NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

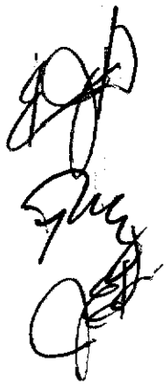
FIRST CIRCUIT

NUMBER 2008 CA 0560

THE ROBERT A. WHITLOCK III FAMILY CHARITABLE REMAINDER UNITRUST AND THE AMOS CATLIN SPAFFORD FAMILY FOUNDATION

VERSUS

MERRILL LYNCH, PIERCE, FENNER & SMITH



Judgment Rendered: SEP 2 3 2008

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Appealed from The Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 532,414
The Honorable Donald R. Johnson, Judge
The Honorable A. J. Kling, Judge

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

**GAIDRY, J.**

Merrill Lynch, Pierce, Fenner & Smith Incorporated appeals a trial court judgment granting plaintiffs' motion to vacate arbitration award. For the following reasons, we reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, The Robert A. Whitlock III Family Charitable Remainder Unitrust (the Unitrust) and The Amos Catlin Spafford Family Foundation (the Foundation) initiated an arbitration proceeding with the National Association of Securities Dealers-Dispute Resolution (NASD-DR) against Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch). In the Statement of Claim, two separate claims for damages were made, one by the Unitrust and one by the Foundation. Plaintiffs alleged that Robert A. Whitlock, as Trustee of the Unitrust, and as President of the Foundation, opened securities brokerage accounts at the Baton Rouge branch office of Merrill Lynch. Plaintiffs further alleged that an Initial Account was opened with a cash deposit of $1,066,251.85. Subsequently, six additional accounts were opened by making cash transfers from the Initial Account into Merrill Lynch Consults Accounts. The Merrill Lynch registered representative assigned to all accounts that became the subject of the arbitration was Daniel M. Hudson.

The Plaintiffs alleged that Hudson was told that the assets of the Unitrust that were deposited with Merrill Lynch were to be invested with conservative to moderate risk and to provide income to allow for annual distributions that were to be made from the Unitrust. The Foundation was one of the entities named as a recipient of the distributions to be made from the Unitrust. Likewise, the assets of the Foundation that were deposited

with Merrill Lynch were to be invested for growth with conservative to moderate risk.

The Statement of Claim further alleged that Merrill Lynch instead placed the assets of the Unitrust and of the Foundation for management with money managers that had above average risk investment styles. Whitlock alleged that Merrill Lynch did not advise him that the money managers it recommended were incompatible with the objectives of the Unitrust[1] and the Foundation. As a result, the Statement of Claim contained allegations that Merrill Lynch breached its fiduciary duty to the Unitrust and the Foundation. Plaintiffs also made claims for breach of contract, negligent misrepresentation, and professional negligence. In all, plaintiffs alleged that the Unitrust incurred losses in the amount of $2,529,854.82. Plaintiffs alleged losses on behalf of the Foundation in the amount of $51,112.76, or 46% of its investment.

Merrill Lynch answered the Statement of Claim alleging that plaintiffs had resorted to exaggerations and misstatements of fact to suggest that Merrill Lynch was somehow responsible for the losses in their accounts when, in reality, the losses were simply a result of a past and prolonged market downturn and plaintiffs' own investment decisions. Moreover, Merrill Lynch alleged that Whitlock, a wealthy and knowledgeable investor, made informed decisions about the investment strategies on behalf of the Unitrust and the Foundation. Merrill Lynch alleged that the Unitrust historically engaged in aggressive trading as evidenced by its prior trading with H & R Block. Moreover, Whitlock answered a questionnaire for

[1]Whitlock alleged that he informed Mr. Hudson that the income from the distributions from the Unitrust accounts were to be used to pay the premiums on two life insurance policies that were each owned by a separate insurance trust. The annual premiums on both insurance policies were in the neighborhood of $25,000.00 apiece. The Northwestern Policy is alleged to have had a death benefit in the amount of $1,803,203.00 and the Prudential Policy is alleged to have had a death benefit in the amount of $2,199,100.00. Plaintiffs argued that the policies lapsed due to the losses in the accounts and the consequent inability to pay the premiums.

purposes of enrolling in Merrill Lynch's Consults program, which, according to Merrill Lynch, demonstrated that he sought relatively aggressive investments for the Unitrust's assets. Merrill Lynch contended that if Whitlock incorrectly answered the questions on the Consults questionnaire, then he alone must bear the burden of those actions. Merrill Lynch asserted several other affirmative defenses, including assumption of the risk and failure to mitigate damages.

