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REPORT

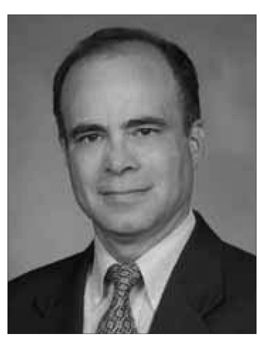
ENFORCEMENT

A Mighty Sword: Should the SEC Bring Enforcement Actions Solely on the Basis of Control Person Liability?

BY KENNETH WINER AND KIMBERLY SHUR

The SEC recently has brought two settled enforcement actions against executives based solely on "control person" liability.[1] The statutory basis for the charges was Section 20(a) of the Securities Exchange Act of 1934. Section 20(a) provides that under certain circumstances a control person is liable jointly and severally to the same extent as the controlled person to "any person to whom such controlled person is liable." The SEC's recent aggressive use of Section 20(a) raises the questions of whether Section 20(a) provides an appropriate basis for an SEC enforcement action and the relief, if any, that should be available against an individual who (solely as a control person) violates the Exchange Act.

The U.S. Courts of Appeal disagree on whether the SEC can maintain an enforcement action under Section 20(a). The Sixth Circuit has issued conflicting opinions on the issue. *Compare SEC v. Coffey*, 493 F.2d 1304 (6th Cir. 1974) *and United States v. Smith*, 208 Fed.Appx. 402, 2006 WL 3690414 (6th Cir. Dec. 14, 2006). The Second Circuit has held that the SEC can maintain an enforcement action under Section 20(a). *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450 (2d Cir. 1996). The Third Circuit has held that the SEC cannot maintain an enforcement action under Section 20(a). *SEC v. J.W. Barclay & Co., Inc.*, 442 F.3d 834 (3rd Cir. 2006).



In this article, we analyze the statutory language, legislative history, and public policy relating to this issue. We then discuss the appellate opinions that have discussed the issue and conclude that the opinions upholding the application of Section 20(a) to SEC enforcement actions have not adequately addressed the problems inherent in that application. In our view, the statutory language, legislative history of the relevant pro-

[1] *See* SEC Litigation Release No. 21162, "SEC Charges Nature's Sunshine Products, Inc. With Making Illegal Foreign Payments," (July 31, 2009), available at http://sec.gov/litigation/litreleases/2009/lr21162.htm; SEC Litigation Release No. 21170, "SEC Charges Hank Greenberg and Howard Smith for Roles in Alleged AIG Accounting Violations," (Aug. 6, 2009), available at http://www.sec.gov/litigation/litreleases/2009/lr21170.htm.

Kenneth Winer and Kimberly Shur are partners in the Washington, D.C. office of Foley & Lardner LLP. They represent entities and individuals in SEC investigations.

visions of the Exchange Act and public policy do not support the application of control person liability to SEC enforcement actions.

I. Analysis of Statutory Language and Congressional Intent

A. As Initially Enacted, Section 20(a) Clearly Did Not Apply to SEC Enforcement Actions

Section 20 contains the control person liability provisions of the Exchange Act. Section 20(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Section 20(a).

The control person liability provisions as initially enacted did not apply to enforcement actions. From enactment until 1975, the Exchange Act definition of "person" did not include the SEC:

> The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.

Section 3(a)(9).

Accordingly, a control person could not be liable to the SEC under Section 20(a) because that section provides only that under certain circumstances the control person is liable jointly and severally with and to the same extent as such controlled person "to any *person* to whom such controlled person is liable" (emphasis added) and the SEC was not a person within the meaning of the Exchange Act.

The plain language of the Exchange Act as initially enacted is consistent with its legislative history. Section 20(a) is based on the control person liability provision of the Securities Act of 1933, Section 15(a). At that time, Section 15(a) provided:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable.

The Securities Act defined "person" to include "a government or political subdivision thereof." Securities Act § 2(2). Both Section 11 and Section 12 of the Securities Act established civil liability to injured persons; neither provided for SEC enforcement actions and both used the term, "liable." Thus, even though the Securities Act defined "person" broadly enough to include the SEC, it is apparent that the intent behind Section 15(a) was limited to civil liability to injured investors. There is no evidence that Congress intended a broader scope with respect to Section 20(a) of the Exchange Act.

