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Father Sometimes Knows Best: District Court Blasts SEC's "No Admit, No Deny" Provisions

October 31, 2022

In a scathing opinion, Southern District of New York Judge Ronnie Abrams recently blasted the SEC's standard demand that defendants settling with the Commission agree never to deny the allegations against them. Judge Abrams' decision in *SEC v. Moraes* reluctantly approved a consent decree containing the usual "no admit, no deny" provision in light of the Second Circuit's recent decision upholding such provisions in *SEC v. Romeril,* in which Judge Abrams' father (the famed First Amendment lawyer Floyd Abrams) represented the defendant in his unsuccessful petition for certiorari. But Judge Abram expressed concern that the SEC's insistence on such provisions violates the "unconstitutional conditions doctrine" and the First Amendment.

Judge Abrams' opinion could give new life to challenges to "no admit, no deny" settlement requirements despite the Second Circuit's *Romeril* decision. That decision, and an even more-recent one from the Fifth Circuit, were issued in the context of motions for relief from longstanding judgments; they were not plenary challenges to the SEC's policy. A plenary, up-front challenge conceivably could yield a different result.

Factual Background

Ever since 1972, the SEC has required the inclusion of "no admit, no deny" provisions in consent decrees settling enforcement actions. The Commission's stated rationale for that requirement is "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."

“No admit, no deny” provisions allow a defendant to avoid admitting the SEC’s allegations as long as the defendant also agrees not to deny them. According to Judge Abrams, the SEC “virtually stands alone,” together with only the CFTC, “in its compulsory use of such a provision as a condition of settlement.” (The court noted that, although the Department of Justice also uses similar language in settlements with corporate defendants, it does not do so with individual defendants.)

In *SEC v. Romeril*, the Second Circuit rejected a challenge to “no admit, no deny” language in a 16-year-old consent judgment, reasoning that consent decrees are “compromises in which parties give up something they might have won in litigation.” The Second Circuit held that “parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings.”

Faced with the *Romeril* ruling, the parties in the *Moraes* case presented the court with the SEC’s standard settlement language and asked for approval. Judge Abrams approved the settlement, but only “with reluctance in light of the SEC’s continued and misguided practice of restraining speech.” And in a nod to her distinguished father, Judge Abrams conceded that, “[r]are though it may be, occasionally we must acknowledge when our parents happen to get it right.”

The Court’s Decision

Judge Abrams first criticized *Romeril*’s reliance on a waiver analysis because, “even if an individual may waive First Amendment rights, . . . the SEC’s use of the [“no admit, no deny” provision] as a condition precedent to settle enforcement actions raises the specter of violating the unconstitutional conditions doctrine.” Under that doctrine, “[t]he government may not condition[] the conferral of a benefit . . . on the surrender of a constitutional right,” such as a First Amendment right.

Second, Judge Abrams opined that “no admit, no deny” provisions have “all the hallmarks of a prior restraint on speech, which the Supreme Court has characterized as ‘the most serious and the least tolerable infringement on First Amendment Rights.” “By preventing defendants from publicly defending themselves, or even criticizing the SEC’s handling of the case . . . , the Provision denies the public the opportunity to scrutinize the government’s enforcement practices.”

Third, Judge Abrams concluded that "no admit, no deny" provisions are "a textbook content- or viewpoint-based prohibition on speech" because they "target[] speech based on its communicative content." "Although a defendant cannot 'create the impression' that he is 'denying the allegations in the complaint,' . . . he is perfectly free to praise the SEC for its enforcement tactics, for instance, or to confess his culpability in violating the securities laws." The court was "unconvinced" that the SEC's asserted justification for the provision – the need "to 'avoid misleading impressions' that could result if a defendant were to 'settle one day without admissions and publicly deny the allegations the next'" – amounted to "a compelling governmental interest" needed to sustain content-based infringements on speech.

Implications

Judge Abrams' critique of the *Romeril* decision adds fuel to the debate about the SEC's insistence on "no admit, no deny" provisions in consent decrees. Such provisions increase the settlement stakes for defendants, who must give up the right to deny the SEC's allegations. But eliminating such provisions could reduce the SEC's willingness to settle. We will see whether attacks on "no admit, no deny" provisions gain momentum despite the Second Circuit's *Romeril* decision and the Supreme Court's denial of certiorari.

Persons wishing to oppose the SEC's "no admit, no deny" policy might choose to launch frontal attacks on it, rather than waiting until many years after a consent judgment has been entered. The *Romeril* decision and the Fifth Circuit's recent decision in *SEC v. Novinger*, both arose in the latter context: *Romeril* rejected a motion for relief from a 16-year-old consent judgment, and *Novinger* rejected a motion for relief from a five-year-old consent judgment.

Both decisions turned at least in part on the very narrow bases available for relief from a judgment under Federal Rule of Civil Procedure 60(b). And *Novinger* turned entirely on that ground. Two of the three judges concurred in the judgment affirming denial of relief, but expressly noted (in an opinion by Judge Edith Jones) that nothing in the court's unanimous ruling "approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties' giving up First Amendment rights." To the contrary, the two concurring judges opined that "[a] more effective prior restraint is hard to imagine." The concurring judges also noted that a petition to review and revoke the SEC's policy had been filed nearly four years ago, but the SEC has not yet responded to it. "Given the agency's current activism, I think it will not be long before the courts are called on to fully consider this policy."

Accordingly, if an attack on the SEC's policy were to arise in a context other than a motion for relief from a final judgment, lower courts might take a different view of the relevant arguments, and the Supreme Court might eventually choose to become involved.

Meanwhile, the SEC's Enforcement Division might currently be inclined to seek more admissions, rather than "no admit, no deny" concessions, as a condition of settlement. Enforcement Division Director Gurbir S. Grewal has made statements about the importance of obtaining admissions, although his recent Congressional testimony on July 21, 2022 might have sought to establish some balance between the two approaches: "Although we will continue to recommend no-admit-no-deny settlements in the majority of cases, we will seek admissions from wrongdoers in appropriate cases, where heightened accountability and acceptance of responsibility are in the public interest. When it comes to accountability, few things rival the magnitude of wrongdoers admitting that they broke the law. Admissions also give greater clarity regarding the facts of the violations and send a strong deterrent message to other market participants and are, therefore, important to building public trust."

We will continue to monitor developments in this area.

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