

# **ENFORCEMENT—D.N.J.: Sovereign immunity blocks challenge to SEC investigation,(May 15, 2019)**

By John M. Jascob, J.D., LL.M.

The principal of a Bahamas-based broker-dealer failed to quash an SEC investigation into whether his firm improperly solicited U.S. customers.

A federal district court lacked subject matter jurisdiction over an action to enjoin an SEC investigation, holding that the suit was barred by sovereign immunity. Although the waiver of sovereign immunity in Section 702 of the Administrative Procedure Act (APA) generally extends to all nonmonetary claims against federal agencies, the SEC's authority under the Exchange Act to seek judicial enforcement of its subpoenas provides an exception to the waiver. Accordingly, the court granted the SEC's motion to dismiss (*Gentile v. SEC*, May 14, 2019, Linares, J.).

SEC investigation. The plaintiff, Guy Gentile, filed an action for declaratory and injunctive relief, seeking to prevent an ongoing investigation by the SEC's Miami office into whether Gentile and his Bahamas-based broker-dealer, SureTrader, improperly solicited U.S. customers. Specifically, Gentile sought to quash the SEC's subpoenas into SureTrader's relationship with an entity called Traders Café, arguing that there was no connection between the two firms other than the fact that Traders Café maintained an account at the broker-dealer.

Gentile also contended that the Florida investigation was an improper attempt by the SEC to revive claims against him for penny stock manipulation that the same court had dismissed in 2017 on statute of limitations grounds. According to Gentile, the SEC's Florida investigation was merely an attempt to harass him and blacklist him in the business community while circumventing the court's 2017 ruling. The SEC sought to dismiss Gentile's action, however, arguing, among other things, that the court lacked subject matter jurisdiction because the SEC had not waived sovereign immunity.

Sovereign immunity. The court rejected the SEC's first contention that the waiver of sovereign immunity for non-monetary actions under Section 702 of the APA only applies to actions other than a "final agency action" or actions "for which there is no other adequate remedy," as set forth in the judicial review provision contained at APA Section 704. The court observed that the Third Circuit has expressly rejected this argument, clarifying that the waiver of sovereign immunity in Section 702 extends to all nonmonetary claims against federal agencies and their officers, regardless of whether the cases seek review of an "agency action" or a "final agency action" as set forth in Section 704.

The SEC succeeded, however, with its argument that the SEC's authority under Exchange Act Section 21(c) to seek judicial enforcement of its subpoenas in federal court provides an exception to the APA's sovereign immunity waiver. As held by the Second Circuit in *Sprecher v. Graber* (2d Cir. 1983), an action

to enjoin an investigation falls within Section 702's proviso preserving existing limitations on judicial review. Because Section 21(c) establishes the exclusive mechanism for challenges to the validity of SEC investigations, district courts in the Second Circuit and elsewhere have held that Section 702 of the APA does not waive sovereign immunity for such actions. Accordingly, the court lacked subject matter jurisdiction to hear the plaintiff's case.

The case is No. 19-5155 (JLL) (JAD).

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