

IX. *Kokesh v. SEC and Implications for SEC Disgorgement and Enforcement Actions*

A. Introduction

Since its inception, the Securities Exchange Commission (the SEC or the Commission) has sought disgorgement in securities law enforcement actions.¹ Disgorgement is a monetary remedy of “[r]estitution measured by a defendant’s wrongful gain”² and requires that the defendant return wrongful gains “properly attributable to the defendant’s interference with the claimant’s legally protected rights.”³ Due to its compensatory rather than penal nature, disgorgement historically escaped the statutes of limitations unlike monetary penalties.⁴ Unlike the other monetary remedies sought by the SEC, the five-year statute of limitations historically did not apply to disgorgement.⁵ As such, if a defendant committed a securities law violation more than five years prior to commencement of the legal action, the SEC could require that defendant to return ill-gotten gains upon conviction, even where the law protected him or her from a civil penalty. However, a recent Supreme Court decision, *Kokesh v. SEC*, overturned that practice, restricting all monetary relief sought by the agency to the five year statutory period.⁶ In other words, Bernie Madoff, who notoriously perpetrated a \$60 billion Ponzi scheme dating back to the early 1970s, would only be required to disgorge funds from the 2000s under *Kokesh*.⁷

¹ *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90–91 (S.D.N.Y. 1970) (“When such relief has been necessary for the protection of the investing public, the courts have utilized their inherent equity power to grant relief ancillary to an injunction.”).

² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, cmt a (AM. LAW INST. 2010).

³ *Id.* at 204.

⁴ 28 U.S.C. § 2462 (2012); *Kokesh v. SEC*, 137 S. Ct. 1635, 1638 (2017) (explaining a compensatory remedy is not subject to a statute of limitations while a non-compensatory penalty is).

⁵ See generally 1 T. HAZEN, *LAW OF SECURITIES REGULATION*, § 1:37, at 83 (7th ed., rev. 2016) (discussing the breadth of the SEC’s enforcement authority).

⁶ *Kokesh*, 137 S. Ct. at 1654.

⁷ See generally John Wasik, *Inside the Mind of Madoff: When Did Scam Really Begin?*, FORBES (Oct. 3, 2012, 6:16 PM), forbes.com/sites/johnwasik/

This article serves as an overview of the *Kokesh* decision and its implications. Section B offers a brief history of the SEC and an examination of the Court's decision in *Kokesh*. Section B concludes with a statement of the *Kokesh* holding. Section C discusses the potential ramifications of the holding on two fronts: (1) open securities enforcement actions and (2) other federal agencies' power to seek disgorgement remedies in the future. Section D discusses potential legal challenges courts and agencies may confront as a result of the *Kokesh* holding.

B. Background

1. History of the SEC

As part of the government's response to the Great Depression, Congress enacted the Securities Exchange Act of 1934 (the Act), establishing the SEC.⁸ The Act granted the SEC rulemaking authority and "broad authority to conduct investigations into possible violations of the federal securities laws."⁹ The Act also granted the Commission power to initiate enforcement actions in federal court for alleged violations.¹⁰ Prior to 1990, the Commission sought injunctions barring a defendant from committing future violations of federal securities laws through the Commission's statutory authority and sought monetary remedies—disgorgement—through the court's inherent equitable powers.¹¹ In the 1990 Securities Enforcement Remedies and Penny Stock Reform Act, Congress codified the Commission's authority to seek monetary civil penalties.¹² Empowered with a slew of

2012/10/03/inside-the-mind-of-madoff-when-did-scam-really-begin/#487d2bb94ec8 [https://perma.cc/9ALR-JC29].

⁸ 15 U.S.C. § 78d(a); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186–87 (1963) (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963)) ("It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry.").

⁹ SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 741, 744 (1984).

¹⁰ 15 U.S.C. § 78u-1.

¹¹ *Kokesh*, 137 S. Ct. at 1640; SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 91 (S.D.N.Y. 1970) ("When such relief has been necessary for the protection of the investing public, the courts have utilized their inherent equity power to grant relief ancillary to an injunction.").

¹² Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931, 936 (1990).

enforcement tools, however, the Commission continued to seek disgorgement in enforcement proceedings.

