



Winter 2009

"Prejudgment" Rejudgment: The True Story of *Antoniou v. SEC*

Douglas C. Michael

University of Kentucky College of Law, michaeld@uky.edu

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Recommended Citation

Douglas C. Michael, *"Prejudgment" Rejudgment: The True Story of Antoniou v. SEC*, 61 Admin. L. Rev. 225 (2009).

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RECENT DEVELOPMENTS

“PREJUDGMENT” REJUDGMENT: THE TRUE STORY OF *ANTONIU V. SEC*

DOUGLAS C. MICHAEL*

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INTRODUCTION

Law students traditionally learn the law from reading cases. In some instances, the cases establish a well-reasoned principle of law. In others, law students are asked to read cases in which a court gave a contrary opinion or more simply got the wrong answer. I believe that one such case (now almost twenty years old, but apparently headed for immortality) is of the latter variety. The court simply got the wrong answer, and law students and lawyers should know that.

In *Antoniou v. SEC*,¹ the Eighth Circuit found that Charles C. Cox, then a member of the Securities and Exchange Commission (SEC or Commission), had “impermissibly tainted” an SEC administrative

* Edward T. Breathitt Professor of Law, University of Kentucky College of Law. At the time of the events in *Antoniou v. SEC*, I was counsel to Commissioner Charles C. Cox and wrote the first draft of the now infamous speech that is the subject of the court’s opinion. I have reviewed this Essay with Mr. Cox, but the narrative and opinions expressed herein are mine alone.

1. 877 F.2d 721 (8th Cir. 1989).

proceeding against Antoniu by a speech Cox gave while the proceeding was pending. In this way, Commissioner Cox is now joined with former Federal Trade Commission (FTC) Chairman Paul Rand Dixon of *Texaco, Inc. v. FTC*² and *Cinderella Career & Finishing Schools, Inc. v. FTC*³ fame as an administrative law casebook poster child for “prejudgment” by an administrative agency.

Because this case is seemingly destined for fame (or infamy) in the casebooks,⁴ I believe it is important for readers of the case to know that the truth is very different than the story told therein.⁵ Although the court may have recited proper general principles of law, the court’s application of those principles to the facts at hand is demonstrably incorrect.

The court’s decision in *Antoniou v. SEC* is wrong in two major ways. First, Commissioner Cox said and did nothing to violate the well-settled prejudgment doctrine about which the court writes. Second, in an abundance of caution, he did in fact recuse himself from the proceedings after his speech, except to participate in a routine denial of an offer of settlement (with which the court found nothing wrong). I believe the court’s opinion is out of touch with the realities of the administrative process at the SEC and, I suspect, at many or most other agencies as well.

After a brief discussion of the factual background of the case, I will demonstrate first that Cox’s speech was well on the permissible side of the prejudgment line. Second, I will discuss participation by agency members in settlement offers in administrative proceedings. These offers have the potential for abuse, but modern law suggests that this potential is rarely, if ever, realized. I will show that there was no impropriety in this case. Finally, I will discuss the realities of agency action by delegated authority and how such an otherwise reasonable process makes it difficult for the agency to distance itself from action appropriately taken by its delegates.

I. FACTUAL BACKGROUND

There were two administrative proceedings in question, labeled by the Eighth Circuit as *Antoniou I*⁶ and *Antoniou II*.⁷ The first proceeding arose

2. 336 F.2d 754 (D.C. Cir. 1964).

3. 425 F.2d 583 (D.C. Cir. 1970).

4. *E.g.*, JOHN M. ROGERS, MICHAEL P. HEALY & RONALD J. KROTOSZYNSKI, JR., *ADMINISTRATIVE LAW* 154 (2d ed. 2008).

