

MVP: Jenner & Block's Adam Unikowsky

Law360, New York (December 15, 2017, 4:19 PM EST) -- Jenner & Block LLP's Adam Unikowsky won three unanimous Supreme Court rulings in the past year, including one that could alter how the U.S. Securities and Exchange Commission and other government agencies seek disgorgement in enforcement actions, earning him a spot among Law360's Securities MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Unikowsky successfully argued that disgorgements authorized by the SEC in enforcement actions are penalties rather than equitable remedies and should be subject to the same five-year statute of limitations that applies to other SEC penalties, winning a case for a client who challenged a \$34.9 million disgorgement payment.

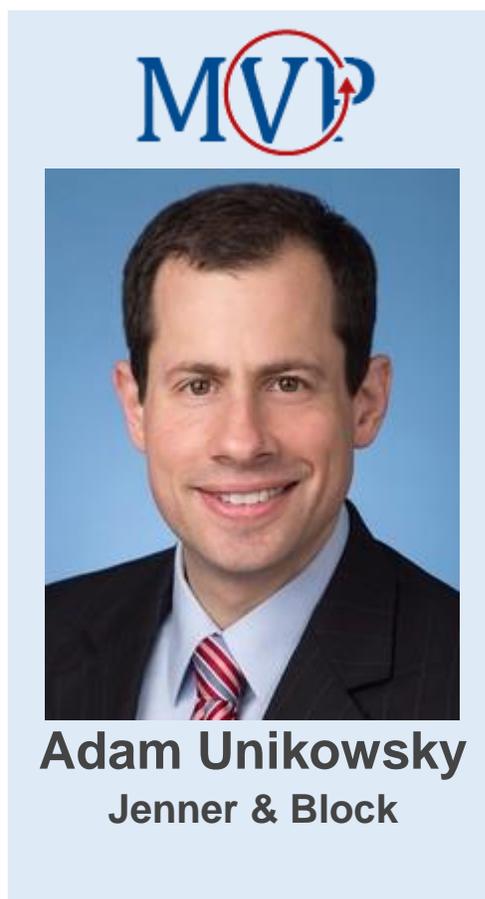
Unikowsky convinced all nine Supreme Court justices that SEC disgorgements are in fact penalties despite no lower court precedents on which to rely.

"The challenge was overcoming this broad consensus," Unikowsky said. "No lower court anywhere had ever concluded that disgorgement was a penalty, which is what the Supreme Court ultimately ruled."

In June, the Supreme Court unanimously reversed a Tenth Circuit ruling upholding a lower court's finding that a five-year statute of limitations didn't apply to an SEC disgorgement action taken against Unikowsky's client, Charles Kokesh, because a disgorgement wasn't a penalty.

Justice Sonia Sotomayor wrote in her reversal opinion that "disgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty."

Consequently, the same five-year statute of limitations that applies to "penalties" also applies to disgorgement, the high court found.



Unikowsky also earned unanimous victories in two other cases argued before the Supreme Court: *Honeycutt v. United States*, which limited the government's ability to collect forfeitures on property acquired directly as a result of a crime, overturning a Sixth Circuit ruling; and *Howell v. Howell*, which held that a federal law related to veterans' benefits took precedence over state law, overturning a ruling by the Supreme Court of Arizona.

HIS PROUDEST MOMENT OF THE YEAR:

Unikowsky cited a footnote in Justice Sotomayor's opinion in *Kokesh*, which states that the ruling should not be interpreted as a finding on whether the courts are authorized to order disgorgements in SEC enforcement proceedings. By adding that footnote, Unikowsky said, the justice left open the question of whether the SEC is, in fact, authorized to order disgorgements.

For decades, the courts have been ordering SEC-authorized disgorgements, Unikowsky explained, but he argued that disgorgement was not a genuinely equitable remedy, which cast doubt on whether the SEC had that authority.

"That was a bit of a risky position because the courts have been doing this for so long," he said. "And most lower courts have viewed that as a settled question."

Justice Sotomayor's footnote, he said, "opens the door to a potential argument that could have a significant impact."

"If the courts don't have the authority to order disgorgement in SEC proceedings, it could remove a very important tool in the SEC's repertoire."

HIS BIGGEST CHALLENGE OF THE YEAR:

Unikowsky's win in *Kokesh v. SEC* came in "a challenging case to litigate," he said.

Unikowsky said the strategy he and his colleagues employed did not focus on the wording in the federal statute related to disgorgement. Instead, they relied on a general statute related to forfeitures and penalties dating from the mid-19th century.

"We had to craft this novel argument which hadn't been accepted by any other court," he said. "It required a multifaceted approach that involved a lot of historical research in order to make the best case we could."

WHAT MOTIVATES HIM:

Arguing cases before the Supreme Court is an honor, Unikowsky said. Winning them only elevates the experience.

"When you win a case, it motivates you to do it again," Unikowsky said. "I get a huge thrill out of being in court and a bigger thrill out of winning. That's what motivates me."

Getting three unanimous wins in 2017 hasn't gone to his head, however.

"If you don't still get butterflies, you shouldn't be doing this anymore," he said.

— *As told to Dunstan Prial.*

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