July 16, 2018

SEC v. *Cohen*—New York Federal Trial Court Holds Supreme Court's *Kokesh* Decision Applies to SEC FCPA Case, Including Demand for Injunctive Relief

The Court Concludes That SEC Demands for Injunctions Operate as Penalties for Purposes of Applicable Statute of Limitations

SUMMARY

On July 12, 2018, the United States District Court for the Eastern District of New York dismissed as untimely a lawsuit by the Securities and Exchange Commission ("SEC") against two former employees of Och-Ziff Capital Management Group LLC ("Och-Ziff"). The lawsuit, *SEC* v. *Cohen*, alleged that, between 2007 and 2012, the defendants participated in a scheme to make improper payments to government officials in Libya, the Democratic Republic of the Congo, and other African countries, to steer business to Och-Ziff, in violation of the Foreign Corrupt Practices Act ("FCPA") and the Investment Advisers Act of 1940 ("Advisers Act").[1] The SEC's action sought monetary penalties, disgorgement of ill-gotten gains, and injunctive relief barring the defendants from committing future violations of the FCPA and Advisers Act. The court held that, under the U.S. Supreme Court's decision in *SEC* v. *Kokesh*, the SEC's claims were barred by the applicable five-year statute of limitations set forth in 28 U.S.C. § 2462.[2] Although *Kokesh* addressed disgorgement and not demands for injunctive relief, the *Cohen* court held that the reasoning of *Kokesh* supported a conclusion that the demand for injunctive relief was similarly time-barred, because the requested injunction would operate, at least in part, as a penalty.

The decision represents a departure from the Eighth Circuit's post-*Kokesh* decision in *SEC* v. *Collyard*,[3] as well as a number of pre-*Kokesh* decisions holding that injunctions are not penalties for purposes of Section 2462, and could have an impact on the SEC's charging decisions in FCPA cases.

BACKGROUND

No specific statute of limitations expressly applies to claims brought by the SEC under the FCPA or the Advisers Act. In *Cohen*, the parties agreed that, to the extent the SEC's claims are subject to any statute of limitations, they are covered by 28 U.S.C. § 2462, which provides a five-year statute of limitations for "action[s], suit[s], or proceeding[s] for the enforcement of any civil fine, penalty, or forfeiture," unless an act of Congress provides otherwise. Prior to the U.S. Supreme Court's decision in *Kokesh*, there had been uncertainty as to whether the statute of limitations applied to suits for disgorgement—i.e., whether disgorgement constituted a "civil fine, penalty, or forfeiture"—and the SEC had routinely pursued such actions outside the five-year limitations period. In *Kokesh*, the Supreme Court determined that an SEC claim for disgorgement was a penalty for purposes of Section 2462, based primarily on the following three reasons: (1) the SEC typically seeks disgorgement for offenses against the United States, rather than private parties; (2) disgorgement typically is sought to deter violations, which the Supreme Court characterized as a "punitive" purpose; and (3) SEC disgorgement usually is not compensatory, in that the monies disgorged typically are not used to compensate victims, but rather are paid to the U.S. treasury.[4] *Kokesh* did not decide whether injunctive relief under the FCPA or Advisers Act likewise constitutes a "penalty" subject to Section 2462.

THE *COHEN* DECISION

The SEC's complaint alleged that the defendants engaged in a series of improper payments in Africa, beginning with the payment of kickbacks to Libyan officials in 2007 for the purpose of obtaining an investment by the Libyan government in Och-Ziff funds in 2007, and a payment made to Libyan officials in 2008 to obtain support for a real estate project.[5] Those Libyan-related transactions were the subject of an SEC investigation initiated in 2012.[6] In connection with that investigation, the SEC and defendant Cohen executed three tolling agreements that tolled the applicable statute of limitations for any action "arising out of the investigation."[7] The SEC later expanded its investigation to encompass other Och-Ziff dealings in Africa, including conduct in the Democratic Republic of the Congo, Congo-Brazzaville, and South Africa that is also discussed in the complaint.[8]

The defendants moved to dismiss the SEC's complaint in full, arguing that *Kokesh* rendered the SEC's lawsuit untimely, as it was filed more than five years after the claims accrued. The court agreed and dismissed the SEC's complaint.

