SEC Disgorgement Actions: Equitable Remedy or Penalty?

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SEC Disgorgement Actions: Equitable Remedy or Penalty?

By Armando Lopez

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I. INTRODUCTION

In October of 1929, the stock market’s cataclysmic crash began what has been regarded as the deepest, longest-lasting economic downturn in the Western industrialized world.\(^1\) In contrast, however, the time period leading up what has now been coined the Great Depression marked one of the greatest periods of economic growth in American history.\(^2\) In 1925, the total value of the New York Stock Exchange was $27 billion.\(^3\) By 1929, this figure had skyrocketed to $87 billion dollars.\(^4\) During this time, “the richest one percent of Americans owned over a third of all American assets[,]” which led to a highly concentrated growth that left out the middle class.\(^5\) Many middle class members, wanting a piece of this large growth, invested any extra earnings they had in the stock market.\(^6\) Due in part to banks’ practices of recklessly lending money to would-be investors, many Americans enjoyed the fruits of the economy’s success.\(^7\) Americans took out loans with high interest rates to invest into the stock markets based on a belief that the economy and stock markets would continue to grow.\(^8\) However, as history has taught us many times, this growth was not infinite.\(^9\) Eventually, the bubble burst and

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\(^{2}\) Id.
\(^{3}\) Id.
\(^{4}\) Id.
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id.
\(^{9}\) Id.
the stock market crashed.\textsuperscript{10} As a result, many Americans lost everything they had.\textsuperscript{11} Over 9,000 banks went out of business.\textsuperscript{12} Combined with a negative 12.9\% economic growth rate, the overall unemployment rate jumped to about 25\%.\textsuperscript{13}

Following the Great Depression, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934 based on a general consensus that for the economy to recover, the public’s faith in the financial markets needed to be restored.\textsuperscript{14} The purpose of these securities laws was to set rules for the financial markets so that there could be stability in the markets and protection for investors.\textsuperscript{15} To advance this purpose and to enforce the newly created securities laws, Congress created the Securities and Exchange Commission (SEC).\textsuperscript{16}

Under the securities laws, Congress initially granted the SEC with statutory authority to seek an injunction barring future violations of securities laws.\textsuperscript{17} In 1970, without statutory authority to seek monetary remedies, the SEC convinced a district court for the first time to order disgorgement of a defendant’s ill-gotten profits as an exercise of the court’s “inherent equity power to grant relief ancillary to an injunction.”\textsuperscript{18} For the last several decades, the SEC has taken the ill-gotten profits concept and sought disgorgement as a standard remedy.\textsuperscript{19} Disgorgement actions “consist of factfinding by a district

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} \textit{Kokesh v. S.E.C.}, 137 S. Ct. 1635, 1640 (2017).
\textsuperscript{18} Id. (citing SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 91 (S.D.N.Y. 1970)).
court to determine the amount of money acquired through wrongdoing—a process sometimes called ‘accounting’—and an order compelling the wrongdoer to pay that amount plus interest to the court.”

One of the recent main issues arising out of disgorgement actions lies within the catch-all statute that restricts government agencies seeking to impose a civil fine, penalty, or forfeiture, to a five-year limitations period, whenever Congress has not specifically provided otherwise. Specifically, § 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Therefore, SEC civil enforcement actions seeking penalties or forfeiture are subject to a five-year statute of limitations.

In Gabelli v. Securities and Exchange Commission, the Supreme Court held that the statute of limitations period under 28 U.S.C § 2462 begins to run when the alleged violation occurs, not when the SEC discovers the violation. However, the Supreme Court did not address what types of remedies constitute a “civil fine, penalty or forfeiture, pecuniary or otherwise” within the meaning of the statute. Whether a disgorgement action falls under § 2462 is particularly important because the SEC has recently relied on these types of actions as its primary method of seeking remedies. In 2017, the SEC recovered “$2.9 billion in disgorgement of ill-gotten gains.”

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22 Id.
23 133 S. Ct. 1216 (2013).
24 Id. at 1224.
25 See id.
an increase from $2.8 billion in 2016. In comparison, the SEC only sought $832 million in penalties, which was actually a decrease from $1.2 billion the previous year.

Before the Supreme Court’s holding in Koke\,\v{c}h, it was the SEC’s view that actions for the disgorgement of ill-gotten gains are not subject to the statute of limitations imposed by 28 U.S.C. § 2462 because these remedies are equitable in nature, and are not a penalty or forfeiture.

Prior to the Eleventh Circuit’s holding in Graham, all circuit courts that had previously taken on this issue had held that the limitations period of § 2462 does not apply to SEC disgorgement actions. However, the Eleventh Circuit’s decision in Graham created a circuit split with the D.C., Ninth, and Tenth Circuits on whether SEC disgorgement actions are subject to a statute of limitations. The D.C. Circuit has specifically held that the limitations period in § 2462 does not apply disgorgement actions. However, the court in Riordan left open the possibility that disgorgement could be “a kind of forfeiture covered by § 2462, at least where the sanctioned party is disgorge profits not to make the wronged party whole, but to fill the Federal Government's coffers.” Similarly, the Ninth Circuit has refused to extend the statute of limitations to any enforcement action brought by the SEC. To add to the split, the Internal Revenue Service (IRS) has stated that a disgorgement payment made to the


\footnote{See id.}

\footnote{Koke\,\v{c}h, 137 S. Ct. 1635 (2017).}

\footnote{SEC v. Graham, 823 F.3d 1357, 1363 (11th Cir. 2016).}

\footnote{Bohn et al., supra note 26.}

\footnote{Id.}

\footnote{Id.}

\footnote{Id. See SEC v. Rind, 991 F.2d 1486, 1492 (9th Cir. 1993) (prior precedent supports “the conclusion that no statute of limitations should apply to Commission civil enforcement actions”); SEC v. Funinaga, No. 213-CV-1658 JCM CWH, 2014 WL 4977334, at *6 (D. Nev. Oct. 3, 2014), aff’d sub nom. SEC v. Fujinaga, 696 F. App’x 203 (9th Cir. 2017) (“The court agrees with plaintiff that the 5-year statute of limitations in § 2462 is inapplicable. Actions for disgorgement of profits are equitable in nature.”).}
SEC is a penalty and therefore not deductible.\textsuperscript{34} This circuit split meant that it was finally time for the Supreme Court to weigh in. In \textit{Kokesh}, the Supreme Court resolved the split and held that SEC disgorgement actions are penalties and therefore, are subject to the five-year statute of limitations of § 2462.\textsuperscript{35}

