

Is Disgorgement a Fine, Forfeiture, Penalty or Equitable Remedy? The U.S. Supreme Court Will Decide

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Hinshaw attorney and former Assistant U.S. Attorney Ken Yeadon spoke to Judy Greenwald of *Business Insurance* about a U.S. Supreme Court Case that will decide whether disgorgement is subject to a five-year statute of limitations.

Under the law, a fine, forfeiture or penalty imposed pursuant to charges brought by the U.S. Securities and Exchange Commission is subject to a five-year statute of limitations. In *Securities and Exchange Commission v. Charles Kokesch*, the Tenth Circuit had ruled last summer that a disgorgement order was not subject to the limitations period because “disgorgement is not a penalty ... it is remedial.” However, the Eleventh Circuit had earlier ruled in a separate case that the limitations period did apply to disgorgement “because forfeiture includes disgorgement.” The U.S. Supreme Court will now resolve these contradictory rulings.

Yeadon noted that the rule within the Seventh Circuit’s jurisdiction (Illinois, Indiana, Wisconsin) is that the statute of limitation does not apply to disgorgement, because it is considered an equitable remedy as opposed to a civil penalty.

The case also has insurance implications, because in a majority of states disgorgement is insurable.

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