

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

William V. Grizinski, (Claimant) vs. American Express Financial Advisors, Inc. and Michael Bryan, (Respondents)

Case Number: 01-00838

Hearing Site: Cincinnati, Ohio

REPRESENTATION OF PARTIES

Claimant, William V. Grizinski, hereinafter referred to as "Claimant": Michael C. Eckert, Esq., Eckert & Eckert Co., L.P.A., Springboro, OH.

Respondents, American Express Financial Advisors, Inc. ("AEFA") and Michael Bryan ("Bryan"), hereinafter collectively referred to as "Respondents": Michael W. DeWitt, Esq., Chorpensing, Good & Mancuso Co., LPA, Columbus, OH.

CASE INFORMATION

Statement of Claim filed on or about: February 16, 2001.

Amended Statement of Claim filed on or about: May 16, 2001.

Claimant signed the Uniform Submission Agreement: February 16, 2001.

Joint Statement of Answer filed by Respondents on or about: May 30, 2001.

AEFA signed the Uniform Submission Agreement.

Bryan signed the Uniform Submission Agreement: March 13, 2001.

CASE SUMMARY

Claimant asserted the following causes of action: tortious interference with a business relationship; defamation/libel; and violation of Ohio's Deceptive Trade Practices Act.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant's Amended Statement of Claim fails to state a claim upon which relief may be granted and Claimant's claims are barred because the alleged statements, to the extent they were published, enjoy the protection of a qualified privilege.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$250,000.00, plus punitive damages in the amount of \$750,000.00, costs, and attorneys' fees.

Respondents requested that the Panel:

- a. Deny the claims set forth in the Amended Statement of Claim;
- b. Grant Respondents' Affirmative Defenses and dismiss the Amended Statement of Claim;
- c. Award such interest, fees, and costs as the Panel deems just and proper; and
- d. Award Respondents reasonable attorneys' fees in connection with the defense of this arbitration.

OTHER ISSUES CONSIDERED AND DECIDED

At the conclusion of the evidentiary hearing, the parties' counsel jointly agreed to waive summation, and requested in lieu thereof to submit post-hearing memoranda. It was thereupon agreed by counsel, and ordered by the Panel, that written submissions not to exceed fifteen (15) pages in length should be submitted, and that the content of the submissions be in the form of proposed findings of fact and conclusions of law, and be delivered directly to the office of each arbitrator not later than Friday, September 27, 2002.

At the conclusion of the evidentiary portion of the hearing at the end of the fifth hearing session, both counsel stated affirmatively on the record that each side had been afforded a fair and full opportunity to present their evidence and present their case.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

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

DECISION

Some time in late 1995, David J. Parker ("Parker") became a client of Claimant William V. Grizinski. Over the course of time, and based upon Grizinski's recommendations, Parker established three (3) annuity contracts through insurance companies represented by Grizinski. One of these annuity products was issued by National Health Insurance Company ("NHIC").

While many facts are not disputed, the parties contest whether the NHIC annuity constituted a replacement of an existing annuity. The parties were nevertheless in agreement that regardless of whether the NHIC annuity product was a replacement for an existing annuity or not, under then current law, a replacement form was not required to be completed if a group annuity product was to be surrendered and a new annuity product was to be issued in its place. In addition, the parties were in agreement that with respect to the sale of the NHIC annuity, Claimant Grizinski had done what was legally required of him with respect to required disclosures, and that he was not obligated to complete an annuity replacement form. The crux of the testimony on this issue was whether or not Claimant Grizinski had gone into the level of detail and explanation to Parker that Respondent Bryan felt was required by the prevailing standard of practice at the time.

The Arbitrators unanimously conclude that the parties intended that Parker's group annuity was, in fact, to be replaced by the NHIC annuity recommended and sold by Claimant Grizinski. The panel therefore also concludes that Claimant Grizinski should have responded affirmatively to Section 6 of the NHIC Annuity Application to reflect that the proposed annuity was to replace an existing annuity or insurance contract, whether or not there was a legal exemption not apparent from the face of the document. Notwithstanding, the Arbitrators unanimously conclude that the issue framed by these facts is not materially significant to the matters in dispute.

