

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

████████████████████

Case Number: ██████████

vs.

Respondent

Ameriprise Advisor Services, Inc.

Hearing Site: Los Angeles, California

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant ██████████ ("Claimant"): Dochter Kennedy, MBA, J.D. and Owen Harnett, Esq., AdvisorLaw LLC, Broomfield, Colorado.

For Respondent Ameriprise Advisor Services, Inc. ("Respondent"): Howard M. Klausmeier, Esq. and Sydney Crowder, Esq., Ameriprise Financial Services, Inc., Troy, Michigan.

CASE INFORMATION

Statement of Claim filed on or about: July 5, 2017.
Claimant signed the Submission Agreement: July 5, 2017.

Statement of Answer filed by Respondent on or about: August 25, 2017.
Respondent signed the Submission Agreement: August 25, 2017.

CASE SUMMARY

Claimant asserted a claim seeking expungement of three occurrences from his Central Registration Depository ("CRD") record ("Underlying Claims"): one customer complaint, occurrence number ██████████ two FINRA arbitration cases, occurrence numbers ██████████ and ██████████.

In the Statement of Answer, Respondent did not object to the request for expungement.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Claims from his CRD record pursuant to FINRA Rule 2080(b)(1)(A), as the claims, allegations, or information are factually impossible or clearly erroneous;

2. Expungement of the Underlying Claims from his CRD record pursuant to FINRA Rule 2080(b)(1)(C), as the claims, allegations, or information are false;
3. In the event that the Arbitrator chooses not to award expungement of the Underlying Claims, expungement of occurrence number [REDACTED] from Claimant's CRD record as it pertains to the same customer dispute as, and is therefore a duplicate of, occurrence number [REDACTED]
4. Damages in the amount of \$1.00; and
5. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent requested:

1. Expungement of the subject Underlying Claims from Claimant's CRD record in the event he is able to bear his burden of proof in accordance with FINRA Rule 2080 and Code of Arbitration Procedure ("Code") Rule 13805;
2. Denial of all requested damages against Respondent; and
3. Assessment of all costs and fees against Claimant incurred by Respondent, including but not limited to the member surcharges and hearing fees, relating to this matter.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

On August 24, 2017, Claimant provided notice that the Statement of Claim was served on the customer in occurrence number [REDACTED] ("Mr. P") and the customers in occurrence numbers [REDACTED] ("Mr. K") and [REDACTED] ("Mr. and Mrs. K"), hereinafter collectively referred to as "Underlying Customers." Occurrence number [REDACTED] is a customer complaint filed by Mr. K prior to him and his wife filing an arbitration, occurrence number [REDACTED], on the same matter.

On August 31, 2017, Claimant filed an Affidavit of Service signed by Claimant's counsel advising that the Underlying Customers were served with the Statement of Claim.

On November 1, 2017, the Arbitrator and parties held the Initial Pre-hearing Conference ("IPHC"). By Order that same date, the Arbitrator ruled that Claimant was to provide a copy of the Statement of Claim and any other documents with tabs and references as needed to find the issues to be discussed at the hearing. The Arbitrator also ruled that the Underlying Customers must be properly served with an affidavit of service prior to the hearing. The Arbitrator further ruled that the Underlying Customers must be served with a copy of Respondent's Answer and date of expungement hearing no later than December 15, 2017, and that they must have all information needed should they want to participate in the expungement hearing.

On November 27, 2017, Claimant provided notice that the Respondent's Answer and notice of the expungement hearing scheduled for March 8, 2018 was served on the Underlying Customers.

By Order dated March 2, 2018, the Arbitrator postponed the expungement hearing since he did not receive all items outlined in the IPHC Order.

On March 5, 2018, Claimant submitted expungement hearing exhibits. Respondent did not file anything in response.

By Order dated May 18, 2018, the Arbitrator ruled, among other things, that all information requested in the November 1, 2017 Order be received as soon as possible, including proof of service to the Underlying Customers that all information was received by them.

On May 22, 2018, Claimant provided notice that the new expungement hearing date of June 11, 2018 was served on the Underlying Customers. On May 25, Claimant filed an Affidavit of Service signed by Claimant's counsel advising that the Underlying Customers were served with Notice of the Expungement Hearing.

On May 30, 2018, Claimant filed a Proof of Service to Customers including exhibits.

