

Supreme Court Declines to Review Constitutionality of SEC In-House Court

SECURITIES TRANSACTIONS AND COMPLIANCE | SECURITIES AND DERIVATIVE LITIGATION | JUNE 30, 2016



Natalie A. Napierala

The SEC's increased use of its own "home court" for enforcement proceedings has triggered constitutional challenges to SEC administrative proceedings (APs). See "Defendants Challenge SEC's Increased Use of Administrative Forum," *Expect Focus*, Winter 2015; "SEC Administrative Law Judge Appointments Held Likely Unconstitutional," *Expect Focus*, Summer 2015. Most of these cases, brought in federal district courts, allege violations of the Appointment, Removal, Due Process and Equal Protection Clauses, the Seventh Amendment right to a jury trial, and the non-delegation doctrine.

While some of these challenges have been decided on jurisdictional grounds, the underlying question of whether APs are constitutional remains unanswered by the U.S. Supreme Court, which has now twice declined to consider constitutional issues raised. In both *Bebo v. SEC* and *Pierce v. SEC*, petitioners argued that, among other things, the SEC's administrative law judges violate Article II because they are "inferior officers" and are hired by SEC staff instead of appointment by the President or the Commission itself. Neither case, however, presented the issue of constitutionality squarely to the Court. For example, in *Bebo*, the question posed was whether district courts can hear challenges before the Commission issues a final decision. And the petitioner in *Pierce* argued that the respondent waived his constitutional challenge, which he failed to raise during the AP and which he brought for the first time after losing an appeal on separate grounds.

Recently, the Eleventh Circuit in *Hill v. SEC* and the Second Circuit in *Tilton v. SEC* joined the Seventh and D.C. Circuits holding that constitutional challenges cannot be brought in federal district court until the Commission issues a final ruling.

Constitutional challenges remain pending in the D.C., Second, Fourth and Eleventh Circuits. For example, the D.C. Court of Appeals recently heard oral argument in *In re Raymond*, where a review is sought of the Commission's holding that the appointment of its ALJs is constitutional. The D.C. Court of Appeals may be the first appellate court to squarely address that issue, and a holding of unconstitutionality could motivate the Supreme Court to at last grant certiorari to review the question.