

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
John David DiStefano

Case Number: 20-02130

vs.

Respondent
Northwestern Mutual Investment Services, LLC

Hearing Site: Kansas City, Missouri

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant John David DiStefano (“Claimant”): Jennifer P. Farrar, Esq., Farrar Law PLLC, Tomball, Texas.

For Respondent Northwestern Mutual Investment Services, LLC (“Respondent”): Thomas K. Anderson, Esq., The Northwestern Mutual Life Insurance Company, Milwaukee, Wisconsin.

CASE INFORMATION

Statement of Claim filed on or about: July 10, 2020.

Amended Statement of Claim filed on or about: March 18, 2021.

Claimant signed the Submission Agreement: June 19, 2020.

Statement of Answer filed on or about: August 31, 2020.

Respondent signed the Submission Agreement: August 31, 2020.

CASE SUMMARY

In the Statement of Claim and Amended Statement of Claim, Claimant asserted a claim seeking expungement of customer dispute information and the Form U5 filed by Respondent from registration records maintained by the Central Registration Depository (“CRD”).

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim, opposed Claimant's expungement request, and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of Occurrence Number 1148801 and the Form U5 filed by Respondent, compensatory damages in the amount of \$1.00, and any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent requested that Claimant's expungement request be denied, that Claimant's request for \$1.00 in compensatory damages be denied, and that forum fees be assessed against Claimant.

In the Amended Statement of Claim, Claimant reasserted the relief requested in the Statement of Claim, but only requested expungement of Occurrence Number 1148801.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

On November 6, 2020, Respondent filed a Motion for Partial Dismissal of the Statement of Claim ("Motion to Dismiss") pursuant to Rules 13504 and 13206 of the Code of Arbitration Procedure ("Code"). On March 9, 2021, Claimant filed notice of the parties' agreement that Claimant would file an amended statement of claim to resolve Respondent's Motion to Dismiss.

On March 18, 2021, Claimant filed an Unopposed Motion to Amend the Statement of Claim ("Motion to Amend"). In an Order dated March 30, 2021, the Arbitrator granted the Motion to Amend.

On April 8, 2021, Claimant advised that the customer in Occurrence Number 1148801 ("Customer") was served with the Amended Statement of Claim and notice of the date and time of the expungement hearing ("Notice"). Claimant also filed a copy of the USPS tracking information available online for the Notice.

The Arbitrator conducted a recorded, telephonic hearing on April 22, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and did not oppose the request for expungement.

The Customer did not participate in the expungement hearing.

At the hearing, the Arbitrator raised the issue of the pending Motion to Dismiss. Respondent withdrew the Motion to Dismiss. Notwithstanding the withdrawal, the Arbitrator cited Rule 13206 of the Code and gave Claimant the opportunity to present oral argument on its applicability. After Claimant's oral argument, the Arbitrator ruled that Claimant's claim is time barred. Herein, the Arbitrator affirms his ruling and dismisses this matter pursuant to Rule 13206 of the Code on the following grounds:

Claimant's claim for expungement of the 2003 disclosure of a customer complaint is ineligible for FINRA arbitration under the Code, because he filed his Statement of Claim more than six years after the occurrence. Rule 13206(a) of the Code provides that "[n]o claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim." Courts and arbitrators have developed a clear and uniform test for when the six- year clock begins to run:

[T]he "occurrence or event" which "gives rise to the ... claim" is the last occurrence or event necessary to make the claim viable. A claim is viable when all the elements of that claim can be established such that it could withstand a motion to dismiss for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6).

Kidder, Peabody & Co. v. Brandt, 131 F.3d 1001, 1004 (11th Cir. 1997).

The occurrence that Claimant seeks to have expunged was disclosed to the CRD in 2003. The disclosure of the occurrence on Claimant's CRD record was the "occurrence or event giving rise to [Claimant's] claim." At that point, Claimant's claim for expungement was viable. *Id.* at 1004. Accordingly, Claimant's claim for expungement of the occurrence became ineligible for FINRA arbitration in 2009. Claimant filed his Statement of Claim seeking expungement of the occurrence in July 2020, well after this date. Consequently, Claimant's Statement of Claim is untimely under Rule 13206(a) of the Code and must be dismissed.

Further, FINRA Rule 13206(a) is incorporated by reference into every agreement to arbitrate before FINRA. Rule 13101 of the Industry Code provides:

(a) Applicability of Code

The Code applies to any dispute that is submitted to arbitration under the Code pursuant to Rules 13200, 13201, or 13202.

(b) Incorporation by Reference

When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

The eligibility rule thus does not function as an ordinary procedural limitation on the timeliness of a party's claim after the claim accrues or a party's ability to prosecute the claim once it is submitted to arbitration. Instead, it operates as a contractual limitation on an arbitrator's power to consider the claim at all. *See PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989) (interpreting Section 15 of the NASD Code—the predecessor to FINRA Rule 13206—and holding that "Section 15 therefore serves as an absolute bar to claims submitted for arbitration more than six years after the event which gave rise to the dispute"). Because the eligibility rule is a contractual limit on the

scope of an arbitrator's authority to hear a dispute, determinations regarding eligibility, unlike determinations regarding compliance with statutes of limitations, cannot take into account equitable factors such as the conduct of the respective parties after a dispute arises or other facts that might support a tolling of the eligibility period. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 385 n.4 (11th Cir. 1995) (claims are not subject to equitable tolling when eligibility rule is invoked); see also, *Ohio Co. v. Nemecek*, 98 F.3d 234, 237 (6th Cir. 1996) (eligibility time period not subject to equitable tolling). Instead, eligibility determinations hinge on a single, objective factor: how much time has elapsed between the occurrence or event giving rise to the claim and the submission of that claim to arbitration.

The claim is dismissed without prejudice to any right Claimant has to file in court; Claimant is not prohibited from pursuing his claims in court pursuant to Rule 13206(b) of the Code.

AWARD

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

1. Claimant's claim is dismissed in its entirety pursuant to Rule 13206 of the Code.
2. Any and all claims for relief not specifically addressed herein are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services 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

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

February 1, 2021, postponement requested by parties = \$ 50.00

Total Postponement Fees = \$ 50.00

The Arbitrator has assessed \$25.00 of the postponement fees to Claimant.

The Arbitrator has assessed \$25.00 of the postponement fees to Respondent.

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, including a pre-hearing conference with the Arbitrator, which lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session @ \$50.00/session		= \$	50.00
Pre-Hearing Conference: November 3, 2020	1 session		

One (1) hearing session on expungement request @ \$50.00/session		= \$	50.00
Hearing: April 22, 2021	1 session		

Total Hearing Session Fees		= \$	100.00
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The Arbitrator has assessed the total hearing session fees to Claimant.

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

ARBITRATOR

Robert S. Baran

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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

Robert S. Baran

Robert S. Baran
Sole Public Arbitrator

05/06/2021

Signature Date

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May 07, 2021

Date of Service (For FINRA Dispute Resolution Services use only)