[Securities Regulation Daily Wrap Up, ENFORCEMENT—5th Cir.: Principal and his advisory firm file opposition to SEC's petition for rehearing en banc of decision that struck down SEC decision, (Jul. 19, 2022)]

Securities Regulation Daily Wrap Up

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By Elena Eyber, J.D.

A principal and his advisory firm filed an opposition to the SEC's petition for a rehearing en banc of a decision that struck down the SEC's decision for being unconstitutional.

A principal and his advisory firm filed an opposition to the SEC's petition for a rehearing en banc with the Fifth Circuit. The principal and his advisory firm argued the petition should be denied because the court correctly applied the law as it exists and entered a decision that follows from that precedent. First, the principal argued the court followed current precedent in holding that securities fraud claims are not "public rights" cases under the Seventh Amendment. Second, the principal argued the court correctly applied the nondelegation doctrine because §929(a) delegated unfettered legislative power to the SEC. Lastly, the principal argued the court was required by precedent to invalidate the statutory scheme insulating SEC ALJs in violation of U.S. Const. Art. II, §3 (*Jarkesy v. SEC*, July 18, 2022).

Procedural history. The SEC petitioned the Fifth Circuit for a rehearing en banc of a decision that had vacated and remanded the SEC's decision, finding it to be unconstitutional. The petition challenged the court's decision which found that: (1) the proceeding brought against the principal and his advisory firm violated the principal's right to a jury trial; (2) that the SEC's choice to initiate an administrative proceeding rather than a judicial action was an exercise of legislative authority in violation of the non-delegation doctrine; and (3) that the removal restrictions for the ALJ violated the separation of powers.

The Seventh Amendment. The principal opposed the SEC's petition by arguing that the court followed current precedent in holding that securities fraud claims are not "public rights" cases under the Seventh Amendment. The principal argued that the SEC is taking the position that the Seventh Amendment never applies to common law claims added to statutes where the government is the plaintiff when the Seventh Amendment was framed to prevent that very situation and goes against the current Supreme Court jurisprudence. The principal further argued that the old Atlas Roofing formulation that the SEC used to dispense with the Seventh Amendment has been long overruled.

Nondelegation doctrine. Next, the principal argued the court correctly applied the nondelegation doctrine because §929(a) delegated unfettered legislative power to the SEC. The principal argued the SEC complains of the court's application of the nondelegation doctrine without mentioning the Supreme Court precedent expressly defining the power to assign claims to non-Article III forum as core legislative power. The principal also argued the SEC ignored the SEC's express admission before the court that Congress provided no "intelligible principle" to regulate the exercise of that power.

Insulation of ALJs. Lastly, the principal argued the court was required by precedent to invalidate the statutory scheme insulating SEC ALJs in violation of U.S. Const. Art. II, §3. According to the principal, the SEC complains of the court's holding that the ALJ's enjoy multiple layers of tenure protection in violation of Art. II, §3, without noting in its petition that it effectively confessed error on this issue in briefing before the Supreme Court in 2018. In that briefing, the principal argued, the SEC agreed with the principal and the court, admitting that "the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority," and that without judicial rewriting of the statutory scheme, these "limitations…on removal of the Commission's ALJs would be unconstitutional."

The case is No. 20-61007.

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Companies: Patriot28 LLC

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