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FINRA Lifetime Bans Come Into Question Before the DC Circuit

By John Curley
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The U.S. Court of Appeals for the District of Columbia Circuit will hear arguments this month in a case that could limit the Financial Industry Regulatory Authority's ability to ban brokers from the securities industry.

The appellant is John Saad, a broker whom FINRA banned for submitting false expense reports and then lying to investigators. The respondent is the U.S. Securities and Exchange Commission, which approved Saad's ban under a framework that permits FINRA to discipline brokers with sanctions that are remedial, not punitive. Saad argues that following the U.S. Supreme Court's 2017 decision in *Kokesh v. SEC*, his bar cannot be considered remedial and must be reversed.

Saad's troubles started in 2006 when, according to a FINRA disciplinary panel, he gave his employer forged receipts for a trip he never took. During the investigation that followed, Saad repeatedly attempted to mislead investigators from FINRA's predecessor, the National Association of Securities Dealers.

In 2007, FINRA barred Saad for life from associating with FINRA member firms. Saad's case has been up and down the appellate path ever since. In 2017, the D.C. Circuit remanded the case to the SEC to consider what impact, if any, *Kokesh* has on Saad's case. The SEC ruled that *Kokesh* did not change the outcome, and this appeal followed.

To understand the impact *Kokesh* could have on Saad's case and broker discipline more broadly, start with the framework that governs FINRA sanctions. The SEC may

reduce a FINRA sanction if it is "excessive or oppressive." Sanctions that are remedial, though, are permissible, and industry bars have long been upheld as remedial.

Kokesh calls into question whether a lifetime ban is really "remedial" rather than punitive. There, the Supreme Court held that disgorgement is a "penalty" under the statute of limitations in 28 U.S.C. §2462. The court explained that there are two principles that define a penalty: one, whether the relief seeks to redress a public or a private wrong; and two, whether the relief is focused on punishment or on compensating victims. Disgorgement is a penalty, at least for statute-of-limitations purposes, because it is imposed as a consequence of violating public laws and for punitive purposes, chiefly deterrence.

Potential Impact on FINRA Sanctions

When the D.C. Circuit remanded *Saad v. SEC* for the SEC to consider *Kokesh*, then-Circuit Judge Brett Kavanaugh explained in a concurrence why he thought a FINRA ban is punitive under *Kokesh* and why the distinction matters: if bans are punitive, regulators will have to justify the ban on the facts of a given case. "FINRA and the SEC will no longer be able to simply wave the 'remedial card' and thereby evade meaningful judicial review of harsh sanctions they impose on specific defendants," he wrote.

The SEC disagrees that *Kokesh* should alter Saad's sanction. It argues that *Kokesh* is not relevant at all, in part because that case considered a different question in a different context—namely, whether a pecuniary

sanction was a penalty under a separate statute. It also argues that characterizing industry bans as “punitive” after *Kokesh* would be inconsistent with the statutes that expressly authorize bars as a possible sanction.

Saad, on the other hand, says *Kokesh* controls. He says his ban punishes a public rather than a private wrong because it was imposed to protect the integrity of the securities markets. And he argues that his ban was imposed for punitive purposes because it was motivated at least in part by deterrence.

He also points to the Supreme Court’s decision earlier this year in *Liu v. SEC*, in which the court held that disgorgement is “equitable relief,” which historically has not included punitive sanctions, as long as it is limited to the wrongdoer’s net profits and is distributed to victims. Saad says that Liu’s focus on the remedial purposes of equitable relief reinforces *Kokesh*’s distinction between punitive and remedial sanctions and confirms that his ban is punitive. Saad stops short of saying that *Kokesh* outlawed all industry bans. Not all bars are “punitive,” even under *Kokesh*, because some are remedial in that they restore the status quo, for example, when brokers are banned for concealing information that would have made them ineligible for registration in the first place.

Moreover, Saad suggests that a bar might be a permissible punitive sanction in certain future cases. He argues that while it is too late for the SEC to justify his ban under a new, post-*Kokesh* framework, a ban, while punitive, could theoretically be permissible as long as it is not “excessive or oppressive” under the facts of a given case. This is the analysis that Kavanaugh envisioned. After *Kokesh*, he wrote, “FINRA and the SEC will have to reasonably explain in each individual case why an expulsion or suspension serves the purposes of punishment and is not excessive or oppressive. Over time, a fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions should ensue.”

Saad’s appeal has potential implications far beyond this case. FINRA routinely seeks industry bars, but if the court rules for Saad, we may see fewer bars as FINRA becomes more selective about when to pursue this severe sanction.



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