B. While the 1975 Amendments Arguably Made Section 20(a) Ambiguous, the Weight of the Evidence Indicates That Congress Did Not Intend to Extend the Scope of Section 20(a) to SEC Enforcement Actions

1. The 1975 Amendments Arguably Made the Application of Section 20(a) Unclear.

In 1975, Congress amended the Exchange Act definition of "person." Although not identical to the Securities Act definition of "person," the Exchange Act's redefinition was broad enough to include government agencies such as the SEC:

> The term, "person" means a natural person, company, government or political subdivision, agency, or instrumentality of a government.

Section 3(a)(9).

The implications associated with changing the definition of "person" are unclear. It seems a stretch, however, to say that a person who violates the federal securities laws is "liable" to the SEC for injunctive relief, disgorgement and penalties in the same manner that a person who filed a false registration statement might be liable under Section 18 of the Exchange Act to a person who purchased a security in reliance on the false registration statement. As one magistrate judge explained:

> The issue is not simply whether the SEC falls within the statutory definition of the word "person." Instead, the issue is whether the SEC constitutes a "person to whom such controlled person is liable," not only generally but "jointly and severally." It strains the statute to characterize a secondary actor as "liable to" the SEC. The SEC is the government agency tasked with enforcing the federal securities laws. It is not an injured party. In an enforcement action brought by the SEC, a defendant may be held liable for certain violations committed by a controlled person, but a defendant is not liable to the SEC the way that he or she would be liable to a private plaintiff.

SEC v. Stringer, 2003 U.S. Dist. LEXIS 25523 at *13 (D. Or. Apr. 24, 2003) (Stewart, Magistrate Judge), *adopted*, 2003 U.S. Dist. LEXIS 25524 (D. Or. Sept. 3, 2003).[2] Thus, while the SEC might be able to obtain a judgment ordering a company that obtained funds from investors who relied on a false registration statements to disgorge the company's unjust enrichment, a strong argument can be made—at least prior to the entry of the disgorgement order—that the company is liable to the injured investors, but not to the SEC. At most, therefore, the Exchange Act redefinition of "person" made it unclear whether Section 20(a) applied to SEC enforcement actions.

A strong argument can be made that a controlled person is not liable for an injunction even if the controlled person has violated the federal securities laws and there is a reasonable likelihood of a future transgression. First, the term, "liable" suggests monetary not injunctive relief. In addition, even when the statutory prerequisites for an injunction are present, the SEC has discretion as to whether to bring, and a court has discretion as to whether to grant, equitable relief. *See* Section

[2] The Findings and Recommendations of Magistrate Judge Janice Stewart in *Stringer* appear to contain the most thoughtful analysis to date as to whether Section 20(a) applies to SEC enforcement actions. The Judge decided that Section 20(a) did not apply.

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21(d)(5) (". . . the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."). Moreover, a strong argument can be made that the term "liable jointly and severally" refers to monetary liability, and does not encompass the statutory authority of the SEC to seek, and the jurisdiction of a court to grant, an injunction. Even if one could say that a company is liable for an injunction—and as set forth above we think that would be a stretch—we do not think people would say that such liability can be joint and several. Accordingly, it does not appear that the plain meaning of the Section 20(a) is intended to mean that a control person can be enjoined merely because the prerequisites for enjoining the controlled person are present and the control person does not establish the affirmative defense available under Section 20(a).