On February 9, 2005, just before the arbitration was to begin, the parties signed an "Agreement to Submit Disputes to Binding Mediation" (the Agreement) to be conducted by a mutually selected sole member of the previously empaneled NASD-DR arbitration panel. The parties selected Simon Savoie to be mediator/arbitrator[2] and the mediation was held on February 11, 2005. Ultimately, the parties were unable to amicably resolve the plaintiffs' claims. Accordingly, as agreed, the sole arbitrator was obliged to issue an award based on the information obtained in the mediation sessions.

On February 16, 2005, the arbitrator issued to the parties, via facsimile, a handwritten award contained on an "Award Information Sheet," finding against Merrill Lynch and ordering it to pay the Robert A. Whitlock Family Charitable Remainder Trust the amount of $52,270.00.[3] One day after the notification, plaintiffs wrote NASD-DR requesting clarification of the award. The arbitrator responded to the inquiry by mailing a letter to

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[2] For consistency, we will here and after refer to Mr. Savoie as the "arbitrator."

[3] Paragraph C(1) of the Agreement states:

> If the matter is not amicably compromised and the mediator is asked to render an award, the mediator agrees to notify the parties in writing of his award within seventy-two hours after the Binding Mediation has concluded. The mediator shall notify the parties by faxing a letter containing the award to both L. Jerome Stanley at 225-926-4348 and to George C. Freeman, III, at 504-589-9701. The award shall be binding on all parties to this Agreement. The mediator shall issue his award in the same form as would be used in a NASD arbitration with the mediator identified as "sole arbitrator."

NASD-DR on March 7, 2005, accompanied by a separate Award Information Sheet, explaining that the award was based on the management fees both plaintiffs had paid to Merrill Lynch, which, broken down, was $47,427.00 paid by the Unitrust and $4,843.00 paid by the Foundation (cumulatively $52,270.00). Before the arbitrator responded, however, plaintiffs, on March 1, 2005, had withdrawn their request for clarification of the award.

Ultimately, NASD-DR incorporated the arbitrator's decision into a "final award," which it issued on March 15, 2005.[4]

On May 16, 2005, plaintiffs filed in the trial court a Motion to Vacate Arbitration Award. Their argument in support of the motion to vacate was two-fold. They complained that Merrill Lynch, at the mediation, presented to the arbitrator lists which demonstrated that Whitlock attended Merrill Lynch sponsored lunch/dinner seminars where several of the money managers that had been recommended by Merrill Lynch to him had given presentations concerning the money manager investment strategies. The lists purportedly demonstrated that Whitlock had attended such seminars when, in fact, he contended that he had not attended any. Plaintiffs alleged, in essence, that Merrill Lynch had fabricated the documents and, therefore, had procured an arbitration award by committing fraud.

Secondly, in support of the motion to vacate, plaintiffs argued that a mutual, final, and definite award upon the subject matter submitted to the arbitrator/mediator was not made in that the original award did not make mention or determination of the claims that had been made against Merrill

[4] As stated, the Agreement also provided that the mediator shall issue his award in the same form as would be used in a NASD arbitration, except that the mediator shall be identified as the "sole arbitrator." Merrill Lynch contends that the award issued on March 15, 2005, was issued in the same form as any other NASD arbitration award.

Lynch by the Foundation. The trial court granted the motion to vacate arbitration award.[5]

Merrill Lynch filed in the trial court a "Motion for New Trial or, Alternatively, Motion to Remand to Arbitrator for Clarification of Award." Merrill Lynch argued that the typewritten NASD award was the official arbitration award and, as such, it should be upheld because it delineated the amounts of money awarded to the Unitrust and to the Foundation. Merrill Lynch further asserted that the court should at least find that the February 16, 2005, Information Sheet Award is a mutual, final, and definite award as to the Unitrust. As such, Merrill Lynch argued that to the extent the court vacated any portion of the February 16 Information Sheet Award, vacatur should be limited to the claims of the plaintiff Foundation, since only those were purportedly left unresolved in the February 16 decision. Alternatively, Merrill Lynch argued that if the court did not grant a new trial, it should remand the February 16, 2005 Award Information Sheet to the arbitrator for clarification. The motion came for hearing before an ad hoc judge on May 21, 2007. The motion was denied on that date; however, a written judgment was not signed until August 15, 2007. This appeal followed.

