

Award
NASD Dispute Resolution

Wesley E. Franklin and Carole A. Franklin vs. TIAA-CREF Individual & Institutional Services, LLC.

Case Number: 05-01838

Hearing Site: Philadelphia, PA

Nature of the Dispute: Customers vs. Member.

REPRESENTATION OF PARTIES

Claimants, Wesley E. Franklin and Carole A. Franklin, hereinafter collectively referred to as "Claimants", were represented by John J. McGovern, Jr., Esq., Scranton, Pennsylvania.

Respondent, TIAA-CREF Individual & Institutional Services LLC ("TIAA-CREF"), hereinafter referred to as "Respondent", was represented by H. Marc Tepper, Esq. and Donald W. Myers, Esq., Buchanan Ingersoll PC, Pittsburgh, Pennsylvania.

CASE INFORMATION

Statement of Claim filed on April 4, 2005.

Claimants signed the Uniform Submission Agreement on March 15, 2005.

Statement of Answer and Counterclaim filed by Respondent on July 20, 2005.

Respondent did not sign the Uniform Submission Agreement.

Respondent filed a Motion to Dismiss on July 20, 2005.

CASE SUMMARY

Claimants asserted the following causes of action, among others: *respondeat superior*, conversion, breach of fiduciary duty, failure to supervise, violation of the Pennsylvania Securities Act, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. The causes of action relate to annuities.

Respondent asserted the following cause of action in its Counterclaim: Claimant Wesley E. Franklin improperly received and retained overpayments made by Respondent.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses, among others: failure to state a claim upon which relief may be granted; equitable doctrines of waiver, estoppel and laches; Claimants' authorization of transactions; failure to mitigate damages; statute of limitations; Respondent did not act with scienter, recklessness or with any improper intent; Respondent exercised due care and diligence and properly supervised its representatives; and Claimants' negligence, comparative negligence and contributory

negligence.

RELIEF REQUESTED

Claimants requested: compensatory damages in the amount of \$ 69,628.12, lost opportunity cost, attorneys' fees, costs, pre and post judgment interest at a legal rate, punitive damages, and such other and further relief as may be just and proper.

Respondent in its Counterclaim requested: compensatory damages in the amount of \$ 56,209.31, interest, costs, and attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Arbitration Code (the "Code") and having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

The Panel denied Respondent's Motion to Dismiss by Order dated April 20, 2006.

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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable and shall pay to Claimant Wesley E. Franklin compensatory damages in the amount of \$ 69,628.12, plus interest at the rate of 6%, which shall accrue from August 13, 2003 through the date the Award is paid in full;
2. Respondent's Counterclaim is dismissed with prejudice;
3. Respondent is liable to and shall pay to Claimants the sum of \$225.00 as reimbursement for the claim filing fee;
4. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and
5. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

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	= \$ 225.00
Counter claim	= \$ 1,000.00

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, TIAA-CREF is a party.

Member surcharge	= \$ 1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 1,700.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

April 25-26, 2006, adjournment by Claimants	= WAIVED
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Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. 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:

One (1) Pre-hearing session with Panel @ \$ 750.00	= \$ 750.00
Pre-hearing conference: October 20, 2005 1 session	

Two (2) Hearing sessions @ \$ 750.00	= \$ 1,500.00
Hearing Dates: July 18, 2006 2 sessions	
Total Forum Fees	= \$ 2,250.00

The Panel has assessed \$ 3,750.00 of the forum fees to TIAA-CREF.

Fee Summary

1. Claimants are solely liable for:

Filing Fee	= \$ 225.00
Total Fees	= \$ 225.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Refund Due Claimant	= \$ 1,200.00

2. Respondent is solely liable for:

Filing Fee	= \$ 1,100.00
Member Fees	= \$ 3,550.00
<u>Forum Fees</u>	<u>= \$ 2,250.00</u>
Total Fees	= \$ 6,900.00
<u>Less payments</u>	<u>= \$ 8,000.00</u>
Refund Due Respondent	= \$ 1,100.00

ARBITRATION PANEL

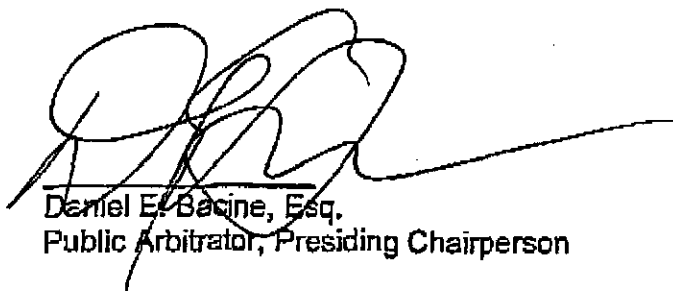
Daniel E. Bacine, Esq.	-	Public, Presiding Chairperson
John W. Lear	-	Public Arbitrator
David Denison	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

NASD Dispute Resolution

Arbitration No. 05-01838

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Concurring Arbitrators' Signature

Daniel E. Basine, Esq.
Public Arbitrator, Presiding Chairperson

7/31/06
Signature Date

John W. Lear
Public Arbitrator

Signature Date

David Denison
Non-Public Arbitrator

Signature Date

7/31/06.

Date of Service (For NASD Dispute Resolution use only)

07-27-06 06:27pm From-NASD DISPUTE RESOLUTION

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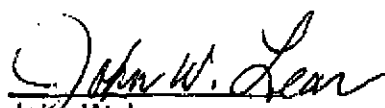
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Concurring Arbitrators' Signature

Daniel E. Bacine, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date


John W. Lear
Public Arbitrator

7/26/2006
Signature Date

David Denison
Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution use only)

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Concurring Arbitrators' Signature

Daniel E. Badne, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

John W. Lear
Public Arbitrator

Signature Date



David Denison
Non-Public Arbitrator

July 28, 2006
Signature Date

Date of Service (For NASD Dispute Resolution use only)