5. Most of the facts are stated in the Security and Exchange Commission’s (SEC or Commission) Proffer of Evidence in Support of the Commission’s Opposition to Application for Attorney’s Fees, *Antoniou v. SEC*, 877 F.2d 721 (8th Cir. 1989) [hereinafter Proffer of Evidence] (on file with author). For a summary of this attorney’s fees motion filed by Antoniu under the Equal Access to Justice Act, see Paul Gonson, *Selected Judicial Developments*, in *THE SEC SPEAKS IN 1993*, at 376, 376–77 (1993).

6. Notice by the National Association of Securities Dealers, Inc., Exchange Act Release No. 34-22383 (*Antoniou I*), 33 SEC Docket 1318 (Sept. 3, 1985).

from Antoniu's criminal conviction in one of the early "misappropriation" insider trading cases.⁸ Such a criminal conviction results in a statutory bar from further participation in the securities brokerage industry.⁹ Notwithstanding that bar, the National Association of Securities Dealers (NASD) sought to allow Antoniu to become associated with an NASD-member registered broker-dealer firm. The NASD was required to file notice of that action with the SEC,¹⁰ and the SEC was empowered to review that application.¹¹ The Commission did so and overturned the NASD's proposed approval for Antoniu's association with the firm in question. In the second proceeding,¹² the SEC exercised its statutory authority¹³ to institute administrative proceedings to determine whether Antoniu should be subject to a permanent bar from association with any registered broker-dealer.

Thereafter, Commissioner Cox was asked to give a speech at a regional enforcement conference.¹⁴ He decided to use the occasion to clarify to the securities industry and securities bar that, in his opinion, the Commission should be tougher on those who violate the securities laws and who believed that some slight time-out should be a sufficient penance. Commissioner Cox referred to the egregious violation of Antoniu and the indifference the NASD had shown (in his opinion) to the severity of Antoniu's violations.

II. THE COURT'S CONFUSION ABOUT THE TWO PROCEEDINGS

The court cited Commissioner Cox's statement from his speech that Antoniu's "*bar from association with a broker-dealer was made permanent*"¹⁵ as evidence of prejudgment of *Antoniu II*, the second

7. Antoniu, Exchange Act Release No. 34-22487 (*Antoniu II*), 34 SEC Docket 244 (Sept. 30, 1985).

8. See Richard J. Hunter, Jr. & Philip Frese, *The Genesis of an Ethical Imperative: The SEC in Transition*, 25 GONZ. L. REV. 9, 38 (1989-1990) ("The misappropriation theory . . . had its judicial origin in a 1980 case filed against Adrian Antoniu . . .").

9. For the details of how this works, see § 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(39)(F) (2000) (defining a "statutory disqualification" by reference to Securities Exchange Act § 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D), based on Antoniu's criminal conviction).

10. Securities Exchange Act § 15A(g)(2), 15 U.S.C. § 78o-3(g)(2).

11. Securities Exchange Act Rule 19h-1, 17 C.F.R. § 240.19h-1(g) (2008).

12. *Antoniu II*, 34 SEC Docket 244 (Sept. 30, 1985).

13. Securities Exchange Act §§ 15(b)(6), 19(d), 15 U.S.C. §§ 78o(b)(6), 78s(h).

14. Charles C. Cox, Comm'r, Sec. Exch. Comm'n, Making the Punishment Fit the Crime—A Look at SEC Enforcement Remedies, Remarks to Eighteenth Annual Rocky Mountain State-Federal-Provincial Cooperative Securities Conference (Oct. 18, 1985) [hereinafter Cox Speech], available at <http://www.sec.gov/news/speech/1985/101885cox.pdf>.

15. *Antoniu v. SEC*, 877 F.2d 721, 723 (8th Cir. 1989). For the language in context, see *id.* and, more fully, Cox's speech:

proceeding. On the contrary, that statement was simply the legal effect of the SEC's refusal to accept the NASD's petition to allow Antoniu back into the securities industry in *Antoniu I*.¹⁶ The meaning is clear from the use of the past tense, "was," which referred to a concluded proceeding (*Antoniu I*) rather than a proceeding in which hearings had not yet begun (*Antoniu II*). The further reference to a bar from "a" broker-dealer (the result of *Antoniu I*), as opposed to "any" broker-dealer (the question still to be decided in *Antoniu II*), should also have been clear to the court.

