Akin

Supreme Court Decision on Statute of Limitations Governing SEC's Recovery of Disgorgement Also Applies to FERC (but Practical Effect Is Limited)

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In *Kokesh*, the SEC brought a securities fraud enforcement action in federal court alleging that the owner of investment-advisor firms misappropriated approximately $35 million from his clients. The SEC prevailed at trial and, consistent with its common practice, sought remedies that included civil penalties, injunctive relief and disgorgement of unjust profits. A five-year federal statute of limitations, 28 U.S.C. § 2462, applied to the civil penalties remedy—meaning that the SEC was barred from seeking civil penalties for conduct occurring more than 5 years prior to the SEC bringing its enforcement action. This five-year statute of limitations is a general catch-all provision applying to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" brought by the federal government whenever the specific statutory scheme (e.g., the Securities Exchange Act or, in the case of FERC, the Federal Power Act or Natural Gas Act) does not otherwise include a limitations provision. The SEC argued, and both the district court and 10th Circuit Court of Appeals agreed, that this five-year limitations period did not apply to the disgorgement remedy because disgorgement is not a "fine," "penalty," or "forfeiture," but rather an equitable remedy that merely restores the status quo by returning to the victim the money that the defendant wrongfully obtained through conduct violating the securities laws.

The Supreme Court, resolving a Circuit split, unanimously reversed, holding that—at least in the context of SEC enforcement actions—the remedy of disgorgement is indeed a "penalty" and therefore must satisfy the five-year limitations period. The Court agreed that disgorgement serves a compensatory purpose for victims, but held that disgorgement in SEC enforcement actions goes beyond that purpose for several reasons. First, an SEC enforcement action seeks to vindicate a public purpose in enforcing the securities laws, not just obtain recovery of funds for victims. Second, in terms of how SEC enforcement actions have evolved in practice, the government's pursuit of disgorgement is primarily for deterrence purposes—and deterrence is inherently punitive in nature. Third, again in terms of actual practice, the SEC has sought, and federal courts have ordered, disgorgement even where some or all of the funds would not be returned to victims (e.g., in cases where disgorgement funds were remitted to the U.S. Treasury). The Court also observed that, in some instances, the amount of disgorgement sought exceeds the profits obtained—including where disgorgement is ordered without consideration of a defendant's expenses that reduced the amount of unlawful profit—and therefore goes beyond returning the defendant to the status quo. As the Supreme Court summarized its analysis and holding, "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. The five-year statute of limitations in § 2462 therefore applies when the SEC seeks disgorgement."

FERC's anti-market manipulation enforcement actions (among other actions) are governed by this same five-year statute of limitations provision. FERC has taken the same position as the SEC in concluding that the five-year limitations period applies to only civil penalties—not disgorgement. While the Supreme Court's decision in *Kokesh* focuses on how disgorgement has been applied in SEC enforcement actions, there are no significant distinctions between FERC and the SEC in terms of how each agency views the disgorgement remedy. Indeed, in a number of respects, including remedies, FERC's approach to market manipulation actions has been influenced by SEC enforcement actions and underlying precedent, given that FERC's anti-fraud statute and rule are expressly patterned on the SEC's anti-fraud statute and rule. Consequently, the Court's observations about disgorgement in SEC enforcement cases (summarized above) apply to FERC actions as well. FERC's enforcement and other staff will certainly analyze *Kokesh* and consider how it applies to FERC enforcement actions, and it is likely that the agency will conclude that it is bound by the Supreme Court's decision.

In contrast to the SEC, however, applying a five-year limitations period on disgorgement for FERC enforcement actions will not change the agency's practice in any significant way, since FERC has rarely sought disgorgement for conduct occurring beyond the limitations period. FERC has asserted that it has the authority to do so, but, in nearly all cases, FERC has analyzed potential disgorgement amounts over the same time period that underlies its analysis of potential civil penalties. *Kokesh* is nonetheless significant in that it provides a clear outer limit on disgorgement in future FERC enforcement actions. The decision may also have some effect on settlement positions, at least for cases where FERC might otherwise have attempted to settle based in part on a recovery of unjust profits obtained from conduct older than five years—something the agency can now no longer do if it proceeds to court.

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