

Securities Regulation Daily Wrap Up, ENFORCEMENT—D.D.C.: Mechanism for review of SEC proceeding does not include district court, (Jun. 11, 2014)

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By Rodney F. Tonkovic, J.D.

A district court lacked subject matter jurisdiction over a complaint brought against the SEC. The plaintiffs sought to stay an administrative proceeding, maintaining that the Commission had prejudged that case against them. The court concluded that, under the statutory scheme set forth in the securities laws, it could not provide the relief sought by the plaintiffs (*Jarkesy v. SEC*, June 10, 2014, Howell, B.).

Background. In an order instituting administrative proceedings, plaintiff George Jarkesy and two other respondents were charged by the Commission with defrauding investors in two hedge funds and steering fees to a broker-dealer. In late 2013, the co-respondents settled the proceeding against them. Jarkesy was not named in the settlement offer, but was referred to therein as the "Manager" and "Adviser."

According to Jarkesy, in accepting the settlement offer and issuing its order, the Commission entered findings of fact and conclusions of law against the plaintiffs in this action. These findings included the determination that the plaintiffs engaged in fraud and violated the Investment Advisers Act. These findings, Jarkesy argued, were unnecessary to effect the settlement and had no purpose other than to express the Commission's opinions and conclusions.

The administrative proceedings against Jarkesy were reported in the *Securities Regulation Daily Wrap Up* for December 5, 2013 (settled proceeding) and March 25, 2013 (order instituting proceedings).

Procedural history. Following the entry of the order, Jarkesy filed a petition for Interlocutory Review and Stay of Proceeding. Jarkesy sought to disqualify the SEC Commissioners from hearing any proceedings against him, alleging that the Commission had prejudged the case against him and that it had engaged in impermissible *ex parte* communications with the Enforcement Division in connection with the settlement. The administrative law judge denied the motion, and the Commissioners denied the interlocutory appeal.

Jarkesy then filed suit in the District of Columbia seeking a temporary restraining order to stay a scheduled administrative hearing. The court denied the motion, stating, among other conclusions, that it was not convinced that it had jurisdiction over the matter. Both parties then proposed that the court issue a ruling on subject matter jurisdiction.

Subject matter jurisdiction. The court found that it was precluded from exercising subject matter jurisdiction to hear Jarkesy's claims. Exchange Act Section 25 provides that review of an SEC final order takes place in a U.S. Court of Appeals. Here, no final order has been entered by the Commission, and, even if the action were ripe, review must take place in an appellate court. This statutory regime, the court concluded, "sets forth an exclusive mechanism for the plaintiffs to pursue their claims: first, before an ALJ, then before the SEC's Commissioners, and finally, if necessary, before a Court of Appeals." The complaint was accordingly dismissed.

The case is No. 14-114.

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Companies: Patriot28, LLC

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