Restrictions on Remedies and Continued Viability of Tolling Theories in Five Year Old SEC Enforcement Actions Post-Gabelli

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I. Introduction

Various courts have considered the SEC’s ability to bring enforcement actions for different forms of relief beyond the five-year limitations period set forth in 28 U.S.C. § 2462 following the Supreme Court’s 2013 decision in Gabelli v. S.E.C., 133 S. Ct. 1216 (2013). In Gabelli, the Supreme Court determined that the discovery rule does not apply to Section 2462 for SEC fraud claims seeking civil penalties.1 Thus, civil penalties for SEC claims brought beyond five years are impermissible. While Gabelli only addressed the narrow issue of civil penalties in SEC enforcement actions, some courts have interpreted the Supreme Court’s rationale in Gabelli to support further restricting other SEC remedies in cases brought more than five years after the conduct at issue. For example, in S.E.C. v. Graham, No. 14-13562, 2016 WL 3033605 (11th Cir. May 26, 2016), the Eleventh Circuit found that Section 2462 also applies to SEC disgorgement claims, holding that disgorgement is substantially the same as “forfeiture,” which is expressly covered by Section 2462. The SEC thus could not obtain disgorgement of ill-gotten gains from the defendants in Graham, because its action was filed more than five years after the alleged violative conduct. However, most recently, in S.E.C. v. Kokesh, No. 15-2087, 2016 WL 4437585 (10th Cir. Aug. 23, 2016), the Tenth Circuit disagreed with the Eleventh Circuit’s holding and joined the majority of circuit courts that have found Section 2462 does not apply to SEC requests for disgorgement. This Article explores various courts’ decisions entered in the wake of Gabelli, how the SEC has still successfully advanced fraudulent concealment and other tolling theories, and the implications of Section 2462 for SEC actions going forward.

II. Background on Section 2462’s Five-Year Limitations Period

Neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 contains a statute of limitations period applicable to enforcement actions by the SEC.2 Rather, a general five-year statute of limitations for governmental actions has been found to apply to SEC enforcement actions that seek

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1 133 S. Ct. at 1224.
to recover “any civil fine, penalty, or forfeiture” from defendants. Specifically, Section 2462 of the U.S. Code provides:

Except 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.

Courts typically hold that a defendant must raise the statute of limitations under Section 2462 as an affirmative defense.

Courts have applied Section 2462 to SEC actions that seek to impose a “penalty” on the named defendants. To most courts that have considered the issue, a claim seeks a “penalty” when the remedy at issue is punitive rather than remedial in nature. Clearly, as in Gabelli, an SEC claim for civil monetary penalties is a “penalty” and subject to the five-year limitations period of Section 2462. However, courts apply Section 2462 to SEC actions for equitable or remedial relief (e.g. disgorgement, injunctions, declaratory relief) only where, in the court’s opinion, the relief seeks to punish the defendant rather than remedy a past wrong or protect the public from future harm.

III. The Supreme Court’s Gabelli Decision and the Discovery Rule

In Gabelli, the SEC brought an enforcement action against investment advisers for allegedly aiding and abetting violations of the Investment Advisers Act of 1940 (the “Advisers Act”). Gabelli Funds, LLC (“Gabelli”) was an investment adviser to a mutual fund formerly known as Gabelli Global Growth Fund (“GGGF”). The defendants in the SEC’s action were Gabelli’s chief operating officer and GGGF’s portfolio manager. The SEC alleged that the defendants allowed one GGGF investor to engage in market timing in the fund from 1999-2002. Although market timing is not illegal per se, the SEC alleged that the defendants did not disclose the arrangement, banned others from market timing, and made statements indicating that the practice would not be tolerated. The SEC filed its action in 2008 and sought civil penalties under Section 80b-9 of the Advisers Act, disgorgement, and injunctive relief.