The first part of this article examines the circuit split on the issue beginning with the line of cases holding that disgorgement does not fall under 28 U.S.C. § 2462 and followed by those cases holding that it does. Second, it looks at the disagreement between the IRS and the SEC on the issue. Third, it analyzes the Supreme Court’s decision in \textit{Kokesh}. Last, it focuses on the implications of \textit{Kokesh}.

\section{The Beginning: \textit{Gabelli v. SEC}}

The discussion on the issue of whether disgorgement falls under 28 U.S.C. § 2462 is best started with the Supreme Court’s analysis in \textit{Gabelli v. Securities and Exchange Commission}.\textsuperscript{36} There, the Supreme Court held that SEC civil actions for fraud under § 2462 are not tolled by the “discovery rule” and that the statute of limitations begins to run at the time of the alleged wrongdoing.\textsuperscript{37} The Supreme Court reasoned that “[g]iven the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of § 2462 . . . [,]” it would decline to do so.\textsuperscript{38} Of importance, the Supreme Court noted that “this case involves penalties, which \textit{go beyond compensation, are intended to punish, and label defendants wrongdoers}.”\textsuperscript{39} In quoting \textit{Meeker v. Lehigh Valley R. Co.},\textsuperscript{40} the Court pointed out that the predecessor statute to § 2462 defined a penalty as “something imposed in a punitive way for an infraction of a public law.”\textsuperscript{41} Additionally, the court noted that

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{35}] \textit{Kokesh}, 137 S. Ct. 1635, 1645 (2017).
\item[\textsuperscript{36}] 568 U.S. 442 (2013).
\item[\textsuperscript{37}] \textit{Id.} at 453.
\item[\textsuperscript{38}] \textit{Id.}
\item[\textsuperscript{39}] \textit{Id.} at 452 (emphasis added).
\item[\textsuperscript{40}] 236 U.S. 412, 423 (1915).
\item[\textsuperscript{41}] \textit{Gabelli}, 568 U.S. at 452 (citing \textit{Meeker}, 236 U.S. at 423).
\end{enumerate}
\end{footnotesize}
penalties are “intended to punish culpable individuals,” not “to extract compensation or restore the status quo.”\textsuperscript{42} The Court, however, did not elaborate what types of remedies fall under the statute. Specifically, the Court left open the question of whether disgorgement falls under § 2462.\textsuperscript{43}

This decision has wide-spread implications. One of which is that because 28 U.S.C. § 2462 governs many civil penalty provisions throughout the United States Code, the Gabelli decision will influence enforcement decisions and actions by many different federal agencies, including the SEC.\textsuperscript{44} Additionally, the SEC typically seeks tolling agreements from parties that are under investigation.\textsuperscript{45} As a result, the SEC will likely seek tolling agreements from parties under investigation much earlier leaving parties to face difficult decisions about “whether to force the government's hand earlier in investigations.”\textsuperscript{46}

III. CASES HOLDING THAT DISGORGEMENT DOES NOT FALL UNDER 28 U.S.C. § 2462

A. SEC v. Kokesh

In \textit{Securities and Exchange Commission v. Kokesh},\textsuperscript{47} the Tenth Circuit held that disgorgement actions brought by the SEC are remedial in nature and, therefore, are not subject to 28 U.S.C. § 2462.\textsuperscript{48} There, the SEC brought an enforcement action against Kokesh for misappropriating investors’ funds in violation of federal

\textsuperscript{42} Id. at 451 (citing Meeker, 236 U.S. at 423).
\textsuperscript{43} See id. at 453 n.1.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{48} SEC v. Kokesh, 834 F.3d at 1160.
securities law where it sought civil penalties, an injunction from violating certain provisions of federal securities law, and disgorgement of profits.49 Kokesh argued that the disgorgement action was time-barred by § 2462 because the SEC failed to bring the action within the five-year statute of limitations period.50 The district court disagreed and ordered Kokesh to disgorge the misappropriated money reasoning that the sum “‘reasonably approximates the ill-gotten gains casually connected to [his] violations.’”51 On de novo review, the court of appeals determined that disgorgement actions are not penalties because it has previously held that disgorgement actions are remedial rather than punitive, and are not forfeitures because, based on its interpretation of the word forfeiture, forfeitures referred to something that was imposed in a punitive manner.52 Therefore, the court concluded that the disgorgement actions are not subject to the five-year statute of limitations period imposed by § 2462.53

In reaching its conclusion, the court of appeals first began by discussing the general statute of limitations principles that are imposed on government actions.54 The court stated that “[s]tatutes of limitations are interpreted narrowly in the government’s favor ‘to protect the public from negligence of public officers in failing to timely file claims in favor of the public’s interests.’”55 Additionally, the court noted that it had previously held that equitable claims are usually not subject to statutes of limitations.56 When specifically discussing the issue of whether disgorgement is a penalty, the court first detailed disgorgement actions as “consist[ing] of factfinding by a district court to determine the amount of money acquired through wrongdoing—a process sometimes called ‘accounting’—and an order compelling the wrongdoer to pay that amount plus interest to the court.”57 The court noted that in past cases it has stated that