In finding the SEC's claims to be untimely, the court first considered whether the SEC's claims for civil penalties were time-barred, and concluded that even the most recent alleged bribe occurred more than five years before the SEC filed suit in 2017, and that, therefore, the civil penalty claims were barred by the limitations period provided by Section 2462.[9]

The court further applied general principles of contractual interpretation to find that the three tolling agreements executed between defendant Cohen and the SEC did not cover the SEC's claims and thus could not render the claims timely. Specifically, the court found that those agreements were limited to actions "arising out of" an investigation relating to the Libyan transactions and did not include claims arising out of separate investigations into Och-Ziff's conduct in sub-Saharan Africa, notwithstanding that those investigations arose out of the original Libya investigation.[10] The court noted that the tolling agreements executed by Cohen did not contain the kind of broad, open-ended language that could have evinced an agreement to toll any claims the SEC might bring.[11] The court further found that the tolling agreements were insufficient to render even the Libya transaction-related claims timely, because those claims accrued outside of the limitations period even accounting for 21 months of tolling under the agreements.[12]

The court then turned to the SEC's claims for disgorgement of allegedly ill-gotten gains, and found those claims to be untimely under a straightforward application of *Kokesh.* The court rejected the SEC's argument that its disgorgement claims had "accrued" when defendants received ill-gotten gains from the alleged bribery scheme, rather than when the alleged bribes had been paid.[13] Additionally, the court concluded that the claims would be barred even if the SEC's theory were correct, because the SEC had failed to allege that the defendants had received any ill-gotten gains.[14] The court rejected the SEC's request for discovery on the issue of whether defendants received ill-gotten gains within the limitations period, concluding that to permit that request would be to "entertain[]" the claims in violation of the terms of Section 2462.[15]

Finally, the court considered whether Section 2462 also barred the SEC's demand for injunctive relief prohibiting defendants from further violations of the securities laws. Although the court acknowledged that a number of other courts have held that injunctions are not penalties for purposes of Section 2462, either because injunctions are inherently forward-looking or because they are equitable remedies, the court determined that the Supreme Court's reasoning in *Kokesh* required that claims for injunctive relief be treated as penalties under Section 2462. *First*, the court concluded that, like disgorgement, an injunction seeks to redress wrongs to the public, rather than any wrong to an individual.[16] The court observed that the claims alleged in the SEC's complaint were described as "committed against the United States" and that there is no private right of action under the FCPA.[17] *Second*, the court determined that the requested injunction was at least partially punitive in nature, given that it imposed no affirmative duties on the defendants (requiring them only to refrain from further violations of the law). Its purpose, therefore, appeared to be at least partially to label defendants as lawbreakers and "stigmatize them in the eyes of the public"—a purpose the court characterized as punitive.[18]

The court acknowledged that its conclusion was in tension with the Eighth Circuit's recent decision in *SEC* v. *Collyard*, in which the Eighth Circuit held that the SEC's requested injunction was not a penalty

under Section 2462 because it "(1) requires only obedience with the law, (2) is based on evidence of a likelihood to violate that law, and (3) seeks to protect the public prospectively from [the defendant's] harmful conduct rather than punish [him]."[19] The court respectfully disagreed with the Eighth Circuit's opinion to the extent that the Eighth Circuit suggested that Section 2462 was not applicable to a remedy if the "remedy's penal effect is only incidental to its remedial effect," finding that conclusion to be at odds with *Kokesh*.[20]

IMPLICATIONS

The *Cohen* decision represents an expansion of the application of *Kokesh*, and, if it withstands appeal, might portend a growing split among the federal courts as to whether the logic of *Kokesh* extends to actions for injunctive relief—a dispute that ultimately might need to be resolved by the U.S. Supreme Court. In the meantime, it remains to be seen whether and to what extent these decisions will impact the SEC's determination to pursue injunctive relief where its claims potentially fall outside of the five-year limitations period in Section 2462. The impact of these decisions on the SEC's investigative and charging decisions is likely to be particularly acute in FCPA cases, in which foreign evidence is often critical to making a charging decision but typically time-consuming and cumbersome to obtain. (Notably, unlike the DOJ, the SEC has no ability to obtain court-ordered tolling of the statute of limitations while requests for foreign evidence are pending.)

The *Cohen* case also serves as a reminder that all parties—in addition to carefully considering whether it is in their strategic interest to enter into such agreements in the first place—should carefully review the specific language of tolling agreements to ensure that the effect of the language reflects the parties' actual agreement, given the likelihood that courts will parse the language of those agreements as carefully as any other contract.

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ENDNOTES

[1] *SEC* v. *Cohen*, No. 17-cv-00430 (E.D.N.Y. July 12, 2018).

[2] *SEC* v. *Kokesh*, 137 S. Ct. 1635 (2017).

[3] *SEC* v. *Collyard*, 861 F.3d 760 (8th Cir. 2017).

[4] *Kokesh*, 127 S. Ct. at 1643-45.

[5] *Cohen*, *supra*, at 3-4.

[6] *Id.* at 20-23.

[7] *Id.* at 20.

[8] *Id.* at 21.

[9] *Id.* at 17-18.

[10] *Id.* at 20-23.

[11] *Id.* at 23.

[12] *Id.* at 21.

[13] *Id.* at 24.

[14] *Id.* at 24-25.

[15] *Id.* at 18.

[16] *Id.* at 29.

[17] *Id.*

[18] *Id.* at 29-30.

[19] *Id.* at 30-31.

[20] *Id.*

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