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Supreme Court of Texas.
In re Merrill Lynch Trust Company FSB, Merrill Lynch Life Insurance
Company,
and Henry Medina, Relators.
No. 04-0865.

March 23, 2005

Appearances:

Charles A. Gall, Corpus Christi, for Merrill Lynch Trust Company FSB, Merrill Lynch Life Insurance Company and Henry Medina, for petitioner.

Hector Antonio Canales, Canales & Simonson, P.C., Corpus Christi, TX, for respondent.

Before:

Justice Scott A. Brister, Chief Justice Wallace B. Jefferson, Justice Paul W. Green, and Justice Don R. Willett, Justice Nathan L. Hecht, Justice David M. Medina Justice Harriet O'Neill, Justice Dale Wainwright, and Justice Phil Johnson

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JUSTICE: Please be seated. Court is ready to hear argument in 04-0865, In re Merrill Lynch Trust Company FSB.

COURT MARSHALL: May it please the Court under Mr. Charles Gall, represent argument for [inaudible] reserve five minutes for rebuttal.

ORAL ARGUMENT OF CHARLES A. GALL ON BEHALF OF THE PETITIONER

MR. GALL: If Court please. In this case the issue is whether a plaintiff, who is admittedly a party to apply arbitration provision can avoid it by clever training and tactical maneuvers concerning who pleads who-- who chooses not to sue. Here, it's undisputed that the plaintiff's signed a Cash Management Agreement when they kindly Merrill Lynch, Pierce, Fenner & Smith, they are the purchase disputes. The plaintiffs' purchased a life insurance product from their Pierce financial advisor through that Pierce financial advisor. As a result of financial advice given by that ierce financial advisor.

JUSTICE: That's-- My question. What is the evidence? That when the day I was giving financial advice specifically about by life insurance as part of portfolio, portfolio that he was acting as the agent of, of Merill Lynch ...

MR. GALL: Pierce, Fenner & Smith. Well, that was the only capacity in which he could act, he had to have, he had to have a securities licence to make the sale. He is, he is-- he was paid by Pierce. His employment was with Pierce that he, he was only employed by one in a Pierce, it's an-- it's always as in-- in his affidavit detail file. He was employed by Pierce. He was paid by Pierce. He wouldn't be paid by ...

JUSTICE: There's no contrary to it is-- and I'm, I'm focusing in which he was given them financial services and advice -

MR. GALL: And ...

JUSTICE: - saying include inserting your profile.

MR. GALL: There's no, there's no contrary evidence. In fact in their pleadings they admit that the life insurance with the one admission in their pleadings is that the life insurance was part of this financial foundation. It was recommended in and through out the which called as financial foundation before that was provided by Medina. As a financial advisor to the Alanizes that ...

JUSTICE: Was it-- was this an investment account under a different name called the [inaudible] services it does?

MR. GALL: Yes.

JUSTICE: Basically, ...

MR. GALL: Yes. Basically, ...

JUSTICE: Series 7 and 63, securities license [inaudible]

MR. GALL: I believe and that's exactly what Mr. Padanamus doing. They can't-- then it comments to him and say, "we like to buy some life insurance." If you help that people are insured [inaudible]. They came as if we, we, recovered two million and three million more than the number is of dollars as result of, of another lawsuit. That-- that's what happened here, they came and they said, "we got this bundle of money." How would you never invested Mr. Medina and with his securities license, he said here's a, here's a variety of products we can provide and they opened, they put first, put the cash in the CMA which is governed by this agreement and it contains the arbitration clause. Then out of that rose the rest of the investments. It-- it never garnered it's, it's exactly like the Jurisdiction versus Bank One case as the Judge Blake decided, decided in our briefs. There the, the, the customer goes into Bank One, he opens at the Bank One, bank, bank account. He's introduced in this case, it's a different person when in the Bank One case, he introduced to a Bank One broker. He buys securities to Bank One confines about the securities they puts us. Hey, did you see saved a relationship was the Bank One, bank it now. And any has a, a arbitration clause. All his plans against the bank when conspiracy got to go the arbitration. That's easy-- the same facts with one exception in, in the Bank One case they actually sued Bank One as well as Bank One securities. In this case in a pre-considered may transparent in the word, "arbitration." What they've done is, they only received Merrill Lynch Trust, Merrill Lynch Life Insurance Company and Henry Medina, we cannot try to ignore the existence of Pierce in a relationship and the reason is obvious that their trying to avoid arbitration.

JUSTICE: What if, what if-- that there was Prudential Life Insurance knows a bank trustee and-- or will cite a different empties on appealing entities. The nature of the investment advice would be irrelevant. But if you were claiming that there was a conflict of interest between selling a life insurance policy and acting as to trustee to hold that policy and they were related to, to Pierce then there would be no claim but that they down by the arbitration clause.

MR. GALL: Well, I think they did-- there wouldn't be an agency ...

JUSTICE: Is your solely suing for the conflict of interest. You shouldn't have-- you had a conflict, you shouldn't have sold this policy.

MR. GALL: If your-- again-- if you-- under the agency argument, I don't think so. I think you could, if you have found the facts you might have an equitable-- they do it, they compel some equitable to-- if the claim was against equitable?

JUSTICE: If the claim is strictly conflict of interest. If it's not this was a banned investment. It was at the wrong investment.

