

**ALERT**

# Fifth Circuit Strikes Down FCC Forfeiture Order, Holds That It Violates Seventh Amendment Right to a Jury Trial

April 24, 2025

On April 17, 2025, the Fifth Circuit issued an opinion (“Op.”) holding unconstitutional a Federal Communications Commission (FCC or Commission) enforcement order. In that order, the Commission imposed civil penalties against a communications provider for allegedly violating Section 222 of the Communications Act. In a decision with far reaching implications for the FCC’s enforcement authority, the Fifth Circuit held that the FCC’s “in-house adjudication” violated the Seventh Amendment to the U.S. Constitution by “denying [the provider] an Article III decisionmaker and a jury trial.” Op. 1–2.

This decision is the first by an appellate court to assess the constitutionality of the FCC’s enforcement regime after the U.S. Supreme Court’s decision last term in *SEC v. Jarkesy* – and it rejects the arguments made by the FCC in seeking to distinguish *Jarkesy*. Although the Fifth Circuit’s decision presents obstacles to FCC enforcement moving forward, the Supreme Court may have the final say, depending on the outcome of cases involving the same legal questions pending in the D.C. and Second Circuits.

## Fifth Circuit Holds That FCC’s In-House Imposition of Forfeiture Order Without a Jury Trial Violates The Seventh Amendment

The case before the Fifth Circuit turned on the constitutionality of an FCC “forfeiture order” – an order from the Commission stating that an entity has violated the Communications Act or FCC rules and assessing a monetary fine. Here, the FCC asserted that the provider failed to employ reasonable safeguards to protect a category of data known as Customer Proprietary Network Information (CPNI) in

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violation of Section 222 of the Act, and it ordered the provider to pay a \$57 million penalty. The provider petitioned the Fifth Circuit for review of the forfeiture order pursuant to the applicable procedures for challenging FCC forfeiture orders.<sup>1</sup> The provider argued, *inter alia*, that the forfeiture order violated the Seventh Amendment's guarantee to "the right of trial by jury" in "Suits at common law."<sup>2</sup>

The Fifth Circuit agreed with the provider that the FCC's enforcement scheme violated the provider's Seventh Amendment right to a jury trial. The Fifth Circuit's analysis closely mirrored the Supreme Court's decision last year in *SEC v. Jarkesy*.<sup>3</sup> There, the Supreme Court held that the SEC violated the Seventh Amendment when it levied civil penalties against a private party for engaging in securities fraud. The *Jarkesy* Court held that the SEC's enforcement proceeding was a "suit at common law" because (i) the remedy – monetary damages – was legal in nature, and (ii) the cause of action – antifraud enforcement – targeted the same basic concept as common-law fraud. The Court also found that the SEC's suit did not qualify for the Seventh Amendment's public-rights exception – a narrow carveout from the Seventh Amendment for "matters" that "historically could have been determined exclusively by the executive and legislative branches." The Supreme Court held that the government's presence in the suit did not remove the action from the ambit of the Seventh Amendment.

The Fifth Circuit followed the same analysis as *Jarkesy*. In analyzing the FCC's forfeiture order, the Fifth Circuit first examined the remedy and found that the FCC, like the SEC in *Jarkesy*, sought money damages designed to punish and deter – "the prototypical common law remedy." Op. 9–10. Second, it found that the FCC's action to enforce Section 222 bore a "close relationship" to common law negligence because "[t]he action punishes [the provider] for failing to take reasonable measures to protect" CPNI. Op. 10–13. The court acknowledged that "the relationship between the [S]ection 222 action and a common law analogue is not as obvious as it was in *Jarkesy*." It nevertheless found that "ambiguity" on the cause of action "points [the court] back to the 'more important' first consideration – remedy," which the *Jarkesy* Court had called "all but dispositive" in determining whether an agency enforcement action implicates the Seventh Amendment.

The Fifth Circuit next concluded that the proceeding did not qualify for the "public rights" exception. In so doing, it rejected the FCC's argument that actions involving "common carriers" are categorically outside the scope of the Seventh Amendment. The court found that this argument would "blow a hole in what is meant to be a narrow exception to Article III" and was unsupported by caselaw or history.

Having found the Seventh Amendment applied to the FCC's enforcement action, the Fifth Circuit held that the provider's Seventh Amendment rights were violated because, pursuant to the FCC's "in-house" enforcement process, "the Commission acted as prosecutor, jury, and judge." Op. 18–20. In doing so, the court rejected the FCC's argument that Section 504 of the Communications Act – which allows the U.S. Department of Justice (DOJ) to bring a suit in federal district court to collect unpaid forfeitures – satisfies the Seventh Amendment. The Fifth Circuit found that although Section 504 entitles the defendant to a jury trial in the collection suit, this "back-end" proceeding would come too late. By that time, the agency would have already judged the provider guilty of violating the statute and imposed immediate real-world consequences on the provider. Further, under Fifth Circuit precedent, a defendant in a Section 504 forfeiture collection suit is foreclosed from making arguments challenging the FCC's legal conclusions. Thus, the Fifth Circuit found, Section 504 creates a "dilemma": an FCC enforcement target can forgo a jury trial to challenge the penalty and underlying legal

conclusions in appellate court, or, “[i]f it wants a jury trial, it has to defy a multi-million dollar penalty, wait for DOJ to sue, and, even then, relinquish its ability to challenge the order’s legality.” Op. 20. “Either way,” the court held, the provider’s “Seventh Amendment rights have been denied.” *Id.*

