

## [Securities Regulation Daily Wrap Up, SUPREME COURT DOCKET— Justices will resolve whether disgorgement may be ordered as equitable relief, \(Nov. 4, 2019\)](#)

Securities Regulation Daily Wrap Up

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Certiorari was granted in *Liu v. SEC* and denied in *Scoville v. SEC*. Oral arguments in *Jander* will be heard later this week.

The Supreme Court has released additional orders from its November 1 conference which saw a grant of certiorari in one securities-related case. The court has added *Liu v. SEC* to its docket, meaning that it will rule on a question left open in *Kokesh*: whether the Commission can seek disgorgement as "equitable relief" for a violation of the securities laws. Certiorari was denied in another petition involving the SEC, asking whether jurisdictional amendments in the Dodd-Frank conferred substantive extraterritorial reach to the antifraud provisions of the securities laws. Finally, on November 6, the Court will hear oral arguments in a case asking it to revisit an employee stock ownership plan fiduciary's duty of prudence under *Fifth Third*.

***Liu v. SEC***. The Supreme Court [granted certiorari](#) in *Liu v. SEC* ([18-1501](#)) on November 1, 2019. The petition asks whether the SEC may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation in light of the Court's ruling in *Kokesh* that such disgorgement is a penalty. In *Kokesh*, the Court [held](#) that the disgorgement often sought by the SEC in enforcement cases is a penalty for purposes of the statute of limitations contained in 28 U.S.C. §2462 (covering civil fines, penalties, or forfeitures). The holding in *Kokesh* was a narrow one, and the Court explicitly said that it was not opining on the authority of federal courts to order disgorgement in SEC enforcement proceedings.

In *Liu*, two defendants in a civil enforcement action challenged a district court's order that they disgorge almost \$27 million raised from investors. The [Ninth Circuit](#), in an unpublished decision, upheld the order. The court explained that *Kokesh* left the question of federal courts' authority to award disgorgement for another day, so that case was not, as the defendants argued, irreconcilable with longstanding Ninth Circuit precedent.

The petition argues that Congress authorized the Commission to seek only injunctions, civil monetary penalties, and equitable relief. As a penalty, disgorgement falls outside the scope of equitable relief and thus lacks any statutory authority. Disgorgement as a remedy is further unsupported by any express or implied authority of the courts to grant equitable relief, the petitioners continue, because equity aims to restore the status quo rather than punish the wrongdoer. Indeed, in this case, the disgorgement left the petitioners nearly \$16 million in debt relative to their position before the alleged fraud. There was also no indication that any disgorged funds would be returned to the victims.

The petition contends that this issue is significant because circuit courts need guidance after *Kokesh*. Prior to *Kokesh*, courts have consistently conceptualized disgorgement within an equitable framework. The notion that disgorgement is remedial is now untenable, the petition says, and courts need guidance in revising their approaches. The petition notes in closing that the SEC is only one of several agencies relying on disgorgement under the courts' general equitable jurisdiction to seek monetary awards.

***Scoville v. SEC***. Next, the court has [denied](#) certiorari in *Scoville v. SEC* ([18-1566](#)), leaving in place a Tenth Circuit ruling that was a major victory for the SEC, although whether other circuits will agree remains to be seen. The petition raised the question of whether *Morrison's* holding on the extraterritorial reach of the securities laws was affected by jurisdictional amendments in the Dodd-Frank Act enacted subsequent to *Morrison*. Specifically at issue was whether Dodd-Frank Act Section 929P(b)'s jurisdictional amendments conferred

substantive extraterritorial reach upon Sections 10(b) and 17(a) in SEC enforcement actions and in federal criminal prosecutions.

In this case, the SEC brought an enforcement action against the operator of an Internet traffic exchange. Ninety percent of the sales of the company's main product was to purchasers living outside of the U.S. The district court concluded that the Dodd-Frank amendments indicated that, with respect to SEC enforcement proceedings, Congress intended that the antifraud provisions of the federal securities laws should be applied to extraterritorial transactions. The [Tenth Circuit](#) affirmed, noting that under the conduct-and-effects test added by Dodd-Frank, the company undertook significant conduct in the U.S. to make those overseas sales.

The petition argued that Morrison's holding on the extraterritorial reach of the Exchange Act was not legislatively overturned by Dodd-Frank. Instead, the plain language of Section 929P(b) of Dodd-Frank (adding Exchange Act Section 27(b) and Securities Act Section 22(c)) did not amend or alter the extraterritorial reach of the substantive regulatory provisions of the securities laws. The petition pointed to the distinction between jurisdiction and the merits of the case. Morrison, the petition said, held that the jurisdictional provisions may be satisfied, but that does not mean that the substantive statute at issue also has extraterritorial effect. And, the language of Section 929P(b) clearly addresses only subject-matter jurisdiction, and not the merits. This language was ignored by the court of appeals in favor of extratextual content, the petition asserted, maintaining that the statute should be enforced according to its terms.

**Jander argument.** On Wednesday, November 6, 2019, the justices will hear oral argument in *Retirement Plans Committee of IBM v. Jander* ([18-1165](#)). In this case, retirement plan fiduciaries have asked the Court to resolve a circuit split over the pleading requirements to state a claim for breach of the duty of prudence as set forth in *Fifth Third Bancorp v. Dudenhoeffer* (2014). The petition asks whether Fifth Third's "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.

**Read the Supreme Court Docket.** These cases, and selected others pending before the Court, can be referenced in the latest version of the [Supreme Court Docket](#). Issued opinions, granted petitions, pending petitions, and denied petitions are listed separately, along with a summary of the questions presented and the current status of each appeal.

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