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8 Jones, 476 F. Supp. 2d at 381.
9 Id. Courts have noted that the substantive requirements for obtaining an injunction—demonstrating a “cognizable danger of recurrent violation”—merges with the statute of limitations question, such that if the claim is viable, it is not subject to a statute of limitations. S.E.C. v. Wyly, 950 F. Supp. 2d 547, 558 (S.D.N.Y. 2013); S.E.C. v. Pentagon Capital Mgmt. PLC, 612 F. Supp. 2d 241, 267 (S.D.N.Y. 2009).
10 Gabelli, 133 S. Ct. at 1219.
The defendants moved to dismiss the SEC’s complaint as time-barred under the five-year statute of limitations in Section 2462. The district court agreed and dismissed the SEC’s civil penalty claim, but found that the SEC’s claims for disgorgement and injunctive relief were timely because they were not subject to Section 2462. The SEC appealed the portion of the district court’s decision dismissing its claim for civil penalties, and the Second Circuit reversed. The Second Circuit acknowledged that Section 2462 applied to the SEC’s civil penalties claim, but accepted the SEC’s argument that the discovery rule also applied because the SEC’s claim sounded in fraud. Thus, the Second Circuit ruled that the statute of limitations for the SEC’s civil penalty claim did not accrue until the claim was discovered or could have been discovered with reasonable diligence by the regulator.

The Supreme Court granted certiorari and reversed. The Supreme Court recognized “the importance of time limits on penalty actions,” in rejecting the SEC’s argument that the discovery rule should apply to Section 2462. The Court found that the SEC’s civil penalty claims accrue, and the five-year clock starts to run, when a defendant’s allegedly fraudulent conduct occurs, not when it is discovered. The Court found that “[t]his reading sets a fixed date when exposure to the specified Government enforcement efforts ends” and that it has “never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties.” The Court stated that there are “good reasons” for not extending the discovery rule to SEC enforcement actions for civil penalties, including:

• Unlike individual victims, the SEC’s “very purpose” is to “root” out fraud. The Court noted that the SEC has many “tools” available to assist in that pursuit, such as demanding that brokers and dealers submit detailed trading information, sending subpoenas for documents and witnesses, and paying monetary awards to whistleblowers.
• The civil penalties sought by the SEC go beyond compensation and seek to punish and label defendants as “wrongdoers,” justifying a fixed time period for how long a defendant is exposed to such an action.
• Determining what the SEC knew and when poses a considerable challenge for the courts, given that “agencies often have hundreds of employees, dozens of offices, and several levels of leadership,” and the SEC would likely assert a variety of privileges.

The Supreme Court noted that its decision in *Gabelli* does not address whether Section 2462 applies to SEC claims for disgorgement and injunctive relief, or whether the fraudulent concealment doctrine or other equitable tolling principles apply to Section 2462. Lower courts have since addressed these issues to varying degrees.

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11 Id. at 1220.
12 Id. at 1220 n.1.
13 See 133 S. Ct. at 1223 (quoting Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805) (stating that it would be “utterly repugnant” if actions for penalties “could be brought at any distance of time”)).
14 Id. at 1220.
15 Id. at 1222.
16 Id. at 1223.
17 Id. at 1220 n.1, 2.
IV. Relevant Penalties and Forfeiture Case Law Post-Gabelli

A. Disgorgement

Prior to Gabelli, the Ninth Circuit, First Circuit, and D.C. Circuit all declined to apply Section 2462 to disgorgement claims on the basis that disgorgement is an equitable remedy. The Second Circuit has not decided this issue, but district courts in the Second Circuit (and other circuits) have found both pre- and post-Gabelli that disgorgement, being an equitable remedy, is not subject to Section 2462. Recently, the Eleventh and Tenth Circuits each considered this issue and reached different conclusions, creating a split of authority, which may cause the Supreme Court to again review the scope of the statute.

1. The Eleventh Circuit’s Decision in S.E.C. v. Graham

In S.E.C. v. Graham, No. 14-13562, 2016 WL 3033605 (11th Cir. May 26, 2016), the Eleventh Circuit relied on Gabelli to affirm a district court’s application of Section 2462’s limitations period to the SEC’s requests for disgorgement and declaratory relief. Graham involved an SEC enforcement action filed on January 30, 2013, against individual defendants for allegedly violating federal securities laws by selling condominiums that qualified as unregistered securities from November 2004 to early January 2008. The SEC requested civil money penalties, disgorgement of all profits from the defendants’ illegal ventures, a declaration that the defendants violated federal securities laws, and a permanent injunction from violating federal securities laws in the future.

