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Legal Sidebar

Two Years After *SEC v. Jarkesy*: Overview of Selected Appellate Decisions

September 2, 2026

In 2024, the Supreme Court decided *Securities and Exchange Commission (SEC) v. Jarkesy*. The Court held that the Seventh Amendment—which provides a right to jury trial in common law actions—prohibits the SEC from imposing civil penalties for securities fraud by way of a jury-less, in-house adjudication. Under *Jarkesy*, SEC instead must litigate such enforcement actions in Article III courts, where jury trials are available in cases subject to the Seventh Amendment and where different evidentiary and procedural rules apply. While the case specifically concerned SEC enforcement actions related to securities fraud, the Court did not cabin its holding to such actions. Thus, the decision raised potential questions regarding the constitutionality of numerous other enforcement schemes enacted by Congress that authorize agencies to pursue, through in-house tribunals, civil penalties and other remedies for noncompliance.

In 2026, the Court issued a decision in *Federal Communications Commission (FCC) v. AT&T* that determined that agency-issued orders to pay monetary fines are only subject to the Seventh Amendment constraints if they are binding. *AT&T* did not, however, provide additional guidance on determining whether a particular action is required to be heard in an Article III court in the first instance. In the two years since the *Jarkesy* decision, several appellate courts have considered *Jarkesy*-based challenges brought by various regulated entities subject to enforcement actions carried out through in-house adjudication proceedings. While some courts have rejected these challenges, other courts have concluded that certain enforcement schemes violate the Seventh Amendment or Article III of the Constitution under *Jarkesy*. This Sidebar begins with a background on the Seventh Amendment, its jury trial requirement and the public rights exception thereto, and *Jarkesy*. The Sidebar then provides an overview of selected post-*Jarkesy* appellate decisions and selected considerations for Congress.

Background on the Seventh Amendment and *Jarkesy*

The Seventh Amendment preserves "the right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." The Supreme Court has explained that the term *suits at common law* embraces all actions that are "legal in nature," meaning that it is the type of action that courts of law, rather than courts of equity (which historically sat without a jury and typically awarded nonmonetary relief such as injunctions), would hear. The Court, however, has recognized an exception to the Seventh Amendment for cases involving "public," rather than "private," rights. Such public rights cases are permitted to be heard outside of the Article III courts, where a jury would not be available. While the Court has not "definitively explained" this *public rights exception*, it has recognized that the exception includes certain "historic categories of adjudication," such as revenue collection, foreign commerce, immigration, tribal relations, public lands, public benefits, and patents.

In *Jarkesy*, the Court held that a statutory scheme in which the SEC could impose civil penalties for securities fraud through an in-house administrative proceeding (with either an administrative law judge or the Commission itself acting as decisionmaker) violated the Seventh Amendment. The Court first concluded that the Seventh Amendment was implicated because the action was "legal in nature." The remedy was the "most important" factor in this determination. Civil penalties, the Court explained, are designed to punish wrongdoing rather than to restore the status quo between the parties; they are, therefore, quintessentially legal, rather than equitable, in nature. While the presence of penalties was enough to establish the legal nature of the claim, the nature of the cause of action "confirmed" the Court's conclusion. While "not identical," the Court recognized a "close relationship" between securities fraud and historic common-law fraud.

The Court further held that the public rights exception did not apply to these SEC proceedings. The public rights exception, the Court cautioned, "has no textual basis in the Constitution" and must be treated "with care" so as not to let it swallow the Seventh Amendment's general rule. When considering "whether the Seventh Amendment guarantees the right to a jury trial 'in the face of Congress' decision to allow a non-Article III tribunal to adjudicate' a statutory 'fraud claim,'" the Court explained that "what matters is the substance of the action." In particular, the inquiry is whether the underlying claim "possess[es] a long line of common-law forebears." With respect to fraud, the Court observed that "law courts have dealt with fraud actions since before the founding." In the Court's view, the fraud claim at issue in these SEC actions, like the statutory claim for fraudulent conveyance under the bankruptcy code at issue in *Granfinanciera, S.A. v. Nordberg*, involved "claims that traced their ancestry to the common law." In so holding, the Court did not overrule *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, which held that the public rights exception applied to civil penalty suits enforcing requirements of the Occupational Safety and Health Act of 1970 (OSH Act), a federal workplace safety law. In the Court's view, *Atlas Roofing* is inapposite because the statutory scheme there imposed federal safety standards that "resemble[] a detailed building code" and "bring no common law soil with them," and thus the civil penalty suits "involved 'a new cause of action, and remedies therefor, unknown to the common law.'"