Similarly, because of the public policy component relating to the imposition of monetary penalties, a strong argument can be made that a controlled person is not "liable" for a penalty unless and until a tribunal has entered a judgment ordering the controlled person to pay the penalty. In addition, by statute, penalties imposed in a court proceeding are due to the U.S. Treasury, not to the SEC. *See* Section 21(d)(3)(C). If Congress intended that Section 20(a) would apply to Section 21(d) penalties, then Congress presumably either would not have specified that the penalties be paid to the U.S. Treasury or would have specified that the penalties were a liability to the SEC even though they were to be paid to the U.S. Treasury.[3]

2. It Appears That Congress Did Not Intend The 1975 Amendments To Extend Section 20(a) To SEC Enforcement Actions.

Congress accomplished a number of objectives in the 1975 amendments, including setting up a "comprehensive pattern for the relation of brokers, dealers, and banks trading in municipal securities." Senate Report No. 94-75 to accompany S. 249, "Securities Acts Amendments of 1975" at 38 (Apr. 14, 1975). While a likely purpose of the redefinition of "person" was to extend the antifraud provisions of the Exchange Act to municipalities, the legislative history does not make clear that this was the primary purpose, much less the sole purpose.

We, however, have identified no evidence that Congress considered the implications of extending control person liability to SEC enforcement actions. If Congress had intended to extend control person liability to SEC enforcement actions, Congress presumably would have considered such issues as:

- the circumstances under which making control persons subject to injunctive and other equitable relief would be appropriate;
- whether the redefinition of "person" would accomplish the desired result; and
- whether the redefinition of "person" would make a control person subject to criminal liability if the controlled person was subject to criminal liability.

Neither the relevant Committee reports nor the Conference Reports reflects such consideration. Although the Senate Report explains the purpose of many of the redefinitions set forth in the proposed amendments, the Senate Report simply summarizes the proposed redefinition of "person" without explanation. S. Rep. no 94-75 at 90 (1975).

As Congress redefined "person" in 1975, the United States Government is a "person" within the meaning of the Exchange Act. If the term "liable" can be stretched to encompass the potential exposure of a controlled person to a court injunction, court-ordered disgorgement and civil penalties, then the term "liable" arguably can be stretched to include imprisonment and criminal penalties. The potential extension of Section 20(a) to impose criminal penalties on a control person who reasonably and in good faith induced a controlled person to violate the Exchange Act raises obvious public interest concerns. It is one thing to imprison a person who willfully violated the Exchange Act, it is another thing to imprison a person who reasonably and in good faith induced a control person to willfully violate the federal securities laws. The absence of any discussion in the legislative history of whether Section 20(a) should apply to criminal penalties is further evidence that Congress did not intend Section 20(a) to apply to SEC enforcement actions.

In 1974, one year before "person" was redefined for the purpose of the Exchange Act, the U.S. Court of Appeals for the Sixth Circuit held that "section 20(a) of the 1934 Act may not be relied upon by the SEC in an injunctive enforcement action." *SEC v. Coffey*, 493 F.2d 1304 (6th Cir. 1974). The Sixth Circuit based its holding on its view of Congress' intent in enacting the Exchange Act:

> Section 20(a) of the 1934 Act makes a controlling person liable "to any person to whom such controlled person is liable." As a matter of legislative interpretation, we hold that the SEC is not a person under section 20(a), since section 20(a) was meant to specify the liability of controlling persons to private persons suing to vindicate their interests.

493 F.2d at 1318.

The Sixth Circuit explained that "Section 20(b) sets forth the standard of lawfulness to which a controlling person must conform, on penalty of liability in injunction to the SEC or criminal prosecution." *Id*Section 20(b), enacted in 1934, provides:

> It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation there under through or by means of any other person.

Id.

The Sixth Circuit concluded:

> Under section 20(b), there must be shown to have been knowing use of a controlled person by a controlling person

[3] There is no statutory requirement that penalties imposed in an administrative proceeding pursuant to Section 21B be paid to the U.S. Treasury, and the SEC Rules of Practice specify that penalties imposed in administrative proceedings be paid to the SEC. *See* SEC Rule of Practice 601(c), available at http://www.sec.gov/about/rulesprac2006.pdf. It is difficult to understand why Congress would have intended that Section 20(a) apply to control persons of persons who were subject to penalties pursuant to Section 21B, but not control persons of persons who were subject to penalties pursuant to Section 21(d). Moreover, it is difficult to fathom what Congress would have intended with respect to control persons of those controlled persons as to whom the SEC could have pursued penalties against either pursuant to Section 21(d) or pursuant to Section 21B. The logical conclusion is that in providing for penalties in Section 21(d) and Section 21B, Congress did not intend that control persons be derivatively liable for those potential penalties pursuant to Section 20(a).

