Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

SEC Isn't Trying To Punish Broker-Dealer, 3rd Circ. Told

By **Jeannie O'Sullivan**

Law360, Philadelphia (November 6, 2018, 5:11 PM EST) -- The U.S. Securities and Exchange Commission urged the Third Circuit to revive the agency's civil case against a penny stock broker-dealer who was criminally charged, but not convicted, of a $17.2 million pump-and-dump scheme, arguing Tuesday that the lower court judge who tossed the suit wrongly characterized it as punitive.

The agency's bid to bar Guy Gentile from the securities industry aims to protect the investing public, not tar his reputation, SEC attorney Daniel Staroselsky argued before a three-judge panel sitting in Philadelphia. A New Jersey federal judge had **granted** Gentile's dismissal motion in December after finding the SEC's March 2016 action punitive in nature and therefore subject to the five-year statute of limitations for civil penalties set by the U.S. Supreme Court's decision in Kokesh v. SEC .

The conduct at issue ceased in 2008, meaning the SEC would have had to file its case by 2013, the district court had reasoned. However, Staroselsky argued Tuesday that the time limit didn't apply because the SEC's injunctive bid, which asked that Gentile be ordered to obey the law and be barred from trading penny stocks, wasn't meant to punish him.

"It's about the purpose of the court, not the incidental effect. The purpose isn't to label [Gentile] a wrongdoer," Staroselsky said.

An attorney for Gentile, who also defeated criminal charges over the alleged scheme, emphasized U.S. District Court Judge Jose Linares' holding that injunctions are penalties. The penalty in this case would be branding Gentile a wrongdoer, according to Adam C. Ford of Ford O'Brien LLP.

"That branding has real collateral consequences," Ford told the court.

Gentile was accused along with several alleged co-conspirators of using misleading promotional materials to inflate prices of free-trading shares in Raven Gold Corp. and Kentucky USA Energy Inc. Prosecutors have said that after obtaining control over large blocks of the free-trading shares of the two companies, Gentile and his co-conspirators allegedly inflated the stock prices by engaging in manipulative trading and disseminating misleading promotional materials touting the stocks and encouraging others to purchase them.

Gentile and the others ultimately sold large volumes of the stock to investors, netting about $17.2 million in gross trading proceeds, prosecutors said. Victims of the scheme suffered losses when the companies' stock prices dropped, they said.

Judge Linares also cited the five-year statute of limitations when he granted Gentile's motion to dismiss his March 2016 criminal indictment stemming from the alleged scheme.

Third Circuit Judge Thomas M. Hardiman questioned the SEC's injunction bid, noting that Gentile's alleged wrongdoing was never proven, given the dismissal of his criminal and civil cases.

"How could barring him from the industry not be punitive?" Judge Hardiman asked.

Staroselsky countered that the passage of time shouldn't prevent the SEC from protecting the investing public, and said it was likely that Gentile would engage in the same conduct.

“You have to look at the past in order to make a good judgment about the future,” Starolesky said.

The SEC is represented in-house by Nancy A. Brown, Sarah Prins and Daniel Staroselsky.

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

The case is SEC v. Guy Gentile, case number 18-1242, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Jill Coffey.