MR. GALL: I don't think it makes me deals with this conflict of interest toward wrong investment is to be resolve in the case. I don't think that's, that's the controlling, that's the controlling-- I don't think that controls the result. I, I think in your opinion-- in your hypothetical-- if the, if the, the seller of the life insurance was equitable. I think he could still in that-- you know, arbitration through conceivably through equitable estoppel, equitable could be compel through equitable estoppel, the arbiter purchased could develop ...

JUSTICE: Act of a bill, I were-- FAA, I mean deciding whether or nonsignatory is bound. Do we plus state law or federal law.

MR. GALL: Under the Federal Arbitration Act in determining whether a nonsignatory is bound, I think you are the Federal Arbitration Act ...

JUSTICE: Why, why is that in deciding whether there was a contract normally first options, US Supreme Court says, "We look to state law."

MR. GALL: I think your, your deciding with your contract exactly exist your, your determining the discovery for the Federal Arbitration Act in, in applying rules in this Federal Arbitration Act. And what, what, what in Fifth Circuit raised and said and-- all the other circuit and said, "I know the Federal Arbitration Act." There's a why to get the Arbitration for a nonsignatory. One of the ways, eight agency is one way, equitable estoppels is another. And I don't think Texas Supreme Court where a Texas Court can say, "Well, we are in the Federal Arbitration Act" and we're going to say, "Equitable estoppel that define Texas." Because you know, Texas Law state on them, then, then recognize that. I don't think-- I don't, I don't-- it's a Federal System, it's a Federal Act and expected to be apply consistently. You know, it's no different than [inaudible] versus [inaudible].

JUSTICE: But, but as I read first options if state, if the state had a ruled there are no oral contracts in the state. There are no written contracts do not count unless they're signed. Federal Arbitration Act doesn't require arbitration clause to be signed as I read first option as state, "As long as it complies to every contract" could say that the only contracts in the state we're going to force your sign boards including arbitration clauses. And that would not tramp the FAA but it would govern.

MR. GALL: It seems to me I'm not-- I don't agree-- I, I think it, it-- under the Federal Arbitration Act if, if, if the Federal Arbitration Acts has these agreements are enforceable under this circumstances a, a state can't undo that. Because it's a Federal, it's, it's a matter of Federal Sensitive Law that, that should be applied consistently.

JUSTICE: So what are the elements of equitable estoppel under Federal Law.

MR. GALL: Under Grigson, the Grigson court says if he attempting to enforce the contract and presume the existence of the contract that, that first pronged or if you ha-- you assert substantial indefinite

assertive misconduct by a signatory or non-- or nonsignatory. If either of those apply in equitable estoppel. The, the, the Grigson also says and that the image in this during early argument that Lynch [inaudible] of it is fairness and, and that, that, that basically, it, it looks it whether it's fair under the circumstances to compel arbitration. I'm not sure that, that ...

JUSTICE: That's no test at all.

MR. GALL: I, I, I think, I think that argument-- I understand your argument and, and I think that is burden for criticism that, that, that's what the case says. And, and I think it does give the court some, some ability to mold through particular fact situation and, and in Kennedy you look at the cases and, and they do, you know that it, it, it, it didn't apply on this, as much as they try to say this. I, I think your own hindered you look at whether it's fair in the circumstances that this person should be able to avoid this agreement, given the circumstances ...

JUSTICE: What if Medina had advise her to purchase his life insurance policy and if that assaulted to her but she written to check proper savings account. It wasn't at Pierce.

MR. GALL: I don't think that important-- I think here it, it is not insignificant where the money came from. The, the cash banned but I don't think that's totally void. I think that he had err all offense that we got but she learned about another bank account, he'd still ...

JUSTICE: He had still are tried in the-- there's no or trice agreement anywhere except for that ...

MR. GALL: But, but, but when she came to Pierce where they can, he had-- she-- in her, in her hypothetical. When they came the analysis in Pierce. They would pertaining advice from [inaudible] remedy and it's part of that they set up an account and they said, "Any disputes that we have with you concerning anything, any of the advice we give you, we're going to compel it." They're going to go arbitration. So they don't say, "It's not that, that only disputes were going to compel arbitration." We would like to-- my advice that you pay for out-of-cash mention again. So any who comes first we have provided any of-- any transaction we undertake and, and that's what happened. There's a, there was advice given. There's a policy purchase and-- you know, I think it's helpful under these facts that the, the money came from the investments accounts. I don't think it's sold. We focus here on equitable estoppel few minutes are talked and I think that agency-- the agency argument deserves from agency as well. This case is virtually identical factually to the Chrisford case and the Third Circuit that we-- we've cited the only, the only the difference there is-- was a different, it's even Merrill Lynch. It's just the different Merrill Lynch subsidiary. There was Merrill Lynch [inaudible] of management that, that was involved in set of security. Here it's Merrill Lynch Life Insurance and Merrill Lynch Trust Company. It, it otherwise, the, the, the case is identical again the only difference being, they chose to sued Pierce in that case. They didn't choose to sue Pierce.

JUSTICE: Well, they couldn't have sued Pierce here for violation of the Trust Code or the Insurance Code.

MR. GALL: Well, I think they, they could have alleged the conspiracy, they could have alleged agency and if ...

JUSTICE: And always sued, I [inaudible]

MR. GALL: I know there's theories-- let me tell you, Pierce can sued for a lot of different stuff. Then, then-- so, so this-- yes, they could, they couldn't have actually sold from breach of trust. I agree to that.

