

# SEC v. Jarkesy: The Case That Could Prevent the PCAOB from Seeking Civil Penalties

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Dec 07, 2024 ⌚ 8 min read

## Summary

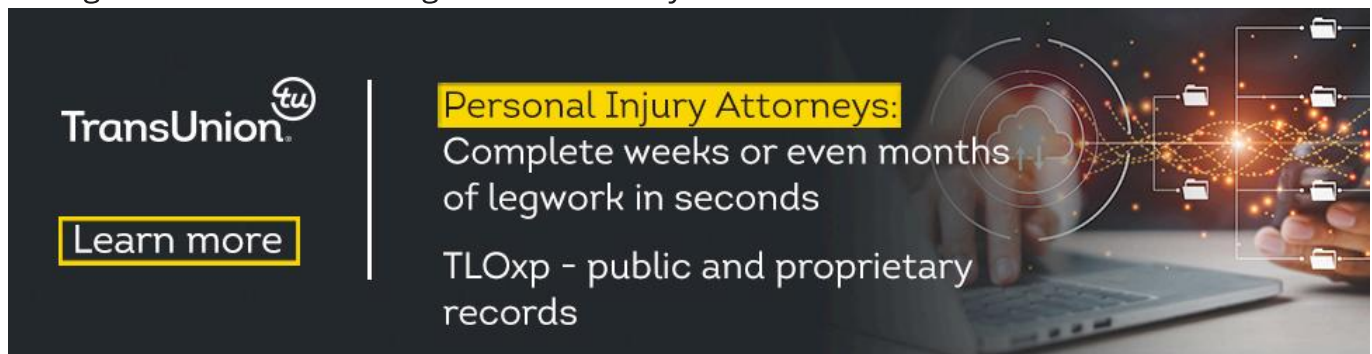
- ❑ In a 6–3 decision, the U.S. Supreme Court held in *Securities & Exchange Commission v. Jarkesy* that the Seventh Amendment right to a jury trial applied to an SEC enforcement proceeding for fraud.
- ❑ The Seventh Amendment rights of the respondent were violated when the SEC enforcement proceedings sought to impose a civil penalty in a fraud-related proceeding.
- ❑ The Court held that the Seventh Amendment right to a jury applied because the SEC imposed a punitive penalty, the claim against the respondent was analogous to a common-law fraud claim, and the public rights exception did not apply.
- ❑ Many of the same factors are present in PCAOB disciplinary proceedings.
- ❑ A significant distinction between PCAOB and SEC regulatory actions is that the PCAOB does not have the ability to institute proceedings in federal court.
- ❑ The PCAOB could be unable to obtain civil penalties under an expansive view of *Jarkesy* because it is limited to administrative proceedings and does not have the ability to institute a proceeding in an Article III court.

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The Court's most recent term produced two significant administrative law cases—[Loper Bright Enterprises v. Raimondo](#) and [Securities & Exchange Commission v. Jarkesy](#)—ending “Chevron deference” and the U.S. Securities and Exchange Commission’s (SEC’s) ability to seek civil monetary penalties for fraud in administrative proceedings. *Loper Bright* is clear—the Court overruled [Chevron U.S.A., Inc. v. NRDC](#) explicitly. *Jarkesy*'s impact is far more

murky. It is yet to be seen how far courts are willing to apply the same reasoning to other administrative proceedings with different regulators. A narrow reading of *Jarkesy* would only apply to the SEC during administrative proceedings where the agency seeks civil penalties in a fraud case. However, the extent to which courts may be willing to extend the reasoning of *Jarkesy* to either nonfraud administrative proceedings or proceedings with other agencies is unclear. There is [great alarm](#) about what an expansive reading of *Jarkesy* could mean and whether agencies would have the ability to regulate effectively. *Jarkesy* could substantially limit the remedies that administrative agencies can pursue “in-house”—in a proceeding before the agency itself or an administrative law judge (ALJ) rather than a federal court.

Consequentially, entities that Congress has not expressly authorized to pursue matters in federal court may be precluded *entirely* from seeking monetary penalties. The Public Company Accounting Oversight Board (PCAOB or Board) is one such agency. Unlike the SEC, the statute creating the PCAOB does not authorize the entity to bring an enforcement proceeding in federal court. Thus, after *Jarkesy*, the PCAOB’s ability to impose civil penalties is in question, and the agency may be in the crosshairs of some of its regulated entities seeking to avoid liability.

