

## [Securities Regulation Daily Wrap Up, TOP STORY—D.C. Cir.: Lucia casts shadow over Timbervest matter as firm, SEC clash on need for remand, \(Sept. 7, 2018\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

Timbervest, LLC took a step towards restarting its battle against the SEC by asking the D.C. Circuit to move forward with oral arguments on its statute of limitations argument, although the shadow cast by the Supreme Court's decision in *Lucia* holding that the SEC's administrative law judges (ALJs) are inferior officers subject to the U.S. Constitution's Appointments Clause looms large. The government countered Timbervest's motion by arguing that the case, per *Lucia*, should instead be remanded to the agency for a new hearing before a properly appointed official. The *Timbervest* case had been closely watched because of the potential that it could also put a question unanswered by *Lucia* (how ALJs are removed) before the court, but the latest motions focus exclusively on how to apply *Lucia*'s remand holding ([Timbervest v. SEC \(SEC motion to remand\)](#)), September 6, 2018).

**Is an associational bar a penalty?** The SEC had charged Timbervest in an administrative proceeding with violating Advisers Act Sections 206(1) and (2) for having engaged in a fraudulent transaction in which Timbervest failed to disclose conflicts of interest and brokerage fees. An SEC ALJ found in an initial decision that Timbervest violated the Advisers Act and imposed a cease and desist order and ordered disgorgement, but also found that 28 U.S.C. § 2462 barred the imposition of associational bars. The Commission later upheld the ALJ's initial decision but also imposed the associational bars. Meanwhile, Timbervest had raised constitutional issues regarding the appointment and removal of SEC ALJs, but its petition for review in the D.C. Circuit was put on hold while the Supreme Court mulled the *Lucia* case.

According to Timbervest, the D.C. Circuit should go forward with oral arguments on its statute of limitations theory, which it claims is dispositive of the case such that remand under *Lucia* is unnecessary. Specifically, Timbervest said the SEC's penalties are improper because they are penal and fall outside the five-year limitations period of 28 U.S.C. § 2462. Timbervest argued that the combination of the Supreme Court's opinions in *Kokesh* (disgorgement is penal) and *Gabelli* (limitations period runs from time when respondent's violation occurred), and the D.C. Circuit Court's *Johnson* decision (suspensions and bars are penal) all support its cause.

With respect to *Johnson*'s applicability to bars, the Commission acknowledged in a footnote to its [Timbervest opinion](#), that *Johnson* is the governing rule in the D.C. Circuit, to which many SEC administrative matters are appealed. But the Commission stated that, at least outside the D.C. Circuit, *Johnson* holds less sway: "...to the extent that we have acknowledged the applicability of *Johnson* in certain, previous adjudicatory decisions, those decisions should not be understood as a change from our position expressed above that Section 2462 does not apply to bars." In such cases, the Commission said it continues to argue that "*Johnson* was incorrectly decided."

Moreover, Timbervest leans on a concurring opinion by Judge Kavanaugh of the D.C. Circuit, currently nominated to replace retired Supreme Court Justice Anthony Kennedy, who posited in [Saad v. SEC](#) that expulsions and suspensions are punitive instead of remedial. The *Saad* panel concluded that the SEC properly considered mitigating evidence but remanded the lifetime bar question to the Commission for additional consideration in light of *Kokesh*. Judge Kavanaugh's concurrence in *Saad* explained that he understood *Kokesh* to mean that courts may not continue to call expulsions or suspensions remedial instead of punitive. He analogized the payment of disgorgement to the government to expulsions and suspensions because they too result in nothing being paid directly to victims (the Supreme Court in *Kokesh* noted that one reason for its holding

was that disgorgement did not always get paid to victims but instead was paid to the government, one hallmark of a penalty).

By contrast, Judge Millett, who wrote for the panel, also said in a separate dubitante opinion that Saad could only advance his late *Kokesh* argument (she traced Saad's effort to a lone citation in his reply brief that she said was bereft of context) if he now claims that "penalty" in 28 U.S.C. § 2462 applies to the Commission's "excessive or oppressive" standard and deprives the Commission of discretion to review FINRA disciplinary matters. Judge Millett also noted that other circuits, notably the [Eighth](#) (*Collyard*) and [Tenth](#) (opinion by Justice—then-Judge—Gorsuch), support the D.C. Circuit's law on occupational debarment.

Timbervest also argued that district court cases from the District of New Jersey ([SEC v. Gentile](#)) (obey-the-law and penny stock bar are penal) and the Eastern District of New York ([SEC v. Cohen](#)) (injunction was partially a penalty) further back its argument about the penalties imposed by the Commission. But Timbervest attempts to distinguish the Eighth Circuit's decision in [Collyard](#), holding that a civil injunction was not subject to 28 U.S.C. § 2462, because that decision is inconsistent with the Supreme Court's decision in *Kokesh*. The Eighth Circuit had itself distinguished the disgorgement sanction in *Kokesh* by focusing on the "incidental" deterrent effect of the injunction in *Collyard*.

**The remand question.** The government would have the court remand *Timbervest* to the Commission under *Lucia*'s remedy holding, which provided that, where a timely constitutional challenge was made, the respondent should get a new hearing before a properly appointed official which, in *Lucia*'s case, meant a hearing before a different ALJ or before the Commission. According to the government, *Lucia* prescribed the proper remedy (a point Timbervest does not dispute) and there is no dispute that Timbervest's constitutional objection was timely; thus, remand would "cure the constitutional error." The Commission has since [ordered](#) that all pending administrative proceedings (126 in total) be vacated and remanded to the Office of Administrative Law Judges such that the respondents can get new hearings before different ALJs or before the Commission.

Timbervest argued that the limitations issue is a "live threshold and dispositive" one, so remand is unwarranted. Timbervest, in a footnote, also distinguished arguments made in another D.C. Circuit case on the ground that a decision on the limitations issue would also dispose of the SEC's ability to bring a future matter against Timbervest.

The case is [No. 15-1416](#) ([SEC motion to remand](#)).

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Companies: Timbervest, LLC

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