



June 2016

The 11th Circuit Finds the SEC's Claim for Disgorgement Time-Barred, Thereby Creating a Circuit Split

Creating a split with the United States Courts of Appeals for the D.C. Circuit, the 11th Circuit Court of Appeals recently determined that the five-year limitations period applicable to SEC enforcement actions bars not only civil monetary penalties, but also declaratory relief and disgorgement. *See SEC v. Graham*, Case No. 14-13562, --- F.3d ----, 2016 WL 3033605 (11th Cir. May 26, 2016). The Court held, however, that injunctive relief was not subject to the five-year limitation period.

Barry Graham, together with four co-defendants, allegedly violated federal securities laws by selling condominiums that were essentially unregistered securities. *See id.* at *1. The SEC alleged that he “raised more than \$300 million from approximately 1,400 investors around the country but failed to pay out the returns they had guaranteed[,]” and sought injunctive relief preventing further securities violations; a declaration that the defendants’ conduct violated the securities laws; and an order directing the defendants to “disgorge all profits from their illegal ventures, with prejudgment interest[.]” *Id.* The defendants moved for summary judgment, arguing that 28 U.S.C. § 2462—which has a five-year limitations period applicable to securities enforcement actions—barred the SEC’s requested relief. *See id.* The district court agreed and dismissed the SEC’s action with prejudice. *See SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014). The SEC appealed.

Section 2462 provides that:

[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

In determining whether an injunction or declaratory judgment would be subject to the five-year limitations period, the Court considered whether they would constitute a “penalty” within the meaning of the statute. The Court concluded that a “penalty” is a punishment imposed for *past* wrongdoing. *Graham*, 2016 WL 3033605 at *2. Based on that definition, the Court held that injunctions are not penalties because they prevent *future* harms and therefore Section 2462’s five-year limitations period is inapplicable to claims for injunctive relief. *See id.* at *3. Unlike injunctive relief, the Court held that a declaratory judgment that defendants violated the securities laws is a “penalty,” and therefore is subject to a five-year statute of limitations, because a declaratory judgment is “designed to redress previous infractions rather than to stop any ongoing or future harm.” *Id.* (citation omitted).

Moving on to disgorgement, the Court looked to the definition of “forfeiture” as used in the statute. The Court agreed with the district court that “the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws—*i.e.*, requiring defendants to relinquish money and property—can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise)[.]” *Id.* Finding “no meaningful difference in the definitions of disgorgement and forfeiture[,]” *Id.* at *5, the Court applied Section 2462’s five-year limitation on forfeiture actions and barred the disgorgement the SEC sought. *See id.* That holding was contrary to the D.C. Circuit Court of Appeals’ holding in *Zacharias v. SEC*, 569 F.3d 458, 473 (D.C. Cir. 2009), that the five-year limitations period does not apply to SEC claims for disgorgement because disgorgement is not punitive but merely restores the status quo ante by depriving defendants of ill-gotten gains. Unlike the 11th Circuit, the D. C. Court did not consider whether disgorgement should be considered a forfeiture within the meaning of Section 2462.

The Court’s ruling marks a departure from previous Florida U.S. District Court decisions—as well as district court rulings around the country—finding that declaratory relief and disgorgement are equitable remedies unaffected by Section 2462’s limitations period. By holding that § 2462 *does* apply to declaratory relief and disgorgement, the 11th Circuit provides an additional argument available to parties defending SEC enforcement actions.

This *GT Alert* was prepared by Greenberg Traurig Shareholder and Co-Chair of the D&O Securities Litigation Practice, [Robert A. Horowitz](#), Greenberg Traurig Shareholder and Co-Chair of the Miami Litigation Practice, [David A. Coulson](#), and Greenberg Traurig Associate, [Jared R. Kessler](#).

Securities Litigation Shareholders and Of Counsel

Atlanta

Terry R. Weiss

Boston

Pete S. Michaels
A. John Pappalardo
James P. Ponsetto
David L. Ward

Chicago

Miriam G. Bahcall
Arthur Don
Jeffrey M. Henderson
Daniel G. Hildebrand
Harris L. Kay
Bruce M. Lewitas
Steven M. Malina
Peter Rush
Gregory B. Simon

Dallas

Karl G. Dial
Jason Hopkins
David W. Klautt
Jason S. Lewis
Casey L. Moore

Houston

Jennifer Tomsen

Los Angeles

Jason R. Lindsay
Paul J. Schumacher
Daniel J. Tyukody, Co-Chair

Miami

Hilarie Bass
David A. Coulson
Ricardo A. Gonzalez
Eliot Pedrosa
Ian M. Ross
Mark P. Schnapp

New Jersey

Geoffrey S. Berman

New York

Anastasia A. Angelova
Dennis J. Block
William D. Briendel, Co-Chair
Donald N. Cohen
Timothy E. Di Domenico
Richard A. Edlin
Robert S. Frenchman
Robert A. Horowitz, Co-Chair
Ronald D. Lefton
William B. Mack
Jeffrey R. Mann
Michael P. Manning
Terri A. Mazur
Mark L. Parmalee
Stephen L. Saxl
Hal S. Shaftel
Toby S. Soli
George D. Sullivan
Joseph A. Vallo

Palm Beach County

Mark F. Bideau
Beth A. Black
Joseph C. Coates III
Jason M. Fedo
Tracy L. Gerber
Lorie M. Gleim
Bradford D. Kaufman, Co-Chair
Stephen A. Mendelsohn

Philadelphia

Brian T. Feeney
Steven M. Felsenstein

Phoenix

Clifford E. Neimeth
Brian J. Schulman
E. Jeffrey Walsh

San Francisco

Don Davidson
Jeff P. Palmer

Silicon Valley

David M. Lisi

Tallahassee

Barry Richard

Washington, D.C.

Timothy C. Bass

GREENBERG TRAUIG, LLP | ATTORNEYS AT LAW | WWW.GTLAW.COM

This Greenberg Traurig Newsletter is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2016 Greenberg Traurig, LLP. All rights reserved.