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WHITE-COLLAR CRIME

Restitution and Disgorgement Under Scrutiny

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Over time, white-collar criminal cases have taken on some of the features of civil disputes in their focus on economic harm and recovery for victims. Some of the terminology is different—for example, "loss" and "restitution" rather than "damages—but the concepts are similar.

In parallel, civil enforcement by the Securities and Exchange Commission (SEC) routinely seeks "disgorgement," an equitable remedy intended to deprive someone of alleged ill-gotten gains. In recent years, pursuit of disgorgement has been challenged, and some courts have required a clear identification of victims and victim losses before disgorgement may be ordered.

In this article, we discuss two recent decisions that suggest courts may be seeking to rein in the use of these financial tools of criminal and civil enforcement. In *Ellinburg v. United States*, 607 U.S.—, 2026 WL 135982 (Jan. 20, 2026), the Supreme Court held that restitution is punitive in nature; it is not a civil remedy subject to civil procedure. In *Sripetch v. SEC*, 25-466 (Jan. 9, 2026), the Supreme Court agreed to address a split in the circuits over whether the SEC must prove that investors suffered actual financial harm before a district court may order disgorgement.

Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

Restitution

Under the Mandatory Victims Restitution Act of 1966 (MVRA), a district court is required to order restitution to "victims" if a defendant is convicted of certain offenses specified in subsection (c) of the statute. 18 U.S.C. §3663A(a)(1). "Victim" here refers to a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. §3663A(a)(2).

The Second Circuit has construed "direct[] and proximate[]" harm "to impose cause-in-fact and proximate[-]cause requirements." *United States v. Goodrich,* 12 F.4th 219, 229 (2d Cir. 2021).

The "cause-in-fact" requirement means that the defendant's conduct was "a necessary factor in bringing about the victim's harm" so that "but for" the defendant's conduct, the victim would not have suffered losses. *Goodrich*, 12 F.4th at 229.

For "proximate cause," courts look at "whether the harm alleged has a sufficiently close connection to the conduct," with courts analyzing "whether that harm was 'foreseeable' to a defendant." *Goodrich*, 12 F.4th at 229. Under the MVRA, "a sentencing court cannot order restitution that goes beyond making the victim whole." *United States v. Fishman,* 157 F.4th 143, 167-68 (2d Cir. 2025). Restitution is not mandatory if the number of victims or complexity of facts make a determination of restitution unduly burdensome. 18 U.S.C. §3663A(c)(3); *see* J. Sack and K. Wilderman, "Restitution in FCPA Cases: Who Is a Victim of Foreign Corruption," Anti-Corruption Report (Sept. 29, 2021).

Disgorgement

Since the 1970s, courts have ordered disgorgement in enforcement actions at the urging of the SEC. The Sarbanes-Oxley Act of 2002 expressly authorized federal courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. §78u(d)(5). The SEC has used this authority to seek disgorgement in enforcement actions.

Two Supreme Court decisions (in 2017 and 2020) limited imposition of disgorgement. Following these decisions, the National Defense Authorization Act for Fiscal Year 2021 was enacted. Section 6501 expressly authorizes federal courts to order disgorgement. *See* 15 U.S.C. §78u(d)(7)-(8). We discuss these decisions and the effect of Section 6501 below.

Restitution is Criminal Punishment

In *Ellingburg,* the Supreme Court held that restitution imposed under the MVRA is a form of criminal punishment and therefore is subject to the Ex Post Facto Clause of the U.S. Constitution. Art. I, §9, cl. 3. That Clause prohibits Congress from retroactively imposing or increasing criminal punishment after a crime has been committed.

The *Ellingburg* case has an unusual history. It arose from a bank robbery in 1995. At the time of the offense, courts had discretion to order restitution obligations that did not expire until 20 years from the entry of judgment under the Victim and Witness Protection Act (VWPA), the first generally applicable federal criminal restitution scheme.

In 1996, the MVRA amended the VWPA's restitution regime and made restitution mandatory for specific offenses. The MVRA further extended offender's restitution obligations to "the later of 20 years from entry of judgment or *20 years after the release from imprisonment*." 18 U.S.C. §3613(b) (emphasis added). In 1996, when a jury found Holsey Ellingburg, Jr. guilty of bank robbery, the MVRA had taken effect.

Ellingburg was sentenced to 322 months in prison and ordered to pay over $7,500 in restitution, which he paid $2,154 towards while he was incarcerated. After he was released in 2022, he received a notice that he still owed $13,476 in restitution to account for accumulated interest. If the VWPA applied, his restitution obligation would have expired in 2016.

Ellingburg challenged enforcement of his restitution obligation under the Ex Post Facto Clause. The district court denied his challenge, holding that the MVRA's extension of a defendant's obligation to pay restitution did not constitute an increase in criminal punishment. The Court of Appeals for the Eighth Circuit affirmed on ground that restitution is primarily remedial or compensatory rather than punitive.

Ellingburg petitioned the Supreme Court for certiorari, and the Court agreed to hear the case. Ellingburg argued that restitution under the MVRA is punitive in nature and purpose. The government filed a brief supporting vacatur

of the Eighth Circuit's decision, agreeing that MVRA restitution is punitive. The government contended, however, that on remand the lower court should not upset Ellingburg's restitution obligation on the ground that extending the expiration period is not an ex post facto *increase* in punishment as applied to past offenses.

Justice Brett Kavanaugh, writing for a unanimous court, reversed and remanded the case because "[r]estitution under the MVRA is plainly criminal punishment," and imposition of a punishment retroactively is prohibited under the Ex Post Facto Clause. The court concluded that "Congress intended restitution under the MVRA to both punish and compensate" given that the MVRA calls restitution a "penalty" for a criminal "offense."

