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WILL FIFTY YEARS OF THE SEC'S DISGORGEMENT REMEDY BE ABOLISHED?

Roberta S. Karmel*

ABSTRACT

SEC v. Texas Gulf Sulphur was the first case holding that equitable relief, and specifically disgorgement, can be obtained by the SEC in a federal court action for an injunction against insider trading. Such ancillary equitable relief has been obtained in numerous cases during the fifty years since Texas Gulf was decided. But, the continued availability of the remedy of disgorgement has been thrown into question by the recent Supreme Court case of Kokesh v. SEC, in which the Supreme Court held disgorgement to be a penalty for purposes of the federal statute of limitations. The Court identified, but expressly reserved for the future, issues as to “whether courts possess authority to order disgorgement in SEC enforcement proceedings or . . . have properly applied disgorgement principles in this context.”¹ In this essay, I will address these issues left open in Kokesh and argue that in SEC injunctive actions, the federal courts have authority to order disgorgement to prevent unjust enrichment by wrongdoers and to deter future violations of the law.

SEC v. Texas Gulf Sulphur Co.² (hereinafter *Texas Gulf*) is famous for endorsing the claim of the Securities and Exchange Commission (SEC or Commission) that insider trading is illegal under § 10(b)(5)³ and Rule 10b-5⁴ of the Securities Exchange Act of 1934 (Exchange Act). *Texas Gulf* is also important for holding that equitable relief, and specifically disgorgement, can be obtained by the SEC in a federal court action for an injunction against insider trading.⁵ Such ancillary equitable relief has been obtained in numerous cases during the fifty years since *Texas Gulf* was decided, but the continued availability of the

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1. Kokesh v. SEC, 137 S. Ct. 1635, 1642 n.3 (2017).
2. SEC v. Tex. Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301, 1307–08 (2d Cir. 1971).
3. See 15 U.S.C. § 78j(b) (2012).
4. See 17 C.F.R. § 240.10b-5 (2017).
5. *Texas Gulf*, 312 F. Supp. at 91–92.

remedy of disgorgement has been thrown into question by the recent Supreme Court case of *Kokesh v. SEC*.⁶

In *Kokesh*, the SEC argued that, as an equitable remedy, disgorgement is not subject to the five-year statute of limitations period for any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.”⁷ The Supreme Court held disgorgement to be a penalty for purposes of this statute of limitations, implicitly calling into question whether, for other purposes, disgorgement may be considered to be the equitable remedy that *Texas Gulf* and its progeny held to be available in SEC enforcement actions. *Kokesh* identified, but expressly reserved for the future, issues as to “whether courts possess authority to order disgorgement in SEC enforcement proceedings or . . . have properly applied disgorgement principles in this context.”⁸ In this essay, I will address these issues left open in *Kokesh* and argue that in SEC injunctive actions, the federal courts have authority to order disgorgement to both prevent unjust enrichment by wrongdoers and to deter future violations of the law.

Prior to *Texas Gulf*, the SEC obtained equitable relief in the form of the appointment of a receiver in several cases. In *Los Angeles Trust Deed & Mortgage Exchange v. SEC*,⁹ the SEC alleged that defendant corporations and others had issued and sold securities in violation of the antifraud provisions of the Securities Act of 1933 and the Exchange Act. The Commission sought an injunction against, and the appointment of a receiver for, the insolvent defendants.¹⁰ The district court granted such relief against certain defendants who appealed.¹¹ The circuit court, calling the case one of “near first impression,” held that the SEC had the power and the authority to seek a receiver, and the district court, as a court of equity, had the power to appoint a receiver.¹² Other cases decided in the same year or prior to *Texas Gulf* upheld the appointment of a receiver as an appropriate exercise of a court’s equity power.¹³

With the consent of the defendants, the SEC obtained disgorgement in two insider trading cases in the 1940s.¹⁴ Then in *Cady, Roberts & Co.*,¹⁵ the SEC articulated a rationale for a ban on insider trading under the antifraud provisions of the Exchange Act. The legitimacy of the SEC’s

6. *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017).

7. *See Kokesh*, 137 S. Ct. at 1639 (citing 28 U.S.C. § 2462 (2012)).

8. *Id.* at 1642 n.3.

9. L.A. Tr. Deed & Mortg. Exch. v. SEC, 285 F.2d 162, 164–65 (9th Cir. 1960).

10. *Id.* at 165.

