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Commodities Rulings Appealable to Circuit

Decision Breaks With Eighth Circuit Holding

BY DANIEL WISE

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A UNANIMOUS federal appeals panel yesterday rejected a contention by the Commodity Futures Trading Commission that appeals of its rulings reviewing administrative disciplinary orders must be taken to U.S. district court.

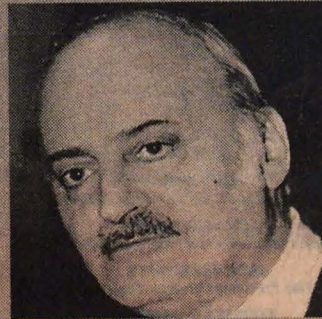
In finding that the appropriate review path was a direct appeal to a federal appellate court, the Second Circuit created a split in the circuits by refusing to follow a 1995 ruling from the U.S. Court of Appeals for the Eighth Circuit.

The decision will be published Monday.

The ruling was a procedural victory for Michael J. Clark, a floor broker on the Commodities Exchange (COMEX), who had sought review directly in the Second Circuit. The panel's ruling did not address the merits of Mr. Clark's claims that he should not have been fined \$25,000 and suspended from trading for three months on several violations, including withholding customers' orders for the benefit of another broker and trading in a manner that conflicted with his customers' interests.

The initial findings and penalties were imposed in 1996 by COMEX, an exchange where futures and option contracts related to a variety of commodities are traded, and affirmed in

Excerpt From The Decision



The Second Circuit's analysis starts with proposition the statute governing appeals from CFTC orders, when it is acting in its review capacity, is "ambiguous." The Commodities Exchange Act, 7 USC §12c(c) merely refers to the availability of "judicial review" without specifying to which court.

Judge Roger J. Miner

Continued on page 8, column 5

Friday, February 19, 1999

Commodities Rulings' Appeals

Continued from page 1, column 5

July 1998 by the Commodities Futures Trading Commission (CFTC), which supervises a number of trading exchanges.

The Second Circuit's analysis starts with the proposition that the statute governing appeals from CFTC orders, when it is acting in its review capacity, is "ambiguous," Judge Roger J. Miner wrote in *Clark v. Commodities Futures Trading Commission*, No. 98-4291. The Commodities Exchange Act, 7 USC §12c(c), Judge Miner pointed out, merely refers to the availability of "judicial review" without specifying a court.

'Florida Power' Factors

The fact that the Commodities Exchange Act provides for direct review to the circuit for disciplinary orders issued by the CFTC when it acts on cases in the first instance, rather than in a review capacity, was pivotal under the factors announced by the U.S. Supreme Court in its 1985 ruling, *Florida Power & Light Co. v. Lorion*, Judge Miner concluded.

In *Florida Power*, the Supreme Court set forth four factors for determining the procedures for judicial review of administrative decisions: overall structure of the relevant statute; legislative history; congressional purposes behind the legislation; and general principles regarding the allocation of review authority.

The Eighth Circuit, in *Jaunich v. U.S. Commodities Futures Trading Commis-*

sion, 50 F.3d 518, had stressed the legislative history behind the "judicial review" provision of the Commodities Exchange Act as the *Florida Power* factor that controlled the outcome. According to the Eighth Circuit, that legislative history included congressional inaction which had provided a "firm indication" that review should be in the district court. Congress, the Eighth Circuit noted, had failed to act on either of two related proposals: one that would have placed review of all CFTC orders in the circuit courts and another that would have provided for direct review to a circuit court of CFTC orders entered upon appeal of disciplinary orders imposed by exchanges it regulates.

Noting "respectful disagreement," Judge Miner wrote that no such "firm indication" could be drawn from Congress's failure to act, especially when the case is analyzed in light of all four factors in the *Florida Power* case.

Judge Miner also noted that the Eighth Circuit had acknowledged that to have one review path for cases originally heard by the CFTC and another for cases it decides in its administrative appeals capacity creates a "procedural conundrum." Unlike the Eighth Circuit, Judge Miner wrote, the Second Circuit could not overlook such a procedurally anomalous result.

Judges Guido Calabresi and Robert R. Sack joined in the ruling.

Mr. Clark represented himself. The CFTC was represented by Janene M. Smith and Glynn L. Mays, both of its legal staff.