Second Circuit Declines to Strike Down No-Deny Provision of Executive's SEC Consent Agreement

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On Sept. 27, 2021, the U.S. Court of Appeals for the Second Circuit rejected the most recent legal challenge to the Securities and Exchange Commission's (SEC) practice of using "no-deny" consent agreements to resolve civil enforcement actions.[1] This practice allows alleged violators of federal securities laws to settle civil actions with the SEC without admitting or denying wrongdoing but requires that the persons agree not to publicly deny the SEC's allegations against them. Corporate executives, constitutional scholars, activists and even members of the judiciary have raised First Amendment concerns, but so far, no challenge has been successful.

In 2003, Barry Romeril, the former chief financial officer of Xerox Corp., settled a civil enforcement action with the SEC. The SEC had alleged that he was responsible for filing materially false and misleading public financial statements. Romeril entered into a consent agreement with the SEC, neither admitting nor denying the SEC's allegations, and agreed to pay over $5 million to settle the claims against him. The district court issued a final judgment effectuating Romeril's agreement with the SEC.

Importantly, the consent agreement contained a no-deny provision, in which Romeril agreed "not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis." If Romeril violated this provision, the agreement allowed the SEC to "petition the Court to vacate the Final Judgment and restore this action to its active docket." The court's final judgment required Romeril to comply with this and every other provision in the consent agreement.

The SEC has incorporated these no-deny provisions into its consent agreements for nearly 50 years. SEC policy, announced in 1972, does not "permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint."[2] The agency's stated rationale is that "it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur."[3] From the agency's perspective, while it is willing to permit an individual

to settle charges without admitting liability, it is not prepared to have that individual then publicly deny the charge.

However, the SEC's use of such provisions has not been without controversy or criticism. In 2011, for example, the Honorable Jed S. Rakoff of the U.S. District Court for the Southern District of New York suggested that "the SEC's no-denial policy raises a potential First Amendment problem."[4] At the same time, Judge Rakoff was also critical of the SEC's entry into settlements without insisting on admissions of liability and refused to approve one such settlement, although not necessarily on that basis, a decision ultimately reversed by the Second Circuit.[5]

In 2019, 16 years after Romeril entered into the consent agreement, he moved for relief from the judgment obligating him to comply with the no-deny provision. In his motion, Romeril relied on Federal Rule of Civil Procedure 60(b)(4), which allows a court to relieve a party from a final judgment if "the judgment is void." Romeril argued that the no-deny provision both violates due process and infringes on his First Amendment right to speak about his conduct, defend himself in the media and "petition Congress and the SEC for securities law reform." The district court denied his motion.

The Court of Appeals affirmed the district court's denial of Romeril's motion. The court noted that, under Rule 60(b)(4), a judgment is void only if it is "premised on" either (1) "a total want of jurisdiction and no arguable basis on which [the court] could have rested a finding that it had jurisdiction" or (2) "a violation of due process that deprives a party of notice or the opportunity to be heard." By contrast, a judgment is not void "simply because it is or may have been erroneous." Applying this framework, the court ruled that Romeril had failed to show a basis under Rule 60(b)(4) requiring the court to vacate the no-deny clause of his consent agreement.

First, the court rejected Romeril's argument that the district court lacked jurisdiction to enter the order because it violated his First Amendment rights. As an initial matter, the court reasoned that even if the no-deny clause did violate Romeril's First Amendment rights, this would merely render the judgment legally "erroneous," not deprive the district court of an arguable basis to find it had jurisdiction to enter it. In any event, the court concluded that Romeril waived any First Amendment rights he had to contest the SEC's allegations by willingly entering into an agreement containing a no-deny clause. The court noted that litigants can and routinely do waive constitutional rights in exchange for a more favorable resolution, such as "the right to trial and the right to confront witnesses." Litigants can waive the First Amendment like any other right.

Second, the court rejected Romeril's argument that the judgment violated his right to due process. In this context, the court reasoned, all due process required was that Romeril receive notice of the proceedings and an opportunity to raise objections—which he did. Moreover, by agreeing to the terms of the consent agreement in exchange for avoiding the "expense of further litigation and the risk of an adverse judgment," Romeril could not "complain . . . on post-judgment, collateral review, that the [no-deny] provision violates his right to due process."

Romeril's attack on the no-deny provision of his consent agreement generated interest from both academics and libertarian activists. Three different *amici curiae* filed briefs in the Second Circuit appeal: the Americans for Prosperity Foundation,[6] the Competitive Enterprise Institute,[7] and a group of constitutional law scholars and public policy institutes.[8] Romeril himself is represented by litigation counsel from the New Civil Liberties Alliance (NCLA).[9]

Other litigants have pressed similar claims, all to date unsuccessful. In August 2021, the U.S. District Court for the Northern District of Texas rejected a nearly identical motion for relief from the no-deny provision in a consent judgment, for reasons similar to those of the Second Circuit in *Romeril*.[10] A month earlier, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of a slightly different kind of challenge.[11] There, the Cato Institute claimed it wanted to publish statements by individuals who were subject to SEC consent decrees, and sued the SEC to enjoin it from enforcing the no-deny provisions in those agreements. The D.C. Circuit found the Cato Institute lacked standing because blocking the SEC from enforcing its no-deny provisions would not redress its injury—the individual district courts would be able to enforce the no-deny provisions in the consent decrees whether or not the SEC itself was enjoined from doing so.

It seems likely that activists, academics and civil defendants interested in this issue will continue to seek avenues to challenge the SEC's practice.