

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Thomas W. Payne,  
Claimant / Counter-Respondent

v.

99-02154  
Des Moines, Iowa

Lincoln National Life Insurance Company, and  
Lincoln Financial Advisors Corporation,  
Respondents / Counter-Claimants

and

Mary Ann Burris and Barbara Crosby,  
Respondents / Counter-Claimants

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**REPRESENTATION OF PARTIES**

Thomas W. Payne ("Claimant") was represented by David L. Charles, Esq., and Ed Mansfield, Esq., Belin Lamson McCormick Zumbach Flynn, Des Moines, Iowa.

Lincoln National Life Insurance Company ("Lincoln National") and Lincoln Financial Advisors Corporation ("Lincoln Financial"), hereinafter referred to as ("Lincoln Respondents") were represented by Denny L. Dennis, Esq., and Todd Strother, Esq., Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, Iowa.

Mary Ann Burris ("Burris") and Barbara Crosby ("Crosby"), hereinafter referred to as "Individual Respondents" were represented by George A. LaMarca, Esq., and Justin E. LeVan, Esq., LaMarca & Landry, PC, West Des Moines, Iowa.

**CASE INFORMATION**

The Statement of Claim was filed on or about May 10, 1999. The Submission Agreement of Claimant Thomas W. Payne was signed on or about May 4, 1999.

Statement of Answer was filed by Respondents Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation on or about July 21, 1999. Substituted Answer, Affirmative Defenses, and Counterclaims of the Lincoln Respondents was filed on or about November 1, 1999. The Submission Agreement of Respondent Lincoln National Life Insurance Company was signed on or about July 19, 1999, by Denny L. Dennis. The Submission Agreement of Respondent Lincoln Financial Advisors Corporation was signed on or about July 19, 1999, by Denny L. Dennis.

An Additional Answer was submitted by Respondents Burris and Crosby on or about July 16, 1999. Substituted Answer and Affirmative Defenses, and Counterclaims was filed by Respondents Burris and Crosby on or about October 27, 1999. The Submission Agreement of Respondent Mary Ann Burris was signed on or about July 15, 1999. The Submission Agreement of Respondent Barbara Crosby was signed on or about July 15, 1999.

Claimant's Response to Substituted Answer, Affirmative Defenses and Counterclaims of all Respondents filed on or about December 17, 1999.

Respondents Burris and Crosby filed a Rule 10314(b)(2)(C) Motion on or about December 16, 1999. Claimant filed a Resistance to said Motion on or about December 21, 1999.

Motion to Bifurcate and Stay Discovery on Damage Issues filed by the Lincoln Respondents on or about August 30, 1999. Resistance to Motion to Bifurcate and Stay Discovery on Damage Issues filed by Claimant on or about September 16, 1999. Reply in Support of Motion to Bifurcate and Stay Discovery on Damage Issues filed by the Lincoln Respondents on or about October 8, 1999.

All Respondents filed an Application re: Hearing Site. Claimant's Original Claim requested that the hearing be held in Des Moines, Iowa.

The Lincoln Respondents filed a Motion for Summary Judgment and Brief in Support Thereof on or about January 5, 2001. Claimant filed a Resistance to the Lincoln Respondents' Motion for Summary Judgment on or about February 1, 2001. The Lincoln Respondents filed a Reply Brief in support of their Motion for Summary Judgment on or about February 15, 2001.

Respondents Burris and Crosby filed a Motion for Summary Judgment on or about January 11, 2001. Claimant filed a Resistance to the Individual Respondents' Motion for Summary Judgment on or about February 1, 2001.

Claimant's Statement of Material Facts in Resistance to Motions for Summary Judgment, Claimant's combined brief in Resistance to Motions for Summary Judgment filed by Respondents, and Response to Burris and Crosby Statement of Alleged Facts filed on or about February 1, 2001.