The defendants filed motions for summary judgment arguing, in part, that the statute of limitations under Section 2462 barred all of the SEC’s requested forms of relief. Citing Gabelli, the district court found that the “long-held policies and practices that underpin the Supreme Court’s unanimous opinion . . . as well as the text of the statute itself, require the conclusion that § 2462 does reach all forms of relief sought by the SEC in this case.” The district court determined that Gabelli reaffirms that “statutes of limitation . . . are indeed vital to the welfare of society,” and supports an interpretation that “[p]enalties . . . are at the heart of all forms of relief sought by the SEC in this case.” The district court noted that the SEC’s request for declaratory relief sought to “label defendants wrongdoers,” in keeping with the Supreme Court’s analysis for finding such relief to be punitive. The district court also found that the injunctive relief sought to forever bar the defendants from future violations

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18 Riordan v. S.E.C., 627 F.3d 1230, 1234 (D.C. Cir. 2010) (finding that disgorgement is not a “penalty” under Section 2462 “so long as the disgorged amount is causally related to the wrongdoing”); S.E.C. v. Tambone, 550 F.3d 106, 148 (1st Cir. 2008); S.E.C. v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993).


20 2016 WL 3033605, at *1.


22 Id. at 1309-10.
despite no evidence of any continuing harm, and the request for disgorgement “can truly be regarded as nothing more than a forfeiture.” Thus, all of the SEC’s claims for relief were time barred. The district court held that Section 2462 is jurisdictional and, because it applied, the court lacked subject matter jurisdiction. The district court dismissed the action with prejudice.

On appeal, the Eleventh Circuit declined to address whether Section 2462 is jurisdictional or an affirmative defense, because there was no issue on appeal regarding whether the defendants waived the statute of limitations or whether the SEC is entitled to equitable tolling, and it therefore made “no difference in this case.” Turning to the applicability of Section 2462 to the SEC’s requested forms of relief, the Eleventh Circuit first found that it disagreed with the district court that the SEC’s requested injunctive relief was a penalty. The court stated that “[o]ur precedent forecloses the argument that § 2462 applies to injunctions, which are equitable remedies.” Further, the court reviewed definitions of the word “penalty” and found that they all have “the common element of looking backward in time.” By contrast, injunctions “typically look forward in time.” The court found that Section 2462 did not apply to the SEC’s request for an injunction and Gabelli did not compel a different conclusion.

However, the Eleventh Circuit found Gabelli “instructive” for the SEC’s request for declaratory relief and agreed with the district court that it is “backward-looking and thus would operate as a penalty under § 2462.” The court found that the declaratory relief at issue was “designed to redress previous infractions” and that “[a] public declaration that the defendants violated the law does little other than label the defendants as wrongdoers.”

Further, the Eleventh Circuit agreed that disgorgement and forfeiture are “effectively synonyms” for purposes of Section 2462. The court reviewed definitions for the word “forfeiture,” which is expressly included in Section 2462, and found that they “illustrate that a forfeiture occurs when a person is forced to turn over money or property because of a crime or wrongdoing.” The court found that there is “no meaningful difference” in the definition of disgorgement and the Supreme Court has used the two terms interchangeably. At a minimum, the court found that disgorgement “can be considered a subset of forfeiture.” Accordingly, the Eleventh Circuit found that Section 2462 applies to disgorgement under either theory. Because the court found that disgorgement is a “forfeiture” under Section 2462, it did not address the defendants’ alternative argument that disgorgement is a “penalty.”

2. The Tenth Circuit’s Decision in S.E.C. v. Kokesh

In S.E.C. v. Kokesh, No. 15-2087, 2016 WL 4437585 (10th Cir. Aug. 23, 2016), the Tenth Circuit disagreed with the Eleventh Circuit’s holding and joined the majority of circuit courts that have found Section 2462 does not apply to SEC requests for disgorgement. Kokesh involved an SEC enforcement action against an individual defendant for misappropriating funds from four SEC-registered business development companies in violation of federal securities laws. Following a jury trial,
the district court entered a judgment permanently enjoining the defendant from violating certain provisions of federal securities laws, ordering disgorgement of $34.9 million plus pre-judgment interest of $18.1 million, and imposing a civil penalty of $2.4 million.27 The district court found that the disgorgement award “reasonably approximates the ill-gotten gains causally connected to Defendant’s violations” and that an injunction was warranted because “there is a reasonable and substantial likelihood that Defendant will again violate the securities laws.”28 The defendant appealed, arguing that the disgorgement and injunction remedies were barred by Section 2462.