The NHIC annuity was purchased by Parker in May, 1999. Parker testified that at the time, he acknowledged his receipt and understanding of NHIC's disclosure of the applicable withdrawal, or surrender, charges. When questioned at length during the hearing, Parker confirmed that he had read the annuity application, the disclosure documents and the contract, and that at the time he understood and appreciated the surrender charges and accepted them because his intent was to acquire a long-term investment which he anticipated holding well beyond the duration of the surrender penalty period. Parker further testified that at the time,

he had no questions regarding the attributes of the NHIC annuity product.

In the mid-1990's, Parker developed a close personal and professional relationship with Respondent Michael J. Bryan, who was an employee of AEFA where he had become employed in or about 1996. In late 1999, Parker consulted with Respondent Bryan regarding the annuity products which he owned and the desirability of other investment opportunities. Because of the nature of this relationship, the Arbitrators do not conclude that tortious interference in Parker's relationship with Claimant Grizinski occurred.

Respondent Bryan's recommendation was to move funds from the annuities Parker held, and invest in mutual funds. At Respondent Bryan's request, Parker provided him copies of his annuity contracts, which Respondent Bryan reviewed and analyzed for him.

As a result of his analysis of Parker's annuity contracts, Respondent Bryan convened a meeting with Parker on February 25, 2000. At that meeting, Respondent Bryan composed and prepared a letter for Parker to send to NHIC. Salient provisions of the letter stated that Parker "was surprised to learn" that his NHIC contract surrender charge was fifteen percent (15%) and that Parker "was not aware of this surrender charge." The letter further represented that Parker "learned that a replacement form needs to be filed whenever one annuity is replaced by another." The letter also stated that Parker "was only told by the agent [Grizinski] that the NHIC product would be a good front end investment with a 7.5% first year guarantee and that all 403(b) plans are long term investments." The letter also represented that Parker "did not receive full disclosure as to the new surrender charges * * * [and] because proper procedures were not followed in filing a replacement form" it demanded that NHIC abate the surrender charges in their entirety. Finally, the letter represented Parker's understanding that "there is legal precedent regarding the lack of full disclosure and the failure to follow the proper procedure in replacing one annuity with another."

Respondent Bryan recommended to Parker that a copy of the letter be sent to the Ohio Department of Insurance. After Parker signed the letter, Respondent Bryan also prepared the envelopes and mailed the original letter to NHIC and its copy to the Ohio Department of Insurance. Respondent Bryan testified that while it was not his intent to circumvent his employer's compliance procedures regarding outgoing correspondence of this nature, he conceded that had this letter been composed for his signature, it would have had to receive review and approval by AEFA's compliance officer. The panel takes notice that such a letter would likely not have been approved by a compliance officer.

Respondent Bryan testified that he did not give any consideration to the fact that NHIC would investigate the allegations in the February 25, 2000 letter, or that the Ohio Department of Insurance would likewise investigate them, but knew that it had the power to discipline Claimant Grizinski for violation of its regulations, including the possibility of suspending or

revoking his license. Both Parker and Respondent Bryan admitted that the purpose of the letter was to gain an economic advantage, namely waiver of the surrender fees to which NHIC was contractually entitled, and that the purpose of sending a copy of the letter to the Ohio Department of Insurance was to apply leverage to force NHIC into agreeing to waive the contract's surrender charges.

Parker's actual knowledge and understanding of the contents of the letter drafted by Respondent Bryan was limited. Moreover, Parker's testimony contradicted several of the specific assertions. In particular, Parker testified that he was not "surprised to learn" about the NHIC contract surrender charge, but had known of it previously, and had simply not remembered. Parker also conceded that at the time he had no idea whether a replacement form was required if a group annuity was replaced by an individually acquired annuity, and relied on Respondent Bryan's incorrect advice on that point. Parker also acknowledged that the statement that he was "only told by the agent" was inaccurate in that full disclosure had in fact been made to him by Claimant Grizinski regarding his purchase of the NHIC annuity product. Finally, Parker admitted that he never even thought about the potential adverse consequences these written accusations would have on Claimant Grizinski's license record with the Ohio Department of Insurance.

