# Second Circuit Says Injured Investors Lack Standing to Challenge Release of Fair Funds to US Treasury

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The US Court of Appeals for the Second Circuit recently held that injured investors, who had already recovered some of their losses due to certain specialist firms' "manipulative tactics," lacked standing to challenge the release to the US Treasury of settlement funds obtained by the Securities and Exchange Commission.

In 2004, the SEC alleged that seven specialist firms had engaged in "interpositioning" and "trading ahead," two types of conduct by which the firms profited at the expense of their customers. The firms ultimately settled the allegations, and disgorged $157.8 million of profits and an additional $89.4 million in civil penalties, for a total of $247.2 million.

Pursuant to the Sarbanes-Oxley Act, the SEC placed the monies in Fair Funds, which were administered by a law firm tasked with identifying, locating and reimbursing injured investors. The firm was able to match customers for 77.6% of all transactions at issue, but was unable to do so for the remaining 22.4%, leaving $159.8 million in the accounts.

The SEC solicited public comments on the disposition of the undistributed amount. Rejecting proposals from petitioners Robert Martin and Empire Programs, Inc. (Petitioners) and others, the SEC opted to release the leftover Fair Funds to the US Treasury. Petitioners then filed suit seeking review of the SEC's decision.

The Second Circuit dismissed, finding that Petitioners failed to plead an injury in fact necessary for standing purposes. The court held that any alleged injury was either fully compensated, conjectural or based on alleged violations not covered by the SEC settlements.

Because Petitioners had received payments from the Fair Funds, they had been adequately compensated for injuries arising from the conduct subject to the settlement with the SEC. Moreover, Petitioners failed to prove that they were the injured customers in any of the transactions that the Fair Funds administrator was unable to match. Due to the absence of such proof, the court found that Petitioners alleged a hypothetical injury insufficient to confer standing.

Lastly, the Second Circuit held that any injuries Petitioners suffered in non-covered transactions do not provide them an interest in the remaining funds from a settlement based on covered transactions.

*Martin et al. v. US Secs. & Exch. Comm'n*, No. 11-3011 (2d Cir. 2013).



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