

15-0600

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DEBRA K. BAYLES,

Plaintiff,

v.

**Civil Action No. 14-C-139
(Judge David W. Hummel, Jr.)**

**JEFFREY N. EVANS, INDIVIDUALLY
and in his capacity as an EMPLOYEE,
SERVANT, OR AGENT OF AMERIPRISE
FINANCIAL SERVICES, INC., AMERIPRISE
FINANCIAL SERVICES, INC., KRISTINA NICHOLLS,
INDIVIDUALLY, and STEPHEN BAYLES, INDIVIDUALLY,**

Filed 5.19.15
D. Hummel

Defendants.

ORDER

On February 27, 2015, came the parties, by and through their counsel, for a hearing on Defendants' Motion to Dismiss and to Compel Mandatory Arbitration. Having considered the papers presented and the arguments of counsel, the Court finds as follows:

1. Plaintiff Debra K. Bayles is the widow of decedent William N. Bayles and claims to be the beneficiary of certain Individual Retirement Accounts ending in numbers 264133 and 961133, which were opened by the decedent in his name before his passing.

2. The decedent met with Defendant Jeffrey N. Evans on or about June 20, 2012, at which time he completed a Brokerage Application for a new Individual Retirement Account ending in 264133. Part 9 of the document states in pertinent part:

You acknowledge that you have received and read the Ameriprise Brokerage Client Agreement ("Agreement") and agree to abide by its terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in the Agreement. This brokerage account is governed by a predispute arbitration clause which is found on Section 26, page 3 of the Agreement. You acknowledge receipt of the predispute arbitration clause.

3. The corresponding Brokerage Agreement contains the arbitration clause mentioned in Part 9 of the Brokerage Application. The arbitration clause appears at Paragraph 26 in the Brokerage Agreement and states as follows:

This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:

(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(B) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

(E) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.

(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with Ameriprise Financial or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.

Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference. Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding.

You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

4. The plaintiff is the intended third-party beneficiary of the Individual Retirement Account ending in 264133.

5. Defendants aver that because the plaintiff is an intended third-party beneficiary of the IRA Account, she may only receive proceeds from said account under the terms and conditions of the account, which include the aforementioned arbitration clause.

6. Defendants also aver that the plaintiff is subject to the aforementioned arbitration clause under the doctrine of incorporation by reference.

7. The Court finds that the Brokerage Application refers to the Brokerage Agreement and the predispute arbitration clause found in Section 26 of the Brokerage Agreement. The Court also finds that there is no signature contained in the Brokerage Agreement, even though the initial language appearing in the arbitration clause states "[b]y signing this Agreement the parties agree as follows:..."

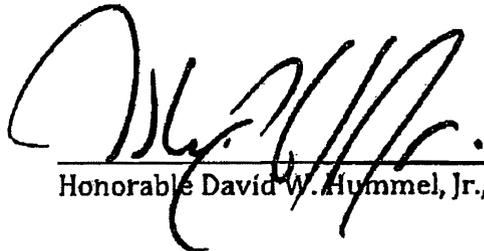
8. The Court finds that the absence of a signature within the Brokerage Agreement creates an ambiguity to be construed against the drafter, Defendant Ameriprise Financial Services, Inc. ("Ameriprise"), under the doctrine of *contra proferentem*.

9. Accordingly, the Court concludes as a matter of law that the decedent did not enter into a valid arbitration agreement with Ameriprise and, therefore, Defendants' motion is hereby **ORDERED DENIED**.

The Court notes the exceptions and objections of the parties to this ruling.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTERED this 19th day of May, 2015.



Honorable David W. Hummel, Jr., Judge

Prepared by:

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