

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

American Express Financial Advisors, Inc., and
IDS Life Insurance Company

Claimants and Counter-Respondents,

v.

No. 95-00315

Darryl Witkowski, and
A.G. Edwards & Sons, Inc.

Respondents and Counter-Claimants.

REPRESENTATION OF PARTIES

Claimants and Counter-Respondents American Express Financial Advisors, Inc. and IDS Life Insurance Company ("Claimants") were represented by Eric D. Brandfonbrener, Esq. of Grippo & Elden located in Chicago, Illinois.

Respondents and Counter-Claimants Darryl Witkowski and A.G. Edwards & Sons, Inc. ("Respondents") were represented by Clay L. Grumke, Esq. of A.G. Edwards & Sons, Inc. located in St. Louis, Missouri.

CASE INFORMATION

The Statement of Claim was filed on or about January 19, 1995.

The Statement of Answer and Counterclaim was filed on or about April 3, 1995.

Claimants' Answer to Respondents' Counterclaim was filed on or about April 17, 1995.

The Amended Statement of Claim was filed on or about October 10, 1995.

Respondents' Answer to the Amended Statement of Claim was filed on or about October 26, 1995.

Claimant American Express Financial Advisors, Inc.'s Submission Agreement was signed on January 17, 1995.

Claimant IDS Life Insurance Company's Submission Agreement was signed on January 17, 1995.

Respondent A.G. Edwards & Sons, Inc.'s Submission Agreement was signed on March 31, 1995.

Respondent Darryl Witkowski's Submission Agreement was signed on March 14, 1995.

HEARING INFORMATION

A pre-hearing conference was held on July 10, 1996 for one (1) session and August 23, 1996 for one (1) session.

The Hearing was held on: August 27, 1996 for two (2) sessions, and August 28, 1996 for one (1) session.

The Hearing was held in Milwaukee, Wisconsin.

CASE SUMMARY

Claimants alleged that Respondent Darryl Witkowski (sometimes referred to as "Witkowski") was a Personal Financial Planner for American Express Financial Advisors, Inc. and IDS Life Insurance Company ("IDS"). Claimants maintained that Witkowski voluntarily resigned from IDS and began working for Respondent A.G. Edwards & Sons, Inc. ("A.G. Edwards"). Claimant asserted that Witkowski refused to comply with, and violated the terms of an Agreement (the "Agreement") which Witkowski entered into with IDS. Claimants contended that the Agreement contained, among other things, a covenant which restricted Witkowski from soliciting or servicing the IDS customers he was assigned when he was at IDS. Claimants alleged that Respondent A.G. Edwards actively aided and abetted Witkowski's breach of his obligation to IDS. Claimants asserted the following claims, including: Breach of Agreements; Breach of Fiduciary Duty; Unlawful Interference with Contracts; Unfair competition; and Misappropriation of Trade Secrets.

Respondents denied all liability to Claimants in the Statement of Answer. Respondents alleged that Claimants have attempted to restrict reasonable and appropriate competition by a broker who decided to seek employment with a competing investment firm in order to better service his clients. Respondents asserted that Respondent Witkowski appropriately conducted his business and his transfer from one firm to another in compliance with acceptable industry standards, the law of the

State of Wisconsin, and equitable and fair means of business competition. Respondents alleged that IDS does not have an enforceable contract under Wisconsin Law.

RELIEF REQUESTED

Claimants requested that the panel:

1. Direct Respondents to return all copies of IDS documents, including all IDS customer records and IDS computer software, in their possession or control;
2. Award compensatory damages in an amount to be shown at the Hearing;
3. Award IDS punitive damages; and
4. Grant such other relief as appropriate.

Respondents requested:

1. That all claims brought by IDS be dismissed;
2. That the arbitrators find that injunctive relief entered by the U.S. District Court be discontinued;
3. That damages be entered in favor of Witkowski;
4. That Claimants pay Respondents for costs and attorneys' fees; and
5. That the arbitrators award exemplary damages.

OTHER ISSUES CONSIDERED & DECIDED

The Panel finds that, having answered the claim, appeared and testified at the hearing, and after having filed a duly executed Uniform Submission Agreement, Respondent IDS Life Insurance Company is bound by the determination of the arbitration panel on all issues submitted, regardless of whether a portion of this dispute may involve IDS's insurance business.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

- (1) That Respondents Darryl Witkowski and A.G. Edwards & Sons, Inc. are jointly and severally liable for, and shall pay to Claimants American Express Financial Advisors, Inc. and IDS Life Insurance Company compensatory damages in the amount of Five Thousand Dollars and No Cents (\$5000.00); and
- (2) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby dismissed in their entirety with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were two (2) pre-hearing session x \$300 = \$600 in forum fees, and there were three (3) hearing sessions x \$750 = \$2,250 in forum fees. Total forum fees = \$2,850. Pursuant to §10205(b) of the NASD Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10205(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to §10205(c) of the NASD Code of Arbitration Procedure, Claimants American Express Financial Advisors, Inc. and IDS Life Insurance Company are jointly and severally liable for, and shall pay forum fees in the amount of \$675. Pursuant to §10333 of the NASD Code of Arbitration

Procedure, Claimant American Express Financial Advisors, Inc. and IDS Life Insurance Company are each liable for, and shall each pay the Member Surcharge in the amount of \$350.

Pursuant to §10205(c) of the NASD Code of Arbitration Procedure, Respondents Darryl Witkowski and A.G. Edwards & Sons, Inc are jointly and severally liable for, and shall pay forum fees in the amount of \$1,425.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Richard P. Franz
Richard P. Franz
Chairperson
Industry Arbitrator

September 24, 1996
Dated:

/s/ Robert F. O'Keef
Robert F. O'Keef
Panelist
Industry Arbitrator

September 27, 1996
Dated:

/s/ Gerald A. Grossman
Gerald A. Grossman
Panelist
Industry Arbitrator

September 26, 1996
Dated:

For NASD use only:
Date award served on the parties: October 9, 1996