The Arbitrator conducted a recorded telephonic hearing on June 11, 2018 so the parties could present oral argument and evidence on Claimant's requests for expungement. Respondent appeared at the expungement hearing and did not contest the expungement requests. The Underlying Customers did not appear or participate in the expungement hearing. The Arbitrator notes that the Underlying Customers were notified of the hearing several times and were advised that they had the right to participate in the hearing or submit written documentation, but that nothing was received.

During the expungement hearing, Claimant withdrew his request for damages in the amount of \$1.00.

By Order dated June 11, 2018, among other things, the Arbitrator ruled that the expungement hearing held that same day was adjourned and would be reconvened on June 13, 2018. The Arbitrator further ruled that the following should be completed immediately for the June 13 hearing: underlying customers Mr. and Mrs. K should be given notice of the hearing and given the opportunity to either be included in the telephonic hearing or be advised that they can provide written comments immediately by email to FINRA so that any input they may want included be available. The Arbitrator further ordered that proof of service should be forwarded to FINRA Office of Dispute Resolution ("ODR").

On June 12, 2018, Claimant provided notice that the expungement hearing date of June 13, 2018 was served on the Underlying Customers.

On June 13, 2018, the Arbitrator reconvened the recorded telephonic expungement hearing so the parties could present oral argument and evidence on Claimant's requests for expungement. Respondent appeared at the expungement hearing and did not contest the expungement requests. The Underlying Customers did not appear or participate in the expungement hearing. As stated earlier, the Arbitrator notes that the Underlying Customers were notified of the hearings several times and were advised that they had the right to participate in the hearing or submit written documentation, but that nothing was received.

The Arbitrator determined to keep the record open for ten days after the June 13, 2018 expungement hearing to ensure that the Underlying Customers had an opportunity to submit a response to the expungement requests. ODR did not receive any submissions from the Underlying Customers.

On June 19, 2018, Claimant filed an Affidavit of Service signed by Claimant's counsel advising that the Underlying Customers were served with Notice of the Expungement Hearing held June 13, 2018.

The Arbitrator notes that the Underlying Customers were given notice of the hearing several times and invited to attend or otherwise submit information that would support or clarify their position as to actions alleged to have been done by Claimant. Claimant was put under oath for any testimony he made. At the June 13, expungement hearing, Claimant was advised that he was still under Oath. As there was no contradictory testimony, the Arbitrator accepted that answers from questions from Claimant's counsel and the Arbitrator were stated correctly.

The Arbitrator reviewed the BrokerCheck® Report for Claimant. The Arbitrator also reviewed the settlement documents for two of the Underlying Claims (occurrence numbers [REDACTED] and [REDACTED]), considered the amount of payments made to any party, and considered other relevant terms and conditions of those settlements. The Arbitrator noted that settlements of these two Underlying Claims were not conditioned on those underlying customers not opposing the requests for expungement. The Arbitrator also noted that Claimant did not contribute to the settlement amounts. The Arbitrator notes that the settlement amounts paid to Mr. and Mrs. K were significant, but the Arbitrator found that Claimant had received bad information from Mr. F, a Lincoln Financial Life wholesaler, and Mr. AF, an internal advanced case expert at Lincoln Financial Life, and therefore was not at fault for the recommendation.

The Arbitrator notes that there was no settlement in occurrence number [REDACTED]

The Arbitrator noted that Claimant did not previously file any claims requesting expungement of the same disclosures in the CRD.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's exhibits 3, 4, 7, 9, 14 and 18 (as set out below); Claimant's credible testimony; and the presentation by Claimant's attorney.

The Arbitrator has agreed that a handwritten, signed Award may be entered.

AWARD

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

The Arbitrator recommends the expungement of all references to occurrence numbers [REDACTED], [REDACTED] and [REDACTED] from registration records maintained by the CRD, for Claimant [REDACTED] (CRD# [REDACTED]), with the

understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact for all the Underlying Claims: The claim, allegation, or information is factually impossible or clearly erroneous; and the claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 findings based on the following reasons:

Occurrence Number [REDACTED]