JUSTICE: Well, but what I'm saying is that the plaintiff decides a, a really all I wanted to save for years violation of Trust Code.

MR. GALL: Right.

JUSTICE: That's it.

MR. GALL: Okay.

JUSTICE: Pierce has nothing to do with that ...

MR. GALL: Well, that the Pierce did have something to do because the evidence here shows that-- but for the, the opening of the account Pierce Merrill Lynch Life Insurance Company would not have sold the prior and question that they all need -

JUSTICE: Well, that ...

JUSTICE: Did they only sold their products to your-- to that vehicle.

MR. GALL: Yes. And that's what the record shows and it's in TF 7-- I can't find the record ...

JUSTICE: But if, if the sole claim is that would why liability your seeking to impose is under the Trust Code. And there's no liability under Trust Code against Pierce. I don't understand why you would include Pierce in the lawsuit.

MR. GALL: Well, including or not isn't, isn't-- as I'm saying it include telling factor whether or not in-- or entitle to Federal Arbitration whether Pierce as a party here doesn't-- didn't dictate result in fact in Grigson one of-- if you look into page 528 in Grigson, Grigson they pointed out that it's, it's-- particularly any court will apply equitable estoppel where the signatory is, is bound that in his transaction. It's not [inaudible] is there in fact he didn't drag in the litigation when that date to contracted that anytime they're involved, that's going to go in arbitration. So the Grigson court and say, "That's an specially important situation in which to use that equitable estoppel is where again that, that the party that is the signatory is a non ...

JUSTICE: For what obligation that they alleged was breached?

MR. GALL: They alleged that we committed conflict of interest when Merrill Lynch is a trustee at the Trust Company but their policy nature -

JUSTICE: But whose we -

MR. GALL: - of Merrill Lynch Life Insurance.

JUSTICE: - Merrill Lynch Trust. If I laid it -

MR. GALL: That's what -

JUSTICE: - conflict of interest -

MR. GALL: - that's what I've -

JUSTICE: - and Pierce is not involved in it.

MR. GALL: But, but Pierce broker was the one who recommended it, Pierce broker was the one can sold the policy. Pierce% broker was the one that is paid for the policy and the evidence shows that, that for the role of Pierce in the transaction. There wouldn't have been a sign ...

JUSTICE: But your not setting up a but for test for equitable estoppel are you? That anybody who-- but for the guy who run the red light on the way to the office today-- I mean, it-- it's got to the where the legal obligation arises they presumed. And it's rights made that if your suing for violation of the Trust Code and you claim trust violated trust code. Why would you want Pierce in here and what is that matter that bounds if your not suing on the investment advice and your suing for violation of that inter appellate transaction. What-- I don't understand Pierce as relevant.

MR. GALL: Well, I'm not a-- Pierce's rule is that, that Pierce

broker sold the life insurance.

JUSTICE: I understand their factual -

MR. GALL: I, I understand.

JUSTICE: - I don't understand their, their-- the legal did he take your claiming that violated the, the ...

MR. GALL: Did the Pierce violate it-- I'm not calling a Pierce violating ...

JUSTICE: Nor are that?

MR. GALL: Well, I understand it. But, but ST or but for this-- I don't think I'm going to answer that part of your question. You look at Merrill Lynch Pierce, Fenner and Smith versus Aedings which is a case out in the record. It, it's almost this-- that's trust sit-- this situation involving a trust and a claim by settlement of trust and the court, court-- they're saying even though it's a claim by settler or involving breach of the trust against what, what you have is that the relationship would have exist, in fact if there's a Cash Management Agreement. Almost exactly this kind situation and they can tell and claims maybe ...

JUSTICE: [inaudible]. If, if, if, if-- let's say that you were suing trust for violating provision of the security clause. He didn't understand the part of the trust but he didn't sell it pursuant to a, a-- required disclosure in law or something like that. You were simply suing for the nondisclosure under the securities laws.

MR. GALL: I didn't hear you said it. Trustee?

JUSTICE: Trustee, yes. Then what would Pierce have to do with that?

MR. GALL: Maybe not ...

JUSTICE: But you'd still saying -

MR. GALL: Begins on the [inaudible] that the ...

JUSTICE: - there is the money came from Pierce.

MR. GALL: It depends if the Merrill Lynch broker is accused of having [inaudible].

JUSTICE: But you don't care about, you don't care about who gave it the advice to get a trust. What you're suing is cause the trust didn't disclosed something to you.

MR. GALL: But it did so he's accusing not doing, not making the disclosure. If the trustee is, if the trustee is due below and it didn't make a disclosure. Then next got nothing to do with us. Then if it that-- allege nondisclosure with by Henry Medina is he got a securities lawsuit but his not making-- his execution did not having disclosed something. Pierce brought a new of them. That's the, that's the-- you can't have any work interdependent and deserted alleged misconduct. Then if there's, there's only one actor in this play. It's either to be. I mean, that that's the point here. There's, there's only one person who's alleged that, that anything wrong. And that's broker.

JUSTICE: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the Real Court.

COURT MARSHALL: May it please the Court. Mr. Hector Canales, represents argument for the Real Court Arena.