**DISCUSSION**

Under the Louisiana Binding Arbitration Law, La. R.S. 9:4201 *et seq.*, a party to an arbitration award may request that a trial court confirm or vacate the award. The trial court must confirm the award unless the award is vacated, modified or corrected. La. R.S. 9:4209. Louisiana Revised Statutes 9:4210 sets forth four grounds for which a trial court may vacate an arbitration award, as follows:

[5] It is not clear upon which basis the trial court granted the motion to vacate. However, the judgment evidences that the trial court vacated the February 16, 2005 handwritten arbitration award.

A. Where the award was procured by corruption, fraud, or undue means.
B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.
C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.
D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Because of the strong public policy favoring arbitration, arbitration awards are presumed to be valid. **MMR-Radon Constructors, Inc. v. Continental Ins. Co.**, 97-0159, p. 7 (La. App. 1st Cir. 3/3/98), 714 So.2d 1, 5, writ denied, 98-1485 (La. 9/4/98), 721 So.2d 915. It is well-settled that an award may be challenged only on the grounds specified in the applicable arbitration statute. A court does not ordinarily sit in an appellate capacity to an arbitration panel, but confines its determination to whether there exists one or more of the specific grounds for impeachment as provided for under the applicable statute. *Id.*

In this appeal, Merrill Lynch asserts that the trial court had no basis for vacating the arbitrator's award. Merrill Lynch contends that plaintiffs altogether dropped the fraud allegation and relied exclusively on the little addressed argument that the award was not mutual, final, and definite as to the subject matter submitted to arbitration, as required by La. R.S. 42:4210(D), because the award addressed only the claims of the Unitrust against Merrill Lynch and did not make mention of the separate claims of the Foundation against Merrill Lynch.[6]

Thus, as an initial matter, we must determine whether it was permissible for the arbitrator to clarify his original, handwritten award.

[6] It appears from a review of the plaintiffs' brief and the record of the hearing on the motion for new trial that the plaintiffs have abandoned the issue of fraud.

Plaintiffs contend that the arbitrator exceeded its authority in issuing the amended award, since none of the grounds permitting the modification or correction of an arbitration award under La. R.S. 9:4211 were present.

Louisiana Revised Statutes 9:4211 provides as follows:

> In any of the following cases the *court* in and for the parish wherein the award was made shall issue an order modifying or correcting the award upon the application of any party to the arbitration. (Emphasis added.)
>
> A. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> B. Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted.
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> C. Where the award is imperfect in matter of form not affecting the merits of the controversy.
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> The order shall modify and correct the award so as to effect the intent thereof and promote justice between the parties.

Louisiana Revised Statutes 9:4211 lists the instances in which a *court* may modify or correct an award. The statute in no way limits an arbitrator's ability to clarify his own award. Aside from arguing the applicability of La. R.S. 9:4211, plaintiffs have failed to provide any legal or contractual authority that would prohibit the arbitrator from clarifying his decision. Moreover, we are unaware of any provision of law or jurisprudence that prohibits an arbitrator from clarifying his decision. Indeed, as evidenced by a mere reading of the Louisiana Arbitration Law, an arbitrator's powers are vast. Moreover, both state and federal courts have recognized an arbitrator's authority to clarify his decision. *See, e.g.,* **Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local, No. 24**, 357 F.3d 546, 554 (6th Cir. 2004) (internal cites omitted) (an arbitrator is free to clarify his award, for example, "(1) where the arbitrator can correct a

