

[Securities Regulation Daily Wrap Up, TOP STORY—D.C. Cir.: Constitutional challenge to admin proceeding kicked out of federal courts, \(Sept. 29, 2015\)](#)

Securities Regulation Daily Wrap Up

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By Anne Sherry, J.D.

The D.C. appeals court affirmed dismissal of a challenge to the constitutionality of an SEC enforcement action, holding that the detailed statutory provision for an administrative proceeding before the Commission precludes concurrent district-court jurisdiction. If the SEC rules against the respondents, the Court of Appeals will then have jurisdiction to review the proceeding per the statutory scheme (*Jarkesy v. SEC*, September 29, 2015, Srinivasan, S.).

Background. The plaintiffs were among several charged with defrauding investors in two hedge funds. The plaintiffs did not settle, but their co-respondents did, and the SEC's associated order included findings that the plaintiffs violated the securities laws. The plaintiffs sued the SEC in the district court in D.C., seeking to stay the administrative proceeding for Due Process violations arising from the SEC's alleged prejudgment of the case. The district court [concluded](#) that under the Supreme Court's *Thunder Basin* (1994) framework, it had no concurrent jurisdiction to consider the challenge because Congress intended the statutory scheme of administrative and judicial review to be exclusive.

Thunder Basin. The appeals court likewise looked to *Thunder Basin*, which directs that Congress intended a litigant to proceed exclusively through a statutory scheme of administrative and judicial review when (1) that intent is "fairly discernible in the statutory scheme" and (2) the litigant's claims are "of the type Congress intended to be reviewed" through the scheme. Both of these factors supported the conclusion that the statutory scheme was meant to be exclusive. Indeed, the court noted that the securities law scheme resembled the enforcement scheme the Supreme Court found exclusive in *Thunder Basin*: it is equally comprehensive and follows nearly the same progression, except that the SEC rather than the sanctioned entity initiates agency review. The plaintiffs did not dispute this point, but directed their argument towards the second prong of *Thunder Basin*, arguing that the challenges raised in the district court are not of the type Congress intended to be reviewed within the statutory structure.

Free Enterprise. The D.C. Circuit disagreed, using the Supreme Court's subsequent *Free Enterprise* decision for guidance. Under that opinion, Congress can be presumed to have left district-court review open if a finding of preclusion could foreclose all meaningful judicial review, if the suit were wholly collateral to the statutory review provisions, or if the claims were outside the agency's expertise. Each of these factors argued for the statutory scheme's exclusivity, however. Because the plaintiffs' constitutional claims can eventually reach an Article III court if the SEC rules against him, it did not matter for these purposes that the SEC had the authority to rule on them in the first instance. Furthermore, the claims, rather than being "wholly collateral" to the securities laws' statutory scheme, were "inextricably intertwined" with the enforcement proceeding that the statute empowered the SEC to institute and resolve. Finally, the fact that the SEC had rejected similar arguments to the plaintiffs' in an unbroken line of decisions was a case in point that the proceeding fell within its expertise.

The case is [No. 14-5196](#).

Attorneys: S. Michael McColloch (S. Michael McColloch, PLLC) and Mark B. Bierbower (Hunton & Williams LLP) for appellants. Dominick V. Freda, Securities and Exchange Commission, for appellee.

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