Overview of Selected Post-*Jarkesy* Appellate Decisions

Since *Jarkesy*, certain entities subject to various agency administrative enforcement actions have challenged those actions as violating the Seventh Amendment or Article III. Appeals court decisions issued to date have addressed questions left open by *Jarkesy*, including (1) whether and under what circumstances the "public rights exception" applies with respect to civil penalty enforcement actions and (2) whether and under what circumstances a case needs to be heard in an Article III court beyond the civil penalties context.

Selected Appellate Decisions Addressing the Public Rights Exception

At least four appellate courts have considered whether certain agencies' use of in-house administrative proceedings to assess civil penalties violated the Seventh Amendment's jury trial requirement. These actions sought to enforce requirements of various statutory schemes, including those regulating aviation safety, Medicare-participating nursing homes, migrant labor conditions, banking, and tobacco products. In analyzing the Seventh Amendment question in these cases, the appellate courts generally found that, under *Jarkesy*, actions for civil penalties are legal in nature and thus implicate the Seventh Amendment's jury trial requirement. The focus of the courts' analyses was, accordingly, whether the relevant enforcement actions fell within the public rights exception.

Some appellate courts have interpreted *Jarkesy*'s public rights exception inquiry to focus on whether the statute authorizing the action—like the statutory schemes at issue in *Granfinanciara* and *Jarkesy*—"merely repackage[d] (or assign to a different party) a common law cause of action" or—like the scheme at issue in *Atlas Roofing*—created new requirements enforced by a "'novel' enforcement scheme that would have been 'unknown to the common law.'" Relevant considerations in this inquiry include whether the enforcement action "target[ed] the same basic conduct as" well-recognized common law actions, "employ[ed] the same terms of art, and operat[ed] pursuant to similar legal principles."

In *Axalta Coating Systems LLC v. Federal Aviation Administration* (*FAA*), for instance, the U.S. Court of Appeals for the Third Circuit (Third Circuit) concluded that FAA's civil penalty action to enforce the Hazardous Materials Regulations—which govern whether and how hazardous materials like flammable paint may be transported by aircraft—"cannot be distinguished from the enforcement action considered in *Atlas Roofing*." In particular, the court found that the relevant safety regulations, like the regulations at issue in *Atlas Roofing*, consist of detailed "technical prescriptions for engaging in the regulated activity" that did not "bring . . . common law soil with them." Similarly, in *Sligo Creek Center v. U.S. Department of Health & Human Services* (*HHS*), the U.S. Court of Appeals for the Fourth Circuit held that a civil penalty action to enforce health and safety regulations that apply to Medicare-participating nursing homes falls within the public rights exception and could proceed through agency adjudication. The court found that, "[a]s in *Atlas Roofing*, Congress did not merely repackage . . . a common law cause of action" but instead "created a detailed series of new requirements that apply only to 'skilled nursing facilit[ies]' that voluntarily participate in Medicare." The court further observed that "the obligations at issue here are . . . untethered to any injury." While "[s]uits at common law to vindicate private rights required both *injuria* (a legal wrong) and *damnum* (actual, concrete harm)," Congress has, under the relevant Medicare provision, "authorized HHS to take various actions—including imposing monetary penalties—even when no resident has suffered or is at immediate risk of suffering harm."

In contrast, in *Sun Valley Orchard, LLC v. Department of Labor* (*DOL*), the Third Circuit held that DOL's civil penalties action against a farm for breaching an employment agreement formed under a nonimmigrant visa program could not proceed through agency adjudication. The court acknowledged that the visa program, in authorizing domestic employers to temporarily hire foreign laborers to perform seasonal agricultural work, "exists at the intersection of labor and immigration law," one of the areas of public rights identified by the *Jarkesy* court. The Third Circuit, however, observed that DOL's specific enforcement action was based on the petitioner farm's failure to provide, among other things, housing and kitchen access in accordance with the applicable job order that functions as a work contract between the farm and the laborer. Thus, the court concluded, DOL's action was therefore "like a suit for breach of contract, which would have traditionally been heard in common law courts."