11. L.A. Tr. Deed & Mortg. Exch. v. SEC, 186 F. Supp. 830, 890 (S.D. Cal. 1960), *modified*, 285 F.2d 162 (9th Cir. 1960).

12. L.A. Tr. Deed & Mortg. Exch., 285 F.2d at 181–82.

13. *See, e.g.*, SEC v. Bartlett, 422 F.2d 475, 478–81 (8th Cir. 1970); SEC v. Bowler, 427 F.2d 190, 197–98 (4th Cir. 1970); SEC v. S & P Nat’l Corp., 360 F.2d 741, 750–51 (2d Cir. 1966); SEC v. Keller Corp., 323 F.2d 397, 402–03 (7th Cir. 1963).

14. *See* SEC Release Notice, *In re Ward La France Truck Corp.*, Release No. 34-3445 (May 20, 1943), 1943 WL 29807, at *4.

15. SEC Release Notice, *In re Cady, Roberts & Co.*, Release No. 34-6668, 1961 WL 60638 (Nov. 8, 1961), at *1–3.

authority to first obtain an injunction against officers and directors who traded on undisclosed material inside information and then to obtain disgorgement of their profits was not litigated in a federal court, however, until *Texas Gulf*.

In the SEC's complaint in *Texas Gulf*, the Commission alleged that individual defendants, who were officers or employees of Texas Gulf, purchased its common stock or calls on their stock on the basis of material inside information about a valuable copper strike in land owned by Texas Gulf in Canada without disclosing that information to the sellers. Further, the complaint alleged that Texas Gulf employees divulged material inside information to others and stated that these tippees then purchased Texas Gulf stock or calls without disclosing information to their sellers, and accepted stock options from Texas Gulf with knowledge of material inside information concealed from the Texas Gulf board of directors.¹⁶ After a four week trial, U.S. District Court Judge Bonsal dismissed the SEC's complaint against the issuer, which had published misleading information about the copper strike, and ten individual defendants. However, the judge found that two other individual defendants purchased Texas Gulf stock on the basis of material inside information.¹⁷ On the Commission's appeal, an en banc panel of the Second Circuit issued six separate opinions, with only two of nine judges dissenting.¹⁸ Although these opinions addressed whether the conduct of the defendants violated the antifraud provisions, the question of appropriate remedies was broached only indirectly because the parties had agreed to bifurcate the case into: (1) whether violations occurred and (2) if so, what remedies were appropriate.

On remand for consideration of remedies, Judge Bonsal enjoined only two of the defendants, but deprived four of the defendants (whether enjoined or not) of their profits and the profits of their tippees.¹⁹ He held that "the court may, on the basis of Section 27 [of the Exchange Act], fashion an appropriate remedy to effectuate the purpose of the 1934 Act, and to deter future violations of [the antifraud provisions]."²⁰ The SEC had sought rescission and restitution, and the court ordered the defendants to pay "the difference between the mean average price of [Texas Gulf] common stock on the New York Stock Exchange on April 17, 1964," the day the news regarding the copper find was publicly announced, and the purchase price of their shares, plus the cost of interest.²¹ These payments were ordered to be made to Texas Gulf "in escrow in an interest-bearing account for a period of three or more years, subject

16. See *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262, 267 (S.D.N.Y. 1966), *aff'd in part, rev'd in part*, 401 F.2d 833 (2d Cir. 1968).

17. *Id.* at 296.

18. See generally *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968).

19. *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90-92 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301, 1307-08 (2d Cir. 1971).

20. *Texas Gulf*, 312 F. Supp. at 92.

21. *Id.* at 93.

to disposition in such manner as the court might direct upon application by the SEC or other interested person or on the court's own motion."²² "At the end of the period, any money remaining undisposed of would become property of [Texas Gulf]."²³

The defendants appealed the disgorgement order, contending that the SEC did not have authority to seek an injunction and whatever ancillary relief was necessary to enforce the injunction.²⁴ They further contended that the disgorgement order was a penalty that was only appropriate in a criminal case.²⁵ But, the Second Circuit rejected both arguments.²⁶ It upheld the lower court's order of restitution as a proper exercise of the court's general equity powers to afford complete relief found in § 27 of the Exchange Act.²⁷ However, the court also found that "the SEC may seek other than injunctive relief in order to effectuate the purposes of the [Exchange] Act, so long as such relief is remedial relief and is not a penalty assessment."²⁸

