

SEC No-Deny Consent Policy Continues To Withstand Challenge While Remaining Subject to Constitutional Scrutiny

By Gary P. Naftalis, Alan R. Friedman and Michael Hardin

On July 12, 2022, the U.S. Court of Appeals for the Fifth Circuit in *S.E.C. v. Novinger* rejected the latest in a number of legal challenges to the Securities and Exchange Commission's (SEC) practice of using "no-deny" consent agreements in civil enforcement actions. See *S.E.C. v. Novinger*, __ F.4th __, No. 21-10985, 2022 WL 2688620 (5th Cir. 2022). Although the court refused to vacate this particular agreement, two members of the three-judge panel signaled that, under the right circumstances, they may vote to strike down similar agreements in the future.

Longstanding SEC policy allows defendants to settle civil actions without admitting or denying wrongdoing, but requires that they agree not to publicly deny the SEC's allegations. In recent years, litigants have mounted serious challenges to the con-

stitutionality of the no-deny requirement, principally on First Amendment grounds. While to-date none of the attempts to undo existing consent decree provisions has succeeded, courts have nonetheless expressed concern as to the requirement's validity. It remains to be seen whether litigants can formulate a more attractive procedural posture to litigate these claims and whether the SEC, which along with the CFTC, is one of only two federal agencies to mandate no denial settlements, will reevaluate its rule in light of these criticisms and concerns.

The Fifth Circuit decision follows the Supreme Court's recent denial of certiorari in *S.E.C. v. Romeril*, a Second Circuit case in which that court rejected another SEC defendant's attempt to invalidate the no-deny provisions of his consent agreement. See *S.E.C. v. Romeril*, 15 F.4th 166 (2d Cir. 2021), cert. denied, 142 S. Ct. 2836 (Mem.), 2022 WL 2203361 (U.S., June 21, 2022). Romeril's



U.S. Securities and Exchange Commission building in Washington, D.C. Jan. 5, 2019.

certiorari petition attracted substantial attention and a number of supporting amicus briefs.

The Fifth Circuit's 'Novinger' Decision

Defendants Christopher A. Novinger and his company, ICAN Investment Group, settled a 2015 SEC enforcement action alleging that Novinger fraudulently sold \$4.3 million worth of securities by making false or misleading statements to Texas investors, pocketing nearly \$515,000 in commissions. The settlement agreements contained a no-deny clause, forbidding Novinger and ICAN from making any public statement denying the SEC's allegations, suggesting that the SEC's complaint had no factual basis, or stating

that they do not admit the allegations without adding that they also do not deny them. The agreements also stated that Novinger and ICAN understood and agreed to comply with the SEC's no-deny policy, that they had entered into the agreements voluntarily, and that the U.S. District Court for the Northern District of Texas had jurisdiction to enforce the settlement. The district court entered judgment on June 6, 2016.

Five years later, Novinger and ICAN moved for relief from the judgment under Federal Rule of Civil Procedure 60(b)(4) and (5). Rule 60(b)(4) provides that a district court can relieve a party from a final judgment if the judgment is "void," while Rule 60(b)(5) provides relief from a judgment when, inter alia, "applying it prospectively is no longer equitable." The defendants argued that, under Rule 60(b)(4), the judgment was void because it "denied them a fundamental due process right by penalizing them for attempting to 'speak truthfully,'" and because the district court lacked authority to issue a judgment that violated their First Amendment rights. Moreover, under Rule 60(b)(5), the defendants argued it would be inequitable to enforce the no-deny policy because doing so would harm the public interest in

hearing "healthy criticism" of the SEC. The district court denied Novinger and ICAN's motion.

The Fifth Circuit affirmed the district court's decision. Regarding Rule 60(b)(4), the court noted that a judgment is not void for lack of due process so long as a party has notice of the judgment and the opportunity to be heard. Novinger and ICAN's year-long participation in the SEC's lawsuit against them and their voluntary agreement to the no-deny provision satisfied these requirements. As for the defendants' First Amendment claim, the court cited Supreme Court precedent, *United Student Aid Funds v. Espinosa*, foreclosing relief under Rule 60(b)(4) for anything other than a due process violation or a jurisdictional defect. In other words, a judgment is not "void" merely because it raises a First Amendment issue. Finally, the court held that relief was not warranted under Rule 60(b)(5) because the defendants had failed to identify any unexpected changes in the facts or law such that enforcing the judgment was no longer equitable.