ORAL ARGUMENT OF HECTOR ANTONIO CANALES ON BEHALF OF THE RESPONDENT

MR. CANALES: May it please the Court. Thank you very much for I hear your time in the consideration was [inaudible]. My client's case

arises from this factual scenario in which the parties of his lawsuit-- we all call the Insurance Company and the Trust Company. And Mr. Medina acting as the-- at the agent of the Insurance Company, half all admitted to a statutory violations of the Texas Trust Code and Texas Insurance Code. And so with that is in our claim that we are making on behalf and against those specific parties. I want to address the question I believe the court has been asking that-- in this case and then the previous two cases have heard and that is, why was it the brokerage firm-- he preferred for Pierce. I call the brokerage firm. Why wasn't the brokerage firm sued and there's a factual and legal answer to that. Clearly anybody can sue. The question is: Can you legitimately sue. I have been accused here here of be a slick with the court or to pleading using tactical maneuvers. I submit to the court that I have not. Well, I have been is honest and forthright in who I have chosen to sue and not taking a shotgun approach. And sued every entity or fill it after that has the [inaudible] Merrill Lynch's fund. Because in this particular case, the claims are for violations of the Texas Trust Code like by trustee and gave him the cellphone for buying the insurance policy permits affiliate. Merrill Lynch Life Insurance Company. There is no dispute as to that ...

JUSTICE: It might be life insurance products that were purchased that they have an investment component in them?

MR. CANALES: Yes, your Honor, they do. They are variable on a life insurance policies a portion of the premiums that go in or invested in a mutual funds in this particular case. But with regards to that, I, I think that it is a red herring in protection confusion that was being forward here by confusing the qualifications that an, that an insurance agent must have in order to sell one of his policies as a securities component to it.

JUSTICE: Could Mr. Medina have sold this insurance product without having his securities licenses, 387063 [inaudible] perhaps.

MR. CANALES: I, I have, I have the answer to that question, your Honor, honestly is [inaudible] ...

JUSTICE: If he had done legally.

MR. CANALES: I do not know. I haven't tried very very hard to research to this matter. The petitioners in this case have, have cited the Texas Administrative Code of lead but Title 28.19 of 701, whatever is in, whatever is in their brief. That particular section deals with claims suggestions. I don't find anything in particular that says, "You have to have these series of licenses." What I have looked at started on my brief is I've gone to the Texas Insurance Code Chapter 21.701 and it says in there that all you have to have is a group one life insurance policy which Mr. Medina, the record have questionly says had in order to sell and specifically points out on their variable a newly contracts or variable life insurance contracts. So my position, your Honor is and I stand to be corrected by, by it. But I could not find anything that's specifically says that you have another series 763 or whatever. Regardless to that judge ...

JUSTICE: That Mr. Medina give advice to your clients on purchasing these insurance products.

MR. CANALES: No, your Honor, he did not. What he's been-- what has been reference here is the brokerage firm created a document that was prepared by brokerage firm it And lost million other sayings included, included a section on life insurance but Mr. Medina want to go between of having prepared that particular document and present the things to, to my client but it's important, I think to understand that Mr. Medina were several different hatch here. There was no doubt he is a licensed

insurance agent. They ...

JUSTICE: They also an agent of a Merrill Lynch?

MR. CANALES: In 19 other companies as well, your Honor, including AIG if you look at it's in the record, if you look at his appointment schedule. He could be an agent in the selling and there-- there's a difference between the recommendation of a particular insurance product and selling a product. You have to be, it is a law in the State that you must be a licensed insurance agent. You got to have a group one at least you group to one. In order to sell an insurance policy and that is the capacity that Mr. Medina is being sued in here and that's why it get back and look.

JUSTICE: He recommended that they purchased insurance-- an insurance policy is for the portfolio ...

MR. CANALES: According -

JUSTICE: - and he recommended that they create irrevocable errand of the trials ...

MR. CANALES: - according to Mr. Medina in his affidavit that was attached on part of record at the, at the trial court level. He says that Life Insurance Company followed by Nick Harrison recommended it along with my client's attorney at the, at the time. He sai-- claims that he was present at that particular, at that particular meeting and they also claims that the Trust Company recommended along with my client's lawyer, different lawyer not, not me at the time honestly ...

JUSTICE: Is that, is that the lawyer was a subject to the underlying litigation as well?

MR. CANALES: No, your Honor, he has not, he has not been denied in the litigation. But I will tell you that he has I guess not a term as a person of interest in the, in a, in a litigation but there is no act of arbitration agreement between my clients and the attorney was so abrogate.

JUSTICE: Is there any evidence in the record as to whether Mr. Medina was paid commissions or fees but stay out of these products.

MR. CANALES: Yes, your Honor, there, there is evidence in the record on that. Mr. Medina-- Merrill Lynch Life Insurance Company pay Mr. Medina a commission for the, for the sell of his particular product. Now, the method in which that was paid was Merrill Lynch-- the Life Insurance Company gave funds to the brokerage firm. The brokerage firm then, a distributor note in its, in its world as production products. And I would submit to the Court the reason they do that is the brokerage firm cannot pay Mr. Medina in cash for something that it is the brokerage firm must precluded as a matter of law from engaging it and that is the sale of insurance ...

JUSTICE: Then why that-- why the insurance could pay them the print of ...

MR. CANALES: Well, because-- I don't know because I, because I'm sure I guess it's a Merrill Lynch-- was a Merrill Lynch product and I do not know the rationale behind Merrill Lynch as products but I do not believe ...

