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Supreme Court Rejects Investor-Loss Limit on SEC Disgorgement

In a unanimous decision issued today in [Sripetch v. SEC](#), the Supreme Court held that the SEC need not prove that investors suffered any actual pecuniary loss in order to obtain disgorgement for securities-law violations. The decision resolves a split among the Courts of Appeals and rejects the Second Circuit's contrary approach in *SEC v. Govil*. Under *Govil*, disgorgement was unavailable absent proof that investors suffered pecuniary harm. The practical effect will be most immediate in the Second Circuit, where many enforcement actions are litigated and where *Govil* had imposed a significant constraint on the Commission's ability to seek disgorgement.

As we explained in our June 2020 [memorandum](#) on *Liu v. SEC*, the Supreme Court's 2017 decision in *Kokesh* had raised questions about the SEC's authority to obtain disgorgement by holding that disgorgement is a penalty for statute-of-limitations purposes. The Court answered those questions in *Liu*, preserving the SEC's ability to seek disgorgement but making clear that the remedy is subject to traditional equitable limitations. In keeping with those limitations, *Liu* held that disgorgement must be limited to a wrongdoer's net profits, but left open whether the SEC may obtain disgorgement when the funds cannot feasibly be distributed to injured investors. *Sripetch* addresses another question arising from *Liu*'s equitable limitations, holding that traditional equitable principles do not require the SEC to prove investor pecuniary loss before obtaining disgorgement.

Disgorgement, the Court explained, is measured according to governing equitable principles by the wrongdoer's gain, not the victim's loss. In applying that principle to SEC disgorgement, the Court treated investors whose legally protected interests have been invaded as victims even where the SEC cannot prove that investors suffered pecuniary loss. The Court rejected the argument that its earlier holding in *Liu* that disgorgement be "awarded for victims" effectively imposed a requirement to establish a victim's pecuniary loss, explaining that equitable principles have never required such a showing.

The central import of *Sripetch* is that the SEC has again succeeded in preserving one of its most significant remedial tools. After *Sripetch*, the absence of provable investor losses will no longer be a standalone answer to a claim for disgorgement. That will matter in cases, including insider-trading and accounting matters, where investors' legally protected interests may have been invaded but pecuniary harm is diffused or difficult to quantify. The decision, however, does not disturb the other limitations on disgorgement recognized in *Liu*. Disgorgement must still be limited to net profits and tied to gains causally connected to the violation. It remains to be seen how courts will apply *Liu*'s victim distribution requirement where investors' legally protected interests were invaded but pecuniary losses are difficult to prove. Likewise, courts will also need time to consider whether the SEC may obtain disgorgement when distributions to injured investors are not feasible. Those issues will likely be the subject of future litigation and a point of debate in settlement discussions with the SEC. But

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for now, disgorgement will certainly remain on the table as a viable remedy for the Commission to pursue in appropriate cases.

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