2. *The Kokesh Decision*

A recent Supreme Court decision drastically altered the landscape for agencies seeking equitable remedies. In *Kokesh*, the Supreme Court unanimously held that disgorgement, as applied in SEC enforcement actions, is subject to the five-year statute of limitations in 28 U.S.C. § 2462 because it is a penalty.¹³

Prior to the Supreme Court hearing, a federal district court jury for the District of New Mexico found that Charles Kokesh, owner of two investment-advisor firms, violated the Investment Advisers Act of 1940 and the Securities Exchange Act of 1934 by misappropriating \$34.9 million and “filing false and misleading SEC reports.”¹⁴ The SEC sought a disgorgement order of \$34.9 million although \$29.9 million resulted from Kokesh’s actions outside the five-year statute of limitations period.¹⁵ The District Court entered judgment for the full amount of \$34.9 million, plus \$18.1 million prejudgment interest, and \$2 million in civil penalties. The District Court found that disgorgement is not a penalty under § 2462 and thus not subject to the statute of limitations.¹⁶ On appeal, the Tenth Circuit affirmed,¹⁷ creating a circuit split. The Tenth Circuit agreed with the D.C. Circuit and First Circuit, but the Eleventh Circuit held that § 2462 statute of limitations applied to disgorgement.¹⁸

¹³ 28 U.S.C. § 2462 (2012); *Kokesh*, 137 S. Ct. at 1654 (“Disgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under §2462. Accordingly, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.”).

¹⁴ SEC v. Kokesh, 2015 U.S. Dist. LEXIS 179999, at *1–2, *32 (D. N.M. Mar. 30, 2015).

¹⁵ *Id.* at *7–9, *31 (“The statute of limitations at 28 U.S.C. § 2462 applies to civil money penalty and, thus, limits the total amount of penalty the Court may impose. However, because some of the claims first accrued within the limitations period, § 2462 does not bar a civil money penalty in its entirety.”).

¹⁶ *Id.* at *31–32 (“[N]either injunction nor disgorgement is subject to the statute of limitations at § 2462.”).

¹⁷ SEC v. Kokesh, 834 F.3d 1158, 1168 (10th Cir. 2016), *aff’g* 2015 U.S. Dist. LEXIS 179999 (D. N.M. Mar. 30, 2015).

¹⁸ SEC v. Graham, 823 F.3d 1357, 1363–64 (11th Cir. 2016) (“[T]he SEC is time-barred from proceeding with its claim for . . . disgorgement because,

The Supreme Court granted certiorari to address the circuit split on “whether disgorgement claims in SEC proceedings are subject to the 5-year limitations period of § 2462.”¹⁹ The SEC argued that disgorgement could not qualify as a penalty under § 2462 because it “simply prevents a defendant from retaining money acquired through a violation of the law for which he has been found liable.”²⁰ Furthermore, the SEC insisted that disgorgement is indeed remedial because it is “intended to lessen the effects of a violation.”²¹ To limit disgorgement to a statutory period would permit a wrongdoer to retain his ill-gotten gains, contrary to the principles sought in equitable remedies.²² The Supreme Court disagreed with the SEC.²³ It held that SEC disgorgement is subject to the statute of limitations because “SEC disgorgement constitutes a penalty.”²⁴ 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.”²⁵

The Supreme Court’s definition rests on two principles. First, pecuniary sanctions address wrongs to the public.²⁶ By its own concession, the SEC seeks disgorgement as relief for violations committed against the public laws of the United States.²⁷ The SEC can bring suit in the absence of private complainants, and violators are

under the plain meaning of 28 U.S.C. § 2462, [disgorgement is] . . . a forfeiture.”).

¹⁹ *Kokesh v. SEC*, 137 S. Ct. 1635, 1641 (2017).

²⁰ Brief for Respondent at 13, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529).

²¹ *Id.* at 17 (citing *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95) (arguing that disgorgement “is analogous to restitution to an injured party by which a defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives.”) (internal quotation marks omitted).

²² *Id.* at 42 (citing Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 HARV. BUS. L. REV. 129, 153 (2014)).

²³ *Kokesh*, 137 S. Ct. at 1643–44 (reasoning that disgorgement is subject to the statute of limitations in part because it serves the “inherently punitive” purpose of deterrence).

²⁴ *Id.* at 1642.

²⁵ *Id.* (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)).