With regard to disgorgement, the Tenth Circuit first addressed the defendant’s argument that disgorgement constitutes a “penalty” under Section 2462. The court found that, “[p]roperly applied, the disgorgement remedy does not inflict punishment” because it “just leaves the wrongdoer in the position he would have occupied had there been no misconduct.”29 The court recognized that disgorgement does serve a “deterrent purpose, but it does so only by depriving the wrongdoer of the benefits of wrongdoing.” Further, the court found that there is “nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly diverted to others as well as himself.”30 Although the defendant argued that his age and insolvency rendered him incapable of restoring the gains he received, the court found that “the likelihood of the government’s recovery is irrelevant to determining whether his disgorgement order is punitive or remedial because it does not change the nature of the sanction.”

The Tenth Circuit next addressed the defendant’s argument that disgorgement is a “forfeiture” under Section 2462. The court recognized that the Eleventh Circuit recently held in Graham that disgorgement is a forfeiture under Section 2462 due to their similar definitions and concepts. However, the Tenth Circuit disagreed and found that the word forfeiture in Section 2462 must be read in the context of government causes of action. The court found that government forfeiture actions “date back to the early days of the Republic,” have a narrow focus, and are used to “take tangible property used in criminal activity.” In such actions, “[t]he owner of the seized property could be completely innocent of any wrongdoing, and the value of the property taken have no necessary relation to any loss to others or gain to the owner.” To illustrate its point, the court cited a “modern-day example” from a 1978 Supreme Court decision in which the Court affirmed the forfeiture of a yacht from an innocent owner after the government found one marijuana cigarette on the yacht while it was under the lessee’s control.31 Accordingly, the Tenth Circuit found that Congress contemplated the meaning of forfeiture in this historical sense when it linked the term forfeiture to the “undoubtedly punitive” actions for civil penalties and fines in Section 2462, and that the equitable remedy of disgorgement “does not fit in that company.”32 Moreover, although some federal forfeiture statutes have been expanded in recent years to include disgorgement-type remedies, such as the 1978 amendment to the Comprehensive Drug Abuse Prevention and Control Act and the 1984 amendment to the Racketeer Influenced and Corrupt Organizations Act, the Tenth Circuit noted that Congress enacted Section 2462 in 1948 and its words

28 Id. at *2.
29 Id. at *4.
30 Id. at *5.
31 Id. (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).
32 Id. at *6.
must be given their common meaning at that time. Further, the court reiterated the importance of construing Section 2462 in the government’s favor to avoid a limitations bar.

3. District Court Decisions Following Graham
Prior to being affirmed by the Eleventh Circuit, some courts referred to the district court’s decision in Graham as an “outlier” or unpersuasive due to the great weight of authority finding that Section 2462 does not apply to disgorgement. At least one district court has considered the issue following the Eleventh Circuit’s Graham decision. In S.E.C. v. Saltsman, No. 07-CV-4370 (NGG) (RML), 2016 WL 4136829, at *24 (E.D.N.Y. Aug. 2, 2016), the District Court for the Eastern District of New York found that disgorgement is not a fine and noted that the Second Circuit has already determined disgorgement is not a penalty. Although it was a “harder question whether disgorgement is a forfeiture” under Section 2462, the district court sided with the majority of circuits that have found it is not. The Saltsman court provided two reasons for its decision, which are similar to those relied upon by the Tenth Circuit in Kokesh: (1) disgorgement and forfeiture are independent remedies with important procedural and substantive differences; and (2) disgorgement, unlike forfeiture, fines, or penalties, is not punitive.

Although the Graham decision does not appear to be gaining much support in the courts, the consequences of extending Section 2462 to disgorgement claims could be significant to the SEC, considering that courts have discretion to impose a disgorgement award jointly and severally on defendants where there is a “scheme to defraud” or evidence of collaboration. The SEC cannot seek joint and several liability on civil penalty claims. Further, recently in an SEC administrative proceeding, In re Grossman & Adams, Case No. 3-15617, one of the respondents requested that the SEC overturn a disgorgement award as time barred based on the Eleventh Circuit’s decision in Graham, opening the issue of whether the SEC may similarly be restricted in its administrative forum.