49 Id. at 1161.
50 Id.
51 Id. at 1161–62 (quoting Aplt. App., Vol 2 at 1880).
52 Id. at 1166–67.
53 Id.
54 Id. at 1162.
55 Id.
56 Id.
57 Id. at 1164.
disgorgement are not penalties under § 2462 because they are remedial.\textsuperscript{58} Additionally, the court noted that other circuits are in agreement that disgorgement actions are not penalties, as long as the disgorged amount is causally related to the wrongdoing.\textsuperscript{59} The court reasoned that “properly applied, the disgorgement remedy does not inflict punishment.”\textsuperscript{60} Instead, the objectives are to eliminate profits acquired from wrongdoing, while avoiding the imposition of a penalty, and to merely leave the wrongdoer in the position he would have been had he not done the wrongful act.\textsuperscript{61} Through the use of disgorgement, the court reasoned, lawbreaking can be made unprofitable.\textsuperscript{62} Thus, while disgorgement serves as a deterrent purpose similar to penalties, it only does so through the deprivation of the benefits acquired through wrongdoing.\textsuperscript{63} The court added that “if punishment is required, disgorgement can be supplemented with exemplary damages.”\textsuperscript{64}

The court then looked at Defendant’s arguments that the disgorgement order is punitive.\textsuperscript{65} The Defendant argued “that the disgorgement order is punitive because he is being required to disgorge more than he actually gained himself”—since some of the money went to others. The court reasoned that disgorgement of funds from one individual has been allowed even when only third parties have benefitted from the illegal activity if the individual caused the funds to be improperly diverted to others.\textsuperscript{66} The logic was that a failure to impose a disgorgement action against such individuals

\textsuperscript{58} Id.
\textsuperscript{59} Id. See also Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("[D]isgorgement orders are not penalties, at least so long as the disgorged amount is causally related to the wrongdoing."); SEC v. Tambone, 550 F.3d 106, 148 (1st Cir. 2008) ("[T]he applicable five-year statute of limitations period [the defendant] invokes applies only to penalties sought by the SEC, not its request for injunctive relief or the disgorgement of ill-gotten gains."); withdrawn, 573 F.3d 54 (1st Cir. 2009), reinstated in relevant part, 597 F.3d 436, 450 (1st Cir. 2010).
\textsuperscript{60} Kokesh, 834 F.3d at 1164.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. (citing Restatement Third Section 51 cmt. K).
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 1165.
would allow them unjustly enrich others.\textsuperscript{67} Kokesh’s second argument, that the disgorgement action is punitive because he is unlikely to be able to restore the gains he received due to his age and insolvency, was also unpersuasive to the court.\textsuperscript{68} The court reasoned that the likelihood of the SEC’s recovery is irrelevant to the issue of whether disgorgement is punitive or remedial.\textsuperscript{69}

The court next looked at whether disgorgement is a forfeiture.\textsuperscript{70} The court first noted how \textit{disgorge} and \textit{forfeit} in both the common English definition and the definitions in the leading legal dictionary share similarities.\textsuperscript{71} Specifically, it pointed out how Black’s Law Dictionary defines disgorgement as “[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion,” and forfeiture as “[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.”\textsuperscript{72} The court pointed out how, “[b]ecause of these similarities[,] the Eleventh Circuit [has] recently held that disgorgement is a forfeiture under §2462.”\textsuperscript{73} However, the court disagreed with the Eleventh Circuit’s view and pointed to other courts that have also disagreed.\textsuperscript{74} Instead, the court reasoned that the word forfeiture under §2462 needs to be read in the context of government actions.\textsuperscript{75} In the past, “[f]orfeiture was an in rem procedure to take ‘tangible property used in criminal activity.’”\textsuperscript{76} “The owner of the seized property could be completely innocent of any wrongdoing, and the value of the property taken have no necessary relation to any lost to others or gain to the owner.”\textsuperscript{77} The court pointed to \textit{Calero-Toledo v. Pearson Yacht Club}.\

\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. See \textit{Riordan}, 627 F.3d at 1234; \textit{Tambone}, 550 F.3d at 148 (noting that § 2462 does not apply to disgorgement); see also SEC v. Saltsman, No. 07–CV–4370 (NGG) (RML), 2016 WL 4136829, at *25–29 (E.D.N.Y. Aug. 2, 2016) (rejecting \textit{Graham} and citing three other district courts sharing that view).
\textsuperscript{75} Kokesh, 834 F.3d at 1165.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1166.
Leasing Co. to illustrate its point. In Calero-Toledo, the Supreme Court affirmed a forfeiture proceeding where government officers had seized a yacht from an innocent owner because the officials had found a marijuana cigarette while it was in the control of the lessee. The court reasoned that "[w]hen the term forfeiture is linked in § 2462 to the undoubtedly punitive actions for a civil fine or penalty, it seems apparent that Congress was contemplating the meaning of forfeiture in this historical sense." Because "[a]ssociated words bear on another’s meaning[,]" the non-punitive remedy of disgorgement does not fit. The court further reasoned that in "construing a predecessor to § 2462, which imposed a five-year statute of limitations period for a ‘suit or prosecution for any penalty or forfeiture,’ the Supreme Court said that ‘[t]he words ‘penalty or forfeiture’ in this section refer to something imposed in a punitive way for an infraction of a public law.’"

