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Securities Litigation

Kokesh v. SEC

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On June 5, 2017, the US Supreme Court unanimously ruled in favor of Jenner & Block's client, Charles Kokesh, in *Kokesh v. SEC*, No. 16-529, briefed and argued by Adam Unikowsky. The Court held that a claim by the SEC for disgorgement is subject to the five-year statute of limitations under 28 U.S.C. § 2462 that also governs claims for civil penalties in such cases. As a result of the Supreme Court's decision, over $29 million of the disgorgement judgment against Mr. Kokesh has been swept away; and the SEC's ability to extract judgments and settlements in enforcement actions alleging long-running schemes is likely to be substantially constrained.

But this case could have much broader implications beyond the statute of limitations: It leaves the door open for future litigants to argue that the SEC lacks the power to seek disgorgement, or that if the SEC has that power, it is subject to traditional equitable limitations, which would narrow it significantly from its currently expansive scope. That argument would flow from Jenner & Block's argument in this case, which contended that disgorgement did not fall within an exception to statutes of limitations for "equitable" remedies, because disgorgement was not an "equitable" remedy. The SEC declined to offer any meaningful response to this point—even though the entire premise of the disgorgement remedy is that it is an implied remedy lying within courts' equitable powers. As a result, at oral argument, several justices explored the potential implication of this argument—because disgorgement is not an equitable remedy, the SEC lacks power to seek disgorgement in federal district court. The Court did not resolve the issue in its opinion, but was careful to add a footnote virtually inviting future defendants to challenge the SEC's power to seek disgorgement in federal district court in the first place.

Kokesh's reasoning also invites a related challenge to the SEC's power to seek disgorgement. By classifying disgorgement as a "penalty," the Court has invited defendants in SEC cases to argue that the securities laws already provide for "civil monetary penalties," and those penalties are calculated as the greater of (1) a fixed amount depending on the defendant's state of mind multiplied by the number of violations or (2) the gross pecuniary gain as a result of the violation; and that any additional disgorgement "penalty" is not authorized by statute in federal district court cases.

Going forward, defendants in SEC cases will argue that the SEC lacks the authority to obtain disgorgement. The SEC, by contrast, may try to use its power to seek civil monetary penalties more aggressively as an alternative to disgorgement, or bring enforcement cases as administrative proceedings where, unlike in court, it has express statutory authority to seek disgorgement.

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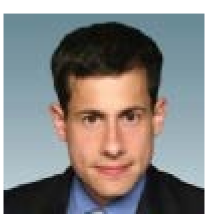

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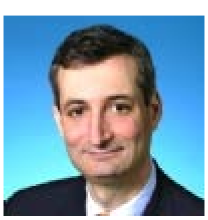

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