

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant  
Jewel Cody Drinkard

Case Number: 05-03136

Names of Respondents  
AXA Advisors, LLC  
Kelly Gene Burke

Hearing Site: Charlotte, North Carolina

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Nature of the Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

For Jewel Cody Drinkard, hereinafter referred to as "Claimant": David Scott Drinkard, Sr., Charlotte, North Carolina.

For AXA Advisors, LLC ("AXA"), hereinafter referred to as "Respondent AXA": Eileen Stassa, Vice President and Counsel, AXA Equitable Life Insurance Company, New York, New York.

For Kelly Gene Burke ("Burke"), hereinafter referred to as "Respondent Burke": John E. Spainhour, Esq., McAngus Goudelock & Courie, PLLC, Charlotte, North Carolina.

**CASE INFORMATION**

Statement of Claim filed on or about: June 17, 2005.

Claimant signed the Uniform Submission Agreement: August 6, 2005.

Statement of Answer and Motion to Dismiss jointly filed by Respondents on or about: October 3, 2005.

Respondent AXA signed the Uniform Submission Agreement: September 30, 2005.

Respondent Burke did not file an executed Uniform Submission Agreement.

Claimant's Opposition to Respondents' Motion to Dismiss filed on or about: January 9, 2006.

Respondents AXA and Burke's Reply to Claimant's Opposition filed on or about: January 24, 2006.

Motion to Dismiss for Non-Compliance filed by Respondent AXA on or about: August 3, 2006.

Claimant's Response to Respondent AXA's Motion to Dismiss for Non-Compliance filed on or about: August 12, 2006.

Motion to Join in Respondent AXA's Motion to Dismiss for Non-Compliance filed by Respondent Burke on or about: August 23, 2006.

### **CASE SUMMARY**

Claimant asserted the causes of action of misrepresentation and negligence. The causes of action relate to Respondents' allegedly erroneous placement of Claimant's monies in a "cash management fund," and Respondents' investment in variable annuities which were allegedly guaranteed to have a 6% annual increase in cash value, regardless of market performance.

Unless specifically admitted in their Answer, Respondents AXA and Burke (hereinafter collectively referred to as "Respondents") denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$62,778.99 and punitive damages in the amount of \$37,000.00.

Respondents AXA and Burke requested that the Statement of Claim be dismissed in all respects; that costs be awarded against Claimant in favor of them; that Respondents AXA and Burke be awarded attorneys' fees; and, that Respondents be awarded such other and further relief as is deemed just proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

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

On or about February 21, 2006, the Panel conducted a pre-hearing telephonic conference to hear oral argument on Respondents' October 3, 2005, Motion to Dismiss. Thereafter, the Panel ruled that the decision on the Motion to Dismiss was held in abeyance, pending receipt of all testimony in this matter. On or about August 28, 2006, the Panel issued an Order on Respondent AXA's Motion to Dismiss for Non-Compliance and, consistent with the Panel's prior ruling, deferred a decision pending receipt of all testimony in this matter.

At the close of Claimant's case in chief, Respondents made an ore tenus Motion for a Directed Verdict to Dismiss based upon the following: (1) a signed Settlement Agreement and Release, dated February 1, 2004, covering all matters alleged in the claim; (2) statute of limitations violations as to both three year state law and six year NASD rules; (3) no written proof of the alleged guarantee having been made, as alleged; and, (4) Claimant's failure to mitigate damages. Claimant objected, asserting that she had been pursuing the claim since 1999, and that she had no reason to purchase the annuities if it had not been represented as being a better product than what she previously had. Consistent with its prior rulings, the Panel deferred a decision pending completion of testimony.

Both before the evidentiary hearing and during the evidentiary hearing, Claimant consistently avoided complying with the obligation to produce documents in her possession or under her control that are presumed to be discoverable under the NASD Discovery Guide, of which she had a copy. Claimant is hereby censured for her failure to produce timely a number of documents requested by Respondents in accordance with the NASD Rules and for her flagrant disregard of the discovery orders issued prior to the evidentiary hearing. Upon being ordered to do so by the Panel at the evidentiary hearing, Claimant finally produced on the second day of the evidentiary hearing certain documents that had been requested by Respondents during the discovery period. Further, Claimant failed to honor her 20 day exchange obligations under the NASD Rules and failed to submit a witness list, both of which obligations had been clearly explained in prior orders issued during the discovery process. Such conduct cannot be tolerated if the arbitration process is to proceed in an orderly fashion.