Other appellate courts have interpreted *Jarkesy* to focus the public rights analysis on whether the enforcement action at issue implicates a public right of "a serious and unbroken historical pedigree." Two appellate courts have applied this historical approach with different degrees of specificity. In *Ortega v. Office of the Comptroller of the Currency (OCC)*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) considered whether OCC's civil penalties action against two bank officers for engaging in "unsafe or unsound banking" and breach of fiduciary duties in violation of 12 U.S.C. § 1818 fell within the public rights exception. Applying what it described as a "historical and categorical" analysis, the court concluded that OCC's action is part of the regulation of federally insured and nationally chartered banks, a prerogative long subject to the exclusive domain of the non-Article III branches as evidenced by a review of statutory and legislative history of the major banking regulatory laws and relevant references in Supreme Court case law dating back to 1903. Therefore, the action could be adjudicated outside of an Article III court without access to a jury. In *Bonan v. Federal Deposit Insurance Corporation (FDIC)*, the

U.S. Court of Appeals for the Seventh Circuit considered a similar enforcement action initiated by the FDIC against a bank's board member. In the court's view, the public rights inquiry under *Jarkesy* turns on whether the relevant standards under § 1818 implicated any private rights subject to common law claims during the founding era. The court concluded, primarily based on review of several academic articles and relevant legislative history, that the "unsafe or unsound practice" standard "brings no common law soil with it, as the term likely emerged from nineteenth century state banking laws." The court further explained that, although the breach of fiduciary duty standard involved a duty that—based on the court's review of relevant academic articles and case law references—was recognized in equitable actions during the founding era, it "d[id] not appear to have extended to bank directors." Based on these findings, the court concluded that the FDIC's enforcement action involved public rights that may be adjudicated by an agency without violating the Seventh Amendment.

In *Texas Tobacco Barn, LLC v. HHS*, the Fifth Circuit—seemingly applying the "historical and categorical" analysis—held that HHS's civil penalties action against a seller of flavored vapes for selling unauthorized vape products in violation of the federal Food, Drug, and Cosmetic Act (FD&C Act) could not proceed through administrative adjudication. In the court's view, HHS's enforcement action "is analogous to various common law actions," including "the common law action for trespass-on-the-case," which "lay against the 'unwholesome practices' of selling 'bad provisions or wine,'" and "the common law cheat action" against those who provided false representations of superior quality. The court further concluded that the public rights exception did not apply because "HHS does not demonstrate that adjudicating violations of public-health regulations 'historically could have been determined exclusively by [the executive and legislative] branches.'" In doing so, the court rejected the government's argument that the FD&C Act "establish[ed] a novel and comprehensive scheme for the regulation of tobacco products" and thus established a claim "'unknown to the common law.'"

The Supreme Court has granted the government's petition for certiorari in *Sun Valley* to consider certain questions, including whether DOL may collect monetary remedies through agency adjudication in the context of the visa program. As of the publication date, the time for filing petitions for certiorari in *Bonan* and *Texas Tobacco Barn* has not expired.

Applying *Jarkesy* Outside the Civil Penalties Context

The above cases discuss the application of *Jarkesy* to agency enforcement actions involving civil monetary penalties—actions "at law" that implicate the Seventh Amendment. However, in March 2026, the Fifth Circuit, in *Intuit, Inc. v. Federal Trade Commission (FTC)*, determined that *Jarkesy*'s scope reached beyond legal actions and had implications for actions in equity—a type of action that would not implicate the Seventh Amendment. The case involved an in-house adjudication that the FTC brought against Intuit for "deceptive" advertisements under Section 5 of the Federal Trade Commission Act. After an adjudication conducted by an Administrative Law Judge (ALJ), the FTC found that Intuit's advertisements were "likely to mislead at least a significant minority of reasonable consumers." Unlike in *Jarkesy*, where the SEC issued civil monetary penalties, the FTC issued a cease-and-desist order, an equitable remedy, prohibiting Intuit from advertising its goods or services as free for the next twenty years. Intuit appealed the order to the Fifth Circuit claiming, among other things, that the "FTC unlawfully adjudicated 'private rights' before an ALJ rather than in an Article III court."

