Securities Regulation Daily Wrap Up, ENFORCEMENT—D.C. Cir.: Could 1947 AG manual sway SEC in-house judges case?, (Apr. 8, 2016)

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By Mark S. Nelson, J.D.

The ongoing constitutional battle over the SEC's administrative law judges will heat up again when the D.C. Circuit hears Raymond J. Lucia's petition for review of a Commission opinion finding that Lucia's "Buckets of Money" retirement strategy ran afoul of the federal securities laws. Several cases pending in the Second, Fourth, and Eleventh Circuits also pose similar constitutional questions. Oral argument in Lucia's case is set for mid-May (*Raymond J. Lucia Companies, Inc. v. SEC*, April 6, 2016).

While Lucia's briefs filed in the appeals court recite the familiar Article II Appointments Clause arguments, it is Lucia's reply brief that suggests the answer may lie, at least partly, in the decades-old Attorney General's Manual on the Administrative Procedure Act and its explanation of the semantics of "initial" and "recommended" decisions. Specifically, Lucia said the SEC's reference to the manual in the agency's responsive brief missed the mark.

The SEC argued that its ALJs make only recommended or advisory decisions, despite calling them "initial decisions." According to the SEC, the manual explained that "initial decisions" are "advisory in nature" while preserving an agency's ability to decide a matter as if the agency itself was hearing the evidence. By contrast, Lucia argued that a closer reading of the manual shows its authors meant to say that a "recommended" decision (as opposed to an "initial" decision) would have this advisory character.

According to Lucia, the upshot is that the SEC inaptly focused on the more general legislative history of ALJs rather than the specific history of the SEC's ALJs, which Lucia said undermines comparisons of the SEC's ALJs to those at the FDIC, which the D.C. Circuit concluded in *Landry* did not violate the appointments clause. Here, Lucia points to another part of the manual that suggests a line in the sand between recommended decisions (the FDIC's ALJs) and the initial decisions issued by the SEC's ALJs, which become final agency action if not reviewed (Lucia claimed that 90 percent of the SEC's ALJs' initial decisions go unreviewed).

To be sure, the bulk of Lucia's petition rests on the "significant authority" maxim from the Supreme Court's *Buckley* opinion. Lucia also emphasizes how the SEC's ALJs are more akin to the special trial judges (inferior officers) in the Supreme Court's *Freytag* opinion than the FDIC's employee-ALJs in *Landry*. Still, Chief Justice John Roberts, writing for the Supreme Court's *Free Enterprise Fund* majority, noted in the main opinion text that readers should not draw from that opinion too many negative conclusions about the validity of the civil service system for independent agencies, although the court said in a footnote that its opinion did not deal with ALJs and that *Landry* is potentially in dispute.

Lucia also seeks to vacate the Commission's findings (dissenting opinion), arguing that a majority of the commissioners were wrong to find the statements or omissions in the case were material and that Lucia acted with scienter. Lucia also argues that the "career-ending" lifetime bar the Commission imposed is the securities law equivalent of "capital punishment" and is far in excess of what the applicable standard allows. Lucia's petition for review has drawn amici that include celebrity businessman Mark Cuban and Ironridge Global IV, Ltd., another firm challenging the SEC's ALJs in different court.

The case is No. 15-1345.

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Companies: Raymond J. Lucia Companies, Inc.; Ironridge Global IV, Ltd.

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