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The SEC's Compulsory Practice of Restraining Free Speech: "You Signed It, So Live With It!"

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Since 1972, the SEC has prohibited defendants who settle civil enforcement actions with the SEC without admitting or denying wrongdoing from later publicly "denying the allegations in the complaint" filed against them. The SEC codified this policy in 17 C.F.R. § 202.5(e), after determining that it was "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." Therefore, "[i]n compliance with this policy, [a] defendant agrees 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." This "policy" forecloses the defendant's ability to question not only the staff's "interpretation" of the facts, even if other witnesses or evidence proves them wrong, but also the tactics used by the staff to threaten the defendant with enormous sanctions to force a settlement. But the SEC generally would not be entitled to such a "gag order" as part of its case on the merits, nor be able to point to a compelling need for such an order to carry out its mission of protecting investors and promoting fair and orderly securities markets. Rather, the gag order's main effect is to throw a protective bubble over the SEC staff's often overly aggressive strategies for extracting settlements. In *SEC v. Novinger* (July 2022), Judge Edith Jones of the Fifth Circuit Court of Appeals disagreed with her colleagues who upheld one of these gag orders:

> I write to note that nothing in the opinion (or in the district court opinion, for that matter) approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties' giving up First Amendment rights. If you want to settle, SEC's policy says, 'Hold your tongue, and don't say anything truthful — ever'— or get bankrupted by having to continue litigating with the SEC. A more effective prior restraint is hard to imagine.

In *SEC v. Moraes* (October 2022), Judge Ronnie Abrams of the Southern District of New York,

daughter of First Amendment lawyer and scholar Floyd Abrams, issued her own scathing opinion of this policy: Truth is no defense. No matter how weak, or strong, the allegations in the [SEC] complaint may be — indeed, even if the testimony of key witnesses proves to be false — if defendants ever consider publicly defending themselves, the [settlement gag provision] prevents them from doing so. *** Perhaps most concerning, the federal judiciary is made complicit in this practice — normalizing lifetime gag orders in the process. Courts are called upon to turn a blind eye to First Amendment rights being used as a bargaining chip; to endorse consent decrees, giving No-Admit-No-Deny Provisions the imprimatur of judicial sanction; and to enforce them should defendants ever step out of line. Judge Abrams found that the SEC's practice "raises the specter of violating the unconstitutional conditions doctrine," by which the government "conditions" receipt of a particular benefit on giving up certain rights (including the right to criticize the government). She also stated that the SEC's practice has "all the hallmarks of a prior restraint on speech." Nevertheless, Judge Abrams reluctantly felt compelled under *SEC v. Romeril* to approve the settlement; but she refused to "do so silently." In its 2021 *Romeril* opinion, the Second Circuit Court of Appeals held that the defendant waived any First Amendment right when he signed an SEC settlement agreement containing a gag order. The Second Circuit remarked that "*even assuming that Romeril is correct that the no-deny provision violates his First Amendment rights*," he failed to satisfy either of the prerequisites for voiding a judgment pursuant to Federal Rule of Civil Procedure 60(b)(4): lack of jurisdiction, which the district court had, or lack of due process (notice and opportunity), which Romeril had received. Relying on cases that permit waiver of *procedural* rights in a criminal case, and also relying on cases involving private (not governmental) parties, the Second Circuit boldly jumped to the conclusion that the fundamental constitutional right of the First Amendment is "no exception." The opinion seems wrongly decided. The U.S. Supreme Court has yet to provide a definitive analysis. A string of Supreme Court cases upholds the waiver of certain criminal *procedural* rights — such as the right to trial, the right to confront witnesses, and appellate review — when the waiver is "knowingly, voluntarily, and intelligently" made. But none of those cases deal with the waiver of a fundamental right like those protected by the First Amendment. *Snepp v. United States* is the only case in which the U.S. Supreme Court has implied that a defendant may waive First Amendment rights in a contract with the government. In 1968, Snepp signed an employment agreement with the Central Intelligence Agency under which he agreed not to publish any information relating to his employment without agency approval. When Snepp published a book about CIA activities in Vietnam, the CIA sued to enforce the employment agreement. Snepp lost in the district court. On appeal, the Fourth Circuit Court of Appeals stated that the purpose of such an agreement was not to give the CIA the power to censor its employees' critical speech but rather to ensure that classified, nonpublic information is not disclosed without the agency's permission. Indeed, the Fourth Circuit stated that Snepp had a First Amendment right to publish unclassified information. The Supreme Court held that Snepp's violation of his agreement impaired the CIA's ability to perform its statutory duties and potentially jeopardized the safety of current foreign government operatives. The court thus enforced his employment agreement *as a matter of national security* but did not address First Amendment issues other than signaling in a footnote that a claim

of "execution under duress" could render any waiver of First Amendment rights unenforceable. However, the dissenting justices in *Snepp* stated that under a rule of reason analysis of the government's interest and the employee's interest in protecting his First Amendment rights, the "covenant imposes a serious prior restraint on Snepp's ability to speak freely and is of indefinite duration and scope — factors that would make most similar covenants unenforceable." Nor can the SEC point to a compelling interest for gag orders unlimited in duration and scope, which the SEC as much as acknowledged before Judge Abrams in *Moraes*. Judge Jones' and Judge Abrams' apt analyses — as well as *Snepp*, properly understood in its entirety — should embolden defense counsel to challenge the SEC over gag orders. But such efforts should commence at the time of settlement talks, and a record should be made to preserve the defendant's right to raise First Amendment issues, including any facts suggesting that the gag order was agreed to under duress and for an impermissible duration and scope. First Amendment issues could then be raised with the district court after the SEC approves the settlement and the staff presents it to the district court for approval. In an administrative proceeding context, a respondent who signs the settlement should preserve the First Amendment issue and challenge the final order in court under the Administrative Procedure Act as arbitrary, capricious, and an abuse of discretion as well as contrary to a constitutional right. The time may well be at hand when such challenges to sweeping SEC gag orders may find more success than historically they have.

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