### **CASE SUMMARY**

Claimant asserted causes of action against the Lincoln Respondents including: interference with contract, interference with business relations, aiding and abetting breaches of fiduciary duty, fraud and fraudulent concealment, and unjust enrichment. Claimant asserted the causes of action against Respondents Burris and Crosby including: breach of contract, breach of fiduciary duty, and accounting between partners. Claimant

submitted the following issue for resolution to the Panel, "Whether an insurance company can encourage a long-time successful Agent to: build a personal practice/agency, introduce new Agents/Brokers, and engage in efforts to build a long-term practice/ agency using the Successor Building Concept, only to have the insurance company interfere with, actively encourage, conspire with, and facilitate the force-out of that Agent by the individuals he brought into the practice/agency to run it?"

Unless specifically admitted in their Answer, the Lincoln Respondents denied the allegations made in the Statement of Claim and asserted defenses including the following: where a party acts within its contractual and legal rights, it cannot be held liable for tortious interference with performance of contract, qualified privilege, Respondent Lincoln National had the right to terminate Claimant's services as an independent contractor, and legally and validly did so, and no such cause of action as "aiding and abetting breaches of fiduciary duty" exists under Iowa law. The Lincoln Respondents filed a Counterclaim for tortious interference with contractual relations and defamation.

Unless specifically admitted in their Answer, the Individual Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: there has been no breach of contract/partnership agreement, the Statute of Frauds, failure to state a claim upon which relief can be granted, unilateral contract, prevention or frustration of performance, lack of consideration, renunciation, prior material total breach, the terms of the alleged partnership agreement are unconscionable and therefore unenforceable, the doctrines of estoppel and waiver, failure to mitigate damages and public policy. Respondents Burris and Crosby filed a Counterclaim against Claimant for tortuous interference with prospective business advantage, defamation and spoliation of evidence.

### **RELIEF REQUESTED**

Claimant requested an award in the amount in excess of \$600,000.00 in addition to exemplary damages. In correspondence to NASD dated May 24, 1999, Claimant requested damages between \$6,000,000.00 and \$10,000,000.00.

The Lincoln Respondents requested that the claims asserted against them be denied in their entirety and other unspecified damages. The Lincoln Respondents requested damages in excess of \$300,000.00 plus punitive damages in their counterclaims.

Respondents Burris and Crosby requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees, as well as award actual damages estimated between \$30,000.00 and \$300,000.00 and punitive damages on their tortious interference counterclaim, plus \$175,000.00 for Crosby and \$150,000.00 to Burris on their defamation counterclaim, and damages including unspecified discovery sanctions and that the trier of fact draw an unfavorable inference in their spoliation of evidence counterclaim.

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

The parties agreed to appoint a special master to resolve their discovery issues.

The Panel granted the Lincoln Respondents Motion to Bifurcate and Stay Discovery on Damage Issues on or about January 7, 2000. In the same Order, the Panel denied the Rule 10314(b)(2)(C) Motion submitted by Respondents Burris and Crosby.

The Panel denied Claimant's Motion to Rescind the Panel's January 7, 2000, Order to Bifurcate Liability and Damages. Upon reconsideration after the parties subsequent agreement, the Panel granted the Motion on or about April 24, 2000.

The Panel granted the parties' request to move the hearing to Des Moines, Iowa, and ordered the parties to pay for the arbitrators' expenses and hearing expenses on or about January 11, 2001. To the extent any of these fees remain, they are to be paid by the parties pursuant to their agreement.

After oral arguments on February 16, 2001, the Panel denied the Motions for Summary Judgment submitted by the Lincoln Respondents jointly and Respondents Burris and Crosby jointly on or about February 23, 2001.

At hearing on June 7, 2001, all Respondents moved for a directed verdict against Claimant. The Panel took all motions under advisement. To the extent not previously ruled upon, each of said Motions is hereby overruled.

Claimant filed a Motion to enforce Sequestration Order on or about June 11, 2001. The Panel granted in part and denied in part said Motion by letter on or about June 15, 2001.