Following its investigation, NHIC determined that whether or not Parker's purchase of its annuity was a replacement was irrelevant, insofar as replacement forms were not required in Ohio at the time if a group annuity were being replaced. NHIC also determined that Claimant Grizinski had acted in good faith and made full disclosure. Following its separate investigation, the Ohio Department of Insurance found that there had been no violation of Ohio insurance laws or regulations, nor that there was evidence that NHIC or Claimant Grizinski had acted improperly. Subsequently, Parker sent an undated letter to Claimant Grizinski seeking to explain, and apologize for, the February 25, 2000 letter and its ramifications.

As a result of the foregoing, Claimant Grizinski sued Parker in the Scioto County Common Pleas Court. While the claims and defenses in that litigation were not before the panel, the evidence established that Parker was defended at the expense of AEFA, by its legal counsel, Attorney DeWitt, and that Mr. DeWitt's motion to stay the litigation and compel arbitration was denied by the court by judgment entry filed August 31, 2001.

Notwithstanding the courts adjudication of this very issue, on October 8, 2001, Mr. DeWitt, without Parker's knowledge or consent, submitted a written complaint to the National Association of Securities Dealers ("NASD") asserting that Claimant Grizinski's prosecution of his claims against Parker in court constituted a violation of NASD Conduct Rule 2110 Standards of Commercial Honor and Principles of Trade, and demanding that Grizinski be disciplined. This rule states, "A member, in the conduct of his business, shall observe high

standards of commercial honor and just and equitable principles of trade." Attorney DeWitt's letter precipitated an inquiry by NASD Regulation which resulted in a determination that the institution of disciplinary action against Claimant Grizinski was unwarranted.

The evidence at the hearing was that notwithstanding this determination, Claimant Grizinski became and remains obligated to disclose this complaint, and that it has created a permanent blemish on his previously "clean" Central Record Depository ("CRD") file.

Claimant Grizinski offered evidence that as the result of Respondent Bryan's misrepresentations, Parker surrendered the LSW annuity, although not the NHIC annuity, which resulted in Claimant Grizinski's loss of some residual commissions, and that he suffered unquantifiable damages for having his professional reputation impugned and his disciplinary records with the Ohio Department of Insurance and the NASD tarnished.

Respondents countered with testimony through Mr. Kenny Allen Dodson, an independent financial planning consultant, that companies such as those represented by Claimant Grizinski give little heed to complaints against licensed representatives in the absence of disciplinary measures. Dodson conceded, however, that his testimony was an opinion based on his perception of industry practices, and not based on experience. Dodson also acknowledged that he did not know if he would feel damaged by the filing of a false complaint, but that if the February 25, 2000 letter authored by Respondent Bryan and signed by Parker had been directed against one of his company's employees, he would have been "displeased" with that employee were the content to have been true.

The panel having weighed all the written and oral evidence, unanimously determines that while Claimant Grizinski ought properly to have identified the NHIC annuity product as a replacement for Parker's prior group annuity contract, he violated no specific duty owed to Parker by not having done so, and he violated no law or regulation by neglecting to complete and submit a replacement form which, in any event, was not required. His not doing so resulted in no harm to Parker, mainly because Parker fully appreciated that the NHIC annuity would replace his group annuity, and fully appreciated its attributes. The Arbitrators further unanimously determine that Respondent Bryan and AEFA are charged with actual knowledge at the time of the February 25, 2000 letter, that no replacement form needed to be submitted.

The Arbitrators further unanimously determine that the February 25, 2000 letter misrepresented Parker's knowledge, his appreciation of the true facts and the disclosures made to him by Claimant Grizinski, and that it disparaged the quality of Claimant Grizinski's professional services in violation of Ohio's Deceptive Trade Practices Act. The Arbitrators also unanimously determine that the sending of the February 25, 2000 letter to NHIC was solely to obtain an economic advantage for Parker as well as for Respondents, and that the submission of a copy to the Ohio Department of Insurance was undertaken solely to obtain

leverage with which to achieve such economic advantage.

