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Are Disgorgement's Days Numbered? *Kokesh v. SEC* May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief

BY M. SEAN ROYALL, RICHARD H. CUNNINGHAM, AND ASHLEY ROGERS

THE FEDERAL TRADE COMMISSION'S Bureau of Consumer Protection recovers big dollars. Some recent examples: Vemma Nutrition Company agreed to pay $238 million to settle charges that the multi-level marketing company operated an illegal pyramid scheme; TracFone, the nation's largest prepaid mobile provider, paid $40 million to settle deceptive advertising charges; the marketers of Sensa settled charges of misleading weight-loss claims for $26.5 million; and Google agreed to pay at least $19 million to resolve charges relating to the in-app purchase feature in the Google Play Store.[1]

From the FTC's standpoint, there is nothing controversial about the agency seeking monetary relief from individuals and companies alleged to have engaged in deceptive or unfair practices that violate Section 5 of the FTC Act. Indeed, the FTC in December 2017 boasted that the Bureau of Consumer Protection obtained 168 court orders totaling over $12.72 billion between July 1, 2016 and June 30, 2017, resulting in more than $6.4 billion in consumer refunds.[2] The FTC obtains a substantial portion of these monetary remedies pursuant to Section 13(b) of the FTC Act—a provision that does not mention monetary remedies and speaks only in terms of "injunctions." Federal circuit courts have, nevertheless, construed Section 13(b) to allow the FTC to obtain monetary relief on the theory that Congress's use of the word "injunctions" permits the FTC to seek a full panoply of equitable relief, including disgorgement and restitution.

In an article published in the Fall 2016 edition of ANTITRUST, David C. Vladeck, a former Director of the FTC's Bureau of Consumer Protection and a current member of the faculty at Georgetown University Law Center, summarized the precedents in this area and concluded that the argument that the FTC lacks authority to obtain monetary relief pursuant to Section 13(b) "has been repeatedly and uniformly rejected by every court to address it."[3] Professor Vladeck then predicted that this "is not going to change" because "Section 13(b) of the FTC Act authorizes courts to grant injunctions, and that grant of authority empowers courts to order the full range of equitable remedies, including restitution and disgorgement."[4]

The Supreme Court, however, has never approved the FTC's monetary relief authority under Section 13(b) and, last summer, signaled in *Kokesh v. SEC* that significant limits on this authority may be on the horizon. In *Kokesh*, the Supreme Court held that disgorgement obtained by the Securities and Exchange Commission is a "penalty" subject to a five-year statute of limitations under 28 U.S.C. § 2462 when ordered pursuant to provisions similar to Section 13(b).[5] While *Kokesh*'s holding is confined to the SEC and a statute of limitations question, the Supreme Court's reasoning and analysis suggest potential implications for the FTC.

First, with regard to matters in which the FTC seeks disgorgement, the agency likely will be subject to the five-year statute of limitations in 28 U.S.C. § 2462. Each of the "hallmarks of a penalty" the Supreme Court identified in *Kokesh* applies equally to the FTC's use of disgorgement. This change alone may significantly decrease the size of the FTC's disgorgement awards, as the agency has frequently gone back much further than five years in its remedy calculations.[6]

Second, and perhaps more importantly, the Supreme Court signaled that federal agencies may not be able to obtain disgorgement or other remedies with similar characteristics as equitable relief ancillary to an injunction at all. In a footnote in the *Kokesh* opinion, the Court stated that it was not opining on "whether courts possess authority to order disgorgement in SEC enforcement proceedings" or whether disgorgement has been "properly applied."[7] At oral argument, several Justices posed questions suggesting discomfort with the SEC's current disgorgement practices. For example, Justice Kagan asked if the SEC has "ever set down in writing what the guidelines are for how the SEC is going to use disgorgement and what's going to happen to the monies collected?"[8] In addition, the fact that the Supreme Court deemed the SEC's disgorgement remedy to be a "penalty"

M. Sean Royall and Richard H. Cunningham are partners, and Ashley Rogers is an associate, with Gibson, Dunn & Crutcher LLP. Mr. Royall served as Deputy Director of the Bureau of Competition of the Federal Trade Commission from 2001 through 2003 and served as appellate counsel for the defendant in FTC v. Commerce Planet, Inc., *815 F.3d 593 (9th Cir. 2016). Mr. Cunningham served as Staff Attorney and Senior Trial Counsel with the Bureau of Competition from 2004 to 2013.* *The authors thank Natalie J. Hausknecht for her valuable contributions to this article.*

suggests that disgorgement may not be available as relief ancillary to an injunction in light of the fact that the Court has previously said that a court in equity may not enforce a "civil penalty."[9] Because the FTC relies on the same legal rationale as the SEC for its authority to obtain disgorgement, *Kokesh* raises the possibility of future Supreme Court decisions reaching the issues of whether and to what extent the FTC may obtain disgorgement or other monetary relief.

