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OPINION

He Waited 17 Years to Be Denied an SEC Whistleblower Award

- **By Leah McGrath Goodman**

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Gene Ross (Photograph by Christopher Leaman)

After reaping more than $50 million from a sprawling fraud uncovered by Eugene Ross, the SEC has handed down a final order denying him any award.

In September 2004, Eugene Ross stumbled on a Wall Street fraud of such far-reaching proportions, the U.S. Securities and Exchange Commission is still recovering funds from it to this day.

Yet, in July, the SEC handed down a final order dismissing Ross's role in uncovering and reporting two of the biggest fraudsters of the dotcom era and denying him any claim to a whistleblower award. The decision, rather than showing a just process that rewards whistleblowers who face retaliation and extreme hardship in acting to protect investors, reveals just how far the agency seems willing to go to deploy legal strategies and gamesmanship to reject whistleblower awards.

Ross never intended to become a whistleblower. When he discovered the fraud, he was overseeing the management of hundreds of millions of dollars for the now-defunct Bear Stearns. One of his clients, Lily Cates, the mother of the Hollywood actress and Fast Times at Ridgemont High star Phoebe Cates, had asked him to look into irregularities in one of her hedge fund accounts. What Ross discovered — initially, the theft of around $175,000 of Cates's money — soon spiraled into a vast array of crimes: money laundering, wire fraud, securities fraud, and other violations that earned the scandal its own episode on the television series American Greed.

Events moved quickly from there. Ross immediately reported the theft to Bear Stearns and Cates herself, which prompted fast action by the U.S. attorney's office for the Southern District of New York, the U.S. Department of Justice, and the SEC. Within eight months, the hedge fund at the center of the allegations, Amerindo Investment Advisors, and its billionaire co-founders, Alberto Vilar and Gary Tanaka, made global headlines as the two men were arrested and charged with stealing tens of millions of dollars from investors — approximately $5 million of which belonged to Cates. By November 2008, Vilar and Tanaka were convicted and sent to prison. The money they took from their investors, due to the swift response, was fully recovered.

What has moved far more slowly is the story of Gene Ross, father of three, who, in the process of voluntarily cooperating with government prosecutors and regulatory agencies in the criminal and civil actions against Amerindo, lost his job at Bear Stearns, which strongly discouraged his participation in the legal reckoning that followed, cut his pay, took away his sales team, and subjected him to unchecked harassment and retaliation. After leaving Bear, Ross was forced to sell his home to cover mounting legal bills that eventually bankrupted him. Yet he continued to provide evidence, documents, and testimony as a star witness in the 2008 criminal case that put Vilar and Tanaka behind bars.

During this time, Bear Stearns imploded in the great financial crisis and Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. This legislation, enacted on July 21, 2010, granted Wall Street whistleblowers, for the first time, anywhere from 10 percent to 30 percent of the total collected in SEC enforcement actions, at the agency's discretion, when a case resulted in sanctions of more than $1 million.

With the criminal case clinched, the SEC handily won its civil enforcement action against Amerindo and its founders in 2014 — a case tracing its provenance directly to Ross's discovery of the fraud at Amerindo one decade earlier. The SEC has so far recovered an estimated $54 million in penalties, disgorgements, and interest from the Amerindo case, which it filed in June 2005. However, 17 years after Ross sounded the alarm, the SEC has repeatedly declined to credit him with reporting the fraud and has denied Ross any claim to a whistleblower award. Ross first filed for the award in 2014 and was denied in 2018. Through his lawyers, he appealed — and was denied again on July 9, days after *Institutional Investor* wrote about the Ross case.

The SEC's reasoning in its heavily redacted final order is problematic in that its arguments allow for no scenario under which Ross could have reported the fraud in a timely fashion — allowing for investors to recover their money before it vaporized — and also qualify for a whistleblower award.

Because Ross alerted his client and employer to the fraud immediately, Ross, according to the SEC, effectively disqualified himself. In its final determination, the SEC states that Ross would have had to report the fraud after the enaction of Dodd-Frank on July 21, 2010, not before, in order to receive the award. This is not according to the rules of Dodd-Frank, but according to the SEC's own rules, which overlay Dodd-Frank, as the agency noted in its decision.