The Arbitrators unanimously determine that the February 25, 2000 letter was a communication not made in good faith on a matter of common interest, and therefore enjoyed no qualified privilege protection. To the contrary, its representations are found by the Arbitrators unanimously to have been made falsely or with reckless disregard as to whether they were true or not, and with reckless disregard as to whether they would adversely affect Claimant Grizinski in his trade or profession. Reckless disregard may be established by clear and convincing evidence that the statements were made with a high degree of awareness of probable falsity, or that the defendant in fact entertained serious doubts as to the truth of his publication. The evidence at hearing was clear and convincing that the letter was a "long shot angle" and supports the conclusion that respondents either knew the statements to be probably false or had serious doubts about the truth of the matters asserted.

The Arbitrators further unanimously determine that the subsequent filing of a complaint with NASD seeking disciplinary sanctions against Claimant Grizinski, after the identical issue had been adjudicated in his favor by a court of competent jurisdiction, was undertaken by AEFA, through its counsel, without justification and with reckless disregard of the consequences which a complaint would have on Claimant Grizinski's CRD records. The arbitrators also find unanimously that because Parker was wholly unaware of Mr. DeWitt's complaint to the NASD purportedly on his behalf, the complaint was instigated by or on behalf of Respondents to advance their own interests, not those of Parker.

The panel finds that the February 25, 2000 letters to NHIC and the Ohio Department of Insurance, were defamatory in that they derogated the quality of Claimant Grizinski's professional services, harmed him in his professional reputation and created appearances of multiple improprieties to the Ohio Department of Insurance and the NHIC. As such they violated Ohio's Deceptive Trade Practices Act, and have the potential of deterring third parties from dealing with him as a result. The statements were made with the knowledge of their falsity and with conscious and deliberate disregard of the interests and rights of Claimant Grizinski. The panel further unanimously determines that the subsequent filing of a complaint with the NASD, after Claimant Grizinski had been vindicated by a court judgment, was made in a spirit of revenge, falsely created appearances of unethical business practices and continued to demonstrate a conscious and deliberate disregard of his interests with the effect of injuring his professional reputation. The panel finds that Claimant proved these facts by clear and convincing evidence, thereby establishing the appropriate predicate for a finding of malice and an award of punitive damages. *Preston v. Murty* (1987), 32 Ohio St.3d 334.

Upon consideration of the foregoing, the Arbitrators unanimously hereby award in full and final resolution of all issues submitted for determination, as follows:

1. Claimant shall recover from Respondents, whose liability shall be joint and several, compensatory damages for injury to his professional reputation and disciplinary record in the sum of \$25,000.00.
2. Claimant shall recover from Respondent AEFA, punitive damages in the amount of \$50,000.00.

The panel finds that the February 25, 2000 letters to NHIC and the Ohio Department of Insurance, were defamatory in that they derogated the quality of Claimant Grizinski's professional services, harmed him in his professional reputation and created appearances of multiple improprieties to the Ohio Department of Insurance and the NHIC. As such they violated Ohio's Deceptive Trade Practices Act, and have the potential of deterring third parties from dealing with him as a result. The statements were made with the knowledge of their falsity and with conscious and deliberate disregard of the interests and rights of Claimant Grizinski. The panel further unanimously determines that the subsequent filing of a complaint with the NASD, after Claimant Grizinski had been vindicated by a court judgment, was made in a spirit of revenge, falsely created appearances of unethical business practices and continued to demonstrate a conscious and deliberate disregard of his interests with the effect of injuring his professional reputation. The panel finds that Claimant proved these facts by clear and convincing evidence, thereby establishing the appropriate predicate for a finding of malice and an award of punitive damages. *Preston v. Murty* (1987), 32 Ohio St.3d 334.

3. The foregoing award, totaling \$75,000.00, shall be paid by electronic funds transfer or by delivery of a check to counsel for Claimant on or before thirty days from the date this award is served, after which that sum shall bear simple interest at the annual rate of ten percent (10%) pursuant to Ohio Revised Code Section 1343.03 until paid in full.
4. Respondent AEFA shall at its own cost and expense prosecute such action(s) and/or administrative proceeding(s) as necessary to result in the entry of final, non-appealable judgement(s) and/or administrative order(s) requiring the full and final expungement of the disciplinary inquiry and any record thereof with the Ohio Department of Insurance, the National Association of Securities Dealers, the Central Registration Depository, and the Securities and Exchange Commission resulting from the February 25, 2000 letter and Mr. DeWitt's October 8, 2001 complaint to the NASD.

