

**Award**  
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant  
Joseph Menice

Case Number: 18-01289

vs.

Respondent  
James Edmond Moniz

Hearing Site: Boston, Massachusetts

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Nature of the Dispute: Customer vs. Associated Person

This case was decided by a majority-public panel.

**REPRESENTATION OF PARTIES**

For Claimant Joseph Menice: Keith A. Macdonald, Esq. and Maura Kiefer, Esq.,  
Kearney & Macdonald, LLP, Rockland, Massachusetts.

For Respondent James Edmond Moniz: Peter F. Flynn, Esq., Law Office of Peter Flynn,  
Boston, Massachusetts, and John A. Mangones, Esq., Godbout Law PLLC, Boston,  
Massachusetts.

**CASE INFORMATION**

Statement of Claim filed on or about: April 9, 2018.

Claimant signed the Submission Agreement: April 9, 2018.

Statement of Answer filed by Respondent on or about: June 6, 2018.

Respondent signed the Submission Agreement: August 3, 2018.

**CASE SUMMARY**

Claimant asserted the following causes of action: misrepresentation, fraud, intentional infliction of emotional distress, unsuitability, violation of M.G.L. c.93A, § 9, and breach of fiduciary duty. The causes of action relate to investments in a variable annuity and insurance financed with proceeds from a reverse mortgage.

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested an award of \$500,000.00, treble damages, costs, attorneys' fees, and any further relief as may be just, equitable, fair and appropriate.

At the close of the hearing, Claimant requested \$262,343.40 in compensatory damages, treble damages, and attorneys' fees pursuant to M.G.L. c.93A, §.9.

In the Statement of Answer, Respondent requested that all relief sought by Claimant be denied.

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

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On November 27, 2018, the parties jointly requested an explained decision.

The Arbitrators have provided an explanation of their decision in this award. The explanation is for the information of the parties only and is not precedential in nature.

The parties present at the hearing 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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are denied in their entirety.
2. Any and all claims for relief not specifically addressed herein, including treble damages and attorneys' fees, are denied.

### **ARBITRATORS' EXPLANATION OF DECISION**

#### **BACKGROUND**

In or about April 2018, Claimant, a 91 year old man, brought this arbitration proceeding against his former financial advisor, the Respondent, for damages claiming misrepresentation, fraud, intentional infliction of emotional distress, unsuitability, and unfair and deceptive practices under Chapter 93A of the Massachusetts General Laws, and breach of fiduciary duty. Respondent filed a general denial alleging affirmative defenses, including ineligibility under FINRA Rule 12206, applicability of the statute of limitations, and waiver.

The cause of action arose from Respondent's advice to Claimant to purchase a reverse mortgage in the net amount of approximately \$263,000 in November 2007. Thereafter, in August 2008, Respondent sold Claimant a variable life insurance policy in the amount of \$250,000, a variable annuity, and long-term care insurance to be financed with proceeds from the reverse mortgage.

By letter dated September 29, 2014, John Hancock Financial Services notified Claimant that Respondent, John Hancock's agent, was terminated from John Hancock; that using funds from a reverse mortgage to fund a life insurance policy can be a complex transaction, and that pursuant to a settlement with the Attorney General's office it was offering Claimant an opportunity to liquidate the policy for a refund of premiums less certain costs.

This arbitration proceeding was brought in April 2018. In August 2018, Respondent brought a Motion to Dismiss pursuant to FINRA Rule 12206. The motion was denied by the panel in November 2018 without prejudice to Respondent renewing the motion at the hearing, subsequent to the presentation of testimony and evidence that would bear upon the issues raised in the motion.

### TESTIMONY

There was testimony that: (i) Claimant did not accept John Hancock's offer to liquidate the life insurance policy in 2014; (ii) Claimant suffered emotional distress after he received the letter; (iii) Claimant terminated the life policy in July 2015 for its cash surrender value at a disadvantage; (iv) the long-term care policy which was surrendered in August 2018 could have provided substantial benefits to Claimant; (v) the family was available to take care of the Claimant if he needed care, and (vi) the variable annuity which was cashed out in August 2018 was profitable with a return of 53% before it was surrendered.