²⁶ *Id.* (“[W]hether 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.’”).

²⁷ *Id.* at 1643 (“SEC disgorgement is imposed by the courts as a consequence for violating what we described in *Meeker* as public laws.”).

charged under federal securities laws.²⁸ Second, pecuniary sanctions serve punitive, rather than compensatory, purposes.²⁹ SEC disgorgement serves the punitive purpose of deterrence, and disgorged funds are not always dispersed to securities fraud victims.³⁰ Instead, collected funds may be paid to the U.S. Treasury.³¹ The Court insisted that “[w]hen an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.”³²

The SEC insisted that its use of disgorgement was remedial because it “lessen[ed] the effects of a violation by restoring the status quo.”³³ The Court rejected this argument.³⁴ Historically, the SEC sometimes disgorged profits without adjustment for expenses incurred by the defendant.³⁵ The Commission also disgorged money accrued by innocent third parties due to the wrongdoer’s fraudulent scheme.³⁶ These facts, taken with the dual goals of deterrence and compensation, placed disgorgement squarely in the penalty category because “[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.”³⁷ Thus, the Supreme

²⁸ *Id.* at 1642 (“[W]hen the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties.”) (internal quotation marks omitted).

²⁹ *Id.* (“[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.”) (internal quotation marks omitted).

³⁰ *Id.* at 1644 (citing *SEC v. Fischenbach Corp.*, 133 F.3d 170, 175 (1997)) (“[I]t is ‘within the court’s discretion to determine how and to whom the money will be distributed.’”).

³¹ *Id.* (discussing how disgorgement funds won by the SEC in enforcement actions are typically dispersed).

³² *Id.*

³³ *Id.* (quoting Brief for Respondent at 17, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

³⁴ *Id.* (questioning if SEC disgorgement served the purpose of providing equitable relief to a defendant).

³⁵ *Id.* at 1644–45 (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, cmt. h (AM. LAW INST. 2010)) (“Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid.”).

³⁶ *Id.* (citing *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014)).

³⁷ *Id.* at 1645 (citing *Austin v. United States*, 509 U.S. 602, 610 (1993)).

Court held in *Kokesh* that disgorgement, as used in SEC enforcement actions, qualifies as a penalty. Therefore, disgorgement is subject to the five-year statute of limitations for monetary penalties set forth in § 2462.³⁸

C. Implications

The *Kokesh* decision will impact open and future SEC enforcement actions, and it may affect the powers of other agencies.³⁹ When read narrowly, the *Kokesh* decision limits the SEC's ability to retrieve monetary relief from securities laws violators.⁴⁰ When read broadly, *Kokesh* signals new limits on the powers of the administrative state as part of a larger trend limiting expansive reading of statutes.⁴¹ This section examines the potential scope and consequences of the *Kokesh* decision.

1. SEC Investigations and Enforcement Actions

Perhaps the most immediate impact of *Kokesh* will be on SEC investigations themselves. This decision will limit the remedies available in complex cases, particularly those that require more than five years to investigate and violations that do not come to the SEC's

³⁸ *Id.* (reversing the Tenth Circuit holding).

³⁹ See Andrew Ceresney, *The Impact of the Kokesh Decision on Disgorgement for Conduct Within the Statute of Limitations*, BLOOMBERG BNA (June 29, 2017), <https://www.bna.com/impact-kokesh-decision-n73014461027/> [<https://perma.cc/QW3G-Z4ER>] (discussing the impact of *Kokesh* on the indemnification and tax deductibility of disgorgement orders).

⁴⁰ Jessica S. Mussallem, Matthew J. Jacobs & Erica Connolly, *Keeping Current: Supreme Court Curbs SEC's Disgorgement Power*, A.B.A. BUS. L. TODAY 2 (July 2017) (“[N]othing in this decision would seem to limit the DOJ's authority to seek heavy criminal fines from corporations, even for conduct that is more than five years old.”).

