

Against All Odds Alpine Wins Important Injunction Against FINRA

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On July 5, 2023, the D.C. Circuit Court of Appeals issued an injunction that raises a challenge to FINRA's authority to use FINRA-appointed hearing officers to conduct enforcement proceedings. The injunction enables Alpine Securities Corp., which FINRA had expelled from its membership, to nevertheless remain a member pending Alpine's appeal of its expulsion. FINRA has enjoyed a long history of prevailing in federal court when broker-dealers or registered persons challenge its authority or claim that it is a "state actor." The refrain is largely the same: FINRA is not a government regulator; it is a self-regulatory organization (SRO), where membership is voluntary. Thus, expulsion from membership is not much different from being kicked out of a country club for dealing from the bottom of the deck during weekly poker games. Not so fast, says Judge Walker in a concurring opinion attached to the injunctive order, which was issued by a three-judge panel. He explains that FINRA's hearing officers are near carbon copies of SEC administrative law judges, who the Supreme Court held in *Lucia v. SEC* must be appointed in accordance with the appointments clause of the U.S. Constitution. Judge Walker queries whether it makes a difference that FINRA hearing officers are employees of a nominally private corporation. He thinks that although FINRA is private, its enforcement activities are controlled by the government, positing that FINRA hearing officers execute government laws subject to a government plan, with little room for private control. The Next Hand Although arguments that FINRA is a state actor have generally been dismissed without serious consideration by courts, such arguments may now have a more receptive audience in the D.C. Circuit. Judge Walker's concurrence highlights the reality that securities brokers do not have a choice if they want to sell securities in the United States. FINRA membership is, in effect, mandatory. And FINRA enforces not only its own rules (which are generally vetted by the SEC) but also provisions of the Securities Exchange Act. Although the injunction is a serious setback for FINRA, it is not "game over" as expulsion would be for Alpine. One judge on the panel would have denied the injunction, and the third judge, while granting it, did not join in Judge Walker's concurrence. Two weeks after the injunction was issued, FINRA filed a motion for en banc reconsideration of the injunction. On August

22, 2023, the D.C. Circuit denied this request, which indicates that the greater court is perhaps sympathetic to Judge Walker’s view of FINRA’s authority. Regardless, we are not even mid-shoe in the cards that have been played. This case now needs to be played out on the merits. If Alpine ultimately prevails, it could be a game-changer for FINRA enforcement. Would FINRA attempt to have its hearing officers appointed by the president under the appointments clause? Would FINRA disciplinary hearings be conducted by SEC ALJs, thus depriving FINRA of the ability to adjudicate its own rules? Time will tell, but this ruling will surely create sleepless nights for many within the SRO.

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