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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Ex-Informant Again Beats SEC Suit Over Stock Schemes

By **Bill Wichert**

Law360 (September 29, 2020, 8:17 PM EDT) -- A former government informant on Tuesday again defeated a U.S. Securities and Exchange Commission suit over his alleged role in penny stock manipulation schemes, with a New Jersey federal judge finding that the agency did not show injunctions were needed to prevent him from breaking securities laws in the future.

In the latest twist in a **long-running feud** between the SEC and Guy Gentile, U.S. District Judge Brian R. Martinotti concluded that the agency failed to back up its request for injunctive relief of an "obey-the-law" order and a bar on trading penny stocks. The decision comes roughly a year after the Third Circuit **revived the action**.

The SEC had asserted that Gentile's "denial of wrongdoing and rejection of responsibility for his actions" indicate that he'll likely commit securities violations down the road, but the facts cited by the agency are "somewhat feeble," according to the judge.

To support those claims, the agency pointed to Gentile's public remarks that he "did nothing wrong" and that the SEC investigation is a "witch hunt," adding that Gentile "has not offered any assurance that he will not violate the securities laws in the future."

But Judge Martinotti offered "a simple hypothetical" to demonstrate how the SEC's allegations fall short: If Gentile posted on social media that he was innocent of the charges against him but still vowed to follow all securities laws in the future, "would the SEC consider that contrition and abandon their sought injunctions?" the judge asked.

"Surely they would not. Yet the SEC argues that a single comment made by the defendant where he said he 'did nothing wrong' bolsters their claim for relief," the judge said. "The court finds such a conclusion to be suspect."

After now-retired Chief U.S. District Judge Jose L. Linares nixed related criminal charges against Gentile in January 2017, Judge Linares granted Gentile's previous motion to dismiss the SEC's civil complaint in December 2017, 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 2019 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 appellate court remanded the matter.

After Gentile later **moved to dismiss** the amended suit, the SEC **countered** that his arguments were procedurally barred under Federal Rule of Civil Procedure 12(g)(2) and the so-called "law of the case doctrine," saying he made or could have made them earlier in the case.

The agency added that the motion violated the rule's "proscription against serial motions to dismiss on grounds previously available."

Judge Martinotti, however, rejected that argument, saying the Third Circuit opinion "created new binding precedent upon this court and other courts within this circuit."

"The court, therefore, is skeptical that the defense and objections contained within defendant's motion were truly available to him when his first motion was filed," the judge said, adding that Judge Linares' ruling "was premised on statute of limitations grounds and did not address the substantive merits of the parties' arguments."

"The parties' substantive arguments, therefore, are only now truly before the court for the first time," the judge concluded.

In considering the proposed injunctions, Judge Martinotti also rejected the SEC's reliance on assertions that were not included in its amended complaint, including Gentile's purported "attempt to organize and operate an 'international financial entity' in Puerto Rico. Judge Linares previously rejected a similar move by the agency, Judge Martinotti said.

"The SEC appears to be, once again, raising examples of the defendant's conduct not contained in the amended complaint. Such an effort was not previously permitted by the court, nor will it be permitted now," said Judge Martinotti, who gave "the SEC one final opportunity to amend their complaint."

Gentile attorney Adam C. Ford of Ford O'Brien LLP told Law360 on Tuesday, "We are thrilled with Judge Martinotti's well-reasoned decision dismissing these stale allegations. We sincerely hope that the SEC declines to file another Amended Complaint and rather turns its focus to matters that are consistent with its mandate and actually protect investors."

SEC representatives did not immediately respond to a request for comment Tuesday.

The SEC is represented in-house by Nancy A. Brown, Jorge G. Tenreiro and Simona K. Suh.

Gentile is represented by Adam C. Ford and Matthew A. 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 Steven Edelstone.
