Trying to Revisit an SEC Settlement? Fifth Circuit Says Not So Fast

What the Apex Clearing Decision Means for Modifying Consent Orders

Key Takeaway

The Fifth Circuit rejected Apex Clearing Corp.'s bid to loosen terms in its SEC settlement after later-settling firms received lighter requirements. The court said the SEC reasonably treated Apex like others who asked for modifications and adequately explained why Apex did not qualify. Simply pointing to better terms obtained by firms that settled later than Apex was not enough.

What Happened

In August 2024, the **SEC announced settled charges** against 26 broker-dealers, investment advisers, and dually-registered broker-dealers and investment advisers related to what the SEC described as widespread and longstanding failures by the firms and their personnel to maintain and preserve electronic communications. Together, these firms agreed to pay $390 million to settle the SEC charges. Apex was one of the 26 settling respondents; it agreed to pay a $6 million penalty and to certain ongoing requirements including the retention of an independent consultant.

In January 2025, **the SEC announced additional settlements** with other firms—including nine investment advisers and three broker-dealers—that paid a combined $63 million tied to similar alleged recordkeeping and supervision lapses but faced fewer ongoing requirements.

Sixteen firms that had settled earlier asked the SEC to modify their settlements to remove obligations that the January 2025 respondents did not have, such as six years of heightened FINRA supervision and filing continuing membership applications. The SEC majority denied those requests, stating that prior instances of settlement modification were either not comparable or turned on particular circumstances, and that it does not change past settlements simply to "equalize" terms with later resolutions.

Apex petitioned the Fifth Circuit to review the SEC's denial of its modification request. In an unpublished decision, a three-judge panel affirmed the SEC.

How the Court Analyzed It

The panel reviewed the SEC's denial under the Administrative Procedure Act and focused on whether the commission treated Apex like other parties that had successfully obtained modifications and whether the SEC adequately explained any differences.

The court agreed with the SEC that the decision under review was the order denying modification, not the original settlement. It held that the SEC applied a consistent standard by requiring Apex to show that circumstances warranted a change. Citing the U.S. Supreme Court's 1992 *Rufo v. Inmates of Suffolk County* decision, the panel noted that a settlement may be modified only when there is a significant change in facts or law, typically involving unworkability or harm to the public interest. The panel concluded Apex had not shown that its obligations had become unworkable or contrary to the public interest due to the later settlements.

The court also emphasized that Apex voluntarily agreed to its settlement terms and that agencies cannot impose unequal burdens in settlements unless the parties consent—which, the panel said, Apex did. While acknowledging that the January 2025 firms "were lucky to be caught in a later wave" with "significantly lighter settlement terms," the panel held that this disparity alone did not make the SEC's denial unlawful.

Why It Matters

For companies seeking to modify existing SEC settlements, the decision reinforces three practical points:

1. Later, more favorable SEC settlements for others are not, by themselves, a basis to revise your deal.

2. You must show a significant change in facts or law that makes your obligations unworkable or adverse to the public interest.

3. The SEC's explanation and consistency across modification decisions will carry substantial weight on review.

Practical Implications for Clients

1. Evaluate modification requests against concrete, post-settlement changes, not comparative fairness with later settlements.

2. Build a record showing why specific obligations have become impractical or harmful to broader interests, rather than merely burdensome.

3. Assume negotiated obligations will stand absent a strong, well-documented change in circumstances.

Bellementis helps clients navigate SEC investigations and settlement negotiations with a focus on achieving durable resolutions and understanding the limited circumstances in which a final settlement may later be reopened. Please contact us to discuss how this decision may inform your enforcement, settlement, or post-settlement strategy.

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