



U.S. Supreme Court Limits Disgorgement Claims to Five Years

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On June 5, 2017, in a unanimous decision, the U.S. Supreme Court imposed a five-year statute of limitations on claims for disgorgement, resolving a split in the U.S. Courts of Appeals. In his petition for certiorari, Mr. Kokesh pointed to the circuit court split as well as the increasing importance of disgorgement in SEC enforcement actions: In 2015, the SEC collected \$3 billion in disgorgement payments, more than twice the

amount of monetary penalties collected. Petition for a Writ of Certiorari, *Kokesh v. SEC*, No. 16-529 (Oct. 18, 2016), 2016 WL 6124409, at *16-17.

The question before the court in *Kokesh v. SEC* was whether the five-year statute of limitations that applies to any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise,” covers claims for disgorgement imposed as a sanction for violating a federal securities law. *Kokesh v. SEC*, No. 16-529, slip op. at 1 (June 5, 2017) (quoting 28 U.S.C. §2462). The government had taken the position that it may seek disgorgement as a mechanism to recover amounts for

any period without limitation. The court held that, like monetary penalties, disgorgement is subject to the five-year limitations period, finding that “[d]isgorgement in the securities-enforcement context is a ‘penalty’ within the meaning of §2462.” *Id.*

The court explained that “a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution.” *Id.* at 7. The “primary purpose” of disgorgement, the court found, is deterrence, and “[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive.” *Id.* at 8. The court observed that courts are not required to disburse disgorged funds

to victims as restitution. *Id.* at 9. Finally, the court rejected the SEC's claim that disgorgement is "remedial" because disgorgement may leave the defendant worse off by including gains of third parties that "can be attributed to the wrongdoer's conduct." *Id.* at 10.

The court's decision relieves Kokesh of disgorgement of nearly \$30 million. A jury had found that Kokesh violated securities laws, and the district court ordered Kokesh to pay a "civil penalty" of nearly \$2.4 million—"the amount of funds that Kokesh himself received during the limitations period," and disgorgement of \$34.9 million, \$29.9 million of which resulted from violations outside the five-year limitations period. *Id.* at 4.

The U.S. Court of Appeals for the Tenth Circuit had affirmed the district court, holding that disgorgement is neither forfeiture nor a penalty. *SEC v. Kokesh*, 834 F.3d 1158, 1164-67 (10th Cir. 2016). In so doing, the Tenth Circuit rejected the

Eleventh Circuit's decision in *SEC v. Graham* and followed the D.C. and First Circuits in holding that disgorgement is not subject to the five-year limitations period in 28 U.S.C. §2462. *Id.* at 1165-66; see also *SEC v. Graham*, 823 F.3d 1357,

Because the Supreme Court concluded that disgorgement is a "penalty," and thus subject to the five-year limitations period applicable to penalties, it did not reach the question of whether disgorgement falls within the definition of "forfeiture."

1363-64 (11th Cir. 2016); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008). The Tenth Circuit had reasoned that disgorgement is not a penalty because it does not inflict punishment; it "just leaves the wrongdoer 'in the position he would have occupied had there been no misconduct.'" *Kokesh*, 834 F.3d at 1164 (quoting Restatement

(Third) of Restitution and Unjust Enrichment §51 cmt. k (Am. Law Inst. 2010)). The Tenth Circuit also held that disgorgement does not fit within the term of "forfeiture" in the "historical sense." *Id.* at 1166. By contrast, in *SEC v. Graham*, the Eleventh Circuit had held that disgorgement is a synonym or subset of the statutory term "forfeiture" and thus falls within the five-year statute of limitations. *SEC v. Graham*, 823 F.3d 1357, 1363-64 (11th Cir. 2016). Because the Supreme Court concluded that disgorgement is a "penalty," and thus subject to the five-year limitations period applicable to penalties, it did not reach the question of whether disgorgement falls within the definition of "forfeiture."