

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Steven L. Kennedy

Case Number: 20-02513

vs.

Respondent
Equitable Advisors, LLC

Hearing Site: Albany, New York

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 Steven L. Kennedy: Michael O’Gara, J.D. and Dochter Kennedy, MBA, J.D., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Equitable Advisors, LLC: Johan E. Tatoy, Esq., Equitable Advisors, LLC, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: August 5, 2020.
Steven L. Kennedy signed the Submission Agreement: August 5, 2020.

Statement of Answer filed by Respondent on or about: August 21, 2020.
Equitable Advisors, LLC signed the Submission Agreement: August 13, 2020.

CASE SUMMARY

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

In the Statement of Answer, Respondent took no position on Claimant’s expungement request and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: expungement of Occurrence Number 2019068; compensatory damages in the amount of \$1.00 from Respondent; and any and all other relief that the Arbitrator deemed just and equitable.

In the Statement of Answer, Respondent requested: that Claimant take nothing against Respondent; that the Arbitrator deny Claimant's request for \$1.00 in compensatory damages; that Respondent be awarded the costs of this proceeding; and that all costs of this proceeding, including member forum fees, be assessed against Claimant.

At the beginning of the hearing, Claimant withdrew the request for \$1.00 in damages.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about December 29, 2020, Claimant advised that the customers in Occurrence Number 2019068 ("Customers") were served with a copy of the Statement of Claim, notice of the date and time of the expungement hearing and of their right to participate therein. On or about January 5, 2021, Claimant filed with FINRA Dispute Resolution Services an Affidavit of Service, along with proof of service via FedEx upon the underlying Customers, advising that the Customers were served with a copy of the Statement of Claim and notice of the date and time of the expungement hearing.

The Arbitrator conducted a recorded, telephonic hearing on March 11, 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 Customers also participated in the expungement hearing and did not oppose the expungement request. The Arbitrator found that the Customers had notice of the expungement request and hearing.

The Arbitrator reviewed Claimant's BrokerCheck® Report. The Arbitrator noted that a prior arbitration panel or court did not previously rule on expungement of the same occurrence in the CRD.

The Arbitrator noted that the dispute related to Occurrence Number 2019068 was not settled and, therefore, there was no settlement document to review.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's Statement of Claim; Claimant's testimony; Customers' testimony; Claimant's Submission of Expungement Hearing Exhibits; and Respondent's Supplemental Exhibit.

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. The Arbitrator recommends the expungement of all references to Occurrence Number 2019068 from registration records maintained by the CRD for Claimant Steven L. Kennedy

(CRD Number 5437727) with the understanding that, pursuant to Notice to Members 04-16, Claimant Steven L. Kennedy 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 of Arbitration Procedure (“Code”), the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous.

The claim, allegation, or information is false.

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

The following facts support the Arbitrator’s decision that the allegation or information is factually impossible or clearly erroneous:

The AXA Accumulator Variable Annuity (“AXA Annuity” or “Product”) was a product of Respondent. As a registered representative for Respondent from December of 2007, to June of 2010, Claimant sold the AXA Annuity to the Customers.

Claimant serviced the Customers’ account with his Direct Manager (“DM”).

Claimant did not provide the Customers with any income guarantee from the AXA Annuity or from any other investment.

Claimant explained to the Customers that if they met certain criteria, the AXA Annuity could potentially provide income of approximately six percent.

In June of 2010, Claimant left and was no longer employed by Respondent. After June of 2010, Claimant did not service the Customers’ account because they were no longer Claimant’s clients. Respondent erred by not assigning a new registered representative to the Customers.

In September of 2010, when Claimant was not employed by Respondent and did not service their account, the Customers signed the AXA Equitable Accumulator Variable Annuity Series Withdrawal Request Form (“Accumulator Withdrawal Request Form”), which raised their monthly withdrawal to begin on October 2, 2010. DM assisted the Customers in making this change.

A Financial Professional (“FP”) for Respondent was assigned to the Customers’ account in or around October of 2010.

On April 10, 2013, the Customers signed the AXA Accumulator One-Time Transfer Form in a meeting with FP and at her direction.

By making the change in the contract on April 10, 2013, the Customers triggered limitations in their account that FP did not explain to them. The change disrupted the amount of monthly income that the Customers had experienced since October of 2010 and were expecting to receive for life.