⁴¹ Rachel Paulose, *May the Federal Administrative State Seek Disgorgement Unrestrained by Any Statute of Limitation?*, 44 A.B.A. PREVIEW UNITED STATES SUP. CT. CASES (2017) 236, 239, available at <https://www.scribd.com/document/355283559/Kokesh-v-SEC> [<https://perma.cc/B572-SWY7>]; see also, Mussallem, Jacobs & Connolly, *supra* note 40 (“This decision continues a trend by the Supreme Court limiting the government's expansive reading of statutes and the imposition of heavy fines in corporate investigations.”).

immediate attention.⁴² This may encourage the SEC to pursue fresh, current cases in keeping with the agency's mission "to bring timely, high-quality enforcement actions."⁴³ Furthermore, the SEC can expect challenges to its authority to disgorge funds from relief defendants, innocent third-parties who received ill-gotten gains from named defendants, and its power to request prejudgment interest on disgorgement amounts.⁴⁴

The *Kokesh* decision may impact non-monetary remedies as well. The Financial Industry Regulatory Authority (FINRA), a private, self-regulating body that supervises the securities industry, sanctions members who violate the organization's rules.⁴⁵ After being sanctioned, a violator may request that the SEC review FINRA's disciplinary action.⁴⁶ Recently, FINRA ordered a lifetime membership bar on a registered broker-dealer after he submitted multiple false expense reports to his employer and attempted to cover up his wrongdoing.⁴⁷ After the SEC affirmed the membership bar, the violator appealed, arguing the SEC's affirmation of the membership bar was "impermissibly punitive rather than remedial" and was thus in violation of *Kokesh*.⁴⁸ On October 13, 2017, the D.C. Court of Appeals

⁴² See Maranda Fritz & Brian Steinwascher, *Demise of Disgorgement? Kokesh and Honeycutt in Tandem*, LAW360 (July 3, 2017, 11:47 AM), <https://www.law360.com/articles/939021/demise-of-disgorgement-kokesh-and-honeycutt-in-tandem>; Carmen Germaine, *Supreme Court Limits SEC Disgorgement Orders*, LAW360 (June 5, 2017, 10:23 AM), <https://www.law360.com/articles/928024/supreme-court-limits-sec-disgorgement-orders>; Sarah N. Lynch & Lawrence Hurley, *Supreme Court Limits SEC's Power to Recover Ill-Gotten Gains*, REUTERS (June 5, 2017, 10:19 AM), <http://www.reuters.com/article/us-usa-court-sec/supreme-court-limits-secs-power-to-recover-ill-gotten-gains-idUSKBN18W1UQ>.

⁴³ Brief for the Cato Institute as Amicus Curiae Supporting Petitioner at 9, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529).

⁴⁴ Dixie L. Johnson & M. Alexander Koch, *Reflections on Kokesh v. SEC*, L. J. NEWSL. (Aug. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/08/01/reflections-on-kokesh-v-sec/?slreturn=20171015170401> [<https://perma.cc/7EMP-5F2V>] ("[I]t is not clear that the SEC will be able to obtain disgorgement from non-wrongdoers.").

⁴⁵ *Saad v. SEC*, 873 F.3d 297, 298–99 (D.C. Cir. 2017) (discussing the eight factors considered by FINRA in determining whether to impose a sanction); see generally *About FINRA*, FINRA, <http://www.finra.org/about> [<https://perma.cc/ARU4-J6AF>] (last visited Nov. 15, 2017).

⁴⁶ *Saad*, 873 F.3d at 299.

⁴⁷ *Id.* at 300–01.

⁴⁸ *Id.* at 298.

remanded the case for the SEC to determine the applicability of *Kokesh* to this type of disciplinary action.⁴⁹ Notably, in his concurring opinion, Judge Kavanaugh argued that the *Kokesh* decision “means that we can no longer characterize an expulsion or suspension as remedial” but rather punitive.⁵⁰

Additionally, the *Kokesh* court did not address whether courts have the authority to order disgorgement in civil enforcement proceedings, noting that the opinion should not be read so expansively.⁵¹ In doing so, the Court may have explicitly left open this question to invite a future challenge to “the entire practice of SEC disgorgement.”⁵²

2. *Impact on Other Agencies*

Kokesh may also affect other agencies because the Court explicitly left open whether disgorgement is a permissible remedy in this context.⁵³ Specifically, the Federal Trade Commission’s (FTC) ability to obtain restitution may be jeopardized because the FTC uses Section 13(b) of the Federal Trade Commission Act to seek equitable monetary relief, such as restitution and disgorgement of profits.⁵⁴ The funds collected by the FTC as restitution bear a few notable and fatal

⁴⁹ *Id.* at 304 (remanding in part so the Commission may address whether *Kokesh* is applicable to “the Commission’s affirmance of FINRA’s lifetime bar on [petitioner’s] affiliation with FINRA and its members”).