The general rationale utilized by the SEC and the courts in ordering equitable relief such as disgorgement was that effective enforcement of the federal securities laws required that violations be made unprofitable. "The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."²⁹

Although the SEC does not have explicit statutory authority to seek equitable relief in enforcement actions, § 27 of the Exchange Act gives the U.S. district courts "exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."³⁰ In 1990, Congress expressly authorized the SEC to seek disgorgement in administrative proceedings, including cease and desist cases, in the Remedies Act.³¹ At this time and subsequently, Congress assumed that disgorgement was an equitable remedy the SEC could obtain in the district courts.³² In 2002, Congress granted the SEC the statutory authority to seek "any equitable relief that may be appropriate or necessary for the benefit of investors" in "any action or proceeding brought or instituted by the Commission under any provision of the securities laws" and explicitly authorized federal

22. *Id.*

23. *Id.*

24. *Texas Gulf*, 446 F.2d at 1307.

25. *Id.*

26. *Id.* at 1307-08.

27. *Id.*

28. *Id.* at 1308.

29. *SEC v. Manor Nursing Ctrs, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

30. 15 U.S.C. § 78aa (2012).

31. Remedies Act, Pub. L. No. 101-429, § 202(e), 104 Stat. 931, 938 (Oct. 15, 1990); 15 U.S.C. §§ 78u-2(e), 3(e) (2012).

32. See H.R. REP. NO. 355, at 25 (1983) (discussing that the legislative history of ITSA reflects that Congress and the Commission intended that other remedies, including disgorgement, continue to be available to the Commission).

courts to grant such relief.³³ The Senate Commission report on this provision stated: “For a securities law violation, currently an individual may be ordered to disgorge funds that he or she received ‘as a result of the violation.’ Rather than limiting disgorgement to these gains, the bill will permit courts to impose any equitable relief necessary or appropriate to protect, and mitigate harm to, investors.”³⁴ Further, when Congress enacted this provision, it should be presumed that Congress was familiar with *Texas Gulf* and its progeny, and expected its enactment of § 78u(d)(5) to be interpreted in conformity with these precedents.³⁵

The assumption that disgorgement is an available equitable remedy, based on fifty years of case law since *Texas Gulf*, was thrown into doubt by *Kokesh*. In this case, the Supreme Court held that a five-year statute of limitations applies to claims by the SEC for disgorgement, interpreting disgorgement as a “penalty” under 28 U.S.C. § 2462.³⁶ This statute applies to any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise,” and sets forth a five-year statute of limitations for such cases.³⁷ The SEC instituted this enforcement action in 2009, claiming that Charles Kokesh, an investment adviser, violated various securities laws by concealing the misappropriation of \$34.9 million from four business development companies from 1995 to 2009.³⁸ The SEC sought monetary civil penalties, disgorgement, and an injunction.³⁹ A jury found that the defendant had violated the securities laws.

The district court judge found that the civil monetary penalties fell under 28 U.S.C. § 2462, and therefore ordered Kokesh to pay a civil penalty of \$2,354,593, which represented the amount of funds he received during the statute of limitations period.⁴⁰ The judge ruled, however, that the statute did not apply to disgorgement, and therefore entered an order that the defendant pay \$34.9 million, and an additional \$18.1 million in prejudgment interest.⁴¹ The Tenth Circuit affirmed.⁴² The Supreme Court then reversed, finding that disgorgement was a “penalty” for purposes of the statute of limitations. Although the Court noted that “[t]he sole question presented in this case is whether disgorgement, as applied in SEC

33. 15 U.S.C. § 78u(d)(5) (2012).

34. S. REP. NO. 205, at 27 (2002); see *SEC v. DiBella*, 409 F. Supp. 2d 122, 127 (D. Conn. 2006).

35. See *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (“We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.”); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979) (clarifying that the Court is decidedly receptive to implying a remedy “when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose.”).

36. See *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017).

37. 28 U.S.C. § 2462 (2012).

38. *Kokesh*, 137 S. Ct. at 1641.

39. *Id.* at 1638.

40. *SEC v. Kokesh*, 2015 WL 11142470, at *10 (D.N.M. 2015), *rev'd*, 137 S. Ct. 1635 (2017).

