

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

David A. Gingras

96-01251

Name of Respondents

Equitable Life Assurance Society  
of the United States  
Equitable Variable Life Insurance Co.  
Equico Securities, Inc.  
Raymond Barry  
Charles R. Datres  
James H. Houck  
Mark A. Swartz  
George W. Karr, Jr.

REPRESENTATION

Claimant David A. Gingras ("Claimant") was represented by John R. Gingras, Esq., Broomall, PA.

Respondents Equitable Life Assurance Society of the United States ("ELAS"), Equitable Variable Life Insurance Co. ("EVLICO"), Equico Securities, Inc. ("EQUICO"), Raymond Barry ("Barry"), Charles R. Datres ("Datres"), James H. Houck ("Houck"), Mark A. Swartz ("Swartz") and George W. Karr, Jr. ("Karr") were represented by Eileen Wishnia, Esq., Equitable Life Assurance Society, New York, NY.

CASE INFORMATION

The Statement of Claim was filed March 21, 1996.

Claimant's Uniform Submission Agreement was signed March 14, 1996.

The Joint Statement of Answer of ELAS, EVLICO, Equico, Barry, Datres, Houck, Swartz and Karr (collectively "Respondents") was filed July 26, 1997.

ELAS' Uniform Submission Agreement was signed July 25, 1996.

EVLICO's Uniform Submission Agreement was signed July 25, 1996.

EQUICO's Uniform Submission Agreement was signed July 25, 1996.

Barry's Uniform Submission Agreement was signed July 22, 1996.

Datres' Uniform Submission Agreement was signed July 23, 1996.

Houck's Uniform Submission Agreement was signed July 23, 1996.

Swartz's Uniform Submission Agreement was signed July 23, 1996.

Karr's Uniform Submission Agreement was signed July 23, 1996.

### HEARING INFORMATION

Hearing Dates/Sessions: February 24, 1997/two sessions  
February 25, 1997/two sessions  
March 10, 1997/two sessions  
April 8, 1997/two sessions

Hearing Location: NASD Regulation District Office  
Philadelphia, PA

### CASE SUMMARY

Claimant alleged, among other things, that Respondents made an inaccurate and/or misleading statement in an amended Uniform Termination Notice ("U-5") filed with the NASD Regulation following Claimant's termination of employment. Claimant alleged that prior to February 1994, he was licensed as a Life Insurance Agent under contract with ELAS, assigned to the Karr Swartz Agency and that his registration to sell securities had been placed under a voluntary termination status effective May 3, 1990. Claimant alleged that due to the termination of his license to sell securities, he neither received compensation, wrote any applications or orders nor solicited any person to purchase such products through him. Claimant alleged that in February 1994, Karr notified Gingras that as he was suspected of soliciting a variable life insurance policy sale during the period when he was not licensed to sell securities, his employment would be terminated. Claimant alleged in fact his individual agent's contract with ELAS was terminated. Claimant alleged that the customer he was "suspected" of soliciting did not establish an account, file an application or file information related to suitability and that the customer had been referred, by Claimant, to a registered representative employed by Respondents to answer the technical questions posed by the customer about variable life insurance products.

Claimant alleged that following the termination of employment, counsel for Respondents informed Claimant that an amended/updated U-5 would be filed with the NASD. Claimant alleged that counsel for Respondents was informed that as Claimant was not licensed by the NASD, any such action would be viewed as an intentional misrepresentation. Thereafter, Claimant alleged, he heard nothing further as to any filing of the amended/updated U-5 even though ELAS would be required to provide a copy of the U-5 to Claimant.

Claimant alleged that a review of the NASD Central Registration Depository showed that an amended/updated U-5 was received from Respondents on March 16, 1994 which stated that Claimant was "suspected of soliciting . . ." without further comment. In addition, Claimant alleged that the amended/updated U-5 stated in response to query #15 of the U-5 that Claimant was, at the time of termination, under internal review for fraud or violation of investment related statutes, regulations, rules or industry standards of conduct. Claimant alleged that Respondents failed to determine the facts which could easily have been done by inquiring of the customer he was suspected of soliciting and their own registered representative who actually discussed the specifics of the variable life insurance products with the customer.

Claimant alleged that Respondents violated the Articles and By-laws of the NASD as well as the Rules of Conduct as specified therein. Specifically, Claimant alleged that the intentional filing of an inaccurate statement on the U-5 violated NASD Rule 1000, particularly IM-1000-1, in that Respondents made statements which were incomplete, inaccurate so as to be misleading or which would tend to mislead. Claimant alleged that this filing was done in bad faith in negligent or intentional disregard for the Rules

of Conduct and Fair Practice. Claimant alleged that prospective employers in the insurance industry have informed Claimant that the misrepresentation made on the amended/updated U-5 would have to be cleared from his registration before he would be hired or provided a contract to sell life insurance.

