

Securities Regulation Daily Wrap Up, ENFORCEMENT—D. Mass.: Court holds commodity pool operator strictly liable for failure to register with CFTC, (May 20, 2014)

By Anne Sherry, J.D.

A court granted summary judgment in favor of the CFTC in an action against John B. Wilson and JBW Capital LLC for failing to register as a commodity pool operator and for defrauding pool participants. The CFTC's registration requirement should be construed as a strict liability provision analogous to the SEC's registration requirement under the Exchange Act, the court concluded ([CFTC v. Wilson](#), May 16, 2014, Stearns, R.).

Allegations. According to the complaint, during the life of the pool, Wilson obtained over \$2 million from twenty-five pool participants but lost nearly all of the money, returning only \$227,000 to investors. The CFTC alleged that Wilson deceived investors by inflating the net asset value of the pool, among other misrepresentations. For example, he allegedly told one investor that his investment in JBW was worth \$120,000, when in fact the net asset value for the entire pool was only \$42,000.

Failure to register with CFTC. The court rejected Wilson's "advice of counsel" defense for his failure to register as a commodity pool operator. Not only did he not meet the requirements for the defense, the court found that the CFTC's registration requirement does not contain a "state of mind" limitation to liability. Finding a dearth of case law on state of mind with regard to a failure to register, the CFTC drew an analogy to courts' consistently holding that the SEC registration requirement for investment advisers is a strict liability provision. The court agreed that for enforcement purposes, the relevant section of the Commodity Exchange Act "deserves to stand on the same footing" as the Securities Exchange Act requirement. As Wilson had directly admitted to "choosing" not to register as a commodity pool operator, the court held him in violation of the registration requirement.

Fraud. On the fraud charges, the court rejected Wilson's contention that he did not "intend" to defraud. Calling this "rather dubious," the court additionally noted that the CFTC may base liability upon "willful" behavior, including recklessness. As Wilson did not deny knowing that his statements were false, his intention to roll losses over in the hope that his investment luck would turn around "virtually defines an intent to deceive." Finally, Wilson's argument that his investors

did not rely on his misrepresentations was irrelevant because reliance is not an essential element of public enforcement cases.

Remedies. The court granted the requested injunctive relief and civil penalties in the statutory per-violation amount, finding treble damages inappropriate in the absence of a showing of any personal gain. For the same reason, the court denied the request for disgorgement and restitution in the amount of the pool participants' losses.

The case is [No. 12-11799-RGS](#).

Attorneys: W. Derek Shakabpa for the CFTC. Philip M. Giordano (Reed & Giordano, PA) for John B. Wilson and JBW Capital LLC.

Companies: JBW Capital LLC

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