JUSTICE: It's Merrill Lynch, it's Merrill Lynch product [inaudible] ...

MR. CANALES: But the Life Insurance Company product, yes.

JUSTICE: And they're affiliated with Merrill Lynch, they just avoid Merrill Lynch and many other companies why is not Merrill Lynch protected than arbitration agreement.

MR. CANALES: Because, because as the Grigson court says in this particular case. We are not relying upon or seeking to-- into gain any damages or, or any responsibility on behalf of brokerage firm. In fact

the testimony in this case from the Court of representative of the Life Insurance Company and both representative of the brokerage firm is that they have no responsibilities underneath the, the, the brokerage firm agreement and vice versa. The brokerage firm has no responsibilities under the insurance contract or the trust contract which I submit to the court or the docu-- he did not hear the petitioner's say one thing about what are the true contracts at issue in this case.

JUSTICE: I'm going to be broker your answer to my question [inaudible] -

MR. CANALES: Okay.

JUSTICE: - what was the evidence on who make recommendations to. Do it irrevocable trust and a binds you and you said, it was Mr. Harrison it is-- and it wasn't for me. Is there any evidence at all but the brokerage firm is involved in that breached recommendations.

MR. CANALES: No, there is not-- in fact there, there is evidence in the record with [inaudible] that it was-- the brokerage firm had no involvement. That's what I just-- what I-- and I know that's completely a 180 degrees different from what Mr. Galvez told the court, but that is ...

JUSTICE: That's hard to understand, I mean how would [inaudible] read record but and how would the Life Insurance Company even know the account existed there brokerage firm and, and Mr. Medina decide with it.

MR. CANALES: It, it, it's irrelevant to the Life Insurance Company and there were Court representative said so. They said, "it isn't matter where the money comes from it, it ...

JUSTICE: I don't understand that what I mean haven't they know that they knocked on the door? I mean, was this a door-to-door sale or ...

MR. CANALES: No, Mr., Mr. Medina called the Life Insurance Company and brought them to, to my client.

JUSTICE: Well, isn't that, it was in him is the financial advisor the brokerage firm.

MR. CANALES: Yes, sir. But, but when he is engaged in the selling of insurance, he does stop. He must do so. As a licensed insurance agent, another point in the, in the record there is an affidavit submitted by Mr. Edfel8, who is the-- who swears that he is the, the administrator manager employed by the brokerage firm. And in paragraph 4, he makes us think in [inaudible] of these accounts-- and he's relating to the brokerage firm accounts. These accounts bear no relationship to the one manual or normally deceit irrevocable wherever life insurance trust. So you have the brokerage firm and sells saying, "There's no relationship whatsoever between the accounts that our govern by this agreement that there relying on and the trust ...

JUSTICE: But I'm [inaudible] financial source as will provide. Financial planning forget about the account. There was some sort of agreement oral, oral he was in which financial services will provide. And if who-- what is the evidence on what entity was providing financial services and was telling, advising your clients, get into this [inaudible] trust in one of the things you will pass is a policy. If somebody ...

MR. CANALES: Well, there's, there's financial services are the-- mind you, the product that issue here is irrevocable of trust has one asset in it. And it is this life insurance policy. Then, there are this other brokers from his accounts -

JUSTICE: Okay.

MR. CANALES: - that-- or lots of services were rendered into those

accounts and those that these of the two accounts that, that -

JUSTICE: That is to that-- is it, is it undisputed saying that AP's of the financial services provide was to get into this event the trust. Among all these other investments, we want you that's here, here, here and here.

MR. CANALES: I, I, I don't think that's part of their financial services and, and the reason why is, is the brokerage firm cannot engaged in those cut-- I mean, it's one thing to say, "Hey, you have options available to you that there are trust out there in the brokerage firm ...

JUSTICE: Why, I go to an investment [inaudible]. So give me some investment advice. He might not be able to sell me the life insurance but he can tell me one thing your portfolio ought to include is an irradical trust that holds an insurance policy live test.

MR. CANALES: Right.

JUSTICE: That who provided that box.

MR. CANALES: Mr. Medina, Mr. Medina ...

JUSTICE: In what ha-- did he have one when he provided that, that advice?

MR. CANALES: I think when he provided that had, he had a lot of, of, of, of, of financial advices on -

JUSTICE: And that ...

MR. CANALES: - but, but that's not what the [inaudible] about-

JUSTICE: - but as [inaudible] would-- is so he work for the brokerage company as financial advisor.

MR. CANALES: Yes. There's no, there's no dispute about that that he is-- that he, that he's a financial advisor for Merrill Lynch-- for the broke-- for the brokerage ...

JUSTICE: So your not, your not complaining that the advice to get a life insurance policy was bad advice.

MR. CANALES: No.

JUSTICE: So what's your damages?

MR. CANALES: My damages come under the Texas Trust Code and the Texas ...

JUSTICE: So what they come under? What are your damages? I, I can see the list of twelve different things you've alleged. As I read your petition, your complaint is that-- I supposed it would be that disgorge the profits who calls of self-dealing.

MR. CANALES: Well, that would be one. I know--I think you also have an in Trust Code violations you would have the-- any fees that were paid because there's an admitted breached of petitioner duty by the trustee. I think I would be entitled to regroup a fees by paid to the trustee.

JUSTICE: But you wouldn't be entitled to regroup premiums for policy that your-- for your client actually got life insurance coverage just the fees.

