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Kokesh v. SEC: The U.S. Supreme Court Limits SEC Disgorgement Powers

By John I. Sanders

Since the 1970s, courts have regularly ordered disgorgement of ill-gotten gains in SEC enforcement proceedings.^[1] According to the SEC, this was done as a means to both “deprive . . . defendants of their profits in order to remove any monetary reward for violating” securities laws and “protect the investing public by providing an effective deterrent to future violations.”^[2] Disgorgement has been one of the SEC’s most powerful tools in recent years.^[3] Yesterday, the Supreme Court issued an opinion that significantly limits the SEC’s ability to disgorge ill-gotten gains.^[4] The question before the Supreme Court in *Kokesh v. SEC* was whether disgorgement, as it has been used by the SEC, constitutes a “penalty.”^[5] Under federal law, a 5-year statute of limitations applies to any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.”^[6] The SEC has long argued that disgorgement does not constitute a “penalty” and, therefore, is not subject to a 5-year statute of limitations. The Supreme Court unanimously rejected the SEC’s position by holding that disgorgement constitutes a “penalty.”^[7] As a result, the SEC will be precluded from collecting ill-gotten gains obtained by the defendant more than five years before the date on which the SEC files its complaint.^[8] In the *Kokesh* case, the Supreme Court’s decision means that the defendant may retain \$29.9 million of the \$34.9 million of allegedly ill-gotten gains because that amount was received outside of the 5-year state of limitations.^[9] The *Kokesh* decision is also likely to have a significant long-term impact on SEC enforcement proceedings by reducing the leverage the SEC can apply while negotiating settlements. **John I. Sanders** is an associate based in the firm’s Winston-Salem office. ^[1] *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (SDNY 1970), aff’d in part and rev’d in part, 446 F. 2d 1301 (CA2 1971). ^[2] *Id.* at 92. ^[3] SEC, *SEC Announces Enforcement Results for FY 2016* (Oct. 11, 2016), available at <https://www.sec.gov/news/pressrelease/2016-212.html> (illustrating that the SEC has obtained more than \$4 billion in disgorgements and penalties in each of the three most recent fiscal years). ^[4] *Kokesh v. SEC*, available at www.supremecourt.gov. ^[5] *Id.* (“This case presents the question whether [28 U.S.C.] §2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law.”). ^[6] 28 U.S.C. §2462 (2017). ^[7] *Kokesh v. SEC*, *supra* note 4, available at www.supremecourt.gov. (“SEC disgorgement thus bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate.”). ^[8] *Id.* ^[9] *Id.*