In most such proceedings, which involve a bar from participation in an industry regulated by the Commission, counsel for the respondent asks for permission to reapply for association with a broker-dealer after a certain period of time. Denial of leave to reapply might be interpreted as making a bar "permanent," but in reality, of course, an individual would be free to ask for leave to reapply the next day.¹⁷ Indeed, one of Commissioner Cox's points in his speech was that there should be, in his opinion, a more substantial time-out from the industry for violators than had been previously considered customary.¹⁸

One issue that frequently arises with respect to individuals whom I call "indifferent violators" is the length of time that a Commission remedy should remain in effect. . . . In *First Jersey*, for example, the special examiner was to make one report within ninety days, although the injunction is permanent. In the case of Mr. Antoniu, his bar from association with a broker-dealer was made permanent.

Cox Speech, *supra* note 14, at 5 (citing SEC v. First Jersey Sec., Inc., Litigation Release No. 10,616, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,848, at 90,231 (Nov. 26, 1984)).

16. See Notice by the Nat'l Ass'n of Sec. Dealers, Inc., Exchange Act Release No. 34-22383, 33 SEC Docket 1318, 1319 (Sept. 3, 1985) (directing the NASD to bar Adrian Antoniu from becoming associated with a member firm).

17. See Jeffrey B. Maletta & Neil S. Lang, *Sanctions and Collateral Consequences*, in THE SECURITIES ENFORCEMENT MANUAL 131, 158-59 (Richard M. Phillips ed., 1997).

[T]he Commission often bars an individual permanently with a right to reapply after stated periods of time. . . . Although a so-called permanent bar with no stated time period is generally regarded as harsher than one which specifies a right to reapply after expiration of a stated time period, theoretically, a barred person can apply for reinstatement at any time.

Id. (citation omitted); see also SEC Rule of Practice 193(a)(2), 17 C.F.R. § 201.193(a)(2) (2008) (allowing application for consent to associate where initial bar "contains a proviso that application may be made to the Commission after a specified period of time.").

18. The relevant language from the speech is as follows:

My experience indicates that the word "permanent" may not always mean what it says. It is apparently accepted wisdom that inside every permanent SEC order or injunction—despite its broad, unwavering terms—is a temporary one struggling to get out. . . .

. . . . The Commission is aware that its remedies may impose restraints for what appears to be a very long time. If an individual or firm petitions for relief based not on changed circumstances but on a general belief in the clemency or forgetfulness of the Commissioners and staff, I believe this is a prime indicator that we have an "indifferent violator" on our hands, and that modification of the remedy is not warranted.

Cox Speech, *supra* note 14, at 5-6.

Professor Richard Pierce, in a thoughtful article discussing this case,¹⁹ affirmed the general leniency that courts should afford agency members in their policy statements.²⁰ Nonetheless, he found the reference in Commissioner Cox's speech "ambiguous," asking rhetorically "[w]as Commissioner Cox's reference to Antoniu an expression of his policy preference that all intentional violators be permanently barred, or was it instead an indication that he had already resolved the contested issues of adjudicative fact necessary to determine an appropriate individualized sanction for Antoniu?"²¹ With all due respect to Professor Pierce's question, I believe the answer is clear: It was a policy judgment based on the illustrative facts of *Antoniu I*, and the speech was intended to serve important policy purposes.²²

The statements in Commissioner Cox's speech about Antoniu's case were precisely the kind of policy judgments—as opposed to "adjudicative facts"—that agency members are entitled to make.²³ The adjudicative facts in *Antoniu II* were (1) the existence of Antoniu's prior criminal conviction (a fact already on record) and (2) whether it would be "in the public interest" to bar Antoniu from association with *any* registered broker dealer.²⁴ Contrary to how the language of the speech has been interpreted,

19. Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990).

