Panel #6: Achieving Efficient and Effective Settlements under the OSC's New No-Contest Settlement Scheme

In light of Ontario's nascent experience with no-contest settlements, this panel explored what makes an effective and efficient no-contest settlement and to what extent they further the public interest and/or aid in investor recovery.

Panellists:

Phillip Anisman, Barrister & Solicitor,
Kelly Gorman, Deputy Director – Enforcement at the Ontario Securities Commission (OSC),
Anita Anand, Professor of Law at the University of Toronto Faculty of Law, and
Stephen L. Cohen, Associate Director – Enforcement Division at U.S. Securities and Exchange Commission (SEC).

Moderator:

Mary G. Condon, Professor of Law at Osgoode Hall Law School, York University

Mr. Anisman and Ms. Gorman argued that no-contest settlements are in the public interest, notwithstanding the fact that they require no admission of the underlying facts of a contravention of securities law. Mr. Anisman provided some background context surrounding the introduction of no-contest settlements in Ontario. Historically, the OSC required an admission of a contravention of securities law but this was rare because the respondent was exposed to civil liability and/or was simply not prepared to make an admission. Mr. Anisman argued that the OSC accepted that no-contest settlements could be in the public interest, despite the lack of an admission, when it began to accept no-contest settlements in 2014. Ms. Gorman provided further insight into Ontario's new no-contest settlement scheme. She outlined the eligibility requirements for the Scheme (e.g. not available where there has been abusive, fraudulent or criminal conduct), as well as a summary of Ontario's first and second no-contest settlements. She argued both settlements have led to better compliance. Moreover, she made the case that the Scheme promotes general deterrence, because of the timeliness, severity and certainty of a sanction and because it frees up resources to pursue other wrongdoing.

Professor Anand disagreed that no-contest settlements were in the public interest for three main reasons. First, there is likely little general deterrence because there are no written reasons that are required to accompany a settlement. Second, investors have an impeded ability to recover under the Scheme, as compensation is discretionary and the OSC must approve the respondent's proposal for a no-contest settlement in a public hearing based on a determination that resolving the enforcement matter is in the public interest. Third, a no-contest settlement scheme potentially undermines the value of civil litigation or/and increase the difficulty in pursuing civil proceedings.

Mr. Cohen provided insight into the American experience with no-contest settlements in practice. He assuaged concerns about the "no admission, no denial" rule, and argued that the SEC's system still fosters accountability. However, he mentioned that the SEC is moving toward encouraging admissions, because there is a common understanding that there is greater accountability achieved by admissions of wrongdoing. However, the policy rationale for accepting no-contest settlements is that there is an understanding that the SEC is achieving some appropriate level of accountability in most instances.