

Alert | Health Care & FDA Practice



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Fifth Circuit Decision Could Undermine Constitutionality of HHS Civil Money Penalty Laws

On May 18, 2022, the U.S. Court of Appeals for the Fifth Circuit issued its decision in *Jarkesy v. Securities and Exchange Comm'n*, in which it examined the constitutionality of an agency civil money penalty enforcement proceeding. The decision could have widespread implications for the Department of Health and Human Services.

In *Jarkesy*, a Securities and Exchange Commission administrative law judge (ALJ) found petitioners liable for securities fraud and imposed a \$300,000 civil penalty and in addition, required one of the petitioners to disgorge \$685,000, in what was termed “ill-gotten gains.” The Commission affirmed the ALJ’s findings and petitioners sought review.

A split panel of the Court, in vacating the SEC decision, concluded that “(1) the SEC’s in-house adjudication of Petitioners’ case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I’s vesting of ‘all’ legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II.” Slip Op. at 2.

The Court’s disposition of the Seventh Amendment issue could affect the viability of various provisions of the Social Security Act that authorize the administrative imposition of civil money penalties or authorize the agency, directly or through certified surrogates, to adjudicate disputes between private parties.

The Seventh Amendment guarantees the right to a trial by jury in any case at law where the amount in controversy exceeds \$20. Under Supreme Court jurisprudence the Seventh Amendment does not apply to matters at law involving “distinctly public rights,” a term with a meaning that is less than clear. In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Court sought to clarify that Congress “cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns ‘traditional legal claims’ to an administrative tribunal. *Id.* at 52. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution. *Id.* at 54.” Slip Op. at 8.

“If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment’s guarantee of a jury trial.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 54-55. Paradoxically, according to the *Nordberg* Court, a “public right” can exist even though the government may not be a party to the action. Suffice it to say, the Court’s attempt to define the term “public right” is at best muddled and at worst, internally inconsistent.

The Fifth Circuit, perhaps recognizing this lack of clarity, struck out on its own by noting, quite simply, that “[s]ecurities fraud actions are not new actions unknown to the common law. Jury trials in securities fraud suits would not ‘dismantle the statutory scheme’ addressing securities fraud or ‘impede swift resolution’ of the SEC’s fraud prosecutions. And such suits are not uniquely suited for agency adjudication.” Slip Op. at 11. The court concluded that the SEC’s scheme for administratively resolving these cases violated the Seventh Amendment.

The same logic would apply to any one of a number of adjudicative schemes within the Department of Health and Human Services, including the dispute resolution regulation implementing the “No Surprises Act,” which channels private fee disputes between provider and private insurers to be resolved through a system of binding arbitration using CMS certified arbitrators. While a portion of the regulation was recently vacated, the issue whether the compelled binding arbitration would survive an Article III or Seventh Amendment challenge appears to be in greater doubt now as a result of *Jarkesy*. See *Tex. Med. Ass’n v. United States Dep’t of Health & Human Servs.*, 6:21-cv-425-JDK, at *1 (E.D. Tex. Feb. 23, 2022) (vacating portion of Rule creating a presumption). Also now at issue are all civil money penalty laws, including those for violating the Health Insurance Portability and Accountability Act of 1996.

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