20. Indeed, Professor Pierce suggests that the lower courts may be out of touch with the Supreme Court cases. See *id.* at 494 ("I suspect . . . that the Supreme Court would be more tolerant of outspoken agency decisionmakers than were the judges in *Cinderella* and *Antoniu*. . . . It is unrealistic to expect either [FTC Chairman Dixon or Commissioner Cox] not to have developed opinions on the case prior to formal action as decisionmaker.")

21. *Id.* at 494–95.

22. I believe that Professor Pierce answered this question even before he asked it. The references to specific cases were intended only to illustrate the kind of policies the decisionmaker preferred. As all teachers know, examples help students put meat on the bones of abstractly expressed rules or policies. Moreover, the purpose of the speeches in each case was to further another important goal of the administrative state—that of helping regulatees understand the agency's policies so that they can shape their conduct accordingly.

See *id.* at 494.

23. See BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 346 nn.9–10 (3d ed. 1991) (citing *NLRB v. Honaker Mills*, 789 F.2d 262 (4th Cir. 1986); *Samuel v. Bd. of Chiropractic Exam'rs*, 712 P.2d 132 (Or. App. 1985); *In re Rollins Envtl. Servs.*, 481 So. 2d 113 (La. 1985); *New York State Inspection, Sec. & Law Enforcement Employees v. Pub. Employment Relations Bd.*, 629 F. Supp. 33 (N.D.N.Y. 1984)).

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.

Pierce, *supra* note 19, at 482 n.6 (quoting KENNETH CULP DAVIS, 2 *ADMINISTRATIVE LAW TREATISE* § 12:3, at 413 (2d ed. 1979)).

24. See Securities Exchange Act § 15(b)(6)(A), 15 U.S.C. § 78o(b)(6)(A) (2000) (listing the public interest as a relevant factor in SEC deliberations on whether to grant or

the Commission made no judgment about the “public interest” in the *Antoniou II* proceeding. Indeed, Commissioner Aulana L. Peters restated the policy judgments made in Commissioner Cox’s speech when she spoke to the very same group two years later, which was before the Commission heard the *Antoniou II* appeal.²⁵ And in any event, Commissioner Cox abided by the requirements of the prejudgment doctrine and, in an abundance of caution, recused himself from the *Antoniou II* proceeding, except for entertaining an offer of settlement as discussed next.

III. THE OFFER OF SETTLEMENT

The *Antoniou II* proceeding was conducted before an SEC administrative law judge pursuant to delegated authority.²⁶ The Division of Enforcement, which prosecuted the administrative proceeding, brought Antoniu’s offer of settlement to the Commission. The Commission routinely considers such offers in the midst of an administrative proceeding. The Commission concurred with the staff’s recommendation to reject Antoniu’s offer.²⁷

Offers of settlement place *any* agency (and any member of any agency) in a difficult situation. Rejecting an offer of settlement might be construed as prejudgment of the merits of a case that the agency might later be called to adjudicate. This effect occurs regardless of any speeches anyone might have made.²⁸ However, the law in this area is relatively clear: such combination of functions does not offend the Constitution.

It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. *This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.*²⁹

deny applications for association with a broker or dealer). Professor Pierce questions the need for *any* hearing in such cases, where the predicate facts for the agency’s actions have been established as a matter of law. Pierce, *supra* note 19, at 494. However, Congress’s direction to consider the “public interest” in such proceedings makes clear, in my opinion, the need for a further hearing on contumacy or responsibility of the respondent apart from the predicate proceeding.