B. Injunctive relief

Courts before and after Gabelli tend to find that the SEC’s requests for injunctive relief are not “penalties” under Section 2462. Courts often consider whether there is a likelihood of recurrence when deciding whether an injunction constitutes a “penalty” under Section 2462. When a defendant has engaged in a pattern of securities law violations, courts are more likely to find that injunctive relief is warranted to prevent future harm, is not a penalty, and therefore is not subject to the Section 2462 limitations period. If the defendant is not a “repeat offender,” however, the SEC cannot rely solely on the defendant’s past conduct, but must also address his present fitness in order to establish that an injunction is remedial and not punitive. Courts have noted that the substantive requirement for obtaining an injunction—demonstrating a “cognizable danger of recurrent

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34 Saltsman, 2016 WL 4136829, at *25.
35 See Pentagon Capital Mgmt. PLC, 725 F.3d at 288 (imposing $38,416,500 disgorgement award jointly and severally).
36 Power, 525 F. Supp. 2d at 426-27.
37 Jones, 476 F. Supp. 2d at 384.
38 Id.
violation”—merges with the statute of limitations question, such that if the claim is viable, it is not subject to a statute of limitations.\textsuperscript{39}

For example, in \textit{Kokesh}, the Tenth Circuit found that the permanent injunction at issue was simply “an order to obey the law” and not a penalty.\textsuperscript{40} Even absent allegations of recent misconduct, the Tenth Circuit found that the district court did not err in holding that the defendant’s work history, lifestyle, and occupation would present opportunities for future violations of the securities laws.

\section*{V. Possible Section 2462 Tolling Post-Gabelli}

Although the SEC cannot invoke the discovery rule under \textit{Gabelli}, it still has options available to toll the five-year statute of limitations. First, the language of Section 2462 may toll the limitations period during times when a defendant is not physically present in the United States. Second, \textit{Gabelli} does not prohibit the SEC from seeking to toll the statute of limitations under the fraudulent concealment or continuing violation doctrines.

\subsection*{A. Tolling Due to a Defendant’s Lack of Presence in the United States}

The last clause of Section 2462 provides that an action cannot be “entertained unless commenced within five years from the date when the claim first accrued if, within the same time period, the offender or the property is found within the United States in order that proper service may be made thereon.” 28 U.S.C. § 2462 (emphasis added). Shortly before \textit{Gabelli} was decided, two district courts found that this language from Section 2462 requires a defendant’s physical presence in the United States in order for the limitations period to run.

First, in \textit{SEC v. Sharef}, No. 11-Civ-9073 (SAS), 2012 WL 7656944 (S.D.N.Y. Nov. 13, 2012), the district court found that the defendant could not show that the five-year limitations period had started to run when the defendant previously argued (for personal jurisdiction purposes) that he had not traveled to the United States or otherwise even established minimum contacts here. The court noted that “the statutory language is unambiguous on its face” and that “statutes of limitations sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government.” The court rejected the defendant’s argument that the statute should run if he is subject to service in another country, because that is “plainly not how the statute reads.” Further, the court found that the tolling provision is not “nonsensical” as it “prevents a defendant from evading prosecution for violations of United States laws by fleeing to another country, or from ‘riding out’ a limitations period in a foreign jurisdiction where he is difficult to locate and serve.”

Similarly, in \textit{S.E.C. v. Straub}, 921 F. Supp. 2d 244 (S.D.N.Y. 2013), the district court found on a motion to dismiss that Section 2462 requires a defendant’s physical presence in the United States. Because the foreign defendants in \textit{Straub} were not “found” in the United States at any point during


\textsuperscript{40} \textit{Kokesh}, 2016 WL 4437585, at *3.
the limitations period, the court decided that the statute of limitations had not yet run. The court noted that, although Section 2462 was enacted prior to the “possibilities opened by worldwide service of process,” Congress has maintained the statutory carve-out for defendants not found within the United States, and joining the Hague Convention did not somehow amend Section 2462.\footnote{Straub, 921 F. Supp. at 260-61.}

Because these two cases were decided before \textit{Gabelli}, it is possible that courts may decide this issue differently in the future. However, in \textit{Gabelli}, the Supreme Court partly based its decision on the fact that Section 2462 does not contain any express language indicating that the discovery rule should apply.\footnote{Gabelli, 133 S. Ct. at 1224.} By contrast, Section 2462 does contain the express language requiring that the defendant “is found within the United States,” which may lead to the “strict construction” applied in \textit{Sharef}.

