

Securities Regulation Daily Wrap Up, ENFORCEMENT—5th Cir.: Defendants' constitutional rights not violated by SEC settlement's no-deny policy, (Jul. 14, 2022)

Securities Regulation Daily Wrap Up

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By [Jay Fishman, J.D.](#)

Federal Civil Procedure Rules 60(b)(4) and (5) only void a judgment on due process or First Amendment grounds if district court's jurisdiction or defendants' notice/opportunity to be heard were improper.

The U.S. Court of Appeals for the Fifth Circuit affirmed the Texas District Court's holding that the SEC's 1972-initiated no-deny policy included in the defendants' signed 2016 settlement agreement with the Commission did not void the judgment on constitutional grounds under Federal Civil Procedure Rules 60(b)(4) or (5). The court of appeals declared that Rule 60(b)(4) or (5) would void the settlement on due process or First Amendment grounds only if either the lower court did not properly have personal or subject matter jurisdiction over the defendants or the defendants were not provided actual notice of the case or an opportunity to be heard, all of which were proper and not contested by either party in 2016. The two concurring judges, however, offered up the most interesting part of the case by proclaiming that today's decision does not determine the merits of the no-deny policy itself and that given the SEC's current activism, this or another high court may be called upon in the near future to decide whether the policy remains or is struck down ([SEC v. Novinger](#), July 12, 2022, Stewart, C.).

Life settlement fraud. In 2016, a company and its two financial radio show hosts (defendants) settled with the SEC for having bilked 26 investors out of approximately \$4.3 million in life settlements between 2012 and 2014 ([SEC v. Novinger](#), May 11, 2015). The signed settlement contained a no-deny policy which prohibits defendants from later publicly denying the allegations made against them. The case procedures spanned two years, from 2014 to 2016, during which the Commission conducted its investigation and met with the defendants to discuss the matter which ultimately led to the agreed upon settlement and no disputes over whether: (1) the Texas District Court had jurisdiction over the case; or (2) the defendants received actual notice or an opportunity to be heard.

Defendants' 2021 claims. Five years later, in 2021, the defendants sought to void the judgment by claiming the settlement's no-deny policy violated their due process and First Amendment rights under the Constitution. They basically argued that not being able to publicly deny the allegations violated their rights to free speech. But the SEC countered by stating that the defendants' reliance on Federal Civil Procedure Rule 60(b)(4) and (5) for their constitutional claims was misplaced because these Rules can only void a judgment either for lack of jurisdiction or failure to receive notice or an opportunity to be heard. The district court agreed with the Commission and the defendants appealed. The appellate court, in reviewing the case de novo, began by remarking that the defendants waited five years to have the judgment declared void, as if it took them that long to decide they could no longer live with the judgment; not wanting to live with the judgment, the court said, is not grounds for overturning it.

Rule 60(b)(4). The court acknowledged the defendants' passionate contentions that their constitutional rights were violated but affirmed the district court decision by relying on a defining U.S. Supreme Court case from 2010—*United Student Aid Funds, Inc. v. Espinoza*—which declined to expand a due process or First Amendment violation under Rule 60(b)(4) beyond a party's being deprived of notice or opportunity to be heard. Also, the defendants' arguments relied on cases either from other circuits that do not affect this court or that pertained to remote parties who were not provided with actual notice or an opportunity to be heard.

Rule 60(b)(5). While the defendants asserted that the judgment should be set aside under Rule 60(b)(5) because it violates the public interest, the court remarked that Rule 60(b)(5) can void a final judgment only if, among other things, “applying it prospectively is no longer equitable” and not, as stated above, “when it is no longer convenient to live with the terms of a [judgment].” Relying on the 1992 U.S. Supreme Court *Rufo v. Inmates of Suffolk Cnty. Jail* case, the court went on to say that a final judgment applied prospectively renders it inequitable only if “a significant change either in factual conditions or in the law renders continued enforcement detrimental to public interest.” The court acknowledged the defendants correctly contending a public interest violation under Rule 60(b)(5) but concluded that no significant changes in factual circumstances or the law from 2016 to the present rendered the final judgment inequitable.

This case is [No. 21-10985](#).

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Companies: ICAN Investment Group, LLC

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