Targets of FTC enforcement actions are already arguing that *Kokesh* limits the FTC's ability to obtain monetary relief in Section 13(b) actions. The agency's response in the five instances in which *Kokesh*-related arguments have arisen to date has been to deny that *Kokesh* applies to the FTC. Notwithstanding this position, the agency has also simultaneously excluded from its remedy demands any funds associated with conduct outside of Section 2462's five-year statute of limitations. The FTC has also described its primary remedy demand as restitution—which focuses on harm to victims caused by the unlawful conduct—rather than disgorgement—which focuses on depriving the wrongdoer of ill-gotten gains, and/or has characterized the purpose of its monetary remedy request as victim compensation. Whether restitution in the context of a Section 13(b) enforcement action is substantively different than disgorgement in practice and does not constitute a "penalty" under *Kokesh* is an open question that undoubtedly will be litigated vigorously as this area of case law evolves.

The full impact of *Kokesh* on the FTC's authority under Section 13(b) remains to be seen. At a minimum, however, *Kokesh* provides a sound basis to question the view expressed by Professor Vladeck and others that challenges to the scope of the FTC's authority to obtain monetary relief under 13(b) are futile and that "courts are increasingly showing impatience with these long discredited arguments."[10]

Kokesh Limits the SEC's Disgorgement Authority

The facts at issue in *Kokesh* are straightforward. The defendant, Charles Kokesh, owned two investment-adviser firms that provided advice to business-development companies. In 2009, the SEC brought charges against Mr. Kokesh, claiming he had misappropriated $34.9 million from four of these clients and filed false reports with the Commission to cover this up for 14 years. The jury agreed.

The remedies phase is where *Kokesh* got interesting. In 2013, the Supreme Court had held in *Gabelli v. SEC* that the general five-year statute of limitations in 28 U.S.C. § 2462 applied when the SEC sought statutory monetary penalties.[11] The district court in *Kokesh* recognized that any monetary "penalty" against Mr. Kokesh therefore had to be based on his misconduct during the last five years of his scheme. The problem for the SEC was that Mr. Kokesh had taken the vast majority of the $34.9 million involved—$29.9 million to be exact—outside this limitations period. As a result, the district court concluded it could impose a civil fine of only $2.35 million for his unlawful behavior.[12]

To obtain a monetary remedy that reached back further in time, the SEC invoked its authority to seek disgorgement as relief ancillary to an injunction issued pursuant to the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act.[13] This authority had been widely accepted among the lower courts, even after Congress in 1990 gave the SEC the power to seek statutory civil fines instead.[14] Citing lower court decisions, the SEC contended that its disgorgement authority was not subject to 28 U.S.C. § 2462's statute of limitations because disgorgement is an equitable, "remedial" monetary sanction, rather than a "penalty."[15] The district court concurred and ordered Mr. Kokesh to pay $34.9 million in disgorgement and another $18.1 million in prejudgment interest on top of his civil fine. The Tenth Circuit likewise found "the reasons for th[at] view are clear" and affirmed.[16]

In a unanimous opinion penned by Justice Sotomayor, the Supreme Court reversed, holding that SEC disgorgement constitutes a penalty subject to the five-year statute of limitations found in Section 2482.[17] To reach this conclusion, the Court began by defining a "penalty" as a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws."[18] From this definition, the Court extrapolated three "hallmarks" of a penalty: (1) it is imposed to redress the violation of a public law; (2) it is sought for a punitive purpose such as deterrence; and (3) it is not intended solely to compensate a victim for his loss.[19]

Applying these factors, the Court determined that SEC disgorgement was a penalty subject to Section 2482. First, the Court noted that lower courts imposed SEC disgorgement as a consequence for violating public laws—i.e., a violation committed against the United States rather than an aggrieved individual.[20] A securities enforcement action may proceed, the Court reasoned, even if the victims do not endorse it.[21] Second, the Court concluded that disgorgement in the SEC context was imposed for the "inherently punitive" purpose of deterring of future public law violations.[22] Third, the Court recognized that "in many cases," SEC disgorgement was not compensatory because lower courts did not require the money actually be paid to victims.[23] The Court summarized its decision by stating that SEC disgorgement bore "all the hallmarks of a penalty: It is imposed as a consequence of violating a public law, and it is intended to deter, not to compensate."[24]

The Potential Implications of *Kokesh* for the FTC

Kokesh establishes a general definition of what constitutes a "penalty" subject to Section 2462's five-year limitations period. This definition is unlikely to be confined to the SEC and logically applies to the FTC's authority to seek monetary relief under Section 13(b).

