

SEC ALJ Rules Revocations and Bars Are “Penalties” Subject to Five-Year Statute of Limitations in Section 2462

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In 2013, the Supreme Court handed down an important ruling concerning the statute of limitations in civil enforcement actions in which the SEC seeks civil monetary penalties. In *Gabelli v. SEC*, the Justices unanimously ruled that the five-year statute of limitations from 28 U.S.C. § 2462 applies to such actions and that the “discovery rule” does not extend—or “toll”—that period. (Click here for March 2013 alert.)

Although the outcome in *Gabelli* was not particularly controversial, the implications of the decision have been hotly contested in *In re Matter of Timbervest LLC et al.* In 2013, the SEC charged Timbervest, a registered investment advisor in Atlanta, Georgia, which manages more than \$1B in timber-related investments, and its principals, with having engaged in unauthorized and undisclosed transactions in 2006 and 2007 at the expense of their clients. Timbervest denied those charges and argued that the civil enforcement action, which sought significant financial penalties, was time-barred by the five-year statute of limitations.

On August 20, 2014, ALJ Cameron Elliott issued his initial decision, effectively splitting *Gabelli*'s baby. The judge found that, in fact, Timbervest and its executives had violated federal securities laws, specifically Sections 206(1) and 206(2) of the Investment Advisers Act, and he ordered that they pay nearly \$1.9M in disgorgement plus pre-judgment interest. The judge declined, however, to revoke Timbervest's registration or to bar any of the individual respondents from associating with Timbervest (or any other registered investment adviser).

Looking to *Gabelli*, ALJ Elliott had to decide which sanctions constitute “civil penalties,” which would be barred by the five-year statute of limitations. The respondents in *Gabelli* had successfully appealed from civil monetary penalties, but they had not challenged any injunctive relief. Thus, in *Timbervest*, the judge relied on earlier federal case law holding that, for the purpose of § 2462, suspensions and censures are “punitive” but cease-and-desist orders and disgorgement are “equitable.” On that basis, Judge Elliott ruled that, notwithstanding the violations of federal securities law, the SEC could not obtain revocation against Timbervest or impose bars against its principals for misconduct that occurred more than five years before the SEC began its administrative proceedings.

It is possible that this litigation will continue, with appeals to the Commission and the United States Court of Appeals for the D.C. Circuit by Timbervest (which has suggested that even disgorgement should be off the table) or the SEC. It is also possible that, in future civil enforcement actions, the SEC will try to avoid this problem altogether by entering into “tolling agreements” with respondents that allow the SEC to seek “penalties” in later actions. For now, however, the order in *Timbervest* further clarifies *Gabelli* and establishes which sanctions may be time-barred by the five-year statute of limitations in § 2462.

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