

AMERIPRISE ADVISORS MUST PAY FIDELITY UNIT \$341K OVER REVERSE BREAKAWAY

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Like a breakaway move — in which advisors leave broker-dealers to go independent — a move in the opposite direction may also bring litigation in its wake.

Two Ameriprise financial advisors have been ordered to pay Fidelity's National Financial Services an early termination fee and return their credit line, after the clearing firm accused them of breaching a contract when they moved to Ameriprise in 2015.

Under a FINRA arbitration panel ruling, National Financial Services won compensatory damages of \$341,620 from Frank Aguilar, Jason Garofalo and their former BD, TriCor Financial (which had an affiliated RIA called TriCor Advisory Services).

The advisors caused the breach of contract "by terminating TriCor's broker-dealer registration and transferring client accounts to another broker-dealer, thereby leaving TriCor unable to meet its obligations under the [fully disclosed clearing agreement]," the March 22 award summary says.

NFS had also sought a \$35,000 interest payment from the Las Vegas-based brokers, but the three-member panel did not include it in the award.

Large IBDs like Ameriprise have been pitching their scale and resources to fully independent advisors for so-called reverse breakaway moves. The firm and its rivals have also been acquiring smaller IBDs, and the total number of IBDs has fallen 28% to 847 firms in the past decade, according to **ECHELON Partners**.

A third-party equity investor set the value of TriCor's holding company at \$5 million in 2010, according to a FINRA disciplinary action the following year against Aguilar and TriCor. The RIA's last ADV prior to Aguilar and Garofalo joining Ameriprise in 2015 listed \$137.1 million in assets under management.

While the NFS case against the brokers and their former BD sounds like a "fairly routine breach of contract action," it also shows that advisors need to consider such potential litigation by a clearing firm when making a reverse breakaway move, says Alan Foxman, a vice president with NCS Regulatory Compliance.

On the other hand, advisors may also try to negotiate a buyout of their old firm by the new firm as part of the recruiting process or use the arbitration process for leverage over the old firm, Foxman points out.

"Often times, when you have firms that are in this type of situation, nobody wants to have to spend the extra money to go to litigation," he says. "The risk is that, other than paying their attorney fees, they might actually win or not have to pay out as much. Sometimes it might be a negotiating tactic."

Aguilar, Garofalo and their lawyer did not respond to requests for comment on the case, and a spokeswoman for Ameriprise declined to comment. A spokeswoman for Fidelity said the firm doesn't comment on arbitration cases.

NFS filed the claim in September 2016, about 10 months after the Ameriprise move. The clearing firm accused TriCor of breaching its fully disclosed clearing agreement and failing to pay the early termination fee. NFS also alleged tortious interference with a contract by Aguilar and Garofalo.

Aguilar and Garofalo denied the allegations in the NFS claim, later filing a motion to dismiss it on the grounds that they were not involved in the alleged conduct. The Las Vegas panel denied the motion in September after oral arguments.

The tribunal ruled that Aguilar and Garofalo "are considered one and the same" as TriCor and should therefore be held jointly liable. The award includes the repayment of a \$45,000 business development credit line, but the arbitrators deducted \$126,870 still on TriCor's books at the time of the termination.

FINRA had included the TriCor valuation in a letter of acceptance, waiver and consent after accusing Aguilar and the firm of a failure to file an application to the regulator for a 25% change in indirect ownership equity. Firms must file the application at least 30 days before such transactions.

In November 2011, TriCor spanned seven branch offices with 27 registered representatives. An entity called SP LLC bought 20% of the firm for \$1 million in September 2009 and 5% more of it for \$250,000 in January 2010, according to the AWC letter.

At the time, FINRA censured TriCor, fined the firm and Aguilar \$15,000 and suspended him for two months. Neither TriCor nor Aguilar admitted or denied the findings.

Aguilar also paid \$82,500 in a civil judgment in May 2017, and he faces a pending client dispute from June 2016 about a client's REIT investments, according to FINRA BrokerCheck. Another arbitration panel also awarded a former TriCor client \$184,391 in a March 2015 award involving nontraded REITs.
