



Supreme Court Limits Disgorgement Remedy In SEC Civil Enforcement Actions

***Liu v. Securities and Exchange Commission*,
No. 18-1501**

Decided June 22, 2020

Today, the Supreme Court held 8-1 that although the SEC may seek disgorgement in civil enforcement actions, the remedy must be limited to the wrongdoer's net profits and be awarded for the benefit of victims.

Background:

When alleging securities fraud in a civil action, the SEC is authorized to seek civil penalties and any "equitable relief" that "may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). Here, the SEC alleged that Petitioners misappropriated millions of dollars of investor money after soliciting funds for the construction of a cancer-treatment center. Finding for the SEC, the district court imposed a civil penalty and ordered disgorgement equal to the full amount Petitioners raised from investors less the amount that remained in the corporate accounts for the project.

Petitioners objected that the disgorgement award failed to account for their business expenses. Petitioners relied on *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that a disgorgement order in an SEC enforcement action imposes a "penalty" for purposes of the applicable statute of limitations. Because courts of equity historically could not impose punitive sanctions, Petitioners reasoned, the court lacked statutory authority to impose the disgorgement remedy. But the Ninth Circuit disagreed, concluding that the proper amount of disgorgement was the entire amount raised minus the money paid back to investors.

"[A] disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5)."

Justice Sotomayor,
writing for the Court

Gibson Dunn Named
Appellate Firm of the Year



Issue:

Whether, and to what extent, disgorgement is statutorily authorized “equitable relief” in an SEC civil enforcement action.

Court's Holding:

A disgorgement award in an SEC civil enforcement action is “equitable relief” so long as it does not exceed a wrongdoer’s net profits and is awarded for victims.

What It Means:

- The Supreme Court held that a disgorgement remedy may constitute “equitable relief” under 15 U.S.C. § 78u(d)(5), but only if limited to the wrongdoer’s net profits and awarded for victims. This holding, the Court noted, was consistent with the “circumscribed” power of courts of equity to strip wrongdoers of ill-gotten gains. The Court therefore vacated the Ninth Circuit’s judgment and remanded with instructions to ensure that any legitimate business expenses are deducted from the disgorgement award.
- The opinion casts doubt on several SEC disgorgement practices that have appeared in recent decades. The Court observed that disgorgement awards are “in considerable tension” with equity practice when they (1) order the funds deposited in the U.S. Treasury instead of disbursing them to victims; (2) impose joint-and-several liability; or (3) decline to deduct business expenses that are legitimate or that have value independent of fueling a fraudulent scheme. The Court left those questions to the Ninth Circuit to address on remand.
- The Court’s decision reinforces the need, in a variety of contexts, to examine and apply traditional limits on awarding “equitable relief.” The Court examined traditional equitable practice in concluding that courts of equity would not award more than the wrongdoer’s net profits to the victims of the offense.

The Court's opinion is available [here](#).

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

Appellate and Constitutional Law Practice

Allyson N. Ho
+1 214.698.3233
aho@gibsondunn.com

Mark A. Perry
+1 202.887.3667
mperry@gibsondunn.com

Securities Enforcement Practice

Barry R. Goldsmith
+1 212.351.2440
bgoldsmith@gibsondunn.com

Richard W. Grime
+1 202.955.8219
rgrime@gibsondunn.com

Mark K. Schonfeld
+1 212.351.2433
mschonfeld@gibsondunn.com

© 2020 Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, CA 90071

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

If you would prefer NOT to receive future e-mail alerts from the firm, please reply to this email with the word "UNSUBSCRIBE" in the subject line. Thank you.

Please visit our website at www.gibsondunn.com. | Legal Notice, Please Read.