Claimant filed a Motion to Use Documents During Cross Examination and/or Rebuttal Obtained Subsequent to Monday July 23, 2001, at 5:00 PM on or about August 28, 2001. The Panel overruled said Motion on or about October 2, 2001.

A Motion for Post Hearing Briefs was filed on or about September 24, 2001, by the Lincoln Respondents. Claimants' Response to said Motion was filed on or about September 28, 2001. The Panel granted said Motion on or about October 10, 2001.

Claimant moved for Directed Verdict against all Respondents' Counterclaims at hearing on or about October 9, 2001. The Panel took said Motions under advisement. To the extent not previously ruled upon, each of said Motions is hereby overruled.

On or about October 9, 2001, the Lincoln Respondents renewed their Motions for Directed Verdict against Claimant. The Panel took said Motions under advisement and are hereby overruled.

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 NASD Dispute Resolution. ("NASD").

### **AWARD**

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

- 1.) Respondents, Lincoln National Life Insurance Company, Lincoln Financial Advisors Corporation, Mary Ann Burris and Barbara Crosby, are jointly and severally liable for and shall pay to Claimant, Thomas W. Payne, the sum of \$175,352.00 in compensatory damages;
- 2.) Respondents Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation are jointly and severally liable for and shall pay to Claimant, Thomas W. Payne, the sum of \$1,108,023.00 in compensatory damages;
- 3.) The Counterclaim of Respondent Lincoln National Life Insurance Company and Respondent Lincoln Financial Advisors Corporation is dismissed with prejudice;
- 4.) The Counterclaim of Respondents Mary Ann Burris and Barbara Crosby is dismissed with prejudice;
- 5.) That other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 6.) That any relief not specifically enumerated, including punitive and exemplary damages, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 600.00
Counterclaim filing fee (Lincoln Respondents)	= \$ 1,000.00
Counterclaim filing fee (Respondents Burris and Crosby)	= \$ 375.00

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firms are Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation.

Member surcharge	= \$ 3,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 5,000.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

February 5-9, and February 27, 2001 - March 2, 2001, adjournment by the Lincoln Respondents	= \$ 1,200.00
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June 18-22, 2001, emergency adjournment by the Lincoln Respondents	= \$ 1,000.00 (waived by Panel)
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### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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:

Five (5) Pre-hearing sessions with Panel x \$1,200.00	= \$ 6,000.00
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Pre-hearing conferences:	February 1, 2000	1 session
	January 11, 2001	1 session
	February 16, 2001	1 session
	June 14, 2001	1 session
	July 24, 2001	1 session

Thirty -Two (32) Hearing sessions x \$1,200.00	= \$38,400.00
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Hearing Dates:	April 23, 2001	2 sessions
	April 24, 2001	2 sessions
	April 25, 2001	2 sessions
	April 26, 2001	2 sessions
	April 27, 2001	1 session
	June 4, 2001	2 sessions
	June 5, 2001	2 sessions
	June 6, 2001	2 sessions

June 7, 2001	3 sessions
June 8, 2001	2 sessions
July 16, 2001	3 sessions
July 17, 2001	3 sessions
July 18, 2001	2 sessions
July 19, 2001	1 session
October 9, 2001	2 sessions
October 10, 2001	1 session

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Total Forum Fees	= \$44,400.00
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The Arbitration Panel has assessed \$22,200.00 of the forum fees to Thomas W. Payne.

The Arbitration Panel has assessed \$22,200.00 of the forum fees jointly and severally to Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation.

