Focus BUSINESS LAW

No-contest settlements affected by U.S. ruling

Shara Roy

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The U.S. Court of Appeals for the Second Circuit released its decision earlier this month in *SEC v. Citigroup Global Markets Inc.* It overturns a widely publicized decision of Judge Jed Rakoff of the U.S. District Court for the Southern District of New York, and has the potential to shake up regulatory "no-contest" settlements in the U.S. and Canada.

In *SEC v. Citigroup Global Markets Inc.*, 827 F. Supp. 2d 328 (SDNY 2011), the SEC sought approval of a settlement with Citigroup Global Markets concerning allegations that Citigroup had negligently misrepresented its role and economic interest in a fund of subprime mortgage-backed securities. When the subprime market collapsed in the U.S., investors in the fund lost millions while, it was alleged, Citigroup made a profit of $160 million from a short position it had taken in the same securities.

As part of the settlement agreement, Citigroup agreed to the disgorgement of $160 million it earned from the short position, and a civil penalty of $95 million plus interest. Citigroup also agreed not to seek an offset against any compensatory damages in any related investor action and consented to make certain internal changes. Citigroup agreed to the settlement on the basis that they "neither admitted, nor denied" the facts as set out by the SEC in the settlement agreement.

In refusing to approve the settlement, Judge Rakoff identified, among other things, the inability of investors to rely upon admissions contained in a settlement in companion civil actions. Without the admissions, Judge Rakoff decided that he did not have a sufficient factual basis to rule that the settlement should be approved.

In the wake of Judge Rakoff's decision, the SEC announced that it would not offer no-contest settlements in cases involving criminal proceedings in which a defendant admitted to violations of criminal law or in proceedings where there is a "special need for public accountability and acceptance of responsibility," even in the absence of any admission of guilt in parallel criminal proceedings.

The SEC and Citigroup appealed the District Court's decision.

Although the Court of Appeals for the Second Circuit found that Judge Rakoff did not require that Citigroup admit liability as a precondition to approving the settlement, it held that the District Court had abused its discretion by requiring that the SEC establish the "truth" of the allegations, by admissions or otherwise: "Trials are primarily about the truth. Consent decrees are primarily about pragmatism." The Court of Appeals held that a factual basis for the order was required, but that in most cases the colourable claims supported by the SEC's assertion of facts that are neither admitted nor denied by a respondent are sufficient. The Court of Appeals left the door open for cases where more might be required.

The Canadian regulatory climate was also affected by Judge Rakoff's decision. On March 11, the OSC announced new enforcement initiatives, including a new program for no-contest settlements. The policy provides that the OSC may be prepared to settle a matter in circumstances where the "facts are declared by Staff to be true based on its investigation and which are not denied by the respondent" and there is an acknowledgement by the respondent that it accepts the settlement agreement as a basis for resolving the proceeding. Formerly, all settlements with the OSC required admissions from the settling party.

The announcement came after an extensive review and comment period, and an OSC-commissioned report released June 4 evaluated its policies in light of its mandate and compared with the SEC. The report included robust consideration of Judge Rakoff's decision. The resulting policy appears to address Judge Rakoff's concerns by allowing "no deny" settlements, without speaking to the "no admit" element.

Recent Canadian case law has made it potentially problematic for respondents to settle regulatory proceedings while continuing to defend civil action. The civil courts have held that they will hold respondents to the admissions they make in settling regulatory proceedings in civil proceedings on related facts on the basis that it is an affront to natural justice to permit a respondent to deny in one forum what they have already admitted in another (see *Buckingham Securities Corp. (Receiver of) v. Miller Bernstein LLP* [2008] O.J. No. 1859; *National Bank Financial Ltd. v. Potter* [2012] N.S.J. No. 97).

An OSC no-contest policy more in keeping with the U.S. Court of Appeals decision would make settlements more appealing to respondents in OSC proceedings and the policy more effective.

Shara Roy is a senior associate with Lenczner Slaght, practising in the areas of corporate commercial and securities litigation.

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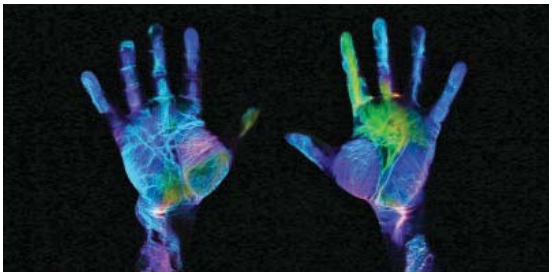

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For thieves, it's not easy being green

It was a crime written all over the perpetrator's face. A 28-year-old London man, Yafet Askale, was convicted of theft on June 10 after being sprayed with an ultraviolet anti-theft liquid, the U.K.'s The Telegraph reports. SmartWater is an invisible, odourless dye embedded with a unique identification number that glows green and can be read only under UV light. Askale was covered in a fine mist of the liquid, which can't be washed off for weeks, when he broke into a car that was booby trapped by police. Not only was he marked with the SmartWater's unique "forensic asset marker," so were items stolen from the car found in his possession. Although he pleaded not guilty, he was convicted of theft from a motor vehicle and sentenced to 49 hours of community work and £400 costs. Police liked the anti-theft system so much they gave free SmartWater to residents of a north London suburb so they could mark their belongings. This, they said, has led to reductions in burglary and street robbery of 80 and 40 per cent respectively. – **STAFF**