41. *Id.* at 11.

42. See *SEC v. Kokesh*, 834 F.3d 1158, 1160 (10th Cir. 2016).

enforcement actions, is subject to § 2462's limitation period[.]”⁴³ the decision has raised questions as to whether disgorgement is prohibited more generally as a penalty in SEC actions for an injunction.

The SEC long claimed that its enforcement actions were not subject to any statute of limitations, or at least that the statute did not begin to run until a defendant's misconduct could have been discovered by the SEC. This claim was rejected by the D.C. Circuit Court in 1996⁴⁴ and the U.S. Supreme Court in 2013.⁴⁵ Taking this into account, the Court may have been more than a little irritated by the SEC's arguments in *Kokesh* and unfortunately issued a broad opinion that may jeopardize a fifty-year-old enforcement strategy with regard to the disgorgement remedy.

In *Johnson*, the D.C. Circuit Court struck down a censure and a six-month suspension imposed in an administrative proceeding of a branch manager on the ground that this sanction was barred by the statute of limitations in 28 U.S.C. § 2462.⁴⁶ The court reasoned that a “penalty” as used in the statute “is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action”⁴⁷ and found the sanctions imposed punishment. The court rejected the SEC's arguments that the sanctions were for the purpose of protecting the public from an incompetent supervisor, and that public policy considerations militated against applying the statute of limitations to SEC enforcement actions.⁴⁸

The SEC was not deterred from continuing to bring cases that would have been barred by the five-year statute of limitations provision of 28 U.S.C. § 2462. Rather, the SEC argued that the statute of limitations did not begin to run until a claim was discovered or could have been discovered. The Supreme Court rejected this argument in *Gabelli v. SEC*.⁴⁹ Although this discovery rule applies to private litigants, the Court declined to apply it to the SEC because the agency has many tools to fulfill its obligation to detect fraud.⁵⁰ Further, “[d]etermining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts.”⁵¹ The Court specifically did not address whether SEC injunctive actions for disgorgement were covered by 28 U.S.C. § 2462.⁵² In *Kokesh*, the Court held that such actions were covered.⁵³ The question now left open is whether disgorgement is a permissible remedy in SEC injunctive actions.

43. *Kokesh*, 137 S. Ct. at 1642 n.3.

44. See *Johnson v. SEC*, 87 F.3d 484, 485 (D.C. Cir. 1996).

45. See *Gabelli v. SEC*, 568 U.S. 442, 454 (2013).

46. *Johnson*, 87 F.3d at 492.

47. *Id.* at 488–89.

48. *Id.* at 490–92.

49. *Gabelli*, 568 U.S. at 454.

50. *Id.* at 451.

51. *Id.* at 452.

52. *Id.* at 447 n.1.

53. *Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017).

Even before *Kokesh*, some critics of the SEC argued that the SEC does not have the authority to ask for disgorgement in the federal courts.⁵⁴ But as eminent an authority as Professor Louis Loss argued, prior to *Texas Gulf*, the SEC had the power to obtain enforced restitution and had been overly cautious in not seeking such a remedy in enforcement cases.⁵⁵

The primary argument against the continued use of disgorgement in SEC actions is that disgorgement is not an equitable remedy, but a penalty, and therefore cannot be granted by a federal court pursuant to its general equitable powers. Another argument, suggested but not expressly stated in the Court's opinion in *Kokesh*, is that the SEC does not need this remedy because it has other remedial remedies in its toolkit. Nevertheless, since disgorgement has been so consistently and widely used in the fifty years since *Texas Gulf*, it would be a revolutionary overturning of hundreds of cases if the Court were to bar its use as a remedy in SEC actions. Furthermore, it would be anomalous if the SEC continued to be allowed to request disgorgement in administrative proceedings but not in court cases.