The Fifth Circuit applied *Jarkesy* to hold that actions involving private rights, regardless of whether the action is legal or equitable, must be heard in an Article III tribunal. The court first established that Article III provides that the judicial power extends "to all Cases, in Law *and Equity*, arising under this Constitution, [and] the Laws of the United States" (emphasis added). It then explained that for an action to be permissibly heard outside of an Article III court, the action must fall under the public rights exception. The court conducted a public rights analysis, finding that FTC's deceptive advertising claims closely resembled traditional causes of action, such as deceit and fraud, available in courts of equity and common law. The court emphasized that the deceptive advertising claims targeted the same basic conduct, employed the same terms, and operated by similar legal principles as these traditional causes of action. Further, it found that the remedy—a cease-and-desist order—was tantamount to an injunction, a traditional equitable remedy. Additionally, the court distinguished the case from *Atlas Roofing* by explaining that "a blanket prohibition on 'unfair or deceptive acts or practices'" under the FTC Act "does not remotely 'resemble[] a detailed building code' like the workplace standards promulgated under the OSH Act." The court concluded that "the agency must therefore redress deceptive advertising in Article III courts."

Thus, although *Jarkesy* was largely framed as a Seventh Amendment case by the Supreme Court, the Fifth Circuit appears to view the case as establishing what actions must be heard by an Article III court regardless whether the Seventh Amendment would apply. For the Fifth Circuit, the distinction between law and equity, although relevant for a Seventh Amendment analysis, does not control whether the action must be heard by an Article III court in the first instance. As the Fifth Circuit stated, "[b]ecause Article III expressly confers exclusive jurisdiction on federal courts over cases that sound in law and equity, any distinction would only become relevant if Intuit claimed a right to a jury trial under the Seventh Amendment." The government did not seek Supreme Court review of the Fifth Circuit's decision.

Considerations for Congress

In the wake of *Jarkesy*, some argued that Congress, if it seeks to ensure compliance with the Seventh Amendment, might consider whether to change the adjudication procedures for numerous federal agencies. In the two years since *Jarkesy*, lower courts have applied the case with different results. With respect to the public rights exception, for instance, some courts have defined a standard that may be more likely to preserve agencies' ability to administratively enforce requirements of statutory schemes that do not borrow directly from common law causes of action, while other courts have applied a "historical and categorical" analysis that could more broadly limit the scope of public rights enforceable by administrative adjudication. Although the Supreme Court may further clarify the applicable standard for the public rights exception in *Sun Valley*, other open questions not at issue in that case may remain. Despite these uncertainties, Congress might consider several options when addressing agency enforcement authorities going forward.

One consideration for Congress is whether to bolster agencies' options for enforcement should their in-house adjudicative processes be deemed unconstitutional. Although many agencies, like the SEC, have authority to pursue civil penalties in either federal court or through in-house adjudication, some agencies only have the authority to adjudicate civil penalties in house. For example, Justice Sonia Sotomayor, in her *Jarkesy* dissent, stated that "the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, [and] the Department of Agriculture," among other agencies, "can pursue civil penalties only in agency enforcement proceedings." If a court rules those actions unconstitutional, those agencies' ability to take enforcement actions may be significantly curtailed without further congressional authorization. Congress may consider amending the organic acts of these agencies to allow them to bring enforcement actions in federal court to ensure that they are still able to pursue potential violators. Similarly, when crafting new enforcement systems, Congress may consider whether to empower agencies to bring claims in court, rather than solely providing administrative enforcement authority.

In *FCC v. AT&T*, the Supreme Court established that the government does not violate the Seventh Amendment if an agency action does not determine any legal rights or obligations on a party prior to a trial de novo. Under *AT&T*, it appears that enforcement mechanisms whereby agencies investigate and hold informal hearings with regulated parties to determine compliance with statutory and regulatory requirements are permissible, so long as the government is "required to prove its case to a jury" before collecting penalties. This, arguably, permits an agency to develop facts and make preliminary assessments before forwarding the case to the Department of Justice for ultimate enforcement. Following the Court's decision, Congress could, if it sought to do so, emulate this enforcement scheme in future statutes or when revising existing laws to bring them in compliance with the Seventh Amendment.

Congress might also be able to minimize the constitutional issues associated with administrative enforcement actions by providing an option for individuals subject to such enforcement actions to remove the proceeding to federal court. Arguably, this could cure the constitutional issue because proceedings would only occur outside of an Article III court if the litigants agreed to the administrative forum. The Fifth Circuit, in the *Intuit* decision, highlighted that non-Article III adjudication has, at least in some instances, been viewed favorably when the parties consent to the forum. Proposals to this effect have been introduced in the 119th Congress. Under these proposals, litigants desiring a jury trial or other Article III procedural protections could remove an administrative action to federal court, while other litigants who may favor the less expensive and potentially expedited administrative proceedings could agree to have their cases heard before the agency.

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