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Supreme Court Applies Five-Year Statute of Limitations to SEC Disgorgement

In a much anticipated decision, the United States Supreme Court today held that 28 U.S.C. § 2462, which establishes a general five-year statute of limitations for government civil penalty proceedings, applies to the imposition of disgorgement in SEC proceedings. See [*Kokesh v. SEC*](#). As a result, the SEC and other government agencies will be unable to seek any kind of monetary remedy for conduct that occurred more than five years before the initiation of enforcement proceedings.

The case arose from an embezzlement scheme lasting between 1995 and 2009. The SEC filed an injunctive action in federal court in 2009. The district court ultimately ordered, among other relief, \$34.9 million in disgorgement, \$29.9 million of which resulted from conduct that occurred more than five years before the SEC filed its enforcement action. Although the Supreme Court had previously held that § 2462 applied to SEC civil money penalties, the Tenth Circuit, like several other courts, held disgorgement was not a “penalty” because it was “remedial.” In a unanimous decision authored by Justice Sotomayor, the Supreme Court reversed, making clear that § 2462 applies to *all* sanctions that serve a partly retributive or deterrent purpose.

The decision leaves open several issues that the Supreme Court may need to address in the future, including how § 2462 may apply to continuing violations that began more than five years before proceedings were initiated but ended within five years of initiation. Also left unaddressed is whether injunctions or other non-monetary remedies could be barred by § 2462, an issue that has also split the circuits.

Kokesh’s larger impact, however, may be to signal to the lower courts and government agencies that § 2462 must be applied rigorously and cannot be evaded through exceptions or loopholes. As a result, the SEC may become more aggressive in pressing parties to enter agreements tolling the running of any applicable limitations period. Companies involved in enforcement inquiries may, in turn, face more complex strategic judgments when responding to such requests by the government.

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