Although the court denied relief to Novinger and ICAN, two members of the three-judge panel concurred separately to comment on the SEC's no-deny policy. Judge Edith H. Jones, joined by Judge Kyle Duncan, wrote that the policy

"conditions settlement of any enforcement action on parties' giving up First Amendment rights," criticized the policy as requiring defendants to "[h]old your tongue, and don't say anything truthful—ever"—or get bankrupted by having to continue litigating with the SEC," and posited that "[a] more effective prior restraint [of free speech] is hard to imagine." Judge Jones then predicted that "[g]iven the agency's current activism, I think it will not be long before the courts are called on to fully consider this policy."

Judge Jones is not the first member of the federal bench to raise First Amendment concerns about the SEC's no-deny provisions. In 2011, Judge 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." At the same time, he was critical of the SEC's entry into settlements without insisting on admissions of liability. See *S.E.C. v. Citigroup Global Mkts.*, 827 F. Supp. 2d 328, 333 n.5 (S.D.N.Y. 2011) vacated and remanded by 752 F.3d 285 (2d Cir. 2014). The no-deny policy has also drawn attention from academics and other litigants.

The 'Romeril' Certiorari Petition

In another challenge to no-deny consent agreements, Barry

Romeril, a former Xerox executive, petitioned the Supreme Court for certiorari to review the Second Circuit's rejection of his own challenge to the no-deny provisions in his SEC consent agreement. For the certiorari petition, Romeril's legal team included as counsel of record Floyd Abrams, one of the nation's leading First Amendment practitioners whose notable representations include the New York Times in the Pentagon Papers case. Moreover, a number of individuals and organizations filed amicus briefs in support of Romeril's petition, including former ACLU president Nadine Strossen, American investors and entrepreneurs Elon Musk, Mark Cuban, Philip Goldstein and Nelson Obus, and various organizations.

Romeril's petition argued primarily that SEC no-deny provisions violate the First Amendment because they are lifetime prior restraints on speech, because they restrict speech based on content and viewpoint, and because they impose unconstitutional conditions on the benefit of settlement. The petition noted that the no-deny policy, unique among federal agencies aside from the SEC and CFTC, has prevented Romeril "for over 18 years fully to discuss his case publicly, a sanction that, as

a matter of well-established First Amendment law, could not have been imposed on someone convicted of treason or of murdering the highest-ranking federal officials." In enforcing this policy, the SEC "ensures the agency not only the first public word—by Complaint and press release—about its enforcement targets' culpability, but also gives the government the final and only word in nearly all SEC cases," because "98 percent of SEC enforcement targets" settle with the agency, leaving them "defenseless for life in the court of public opinion." Romeril further argued that his due process rights were violated by the mandatory nature of the no-deny policy, the vagueness of the no-deny provisions, and because the SEC could not lawfully impose the no-deny conditions if they prevailed at trial. Finally, the petition contended that the district court's judgment enforcing the no-deny provisions was void under Rule 60(b)(4) because the court lacked the authority to violate Romeril's First Amendment and due process rights. See Petition for Writ of Certiorari, *Romeril v. S.E.C.*, No. 21-1284 at 9, 20 (U.S., May 23, 2022). The Supreme Court, however, denied Romeril's petition on June 21, 2022.

Conclusion

While between *Romeril* and *Novinger*, Rule 60(b) challenges to past consent settlement agreements have thus far failed to upend the no-deny policy, the SEC rule remains subject to considerable criticism. Its use raises compelling First Amendment concerns. In addition, litigants settle SEC proceedings for a multitude of reasons—reflecting the costs and distraction of continued litigation, changes in circumstances and priorities, reputational harm, the desire by public companies and regulated persons not to be in a contested dispute with their significant regulator, the compromises inherent in settlement, as well as, of course, an assessment of the merits and the risks of defeat. As a policy matter, one can justifiably ask why the SEC should have not just the last word, with its settled order or complaint and expansive litigation release, but the only word publicly addressing the facts on what are often matters of public importance.

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