"The SEC's interpretations go against the spirit and intentions of Dodd-Frank, protecting investors and the public interest, because they encourage whistleblowers to call a lawyer before reporting any fraud in order to make sure they will qualify for the award," says Ross's lawyer, David Colapinto, whose Washington law firm, Kohn, Kohn & Colapinto, has represented whistleblowers since the 1980s. "That's not balanced. That's not what whistleblowing should be about. But that's the message they're sending to potential whistleblowers: Look out for yourself, not others."

The fact Ross was unable to report the Amerindo fraud in accordance with rules and provisions that had yet to come into existence does not appear to absolve him in the eyes of the SEC, which also declined to use its discretionary powers to grant Ross an award (something the agency has done in the past for whistleblowers it favors). Ross discovered the fraud in 2004, so, logically, his unwitting violation of the unwritten rules was unavoidable. The SEC's case against Amerindo, based on Ross's discovery of the fraud, did not proceed until after Dodd-Frank was enacted. In other words, Ross's whistleblowing, through no fault of his own, was caught in the crossfire of a rapidly changing legal framework and the advent of new consumer protections.

In addition, the SEC quibbles that Ross did not meet its legal definition of "voluntary" or "whistleblower" in his reporting of the fraud. By informing his client (Cates) and employer (Bear Stearns) of the fraud first, and not the SEC, the agency suggests Ross fell short of the agency's exacting definition of these terms, further depriving himself of any claim to a whistleblower award. Again, as the rules were not yet written, he could hardly have avoided such missteps. If Ross had told the SEC before anyone else, or simultaneously with Cates and Bear, this might have put him back in the running. But since he discovered and reported the fraud too soon to qualify for an award, according to the SEC, it would not have mattered.

Perhaps most troubling is the SEC's assessment of Ross's discovery of the fraud itself — what it describes as the "original information" underlying the successful criminal and civil actions against Amerindo that led to the recovery of investor funds and put the bad guys in prison. In its final order, the SEC appears to dismiss Ross's discovery of the fraud and his timely reporting of original information as insignificant, simply because it preceded the enactment of Dodd-Frank. In what appears to be a neat legal stitch-up, the agency cleverly rests on the notion that any information provided before Dodd-Frank, whatever its quality, arrived too soon, while any information coming after Dodd-Frank's enactment did not win the case.

Here is how the SEC puts it: "Claimant [Ross] argues that Dodd-Frank's definition of 'original information' is similarly 'clear and conclusive' and thus the commission's rule excluding from the definition information provided before July 21, 2010, must be rejected," the SEC wrote in its decision. "We disagree." In other words, none of the information Ross provided met the SEC's criteria of "original" as an accident of time, not quality. As an argument, this is circular and maddening.

By this interpretation of the SEC's rules, Ross would have had to wait until after July 21, 2010, to report the fraud to the agency after discovering it, which would have extended Amerindo's crimes by several years. "This decision is literally going out of its way to be discouraging and to prevent future whistleblowers from coming forward," says Colapinto.

The final order ultimately exposes how the whistleblower program, after a decade of issuing nearly a billion dollars in awards, still exhibits serious flaws in both design and logic. It also reveals an SEC award claims review team that seems highly motivated to find a reason to deny even well-deserved whistleblower awards, while forcing the whistleblower to wait many years for a final decision.

Colapinto, who is working on the Ross case pro bono, says he believes the SEC should grant Ross a whistleblower award under its discretionary powers, as he most certainly earned it. "His uncovering of the fraud is not in dispute," he says. Colapinto is still debating whether to take the case to a court of appeals, but notes that no whistleblower has ever won a case after being denied by the SEC. “The appeals courts are usually deferential,” he says. The SEC declined to comment.

Ross, whose children were young at the time he discovered the fraud and are now in their 20s, has left Wall Street and works as a call center manager, overseeing employee benefits such as health care plans. Reached by Institutional Investor at his home in Point Pleasant, New Jersey, he says he wonders why the SEC waited all these years to reject his whistleblower award. “It was a rubber-stamp rejection on all arguments, on all grounds, designed to discourage any chance of appeal,” he says. “Why not just deny it without making me wait? It kind of made me feel like a victim again.”