

Gag Orders, Part II: When the SEC Silences Critics

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This article supplements our article titled [“Gag Orders: Stifling Effect on SEC Critics”](#) in the September 2020 edition of this publication.

Any consent judgment with the SEC includes what is often called a “gag clause.” These clauses prohibit the defendant from challenging the truth of any allegation in the SEC’s complaint or making any statement that might be construed as saying that the complaint lacked a factual basis. This prevents defendants and their counsel from informing the public — including the press and Congress — about what they perceive to be unfair SEC tactics or factual assertions in the proceeding. The lawfulness of the SEC’s power to shield itself from review and criticism in this way was recently addressed by the Second Circuit Court of Appeals in *SEC v. Romeril*.

By way of background, the SEC filed a civil enforcement action against Barry Romeril and certain other parties. Without admitting or denying the allegations, the parties, including Romeril, settled the litigation and entered into the consent judgment that included the gag clause.

Many years later, Romeril asked the federal district court to remove the gag clause to allow him to make “truthful public statements” concerning the SEC’s case against him. Following the district judge’s denial of his request, Romeril argued on appeal that the gag clause is void ab initio as an unconstitutional prior restraint on truthful speech. Carlton Fields was counsel for amicus curiae Americans for Prosperity Foundation in a brief in support of Romeril.

However, the Second Circuit Court of Appeals recently affirmed the district court’s decision. In sum, the appeals court stated that Romeril had “failed to show either a jurisdictional error or a due process violation within the meaning of the rule.”

For example, in rejecting Romeril’s argument that his First Amendment rights had been violated, the court opined that “[t]o the extent Romeril had the right to publicly deny the SEC’s allegations against him, he waived that right” by agreeing to the gag clause. The court further noted that individuals, in

the course of resolving legal proceedings, can and do waive certain constitutional rights in exchange for “some perceived benefit” and that the “First Amendment is no exception.”

Rejecting Romeril’s arguments on due process grounds, the Second Circuit opined that Romeril had “actual notice of the proceedings as well as a full and fair opportunity to litigate on the merits,” further noting that Romeril had participated in the proceedings with his “capable and experienced counsel.” Additionally, the court noted, Romeril had “willingly” agreed to the gag clause and, by waiving certain rights, had avoided the expense of further litigation and the risk of an adverse judgment.

Romeril has filed a petition for rehearing en banc to the Second Circuit Court of Appeals. The New Civil Liberties Alliance, which is representing Romeril, may argue that the federal appeals court had failed to address certain of his arguments on appeal, including that the gag clause violated the Administrative Procedure Act and that it denies due process by prohibiting an individual who settles with the SEC from speaking about the underlying matter.

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