Section 27 of the Exchange Act grants the district courts general equity powers to remedy violations of the securities laws. Most courts have upheld a granting of disgorgement on the grounds that its purpose is to deprive the defendant of ill-gotten gains. For example, in *SEC v. Wang*,⁵⁶ the Second Circuit reasoned that “[t]he disgorgement remedy . . . is, by its very nature, an equitable remedy . . . since it seeks to deprive the defendants of their ill-gotten gains to effectuate the deterrence objectives of the securities laws.”⁵⁷ In a later Second Circuit case, the court reaffirmed that disgorgement serves to “depriv[e] violators of the fruits of their illegal conduct” and “force[s] a defendant to give up the amount by which he was unjustly enriched.”⁵⁸ In this case, the SEC also argued that disgorgement has a deterrent effect.⁵⁹ The court held that “disgorgement does not serve a punitive function, [because] the disgorgement amount may not exceed the amount obtained through the wrongdoing,” but it serves the purpose of making securities violations unprofitable.⁶⁰ In *Kokesh*, the Court pointed out that disgorgement awards in SEC cases have sometimes exceeded the profits to the wrongdoer.⁶¹

54. See George Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865, 930–33 (1983). See generally Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 REV. BANKING & FIN. L. 899 (2014); Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (Nov. 15, 2013).

55. See LOUIS LOSS, *SECURITIES REGULATION* 1827–29 (2d ed. 1961).

56. *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991).

57. *Id.* (internal citations omitted).

58. *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014).

59. See *id.*

60. *Id.*

61. See *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017).

The SEC has consistently disavowed that the purpose of disgorgement is to compensate investors. Although it functions as a restitutionary remedy, the purpose is to make securities law violations unprofitable, not to return funds to investors. In some cases, however, including *Texas Gulf*, the proceeds of disgorgement funds were returned to investors.⁶² Further, Justice Sotomayor, in writing the opinion in *Kokesh*, reasoned that since the disgorged funds were not generally given to investors, the violation is committed against the United States; and, because the primary purpose of disgorgement is to deter future violations, the remedy is a penalty.⁶³ “[I]t is intended to deter, not to compensate.”⁶⁴

Since *Texas Gulf*, the SEC has obtained a panoply of remedies against wrongdoers. In addition to the power to seek disgorgement in administrative proceedings, the SEC may seek monetary civil penalties.⁶⁵ Further, in any judicial or administrative proceeding where the SEC obtains a civil penalty for a violation of the securities laws, the amount of the civil penalty, on motion by the Commission, will “be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.”⁶⁶ Also, in 1984, Congress provided that treble damages may be awarded in suits against those who trade on inside information.⁶⁷ Justice Sotomayor seemed to criticize the SEC for continuing to nevertheless rely on disgorgement as a remedy, but insider trading cases are only a subset of the cases in which the SEC has requested disgorgement.

The critical and interesting question raised by *Kokesh* is whether disgorgement can be a penalty for purposes of the statute of limitations, but nevertheless be a viable equitable remedy in SEC actions for an injunction. The answer to this question turns in part on whether disgorgement is an equitable remedy. In *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*,⁶⁸ the Supreme Court held in a 5-4 decision that the federal courts must ground their power to grant equitable remedies in historical equitable remedies from the English Court of Chancery under the Judiciary Act. In this case, an investment fund that purchased unsecured notes from a Mexican holding company sued the company alleging default and sought damages and a preliminary injunction.⁶⁹ The Court held that the lower court lacked authority to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest was claimed “because such a remedy was historically

62. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2d Cir. 1971).

63. See *Kokesh*, 137 S. Ct. at 1644.

64. *Id.*

65. See 15 U.S.C. § 77t(d) (2012).

66. 15 U.S.C. § 7246(a) (2012).

67. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376 (Aug. 10, 1984). This penalty was strengthened in 1988. See Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704 (Nov. 19, 1988).

68. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

69. *Id.* at 308.

unavailable from a court of equity.”⁷⁰ The power to create remedies previously unknown to the English Court of Chancery was not permitted under the Judiciary Act.⁷¹

Several cases have supported *Grupo* holding, but others have found ways to narrow its meaning and avoid its analysis. One way around *Grupo* is to find some alternative statutory authority to support the equitable power. For example, in the case of *In re Dow Corning Corp.*,⁷² one issue was “whether a bankruptcy court has the authority to enjoin a non-consenting creditor’s claims against a non-debtor to facilitate . . . [the reorganization of a company].”⁷³ The court distinguished *Grupo* by finding statutory authority within the Bankruptcy Code.⁷⁴

In *U.S. Commodity Futures Trading Commissioner v. Southern Trust Metals, Inc.*,⁷⁵ there was an issue about “the scope of equitable restitution available under the Commodity Exchange Act,” and the court focused on whether equitable restitution could be enforced through contempt power. The court conceded that *Grupo* was binding and noted a need to find support for equity jurisdiction from the time of the English Court of Chancery.⁷⁶ However, the court found that traditional notions of equity could be expanded or reduced if they came directly from Congress.⁷⁷ In so reasoning, the court found that the court’s broad equitable authority under the Commodity Exchange Act must include the power of contempt as a necessary tool to enforce the Act.⁷⁸

