Jury Trials for Environmental Enforcement: What Now After *SEC v. Jarkesy*?

By David G. Mandelbaum | July 12, 2024 | The Legal Intelligencer

Last month, the U.S. Supreme Court decided *Securities & Exchange Commission v. Jarkesy*, No. 22-859 (U.S. June 27, 2024), holding that the SEC cannot assess civil penalties for securities fraud through an administrative tribunal. As the court well-understood, the decision has implications for many areas of federal regulatory enforcement, including environmental law. So what does it mean for the environmental practice?

George Jarkesy committed securities fraud. The SEC had the option to sue for penalties in district court but elected to pursue assessment of penalties in an administrative tribunal established by the Dodd-Frank Act. The administrative law judge awarded the penalties and the commission affirmed. Jarkesy petitioned for review of that decision in the court of appeals, arguing that the award of penalties violated his Seventh Amendment right to a jury trial. The court of appeals reversed the commission, agreeing with the Seventh Amendment argument. The Supreme Court affirmed in an opinion by the chief justice joined by the court's six conservatives. In addition, Justice Neil Gorsuch with Justice Clarence Thomas concurred with an additional opinion; Justice Sonia Sotomayor and the other two liberals dissented.

The Seventh Amendment provides:

In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

For the majority, the case turned primarily on the relief sought by the SEC. The commission sought a monetary award on a theory analogous to common law fraud and therefore the SEC's claim amounted to a "suit at common law" and had to be tried to a jury. All of the justices recognized that the securities fraud penalty claim was not exactly a claim for common law fraud. The SEC was penalizing Jarkesy in order to preserve the integrity of the securities markets and not to redress a private loss; indeed, the SEC did not have to prove that any victim of the fraud actually incurred a loss. Further, the penalty was not transferred to victims, but instead retained by the United States. For the majority, a claim for monetary relief to punish or to deter violations is exactly what must be tried to a jury.

The dissent—and perhaps Justices Gorsuch and Thomas—see the issue in more Article III terms. The "judicial Power" is vested in the federal courts and extends "to all cases, in law and equity, arising under … the laws of the United States … ." U.S. Const. art. III, Sections 1, 2. Therefore, one might ask whether Congress has the power to allow an Executive Branch tribunal—an ALJ— to exercise that judicial power and to limit the courts to a deferential review with no jury involved. The dissent would agree that if the civil penalty claim had been adjudicated by the federal district court, the Seventh Amendment would have assured Jarkesy a jury. However, the dissent would have held that regulatory enforcement, like the SEC's

claim in *Jarkesy*, falls within a "public rights" exception to the right to Article III adjudication and a jury. The dissent cites a history of "public rights" cases but relies most heavily on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), allowing OSHA to assess civil penalties through an administrative process. The majority, however, held that Atlas Roofing exemplifies a very narrow exception having to do with "new" regulatory obligations, tax collection, and a few other specific sorts of claims.

Several federal environmental statutes allow for the Environmental Protection Agency to assess civil penalties administratively, including the Clean Water Act, 33 U.S.C. Section 1319(g), Clean Air Act, 42 U.S.C. Section 7420, Resource Conservation and Recovery Act, 42 U.S.C. Section 6928, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9609. In each case, the EPA must provide a hearing, and appeals from the decision in that administrative hearing typically go not to the Administrator but to the Environmental Appeals Board. See 40 C.F.R. Section 1.25(e); www.epa.gov/eab. Petitions for review to the federal courts are on a deferential standard and do not involve a jury. If the sorts of enforcement claims contemplated by these statutes (and others) do not fall within the "public rights" exception, then *Jarkesy* would suggest that the provisions allowing for administrative assessments of civil penalties are unconstitutional. One might expect that violations of obligations under the environmental laws would be like an enforcement of OSHA standards and therefore within the "public rights" exception. However, the majority opinion distinguished OSHA enforcement from SEC enforcement because OSHA was somehow very new without a common law analogy, like a detailed building code, as distinct from the requirements of the securities laws. Some would say that the environmental laws are a statutory elaboration on the principles of common law public nuisance, and therefore would not be within the exception.

Of course, one can always waive a jury. Therefore, one might say that a party subject to enforcement may consent to administrative assessment of a civil penalty. Surely a party can consent to the penalty amount. But can a party object either to the violation or to the amount of the penalty for the violation and consent to the administrative procedure for adjudication of those disputes? If the provisions establishing the administrative assessment procedure are unconstitutional, perhaps they cannot be invoked even by consent. If they are invoked by consent, what rights of judicial review does a disappointed respondent on an administrative order have? The Supreme Court has left all these questions unanswered.

The federal environmental laws also permit assessment of civil penalties through judicial actions. The majority, and perhaps the dissent, in *Jarkesy* implies that those claims must be tried to a jury unless all parties waive it, but there is no direct resolution of that question. Those statutes also allow a successful plaintiff in a citizen suit to recover both an injunction to require compliance and civil penalties. The civil penalties are paid to the United States. The citizen suit injunction claim is equitable, and therefore would not implicate the Seventh Amendment. But the defendant (or, for that matter, the citizen plaintiff) may have a right to a jury to adjudicate monetary relief assessed for the purpose of punishing or deterring violations. If one has a right to a jury, one may have a right to have a jury determine liability for, as well as the amount of, a penalty. Liability for the penalty relies on the same set of facts as liability to an injunction. Are all citizen suits, then, to be tried to juries?

As mentioned above, penalties for some violations CERCLA can be assessed administratively. However, the most important obligations that the government can impose administratively under CERCLA are obligations to implement response actions. The government may issue an order to require response under 42 U.S.C. Section 9606(a). Enforcement of those unilateral administrative orders by injunction is difficult because of the language of Section 9606(a). The United States must enforce UAOs by assessing "civil

fines" under Section 9606(b)(1). Are those actions now triable to a jury, including the issue of whether the defendant has "sufficient cause" not to comply (such as the invalidity of the UAO)?

The Supreme Court has left practitioners to litigate over all of these questions, and the answers may not be the same for different sorts of claims or under different environmental statutes. In the interim, enforcement of the federal environmental laws has become more cumbersome. Maybe that advantages the regulated community. But most sophisticated entities seek to achieve compliance for reasons other than avoiding penalties. They have an interest in effective enforcement against their less punctilious competitors. *Jarkesy* does not help on that score. Finally, a note about state civil penalties. The Supreme Court has never incorporated the Seventh Amendment to the states through the Fourteenth Amendment's due process clause. Thus, *Jarkesy* will not apply directly to state enforcement. However, most states have their own constitutional protection of the right to a jury. Article I, section 6, of the Pennsylvania Constitution provides: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." Recipients of administrative penalty assessments in Pennsylvania may cite *Jarkesy* for the proposition that the Department of Environmental Protection may only exact a penalty through a suit in a court before a jury. That would disqualify, among other tribunals, the Environmental Hearing Board.

Stay tuned.

About the Author:

David G. Mandelbaum is a shareholder in the Environmental Practice of Greenberg Traurig. He maintains offices in Philadelphia and Boston. Mandelbaum teaches "Environmental Litigation: Superfund" and "Oil and Gas Law" in rotation at Temple Law School, and the Superfund course at Suffolk Law School in Boston. He is a Fellow of the American College of Environmental Lawyers and was educated at Harvard College and Harvard Law School. Contact him at mandelbaumd@gtlaw.com.