

## Mass. Could Be New Front In The Battle Over Jury Trial Right

By **Chris Villani**

*Law360 (August 1, 2024, 12:21 PM EDT)* -- Following the U.S. Supreme Court's ruling granting defendants facing administrative civil penalties the right to a jury trial, experts say a similar challenge in Massachusetts is likely, but may not find as receptive a judicial audience.

The high court's 6-3 June opinion in *U.S. Securities and Exchange Commission v. Jarkesy* found that the SEC's in-house enforcement forum runs afoul of the Seventh Amendment when it imposes monetary penalties.

The Seventh Amendment right to a jury trial in certain civil cases does not apply to the states or in matters involving state agencies. But Gary Matsko, a litigator with Davis Malm PC who focuses heavily on securities matters and regulatory agencies, predicted that a case with echoes of *Jarkesy* is "very likely" to end up in Massachusetts state courts before long.

"There is going to be some unhappy person who gets fined or penalized in an administrative process that will see it as a line of appeal," Matsko said. "Certainly there is a blueprint for how to argue it, now that there is a Supreme Court decision."

### Centuries-Old Traditions

An online version of a pamphlet written by the Massachusetts Office of the Jury Commissioner begins with, "When the Pilgrims landed at Plymouth Rock, they brought with them the trial by jury."

The right to a trial by jury on civil claims has been put before the state's top appellate panel, the Supreme Judicial Court, numerous times. The SJC held in *Dalis v. Buyer Advertising* in 1994 that a plaintiff was entitled to a jury trial on her gender discrimination claim.

The jury trial right was expanded in the SJC's 1997 ruling in *Lavelle v. Massachusetts Commission Against Discrimination*, which allowed respondents in discrimination cases to demand a jury trial at some point in the proceeding.

But in 2004, the top state court reversed course, curtailing respondents' jury trial rights in discrimination cases. The ruling drew a sharp dissent from Justice Judith A. Cowin, who wrote that the majority ruling "visits discrimination on an entire class of citizens" and that "our continued tinkering with this statute is, respectfully, making bad matters worse."

The back-and-forth over jury trial rights in discrimination matters suggests to Ben Goldberger, a regulatory

compliance and enforcement lawyer at Anderson & Kreiger LLP, that "the SJC has proved itself willing to revisit its decisions in this area."

Goldberger also pointed out that Massachusetts' reputation as the cradle of American liberty has shaped the practice of law in the state since John Adams penned the state's constitution.

"The SJC and, I think, the Massachusetts bar generally, has prided itself on the notion that our constitution, which predates the U.S. constitution, provides greater protections for individual liberty," Goldberger said. "I think there is a big opening here for entities that are whacked with civil administrative penalties to claim they have a jury trial right."

The Boston-based Pioneer Public Interest Law filed a brief backing Jarkey and calling the SEC's in-house process "drenched in institutional bias."

Frank Bailey, a former federal bankruptcy judge and Pioneer Public Interest Law's president, said the stakes can be high for someone on the wrong end of a steep regulatory penalty.

"If your liability or damages or fines are essentially set by the time you get your first chance at seeing a judge, and certainly if it's an appellate judge, you've got an uphill battle in front of you," Bailey said.

### **A Case of 'Competing Values'**

While experts generally agree that a Jarkey 2.0 challenge at the state level is likely, it is less clear how the SJC might view such a case. Ian Roffman of Nutter McClennen & Fish LLP, a securities and white collar defense attorney, pointed to Jarkey and another recent Supreme Court ruling overturning Chevron deference as part of a line of cases challenging administrative law at the federal level.

"At the state level, the Massachusetts state courts have been fairly deferential to state administrative agencies," Roffman said. "While we have a very strong fundamental belief in the jury system rooted in our state constitution, we also have, I think, a tradition that has been supportive of the work of state agencies for the most part."

"It will be interesting to see how this potential intersection of competing values plays out in our state courts," he added.

Davis Malm's Matsko said agency powers are not as "sweeping" at the state level as they are in the federal arena and noted that there is a "political vein" to the issue, a nod to the ideological-line 6-3 ruling in Jarkey.

"The Supreme Court has been lined with a lot of Republican philosophical issues, including cutting back on the administrative state," he said, questioning whether the same climate exists in Massachusetts. "I wouldn't be surprised if this is something where we get a blue-state, red-state checkerboard around the country."

Emily Renshaw, a securities enforcement litigator at Morgan Lewis & Bockius LLP, said the SJC may find Justice Sonia Sotomayor's dissent in Jarkey persuasive.

Joined by her two Democratic-appointed colleagues, Justice Sotomayor wrote that the Jarkey ruling is "part of a disconcerting trend: When it comes to the separation of powers, this court tells the American public and its coordinate branches that it knows best."

"There are good reasons for Congress to set up a scheme like the SEC's," Justice Sotomayor wrote. "It may yield important benefits over jury trials in federal court, such as greater efficiency and expertise, transparency and reasoned decisionmaking, as well as uniformity, predictability, and greater political accountability."

"I think the SJC may be interested [in the issue], but I do think that the dissent in Jarkesy made very strong arguments as to why the processes should be left in place," Renshaw said. "They certainly could go more along the lines of Justice Sotomayor's dissent. There is a roadmap for both outcomes here."

### **In a Future Analysis, Looking to the Past**

Any argument before a state court that is in line with Jarkesy's at the federal level is likely to turn on whether civil penalties fall under the category of common law fraud traditionally heard by juries.

"If government civil penalties are really 'actions in debt,' as they were called in the 1700s, it seems like there is some space there to argue that it can't be done at state administrative agencies, either," Anderson & Kreiger's Goldberger said, quoting a term used by the majority in Jarkesy.

The SJC would likely examine whether this type of penalty is analogous to rights that were commonly held at the time of the Massachusetts constitution. It heard a similar challenge in 1983 in deciding *Nei v. Burley*, where the court found that there is no right to a jury trial in cases brought under the state's consumer protection statute, known as Chapter 93A.

In that decision, the SJC found that Chapter 93A created "new substantive rights" that do not trigger the right to a jury trial.

In the weeks following the Jarkesy ruling, Morgan Lewis' Renshaw said that the possibility of a challenge is likely enough to weigh into agency enforcement decisions.

"I think the Massachusetts Securities Division, among others, are considering the Jarkesy decision when deciding whether to bring claims against respondents that are analogous," she said. "I would guess, and I would expect, that most agencies like the MSD are revising their in-house administrative processes to avoid challenges like this and protracted litigation."

Secretary of the Commonwealth Bill Galvin, who is responsible for securities enforcement in the state, declined an interview request but said, through a representative, that his "initial impression of the ruling is that it likely would not apply to our enforcement actions, but counsel is still reviewing it."

Regardless of how the SJC ultimately decides the issue, the spotlight placed on it by Jarkesy has put the issue front and center.

"The likelihood of a challenge is pretty high," Nutter's Roffman said. "In light of the Jarkesy decision, the SJC would likely take the issue seriously and really tackle whether administrative hearings deprive people of their fundamental right to a jury trial under our state constitution."

--Additional reporting by Jessica Corso. Editing by Kelly Duncan and Emily Kokoll.