A dark-themed advertisement banner for TransUnion. On the left, the TransUnion logo is displayed above a yellow-bordered button that says "Learn more". To the right of the button, a vertical line separates the text from the background. The text reads: "Personal Injury Attorneys: Complete weeks or even months of legwork in seconds" and "TLOxp - public and proprietary records". The background features a hand holding a laptop, a glowing cloud icon, and a network diagram with nodes and lines.

## The *Jarkesy* Decision

In *Jarkesy*, the Court held that the Seventh Amendment applied to proceedings before the SEC where the SEC sought civil penalties for fraud. The Supreme Court acknowledged that the right to a jury trial is not absolute. The Court applied the two-part test from [Granfinanciera, S. A. v. Nordberg](#) to determine whether the Seventh Amendment required the SEC to provide the respondent a jury trial. Under *Granfinanciera*, a court must determine, first, whether an action is “akin to [a traditional action in debt]” at common law that would require a jury trial if brought in an Article III court. 492 U.S. 33, 75 (1989). If so, a court must next determine whether the public rights exception to the right to a jury trial applies.

The SEC has the authority to bring an enforcement action either in federal court or before the agency itself. In *Jarkesy*, the SEC brought in-house enforcement proceedings and

issued civil penalties for securities fraud, which the Supreme Court found analogous to a common-law fraud claim. Thus, the Supreme Court found that the SEC proceedings violated the respondent's [Seventh Amendment](#) right to a jury trial. After *Jarkesy*, the agency decision of whether to proceed in federal court or administratively will now depend heavily upon the remedy sought.

## *Jarkesy*: Understanding What Makes an Action a Suit at “Common Law”

The Seventh Amendment right to a jury trial is not limited to common-law causes of action that were available in the eighteenth century. A claim at “common law” also extends to statutory claims that are “legal in nature.” When deciding whether a statutory claim is legal or equitable in nature, a court will look at both the cause of action and the remedy it provides, with the remedy being the more important consideration.

The Supreme Court looked at the remedy in *Jarkesy* and found it “all but dispositive.” 144 S. Ct. 2117, 2122 (2024). The SEC sought money damages, which are the “prototypical common law remedy.” *Id.* at 2129. The *Jarkesy* Court looked to any obligation the SEC had to return money to victims—the SEC had no such obligation, and therefore the action could not be in equity. Rather, the Supreme Court found that the monetary relief was punitive in nature, or a “type of remedy at common law that could only be enforced in courts of law.” *Id.* Because the SEC’s action was “designed to punish and deter, not to compensate,” the Court held that the SEC’s “suit implicates the Seventh Amendment.” *Id.* at 2130.

The Supreme Court also determined that the cause of action for securities fraud resembled a claim for common-law fraud: “[Both] target the same basic conduct: misrepresenting or concealing material facts.” *Id.* An identical claim is not necessary, however. Under *Granfinanciera*, the statutory claim and the common-law claim need not be identical to trigger Seventh Amendment rights. The Court determined that the SEC and courts often consider common-law fraud principles when interpreting federal securities law. Thus, the Court found that the same factors were used and that the SEC’s enforcement action was akin to a common-law fraud claim.

## *Jarkesy*: Understanding When the Public Rights Exception Applies

After determining that the SEC’s enforcement action was legal in nature and triggered the respondent’s Seventh Amendment rights, the Court addressed the public rights exception.

The public rights exception acknowledges that Congress may assign a subject matter addressing public rights to an agency without a jury. Matters concerning private rights may not be removed from the jurisdiction of Article III courts. Where a suit is at common law, it presumptively concerns private rights; therefore, it is a matter for adjudication by an Article III court only. Even though the public rights exception includes a significant number of areas, there is a presumption in favor of Article III courts.

The Court, relying on [Stern v. Marshall](#), explained that public rights include a matter that “historically could have been determined exclusively by [the executive and legislative] branches”; thus, an Article III court is not required. *Jarkesy*, 144 S. Ct. at 2123. Courts have held that the public rights exception includes the [collection of revenue](#), [immigration](#), [tariffs](#), [relations with Native tribes](#), [public land administration](#), and [public benefits](#).

The Court looked to the substance of the SEC enforcement action, relying heavily on *Granfinanciera* to state that the antifraud provisions in federal securities laws are actions at law to enforce private rights, which Congress cannot withdraw from Article III courts. The Court rejected the government’s argument that [Atlas Roofing Co. v. Occupational Safety & Health Review Commission](#) controlled. Because the rights in *Atlas Roofing* arose under the Occupational Safety and Health Administration and created “a new cause of action, and remedies therefor, unknown to the common law,” the actions were not required to be brought in an Article III court. *Jarkesy*, 144 S. Ct. at 2123. Thus, *Atlas Roofing* did not address a suit at common law.

