Gag Orders: Stifling Effect on SEC Critics

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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 is currently under judicial review by the Second Circuit Court of Appeals in *SEC v. Romeril*.

In 2003, 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” about the SEC’s case against him. Following the district judge’s denial of his request, Romeril is arguing on appeal that the gag clause is void ab initio as an unconstitutional prior restraint on truthful speech. The SEC argues that the gag clause in the settlement agreement with Romeril was a freely negotiated condition of a contract and that Romeril was represented by competent counsel.

Although the law is clear that First Amendment rights may be waived, the law is equally clear that First Amendment waivers are to be scrutinized when the government is a party. It is not just the individual’s rights — Romeril’s in this instance — that are involved; it is society’s need to hear criticism of the government in order to address and reform government, where appropriate.

The SEC argues that deterrence — its ability to deter violations of the securities laws — will be diminished if settling defendants like Romeril are allowed to question the factual basis of the SEC’s action. However, like most parties who enter into SEC consent orders, Romeril was also subjected to other sanctions that seem significant enough to deter securities violations of the sort alleged in the complaint.

Or, the SEC argues, allowing individuals in Romeril’s position to speak will raise public doubts about the propriety of the SEC’s conduct, thus reducing respect for the SEC and diminishing its effectiveness. However, there is no bar on defendants complaining about Department of Justice actions that convicted them, and yet the DOJ survives and remains effective.

The Second Circuit’s review of the SEC’s gag power is particularly timely. Among the case law in support of invalidating such gags is a recent Fourth Circuit Court of Appeals holding that released an individual from his agreement with a police department not to publicly discuss a beating that he alleged the police had inflicted on him.

Carlton Fields is counsel for amicus curiae Americans for Prosperity Foundation in its brief in support of Romeril’s challenge to the SEC’s gag order.