

How High Court SEC Case Could Affect the ITC

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Published in [Law360](#) on February 16, 2024. © Copyright 2024, Portfolio Media, Inc., publisher of Law360. Reprinted here with permission.

On Nov. 29, 2023, the U.S. Supreme Court heard oral argument in *SEC v. Jarkesy*.

That case questions whether the U.S. Securities and Exchange Commission violated the Seventh Amendment's guarantee of a jury trial by imposing civil penalties on George Jarkesy for misleading investors in his two funds. Several of the justices indicated receptivity to Jarkesy's arguments.

If the Supreme Court finds in Jarkesy's favor, the impact on administrative agencies generally could be massive, including potentially preventing the adjudication and imposition of civil penalties in whole classes of cases.

While it may take years for the courts to sort through how the Supreme Court's potential holding affects each individual agency, the U.S. International Trade Commission's ability to adjudicate patent infringement and impose remedies will likely remain largely intact.

The ITC's ability to issue penalties for violations of its orders, however, may be more directly affected.

This article examines why the ITC may be largely spared by any changes Jarkesy requires and, if it is affected, the most likely changes.

The Seventh Amendment and the Right to a Jury in Civil Cases

The Seventh Amendment to the U.S. Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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.

As stated by Justices Thurgood Marshall and Potter Stewart in their dissent in *Colgrove v. Battin* in 1973, "the extant history of the [Seventh] Amendment is exceedingly sketchy,"^[1] thus providing little guidance of what the language means. But the requirements of the Seventh Amendment generally raise two key questions.

First, is the suit at common law? In *Parsons v. Bedford, Breedlove & Robeson* in 1830, the Supreme Court explained that common law refers to "suits in which legal rights were to be ascertained and determined in

contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.”[2]

To draw the line between legal rights and equity, the Supreme Court looks to what actions are analogous to suits brought in the English law courts, examining “both the nature of the action and the remedy sought.”[3]

Second, if a party is entitled to a jury under the Seventh Amendment because the suit is at common law, a court must decide “whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use the jury as a factfinder.”[4]

In other words, factfinding may be done without a jury in cases that involve public rights.[5] The Supreme Court distinguished such public rights cases from wholly private tort, contract and property cases, for which the right to a jury attaches.[6]

The Supreme Court acknowledged in its 2018 opinion in *Oil States Energy Services LLC v. Greene’s Energy Group LLC* that the “Court has not ‘definitively explained’ the distinction between public and private rights ... and its precedents applying the public-rights doctrine have ‘not been entirely consistent.’”[7]

But it did recognize that matters “which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments” are “public rights.”[8]

Background of Jarkesy

Jarkesy is a hedge fund manager who oversaw assets exceeding \$24 million. The SEC instituted an investigation into Jarkesy’s activities.

An SEC administrative law judge determined that Jarkesy had violated various securities laws through deceptive practices, like falsely telling investors that a prominent investment firm served as the funds’ auditor and that the fund invested more in life-insurance policies than it did.

The administrative law judge ordered Jarkesy to pay a \$300,000 civil penalty and ordered his hedge funds to disgorge nearly \$685,000 in profits. The administrative law judge further ordered Jarkesy to cease his deceptive conduct and barred him from undertaking certain activities in the securities industry.

Jarkesy appealed the SEC’s determinations and remedies to the U.S. Court of Appeals for the Fifth Circuit, arguing that the Dodd-Frank Wall Street Reform and Consumer Protection Act’s authorization of the SEC to impose civil penalties violated his Seventh Amendment right to a jury trial.

He also contended that the act improperly delegated power to the SEC without an intelligible guiding principle and that the statutory removal restrictions for SEC administrative law judges were unconstitutional. The Fifth Circuit agreed with Jarkesy on all points, over the dissent of U.S. Circuit Judge W. Eugene Davis.

The SEC appealed to the Supreme Court, which granted certiorari to consider issues including the constitutionality

of the SEC's power to initiate and adjudicate administrative enforcement proceedings seeking civil penalties.[\[9\]](#)

Jarkesy and the ITC

The ITC is an administrative body, tasked with, among other things, determining whether an industry in the U.S. is harmed by the importation of articles that infringe patents.

It does so by conducting quasi-judicial investigations, overseen by an administrative law judge, to determine whether an industry exists that should be protected and whether the relevant products infringe.

The parties are permitted to present testimony and evidence at ITC hearings, but generally the rules and procedures applied to the evidentiary hearing at the ITC differ from those of district courts under Article III of the Constitution.

Jarkesy asks the Supreme Court to find that administrative agencies are limited in their ability adjudicate and obtain civil penalties in cases that parallel a common law cause of action.[\[10\]](#) How such a rule, if adopted, would be applied in practice remains unclear.