#### Fifth Circuit’s Decision Will Present a Serious Obstacle to FCC’s Enforcement Authority Moving Forward

The immediate impact of the Fifth Circuit’s decision is to broadly call into question the FCC’s ability to impose monetary penalties moving forward. Under both *Jarkesy* and the Fifth Circuit’s decision, the Seventh Amendment analysis involves review of both the remedy and any analogous common law cause of action. With respect to remedy, the imposition of civil penalties triggers what the Fifth Circuit and the Supreme Court have now both called “the prototypical common law remedy,” suggesting that essentially any monetary exaction would raise potential Seventh Amendment issues. That said, the Fifth Circuit also highlighted (quoting *Jarkesy*) that the FCC penalties before it were “punitive” rather than “remedial” – which suggests the FCC may have an argument that narrower penalties designed to “compensate victims” or “restore the status quo” are permissible without a jury trial. Op. 10.

With respect to cause of action, the Fifth Circuit’s finding of a common-law analogue even in the face of “ambiguity” suggests a low bar for a cause of action in an agency enforcement matter to implicate the Seventh Amendment. The FCC thus may face difficulty in future cases asserting that *any* enforcement actions lack a common-law analogue under the standard articulated by the Fifth Circuit. Of course, FCC enforcement targets subject to alleged violations with “obvious” common law analogues (as in *Jarkesy*) or those where the violative conduct turns on “reasonableness” (as did the claimed Section 222 violations in the Fifth Circuit case) will have the strongest argument that the Seventh Amendment is implicated. It is also possible that future courts faced with challenges to “punitive” agency penalties may give even less weight to the cause of action given the *Jarkesy* Court’s direction that the remedy is “all but dispositive.”

Finally, although the Fifth Circuit rejected the FCC’s argument that adjudication against common carriers falls under the “public rights” exception, the Commission may in future enforcement actions seek to establish that its conduct satisfies that exception under a different legal theory. However, this may prove to be an uphill argument for the FCC, as the Fifth Circuit decision emphasizes (quoting *Jarkesy*) that the public rights doctrine is “a narrow and extra-textual ‘exception’ to presumptively mandatory Article III jurisdiction” over agency enforcement matters. Op. 15.

The FCC will need to reckon with whether and how to continue its enforcement activities in light of the Fifth Circuit’s ruling. This issue has been percolating at the agency since the Supreme Court released the *Jarkesy* decision, prompting Republican-appointed Commissioner Nathan Simington to vow to dissent from all FCC enforcement decisions imposing a monetary forfeiture “[u]ntil the Commission formally determines the bounds of its enforcement authority under this new precedent.” But because the Communications Act does not provide a mechanism for seeking a jury trial other than Section 504, it is not clear what steps the Commission might be able to take to continue pressing for money damages in the enforcement context.

Parties facing enforcement actions at the FCC should consider whether and how to leverage the Fifth Circuit's decision in defending against the agency. While not a silver bullet, the decision may give parties significant leverage to push back on the FCC – particularly where it seeks civil penalties. Parties regulated by the FCC also should be prepared for the possibility that the agency may begin to consider and more frequently rely on other mechanisms for enforcement that do not involve civil penalties.

#### Supreme Court May Have the Final Say

The Fifth Circuit is not the only court that will opine on this issue. Providers are challenging similar FCC enforcement orders before the Second Circuit and the D.C. Circuit. These courts may reach the same conclusion as the Fifth Circuit, or they may not. If they disagree, it will result in a circuit split, which may ultimately trigger review by the Supreme Court.

The Supreme Court also is expected to release a decision soon in *McLaughlin v. McKesson*, which deals with the scope of the statute that funnels review of FCC orders to federal courts of appeal. Depending on how this decision comes out, it could call into question the Fifth Circuit precedent holding that defendants in Section 504 collection suits cannot raise legal challenges to the FCC's enforcement order, which was one of the factors the Fifth Circuit relied upon in concluding that Section 504 does not save the FCC's Seventh Amendment violation.

Thus, while the Fifth Circuit's decision applying *Jarkesy* to the FCC is a major development, parties should continue to closely watch these additional cases.

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<sup>1</sup> Wiley filed an *amicus* brief in support of the petition at the Fifth Circuit.

<sup>2</sup> The provider raised a bevy of additional arguments, but the Fifth Circuit did not reach them, as its Seventh Amendment holding was dispositive.

<sup>3</sup> Wiley filed an *amicus* brief in support of the challengers at the Supreme Court.