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Ex-Informant Aims To Sink SEC's 'Pointless' Stock Plot Suit

By **Bill Wichert**

Law360 (February 18, 2020, 9:47 PM EST) -- A former government informant is looking to again knock out a U.S. Securities and Exchange Commission suit against him in New Jersey federal court over an alleged \$17.2 million pump-and-dump penny stock scheme, saying the purported misconduct is too old to justify the agency's proposed injunctions.

Nearly five months after the Third Circuit revived the action, Guy Gentile called on the district court Friday to toss the SEC's amended complaint seeking injunctive relief of an "obey-the-law" order and a bar on trading penny stocks, arguing the court is unable to issue the requisite finding that he committed a "substantive violation" of securities laws.

Such a declaration would be punitive and — since Gentile's alleged criminal activity ended in 2008 — be barred by the five-year statute of limitations for civil penalties set forth in Federal Statute 28, Section 2462, according to Gentile's brief.

"Our nation's courts, already overburdened with actual live controversies, should not be burdened with such an ultimately pointless case," the brief states.

Gentile, a former broker-dealer, has gone from cooperating with the SEC to battling it in court.

After now-retired Chief U.S. District Judge Jose L. Linares had nixed related criminal charges against Gentile, the judge in December 2017 granted his motion to dismiss the SEC's civil complaint, ruling that the agency's March 2016 case came **too late for punitive actions**. The amended complaint was filed in October 2017.

Applying the U.S. Supreme Court's 2017 **Kokesh v. SEC** opinion — which held that disgorgement in an SEC action is a penalty subject to the five-year statutory time bar — Judge Linares concluded that the proposed injunctions against Gentile were such penalties.

In vacating that decision, the Third Circuit ruled in a precedential opinion in September that the injunctions — permitted under federal statute 15 U.S.C. Section 78u(d) — were designed to **prevent future misconduct** and not to penalize Gentile for past wrongdoing.

"The district court held that those remedies — like the disgorgement remedy at issue in *Kokesh* — were penalties," the appellate panel said. "We see these questions of first impression differently and hold that because 15 U.S.C. § 78u(d) does not permit the issuance of punitive injunctions, the injunctions at issue do not fall within the reach of 28 U.S.C. § 2462."

But issuing such 78u(d) injunctions requires finding that Gentile substantively violated securities laws, which the district court cannot do in light of the five-year time bar, according to his brief.

"This court is statutorily precluded from declaring or making a finding of a substantive securities law violation on the underlying claims based on conduct from 2007 and 2008, because such a declaration constitutes a 'penalty' under 28 U.S.C. § 2462, and is thus time-barred," the brief states.

Gentile also pointed to the Third Circuit's reasoning that "if an injunction cannot be supported by a

meaningful showing of actual risk of harm, it must be denied as a matter of equitable discretion." In that regard, he stressed that he has led a law-abiding life for more than a decade.

"For the SEC to obtain an injunction, it needs to allege 'a meaningful showing of actual risk of harm,' but its amended complaint makes no such allegations," according to his brief.

"The commission continues to ignore the six-hundred-pound gorilla in the room: that Gentile is not alleged to have violated any securities laws since June 2008, including in the two and a half years since the Amended Complaint was filed," the brief states.

Counsel for Gentile declined to comment Tuesday. SEC representatives could not immediately be reached for comment Tuesday.

The SEC is represented in-house by Nancy A. Brown.

Gentile is represented by Adam C. Ford of Ford O'Brien LLP.

The case is Securities and Exchange Commission v. Gentile, case number 2:16-cv-01619, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Jeannie O'Sullivan. Editing by Adam LoBelia.

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