But, whatever its form, Jarkesy is unlikely to affect the ITC's primary remedy of blocking the importation of goods that infringe because such a remedy is equitable in nature and thus does not meet the Seventh Amendment's requirement for "suits at common law."

This specific issue came up at oral argument when Justice Amy Coney Barrett asked the SEC's lawyers why it needed to impose civil penalties when there is no question that it is permitted to impose an equitable remedy barring Jarkesy from certain activities.[\[11\]](#)

But, like the SEC, the ITC can impose civil penalties in addition to its equitable exclusion orders. Under Title 19 of the U.S. Code, Section 1337(f)(2), the ITC can impose a "civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order" of up to \$100,000 or twice the domestic value of the articles that violate the order.

Thus, as in Jarkesy, an analysis must be done to determine whether the ITC can impose such a penalty under the Seventh Amendment. The Supreme Court has already decided, in *Markman v. Westview Instruments Inc.* in 1996, that patent infringement under Title 35 of the U.S. Code, Section 271, is a suit at common law, to which the right to a jury trial attaches.[\[12\]](#)

Likewise, the ITC's long-standing interpretation is that it derives its definition of infringement from Section 271, and thus applies the same elements to a determination of whether an article infringes, indicating that there is at least a good argument that an ITC infringement action parallels a case at common law.[\[13\]](#)

So the question of whether Jarkesy may prevent the ITC's civil penalties becomes whether the right being adjudicated is public or private.

In its briefing and at oral argument, the SEC cited to several Supreme Court cases finding that U.S. Customs and

Border Protection duties are a clear example of public rights to which the Seventh Amendment does not apply.^[14] The justices did not give any indication of an intent to overrule these cases.

Customs duties, however, cannot be said to parallel a cause of action at common law between private parties. ITC investigations into patent infringement, unlike customs duties disputes, can be and typically are initiated by a private party filing a complaint.

Likewise, if the ITC institutes an investigation, the complainant bears the burden of proof on the elements necessary to obtain a remedy.

While the Office of Unfair Importation Investigation is sometimes added as a party to the investigation to represent the interests of the public, the government does not bear the burden of proof on any issues. Rather, just as in district court, it is the patent holder that must prove to the ITC that the alleged infringer meets all elements of a patent claim.

Moreover, an enforcement action under which the ITC would impose a civil penalty is initiated by the original complainant — the patent owner — under Title 19 of the Code of Federal Regulations, Section 210.75(a)(1), not by the government. A customs duty, on the other hand, is imposed by the government and does not involve the relative rights between two parties.

On balance, the answer to whether the ITC is adjudicating a public right is at least somewhat unclear because of its similarities to a district court action for patent infringement.

Justice Clarence Thomas indicated an intent during oral argument to better define the meaning of that term, and the definition chosen will likely determine whether the ITC retains its ability to use civil penalties for violations of orders.^[15]

The purpose of Section 1337(f)(2) is to deter violations of the ITC's orders.^[16]

Thus, while Jarkesy is unlikely to directly affect the ITC's ability to conduct patent infringement investigations and issue exclusion orders, it could nonetheless affect the post-order conduct both of adjudged infringers and the ITC.

If these civil penalties are found to be private rights, a jury may have to adjudicate the appropriateness and amount of the penalty for violation of the order.

^[1] 413 U.S. 149, 172 (1973) (Marshall, J., dissenting) (citing Henderson, *The Background of the Seventh Amendment*, 80 Har.L.Rev. 289 (1966)).

^[2] 3 Pet. 433, 447 (1830).

[3] *Tull v. U.S.*, 481 U.S. 412, 417 (1987).

[4] *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

[5] *Id.* at 51.

[6] *Id.*

[7] 138 S. Ctr. 1365, 1373 (2018) (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 58 U.S. 50, 69 (1982), *Stern v. Marshall*, 564 U.S. 462, 488 (2011)).

[8] *Id.*

[9] *Sec. Exch. Comm'n v. Jarkesy*, 22-859, Brief of Petitioner, at (I) (Aug. 28, 2018).

[10] See, e.g., Tr. at 147:24-148:10.

[11] Tr. at 84:17-86:19.

[12] *Markman v. Westview Instrum*, 517 U.S. 370, 377 (1996) (citing *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

[13] Certain Miniature Hacksaws, Inv. No. 337-TA-237, USITC Pub. No. 1948, ID at 4, 1986 WL 379287, *1 (Oct. 15, 1986) unreviewed in relevant part by Comm'n Action Order, 1987 WL 450871 (Jan. 15, 1982)).

[14] See, e.g., Tr. at 59:8-60:22, 66:23-67:10, 69:16-71:23.

[15] Tr. at 5:14-6:10, 43:24-45:16.

[16] *San Juan New Materials High Tech, Inc. v. Int'l Trade Comm'n*, 161 F.3d 1347, 1357 (Fed. Cir. 1998).

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