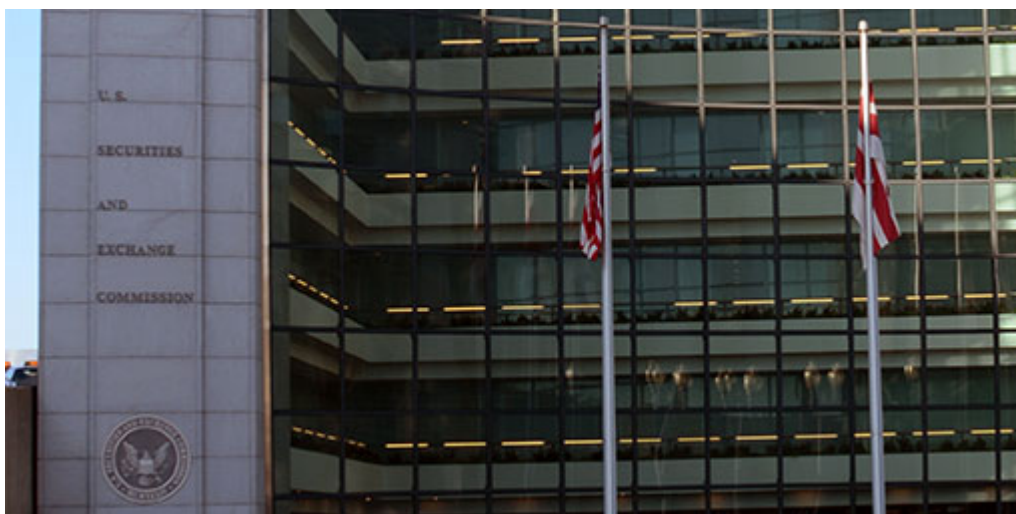


SEC Enforcement Defendants Descend on Georgia for Judicial Relief from the SEC's Allegedly Unconstitutional In-House Tribunal

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It is often hot in Georgia this time of year. In one particular Georgia federal court, the U.S. Securities and Exchange Commission (SEC) has been feeling some of that heat on an issue of significant interest to subjects of SEC administrative enforcement proceedings. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Among many other things, Dodd-Frank expanded the SEC's authority to bring administrative enforcement actions – rather than court actions – for both injunctive relief and civil monetary penalties against “any person” for violations of certain federal securities laws. Since the passage of Dodd-Frank, the SEC has brought increasing numbers of such contested administrative proceedings, which are heard by SEC administrative law judges (ALJs). In turn, enforcement defendants have become more aggressive in raising constitutional challenges – in the federal courts – to the propriety of such “in-house” proceedings. In

recent weeks, the U.S. District Court for the Northern District of Georgia has become a judicial hotbed for this constitutional showdown, with one enforcement defendant finding some success and the SEC claiming “judge shopping.” As an initial salvo, on June 8, 2015, the Georgia district court granted a motion for a preliminary injunction halting an SEC administrative proceeding against a self-employed real estate developer for alleged insider trading. *Hill v. SEC*, No. 1:15-CV-1801-LMM. The court issued its decision rather quickly, as the plaintiff developer filed the suit on May 19, following the developer’s failed effort to convince the SEC ALJ who was presiding over the administrative action to suspend that proceeding. However, in its preliminary injunction ruling, the district court did not embrace all of the plaintiff’s arguments. First, the district court rejected the plaintiff’s argument that Dodd-Frank violates the so-called “non-delegation doctrine” embodied in Article I of the U.S. Constitution in that the statute purportedly “gives the SEC unfettered discretion to select its forum.” The court held that, rather than reflecting a non-delegable exercise of legislative power, the SEC’s forum selection decisions reflect a permissible exercise of executive authority and prosecutorial discretion. Next, the district court dispensed with the plaintiff’s argument that the SEC’s Congressionally authorized use of the administrative forum to enforce federal securities laws and extract civil monetary penalties violates the plaintiff’s Seventh Amendment right to a jury trial. In this respect, the court found that Congress properly may allow for administrative enforcement of statutorily created causes of action involving “public rights” (including those seeking monetary penalties) even if Congress did not specify the non-jury forum when it originally created the statutory cause of action. Turning in favor of the enforcement defendant qua plaintiff, the district court found that the “[p]laintiff has proved a substantial likelihood of success on the merits of his claim that the SEC has violated the Appointments Clause [under Article II of the U.S. Constitution] as well as the other factors necessary for the grant of a preliminary injunction.” In reaching this conclusion, the court accepted the plaintiff’s position that SEC ALJs are “inferior officers” (rather than mere employees of the agency) and, under the Appointments Clause, must be appointed by either the President alone, the SEC Commissioners, or the federal judiciary, which they are not. Thus, the district court enjoined the SEC administrative proceeding “to allow the Court sufficient time to consider this matter on the merits.” The SEC is expected to appeal the district court’s decision to the United States Court of Appeals for the Eleventh Circuit. A few days after the district court’s preliminary injunction ruling in *Hill*, another group of SEC enforcement defendants qua plaintiffs filed a similar constitutional challenge against the SEC in the same court. See *Timbervest, LLC v. SEC*, No. 15 CV-2106. Unlike the procedural posture in *Hill*, this latest challenge relates to an SEC ALJ’s “Initial Decision” that has already been issued against the plaintiffs and is currently on administrative appeal to the full Commission. *Timbervest* has been assigned to the same district court judge as *Hill* because, when they filed it, the *Timbervest* plaintiffs designated their case as a “related case” to both *Hill* and yet another case challenging the constitutionality of the SEC in-house tribunal, *Gray v. SEC*, No. 15-CV-492, which is also pending before the same judge. In the latest twist, the SEC is challenging the “related case” assignment of *Timbervest*. Citing the “appearance of judge shopping,” the SEC argues that the cases do not satisfy the “related case rule” because they do not share the same “issues of fact” or arise out of the same event or transaction. The SEC requests that the case

be returned to the Northern District clerk's office for random assignment. Not surprisingly, the *Timbervest* plaintiffs have filed a response arguing otherwise. The court has yet to rule. We in the SEC defense bar will continue to follow developments in these Georgia cases, as well as similar ones in other venues, with great interest. *Image source: WPPilot (Wikimedia)*

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