

Securities Regulation Daily Wrap Up, ENFORCEMENT—D.D.C.: Group argues SEC’s follow-on administrative case against Lemelson was unconstitutional, (Aug. 22, 2024)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The complaint notes that earlier court precedents appear to give the SEC discretion on where and what claims to pursue but that later Supreme Court opinions may have curbed the SEC’s authorities.

According to a civil complaint filed by a group on behalf of Reverend Father Emmanuel Lemelson (f/k/a Gregory Lemelson), a one-time defendant in an SEC civil case, the agency’s follow-on administrative proceeding against Lemelson in which the SEC seeks to potentially impose an industry bar is unconstitutional or otherwise precluded by principles of res judicata. The complaint noted via two footnotes that while earlier court precedents appear to give the SEC discretion, the Supreme Court’s opinion in the *Chevron* cases and in a related Seventh Amendment case this past term suggest the SEC may no longer have such discretion in follow-on administrative proceedings. ([Lemelson v. SEC](#), No. 24-cv-02415 (D.D.C. Aug. 21, 2024)).

The New Civil Liberties Alliance (NCLA), which is pushing Lemelson’s new case, previously shepherded one of the two now landmark Supreme Court cases that [overturned](#) the *Chevron* doctrine of court deference to federal agencies. The group issued a [statement](#) after the fall of *Chevron* that said it was creating a “Relentless Working Group” to promote agency compliance with the Court’s opinion and to prevent what it feared could be agency efforts to establish new forms of deference. The complaint filed on behalf of Lemelson also referenced the Supreme Court’s opinion in [SEC v. Jarkesy](#), in which the Court held that respondents in SEC enforcement actions seeking civil penalties for securities fraud are entitled to a federal court jury trial under the Seventh Amendment.

“SEC has been playing this expedient administrative trick for decades: First, accuse someone of wrongdoing in court filings and related press releases,” said Russ Ryan, Senior Litigation Counsel at NCLA in a [press release](#) announcing the filing of the complaint. “Then, when the case is over, appoint itself as judge and jury to decide whether the same person should be barred or suspended from the securities industry.”

The SEC convinced a federal judge in Massachusetts to [impose](#) a civil penalty of \$160,000 and a five-year obey-the-law injunction related to the agency’s claim that Lemelson had violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5. The SEC later brought a [follow-on administrative proceeding](#) in which it may seek to impose an industry bar on Lemelson.

The complaint asserts five claims that allege the SEC’s follow-on proceedings violate principles of due process, the right to a jury trial under both the Fifth and Seventh Amendments, amount to the usurpation by the SEC of the judicial power contained in Article III of the U.S. Constitution, resulted in the unlawful deprivation of a hearing on the record, and violated the doctrine of res judicata.

Given that the Fifth Amendment and the Seventh Amendment deal with criminal and civil juries, respectively, it is unusual to see them cited together in a civil case, but Justice Gorsuch’s concurrence in the *Jarkesy* opinion suggested philosophical ties between the two amendments.

With respect to res judicata, the complaint argued that the SEC should have sought the industry bar in its federal court case against Lemelson but instead opted to wait to bring that claim later in an in-house proceeding. The complaint suggested that not only is the follow-on proceeding unfair because of the SEC’s home court advantage but that it would result in impermissible claim-splitting.

The complaint seeks declaratory relief that the SEC's follow-on proceeding against Lemelson was unconstitutional, plus costs and attorneys' fees. Alternatively, if the SEC's authorities are upheld, the complaint seeks a hearing on the record for Lemelson.

The case is [No. 24-cv-02415](#).

Attorneys: Russell Ryan (New Civil Liberties Alliance) for Emmanuel Lemelson.

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