

Update: Eleventh Circuit Affirms Dismissal of Claims for Declaratory Relief and Disgorgement in *SEC v. Graham*

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We [previously wrote](#) about a decision out of the U.S. District Court for the Southern District of Florida in *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014), which involved claims by the SEC in connection with an alleged \$300 million real estate Ponzi scheme. Echoing the Supreme Court's reaffirmation in *SEC v. Gabelli*, 133 S. Ct. 1216 (2013), of the importance of statutes of limitation "to the welfare of society," the district court had held that the five-year statute of limitations in 28 U.S.C. § 2462 is jurisdictional rather than a "claim-processing rule" and that the limitations period provided by § 2462 applies not only to civil penalties but also to equitable relief including injunctions, declaratory relief, and disgorgement. On May 26, 2016, the Eleventh Circuit affirmed in part, reversed in part, and remanded this decision for further proceedings.

The Eleventh Circuit disagreed with the district court's characterization of injunctive relief as "nothing short of a penalty" and therefore subject to the § 2462 time limit on actions "for the enforcement of any civil fine, penalty, or forfeiture." Noting that it was bound by its previous holding that "[t]he plain language of section 2462 does not apply to equitable remedies," *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997), the court additionally explained that injunctions are not "penalties" because they are forward-looking rather than backward-looking relief.

Nevertheless, the court affirmed dismissal of the SEC's claims for declaratory relief and disgorgement. The court reasoned that unlike injunctive relief, declaratory relief is backward-looking and "operate[s] as a penalty under § 2462" because "[a] public declaration that the defendants violated the law does little other than label the defendants as wrongdoers." With respect to disgorgement, the court held that there is "no meaningful difference" between the plain-language definitions of "forfeiture" as used in § 2462 and "disgorgement," and the court rejected the SEC's distinction of the terms as "technical definitions" that Congress cannot be assumed to have meant to apply in the absence of clear indication in the statute. Having determined whether § 2462 applies to injunctive relief, declaratory relief, and disgorgement, the court declined to reach the issue of whether the limitations period is jurisdictional in nature.

Although the court agreed with the SEC's position on injunctive relief, this holding is likely to be of little comfort to the agency. While reasoning that it would be "premature to review the precise nature

of” an injunction the district court had not yet issued, the court noted that the injunction requested in the *Graham* complaint was the type of “obey-the-law” injunction—that is, an injunction prohibiting “the defendants from violating federal securities laws”—it has consistently held to be unenforceable. While the court reasoned that the issue was appropriate for consideration because it “is at least possible that the SEC could seek injunctive relief that would be specific and narrow enough that the parties would be afforded sufficient warning to conform their conduct,” it offered no opinion on what enforceable injunctive relief might look like.

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