> before a controlling person comes within its ambit. Without such a restriction, every link in a chain of command would be personally criminally and civilly liable for the violations of inferior corporate agents. This was not the congressional intent in enacting section 20(b).

Id. at 1318

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It seems likely that if Congress had intended for the redefinition of "person" to overrule *Coffey*, Congress would have referred to *Coffey* in the relevant Committee and Conference Reports. The absence of such a reference indicates that Congress did not have this intention. Moreover, the Sixth Circuit opinion in *Coffey* did not refer to the statutory definition of "person" as the basis of its holding; rather, the opinion appears to rely on the Court's understanding of the Congressional intent behind Section 20(a) and 20(b). Accordingly, if Congress intended to overrule *Coffey*, Congress likely would have done more than simply, and without explanation, amend the definition of "person."

In short, there is no evidence that in redefining "person" Congress intended to authorize the SEC to obtain relief against control persons pursuant to Section 20(a) and there is substantial evidence that this was not the intent of Congress.

II. Extending Section 20(a) to SEC Enforcement Actions Is Not in the Public Interest

Extending Section 20(a) to make a controlled person jointly and severally liable for an injunction and other equitable relief and for penalties that have been or would be imposed is contrary to the public interest. A court should enjoin an individual from future violations of the federal securities laws only if the evidence establishes a reasonable likelihood of future transgressions. It would not be appropriate to enjoin an individual who reasonably and in good faith induced a controlled person to commit a violation merely because there was a reasonable likelihood that the controlled person would commit future violations.

Similarly, the civil penalty that a court might impose on a controlled person might not be appropriate for the controlling person. While it might be appropriate to impose a multi-million dollar penalty on a company that engaged in egregious misconduct and profited greatly from that misconduct, it would not necessarily be appropriate to impose that same penalty on the person who controlled the company. Accordingly, if Section 20(a) did apply to SEC enforcement actions, a court might be forced to reduce the amount of penalty to be imposed on the controlled person because that penalty would be excessive if collected from the control person.

In addition, the application of Section 20(a) to SEC enforcement actions can lead to anomalous results. For example, circumstances might warrant the imposition of a receivership on a company that violated the federal securities laws, *see, e.g.*, *In re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1406 (9th Cir. 1992), but that would hardly warrant placing in receivership an individual who controlled that company. It is unlikely that Congress intended Section 20(a) to be interpreted in a manner that would support the imposition of a receivership on a control person merely because such imposition on the controlled person is appropriate.

III. The Appellate Courts That Have Applied Section 20(a) to SEC Enforcement Actions Typically Have Given the Issue Limited Consideration

As set forth above, the first Court of Appeals to address whether Section 20(a) applied to SEC enforcement actions was the Sixth Circuit in *SEC v. Coffey*, 493 F.2d 1304 (6th Cir. 1974). After finding that the alleged control persons had not committed—nor aided and abetted—primary violations of the federal securities laws, the Sixth Circuit held that the Commission did not have authority to obtain penalties pursuant to the control person liability provision:

> [W]e hold that section 20(a) of the 1934 Act may not be relied upon by the SEC in an injunctive enforcement action. Section 20(b) of the 1934 Act provides for the unlawful actions of controlling persons, and the SEC may only seek injunctions against unlawful actions. *See* section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b); section 21(e) of the 1934 Act, 15 U.S.C. § 78u(e). Section 20(a) of the 1934 Act makes a controlling person liable "to any person to whom such controlled person is liable." As a matter of legislative interpretation, we hold that the SEC is not a person under section 20(a), since section 20(a) was meant to specify the liability of controlling persons to private persons suing to vindicate their interests. Section 20(b) sets forth the standard of lawfulness to which a controlling person must conform, on penalty of liability in injunction to the SEC or criminal prosecution.