⁵⁰ *Id.* (Kavanaugh, J., concurring) (“[P]recedents characterizing expulsions or suspensions as remedial are no longer good law.”).

⁵¹ *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.2 (2017) (“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.”).

⁵² Mussallem, Jacobs & Connolly, *supra* note 40, at 2 (“A footnote in *Kokesh* suggests that the practice of disgorgement could itself be in jeopardy The court may be inviting a case challenging the entire practice of SEC disgorgement.”).

⁵³ *Kokesh*, 137 S. Ct. at 1642 n.2.

⁵⁴ *FTC v. Verity Int’l Ltd.*, 443 F.3d 48, 66–67 (2d Cir. 2006) (an award of restitution must be limited to “equitable restitution”); *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 217 (D. Mass. 2009) (“[A]ny monetary award must be capable of being classified as an equitable, as opposed to a legal, remedy.”).

similarities to SEC disgorgement.⁵⁵ First, the FTC does not necessarily return collected funds to harmed consumers.⁵⁶ Second, those funds are often deposited in the U.S. Treasury.⁵⁷ The *Kokesh* court used parallel factors as evidence that SEC disgorgement was not compensatory.⁵⁸ As such, courts may decide that FTC restitution is punitive and thus restricted by a five-year statute of limitations.

The Commission's brief in *Kokesh* expressly analogized SEC disgorgement to equitable remedies granted in government civil suits.⁵⁹ Because the Court ruled that SEC disgorgement is in fact a penalty, the Commission's reasoning may well apply to agencies that seek disgorgement and restitution remedies.

D. Conclusion

In *Kokesh*, the Court redefined a historically equitable remedy as a penalty, limiting its availability to the statutorily prescribed five years. The Court's decision rested primarily on three principles.⁶⁰ A remedy is a penalty if (1) it addresses a public wrong, (2) serves punitive, noncompensatory purposes, or (3) addresses anything more than purely remedial purposes.⁶¹ Agencies that seek disgorgement or

⁵⁵ See Benjamin Mundel & Lucas Croslow, *How Kokesh Will Impact the FTC and Other Agencies*, LAW360 (June 22, 2017, 10:28 AM), <https://www.law360.com/articles/937090/how-kokesh-will-impact-the-ftc-and-other-agencies>.

⁵⁶ *Id.* (“FTC has no obligation to return restitutionary funds . . .”).

⁵⁷ *Id.* (“Indeed, in many instances, a significant portion of FTC “restitution” is merely paid to the U.S. Treasury.”).

⁵⁸ *Kokesh*, 137 S. Ct. at 1644 (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)) (“Although disgorged funds may often go to compensate fraud victims for their losses, such compensation is a distinctly secondary goal.”).

⁵⁹ Brief for Respondent at 42 (quoting *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)) (“[A]n action on behalf of the United States in its governmental capacity is subject to no time limitation, in the absence of congressional enactment clearly imposing it.”).

⁶⁰ *Kokesh*, 137 S. Ct. at 1643–644 (“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.”).

⁶¹ *Id.* (holding that SEC disgorgement “bears all the hallmarks of a penalty” and is thus subject to the statute of limitations).

restitution under § 2462 and similar provisions will need to ensure their remedies do not meet these three criteria.⁶²

While the total impact of the *Kokesh* decision remains to be seen, the government can expect defense teams to attack aggressively other agencies' power to seek disgorgement and restitution, using the three principles articulated by the Supreme Court. Other agencies that have relied upon disgorgement may face challenges similar to those in *Kokesh*. Specifically, the FTC's characterization of restitution as an equitable remedy will likely to be called into question.⁶³ Federal courts can also expect broader challenges to the SEC and other agencies' authority to seek disgorgement at all, citing the Supreme Court's intent to leave open that question.⁶⁴

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⁶² *Id.* at 1645.

⁶³ Benjamin Mundel & Lucas Croslow, *supra* note 55.

⁶⁴ *Kokesh*, 137 S. Ct. at 1642 n.2.

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