The court later acknowledges the fact that more recently some federal forfeiture statutes have been expanded to include disgorgement type remedies. The court however gives great importance to the fact that § 2462 was enacted decades prior to these modern expansion. Instead, the court reasoned that "when interpreting statutory language, ‘words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute.’" Therefore, the meaning of forfeiture should be as discussed previously, which is an "in rem procedure to take ‘tangible property used in criminal activity.’" Lastly, the court states that, because § 2462 needs to be construed in the government’s favor—since statute of limitations should be “interpreted narrowly in

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79 Kokesh, 834 F.3d at 1166.
80 Id.
81 Id.
82 Id.
83 Id. (quoting Meeker v. Lehigh Valley R.R. Co., 236 U.S. 412, 423 (1915)).
84 Id.
85 Id. (citing Hackwell v. United States, 491 F.3d 1229, 1236 (10th Cir. 2007)).
86 Id. (quoting Hackwell v. United States, 491 F.3d 1229, 1236 (10th Cir. 2007)).
87 Id. (quoting United States v. 92 Buena Vista Ave., 507 U.S. 111, 118 (1993)).
the government's favor 'to protect the public from negligence of public officers'"—it "should not strain to expand the meaning of the statute's language to restrict the government."89

B. Zacharias v. SEC

Similarly, in Zacharias v. Securities and Exchange Commission,90 the District of Columbia Circuit Court of Appeals held that disgorgement is not a punitive measure and therefore, § 2462 does not apply.91 There, defendants argued that a disgorgement action is punitive because it did not remedy the injured party.92 However, the court reasoned that "[t]he primary purpose of disgorgement is not to refund others for losses suffered but rather to 'deprive the wrongdoer of his ill-gotten gain.'"93 The mere "fact that the defendants might suffer some loss is not sufficient to render a sanction punitive."94 Additionally, the court notes how "[i]n theory, a disgorgement order might amount to a penalty if it was not 'causally related to the wrongdoing' at issue."95 However, as will be discussed below, disgorgement can only be applied to illegal profits that are causally related to the wrongdoing. Anything that is not causally related or a reasonable approximation of the profits is not subject to disgorgement.

C. Johnson v. SEC

In Johnson v. Securities and Exchange Commission,96 the District Court of Columbia Circuit Court of Appeals, undertook an analysis of the meaning of the word "penalty" under § 2462.97 The court first

88 Id. at 1162 (quoting United States v. Telluride Co., 146 F.3d 1241, 1246, n.7 (10th Cir. 1998)).
89 Id. at 1166–67.
90 569 F.3d 458 (D.C. Cir. 2009).
91 Id. at 471.
92 Id.
93 Id. (citing SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994)).
94 Id.
95 Id. at 472.
96 87 F.3d 484, 486 (D.C. Cir. 1996).
97 Id. at 487.
noted how the word penalty is not defined anywhere in § 2462. Therefore, the court reasoned that it should be guided by the “Supreme Court's common-sense rule that ‘[c]ourts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry ‘their ordinary, contemporary, common meaning.’” In doing so, the court looked at the definition of the word “penalty” in various dictionaries. First it looked at the word penalty as it is defined by the Webster’s Third New International Dictionary, which states that a penalty is “the suffering in person, rights or property which is annexed by law or judicial decision to the commission of a crime or public offense.” The court found similar definitions in legal dictionaries. Specifically, Black’s Law Dictionary defines a penalty as “[a] punishment imposed by statute as a consequence of the commission of an offense.” The court noted that determining whether a law is a penalty depends on whether its purpose is to punish against an offense to the public justice or merely to afford a private remedy to an injured person. The court noted that:

In many other situations the courts have reaffirmed that a sanction which only remedies the damage caused by the defendant does not trigger the protections of § 2462. See, e.g., Peerless Casualty Co. v. United States, 344 F.2d 495, 496 (D.C.Cir.1964) (government could maintain action for forfeiture of bail bond even after five years, because such action was essentially just “a proceeding upon the breach of a condition of a contract”); United States v. Perry, 431 F.2d 1020, 1025 (9th Cir.1970) (government's action to recover sums allegedly paid in violation of Anti-Kickback Act was not an action for enforcement of a civil penalty within § 2462 because those sanctions “were designed to make the United States whole by

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98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
recovering the extra costs that occurred when kickbacks were paid”); United States v. Doman, 255 F.2d 865 (3d Cir. 1958) (provision of Surplus Property Act requiring payment of $2,000 plus double damages for fraudulent transactions was for “compensatory damages” and thus not covered by § 2462), aff’d sub nom. Koller v. United States, 359 U.S. 309, 79 S.Ct. 755, 3 L.Ed.2d 828 (1959).103

Therefore, any time a law seeks to protect the justice of the public and does not merely provide a private remedy to an injured individual, the law should be considered non-penal in nature.

D. SEC v. Rind

In Securities and Exchange Commission v. Rind,104 the Ninth Circuit Court of Appeals held, while analyzing a different statute, that SEC claims for disgorgement are not subject to any statute of limitations.105 In making that determination, the court first pointed out how, through the Securities Act of 1933 and the Securities and Exchange Act of 1934, Congress developed a plan to regulate the securities market.106 The court explained how Congress granted the SEC with broad powers to enforce the securities laws and did not impose a limitations period.107 The Court noted that because “Congress clearly devoted its time and attention to limitations issues[,] . . . [t]he fact that it did not enact an express statute of limitations for lawsuits instituted by the Commission, therefore, must be interpreted as deliberate.”108 The court further noted that there is a public policy concern the public’s rights should not be forfeited merely based on the negligence of public officials109 The court stated:

103 Id. at 488.
104 991 F.2d 1486 (9th Cir. 1993).
105 Id. at 1491–92.
106 Id. at 1490.
107 Id. at 1491.
108 Id. at 1490.
109 Id.
When the Commission sues to enforce the securities laws, it vindicates public rights and furthers the public interest. The public character of Commission action is reflected in the introduction to the 1934 Act: ‘[T]ransactions in securities . . . are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions.’ 15 U.S.C. § 78b. Congress entrusted the Commission with the vital mission of ensuring the honesty and fairness of the capital markets. “The entire purpose and thrust of a [Commission] enforcement action is to expeditiously safeguard the public interest by enjoining securities violations. The claims asserted in such an action stem from, and are colored by, the intense public interest in [Commission] enforcement of these laws.”

Specifically, court discussed the importance of disgorgement in the enforcement of securities laws. The court noted that to effectively enforce securities laws, the SEC must be able to make violations unprofitable. Furthermore, the court noted how:

By deterring violations of the securities laws, disgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets. Although the Commission at times may use the disgorged proceeds to compensate injured victims, this does not detract from the public nature of Commission enforcement actions: “the touchstone remains the fact that public policies are served and the public interest is advanced by the litigation.”