493 F.2d at 1318.

Twenty years passed before another appellate court addressed the issue. In 1996, the Second Circuit held that the SEC could maintain an enforcement action under Section 20(a). *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450 (2d Cir. 1996).[4] After finding that First Jersey owner, chairman and CEO Robert Brennan had committed primary violations of the federal securities laws, the Second Circuit held that Brennan had control person liability for First Jersey's violations. Perhaps because the focus of the briefing and the Court's analysis was on Brennan's primary violations, the Second Circuit addressed the control person liability claim in a cursory manner. The Second Circuit held that because the definition of "person" had been amended to include government entities, Section 20(a) applied to SEC enforcement actions. The Second Circuit did not address the other reasons to question whether Section 20(a) applied to SEC enforcement actions.

The Second Circuit assessed whether the district court had abused its discretion in making Robert Brennan jointly and severally liable for First Jersey's unjust enrichment. Although the Second Circuit held earlier in its opinion that Brennan was liable for First Jersey's

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[4] In *First Jersey*, the Second Circuit stated that it had upheld in *SEC v. Management Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975) "the SEC's authority to pursue an enforcement action under § 20(a)." 101 F.3d at 1472. In *Management Dynamics*, the Second Circuit had rejected the argument by the defendant corporation that the doctrine of respondeat superior did not apply to claims under the Exchange Act and a corporation could only be liable for the conduct of an employee pursuant to Section 20(a). 515 F.2d at 812-13. The Second Circuit did not address in *Management Dynamics* whether a corporation could be liable to the SEC pursuant to Section 20(a) for the conduct of its employee.

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violations as a control person, the Second Circuit did not reason that therefore Brennan was automatically jointly and severally liable for First Jersey's unjust enrichment. Rather, the Court of Appeals applied a public policy analysis before holding that joint and several liability was appropriate:

> As discussed in the previous sections, Brennan is primarily liable for the frauds at issue here, having been ''intimately involved'' in their perpetration, and is also liable as a controlling person of First Jersey. Under the express terms of § 20(a), a controlling person who has failed to establish his good-faith defense is to be held ''liable jointly and severally with and to the same extent as'' the controlled person. 15 U.S.C. § 78(t). Accordingly, where a firm has received gains through its unlawful conduct, where its owner and chief executive officer has collaborated in that conduct and has profited from the violations, and where the trial court has, within the proper bounds of discretion, determined that an order of disgorgement of those gains is appropriate, it is within the discretion of the court to determine that the owner-officer too should be subject, on a joint and several basis, to the disgorgement order.
>
> Brennan's contention that he should be required to disgorge only amounts that he withdrew from the Firm might be more persuasive if he had owned less than all of First Jersey's stock. But he was the Firm's sole owner; not surprisingly, he testified at trial that he could request a check in any amount at any time and the Firm would issue one to him. As he owned 100% of the Firm, to the extent that the Firm's net worth was increased by its unlawful activities, so was Brennan's personal wealth.

101 F.3d at 1475-76.

In 2006, the Sixth Circuit arguably revisited the question of whether the SEC could maintain an enforcement action pursuant to Section 20(a). *United States v. Smith*, 208 Fed Appx. 402, 2006 WL 3690414 (6th Cir. Dec. 14, 2006). After finding Smith and two companies Smith controlled had committed primary violations of the federal securities laws, the district court held that the SEC may pursue an enforcement action against Smith pursuant to Section 20(a):

