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Lawyers Call For Challenges to SEC Administrative Proceedings.

WASHINGTON - The Supreme Court's refusal to take up a case on the Securities and Exchange Commission's use of administrative proceedings to impose penalties in enforcement cases prompted a law firm to recommend those subject to administrative proceedings to challenge their constitutionality.

The alert issued by Orrick, Herrington & Sutcliffe on Thursday comes as the SEC has faced increasing criticism for using administrative law judges instead of the courts to try enforcement cases.

Most SEC muni enforcement actions are brought through administrative proceedings. However, the commission also files complaints against alleged violators of anti-fraud statutes in district courts.

"The consequences of being subject to an SEC administrative review process are significant," wrote Jason Halper, the co-chair of Orrick's financial institutions litigation practice who authored the alert with two other lawyers from the firm. "In federal court, a defendant is entitled to full civil discovery, complete application of the federal rules of procedure and evidence, in most cases, a jury trial, and adjudication by a neutral arbiter, while a respondent in a SEC proceeding is entitled to none of these protections."

The Orrick lawyers said the "results of that incongruity speak for themselves," citing media reports that found the SEC was successful in 90% of administrative proceedings over a five-year period compared to only 69% of federal court cases during the same time period.

The case on which the alert is based is *Bebo v. Securities and Exchange Commission*. It involves Laurie Bebo, the former chief executive officer of Wisconsin-based Assisted Living Concepts Inc., who challenged the constitutionality of the penalties imposed in administrative proceedings. The SEC had charged that Assisted Living Concepts and Bebo had released false or misleading financial and disclosure documents.

The proceedings were ongoing when Bebo filed her constitutional challenge in the District Court of the Eastern District of Wisconsin. The district court dismissed Bebo's case citing a lack of jurisdiction over the issue because she had not concluded with the administrative proceedings at the time she filed. The Seventh Circuit Court of Appeals in Chicago later affirmed the decision.

Although the Supreme Court decided last week not to review and reconsider the appeals court ruling, the Orrick lawyers said there are more cases making their way through the federal system and that the Supreme Court might decide to address the issue if a split in opinion develops in the circuit courts.

"The SEC has chosen a forum that allows it to investigate, prosecute, adjudicate, and if successful in supporting the charges before an administrative law judge, provide appellate review of a case for which the very same commissioners approved the filing of charges in the first place," Bebo's lawyers

said in the district court complaint.

Mark Cuban, the celebrity entrepreneur, filed a friend-of-the-court brief as Bebo's case was being appealed calling the administrative proceedings a "farce" and unconstitutional.

In the case, Bebo argued that the SEC administrative law judges who impose enforcement penalties violate the Appointments Clause of the Constitution because the judges are hired by the SEC and not appointed by the president or SEC commissioners. The SEC administrative law judges were first allowed to issue enforcement penalties after the Dodd-Frank Act of 2010 was passed, according to the Orrick lawyers.

Representatives from the Department of Justice who responded to the complaint on behalf of the SEC, said the administrative law judges "possess the limited adjudicatory authority that the commission has delegated to them, play a part in a process over which the commission retains ultimate control, enjoy ordinary tenure protection, and have a long history of use."

Andrew Ceresney, director of the SEC's enforcement division, said in a speech to the New York City Bar last year that the commission's "overriding goal is to achieve strong and effective enforcement of the federal securities laws in a fair and efficient manner."

"We try to recommend the forum that will best utilize the commission's limited resources to carry out its mission," he said. The SEC analyzes a host of factors when deciding between administrative proceedings and a district court, but administrative proceedings are almost always wrapped up more quickly and can be much more efficient, Ceresney added.

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