### THE CLAIMS

Claimant alleges misrepresentation, fraud, intentional infliction of emotional distress, unsuitability, violation of M.G.L. c. 93A, and breach of fiduciary duty. The Claimant alleged during the hearing that the damages amounted to \$262,000, and he sought punitive damages either under FINRA rules or M.G.L. c. 93A. Respondent denies these allegations and further asserts that the claims should be dismissed because (a) the claims are time-barred by the applicable statutory statutes of limitation; (b) Claimant suffered no monetary damages, and (c) Claimant failed to establish the appropriate standard of care.

At the hearing, Respondent did not renew his Motion to Dismiss pursuant to FINRA Rule 12206 which sets a six-year eligibility requirement for submission of claims to arbitration. He argued that application of either the one-year or three-year statute of limitations defense for the respective claims precluded recovery.

## THE FINDINGS

The Claimant alleges that the earliest that he could have known that his investments were unsuitable was September 2014 when he received the letter from John Hancock advising him that the Respondent had been terminated. The statute of limitations for unsuitability, misrepresentation, fraud, intentional infliction of emotional distress, and breach of fiduciary duty is three years. Accepting the September 2014 date for purposes of tolling the statute of limitations as asserted by the Claimant, the Respondent maintains that because the arbitration proceeding was instituted in April 2018, the three-year statute of limitations had run.

Respondent also argues that the claim for unfair and deceptive practices under M.G.L c. 93A is wholly derivative of the other claims and cannot be pursued separately under c. 93A which provides for a four-year bar. The Panel agrees and finds that all of Claimant's claims are barred by the applicable statutes of limitation. The case is dismissed on those grounds.

The Panel recognizes that reverse mortgages and the funding of investment products with the proceeds of reverse mortgages present complex issues and may be subject to risk and possible misuse. The Panel also appreciates the age of the Claimant at the time of the purchases of the investment products. However, had the panel not ruled on the statute of limitations, the Panel would have found that the evidence and testimony failed to support Claimant's assertion of unsuitability, misrepresentation, fraud, intentional infliction of emotional distress or breach of fiduciary duty, and the result would have been the same.

## FEES

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

### Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee	= \$ 2,000.00
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\*The filing fee is made up of a non-refundable and a refundable portion.

### 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 person at the time of the event giving rise to the dispute. Accordingly, as Respondent's former firm, Signator Investors, Inc. is assessed the following:

Member Surcharge	= \$ 3,025.00
Member Process Fee	= \$ 6,175.00

**Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with the Panel @ \$1,400.00/session		= \$2,800.00
Pre-hearing conferences:		
August 1, 2018	1 session	
November 2, 2018	1 session	
Two (2) hearing sessions @ \$1,400.00/session		= \$2,800.00
Hearing Date:	December 17, 2018	2 sessions
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Total Hearing Session Fees		= \$5,600.00

1. The Panel has assessed \$2,100.00 of the hearing session fees to Claimant.
2. The Panel has assessed \$3,500.00 of the hearing session fees to Respondent.

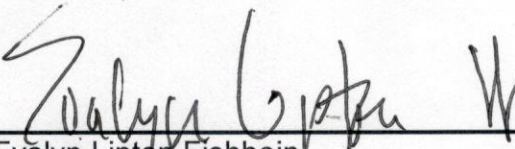
All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Evalyn Lipton Fishbein	-	Public Arbitrator, Presiding Chairperson
Richard J. Grahn	-	Public Arbitrator
Barry J. Rubenstein	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

  
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Evalyn Lipton Fishbein  
Public Arbitrator, Presiding Chairperson

January 10, 2019  
Signature Date

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Richard J. Grahn  
Public Arbitrator

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

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Barry J. Rubenstein  
Non-Public Arbitrator

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

January 11, 2019  
Date of Service (For FINRA Office of Dispute Resolution office use only)

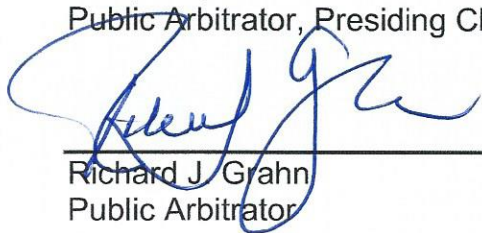
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*1/10/2019*

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