25. See Aulana L. Peters, Comm’r, Sec. Exch. Comm’n, Remarks to the Twentieth Annual Rocky Mountain State–Federal–Provincial Securities Conference 1 (Oct. 16, 1987), available at <http://www.sec.gov/news/speech/1987/101687peters.pdf> (“In Commissioner Cox [s] two appearances at this conference, he addressed the question of what remedies were available to the Commission to deal with securities laws violators. In 1985, Charles suggested that the Commission should be prosecuting vigorously unlawful conduct by ‘indifferent’ and ‘chronic’ violators. I wholeheartedly agree.” (citation omitted)).

26. 17 C.F.R. § 200.30-9 to -10 (2008).

27. See Proffer of Evidence, *supra* note 5, at 3 (rejecting Antoniu’s offer of settlement).

28. Antoniu, indeed, made such a motion to disqualify not only Commissioner Cox, but the Chairman and all the other Commissioners based on this theory; this motion was rejected. See *Antoniou v. SEC*, 877 F.2d 721, 723–24 (8th Cir. 1989).

29. *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106 (D.C. Cir. 1988) (quoting

Furthermore, respondents in administrative proceedings who wish to make offers of settlement to the Commission are routinely required to execute waivers of prejudgment claims.³⁰ This waiver is now part of the Commission's Rules of Practice.³¹

IV. PROCEEDINGS BY DELEGATED AUTHORITY: RECUSAL FROM WHAT EXACTLY?

The administrative law judge ultimately ruled against Antoniu on the merits of his case in *Antoniou II*. There were then two other actions taken in the case: a grant of Antoniu's appeal of this decision to the full Commission and a grant of additional time for the Division of Enforcement to file a reply brief. Both of those decisions were made by delegated authority and never reached the Commission.³² The proceeding never again appeared before the Commission until the oral argument of Antoniu's appeal. Commissioner Cox recused himself as soon as anyone was aware that Antoniu's case was again before the full Commission.

The Eighth Circuit's conclusion that Commissioner Cox "refused to recuse himself" and "continued to participate in the . . . proceedings"³³ was based on the absence of a formal record of *any* proceeding before the Commission at which *any* Commissioner could have noted his or her recusal "on the record." It is difficult to recuse oneself from a nonexistent proceeding.³⁴ Perhaps this is one lesson from the case for agency lawyers.

Commissioner Cox did recuse himself from oral argument and any deliberation on the merits of Antoniu's appeal. This is clear in the record,³⁵ but the Eighth Circuit incorrectly characterized his recusal as coming

Withrow v. Larkin, 421 U.S. 35, 56 (1975) (emphasis added)). In *Blinder*, which was decided shortly before the Eighth Circuit's decision in *Antoniou*, the court refused the defendant's petition to disqualify SEC Commissioners from an administrative proceeding who had participated in prior litigation against him. See *Blinder*, 837 F.2d at 1104-05 (noting an Administrative Procedure Act exemption for agency members, e.g., Commissioners, from the prohibition against agency staff combining prosecutorial and adjudicative functions in the same case).

30. No such waiver was ever mentioned in this case by the Commission or the court.

31. 17 C.F.R. § 201.240(c)(5) (2008).

32. See *id.* § 200.30-14(g)(1)(v) (2008) (noting that a decision to grant a petition for review can be delegated); *id.* § 200.30-5(a)(4)(i) (explaining that the decision to grant extensions to file a brief can be delegated); see also Proffer of Evidence, *supra* note 5, at Ex. 1, ¶¶ 6-7 (noting the two actions taken by delegated authority).

33. *Antoniou v. SEC*, 877 F.2d at 723.

34. See Proffer of Evidence, *supra* note 5, at 2 ("There is no 'document of recusal' in the administrative record, nor does one exist in other files.").

35. The Commission noted in its opinion in the *Antoniou II* proceeding that "[w]e need not reach Antoniu's argument that Commissioner Cox is additionally disqualified because he referred to Antoniu in a speech. Commissioner Cox has recused himself from *all participation in the decision of this matter.*" *In re Antoniu*, 48 S.E.C. 909, 912 n.10 (1987) (emphasis added).