MR. CANALES: Yes, Sir. I think that's, I think that's correct. Also, I believe under 2121. I have other, I had if I could show that in the sale of the insurance policy that it wa-- that materialist representations were made that I would have damages that could result from, from those misrepresent-- most ...

JUSTICE: Which would be what other than disgorging the fees?

MR. CANALES: I think in that part-- it would be a, a disgorging of fees and I think the amounts pay into the premiums-- because, because in this case and now I kind of get in into the facts and give premiums a little bit. There was an issue of premium of \$35,000 and then there were subsequent payments of \$35,000 each year that were not, that,

that, that were-- letters was sent to the insurance company to my client saying, "These are due." And truly there were option that there was a misrepresentation on our claim that says, "They made them, made them appears as if they were not optional as they were require." So we have these seven additional payments that were made that I think the policy misrepresentations under 2121 made by the insurance company. And those were not representation made by Mr. Medina. Those representation that were made from letters coming from the insurance company. I did because Mr. Gall said, "This case is exactly like the jur ..."

JUSTICE: I made just, I had just a couple more questions on it. Your claimed is that the-- it would have been okay if he said, "life insurance is an option and here the five companies to do it." But the problem was that he said, "Did it from my affiliate company here." Isn't that-- aren't you really complaining about where he directed them?

MR. CANALES: No, no Sir. What, what I'm complaining about was-- is what justice have talked about earlier is that it, it's not that they made a recommendation for life insurance or even to put in irrevocable life insurance trust. Where a complaining about is what they admitted to violate and that is the self-dealing that occur between the insurance company and the, and the brokerage firm.

JUSTICE: That's like in a negligent entrustment case in-- I'm not complaining about the negligence, I'm complaining about the entrustment. Were I'm not only complaining about the entrustment not the negligence but the fact that matter is negligent entrustment is about.

MR. CANALES: Well, -

JUSTICE: You can't have one without the other.

MR. CANALES: - well, I think that what, what is what the, what the petitioners are really saying here is that I'm not suit at somehow another I'm relying upon this relationship that Mr. Medina has to the two brokerage firm. And the, and the fact that matter is, is that that brokerage agreement is-- has nothing to do with all, with the violations that we are, that we are, we are complaining of. In fact, you know, there is, there is no because they have not cited to the court, given any debt of, of which particular term in the agreement I'm relying on ...

JUSTICE: Well, the cause is barred than that. I mean, it says any agreement we've had but before that seem the agreement or after it, so setting it was said have to CMA account. [inaudible] is there any agreement at all before actually CMA account to provide the financial services.

MR. CANALES: No. I mean-- and I think what controls here is the, the insurance contract. There's no arbitration agreement in there. The, the trust agreement actually contemplates for the-- for actions. There's no arbitration agreement is there ...

JUSTICE: I thought you have said there were financial services other than a CMA provided.

MR. CANALES: Oh sure, sure, there were transactions ...

JUSTICE: And that's an agreement with the brokerage.

MR. CANALES: Yes. And, and I don't ha-- and I, I submit to the court that if I were, if I were complaining about, about, about-- turns actually got your endings CMA accounts that their manager says, "There no relationship to the trust." That would be common about the arbitration [inaudible].

JUSTICE: He made the decision by an affiliated policy.

MR. CANALES: That would be the Trust.

JUSTICE: In what individual?

MR. CANALES: Well, whoever the trustee-- whoever the individual trustee was of-- the trustee in this case. The trust purchase, the life insurance policy.

JUSTICE: You don't know what individual make that decision?

MR. CANALES: Well, whoever, whoever the trustee that in, in name was-- I, I don't know that, I do not recall.

JUSTICE: It wasn't, wasn't Mr. Medina have any involvement?

MR. CANALES: No, Mr. Medina is not the trustee. Merrill Lynch Trust Company is the trustee and whoever was over seen in that particular-- was your name is the trust whenever John [inaudible] name or Jane those name is the trustee's ...

JUSTICE: About you said that Mr. Medina was that-- was the salesman of the insurance policy, so you did have some involvement beside to buy an affiliate policy.

MR. CANALES: Well, sure he was, he was, he was present at the meeting but according to his affidavit Mr. Nick Harrison from the Life Insurance Company, is the person that was recommended in selling, in selling the trustee. He was present there, but in order for him to be involved in the selling.

JUSTICE: Well, he, he picked in the affiliate company as opposed to AIG.

MR. CANALES: Yes. And he could have picked AIG, he is, he is licensed. He is supported by AIG. Could have been AIG.

JUSTICE: Is Mr. Medina, an agent of this insurance?

MR. CANALES: Yes, your, your Honor. He absolutely is and I'd like ...

JUSTICE: Do they have findings the [inaudible] insurance company.

MR. CANALES: Yes.

JUSTICE : Findings of [inaudible]. The brokerage could bind an insurance company.