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

Claimant's claims are denied in their entirety. The Panel rules in favor of Respondents on all issues.

Any and all claims for relief not specifically addressed herein, including Claimant's request for punitive damages and Respondents AXA and Burke's request for attorneys' fees, are 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	= \$ 225.00
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The Panel denied Claimant's request for a permanent waiver of the initial claim filing fee.

#### **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, Respondent AXA is a member firm and a party.

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

Total Member Fees = \$3,550.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

July 25–27, 2006, adjournment requested by Respondents AXA and Burke = \$ 750.00  
The Panel assessed \$375.00 of the adjournment fee to Claimant.  
The Panel assessed \$375.00 of the adjournment fee to Respondents, jointly and severally.

**Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

No three-day cancellation fees were incurred in this matter.

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were incurred in this matter.

**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) Decision on discovery-related motions on the papers  
with (3) three arbitrators @ \$600.00 = \$ 600.00  
Respondent submitted a discovery-related motion

One (1) Pre-hearing session with a single arbitrator @ \$450.00/session = \$ 450.00  
Pre-hearing conference: June 16, 2006 1 session

Two (2) Pre-hearing sessions with the Panel @ \$750.00/session = \$1,500.00  
Pre-hearing conferences: December 14, 2005 1 session  
February 21, 2006 1 session

Four (4) Hearing sessions @ \$750.00/session = \$3,000.00  
Hearing Dates: November 2, 2006 2 sessions  
November 3, 2006 2 sessions

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Total Forum Fees = \$5,550.00

The Panel has assessed \$1,850.00 of the forum fees to Claimant.  
The Panel has assessed \$1,850.00 of the forum fees to Respondent AXA.  
The Panel has assessed \$1,850.00 of the forum fees to Respondent Burke.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

### **Fee Summary**

Claimant is solely liable for:

Initial Filing Fee	= \$ 225.00
Adjournment Fee	= \$ 375.00
Forum Fees	= \$1,850.00
Total Fees	= \$2,450.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$2,450.00

Respondent AXA is solely liable for:

Member Fees	= \$3,550.00
Forum Fees	= \$1,850.00
Total Fees	= \$5,400.00
Less payments	= \$3,550.00
Balance Due NASD Dispute Resolution	= \$1,850.00

Respondent Burke is solely liable for:

Forum Fees	= \$1,850.00
Total Fees	= \$1,850.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$1,850.00

Respondents are jointly and severally liable for:

Adjournment Fee	= \$ 375.00
Total Fees	= \$ 375.00
Less payments	= \$ 375.00
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**

Zeb E. Barnhardt, Jr., Esq.	-	Public Arbitrator, Presiding Chairperson
Philip H. DeTurk, Esq.	-	Public Arbitrator
M. Bruce Adelberg	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/  
Zeb E. Barnhardt, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

November 8, 2006  
Signature Date

/s/  
Philip H. DeTurk, Esq.  
Public Arbitrator

November 9, 2006  
Signature Date

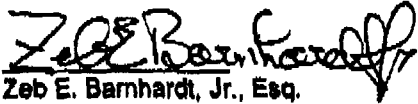
/s/  
M. Bruce Adelberg  
Non-Public Arbitrator

November 8, 2006  
Signature Date

November 9, 2006  
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution  
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Zeb E. Barnhardt, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

11/08/06  
Signature Date

Philip H. DeTurk, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

M. Bruce Adelberg  
Non-Public Arbitrator

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Signature Date

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Public Arbitrator, Presiding Chairperson

Signature Date

Philip H. DeTurk, Esq.  
Public Arbitrator

Signature Date

M. Bruce Adelberg  
M. Bruce Adelberg  
Non-Public Arbitrator

11/8/06  
Signature Date

Date of Service (For NASC Dispute Resolution office use only)



Balance Due NASD Dispute Resolution

= \$ 0.00

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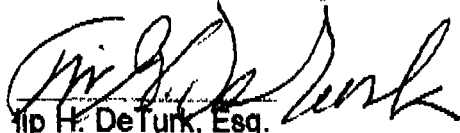
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lip H. DeTurk, Esq.	-	Public Arbitrator
Bruce Adelberg	-	Non-Public Arbitrator

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E. Barnhardt, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

  
Philip H. DeTurk, Esq.  
Public Arbitrator

  
Signature Date

Bruce Adelberg  
Non-Public Arbitrator

Signature Date

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