

SEC Ban On Convicted Atty Wrongfully Retroactive: DC Circ.

By **Melissa Daniels**

Law360, Los Angeles (January 17, 2017, 4:47 PM EST) -- A former attorney convicted in a wide-ranging securities fraud scheme challenging a lifetime industry ban saw his appeal granted on five of six fronts Tuesday when a D.C. Circuit panel found the U.S. Securities and Exchange Commission had incorrectly applied Dodd-Frank Act provisions retroactively.

Gregory Bartko, the former chief executive officer and chief compliance officer of registered broker-dealer Capstone Partners LC, was convicted in 2010 for his part in a financial scheme that fraudulently raised more than \$2.7 million for his two private equity funds between 2004 and 2005. Bartko was later barred by the SEC from participating in six classes of the securities industry, but challenged the finding at the D.C. Circuit. In a 19-page opinion, a panel on Tuesday found the SEC improperly applied Dodd-Frank Act penalty standards retroactively.

“Although we agree with the commission’s findings and conclusions, we believe it applied the bar regarding five of the six classes in an impermissibly retroactive manner,” the panel said.

Brian Matsui of Morrison & Foerster, who was appointed amicus curiae, said they were pleased with the court's decision to completely reverse sanctions in five of the six classes: investment adviser, municipal securities dealer, transfer agent, municipal adviser and nationally recognized statistical ratings organization, or NRSRO, classes. While the ban on the broker-dealer class still applied, Matsui said the results confirmed their view that the SEC overreached.

“The D.C. Circuit was clearly troubled by the SEC’s retroactive application of Dodd-Frank’s new penalties, and its precedential opinion in Mr. Bartko’s favor should stop future attempts by the SEC to impose new penalties to past conduct,” Matsui said in an email.

The 2010 enactment of the Dodd-Frank Act expanded the SEC’s reach to be able to bar someone from six listed classes based on misconduct in only one class, according to the court's history of the law. Back in March 2014, the SEC had barred Bartko from all six: broker-dealer, investment adviser, municipal securities dealer, transfer agent, municipal adviser and NRSRO classes.

Bartko appealed the ban in May 2014, arguing in part that the SEC's use of the Dodd-Frank Act's authorization to bring a single collateral bar proceeding had the impermissibly retroactive effect of sanctioning him for misconduct that predated the statute.

But the SEC replied that the D.C. Circuit has found there are no retroactivity concerns in applying Dodd-

Frank's "change in procedure," citing a July 2015 ruling in *Koch v. SEC* that found an investment adviser couldn't be barred from associating with NRSROs or municipal advisers newly included under Dodd-Frank, but that barring the adviser from both broker-dealers and investment advisory firms was permissible.

During Bartko's appeal, attorneys from Morrison & Foerster LLP who were appointed as amicus curiae supporting Bartko argued that the D.C. Circuit should vacate and reverse the SEC's order because the industry ban was an unlawful retroactive application of Dodd-Frank rules and the SEC's argument misinterpreted the precedent.

In Tuesday's opinion, the panel agreed that the SEC "misreads" the Koch case, and concluded that the use of Dodd-Frank's collateral bar was an impermissibly retroactive penalty, as it applied post-Dodd-Frank penalties to pre-Dodd-Frank conduct. Bartko wasn't attached to three of the six classes — investment adviser, municipal securities dealer or transfer agent classes — that the application of a Dodd-Frank collateral bar applied to, the panel said.

"The application of post-Dodd-Frank penalties to pre-Dodd-Frank misconduct constitutes a quintessential example of 'attach[ing] new legal consequences to events completed before [Dodd-Frank's] enactment,'" the panel said.

Representatives for the SEC didn't immediately respond to requests for comment on Tuesday.

U.S. Circuit Judges Karen LeCraft Henderson and Thomas Griffith and Senior Circuit Judge Stephen Williams sat for the panel.

The SEC is represented by John Wallace Avery, Dominick V. Freda and Stephen G. Yoder.

Bartko is representing himself.

Brian Robert Matsui, Deanne Elizabeth Maynard and Bryan J. Leitch of Morrison & Foerster LLP are appointed as amicus curiae for Bartko.

The case is *Gregory Bartko v. SEC*, case number 14-1070, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Stewart Bishop, David McAfee and Carmen Germaine. Editing by Philip Shea.