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Jurisdiction and Procedure

High Court Ruling Could Have Big Impact on SEC Remedy, Lawyers Say

Imposing a five-year limit on the SEC's authority to take back ill-gotten gains could have a major impact on the historical civil remedy, securities lawyers said.

"The practical consequences of this question are very significant," Daniel Sullivan of Holwell Shuster & Goldberg LLP, New York told Bloomberg BNA April 18 following a U.S. Supreme Court argument on the limitations question (*Kokesh v. SEC*, No. 16-529, oral argument 4/18/17).

If the SEC isn't subject to the five year limit, it could pursue securities violations "dating as far back in time as the Government has the appetite to litigate," he said. However, several justices seemed skeptical of the government's position that it has the right to seek disgorgement indefinitely, said Sullivan, who focuses on appellate and complex commercial litigation. "The justices didn't seem to take comfort in the SEC's argument that, as a practical matter, it wouldn't always exercise that right in that manner."

A ruling that the five-year limit on penalty and forfeiture actions applies to disgorgement cases would eliminate disgorgement risk in perpetuity, Chicago lawyer Ronald S. Betman of Ulmer & Berne LLP, who defends clients in securities actions, said—an impact that is "huge" going forward.

Predictions Earlier that day, in a dispute between the Securities and Exchange Commission and a former investment advisory official seeking to upset a \$35 million disgorgement order, the justices indicated they may conclude the agency is bound by the five-year bar set out in 28 U.S.C. § 2462 for actions to enforce a penalty or forfeiture.

In his second day on the bench, Justice Neil Gorsuch questioned why disgorgement in the criminal context is considered a "forfeiture," but not in civil cases. He appeared skeptical about whether the government could have broad, unlimited power depending on the type of case in which it seeks the remedy.

Betman predicted that the high court, which now has five conservative justices, is likely to narrow the SEC's

enforcement reach. If so, the ruling "will impact the cases under investigation and being prosecuted by the SEC, as well as the potential resolution of those actions," he said.

Boston lawyer R. Daniel O' Connor of Ropes & Gray LLP told Bloomberg BNA "it seems clear that the court is moving in the right direction to impose reasonable limitations on the SEC's ability to seek disgorgement for old acts." He said that when the commission seeks documents in an investigation, it often "reach[es] well back beyond the statute of limitations." If the high court rules against the agency, those requests will make less sense and the cost of responding to them should come down, said O'Connor, a former SEC enforcement attorney who now represents clients in commercial disputes.

The justices "were troubled by the vagueness of it all," New York attorney Jack Yoskowitz of Seward & Kissel LLP told Bloomberg BNA. "My take is the Court will limit the SEC's authority by applying 2462 either to all disgorgement or at least disgorgement actions that do not seek to send the money back to the alleged victims." Yoskowitz represents clients in securities regulatory matters.

The agency declined to comment.

Circuit Split The federal appeals courts are divided on whether claims for disgorgement of unlawful gains are subject to the five-year bar set out in 28 U.S.C. § 2462. The provision doesn't explicitly mention disgorgement, only saying it applies to "enforcement of any civil fine, penalty or forfeiture."

The U.S. Court of Appeals for the Eleventh Circuit held last year that SEC disgorgement claims must be brought within five years of when the claim accrued. In this case, an enforcement action against former investment advisory principal Charles Kokesh, the Tenth Circuit held otherwise, joining the First and D.C. Circuits.

Other unrelated cases seeking time limitations on disgorgement are currently pending in the Second and Eighth Circuits.

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