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11 Id.
12 Id.
13 Id. at 1491–92.
The court reasoned that imposing a statute of limitations on SEC civil enforcement actions would conflict with the underlying policies of the securities laws and this conclusion strongly negates any inference that Congress intended a limitations period to apply.\footnote{114}{Id. at 1492.}

\[T\)he Commission must expend considerable time and energy investigating alleged violations of the securities laws. Unlike the typical case of employment discrimination, securities fraud may involve multiple parties and transactions of mind-boggling complexity. Market manipulation is notoriously hard to detect. Placing strict time limits on Commission enforcement actions therefore would quite plainly "frustrate or interfere with the implementation of national policies."\footnote{115}{Id.}

As a result, the court reasoned that it cannot be inferred that Congress intended to provide a limitations period to the SEC.

\textit{E. SEC v. Jones}

In \textit{SEC v. Jones},\footnote{116}{476 F. Supp. 2d 374 (S.D.N.Y. 2007).} the court provided additional reasoning for the conclusion that the disgorgement claims are not subject to the limitations period of § 2462.\footnote{117}{Id. at 380–81.} The court first noted that because the relevant statute did not contain a limitations period, the “catch all” limitations of § 2462 applied.\footnote{118}{Id. at 380.} Additionally, the court reasoned that “[t]he clear language of the statute is controlling, absent a clearly expressed legislative intention to the contrary.”\footnote{119}{Id. (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980)).}

The court then pointed out the fact that some courts have found that § 2462 is inapplicable to SEC actions that merely seek equitable relief because they are not actions for a penalty within the meaning of...
the statute.\textsuperscript{120} Specifically, the court pointed out how the statute does not apply to equitable relief that seeks to undo prior damage or protect the public from future harm.\textsuperscript{121}

In analyzing \textit{Johnson v. S.E.C.},\textsuperscript{122} the court found that “where equitable relief acts as a penalty—-not a remedial measure--the five-year limitations period in § 2462 applies.”\textsuperscript{123} However, it distinguished between remedial measures and penalties in that “remedial measure restores the wronged party to its \textit{status quo ante}, correcting or undoing the effects of a particular wrong, whereas a penalty” is essentially a punishment imposed by the government for unlawful conduct and goes beyond remediying merely remediying the harmed parties.\textsuperscript{124}

When specifically discussing disgorgement actions, the court held that the primary purpose of disgorgement deprives securities law violators of their ill-gotten gains to deter future fraud.\textsuperscript{125} Specifically, unlike merely imposing damages, disgorgement is a method of forcing a defendant to give up his unjust enrichment.\textsuperscript{126} The court pointed out “that because disgorgement is a remedy aimed at public protection rather than investor compensation, the remedy is decidedly remedial rather than punitive.”\textsuperscript{127}


In contrast, the Eleventh Circuit Court of Appeals held in \textit{SEC v. Graham}\textsuperscript{128} that for purposes of 28 U.S.C. § 2462, forfeiture and disgorgement are synonymous, and, therefore, the statute of

\textsuperscript{120} \textit{Id.} at 381.


\textsuperscript{122} Johnson v. SEC, 87 F.3d 484, 486–92 (D.C. Cir. 1996).


\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.} at 386.

\textsuperscript{126} \textit{Id.} at 385 (quoting SEC v. Commonwealth, 574 F.2d at 102).

\textsuperscript{127} \textit{Id.} (quoting SEC v. Cavanagh, 445 F.3d at 117, n.25).

\textsuperscript{128} SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016).
limitations imposed by § 2462 applies to disgorgement. In this
case, the SEC sought injunctive relief, declaratory relief, and
disgorgement against defendants for violation of federal securities
laws. Similarly, the defendants argued that these claims were time-
barred by § 2462. In concluding that disgorgement is a forfeiture
under § 2462, the court agreed with defendants that disgorgement is
subject to a five-year statute of limitations.

In reaching its conclusion, the court similarly pointed out that
statute of limitations sought against the government should be strictly
construed in the government’s favor. Because the term
disgorgement is not defined in the statute, to determine whether
disgorgement is a forfeiture under § 2462, the court, following
statutory constructions principles, looked to the term’s ordinary
meaning. First, looking at Webster’s Dictionary definition of
forfeiture, the court found forfeiture to mean “the divesting of the
ownership of particular property of a person on account of the breach
of a legal duty and without any compensation to him.” Second,
looking at The Oxford English Dictionary, the court found forfeiture
to mean “[t]he fact of losing or becoming liable to deprivation of (an
estate, goods, life, an office, right, etc.) in consequence of a crime,
offence, or breach of engagement.” From these definitions, the
court reasoned that a forfeiture occurs when a person who commits a
crime or forfeiture is “forced to turn over money or property.” Once
the court had a definition for forfeiture, it looked for a
definition of disgorgement to compare it to. The court referred to
Black’s Law Dictionary, which “defines disgorgement as ‘[t]he act of
giving up something (such as profits illegally obtained) on demand or

129 Id. at 1363.
130 Id. at 1359.
131 Id. at 1363.
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
by legal compulsion.”139 The court compared this definition to the definition of forfeiture: “[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.”140 The court found no meaningful difference between these two definitions.141 Indeed, the court noted how the Supreme Court has also used the two terms interchangeably— “[f]orfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.”142

The court then analyzed the SEC’s arguments, which discussed why disgorgement is not a forfeiture.143 Specifically, the SEC argued that “disgorgement cannot be forfeiture because the two terms refer to fundamentally different things: disgorgement only includes direct proceeds from wrongdoing, whereas forfeiture can include both ill-gotten gains and any additional profit earned on those ill-gotten gains (i.e., secondary profits).”144 The court compared the idea that the court only has power to disgorge ill-gotten profits, as argued by the SEC, with a prior Eleventh Circuit holding that “require[d] defendants to forfeit a building and its subsequent increase in property value between the time the crime began and when the building was sold.”145 The court reasoned that even with the SEC’s argument, disgorgement can be considered a subset of forfeiture and is imposed as redress for wrongdoing.146 Because this would clearly include disgorgement, the court concluded that § 2462 applies to disgorgement and limits the SEC’s disgorgement actions to a five-year period from when the violation occurred.147 The court further determined that taking on the SEC’s interpretation of the statute would “violate the long-settled principle ‘that words in statutes should be given their ordinary, popular meaning unless Congress

