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Can I keep more of my ill-gotten gains?

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The recent US Supreme Court ruling in *Kokesh v SEC* concludes, once and for all, that the SEC disgorgement orders applied in many federal securities cases do constitute a penalty, are not simply remedial and are therefore subject to the five-year statute of limitations. Rik Workman at Forensic Risk Alliance explores the potential consequences of this ruling for FCPA cases.

Disgorgement settlements will become smaller. Disgorgement has been the primary enforcement tool in many FCPA enforcement actions by the US Securities and Exchange Commission (SEC) over these past few years, with most of the top 10 disgorgements being well over US$100 million. Looking more closely, many disgorgement calculations seem to encompass more than five years of illegal profits. Had this *Kokesh* ruling been in place at the time, many early years would fall away, resulting in smaller disgorgement numbers. Disgorgement for Siemens was US$350 million, KBR paid US$177 million in disgorgement, Alcoa paid US$161 million and Total US$153 million, yet in each case the conduct went back beyond five years. We should also bear in mind that other enforcement agencies, and even the SEC itself through civil penalties, may pick up the slack to compensate for smaller disgorgements. Furthermore, one of the key drivers on the overall size of the penalty package these days is affordability and the ability to pay, and while an enforcement agency may now claim that with reduced disgorgement penalties, corporations' affordability arguments may not be as justified, in genuine circumstances this is likely to continue to be an argument put forward by defendants.

Yes the pace of SEC investigations is likely to be quicker, and yes, very historic misconduct may no longer be caught, but will defendants have, and crucially apply, more of this purported leverage? This ruling concerned an individual as the petitioner, not a corporation. History tells us that individuals are more likely to fight enforce-

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ment actions and not necessarily cooperate. On the contrary, the trend has been for corporations to cooperate with the SEC (with the Department of Justice frequently alongside), given the very real benefits available to them; financial and otherwise. Should a corporation decide to delay an investigation or limit a tolling period, will it still be judged to be cooperating? Is one possible consequence of a failure to cooperate and seek the best deal that its officers are perceived to have failed to act in the best interests of the shareholders, a fiduciary duty, and are therefore subject to shareholder derivative lawsuits? The consequences of that might be equally severe, financial and otherwise.

Another interesting comment within the ruling is that "SEC disgorgement sometimes exceeds the profits gained as a result of the violation." Here the court makes specific reference to disgorgement sometimes being ordered "without consideration of a defendant's expenses that reduced the amount of illegal profits." Certain costs can be deducted in determining the amount of disgorgement, and denial of such deductions makes the defendant liable in excess of the net gain actually "earned". Disgorgement cases over the years have always allowed a degree of cost deductibility within the calculation, where those marginal costs relate to the production of the illegal revenues. This ruling reinforces the ongoing eligibility of the deduction of appropriate costs in ensuring that the defendant is not punished by being worse off, but only that the status quo is restored.

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