

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant/Counter-Respondent
Edward M. Rubio

Case Number: 04-05412

Name of the Respondents/Counter-Claimants
Lincoln Financial Advisors Corp.;
The Lincoln National Life Ins. Co.; and,
Charles Gary Shimmin

Hearing Site: Dallas, Texas

NATURE OF THE DISPUTE

Associated Person v. Member Firms and Associated Person

REPRESENTATION OF PARTIES

Claimant/Counter-Respondent Edward M. Rubio, hereinafter referred to as "Rubio": Karen Jewell, Esq., of the firm of Fossi, Jewell & Crain, located in Houston, Texas.

Respondents/Counter-Respondents Lincoln Financial Advisors Corp. ("LFA"), The Lincoln National Life Ins. Co. ("LNL") and Charles Gary Shimmin ("Shimmin"), hereinafter collectively referred to as "Respondents": Steve Schortgen, Esq., of the firm of Baker Botts L.L.P., located in Dallas, Texas.

CASE INFORMATION

Statement of Claim filed: July 9, 2004.

Rubio signed the Uniform Submission Agreement: July 16, 2004.

Statement of Answer and Counterclaim filed by LFA, LNL and Shimmin on: October 18, 2004.

Respondent LFA signed the Uniform Submission Agreement: September 2, 2004.

Respondent LNL signed the Uniform Submission Agreement: September 2, 2004.

Respondent Shimmin signed the Uniform Submission Agreement: October 4, 2004.

Rubio's Reply to LFA's and LNL's Counterclaims filed on: October 27, 2004.

Rubio's First Amended Statement of Claim filed on or about: November 15, 2004.

Respondents' Motion to Dismiss Rubio's Claims filed: June 30, 2005.

Rubio's Response to Respondents' Motion to Dismiss Rubio's Claims filed on: July 19, 2005.

Respondents' Reply In Support of Their Motion to Dismiss Rubio's Claims: July 26, 2005.

CASE SUMMARY

Rubio asserted the following causes of action: breach of contract; common law fraud; statutory fraud; violations of the Texas Deceptive Trade Practices-Consumer Protection Act; promissory estoppel; tortious interference with prospective business relations; theft of property; theft of services; and civil conspiracy. These causes of action related to actions that occurred during Rubio's employment with LFA and the alleged breach of his employment by Respondents.

Unless specifically admitted in its Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Respondents did not breach any written or oral contract that existed between Rubio and Respondents;
2. Rubio's claims are barred, in whole or in part, by Rubio's own material breach of the contracts; the statute of frauds; the parol evidence rule; the doctrines of waiver, termination and repudiation; and Rubio's failure to mitigate damages;
3. Rubio's claims are barred, in whole or in part, because Shimmin is not a party to the alleged contracts;
4. Respondents did not make, knowingly or recklessly, any material misrepresentations to Rubio and did not intend on him to rely on any alleged representations. Therefore, Respondents are not liable for fraud;
5. Respondents did not commit a wrongful act as required under the Texas Deceptive Trade Practices Act;
6. Rubio cannot recover under promissory estoppel;
7. Rubio cannot recover from Respondents for tortious interference, and the claims are barred, in whole or in part, by the doctrines of privilege and justification;
8. Rubio's claims under the Texas Theft Liability Act are barred, in whole or in part, because Respondents have not committed a criminal violation on which Rubio's claims could be based;
9. The Respondents did not engage in a conspiracy;
10. Rubio's claims are barred, in whole or in part, by the statute of limitations; and,
11. Respondent's actions did not proximately cause any of Rubio's alleged damages.

Respondents LFA and LNL asserted a counterclaim for breach of contract; unjust enrichment; and, conversion. These causes of action resulted from excess expenses in Rubio's expense account and Rubio's failure to repay a debit balance in his account.

Rubio denied the allegations of the Counterclaim and asserted the following defenses:

1. The Counterclaims are barred, in whole or in part, by Counterclaimants' own material breaches of contract and by the doctrines of waiver and unclean hands;
2. Counterclaimants have failed to fully perform and satisfy all conditions precedent under the Agent Contract between the parties;
3. Rubio is not liable for breach contract because he did not withhold any of Counterclaimants' money and property;
4. Rubio is not liable for money had and received because (1) he does not hold any

money that in equity and good conscience belongs to Counterclaimants, and (2) he has not been unjustly enriched by holding any money for which Counterclaimants are the rightful owners;

5. Rubio is not liable for conversion because he has not wrongfully assumed dominion and control over Counterclaimants' personal property and Counterclaimants did not own, possess, or have the right to immediate possession of any property in question; and,
6. Rubio has not caused, and Counterclaimants do not have, any damages.

RELIEF REQUESTED

Claimant Edward M. Rubio requested:

Compensatory Damages	In excess of \$5,000,000
Punitive Damages	In excess of \$10,000,000
Interest	Pre- and post-judgment as provided by law
Attorneys' Fees	To be determined
Other Costs	Including expert witness fees, cost of copies of depositions and other costs
Other Monetary/Non-Monetary Relief if any:	In addition or in the alternative, the fair market value of the Advisor Direct Program developed by Rubio and the amount of any profits obtained as a result of Respondents' unjust enrichment.

Respondents requested that Rubio's claims against them be dismissed and denied. Respondents LFA and LFL requested the following damages on their counterclaim:

Compensatory Damages	\$15,000.00
Interest	Pre- and post-judgment as provided by law
Attorneys' Fees	To be determined
Other Costs	Unspecified
Other Monetary/Non-Monetary Relief if any:	Unspecified.

