

The *Loper and Jarksey* Era: Agency Power to Award Civil Penalties in SEC and FINRA Under Increased Scrutiny

Commercial Litigation Update

December 9, 2024 | Blogs | 3 minute read

Categories: Securities, Supreme Court

Since the U.S. Supreme Court's landmark *Loper*^[1] decision, which overturned the longstanding precedent of the *Chevron* doctrine for agency deference, it was anticipated that lower courts, as well as the Supreme Court, would begin to decide whether *specific* deference to agency interpretation and power was appropriate, likely on a policy-by-policy and agency-by-agency basis.

As expected, in the few short months since the *Loper* decision, the SEC and FINRA's administrative power to seek and award civil penalties in their in-house disciplinary function has been called into question.

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Specifically, alongside and in the same term as *Loper*, the Supreme Court decided *SEC v. Jarksey*, which reviewed whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud. In *Jarksey*, the Supreme Court held that, “[w]hen the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.”

After the *Jarksey* decision, FINRA’s power to seek civil penalties in an enforcement proceeding also was called in to question. In *Blankenship v. Fin. Indus. Regulatory Authority*, a FINRA registered broker filed suit in the Eastern District of Pennsylvania, asking the court to enjoin FINRA from proceeding with a disciplinary hearing against him. The broker relied on the Supreme Court’s *Jarksey* decision, arguing that, by extension, FINRA’s proceedings seeking civil penalties against him also ran afoul of the Seventh Amendment. *Id.* While the court in *Blankenship* dismissed the case on jurisdictional grounds, and stated such claims must be brought on direct appeal, this line of cases demonstrates the first wave of many upcoming challenges to SEC and FINRA in-house disciplinary enforcement. *See id.* at *3.

While both *Jarksey* and *Blankenship* do not cite to *Loper*, the cases read alongside each other indicate that courts may be starting to chip away at the power administrative agencies had before the *Loper* decision, and that courts will determine on a case-by-case basis whether previously used administrative “powers” will be upheld if challenged. There likely will be more challenges, not only to the in-house disciplinary powers of the SEC and FINRA to seek civil penalties, but other administrative

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agencies and powers as well. It will be key to monitor this area, especially in regard to the issue of FINRA's power to seek civil penalties, when a jurisdictional challenge does not preclude a decision on the merits of a case.

ENDNOTES

[1] The *Loper Bright Enterprises et al. v. Raimondo* decision overruled *Chevron*, and determined that deference to agency determinations cannot be automatic or authoritative. Lower courts must exercise their independent judgment to determine if an agency has acted within the scope of its delegated authority from Congress, and courts cannot "defer to an agency interpretation of the law simply because a statute is ambiguous." For more information on the *Loper* decision, please refer to previous blog posts written by EBG attorneys on the matter.

Tags: Chevron, FINRA, Supreme Court