mistake which is apparent on the face of the award; (2) where the award does not adjudicate an issue which has been submitted, then as to the issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and (3) where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify."); **Barousse v. Paper Allied-Industrial, Chemical & Energy Workers Intern. Union**, 00-31155, p. 7 (5th Cir. 2001), 265 F.3d 1059 (unpublished) (holding "the more efficient and preferred option" when faced with an unclear arbitral award "is to remand to the original arbitrator who is already familiar with the details of the case"); **San Antonio Newspaper Guild Local No. 25 v. San Antonio Light Division**, 481 F.2d 821, 825 (5th Cir. 1973) (the court held that neither a trial court nor a court of appeal should attempt to resolve an ambiguity in an arbitration award, and should remand the case to the arbitration judge for clarification of the decision); *See also* **Robert S. Robertson, Ltd. v. State Farm Ins. Companies/State Farm Fire and Cas. Companies**, 05-435, p. 7 (La. App. 5th Cir. 1/17/06), 921 So.2d 1088, 1092.[7]

**Hyle v. Doctor's Associates, Inc.**, 198 F.3d 368 (2nd Cir. 1999) is instructive on the issue. The arbitrator in **Hyle** issued an award inadvertently awarding injunctive relief against the wrong party, Gruelich, instead of the intended party, Hyle. The plaintiff wrote to the American Arbitration Association (AAA), the arbitral body that issued the award, asking for clarification of the award. The AAA declined, stating that the

[7] "Because the Louisiana Arbitration law is virtually identical to the United States Arbitration Act...we look to federal law for its interpretation." **Blount v. Smith Barney Shearson, Inc.**, 96-0207, p. 5 (La. App. 4th Cir. 2/12/97), 695 So.2d 1001, 1003; writs denied, 97-0952, 97-0970 (La. 5/30/97), 694 So.2d, 246, 247. *See also* **Gautreaux v. Prudential Ins. Co. of America**, 98-0286, p. 5 (La. App. 1st Cir. 2/19/99), 728 So.2d 921, 924, writ denied, 99-0767 (La. 4/30/99), 743 So.2d 205.

arbitrator no longer had authority over the case.[8] Nevertheless, the arbitrator himself issued a "corrected award," in which the injunctive relief was awarded only against Hyle. *Id.* at 369-370.

Hyle filed a motion with the U.S. District Court to confirm the original arbitration award and to vacate the "corrected arbitration award." The district court deemed the error in the original award as "a simple mistake." For that reason, the court denied Hyle's motion to confirm the original award and to vacate the "corrected" award. The court remanded "for clarification of the award in accordance with this ruling." Hyle appealed, arguing that the arbitrator lacked the authority to render a corrected award. The second circuit rejected that argument and, in doing so, the court noted the situations where the modification of arbitral awards is appropriate. Under the circumstances presented, the second circuit decided the award was "ambiguous," rather than the result of a "mistake," and affirmed the ruling of the district court denying confirmation of the original award and the ruling remanding to the AAA for clarification. However, the appellate court modified the order to remand to provide that it be made without restriction, so as to permit the arbitrator to resolve the ambiguity as to the identity of the person or persons intended to be subject to the award's remedy.[9] *Id.* at 370-373.

Based on the jurisprudence, we find that the arbitrator was permitted to clarify his award. We recognize that the common practice in such a case is to remand the matter to the arbitrator for clarification. However, in this

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[8] Apparently, the AAA's arbitration rules do not allow an arbitrator to correct an award once rendered. NASD has not taken that position here.

[9] The court reasoned that the arbitrator in issuing his "corrected" award may have acted at a time when he lacked authority and the district court, therefore, might have lacked authority to direct compliance with the arbitrator's expressed intention. As such, the more prudent course of action appeared to be a remand to the arbitrator without restriction to resolve the ambiguity concerning the remedy. **Hyle v. Doctor's Associates, Inc.**, 198 F.3d at 371.

case the arbitrator has already clarified his award and, as clarified, the award is a mutual, final, and definite award upon the matter submitted; therefore, a remand would constitute a vain and useless act.[10] As such, we accept as binding on the parties the March 15, 2005 typewritten NASD award.

## CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court granting plaintiffs' motion to vacate the arbitration award. We confirm the March 15, 2005 NASD award. Costs of this appeal are assessed against The Robert A. Whitlock III Family Charitable Remainder Unitrust and The Amos Catlin Spafford Family Foundation.

**REVERSED AND RENDERED.**

[10] *See* **San Antonio Newspaper Guild Local No. 25**, 481 F.2d at 825.