Rubio requested that the counterclaim be denied.

OTHER ISSUES CONSIDERED AND DECIDED

On August 16, 2005, the Panel heard argument regarding Respondents' Motion to Dismiss. After consideration of the arguments and pleadings filed on the parties' behalf, the Panel determined, on or about August 18, 2005, that Rubio's claims under the Texas deceptive Trade Practices Act were dismissed. All other claims remained.

AWARD

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

1. Respondents/Counter-Claimants Lincoln Financial Advisors Corp. and The Lincoln National Life Ins. Co. are jointly and severally liable for and shall pay to the Claimant, Edward M. Rubio, the sum of \$2,100,000.00 as compensatory damages, plus interest at the rate of 6% per annum accruing from 30 calendar days after the award is served until the sum is paid in full;
2. Respondents/Counter-Claimants Lincoln Financial Advisors Corp. and The Lincoln National Life Ins. Co.'s Counterclaims are dismissed and denied in their entirety;
3. The claims asserted against Respondent Charles Gary Shimmin are dismissed and denied in their entirety;
4. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated in this award; and,
5. Any and all relief not specifically addressed herein, including punitive and/or treble damages, is denied.

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	= \$ 600.00
Counter claim	= \$ 750.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Lincoln Financial Advisors Corp. and The Lincoln National Life Ins. Co. are a party to the arbitration and the following member fees are assessed:

Member surcharge	= \$ 3,750.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,500.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

September 20-22, 2005 adjournment by Respondents	= \$ 1,200.00
--	---------------

Forum Fees and Assessments

The Panel has assessed forum 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:

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: January 13, 2005 1 session	
August 16, 2005 1 session	
Six (6) Hearing sessions @ \$1,200.00	= \$ 7,200.00
Hearing Dates: October 3, 2005 2 sessions	
October 4, 2005 2 sessions	
October 5, 2005 2 sessions	
<hr/> Total Forum Fees	<hr/> = \$ 9,600.00

The Panel has assessed \$4,800.00 of the forum fees to Edward M. Rubio and has assessed \$4,800.00 of the forum fees, jointly and severally, to Lincoln Financial Advisors Corp. and The Lincoln National Life Ins. Co.

Fee Summary

Claimant Edward M. Rubio is solely liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$ 4,800.00
Total Fees	= \$ 5,400.00
Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 3,600.00

Respondent Lincoln Financial Advisors Corp. is solely liable for:

Member Fees	= \$10,000.00
Less payments	= \$10,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent The Lincoln National Life Ins. Co. is solely liable for:

Member Fees	= \$10,000.00
Less payments	= \$10,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents Lincoln Financial Advisors Corp. and The Lincoln National Life Ins. Co. are jointly and severally liable for:

Filing Fee	= \$ 750.00
Forum Fees	= \$ 4,800.00
Total Fees	= \$ 5,550.00
Less payments	= \$ 5,075.00
Balance Due NASD Dispute Resolution	= \$ 475.00

NASD Dispute Resolution
Arbitration No. 04-05412
Award Page 6

Respondents Lincoln Financial Advisors Corp., The Lincoln National Life Ins. Co. and Charles Gary Shimmnin are jointly and severally liable for:


Adjournment Fee	= \$ 1,200.00
Less payments	= \$ 1,200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

ARBITRATION PANEL

Kurt L. Smith - Non-Public Arbitrator, Presiding Chairperson
Jack R. Settles - Non-Public Arbitrator
Douglas W. Gill, CFP - Non-Public Arbitrator

Concurring Arbitrators' Signatures


Kurt L. Smith
Public Arbitrator, Presiding Chairperson

10/17/05
Signature Date

Jack R. Settles
Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature
I dissent from this decision.

Douglas W. Gill, CFP
Non-Public Arbitrator

Signature Date

10/17/05 
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
Arbitration No. 04-05412
Award Page 6

Respondents Lincoln Financial Advisors Corp., The Lincoln National Life Ins. Co. and Charles Gary Shimmnin are jointly and severally liable for:

Adjournment Fee	= \$ 1,200.00
<u>Less payments</u>	<u>= \$ 1,200.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

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

ARBITRATION PANEL

Kurt L. Smith - Non-Public Arbitrator, Presiding Chairperson
Jack R. Settles - Non-Public Arbitrator
Douglas W. Gill, CFP - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Kurt L. Smith
Public Arbitrator, Presiding Chairperson


Jack R. Settles
Public Arbitrator

Signature Date

10/17/2005
Signature Date

Dissenting Arbitrator's Signature
I dissent from this decision.

Douglas W. Gill, CFP
Non-Public Arbitrator

Signature Date

10/17/05 Mm
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
Arbitration No. 04-05412
Award Page 6

Respondents Lincoln Financial Advisors Corp., The Lincoln National Life Ins. Co. and
Charles Gary Shimmitt are jointly and severally liable for:

Adjournment Fee	= \$ 1,200.00
Less payments	= \$ 1,200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

ARBITRATION PANEL

Kurt L. Smith - Non-Public Arbitrator, Presiding Chairperson
Jack R. Settles - Non-Public Arbitrator
Douglas W. Gill, CFP - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Kurt L. Smith
Public Arbitrator, Presiding Chairperson

Signature Date

Jack R. Settles
Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature
I dissent from this decision.



Douglas W. Gill, CFP
Non-Public Arbitrator

17 October 2005
Signature Date

10/17/05 R/m
Date of Service (For NASD Dispute Resolution office use only)