of his life. Before dying in November 2002, Graef had been in and out of the hospital, suffering from a wide variety of ailments including glaucoma, diabetes and congestive heart failure.

In 1998, Graef hired Merrill Lynch to organize his holdings, and the company then set up his cash management account. Created nearly 30 years ago, Merrill Lynch's cash management accounts combine brokerage margin accounts with typical banking privileges such as check-writing and debit-card capabilities. Forbes magazine called Merrill's accounts one of the great business innovations of the 20th Century.

Though they appear similar, there are differences between cash management accounts and checking accounts. Checks in cash management accounts are written against a securities portfolio, and if there are insufficient funds in the balance, the brokerage can make a margin call. In the case of Graef's estate, the home-health aide wrote more than \$200,000 in checks, resulting in a margin loan of \$132,354, or about half the value of Graef's holdings with Merrill, according to the court.

This difference between the two accounts makes cash management accounts particularly vulnerable to abuse because they carry greater penalties for overdrafts, Gastwirth said.

Graef's financial troubles began in the last three years of his life, when he hired a home-health aide. For the first year of her employment, Graef's cash management account remained stable, registering only modest withdrawals. That spiked in the last two years, when the aide wrote nearly \$60,000 in the first year and more than \$165,000 in the second.

According to a penmanship expert hired by Graef's estate, the signatures on the checks bore the mark of an older person's hand while the rest of the checks were clearly written by someone else, presumably the aide. The checks were all for large, round amounts, "\$10,000 at a time," said Gastwirth.

She added that the aide first drained Graef's bank account, "but when that went dry, she went to Merrill Lynch." A Nassau County grand jury last year indicted the aide, Neressa Lewis, on a larceny charge, but authorities have not been able to track her down.

According to court records, Graef's broker recognized that something unusual was afoot, noting in a memo that Graef was "running up a significant margin," and the broker tried to contact Graef. But Graef, growing increasingly ill, couldn't communicate well by phone and the broker never made a promised home visit. The check-writing continued.

Gastwirth argued that it was in Merrill Lynch's best interest not to stop the margin loans from increasing by either freezing the account or suspending check-writing privileges. The court didn't disagree and said there would be "a more than colorable justification" that Merrill Lynch breached its fiduciary duty to Graef.

After the NASD awarded Graef's estate \$148,000 to cover the loss in December 2004, Merrill Lynch refused to pay the sum and appealed the case to the Supreme Court.