Based on the defamatory nature of the information, the Panel recommends the expungement of AEFA's October 8, 2001 written complaint to NASD from Claimant William V. Grizinski's registration records maintained by the NASD Central

Registration Depository.

5. The full and final expungement of all such records shall be effected not later than September 30, 2003. If expungement is not effected by such date, AEFA shall pay to Claimant as additional damages the sum of \$100.00 per day until each and all such records are fully and finally expunged.
6. Until the time such records are fully and finally expunged, Claimant may use a copy of this Award as necessary to demonstrate the relief hereby ordered.
7. AEFA is solely liable for and shall pay to Claimant the sum of \$375.00, to reimburse Claimant for the filing fee previously paid to NASD Dispute Resolution.
8. To the extent not specifically awarded or otherwise provided for herein, all other claims and requests for relief by any party hereto, including claims for attorneys' fees and expenses, are incorporated herein and to the extent not specifically addressed, are denied with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:
Initial claim filing fee = \$ 375.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, American Express Financial Advisors, Inc. is a party.

Member surcharge	= \$2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$3,500.00

Adjournment Fees

Adjournments requested during these proceedings:

May 1, 2 & 3, 2002, adjournment by Claimant	= \$1,200.00
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Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with Panel x \$1,200.00		= \$2,400.00
Pre-hearing conferences:		
August 23, 2001	1 session	
April 23, 2002	1 session	
Five (5) Hearing sessions x \$1,200.00		= \$6,000.00
Hearing Dates:		
September 9, 2002	3 sessions	
September 10, 2002	2 sessions	
Total Forum Fees		= \$8,400.00

The Panel has assessed all of the forum fees against AEFA.

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 375.00
Adjournment Fee	= \$ 1,200.00
Total Fees	= \$ 1,575.00
Less payments	= \$ 2,775.00
Refund Due Claimant	= \$ 1,200.00

As stated in the "Award" section above, AEFA is liable and shall reimburse Claimant for the \$375.00 filing fee.

2. AEFA is solely liable for:

Member Fees	= \$ 6,100.00
Forum Fees	= \$ 8,400.00
Total Fees	= \$14,500.00
Less payments	= \$ 6,100.00
Balance Due NASD Dispute Resolution	= \$ 8,400.00

All balances are payable to NASD Dispute Resolution, and are due upon receipt pursuant to Rule 10330(g) of the Code.

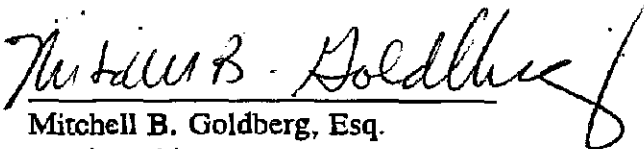
ARBITRATION PANEL

Peter F. von Meister, Esq.	-	Public Arbitrator, Presiding Chair
Mitchell B. Goldberg, Esq.	-	Public Arbitrator
Bernard A. Breton	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Peter F. von Meister, Esq.
Public Arbitrator, Presiding Chair

Signature Date



Mitchell B. Goldberg, Esq.
Public Arbitrator

October 25, 2002
Signature Date

Bernard A. Breton
Non-Public Arbitrator

Signature Date

October 29, 2002
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Peter F. von Meister, Esq.	-	Public Arbitrator, Presiding Chair
Mitchell B. Goldberg, Esq.	-	Public Arbitrator
Bernard A. Breton	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Peter F. von Meister, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Mitchell B. Goldberg, Esq.
Public Arbitrator

Signature Date



Bernard A. Breton
Non-Public Arbitrator

10-28-02
Signature Date


October 29, 2002
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Peter F. von Meister, Esq. -
Mitchell B. Goldberg, Esq. -
Bernard A. Breton -

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures



Peter F. von Meister, Esq.
Public Arbitrator, Presiding Chair

10/25/02
Signature Date

Mitchell B. Goldberg, Esq.
Public Arbitrator

Signature Date

Bernard A. Breton
Non-Public Arbitrator

Signature Date

October 29, 2002

Date of Service (For NASD Dispute Resolution use only)