### Fee Summary

Claimant, Thomas W. Payne, is liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$ 22,200.00
Total Fees	= \$ 22,800.00
Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 21,000.00

Respondents, Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation, are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 1,000.00
Adjournment Fee	= \$ 1,200.00
Forum Fees	= \$ 22,200.00
Total Fees	= \$ 24,400.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 24,400.00

Respondent, Lincoln National Life Insurance Company, is solely liable for:

Member Fees	= \$ 8,600.00
Total Fees	= \$ 8,600.00
Less payments	= \$ 7,725.00
Balance Due NASD Dispute Resolution	= \$ 875.00

Respondent, Lincoln Financial Advisors Corporation, is solely liable for:

Member Fees	= \$ 8,600.00
Total Fees	= \$ 8,600.00
Less payments	= \$ 4,600.00
Balance Due NASD Dispute Resolution	= \$ 4,000.00

Respondents, Mary Ann Burris and Barbara Crosby, are jointly and severally liable for:

<u>Counterclaim Filing Fee</u>	= \$	<u>375.00</u>
<u>Total Fees</u>	= \$	<u>375.00</u>
<u>Less payments</u>	= \$	<u>1,575.00</u>
<u>Balance Refunded by NASD Dispute Resolution</u>	= \$	<u>1,200.00</u>

**All balances are due to NASD Dispute Resolution**

**ARBITRATION PANEL**

Wayne S. Rasmussen, Esq. - Public Arbitrator, Presiding Chair  
Sam Brower, Esq. - Public Arbitrator  
Betty R. Crumpton - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Wayne S. Rasmussen, Esq.  
Wayne S. Rasmussen, Esq.  
Public Arbitrator, Presiding Chair

06/19/02  
Signature Date

/s/ Sam Brower, Esq.  
Sam Brower, Esq.  
Public Arbitrator

06/20/02  
Signature Date

/s/ Betty R. Crumpton  
Betty R. Crumpton  
Non-Public Arbitrator

06/19/02  
Signature Date

06/20/02  
Date of Service (For NASD office use only)



NASD Dispute Resolution  
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Respondents, Mary Ann Burris and Barbara Crosby, are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 375.00
Total Fees	= \$ 375.00
Less payments	= \$ 1,575.00
Balance Refunded by NASD Dispute Resolution	= \$ 1,200.00

All balances are due to NASD Dispute Resolution

**ARBITRATION PANEL**

Wayne S. Rasmussen, Esq. - Public Arbitrator, Presiding Chair  
Sam Brower, Esq. - Public Arbitrator  
Betty R. Crumpton - Non-Public Arbitrator

Concurring Arbitrators:

\_\_\_\_\_  
Wayne S. Rasmussen, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Sam Brower, Esq.  
Public Arbitrator

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

  
Betty R. Crumpton  
Non-Public Arbitrator

6-19-02  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD office use only)

Respondents, Mary Ann Burris and Barbara Crosby, are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 375.00
Total Fees	= \$ 375.00
Less payments	= \$ 1,575.00
Balance Refunded by NASD Dispute Resolution	= \$ 1,200.00

All balances are due to NASD Dispute Resolution

**ARBITRATION PANEL**

Wayne S. Rasmussen, Esq. - Public Arbitrator, Presiding Chair

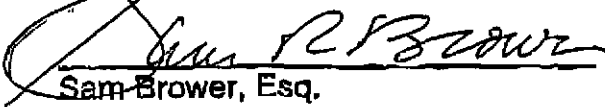
Sam Brower, Esq. - Public Arbitrator

Betty R. Crumpton - Non-Public Arbitrator

Concurring Arbitrators:

  
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Public Arbitrator, Presiding Chair

Signature Date

  
Sam Brower, Esq.  
Public Arbitrator

  
Signature Date

  
Betty R. Crumpton  
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

Respondents, Mary Ann Burris and Barbara Crosby, are jointly and severally liable for:

<u>Counterclaim Filing Fee</u>	= \$ 375.00
<u>Total Fees</u>	= \$ 375.00
<u>Less payments</u>	= \$ 1,575.00
<u>Balance Refunded by NASD Dispute Resolution</u>	= \$ 1,200.00

All balances are due to NASD Dispute Resolution

**ARBITRATION PANEL**

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Sam Brower, Esq. - Public Arbitrator  
Betty R. Crumpton - Non-Public Arbitrator

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6/19/02  
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