Another way in which courts have distinguished *Grupo* is to find an analogous remedy from the Court of Chancery to the relief requested in a case. In *SEC v. Cavanagh*,⁷⁹ the court held that disgorgement is within the proper scope of equitable remedies of the federal courts. In this case, the SEC filed an enforcement action “alleging violations of the registration and antifraud provisions of the federal securities laws.”⁸⁰ Using *Grupo* as precedent, the court looked to whether equity courts traditionally awarded disgorgement of ill-gotten assets and concluded that eighteenth century English chancellors ordered remedies that were functionally identical to the SEC’s disgorgement remedy.⁸¹ Therefore, the court concluded that courts could grant disgorgement under their equity jurisdiction.⁸² The holding was based on similarities to equitable rem-

70. *Id.*

71. *Id.* at 332.

72. *In re Dow Corning Corp.*, 280 F.3d 648, 656 (6th Cir. 2002).

73. *Id.*

74. *Id.* at 657–58.

75. *U.S. Commodity Futures Trading Comm’n v. S. Tr. Metals, Inc.*, No. 14-22739-CIV, 2017 WL 2875427, at *1 (S.D. Fla. May 15, 2017).

76. *Id.* at *11–12.

77. *Id.* at *12.

78. *Id.*

79. *SEC v. Cavanagh*, 445 F.3d 105, 116–17 (2d Cir. 2006).

80. *Id.* at 109.

81. *Id.* at 116–20.

82. *Id.*

edies of accounting, constructive trust, and restitution.⁸³

One commentator criticized *Cavanagh* as wrongly decided, arguing that *Grupo* precludes the SEC from obtaining disgorgement because “the High Court of Chancery ordered disgorgement only in cases involving fiduciary obligations.”⁸⁴ Since insider trading cases are based on a breach of fiduciary duty,⁸⁵ this argument would not prohibit disgorgement in such enforcement actions. Further, Professor Samuel Bray asserts that the foundation of a court’s equitable powers in English Courts of Chancery has not been adhered to rigidly.⁸⁶ He explains how the new equity cases find statutory support for equitable remedies that were not traditionally granted, and courts have changed the date used for comparing requested remedies to historical equitable principles to the year when the Federal Rules of Civil Procedure were adopted, not the Judiciary Act era.⁸⁷

In *SEC v. Ahmed*,⁸⁸ the court recognized that while the term “disgorgement” has only recently entered legal parlance, the historical remedies of accounting, constructive trust, and restitution have compelled wrongdoers to effectively disgorge profits for centuries, and chancery courts had the power of equitable disgorgement in the eighteenth century. A similar analysis was used to justify disgorgement in two non-SEC cases.⁸⁹ In *Spear v. Fenkell*, the court stated that “[t]he disgorgement remedy, and its logical predicate, an accounting, were available in equity not only before 1938 but before the founding of the United States.”⁹⁰ In *United States v. Keyspan Corp.*, a criminal antitrust case, the court held that the limitations of the court’s equitable remedies articulated in *Grupo* do not prohibit disgorgement because it was available at the time of the Judiciary Act.⁹¹ Although the Department of Justice had never previously asked for disgorgement, it was granted.⁹²

*Kansas v. Nebraska*⁹³ was a case in which the Supreme Court exercised original jurisdiction in a dispute over shared water resources allocated in a state agreement. In a split opinion, the Court resolved the conflict and, based on the recommendation of a magistrate in favor of Kansas, ordered Nebraska to pay \$1.8 million in disgorgement in addition to compensa-

83. *Id.* at 119.

84. DeLuca, *supra* note 54, at 930.

85. *See generally* Chiarella v. United States, 445 U.S. 222 (1980).

86. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014 (2015).

87. *Id.* at 1017–23.

88. *See* SEC v. Ahmed, 263 F. Supp. 3d 381, 386 (D. Conn. 2016) (citing *Cavanagh*, 445 F.3d at 119–20). This case interpreted § 2462, the statute of limitations law, before *Kokesh* had applied it to SEC disgorgement.