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139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 Id. at 1363–64.
145 Id. at 1364.
146 Id.
147 Id.
clearly meant the words in some more technical sense."148 The court stated:

We find no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions of forfeiture and disgorgement the SEC urges over the words' ordinary meanings. "Had Congress wished unique or specialized meanings to attach to any of these terms, it readily could have taken the obvious and usual step either of including a specialized meaning in the definitions section of the statute or by using clear modifying language in the text of the statute."149

As § 2462 applies to multiple government agencies, the court was not persuaded to adopt "the technical definition" that the SEC urged the court to adopt.150

V. THE IRS AND SEC DISAGREEMENT

In 2016, "the IRS released a chief counsel advice (CCA), stating that disgorgement payments to the [SEC] in a corporate Foreign Corrupt Practices Act enforcement action" are not penalties and, thus are not tax-deductible.151 In the CCA,152 the taxpayer had agreed with the SEC to pay disgorgement for the profits that he had gained from violations of the "internal controls and books-and-records provisions of the Foreign Corrupt Practices Act."153 The IRS determined that the disgorgement payment was a nondeductible "fine or penalty" under the Internal Revenue Code § 162(f).154 The taxpayer argued that the payment was deductible namely because it

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148 Id.
149 Id.
150 Id.
151 Ray, supra note 34.
152 "A chief counsel advice is nonprecedential guidance from the IRS Office of Chief Counsel." Id. fn 1.
153 Ray, supra note 34, at 1.
154 Id.
was a remedial measure made to encourage prompt compliance with securities laws.\textsuperscript{155} While the CCA did not state that all disgorgement payments are nondeductible, it concluded that when a disgorgement payment is not intended to compensate the original injured party, the payment is primarily punitive in nature.\textsuperscript{156}

The SEC disagrees with this assessment.\textsuperscript{157} Instead, the SEC maintains that disgorgement is never a penalty that would subject it § 2462.\textsuperscript{158} The SEC Enforcement Manual specifically states that, "certain claims are not subject to the five-year statute of limitations under [28 U.S.C. § 2462], including claims for injunctive relief and disgorgement."\textsuperscript{159} Additionally, in SEC administrative proceedings, administrative law judges have ordered disgorgement of ill-gotten profits.\textsuperscript{160} In the proceeding, \textit{In the Matter of Carley},\textsuperscript{161} an administrative judge recommended an order that defendants disgorge their illegally gotten profits based on defendants' violations of federal securities laws.\textsuperscript{162} Defendants argued that § 2462 barred the proceeding because the SEC sought enforcement after the five-year statute of limitations period.\textsuperscript{163} However, the administrative judge, relying on \textit{SEC v. Johnson}, found that disgorgement "is not a punitive measure; it is intended primarily to prevent unjust enrichment."\textsuperscript{164} Therefore, the judge recommended a disgorgement order.\textsuperscript{165} As seen in all of the cases discussed above, when pursuing disgorgement, the SEC has always argued that § 2462 does not apply.

\textsuperscript{155} Id.
\textsuperscript{156} Id. at 2.
\textsuperscript{157} Id. at 1.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 2.
\textsuperscript{160} Id.
\textsuperscript{161} Release No. 8888 (Jan. 31, 2008)
\textsuperscript{162} Id. at 20.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 25.
VI. THE SUPREME COURT WEIGHS IN: KOKESH v. SEC

The Supreme Court began its decision in Kokesh v. SEC with a discussion on the enactment of the securities laws. The Court recognized that Congress enacted the securities laws to ensure that "the highest ethical standards prevail in every facet of the securities industry." Through the Securities Exchange Act of 1934, congress created the SEC to enforce the securities laws. Congress granted the SEC with the power to prescribe rules and regulations for the protection of investors. Additionally, Congress gave the SEC broad authority to investigate violations of securities laws.

The court explained that, the SEC’s remedies were originally limited to seeking injunction that barred future violations of securities laws. Without a basis for monetary remedies, the SEC "urged courts to order disgorgement as an exercise of their ‘inherent equity power to grant relief ancillary to an injunction.'" As the Court explained, disgorgement is generally a "form of ‘restitution that is measured by the defendant’s wrongful gain’" that requires defendants to give up gains acquired through an interference with a claimant’s legally protected rights. The Court noted that starting in the 1970’s, courts began to order disgorgement in SEC enforcement actions to "‘deprive . . . defendants of their profits in order to remove any monetary reward for violating’ securities laws and to ‘protect the investing public by providing an effective deterrent to future violations.’"

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166 Kokesh v. SEC, 137 S. Ct. 1635 (2017).
167 Id. at 1639–40.
168 Id. at 1640 (citing SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 187 (1963)).
169 Id.
170 Id.
171 Id. (citing SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 741 (1984)).
172 Id.
173 Id. (citing SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 91 (S.D.N.Y. 1970)).
174 Id. (citing Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011)).
175 Id. (citing SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 91 (S.D.N.Y. 1970)).
As the Court explained, in 1990, Congress finally authorized the SEC to seek civil penalties as part of the Securities Enforcement Remedies and Penny Stock Reform Act.\textsuperscript{176} The Act gave the SEC many enforcement tools including the ability to promulgate rules, investigate violations of securities laws, seek monetary penalties, and seek injunctive relief.\textsuperscript{177} However, as the court noted, the SEC has continued to seek disgorgement in enforcement proceedings even with the increase in enforcement tools.\textsuperscript{178}