\textbf{B. Tolling Under the Fraudulent Concealment Doctrine}

Courts have held that Section 2462’s five-year limitations period may be tolled if: (1) the defendants concealed the cause of action; (2) the SEC did not discover the cause of action until some point within five years of commencing the action; and (3) the SEC’s continuing ignorance was not attributable to lack of diligence on its part.\footnote{Power, 525 F. Supp. at 424.} Because \textit{Gabelli} did not discuss the fraudulent concealment doctrine, courts continue to allow the SEC to toll the limitations period upon satisfying the above three requirements.\footnote{S.E.C. v. Geswein, 2 F. Supp. 3d 1074, 1084 (N.D. Ohio 2014).}

However, at least one district court has found that, while the SEC can still invoke tolling based on fraudulent concealment, this traditional analysis for fraudulent concealment may “run afoul” of \textit{Gabelli} to the extent it encompasses the discovery rule.\footnote{S.E.C. v. Wyly, 950 F. Supp. 2d 547 (S.D.N.Y. 2013).} In \textit{S.E.C. v. Wyly}, 950 F. Supp. 2d 547 (S.D.N.Y. 2013), the district court limited the SEC’s use of tolling under fraudulent concealment to situations where defendants “take steps beyond the ‘self-concealing’ fraudulent acts to hinder the SEC’s investigation and prosecution of the fraud,” such as taking “active steps to prevent the plaintiff from suing in time, such as promising not to plead the statute of limitations or spoliating evidence.”\footnote{Id. at 555.} The SEC was required to cite acts sufficiently separate from the substantive fraud at issue.\footnote{Id. at 557.} In that case, the SEC failed to meet this standard because it only cited the same disclaimers of beneficial ownership of securities and use of offshore trusts that formed the basis for the claims in the complaint.\footnote{Id. at 556.}

\textbf{C. Tolling Under the Continuing Violations Doctrine}

Another theory for the SEC to advance is the continuing violation doctrine. The continuing violation doctrine tolls the statute of limitations for “a claim that otherwise would be time-barred where the violation giving rise to the claim continues to occur within the limitations period.”\footnote{S.E.C. v. Strebinger, 114 F. Supp. 3d 1321, 1327-28 (N.D. Ga. 2015).} Although

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some courts have questioned whether the continuing violation doctrine should apply to SEC enforcement actions, the other courts have continued to find post-

For example, in S.E.C. v. Strebinger, 114 F. Supp. 3d 1321 (N.D. Ga. 2015), the SEC brought securities fraud claims against the defendants for allegedly operating a “pump-and-dump” scheme. The defendants argued that the SEC’s claims were time barred because all of the alleged wrongful acts occurred before November 3, 2009 (the five-year cut-off for the SEC’s action, which was brought on November 3, 2014). The court disagreed because the defendants’ “individual acts, standing alone, do not form the basis of the SEC’s claims . . . . Instead, the SEC’s claims are based on one continuous fraudulent scheme that encompasses several individual acts . . . . the cumulative effect of all the acts performed by Mr. Strebinger and the other defendants in furtherance of their fraudulent scheme.” The SEC alleged in its complaint that the pump-and-dump scheme continued through April of 2010, ending once certain defendants sold all of their stock. The court found that the SEC’s complaint, which was filed within five years of April 2010, was therefore timely.

Conclusion

There has been considerable fallout for the SEC since the Supreme Court’s Gabelli decision these past few years. So far, most courts only strike the SEC’s requests for penalties, not disgorgement or injunctive relief, when the SEC brings claims five years after the alleged fraudulent conduct occurred. It does seem, however, the SEC should be forced to bring its actions in a timely manner or risk losing more remedies. The government has a large staff available to investigate possible securities laws violations, as noted in Gabelli, and individual defendants in particular should be able to rely upon a lack of SEC actions five years hence in conducting their personal, business and financial affairs. Allowing the SEC to rely on tolling theories defeats that policy consideration. Given the split between the Tenth and Eleventh Circuits following Gabelli, the Supreme Court may soon again discuss the scope and availability of Section 2462 to defendants when the SEC waits long periods to pursue its claims.

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52 114 F. Supp. 3d at 1326-27.
53 Id. at 1327.
54 Id. at 1328.
55 Id.