

Banking and Finance Law Daily Wrap Up, ENFORCEMENT ACTIONS— D.D.C.: Group seeking restraining order for party in FDIC enforcement action files reply brief, (Sept. 4, 2024)

Banking and Finance Law Daily Wrap Up

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By Joe Cox, J.D.

The reply brief, filed by the NCLA, seeks a temporary restraining order against the enforcement action.

An organization seeking a jury trial for an individual named in an FDIC enforcement action filed a [reply brief](#) doubling down on its arguments seeking a temporary restraining order. The group, the New Civil Liberties Alliance (NCLA) seeks relief on behalf of John C. Ponte, including a temporary restraining order enjoining FDIC enforcement action against Ponte and a jury trial (*Ponte v. Federal Deposit Insurance Corporation*, No. 1:24-cv-02379 (D.D.C. Aug. 30, 2024)).

History. The action arose following an FDIC enforcement action against Rhode Island-based Independence Bank. Ponte was named as a party to the action, with the FDIC complaint alleging that he was “an institution-affiliated party of the Bank” and “directly or indirectly violated regulations and recklessly engaged in unsafe or unsound practices in connect with the Bank” between 2017 and 2019.

However, the NCLA then filed, on Ponte’s behalf, a complaint in the district court of the District of Columbia, arguing that the administrative proceeding was unlawful and that the action unconstitutionally denied Ponte his right to jury trial in an Article III court. The suit also sought a temporary restraining order enjoining the FDIC from proceeding against Ponte in the enforcement action. The NCLA argued in its suit that *SEC v. Cochran* confirmed that constitutional claims against administrative proceedings could be brought directly before federal courts. The suit also alleged that, pursuant to *SEC v. Jarkesy*, the FDIC enforcement action violates Ponte’s Seventh Amendment right to a jury trial (see [Banking and Finance Law Daily](#), Aug. 20, 2024).

FDIC response. The FDIC disagreed immediately with the NCLA’s argument, filing a brief in opposition to the petition for a temporary restraining order and a motion to dismiss. The FDIC argued that Ponte had lost two prior attempts to enjoin the enforcement proceeding and had failed to appeal those actions. In addition, the FDIC posited that many courts have indicated that a jury is not necessary to adjudicate restitution-related claims like those against Ponte.

Additionally, the FDIC stated that Ponte failed to sufficiently plead irreparable harm to be entitled to a restraining order, and also failed to demonstrate a likelihood of prevailing on the underlying question (see [Banking and Finance Law Daily](#), Aug. 26, 2024).

NCLA reply. The NCLA’s reply was directed only to the FDIC’s opposition to the petition for a temporary restraining order. The pleading noted that a separate response will be filed to the FDIC’s motion to dismiss. The NCLA utilized most of the brief to argue against the FDIC position regarding Ponte and collateral estoppel for his attack on the enforcement action. Additionally, the NCLA doubled down on the argument that Ponte should receive a jury trial under the Constitution and that he was otherwise qualified for a temporary restraining order.

On the collateral estoppel issue, the NCLA noted that claim preclusion must not work a fundamental unfairness to the non-moving party. The NCLA then posited that the change in underlying law would work such a fundamental unfairness as to preclude collateral estoppel. A lengthy discussion of *Jarkesy* and its significance to the instant case was at the center of NCLA’s argument.

The NCLA then discussed the instant court having jurisdiction over Ponte and his constitutional claims. The brief then continued to argue that whether the relief sought by the FDIC is termed restitution or not, the essential

character of the damages should entitle Ponte to a trial by jury rather than as a party in the administrative proceeding.

Finally, the NCLA argued that Ponte would sustain irreparable harm by continuing within the enforcement action. Further, the brief submitted that Ponte should not be required to submit a substantial bond in support of the temporary restraining order.

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Companies: Independence Bank; New Civil Liberties Alliance

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