DC Circuit Court Remands Case to SEC for Reconsideration of Factors Mitigating Against Lifetime Ban of Registered Representative from Securities Industry

On June 11, 2013, the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") ruled that the SEC abused its discretion in upholding a lifetime ban of registered representative John M. E. Saad from associating with any member firm by failing to adequately address all mitigating factors, and remanded the case to the SEC for reconsideration.

From 2000 to 2006, John M. E. Saad was a regional director of Penn Mutual Life Insurance Company ("Penn Mutual") and registered with the company's broker-dealer affiliate, Hornor, Townsend & Kent ("HTK"). In September of 2007, FINRA filed a complaint with its Office of Hearing Officers alleging that, in August of 2006, Saad violated FINRA rules by submitting false expense reports for non-existent travel expenses and a fraudulently purchased cellular telephone. On August 19, 2008, a FINRA Hearing Panel found Saad guilty of "converting" his employer's funds in violation of NASD Conduct Rule 2110, which requires that members "observe high standards of commercial honor and just and equitable principles of trade." Noting that, "according to FINRA Sanction Guidelines, a bar is standard for conversion," the Hearing Panel sanctioned Saad with a lifetime ban from associating with any FINRA member firm. This sanction was in line with prior cases in which registered representatives found guilty of misappropriation had consistently received permanent bars, regardless of the particular circumstances present in each case.

In October of 2009, FINRA’s National Adjudicatory Counsel (“NAC”) upheld the Hearing Panel’s decision, finding that that Saad’s actions constituted “misappropriation” of Penn Mutual’s funds. In May of 2010, the SEC also upheld Saad’s lifetime ban, finding that Saad’s behavior constituted “misappropriation” of Penn Mutual’s funds, and that the lifetime ban was not an “excessive or oppressive” sanction according to the FINRA Sanction Guidelines.

Saad did not contest his culpability for the charged behavior, but appealed the SEC’s ruling to the DC Circuit on the grounds that the SEC abused its discretion in upholding his lifetime ban. Specifically, Saad argued that the SEC: (1) improperly applied the FINRA Sanction Guidelines for “conversion” and “improper use,” as opposed to the “forgery and/or falsification of records” guidelines; and (2) erroneously failed to consider the mitigating factors that HTK had terminated Saad prior to the initiation of FINRA disciplinary proceedings, and that Saad had been under significant personal and professional stress at the time he violated Rule 2110.

The DC Circuit rejected Saad’s first argument on the grounds that the FINRA Sanction Guidelines do not “prescribe fixed sanctions for particular violations,” and that the SEC reasonably concluded that “conversion” and “improper use” guidelines could be used for the offense of “misappropriation.” The DC Circuit ultimately found that the SEC abused its discretion, however, because the agency failed to adequately address all mitigating factors in the record. Although the SEC had acknowledged both of the mitigating factors advanced by Saad, the agency did not specifically address either, nor articulate the reasons that the agency found these factors unpersuasive. The SEC defended its decision on the grounds that the agency implicitly rejected all mitigating factors with blanket language stating that the agency "denied all arguments inconsistent with the views expressed in [its] opinion." The DC Circuit found this contention to be an insufficient explanation for the agency's failure to provide "reasoned decisionmaking" in support of Saad's lifetime ban. Although the Court did not take a position on the proper outcome of the case, the DC Circuit rebuked the SEC for imposing the "the securities industry equivalent of capital punishment" without carefully considering all factors that might result in a lesser sanction.

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