The Court recognized that it had previous held in \textit{Gabelli} that the five-year statute of limitations under § 2462 applies whenever the SEC seeks monetary penalties.\textsuperscript{179} This left the Court with the present issue of “whether § 2462, which applies to any ‘action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise,’ also applies when the SEC seeks disgorgement.”\textsuperscript{180}

Taking a look at the facts of the case, the Court recounted that Kokesh owned two firms that provided investment advice to business-development companies.\textsuperscript{181} In 2009, the SEC commenced an enforcement action against Kokesh alleging that he misappropriated $34.9 million through his firms.\textsuperscript{182} According to the SEC, Kokesh filed misleading SEC reports and proxy statements to conceal the misappropriation.\textsuperscript{183} As a result, the SEC sought civil penalties, disgorgement, and an injunction, which would bar Kokesh from violating securities laws in the future.\textsuperscript{184}

After a five-day trial, a jury found that Kokesh had violated various securities laws.\textsuperscript{185} The district court ordered Kokesh to pay civil monetary penalties in the amount of $2,354,593, which represented the amount of funds Kokesh received within the

\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 1640–41.
\textsuperscript{180} Id. at 1641.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
limitations period of § 2462.\textsuperscript{186} The SEC also sought disgorgement of $34.9 million, of which, $29.9 million fell outside the limitations period.\textsuperscript{187} The district court, in agreement with the SEC found that disgorgement is not a penalty within the meaning of § 2462.\textsuperscript{188} Because no limitations period applied, the court ordered disgorgement of the full $34.9 million plus $18.1 million in prejudgment interest.\textsuperscript{189} The Court of Appeals for the Tenth Circuit affirmed, finding that disgorgement is not a penalty, and also that it is not a forfeiture within the meaning of § 2462.\textsuperscript{190}

The Court then turned to a discussion on the statute of limitations. As the Court explained, statutes of limitations “se[t] a fixed date when exposure to the specified Government enforcement efforts en[d].”\textsuperscript{191} The Supreme Court further explained that these limits are “vital to the welfare of society and rest on the principle that even wrongdoers are entitled to assume that their sins may be forgotten.”\textsuperscript{192} The Court recognized that § 2462 establishes a five-year limitations period for “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture” and would apply to disgorgement if it constitutes either a fine, penalty, or forfeiture.\textsuperscript{193}

The Supreme Court began its analysis with a discussion of the definition of the word penalty. The Court defined a penalty as a “punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws.”\textsuperscript{194} According to the Court, “[t]his definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on ‘whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.’”\textsuperscript{195} As the Court explained, “[a]lthough statutes creating private causes of action against wrongdoers may appear—or

\textsuperscript{186} Id.

\textsuperscript{187} Id.

\textsuperscript{188} Id.

\textsuperscript{189} Id.

\textsuperscript{190} Id.

\textsuperscript{191} Id. (citing Gabelli, 568 U.S. at 448).

\textsuperscript{192} Id. (citing Gabelli, 568 U.S. at 449) (internal quotations omitted).

\textsuperscript{193} Id. at 1642.

\textsuperscript{194} Id. (citing Huntington v. Attrill, 146 U.S. 657, 667 (1892)).

\textsuperscript{195} Id. (citing Huntington, 146 U.S. at 668).
even be labeled—penal, in many cases ‘neither the liability imposed nor the remedy given is strictly penal.’” 196 This is the case because “[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State.” 197 As the Court noted, the second principle is that “a pecuniary sanction operates as a penalty only if it is sought ‘for the purpose of punishment, and to deter others from offending in like manner’—as opposed to compensating a victim for his loss.” 198

The Court first turned to Brady v. Daly 199 for guidance on the construction of these principles. 200 In Brady, a playwright sued a defendant in Federal Circuit Court under a statute providing damages for copyright infringement. 201 The defendant challenged the Circuit Court’s jurisdiction on the grounds that a separate statute gave district courts exclusive jurisdiction over actions to recover a penalty. 202 In construing whether that statute’s recovery of damages represented a penalty, the Supreme Court in Brady noted that the statute provided:

“[F]or a recovery of damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him,” rather than the public generally, and second, that “the whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person.” 203

According to the Supreme Court, the statute did not impose a penalty because it provided a “compensatory remedy for a private wrong...” 204

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196 Id. (citing Huntington, 146 U.S. at 667).
197 Id. (citing Huntington, 146 U.S. at 667).
198 Id. at 668.
199 175 U.S. 148 (1899).
200 Kokesh, 137 S. Ct. at 1642.
201 Id. (citing Brady, 175 U.S. at 153).
202 Id.
203 Id. (quoting Brady, 175 U.S. at 154).
204 Id.
The Court then turned to *Meeker*, where it had previously construed the statutory ancestor of § 2462. There, a federal agency ordered a railroad company to pay damages to a shipping company for charging excessive shipping rates. The railroad company argued that § 2462’s predecessor statute limited the plaintiff’s action because it sought to impose a penalty. The *Meeker* court rejected that argument because “the words ‘penalty or forfeiture’ in [the statute] refer to something imposed in a punitive way for an infraction of a public law.” According to the Court, a penalty does “not include a liability imposed [solely] for the purpose of redressing a private injury” and “[b]ecause the liability imposed was compensatory and paid entirely to a private plaintiff, it was not a ‘penalty’ within the meaning of the statute of limitations.”

In applying these principles to SEC disgorgement actions, the Court first found that courts order disgorgement as a consequence for violating public laws. The Court explained that the violation is “committed against the United States rather than an aggrieved individual”—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution. The Court noted that the SEC had previously conceded that in seeking disgorgement, it seeks to remedy harm to the public, rather than any particular injured party.

Second, the Court found that “SEC disgorgement is imposed for punitive purposes.” The Supreme Court noted that in “Texas Gulf—one of the first cases requiring disgorgement in SEC proceedings—the court emphasized the need ‘to deprive the defendants of their profits in order to . . . protect the investing public

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206 *Kokesh*, 137 S. Ct. at 1642.
207 *Id.* at 1643.
208 *Id.* (citing *Meeker*, 236 U.S. at 423).
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.*
by providing an effective deterrent to future violations.”  