> Initially, the Court must determine whether the SEC may assert that Smith violated Section 20(a) while also seeking injunctive relief in light of the Sixth Circuit's holding in *SEC v. Coffey*, 493 F.2d 1304 (6th Cir. 1974). In that case, the Sixth Circuit held that 'Section 20(a) of the 1934 Act may not be relied upon by the SEC in an injunctive enforcement action' because that section 'makes a controlling person liable to any person to whom such controlled person is liable' and the SEC is not a person. *Id.* at 1318 (citing 15 USCS § 78t(a)). After that decision, however, Congress amended the definition of ''person'' in the Exchange Act to specifically include governmental entities. 15 U.S.C. § 78c(a)(9). As a result, the Second Circuit held in *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450 (2d Cir. 1996), that ''since § 20(a) is available as an enforcement mechanism to 'any person to whom such controlled person is liable,' and the 1934 Act includes government agencies in the definition of 'person,' *see* 15 U.S.C. § 78c(a)(9), we have upheld the SEC's authority to pursue an enforcement action under § 20(a).'' *Id.* at 1472. The current weight of authority from courts around the country is that the Second Circuit's position on this issue is the correct one. *See, e.g., SEC v. Buntrock*, 2004 U.S. Dist. LEXIS 9495, at *27-28 (D. Ill. 2004); *SEC v. Enterprises Solutions, Inc.*, 142 F. Supp. 2d 561, 575 (S.D.N.Y. 2001); *SEC v. Fitzgerald*, 135 F. Supp. 2d 992, 1029 (N.D. Cal. 2001). In light of the congressional amendment to the definition of ''person'' and the Second Circuit's holding in *First Jersey*, the Court agrees with those courts and holds that the SEC may pursue an enforcement action pursuant to Section 20(a) against Smith.

U.S. v. Smith, 2005 U.S. Dist. LEXIS 21427 at *28 (S.D.N.Y. Sept. 27, 2005). The District Court did not rule on what remedies, if any, were appropriate. *Id*. at 33-34. The Sixth Circuit affirmed, stating only that the district court had accurately set out the law governing these issues and had clearly set forth its conclusions. *Smith*, 2006 WL 3690414 *1.

In affirming the district court opinion, the Sixth Circuit did not note that, contrary to the district court opinion, *Coffey* had not cited to the statutory definition of person. Section 3(a)(9), codified at 15 U.S.C. § 78c(a)(9). As set forth above, *Coffey* had relied on the Sixth Circuit's reading of legislative intent, not on a technical reading of the statutory definition of person. Thus, a key premise of the *Smith* district court was incorrect.

Interestingly, it is not clear whether *Coffey* or *Smith* is the controlling precedent in the Sixth Circuit. The Sixth Circuit did not recommend its opinion in *Smith* for publication. Under the Sixth Circuit Rules, a subsequent panel can overrule an unpublished panel opinion, but not a published panel opinion:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

6th Cir. Rule 206(c). Accordingly, it is possible that *Coffey*, a published opinion, is the controlling precedent in the Sixth Circuit, even though *Smith* is the more recent opinion.

The U.S. Court of Appeals for the Third Circuit was the third circuit court to address whether the SEC can bring an enforcement action under Section 20(a). *See SEC v. J. W. Barclay & Co., Inc.*, 442 F.3d 834 (3rd Cir. 2006). *J. W. Barclay* addressed whether the control person for a defunct broker-dealer was liable under Section 20(a) for a $25,000 penalty that the broker-dealer had failed to pay. After the administrative law judge had ordered payment of the penalty and Barclay's counsel had been served with the order and had notified the broker-dealer of the order, the control person had caused the broker-dealer to disburse its funds (including more than $90,000 to the control person) without paying the penalty. 442 F.3d at 838. The Third Circuit held that the control person was liable for the unpaid penalty pursuant to Section 20(a). The Third Circuit stated, however, that Section 20(a) would not have provided a basis for imposing derivative liability on the control person for the broker-dealer's violative conduct:

> Because of the limited nature of the SEC's claim in this case, we need not reach the issue of whether the SEC could have used § 20(a) to impose joint and several liability on Bruno insofar as he may have induced and been a culpable participant in Barclay's violations of § 17(a) and Rule 17-a-5, rather than insofar as he induced and was a culpable participate in Barclay's failure to pay the penalty. Nonetheless, we note that such a claim would have sought to impose derivative legal liability on Bruno for Barclay's violations of the Exchange Act, and we agree with the Sixth Circuit in *Coffey* that § 20(b), not § 20(a), defines the general ''standard of lawfulness to which a controlling person much conform.'' *See* 493 F.2d at 1318. We also agree with the United States District Court for the District of Oregon, which reasoned that while a control person could be held liable in an SEC enforcement action under § 20(b) for certain violations committed by a controlled person, in such a case the SEC itself would not be an ''injured party,'' and the defendants in such an enforcement action would not be ''liable to the

> SEC the way that [they] would be liable to a private plaintiff.'' *Stringer*, 2003 WL 23538011 at *6. In our case, however, the SEC is not claiming that Barclay is liable to the SEC for its violations of § 17(a) and Rule 17-a-5, but rather that Barclay is liable to the SEC for a debt in the amount of its unpaid penalty. Barclay in that sense is liable to the SEC for this debt just as any debtor would be liable to a private creditor because of the debtor's unpaid financial obligation to the claimant. Similarly, Bruno is individually liable to the SEC for this debt just as any jointly and severally liable party would be individually liable to a private creditor because of the debtor's unpaid financial obligation to that creditor.