89. *See generally* *Spear v. Fenkell*, No. CV 13-2391, 2016 WL 5661720 (E.D. Pa. Sept. 30, 2016); *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. 2011).

90. *Spear*, 2016 WL 5661720, at *32.

91. *Keyspan*, 763 F. Supp. 2d at 639.

92. *Id.* at 635.

93. *See* *Kansas v. Nebraska*, 135 S. Ct. 1042, 1058–59 (2015).

tory relief.⁹⁴ The issuance of an injunction was refused, so the disgorgement order was not ancillary to an injunction but was for the purpose of preventing Nebraska from violating the contract between the states in the future.⁹⁵

Although *Kansas v. Nebraska* illustrates that federal courts have inherent jurisdiction to order disgorgement,⁹⁶ it is not necessary for a court in an SEC case to rely on such authority, because the securities laws give the courts power to decide all suits in equity or law to enforce any liability or duty created by the Exchange Act or the rules thereunder.⁹⁷ In *Mitchell v. DeMario Jewelry*, the Court pointed out that “[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.”⁹⁸

It is somewhat difficult to reconcile *Kokesh* with the many cases granting the remedy of disgorgement in SEC actions and with *Kansas v. Nebraska*, where the Supreme Court itself endorsed disgorgement as a way to prevent future violations of a federal law. In part, this may be due to confusion over the origins and scope of the disgorgement remedy. According to Professor Bray, “disgorgement” was rarely used from 1800 to 1960 and was not used or defined in any Restatement or Black’s Law Dictionary until 2000.⁹⁹ Further, there is some question as to whether disgorgement is legal or equitable.¹⁰⁰ Yet, “[d]isgorgement furthers the deterrence of unjust enrichment,”¹⁰¹ so to argue about its origins and nature seems beside the point of whether it is an appropriate remedy in an insider trading case brought by the government.

In cases since *Kokesh*, the district courts have generally continued to grant disgorgement in insider trading cases and have continued to view disgorgement as an equitable remedy.¹⁰² In *SEC v. Metter*,¹⁰³ the Second Circuit grappled with the implications of *Kokesh*, not in an insider trading case, but in an enforcement action against the managing officer of a publicly traded company for false statements made to increase demand for

94. *Id.* at 1058–59.

95. *Id.* at 1059.

96. *See id.*; *see also* The All Writs Act, 28 U.S.C. § 1651 (2012).

97. *See* 15 U.S.C. §§ 78aa(a), 78u(bb)(D)(5) (2012).

98. *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291–92 (1960).

99. Sam Bray, ‘Disgorgement’ and the Restitutionary Remedies, WASH. POST (Nov. 22, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/22/disgorgement-and-the-restitutionary-remedies/?utm_term=.F18703c97254 [<https://perma.cc/5TKA-KUEY>].

100. *Id.*

101. Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1417 (2016).

102. *See generally* SEC v. Brooks, No. 07-61526-CIV, 2017 WL 3315137 (S.D. Fla. Aug. 3, 2017); SEC v. Jammin Java Corp., No. 215 CV-08921-SVW(MRWx), 2017 WL 4286180 (C.D. Cal. Sept. 14, 2017); SEC v. Lunn, No. 12-CV-02767-RM-BNB, 2018 WL 317468 (D. Colo. Jan. 08, 2018); SEC v. Sample, No. 3:14-CV-1218-B, 2017 WL 5569873 (N.D. Tex. Nov. 20, 2017).

103. SEC v. Metter, 706 F. App’x 699, 702–04 (2d Cir. 2017).

the company's stock. The court held that the SEC was still able to obtain disgorgement, but the liability was essentially punitive in nature and was a fine. In *SEC v. Amerindo Investment Advisors Inc.*,¹⁰⁴ the court acknowledged that *Kokesh* left a lot of uncertainty in the securities law. It therefore seems quite likely that the Supreme Court will be called upon in the future to clarify the SEC's authority to seek disgorgement in insider trading and enforcement cases generally. As argued here, the author believes this important remedy should be upheld.

104. *SEC v. Amerindo Inv. Advisors Inc.*, No. 05-CV-5231 (RJS), 2017 WL 3017504, at *8 (S.D.N.Y. July 14, 2017) (acknowledging that "the Court relied on precedents that *might* subsequently have been abrogated by the Supreme Court in *Kokesh*") (emphasis added).