- a. Allegation that Claimant persuaded the investment is false. Claimant interviewed Mr. P and learned of Mr. P's financial condition, investment experience and objectives. Their discussion included a recommendation of an annuity and the annuity's benefits. Mr. P accepted the investment and received a packet with all pertinent information about the annuity including its benefits, features, costs, conditions, riders, risks, and other items needed to be known.
- b. Allegation that the annuity was unsuitable is false. Mr. B, an office manager at H&R Block Financial Advisors, Inc., which was later acquired by Respondent, and son-in-law of Mr. P, introduced Claimant to Mr. P and mentioned an American Legacy variable annuity to them. Mr. B reviewed and approved all transactions and, due to his relationship with Mr. P, as he stood to inherit a portion of Mr. P's estate, took additional care in the investment. Mr. P approved the annuity.
- c. An H&R Block Financial account application for Mr. and Mrs. P was approved August 30, 2005 (Exhibit 3 – H&R Block Financial Advisors Investor's Account Application, Premium Account Cash Management Application, and related documents for Mr. and Mrs. P dated August 19, 2006 to September 11, 2006). There were changes to the account in 2006. The annuity in question was purchased after the account was opened. On September 9, 2005, Mr. and Mrs. P wrote to Lincoln National Life to cancel a provision in the annuity that would have given Mr. P some protection from some losses (Exhibit 7 – Mr. and Mrs. P's letter to Lincoln National Life cancelling the i4Life rider, dated September 29, 2005).
- d. The annuity performed well for a few years, including with cash distributions.
- e. Allegations of misrepresentation and failure to disclose risks are false as discussions and information provided to Mr. P informed him of major aspects of the annuity (Exhibit 4 – American Legacy Historical Accumulation Illustration prepared by H&R Block Financial Advisors, Inc for Mr. P, dated August 18, 2005).

Occurrence Number [REDACTED]

- a. Allegation of unsuitability is erroneous. Claimant had a reasonable basis to believe the annuity was suitable and had discussed aspects with Mr. K after using received information from Mr. F and Mr. AF, who had given advice on how to structure the annuity, and was assured that the annuity would provide the benefits wanted by Mr. K.
- b. The annuity was purchased in December 2007, and the annuity's value was affected by stock market values. The stock market decline in the fall of 2008 affected all investors, as well as the value of the annuity. The stock market decline was not Claimant's fault (Exhibit 9 – "The Fall of the Market in the Fall of 2008" Investopedia article, dated February 13, 2017).
- c. The terms of the annuity were not misrepresented by Claimant. Claimant did explain to Mr. K the annuity's provisions, including what had been told to him by Mr. F and Mr. AF (Exhibit 14 – Statement of Claim and Demand for Arbitration filed by Mr. and Mrs. K, dated November 2, 2010).
- d. There was no breach of fiduciary duty as Claimant used due diligence to get proper facts (Exhibit 14 – Statement of Claim and Demand for Arbitration filed by Mr. and Mrs. K, dated November 2, 2010).
- e. Claimant did not make any discretionary trades.
- f. Claimant acted in good faith pertaining to the transaction and there was no unfair business practice.
- g. Claimant received no unjust enrichment and there was no negligence as all actions taken were based on information received from Mr. F and Mr. AF, were reasonable, and were for the benefit of Mr. K (Exhibit 14 – Statement of Claim and Demand for Arbitration filed by Mr. and Mrs. K, dated November 2, 2010).

Occurrence Number [REDACTED]

- a. Claims were false as Claimant did not misrepresent the annuity and did reasonable diligence. Claimant relied on information from Mr. F and Mr. AF that the annuity would achieve Mr. and Mrs. K's stated goals, including income, annual withdrawals and death benefits.
- b. The Arbitrator incorporates all reasons outlined in occurrence number [REDACTED] in this occurrence number (Exhibit 18 – Respondent's letter to Mr. and Mrs. K's counsel, dated March 1, 2010).

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee = \$ 50.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge = \$ 150.00

Hearing Session Fees and Assessments

The Arbitrator has assessed hearing session fees for each session conducted. 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:

One (1) pre-hearing session with a single arbitrator @ \$50.00/session = \$ 50.00
Pre-hearing conference: November 1, 2017 1 session

Two (2) hearing sessions on expungement requests @ \$50.00/session = \$ 100.00
Hearing Dates: June 11, 2018 1 session
June 13, 2018 1 session

Total Hearing Session Fees = \$ 150.00

The Arbitrator has assessed \$150.00 of the hearing session fees to Claimant.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

ARBITRATOR

Alan M. Rosen

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Arbitrator's Signature

Alan M. Rosen

Alan M. Rosen
Sole Public Arbitrator

7/25/18

Signature Date

July 27, 2018

Date of Service (For FINRA Office of Dispute Resolution office use only)