442 F.3d at 843, n. 14.

The majority of district court opinions addressing the issue state that Section 20(a) applies to SEC enforcement actions. Most of these opinions contain little or no analysis of the issue. Typically, the district courts do little more than note that the majority of the courts addressing the issue have decided that Section 20(a) does apply and note that the definition of ''person'' includes the SEC. *See, e.g., SEC v. Black*, 2009 WL 1181480 (N.D. Ill. Apr. 30, 2009); *SEC v. Lauer*, 2008 U.S. Dist. LEXIS 73026 (S.D. Fla. Sept. 23, 2008); *SEC v. Hawk*, 2007 U.S. Dist. LEXIS 57414 at *6-7 (D. Nev. Aug. 3, 2007); *SEC v. Blackwell*, 477 F. Supp. 2d 891 (E.D. Ohio 2007); *SEC v. 800America.com*, 2006 U.S. Dist. LEXIS 85571 (S.D.N.Y. Nov. 28, 2006).

The problematic nature of a conclusion that Section 20(a) applies to SEC enforcement action is illustrated by many of the opinions holding that Section 20(a) does apply to such actions. These courts typically do not rely on Section 20(a) in determining the remedy, if any, that is appropriate. For example, in *First Jersey,* the Second Circuit looked at the conduct of Brennan in reviewing the injunction and disgorgement order against him. Similarly, in *SEC v. Save the World Air, Inc.*, 2005 U.S. Dist. LEXIS 28313 (S.D.N.Y. Nov. 15, 2005), as modified by 2006 U.S. Dist. LEXIS 81389 (S.D.N.Y. Nov. 8, 2006), the district court found that the company and its control person had both committed violations of the federal securities laws and held that the former Chairman and CEO of the company was liable for the company's misconduct pursuant to Section 20(a). *Id*. at 43-44. In imposing a civil penalty, however, the court looked at the control person's personal conduct and relied on the statutory maximum for a natural person, $100,000, ignoring its previous holding that Muller was liable both as a primary violator and as a control person. *Id*. at 63-64. Similarly, in *SEC v. Black*, the district court based the entry of an injunction against the control person on the conduct of the control person rather than on the conduct of the controlled person. 2008 U.S. Dist. LEXIS at *69. In *SEC v. Lauer*, the court based the injunction against the control person on the conduct of the control person (not on the conduct of the controlled person) and stated that it would base disgorgement on the ill-gotten gains of the control person. 2008 U.S. Dist. LEXIS 73026 at *94-5.[5] In *800America*, the court based its decision regarding the entry of an injunction, disgorgement and penalty against the control person on the conduct of the control person, not on the conduct of the controlled person. 2006 U.S. Dist. LEXIS 85571 at 33 -9.

IV. Conclusion

The statutory language, and legislative history, of the relevant provisions of the Exchange Act and public policy do not support the application of § 20(a) to SEC enforcement actions. The Courts of Appeals are divided on whether the Section 20(a) applies to SEC enforcement actions. Most courts that hold Section 20(a) applies to such actions largely disregard Section 20(a) when determining the remedies that are appropriate. Interpreting Section 20(a) as applying to such actions is a stretch. The legislative history indicates that Congress intended for Section 20(a) to apply to private actions by injured investors, and not to either enforcement actions by the SEC or criminal prosecutions by the Department of Justice. Public policy does not support the application of Section 20(a) to SEC enforcement actions.

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[5] At the request of the SEC, the court deferred setting the amount of the civil penalties that would be imposed on Lauer.

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