Securities Regulation Daily Wrap Up, TOP STORY—11th Cir.: SEC wins another ALJ appeal, panel muses on effect of 'impending' admin cases, (Jun. 17, 2016)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The Eleventh Circuit joined the Second, Seventh, and D.C. Circuits in holding that constitutional challenges to the validity of the SEC's administrative law judge regime must first be addressed by the Commission. This latest appellate win for the SEC is important for how the court navigated points of agreement and divergence with opinions in the other three circuits. The opinion upends a district judge's ruling that enjoined two of the SEC's in-house cases and orders both federal suits to be dismissed for lack of jurisdiction. Yet another similar case awaits decision by the Fourth Circuit (*Hill v. SEC*, consolidated with *Gray Financial Group, Inc. v. SEC*, June 17, 2016, Pryor, J.).

Fairly discernable. The unanimous Eleventh Circuit panel concluded that it was fairly discernable that Congress intended for disputes like those brought by Charles Hill and Gray Financial to be heard first by the Commission, although an aggrieved party can then petition a federal appeals court to review a Commission final order. That is the initial step in deciding whether a district court has jurisdiction to hear a matter that otherwise would proceed administratively.

The Eleventh Circuit said it agreed with the D.C. Circuit's *Jarkesy* opinion that the Mine Act provision at stake in the Supreme Court's *Thunder Basin* opinion had a similar scope and procedural bent as Exchange Act Section 25, which provides for court review of Commission orders. The court also found similarities between the Exchange Act and the law implicated in the Supreme Court's *Elgin* opinion, even if the securities law's text was less "painstaking" in its detail than the *Elgin* law.

Moreover, the court said a few jurisdictional exceptions sprinkled throughout the securities laws could not alter the result for Hill and Gray Financial. Nor could the Exchange Act's savings clause rescue these cases. Likewise, the court rejected Hill's argument that Congress should have used clearer language if it intended to bar district courts from hearing claims like his because the fairly discernable prong does not require "absolute clarity" by Congress.

Meaningful judicial review key. Having found Congressional intent to channel these cases through the agency apparatus fairly discernable and that the claims were of a type to be heard this way, the court mulled three factors the Supreme Court has said can salvage district court jurisdiction in some cases. But the Eleventh Circuit said this was not one of those instances because "without doubt" Hill and Gray Financial can later obtain meaningful judicial review.

The court led off its discussion by noting its agreement with the Second and Seventh Circuits that the meaningful judicial review factor is critical. Respondents in the several cases before federal district and appellate courts have argued vigorously that the Seventh Circuit, in particular, had improperly focused on this factor. But the Eleventh Circuit made a point of saying "we focus our inquiry there." (The D.C. Circuit said in *Jarkesy* that it prefers a more "holistic" approach than the one taken by the Seventh Circuit in *Bebo*; Circuit Judge Ripple of the Seventh Circuit sat by designation in the combined Hill/Gray Financial appeal, but he was not on the *Bebo* panel).

According to the Eleventh Circuit, the respondents' argument that they cannot avoid an injury without being heard in the district court fell flat because the Supreme Court in *Standard Oil* noted that defending one's self in a costly administrative proceeding is not an irreparable injury. Moreover, the risk of depravation is lessened

because the Exchange Act gives a respondent two chances to stay a final Commission order and an appellate court can vacate an entire Commission order.

The court also said Hill's and Gray Financial's *Mathews v. Eldridge* argument was askew because their claimed injury did not rise to the same level as the injury the Supreme Court mulled in that case. Likewise, Gray Financial's worries about scant discovery options before the SEC were overblown because the appellate court can remand a matter to the Commission for more fact finding.

As for the "wholly collateral" and "agency expertise" factors, the court said they are "less conclusive" than the meaningful judicial review factor and "do not cut strongly either way." The court likened the Commission to the agency in *Elgin*, saying that although the Commission's expertise might not aid a decision of the constitutional claims, it could still use its expertise to decide that the substantive charges are meritless and, thus, skirt the constitutional claim.

But the court seemed most conflicted over whether Hill's and Gray Financial's claims were wholly collateral. The court agreed that *Bebo* surfaced the two ways in which the question can be viewed—compare the constitutional claims to administrative charges or look to the law's review provision (the comparison approach might favor Hill and Gray Financial). The Eleventh Circuit instead focused on the Exchange Act review provision.

Further, while the respondents may yet win their constitutional claims, that result would not necessarily bar liability because the SEC could bring a federal law suit to enforce the securities laws. Still, the court found the claims were not wholly collateral, at least where the respondents can obtain meaningful judicial review.

"Impending" enforcement. Since the *Bebo* decision last year, respondents who dispute the validity of the SEC's ALJs have routinely argued that other courts should not follow what they call argue was the Seventh Circuit's over-reliance on when a suit is filed—file before the order instituting proceedings (OIP) issues and get into court, but file after the OIP and the courthouse doors are closed. The Eleventh Circuit suggested that timing played no role in its decision.

Hill sued the SEC in federal district court five days after an ALJ rejected his constitutional argument. By contrast, Gray Financial filed its federal district court case prior to issuance of the SEC's OIP, but later amended its complaint to add the Article II claim after the SEC issued an OIP. Gray Financial had argued that the procedural stance of its district court case took it outside the Exchange Act's review provision. But the Eleventh Circuit, citing its own precedent (*Doe v. FAA*) said it had already rejected that view.

The court went on to note that *Bebo*, *Jarkesy*, and *Tilton* (of these three cases, *Tilton* was the only case to draw a dissenting opinion) are not necessarily tied to when those suits were filed. The court explained that *Bebo* was a case where the administrative proceeding was in progress and, unlike in *Free Enterprise*, the respondent did not have to "bet the farm" to get court review.

The Eleventh Circuit then said in a footnote that the same reasoning would hold for an "*impending*" enforcement matter and that the court was "confident" *Jarkesy* and *Tilton* would have been decided the same way if they had dealt with "forthcoming proceeding[s]." But the court disagreed with the D.C. Circuit's and the Second Circuit's implicit suggestion that federal district courts might have heard those cases if the SEC's enforcement actions were only impending ones.

The case is No. 15-12831.

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Companies: Gray Financial Group, Inc.; Radiant Systems, Inc.; NCR Corporation

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