## *Jarkesy* Going Forward

Presumably, *Jarkesy*’s analysis will apply to enforcement actions by other regulatory agencies. If an agency initiates an enforcement proceeding to impose a civil penalty, that proceeding may be endangered by *Jarkesy*. By contrast, in proceedings where no civil penalty is sought (such as where a regulator seeks restitution for taxpayers), consumers are not directly imperiled by the *Jarkesy* decision. The Court does not, however, give any certainty to agencies that they can conduct their proceedings without violating a respondent’s Seventh Amendment rights.

## The PCAOB

The Sarbanes-Oxley Act (Act) created the PCAOB as a private corporation, but the Supreme Court in [Free Enterprise Fund v. Public Co. Accounting Oversight Board](#) held that it should be treated as part of the government. Although created by statute to enforce newly created statutory rights and obligations, the PCAOB’s enforcement proceedings, similar to *Jarkesy*, would not necessarily fall under the public rights exception.

The *Jarkesy* decision raises serious questions about whether the PCAOB can seek a civil penalty in an in-house enforcement action. After *Jarkesy*, lower courts will have to decide whether PCAOB enforcement actions are “akin to traditional actions in debt.” Under [Rule 5100](#), the PCAOB may commence an informal inquiry against either a firm or an associated person regarding violations of the Act, the rules of the PCAOB, other securities laws, or professional standards. Then, the PCAOB may, under Rule 5200, commence a disciplinary proceeding. 15 U.S.C. 7215(c). In the alternative, the Board may refer an investigation to the SEC under Rule 5112.

Under Rule 5300, if a violation is found, the Board may impose disciplinary or remedial sanctions: “[T]he Board may impose such disciplinary or remedial sanctions as it determines appropriate,” which include “a civil monetary penalty for each violation.” PCAOB Rule 5300 (Sanctions). The amount of such penalties is authorized by [sections 105\(c\)\(4\)\(F\)\(i-ii\) of the Act](#). These civil penalties do not reimburse victims or consumers. Rather, the penalties, under Rule 5303, fund merit-based scholarships for students in undergraduate and graduate accounting programs. Because these penalties are legal in nature, they are designed to punish the wrongdoer and therefore implicate the Seventh Amendment rights of the respondent.

## *Jarkesy*’s Application to PCAOB Disciplinary Proceedings

A court would almost certainly find that the PCAOB’s monetary penalties are punitive. The PCAOB refers to these as penalties; in other words, the Board’s own language provides that they are punitive. Rule 5300 requires that all civil monetary penalties be used to fund a merit scholarship program; while supporting accounting students is a noble use of these penalties, the fact is that these penalties are not used to compensate victims. Further, many of the PCAOB’s disciplinary proceedings are based on conduct that could instead be a common-law claim (i.e., malpractice or fraud). Because these penalties are punitive, a respondent’s Seventh Amendment rights are violated if the respondent is deprived of the right to a jury trial.

Given the nature of the PCAOB’s disciplinary proceedings, it is highly likely that courts using *Jarkesy* would hold that an auditor or accountant facing a disciplinary proceeding has a Seventh Amendment right to a jury trial. This creates a unique problem for the PCAOB. The entity is significantly more limited than the SEC in bringing disciplinary proceedings. The SEC has statutory authority to bring an enforcement action in federal court or to initiate an in-house administrative proceeding. The PCAOB, on the other hand, can only seek an enforcement action through administrative proceedings.

If *Jarkesy* prevents the PCAOB from imposing monetary penalties without a jury trial, it would be impossible, without referring the matter to the SEC, for the PCAOB to recover

civil penalties—in effect disabling the agency’s ability to regulate by depriving it of obtaining civil monetary penalties or forcing the agency to rely on the SEC. Congress could amend the statute to allow the PCAOB to bring actions in federal court; however, actually doing so is another matter. Alternatively, as noted, the PCAOB is permitted to refer enforcement actions to the SEC. The SEC, in turn, could bring the PCAOB’s enforcement actions in federal court, but that would likely put a strain on the SEC’s resources.

Over the following months, the issue of whether civil monetary penalties in PCAOB disciplinary proceedings violate a respondent’s Seventh Amendment rights will almost certainly be raised by counsel, essentially invoking the *Jarkesy* decision as a defense to any civil penalty. It is unclear what, if any, actions the PCAOB will take in response to *Jarkesy*. For now, if courts find that an auditor or accountant has a Seventh Amendment right to a jury trial before the PCAOB, the PCAOB’s only foreseeable work-around will be to refer every matter where it is seeking a civil penalty to the SEC to be brought in federal court.

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