Respondents denied all allegations of wrongdoing as asserted by Claimant in the Statement of Claim and specifically maintained, among other things, that Claimant's claim is barred by the statute of limitations. Further, Respondents maintained that they are not liable to Claimant because the information reported in the U-5 is protected by an absolute and/or conditional privilege. Respondents maintained that they acted in good faith inasmuch as they had reasonable grounds to believe that the information reported in the U-5 was accurate. Respondents maintained that Claimant has failed to show that he sustained any damages as the result of the information reported on the U-5.

Respondents maintained that on February 1, 1988 Claimant became an agent of Equitable Life and then, pursuant to an agreement dated April 4, 1989, became a representative of Equico, authorized to solicit customers for Equico approved products. Respondents maintained that on July 26, 1989 the District Business Conduct Committee of the NASD filed a complaint against Claimant based on two customer complaints concerning securities purchased through Claimant but while he was employed by another broker-dealer. Respondents maintained that in a decision dated April 26, 1990, Claimant was censured, fined \$45,000.00 and suspended from association with any member of the NASD in any capacity for six months.

Respondents maintained that Claimant entered into an arrangement with the NASD in which Claimant would pay the fine over a five year period but that the six month period of suspension would not commence until the fine was paid in full. Thus, Respondents maintained that Claimant was no longer licensed to solicit or sell variable products or other securities and continued until his termination of employment in February 1994. Respondents maintained that Claimant was still an agent of Respondent and licensed to sell term and whole life insurance only, no equity products.

Respondents maintained that in February 1994, Respondents found correspondence which led them to suspect that Claimant had made a proposal to a customer for the sale of a variable life insurance policy which is an equity product. Respondents maintained that the correspondence indicated that Claimant wanted the customer to take money he had in the bond market and invest that money in a variable life insurance policy from Equitable. Respondents maintained that at no point did Claimant refer the sale to a registered representative. Thus, after an investigation Claimant was terminated and a U-5 was filed, dated March 16, 1994, stating that Claimant was terminated for cause because he was suspected of soliciting the sale of a variable product during a period of suspension from the NASD. Respondents maintained that a copy of the U-5 was sent to Claimant contemporaneously with the filing. Therefore, Respondents maintained that Claimant's claim of defamation is barred by the statute of limitations which is one year in the state of Pennsylvania. In addition, Respondents maintained that the statement made on the U-5 was not defamatory because the Form U-5 is privileged.

### **RELIEF REQUESTED**

Claimant requested relief in the form of compensatory and punitive damages in the amount of \$1,000,000.00 (one million dollars) and expungement of this report from his registration with the Central Registration Depository.

Respondent requested that the Claimant's claim be denied; that they be awarded attorney's fees and other costs and expenses incurred in this arbitration.

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

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 the NASD.

### **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 Equitable Life Assurance Society of the United States, Equitable Variable Life Insurance Co., Equico Securities, Inc. Mark A. Swartz and George Karr are jointly and severally liable to and shall pay to Claimant \$45,000.00.
2. That the claims against Raymond Barry, Charles R. Datres and James H. Houck are denied.
3. That the request for punitive damages is denied.
4. That each party shall pay its own costs and expenses, including attorney's fees.
5. That any relief not specifically addressed herein is denied.

### **FORUM FEES**

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

8 sessions x \$1,500.00 = \$12,000.00

Forum Fees are assessed to Claimant in the amount of \$6,000.00 and to Respondents ELAS, EVLICO, EQUICO, Swartz and Karr, jointly and severally, in the amount of \$6,000.00. Claimant is to receive credit for the \$1,500.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net assessment due from Claimant of \$4,500.00. Respondents have a net assessment due of \$6,000.00.

Fees are payable to the National Association of Securities Dealers Regulation, Inc.

DATE

4/17/97

CONCURRING ARBITRATORS' SIGNATURES

Sheldon Seligsohn  
Sheldon Seligsohn, Chairman  
Public Arbitrator

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Doris J. Dabrowski  
Public Arbitrator

DISSENTING ARBITRATOR'S SIGNATURE

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Charles W. Lake  
Industry Arbitrator

Date Decision Served by NASD Regulation: April 25, 1997

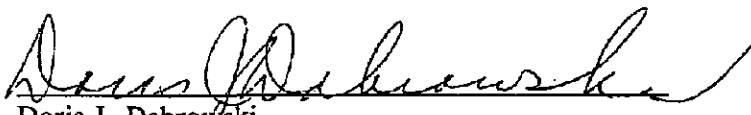
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4/17/97

  
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Industry Arbitrator

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