In August of 2018, FP had a review and analysis of the Customers' account conducted. The review and analysis revealed, among other things, that the Customers "had an excess withdrawal every August since 2015."

Sometime in 2018, FP called the Customers and told them that they would have to begin taking less monthly income. The Customers made repeated calls to FP to get a better understanding for why their monthly income was being reduced, and FP never called the Customers back.

In October of 2018, Respondent called the Customers to inform them that they could no longer take their monthly withdrawal from the AXA Annuity.

The following facts support the Arbitrator's decision that the claim, allegation or information is false:

Prior to their purchase in 2008, Claimant gave the Customers the AXA Annuity prospectus, which described the Product as having a living benefits rider that provided income of six percent with certain limitations. Claimant met with the Customers approximately six times and explained the terms, risks, fees, features and benefits of the AXA Annuity to them.

On August 25, 2008, during the time that Claimant serviced their account, the Customers signed an AXA Equitable Enrollment Form for the Accumulator Elite Combination Variable and Fixed Deferred Annuity ("AXA Annuity Enrollment Form"), that provided a monthly systematic withdrawal beginning on October 1, 2008.

The AXA Annuity Enrollment Form provides an option for Guaranteed Minimum Income Benefit, which the Customers selected.

In September of 2010, when Claimant was not employed by Respondent and did not service their account, the Customers signed the Accumulator Withdrawal Request Form, which raised the monthly withdrawal to begin on October 2, 2010. DM assisted the Customers in making this change.

In 2008, when Claimant sold the AXA Annuity, the Customers completed and signed disclosure documents and affirmed their understanding of the terms, risks, costs, fees, features and benefits.

The Customers did not make changes to their annuity contract while Claimant worked for Respondent.

Neither Respondent nor FP told the Customers that moving funds within the sub-accounts of the AXA Annuity would invalidate the guaranteed rider and, thereby reduce the amount that the Customers expected to continue withdrawing from their annuity.

In a review and analysis of the Customers' account, Respondent determined that in 2010, the wrong form was signed by the Customers. The Customers signed the Accumulator Withdrawal Request Form, not the Accumulator Benefit Base Preservation Systematic Withdrawal Request Form. DM assisted the Customers in September of 2010, when the form was signed.

FP is listed on the Customers' Quarterly Account Review for October through December of 2010.

In a letter to the Customers, dated October 15, 2018, Customer Relations ("CR") for Respondent wrote that "based on their review of the information and documentation available, we have determined that full disclosure was provided to you with regard to the purchase of annuity contract number ***** and its guaranteed benefits. The benefits, terms and provisions of the contract were provided to you and acknowledged by you in the prospectus and contract that you reviewed."

On February 13, 2019, Respondent reported to Claimant's CRD that the Customers alleged that Claimant did not make appropriate disclosures about the AXA Annuity. Respondent also reported that the Customers claimed that Claimant told the Customers that they would receive income of six percent for life.

The Customers testified that they had no complaints with the way Claimant serviced their account. They testified that their complaint was with Respondent because, among other reasons, no one for Respondent returned calls or informed them of the consequences of making changes in their account.

Summary:

Based on the facts listed above, it was not Claimant but Respondent and FP, who were in the position to alert the Customers and to inform them that their April of 2013 reallocation would affect their monthly income stream. When Claimant left Respondent, DM, FP or another representative for Respondent should have been assigned to monitor the Customers' account and communicate to them when changes in their account would cause an effect, such as the reduction of monthly income stream.

In the Statement of Answer, Respondent takes no position regarding Claimant's request for expungement. Respondent participated in the expungement hearing and did not oppose the request for expungement. The Customers agreed that Claimant's expungement request should be granted.

No previous arbitration panel ruled on expungement of this complaint because no prior request was made. No settlement agreement in this case was reviewed because the Customers' complaint was denied by Respondent.

The Arbitrator found that there is no investor protection value to keep the allegations of Occurrence Number 2019068 on Claimant's record. Therefore, expungement of Occurrence Number 2019068 is appropriate.

Claimant's request for expungement is granted.

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

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 with a single Arbitrator @ \$50.00/session = \$ 50.00
Pre-Hearing Conference: December 1, 2020 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing: March 11, 2021 1 session

Total Hearing Session Fees = \$ 100.00

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

Denise L. Quarles

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature

Denise L. Quarles

Denise L. Quarles
Sole Public Arbitrator

03/25/2021

Signature Date

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.

March 26, 2021

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