Restitution is imposed at the time of "sentencing" in a criminal case, in which the government, not the victim, is the adverse party. Further, the MVRA is found in the title of the U.S. Code that concerns crimes and criminal procedure; if restitution obligations are not met, imprisonment may be imposed as a consequence. The court made clear that its ruling "does not mean that a restitution statute can never be civil," but in the case of the MVRA "the statutory text and structure [ ] demonstrate that restitution under that Act is criminal punishment."

The *Ellingburg* ruling may lead to other constitutional challenges to the present framework for imposing restitution. Notably, courts have ordinarily determined restitution amounts by a preponderance of the evidence. If restitution is treated as a criminal punishment, defendants may raise an issue under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that facts necessary to impose punishment must be determined by a jury beyond a reasonable doubt. *See* E. Abramowitz and J. Sack, "Does the Sixth Amendment Apply to Restitution: Justices Say the Answer May be Yes," N.Y.L.J. (March 15, 2019). Since *Ellingburg,* defendants have started to rely on the decision as a basis to challenge restitution orders. See, e.g., *United States v. Rishi Shah*, Dkt. No. 1010, 19 Cr. 864 (N.D. Ill. February 18, 2026).

Disgorgement

The background of the *Sripetch* case is found in two Supreme Court cases that had the effect of limiting disgorgement in SEC enforcement actions. In 2017, the Supreme Court in *Kokesh v. SEC*, 581 U.S. 455 (2017) addressed whether the statute of limitations applicable to traditional civil penalties under 28 U.S.C. §2462 also applies to a disgorgement order for violations of federal securities law.

The SEC argued that it did not apply since disgorgement is a remedial sanction intended to restore the status quo. The Supreme Court disagreed, holding that SEC disgorgement functions as a remedy for wrongs to the public instead of only to an individual, so it is meant to be a deterrent and functions as a penalty. Accordingly, the SEC's action to collect disgorgement in this case was barred by the five-year statute of limitations. In 2021, Congress legislatively overruled *Kokesh*, extending the limitations period on SEC disgorgement. *See* 15 U.S.C. §78u(d)(8).

In 2020, the Supreme Court in *Liu v. SEC*, 591 U.S. 71 (2020) addressed whether, and to what extent, the SEC may seek disgorgement through its authority to seek "equitable relief" for the benefit of investors under 15 U.S.C. §78u(d)(5). The *Kokesh* decision arose from an enforcement action against an investment advisor for misappropriation of clients' funds. The district court ordered disgorgement equal to the full amount the defendant had raised from investors (less a small amount that remained in client accounts). The district court also ordered petitioners jointly and severally liable for the full amount.

In an 8-1 decision, the Supreme Court held that disgorgement is an "equitable" remedy available under §78u(d)(5) so long as the award is limited to the profits made by a given defendant, and not by another party, and the disgorgement amount

is limited to the wrongdoer's "net" profits. In the majority's view, the nature and purpose of equitable disgorgement is to return wrongful gains to those injured by the defendant's misconduct.

Following *Liu*, courts have reached different conclusions as to whether disgorgement may be ordered without proof that a victim suffered pecuniary harm from the fraud and, in some cases, who is a victim for purposes of ordering disgorgement.

Enter the *Sripetch* case, which arose from an enforcement action against Ongkaruck Sripetch and other defendants for allegedly conducting penny stock schemes that defrauded retail investors and resulted in at least $6 million in proceeds. Sripetch consented to a final judgment pursuant to which the district court could order disgorgement for "all ill-gotten gains": the amount was unspecified. The court ordered disgorgement of $2.25 million plus more than $1 million in prejudgment interest. The SEC was not required to prove pecuniary harm.

On appeal, Sripetch argued that the district court abused its discretion because the SEC had not been required to make a showing that the investors had suffered pecuniary harm. The Ninth Circuit affirmed the disgorgement order, holding that pecuniary harm is not a "precondition" to disgorgement under §78u(d).

The Ninth Circuit aligned itself with the First Circuit, see *SEC v. Navellier,* 108 F.4th 19, 41 n.14 (1st Cir. 2024), cert. denied, 145 S. Ct. 2777 (2025) (disgorgement is intended to deprive wrongdoers of ill-gotten gains, rather than compensate investors for losses, so showing of pecuniary harm not required), and disagreed with the Second Circuit. See *SEC v. Govil,* 86 F.4th 89, 98 (2d Cir. 2023) (under *Liu*, district court abused its discretion by concluding that investors were victims without a showing that investors had suffered pecuniary harm).

The SEC opposed the grant of certiorari in *Sripetch,* arguing that the Ninth Circuit was correct in holding that proof of pecuniary harm was not required under the statutory authority for disgorgement. *Sripetch* argued that the Commission's position "flatly ignores" the limiting principles in *Liu* which require funds to be returned to victims and prohibits disgorgement from becoming a penalty.

Conclusion

The *Ellingburg* decision and the *Sripetch* case, scheduled for argument in April, reflect increased judicial scrutiny of the government's power to seek financial remedies without proof of quantifiable harm. In the context of restitution, this scrutiny might affect the burden of proof on the government and who must make necessary findings: judge or jury.

In the context of disgorgement, this scrutiny might limit this remedy to cases in which the SEC can prove quantifiable loss by specific victims. Interestingly, if the Supreme Court further limits disgorgement, that civil remedy could align very closely with restitution in criminal cases. In all events, recent case law reflects an interest in possibly reining in the power of the government to seek harsh financial sanctions in criminal and civil enforcement cases.

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