

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Claimants

Robert Barton Ratliff and Virginia Dianne Ratliff

v.

04-00537  
Denver, Colorado

Respondent

Bradford A. Gann

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Nature of Dispute: Customers v. Associated Person

**REPRESENTATION OF PARTIES**

Robert Barton Ratliff and Virginia Dianne Ratliff ("Claimants") appeared pro se.

Bradford A. Gann ("Respondent") was represented by Michael S. Freeman, Esq., of Fagre & Benson, LLP, Denver, Colorado.

**CASE INFORMATION**

The Statement of Claim was filed on or about January 27, 2004. The Submission Agreement of Claimants was signed on or about January 26, 2004.

The Statement of Answer was filed by Respondent, Bradford A. Gann, on or about March 29, 2004. The Submission Agreement of Respondent, Bradford A. Gann, was signed on or about March 15, 2004.

Claimants filed an Amended Statement of Claim on or about April 13, 2004.

Claimants filed a Reply to Respondent Gann's Answer on or about April 20, 2004.

Claimants filed two separate Motions to Submit Additional Evidence into the Exhibits of their Statement of Claim on or about July 6, 2004.

Respondent filed a Response to Claimants' Motions to Submit Additional Evidence into the Exhibits of their Statement of Claim on or about July 22, 2004.

Respondent filed a Motion to Dismiss on or about July 8, 2004.

Claimants filed a Response in Opposition to Respondent's Motion to Dismiss on or about July 28, 2004.

### **CASE SUMMARY**

Claimants asserted causes of action including the following: breach of fiduciary duty, omission of facts, misrepresentations and failure to supervise. The causes of action related to Claimants' allegation that Respondent failed to disclose to them the option of a rollover of their 401k American Fund Class A shares to Class A shares at net asset value (NAV) back into American Fund shares. In addition, Claimants alleged that Respondent failed to disclose or take advantage of breakpoints, and for purchasing Class B & C shares instead of a NAV transfer of Class A shares. Claimants asserted that because of these non-disclosures, they suffered losses in their accounts.

Respondent denied the allegations set forth in the Statement of Claim and asserted affirmative defenses including the following: Claimants failed to state a claim upon which relief can be granted; Claimants had full knowledge of their accounts, the investments that they made, and the fees involved; Claimants directed and agreed with how their accounts were to be invested; the investments in Claimants' accounts were made at their express direction, and they are estopped from asserting that purchases made were inappropriate; Claimants were regularly advised of their investments and the fees associated with them and did not object at any time; and Claimants cannot assert claims based on the risks inherent in their investments since they made those investments with full knowledge and information about those risks in exchange for a higher potential rate of return.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$25,804 in actual damages, plus, interest, costs, attorney's fees and any other relief the panel deemed just and equitable.

Respondent requested that the claims asserted against him be denied in their entirety and that he be awarded his costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

On or about July 30, 2004, the arbitrator entered an Order granting Claimants' Motions to Submit Additional Evidence into the Exhibits of their Statement of Claim.

On or about August 9, 2004, the arbitrator entered an Order denying Respondent's Motion to Dismiss.

The arbitrator has made the following Finding of Fact with regard to Claimants' Statement of Claim:

"It is the finding of this arbitrator that the Respondent had a fiduciary duty to generically inform the Claimants of the possibility of an availability of a NAV roll over at no cost if the assets were left at the current investment firm. Although others (tax advisor, 401k sponsor) may or may not have been in a position to advise claimant of the possibility, it does not absolve the Respondent of a fiduciary duty to generically inform potential clients of the possibility of this not uncommon practice in the industry. Such a duty becomes even more apparent when the availability of a no cost roll over was clearly stated in the prospectus of the 401k funds being redeemed. The American Express employee handbook requires the employee to have a thorough understanding of movement of money from outside specifically mentioning the prospectus of the fund being redeemed and discussions with the company offering the product. The arbitrator also finds that Respondent did not adequately consult with Claimants regarding the purchase of A, B or C shares prior to investing in the shares, nor did Respondent point out the alternative availability of break even commission points when advising the Claimants about dollar averaging investing. Damages are mitigated somewhat by a "benefit of the bargain" concept. There has been no contradictory evidence indicating that the newly purchased investments did not perform well."

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. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

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

1. Respondent, Bradford A. Gann, is liable for and shall pay to Claimants, Robert Barton Ratliff and Virginia Dianne Ratliff, the sum of Five Thousand Dollars and No Cents (\$5,000.00) in compensatory damages;
2. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto, including punitive damages, are denied with prejudice; and
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

### **Filing Fees**

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee = \$ 150

### **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, the member firm is American Express Financial Advisors.

Member surcharge = \$ 600  
Pre-hearing process fee = \$ 750  
Hearing process fee = \$ 1,000

### **Forum Fees and Assessments**

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

One (1) Pre-hearing session with the Chairperson x \$ 450 = \$ 450

Pre-hearing conference: 06/09/2004 1 session

Two (2) Hearing sessions with the Chairperson x \$ 450 = \$ 900

Hearing Dates: 08/19/2004 2 sessions

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Total Forum Fees = \$ 1,350

The arbitrator has assessed \$ 675 of the forum fees jointly and severally to Robert Barton Ratliff and Virginia Dianne Ratliff.

The arbitrator has assessed \$ 675 of the forum fees to Bradford A. Gann.

### **Fee Summary**

Claimant, Robert Barton Ratliff and Virginia Dianne Ratliff is liable for:

Initial Filing Fee	= \$ 150
Forum Fees	= \$ 675
Total Fees	= \$ 825
Less payments	= \$ 625
Balance Due NASD Dispute Resolution	= \$ 200

American Express Financial Advisors, is liable for:

Member Fees	= \$ 2,350
Total Fees	= \$ 2,350
Less payments	= \$ 600
Balance Due NASD Dispute Resolution	= \$ 1,750

Respondent, Bradford A. Gann, is liable for:

Forum Fees	= \$ 675
Total Fees	= \$ 675
Less payments	= \$ 0
Balance Due NASD Dispute Resolution	= \$ 675

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

**ARBITRATOR**

Suanne M. Parro, CPA - Public Arbitrator, Presiding Chair

Arbitrator's Signature:

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Suanne M. Parro, CPA  
Public Arbitrator, Presiding Chair

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Signature Date

9/2/04  
Date of Service (NASD use only)

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Initial Filing Fee	= \$ 150
Forum Fees	= \$ 675
Total Fees	= \$ 825
Less payments	= \$ 625
Balance Due NASD Dispute Resolution	= \$ 200

American Express Financial Advisors, is liable for:

Member Fees	= \$ 2,350
Total Fees	= \$ 2,350
Less payments	= \$ 600
Balance Due NASD Dispute Resolution	= \$ 1,750

Respondent, Bradford A. Gann, is liable for:

Forum Fees	= \$ 675
Total Fees	= \$ 675
Less payments	= \$ 0
Balance Due NASD Dispute Resolution	= \$ 675

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

**ARBITRATOR**

Suanne M. Parro, CPA - Public Arbitrator, Presiding Chair

Arbitrator's Signature:



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