“finally . . . the day the . . . opinion of the Commission was handed down.”³⁶ It is unfortunate that the court chose to speak on this point as an advocate instead of a finder of facts. There are no facts to support the court’s conclusion that Commissioner Cox “continued to participate” in the proceedings; rather, the facts indicate that Commissioner Cox abided, in an abundance of caution, by the well-understood agency prejudgment principles. The court’s characterization of his conduct as somehow behind the scenes and nefarious cannot not be drawn from the record³⁷ and reflects a lack of understanding about how administrative agencies operate.

The SEC has, to my knowledge, always scrupulously attended to all these well-known rules and has erred, if at all, on the side of insulating the Commissioners from the staff, which has sometimes resulted in the Commissioners’ having to make decisions “alone at the top” in administrative proceedings. The Commission can be left unable to consult with any members of its staff, other than those dedicated to the consideration of appeals and agency opinions (presumably this is the case in most agencies). In my experience, the Commissioners and staff of the SEC are, were, and always have been scrupulously fair and honest in avoiding the appearance of prejudgment.

It is possible, however, that some sort of institutional bias in favor of the Commission’s legislative and administrative efforts may color its judicial determinations. Former SEC Commissioner Edward H. Fleischman offered an assessment of the mix:

My experience suggests that consistency in SEC quasi-executive and quasi-legislative policymaking has assumed an increasingly self-generative and self-vindicative character, demanding the ratification afforded by the quasi-judicial process with its appearance of disinterestedness. Ultimately, in my view, the more consistency the SEC as a body achieves in application of administrative policies, the more committed the SEC as a body becomes to vindication, in whatever capacity it is acting, of the policies thus consistently applied.³⁸

Perhaps this is true, but in this instance Commissioner Cox exercised the well-intentioned judgment to not participate in the judicial “vindication” of the policies he endorsed. That the record failed to reflect this judgment and that a court was therefore able to entertain a wildly fanciful explanation of what might have happened is, in my opinion, most unfortunate.

36. *Antoniu v. SEC*, 877 F.2d at 723.

37. The sentence of the opinion—which is, in my opinion, the most offensive—states, “The motion [to disqualify the entire Commission based on rejection of the offer of settlement] was denied and specifically, Commissioner Cox *refused to recuse himself*.” *Id.* at 723 (emphasis added). This characterization is wholly unsupported and unwarranted.

38. Edward H. Fleischman, *Toward Neutral Principles: The SEC’s Discharge of Its Tri-Functional Administrative Responsibilities*, 42 CATH. U. L. REV. 251, 254 (1993).

EPILOGUE

What happened after this debacle? Antoniu's case was remanded to the Commission following denial of certiorari by the Supreme Court.³⁹ Pursuant to Antoniu's offer of settlement, the Commission barred him from the securities industry in 1992 with leave to reapply in six months.⁴⁰ Antoniu then changed his name and turned his efforts to other venues. In 2001, he was ordered in an SEC administrative proceeding to pay a civil fine of \$100,000 and barred from association with any broker or dealer.⁴¹ In 2005, he settled a civil lawsuit in which he admitted violating the antifraud provisions of the securities laws and agreed to pay a civil penalty of over \$400,000.⁴²

39. *Antoniou v. SEC*, 877 F.2d 721, *cert. denied*, 494 U.S. 1004 (1990).

40. *Antoniou*, Exchange Act Release No. 34-30624, 51 SEC Docket 485 (Apr. 23, 1992). With regard to the amount of time before reapplication, see *supra* note 17 and accompanying text.

41. *Rooney*, Exchange Act Release No. 34-44414, 75 SEC Docket 415 (June 13, 2001).

42. *SEC v. Alexander*, Litigation Release No. 19,100 (Feb. 25, 2005), available at <http://www.sec.gov/litigation/litreleases/lr19100.htm>.