

[Securities Regulation Daily Wrap Up, ENFORCEMENT—10th Cir.: Injunctions and disgorgement orders are not punitive, \(Aug. 24, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

A Tenth Circuit panel has held that a permanent injunction and disgorgement order are remedial and not subject to a five-year limitations period. Neither remedy was a penalty or forfeiture covered by the catch-all statute of limitations in 28 U.S.C. § 2462 (*SEC v. Kokesh*, August 23, 2016, Hartz, H.).

The SEC's 2009 complaint [alleged](#) that, from 1995 through 2006, Charles Kokesh had misappropriated funds from four business development companies through his control of two now-defunct registered investment adviser firms. Following a five-day trial in November 2014, the jury found that Kokesh committed securities fraud. The District Court for the District of New Mexico then entered a final [judgment](#) permanently enjoining Kokesh from violating the federal securities laws, in addition to ordering him to pay a civil penalty of \$2,354,593 plus disgorgement of \$34,927,329, together with prejudgment interest of \$18,077,103.37.

Not penalties. On appeal, Kokesh argued that the imposition of the disgorgement and injunction was barred by 28 U.S.C. § 2462, which sets a five-year limitations period for suits "for the enforcement of any civil fine, penalty, or forfeiture." The panel disagreed, holding that the injunction was not a penalty and that the disgorgement order was neither a penalty nor forfeiture within the meaning of Section 2462.

The final judgment permanently enjoined Kokesh from violating sections of the Investment Advisers Act, the Investment Company Act, and the Exchange Act, and accompanying rules. "We fail to see how an order to obey the law is a penalty," the panel remarked, "after all, everyone has a duty to obey the law." The panel noted its agreement with a D.C. Circuit decision, *Riordan v. SEC*, holding that Section 2462 does not apply to an SEC cease-and-desist order to refrain from violating securities laws because such orders are purely remedial.

Turning to the application of Section 2462 to disgorgement, the panel first addressed the claim that the disgorgement order here was a penalty. The panel pointed out that the Tenth Circuit, and others, have previously held that disgorgement is not a penalty because it is remedial. That is, disgorgement serves to eliminate the profit from wrongdoing by depriving the wrongdoer of its benefits. While Kokesh argued that the disgorgement order was punitive because it required him to disgorge more than he actually gained himself, the panel found nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly diverted to others as well as to himself.

Finally, disgorgement is not a "forfeiture" under the statute. Here, the panel noted that the words "forfeit" and "disgorge" capture similar concepts and that these similarities caused the [Eleventh Circuit](#) to recently hold that disgorgement is a forfeiture under Section 2462. The panel, however, disagreed, reading "forfeiture" narrowly as an in rem procedure to take property used in criminal activity. The panel concluded that, at the time of Section 2462's enactment, Congress was contemplating the historical meaning of "forfeiture," and the nonpunitive remedy of disgorgement was not included.

The case is [No. 15-2087](#).

Attorneys: Sarah Prins for the SEC. Charles R. Kokesh, pro se.

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