MR. CANALES: Sure, absolutely because I-- you've gotten to the heart of the issue here. If in what agency-- which scope of agency was Mr. Medina acronym in this case as relation to the claims that are being made here. Our position is that he can only be acting under the agency of the insurance company 'cause he's selling-- he's selling an insurance and I have the records supports that in two places. If you look at the brokerage firms manual-- [inaudible] manual? It says that I'm quoting you, you've be in the broker. You may sell annuities and other insurance products only in your capacity as a licensed Merrill Lynch Life Agency-- agent and make your sales only through Merrill Lynch Life agency. This is the brokerage firm's terms. Isn't that my work they have to be working and selling through the Life Insurance Company. The Life Insurance Company [inaudible], he is our agent. There is absolutely no connection. Now, what's key about this [inaudible] issues pays [inaudible] that right. In that particular case, the claims may about the plaintiff where that specifically that there was an unauthorized transaction from the bank account to the insurance account. In other word that unauthorized when he moved money from bank to here with not saying that there was any unauthorized, you know, [inaudible] in fact in the record I think, you have our authorizations moving from. So we're not complaining about any particular service or act that brings him to question the brokerage agreement.

JUSTICE: Now, Mr. Medina was an employee of Merrill Lynch, the brokerage firm?

MR. CANALES: Yes, your Honor.

JUSTICE: What was his legal relationship with Merrill Lynch Life

Insurance and Merrill Lynch Trust?

MR. CANALES: With the Life Insurance, he's their agent your Honor. He is appointed on the same Texas to sell their insurance policies. After trust I don't believe he has any relationship with, with, with them. He's not a, he's not, doesn't work for him. There's any licenses.

JUSTICE: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF CHARLES A. GALL ON BEHALF OF PETITIONER

MR. GALL: If the Court please, is it relates to the question about the past in which Mr. Medina is working I want the record shows in that guard. I would point 42105 in the affidavit Mr. Medina as well as the deposition testimony of the Alanizes point. It is clear that what was sold here was a bundle of service. He, he made recommendations and one of the recommendations was that, they purchased this Merrill Lynch Life insurance policy, which was an investment to itself. It was a variable, was a variable policy that, that we bought securities within the policy so that, no doubt that these was part of the overall investment [inaudible].

JUSTICE: What is the issue-- what if he had purchase the AIG policy?

MR. GALL: How can it make any difference as to that the, the, even might make a differences as to whether there was a claim for [inaudible].

JUSTICE: I think AIG would be an appellant motion.

MR. GALL: Under this test everything was are saying, I think not under agency within their equitable estoppel.

JUSTICE: If the insurance policy had no investment aspect to it. It was simply term like with your position change.

MR. GALL: No, not really but, but I think it helps us, I think it's, it's vary for my position that, that there's securities in there because it was clearer than its all part of the investment advice as we-- but I don't think it's, it's crucial. I mean, I don't think its a [inaudible].

JUSTICE: Do you know Mr. Medina had, to had the security license as to sell this product.

MR. GALL: Yes. We've decided the co-provision in her brief. I don't have it in my mind but there's a co-provision that, that supervised.

JUSTICE: Yeah. I'll take different position on that. I guess not surprisingly.

MR. GALL: It's, it's just a matter of Texas Law in our-- but, but-- what-- but I also point out he did have those. And he was acting clearly in this situation with both hands on it. Its not like the-- he step down and said, "Right now, I'm just acting as Insurance Agent." He was, he was given financial advice or bundle of services. And I would point out the records absolutely clear pleads pay back.

JUSTICE: Let me ask you this, if Mr. Medina was only involved in receiving commissions from recommending insurance problems with no investments profits. Would he had to have a security's license are only a group one.

MR. GALL: I think he-- I think he didn't have the security's aspect. Do you think he could have sold it or I can selling the other policy in the group one. I'm not an insurance expert, I may stand to be

corrected and that's my understanding that he didn't have the investment aspect to it-- he's just an Insurance Agent, he's selling here. Life insurance like he hit in every shopping center around the State. That's my understanding-- you know, I would say, "I'm not an expert on the insurance laws that, that's my understanding." I would point out of this question about what the record shows, but I think it was paid by him. And it is clear that he was paid by Pierce not paid by the Life Insurance Company. I also point out-- I want to go back to the question you asked Justice O'Neill about what-- is, is-- are they really kind of speaking and choosing on who their suing here. You know, they sued here on the damage. Mr. Medina is not the trustee of the Trust.

JUSTICE: But he did sell the life insurance policy.

MR. GALL: He did sell a policy that but he's not the trustee or the trust and he, he was not, he was not the trustee so he can't be-- he didn't valid any co-provision of state in Texas. He can't, he can't be guilty of a conflict of interest because he's not the trustee. So ...

JUSTICE: But he knew that on affiliate company was buying affiliate policy.

MR. GALL: If he done that. He didn't.

JUSTICE: They charged [inaudible] of the laws.

MR. GALL: I agree with that, I agree that. But he's not the trustee so he can't be, he can't be, he can't be guilty about for violating a breach of trust or a conflict of interest or a code provision that's applicable to trustee not to him. And I would also point out [inaudible] would allowed brings other than this simple breach of trust. You look at their, their petition in the case I'd like to see through that, that issue with DTPA 1746 of Business Fellow breach negotiating fraudulent convergent negligent of misrepresentation, negligence. I've just enrichment to that, so it's not as of-- they, they only sued is for, for breached in this contract [inaudible]

JUSTICE: Thank you, Counsel.

MR. GALL: Thank you.

JUSTICE: Are there any further questions?

JUSTICE: I'll ask question.

JUSTICE: Yes.

JUSTICE: Do you relate to shift that, that the Alanizes have with, with the company Merrill Lynch that, that's tend from the Cash Management Account. I guess what I'm saying is could, could they have been [inaudible] into this financial arrangement without opening with the Cash Management Account.