However, the Court determined that deterrence is not simply an incidental effect of disgorgement. Instead, the Court found that lower “courts have consistently held that ‘[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.’” The Court noted that when sanctions are imposed to deter infractions of public laws, they are inherently punitive because “deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].”

Finally, the Court found that SEC disgorgement is usually not compensatory.” The court noted that many times, “disgorged profits are paid to the district court, and it is ‘within the court's discretion to determine how and to whom the money will be distributed.’” The Court also noted that lower courts have ordered disgorgement even when the disgorged funds were not going to be paid back to investors as restitution. Instead, while some disgorged funds are sometimes paid to victims, many times the funds are dispersed to the United States Treasury. The court found that “[e]ven though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so.” Ultimately, the court stated that “[w]hen an individual is made to pay a non[-]compensatory sanction to the government as a consequence of a legal violation, the payment operates as a penalty.”

As a result, the Court found that “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.” Therefore, the Court held that the five-year statute of

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215 Id.
216 Id. (citing SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d. Cir. 1997)).
217 Id. (citing Bell v. Wolfish, 441 U.S. 520, 539, n.20 (1979)).
218 Id. at 1644.
219 Id. (citing Fischbach Corp., 133 F.3d at 175).
220 Id.
221 Id.
222 Id.
223 Id.
224 Id.
limitations of § 2462 applies whenever the SEC seeks disgorgement.\textsuperscript{225}

The Court then turned to the SEC’s arguments. As the court stated, the SEC’s primary response was that “SEC disgorgement is not punitive but ‘remedial’ in that it ‘lessen[s] the effects of a violation’ by ‘restor[ing] the status quo.’”\textsuperscript{226} The Court determined that the disgorgement, as applied by courts in SEC enforcement contexts, does not merely return defendants to where they would have been had they not broken the law.\textsuperscript{227} Instead, the Court found, “SEC disgorgement sometimes exceeds the profits gained as a result of the violation.”\textsuperscript{228} To illustrate its point, the Court noted that inside traders can be ordered to pay back not only the unlawful gains acquired, but also any benefit that was accrued to third parties as a result of the inside trader’s violations.\textsuperscript{229} As the Court noted, those who illegally provide confidential trading information can be ordered to disgorge profits that third parties illegally received even when the tippee did not receive any profit.\textsuperscript{230} Additionally, the Court found that “disgorgement sometimes is ordered without consideration of a defendant’s expenses that reduced the amount of illegal profit.”\textsuperscript{231} As the Court explained, in these cases, disgorgement does not merely return defendants to where they would have been—it leaves them worse off.\textsuperscript{232} The Court determined that the lower court’s justification for doing so is that disgorgement is not only meant to prevent unjust enrichment, but also to deter violations of securities laws.\textsuperscript{233} The Court found that this justification and practice “demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction.”\textsuperscript{234}

\textsuperscript{225} Id.
\textsuperscript{226} Id. (internal quotations and citations omitted).
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
Even though the Court noted that “disgorgement serves compensatory goals in some cases[,]” the Court explained that sanctions can have multiple purposes.235 The Court further explained that when a sanction does not serve solely a remedial purpose, and instead also serves a retributive or deterrent purpose, the sanction is a punishment.236

The Court held that “[b]ecause disgorgement orders ‘go beyond compensation, are intended to punish, and label defendants wrongdoers’ as a consequence of violating public laws, they represent a penalty. . . .”237 Therefore, any disgorgement claim in the SEC context “must be commenced within five years of the date the claim accrued.”238

VII. IMPLICATIONS OF KOKESH v. SEC

The Supreme Court’s opinion in Kokesh left many unanswered questions. One of the most important question was posed in a footnote in the opinion. Footnote 3 provides:

Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462’s limitations period.239

We can expect SEC violators facing disgorgement actions will take on the Supreme Court’s apparent invitation to challenge whether disgorgement is a valid SEC remedy at all.240 The SEC has been seeking disgorgement ever since the Texas Gulf court first ordered

235 Id. at 1645.
236 Id.
237 Id.
238 Id.
240 Baughman, et al., supra, note 19.
disgorgement as a form of restitution.\textsuperscript{241} However, if the SEC wants to continue seeking disgorgement in the future, it might have to pull back on its theories of recovery to the extent that it seeks funds that went to third persons or that go beyond returning the violator to the position they would have been had they not violated securities laws, and narrowly tailor the remedy to actual victims of the illegal conduct.\textsuperscript{242}

It is unclear how much the five-year statute of limitations of § 2462 will hinder SEC enforcement. Most of the time, the SEC acts within five years of the misconduct.\textsuperscript{243} For those cases where the “misconduct does not come to light until after it occurred,” the SEC might look to act faster with less investigation or seek tolling agreements from early on.\textsuperscript{244}

Additionally, it is unclear if the SEC can continue to recover disgorgement from third-parties who did not engage in wrongdoing, but have received illegal profits as a result of violations by others.\textsuperscript{245} Normally, courts have used their equitable powers to order disgorgement of these funds.\textsuperscript{246} However, “in the wake of \textit{Kokesh}’s holding that disgorgement is a penalty, it is not clear that the SEC will be able to obtain disgorgement from non-wrongdoers.”\textsuperscript{247}

\textbf{VIII. Conclusion}

The Supreme Court’s opinion in \textit{Kokesh}, while relatively simple in analysis, raises numerous questions. If the SEC, who is tasked with protecting investors to ensure trust in the markets is to continue seeking disgorgement, it should reconsider retailoring their remedy. It will be interesting to see if Congress makes any changes at least to the amount of civil penalties the SEC can seek. In any case, it is likely that this is not the last time that we will hear from the Supreme Court on the issue.

\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{Id.}
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{Id.}