

3rd Circ. Slams 'Ridiculous' SEC Delay In Ex-Informant Probe

By **Jeannie O'Sullivan**

Law360, Philadelphia (January 15, 2020, 7:05 PM EST) -- The Third Circuit blasted the U.S. Securities and Exchange Commission's "ridiculous" delay in wrapping up its investigation into a broker-dealer and onetime government informant who beat criminal claims over a \$17 million pump-and-dump scheme, as it considered Wednesday whether to revive a suit alleging the agency's probe is retaliatory.

During oral argument in Philadelphia, U.S. Circuit Judge Thomas M. Hardiman questioned why the agency hasn't pursued enforcement actions after Guy Gentile and his business associates failed to answer subpoenas the SEC issued while the agency looks into Gentile's customer-solicitation practices. Gentile's retaliation suit, which was dismissed by the district court in New Jersey, alleged that the languishing subpoenas amount to harassment and have cost him business.

After hearing that it's been seven years since the investigation was initiated, Judge Hardiman said "it's ridiculous" and noted that the delay places Gentile under a cloud of investigation.

"You're not investigating some big, publicly traded brokerage house. When are you going to wrap this up?" Hardiman asked.

SEC attorney Matthew S. Ferguson told the court that it was within the SEC's discretion whether or not to launch subpoena enforcement actions.

"Is it your discretion to investigate someone indefinitely and have them labor under the cloud of investigation because the lawyers are too lazy or incompetent to file an enforcement action?" Judge Hardiman shot back.

Judge Hardiman said at one point that he didn't understand the SEC's "lack of urgency."

The enforcement actions should be “effortless” if the SEC’s investigation is legitimate, U.S. Circuit Judge Peter J. Phipps suggested.

Ferguson blamed the holdup on the fact that the agency was trying to get information from both Gentile and his business affiliates, and justified what he called a “reasonable investigative approach.”

“It takes some time to develop factual information when you’re following the trail of money,” Ferguson told the court.

The SEC has said it’s investigating whether Gentile’s Bahamas-based brokerage Sure Trader improperly solicited United States customers. In a complaint filed last year, Gentile said the subpoenas — which came under the agency's investigation of Traders Cafe, which Gentile says is unrelated to him — is a pretext to avenge his escape from criminal and civil cases accusing him of conspiring to inflate prices of free-trading shares in Raven Gold Corp. and Kentucky USA Energy Inc. and promoting their sales with misleading marketing materials.

Gentile wants an order quashing all subpoenas served pursuant to the Traders Cafe probe and a declaration ordering the SEC to stop its allegedly invalid investigation.

“Generally, regulators act in good faith. This one [investigation] really strikes me as different,” Gentile’s attorney, Adam C. Ford of Ford O'Brien LLP, told the court.

Ford called the subpoenas bizarre and said enforcement actions would allow the parties to hash out the legality of the subpoenas in court.

In May, the now-retired U.S. District Judge Jose L. Linares dismissed Gentile’s suit after reasoning that Gentile could only challenge the SEC’s investigation methods if and when the agency leveled some action against him.

In January 2017, Judge Linares granted Gentile's motion to dismiss the criminal charges against him over the pump-and-dump scheme, finding that his March 2016 indictment was filed too late, and rejecting prosecutors' bid for a retroactive application of the six-year statute of limitations created by the 2010 Dodd-Frank Act.

Nearly a year later, Judge Linares dismissed the SEC's civil complaint in connection with the alleged scheme, ruling that the agency's case came too late for punitive actions. The Third Circuit, however, **revived the SEC's suit** in September after finding that Judge Linares erred in rejecting the agency’s proposed injunctions as time-barred penalties.

Gentile **is appealing** the Third Circuit's ruling in the U.S. Supreme Court.

Circuit Judges Thomas M. Hardiman, David J. Porter and Peter J. Phipps sat on the panel for the Third Circuit.

Gentile is represented by Adam C. Ford and Robert S. Landy of Ford O'Brien LLP.

The SEC is represented by Matthew Scott Ferguson of the SEC's Office of the General Counsel.

The case is Guy Gentile v. U.S. Securities and Exchange Commission, case no. 19-2252, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Bill Wichert and Dean Seal. Editing by John Campbell.

CORRECTION: A previous version of this article misstated the name of Gentile's brokerage. The error has been corrected.

CLARIFICATION: This article has been updated to clarify the nature of the SEC's investigation.