MR. GALL: Not registered, she's not-- the record shows but why this-- the way you generate or your relationship with Pierce is. You [inaudible] ...

JUSTICE: He signed that agreement which includes the provisions [inaudible]

JUSTICE: That-- But that's not, I mean there is a dispute of that, that record.

MR. GALL: Well, I think a disputed, I'm not ...

JUSTICE: And it's deposition [inaudible] the money. He didn't have to have a CMA account of purchase of life insurance ...

MR. GALL: He need to have, but, but they will only sell it to you if you were Pierce [inaudible]. Only when they sold it, it was Pierce wants.

JUSTICE: But you didn't have to have CMA account to be approved

the claim?

MR. GALL: Yeah. I mean, you have to have-- I mean, the deposition test [inaudible] their only stay in Pierce ones. In [inaudible] of the record shows that the only way he have a Pierce, your [inaudible] have the [inaudible]. But what-- whatever might happened hypothetically and some other circumstances. In this case, they had, they had CMA account that contain the arbitration fee and the record is clear on the point. They wouldn't sell to it unless you were appears [inaudible]. Then he said ...

JUSTICE: You, you only stated that, your client didn't pay Mr. Medina directly. But he was indirectly pay.

MR. GALL: Here's pay back Pierce.

JUSTICE: But he-- Pierce got the money from insurance company. Correct?

MR. GALL: Ah huh. I don't think the record will replaced it but I, I would [inaudible] ...

JUSTICE: What is on his in this brief?

MR. GALL: I, I wouldn't dispute that the Life Insurance Company put some compensation with Pierce. Pierce can in turn pay for that part of production credit to Mr. Medina which then at the end of the year translates to cash again.

JUSTICE: We're not significant here to determine who Medina was working for?

MR. GALL: It seems to me the fact that he was paid by Pierce shows he's working for him. I don't think that's significant ...

JUSTICE: Pierce wouldn't pay them unless he sold, unless the policy was sold. Correct?

MR. GALL: Right. That, that they wouldn't have pay them for selling the security unless the security was sold. I mean, that's just the product that happened to generate the commission. I mean, that was what he did to generate the commission.

JUSTICE: And your position would be no different if the petition said, this claim is limited to a violation of trust code of the insurance code.

MR. GALL: [inaudible] I think that's-- I don't think that's the determinant factor that was again. You have a situation where the relationship arises that we-- arose on its record was through this Cash Management and that's [inaudible] advice and insurance ...

JUSTICE: Even if you're not suing on that investment advice. Even if you don't have any date about him putting you into the investment. It's just a self dealing.

MR. GALL: Becau-- Well, that, that, that in this conduct is alleged to incur through Henry Medina. Who is both a broker and a Life Insurance Agent.

JUSTICE: If Medina were not sued-- if he were none suited, what then?

MR. GALL: Well, the-- he'd still on misconduct it's an issue. I don't-- you know, again, I'll take, I don't think you had a baby to make the greet by-- cited who's going to sued here [inaudible] ...

JUSTICE: Well, no. I could impel -

MR. GALL: In his conduct ...

JUSTICE: - that it seems like if you're following a limited claim for violation of the Trust Code for self-dealing. You don't care about the advice given or in dispu-- you have a narrow-- you know, simple claim that he can sell deal like this.

MR. GALL: That's not the claim [inaudible] that's why ...

JUSTICE: That's why I ask the question. If that were ...

MR. GALL: - that's not the claim here, if -

JUSTICE: If you were the claimant.

MR. GALL: - if it were the claimant. I still think we be entitle compel arbitration because that, the, the, the alleged misconduct, the, the advice that was given -

JUSTICE: They have no conflict.

MR. GALL: - well, the advice that was given was, "you should buy this policy of marriage."

JUSTICE: I thought you said the trustee made that deterioration that they had nothing to do with that ...

MR. GALL: No. He's on the policy, his-- he's shown on the policy application as, as the financial advisor. I mean that, that, that Alanizes filled out an application. Medina's involved in the application. His in shown, shown in the policy. All that [inaudible].

JUSTICE: But, but why he has to be the insurance agent to do that not for a [inaudible].

MR. GALL: Ultimately, the trust-- these people made the determination to established his trust as part of this purchase. So it all happens at one time. So I'd like to be the trustees sitting here over of the trust that decides they're going to buy this policy. There's one in agree to transaction that occurs and that is sub to trust by the policy all in one feels good. So they made one basic decision which is divide this policy in a point Merrill Lynch Trust Company as trustee of this, of this life insurance trust. And he give-- and it's, it's one integrated transaction it's not, it's not like again that was a-- there could be situations where you haven't trust with the trustee and the trustee does infinite resides his going to buy life insurance for some beneficiary. That's not what we have here, it's only part one same with inquiry transactions. So the realization purchased the policy is made by the Alanizes and to established this trust is made by the Alanizes as part of this again over all of a financial advices given to him by Pierce. Here's, here's what you should do with the part of [inaudible].

JUSTICE : Any further questions? Thank you, Counsel. The Case is submitted and I conclude all oral arguments per se. The Marshall will adjourn the court.

MR. GALL: Thank you.

COURT MARSHALL: All rise. Oyez! Oyez! Oyez! The honorable Supreme Court of Texas will now stand adjourned.

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