The FTC's use of disgorgement meets each of the *Kokesh* criteria for a "penalty." The FTC—like the SEC—is not required to stand in the shoes of a particular victim when it

seeks disgorgement, nor is it seeking to vindicate the rights of any particular victims.[25] Lower courts have likewise held that the FTC, like the SEC, is not required to pay disgorgement to victims, and the Commission has maintained that it need not do so.[26] Additionally, as with SEC disgorgement, courts have held the primary purpose of FTC disgorgement is deterrence of future public law violations.[27] For these reasons, it appears very likely that FTC disgorgement will be limited by the five-year limitations period found in Section 2462. Indeed, the government acknowledged as much in its briefing in *Kokesh*. Specifically, the Solicitor General described the FTC as among the agencies whose authority to obtain monetary remedies would be curtailed by construing Section 2462 as applicable to the SEC's disgorgement authority.[28]

The more interesting question is whether *Kokesh* portends additional limits on the FTC's authority to obtain monetary relief. There are good reasons to believe that it does.

As noted above, the Supreme Court in *Kokesh* stated in a footnote that its decision should not be read to opine on whether courts actually possess authority to order disgorgement in SEC enforcement proceedings or "whether courts have properly applied disgorgement principles in this context."[29] This footnote suggests the Court may not consider either of these issues to be settled.

Justice Gorsuch also reminded the SEC at oral argument that the Court had never given its approval to the 50 years of lower court precedent holding a court could order disgorgement based on its inherent equitable authority ancillary to an injunction.[30] Justice Gorsuch further noted that the difficulty in defining reasonable limits for such a remedy might stem from the fact that "there's no statute governing it. We're just making it up."[31]

Justice Gorsuch was not alone among his colleagues in struggling to identify the source (and consequential limits) of SEC disgorgement. Chief Justice Roberts, too, signaled discomfort with the fact that Congress had never specified disgorgement or another monetary remedy in the text of the relevant provisions.[32] And the Chief Justice was joined by both Justice Kennedy and Justice Sotomayor in pressing the parties to identify a specific statutory authority for disgorgement.[33] Justice Kennedy, in particular, explained that he "understood in cases where the aggrieved party is before the Court, there can be equitable remedies under state law," but he queried whether "[i]t is clear that the district court has statutory authority" to obtain disgorgement otherwise.[34] Justice Sotomayor wondered how, if the money was not being returned to the harmed individuals as restitution, a statutory grant to seek equitable relief could serve as the basis for disgorgement.[35]

Kokesh's holding that disgorgement is not "remedial," but rather is a "penalty," suggests that the Court may question whether disgorgement is an appropriate equitable power when a statute merely authorizes injunctions. In *Tull v. United States*, the Court explained that "while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties."[36] Hence, if disgorgement is a "penalty," then presumably it cannot be a valid equitable remedy under *Tull*.

The entire final section of the *Kokesh* decision focuses on the differences between disgorgement, as applied in the lower courts, and the traditional characteristics of an equitable remedy. The decision notes, in particular, that SEC disgorgement is not "remedial" in large part because it does not simply restore the status quo by returning the defendant to the place he would have occupied had he not broken the law.[37] Rather, SEC disgorgement "sometimes exceed[s] the profits gained as a result of the violation" either by forcing a wrongdoer to disgorge gains that accrued to third parties or by failing to account for expenses that reduced the amount of illegal profit.[38] The Court cited the *Restatement (Third) of Restitution and Unjust Enrichment* for the proposition that such sanctions were punitive ones "that the law of restitution normally attempts to avoid."[39]

Viewed collectively, these are fairly strong signals that the Court might be uncomfortable classifying an agency's requested monetary remedy as equitable relief ancillary to its injunctive authority when the requested remedy has effects beyond merely addressing the harm caused by the defendant's conduct.

The FTC's Initial Response to *Kokesh*

Unsurprisingly, within a matter of days, arguments based on *Kokesh* began surfacing in ongoing FTC enforcement actions. To date, defendants in at least five FTC matters have raised *Kokesh*-related arguments—*FTC v. DirecTV LLC*, *FTC v. J. William Enterprises, LLC*, *FTC v. Credit Bureau Center, LLC*, *FTC v. Publishers Business Services, Inc.*, and *FTC v. AMG Capital Management, LLC*.[40]

FTC v. DirecTV. Fifteen days after *Kokesh* was decided, DirecTV filed a motion for leave to file an amended answer to add affirmative defenses based on *Kokesh* asserting that (1) the FTC is not entitled to seek restitution; and (2) even if it is, the request is subject to a five-year statute of limitations.[41]

In response, the FTC argued that DirecTV's request was untimely. The FTC further argued that *Kokesh* does not apply to an FTC action seeking restitution because the purpose of restitution is compensation rather than punishment, and therefore, restitution is not a "penalty" under *Kokesh*.[42] As a fallback, the FTC also maintained that even if *Kokesh* applies to an action seeking restitution, it did not apply in this case because the agency's complaint sought monetary relief "necessary to redress injury to consumers" that would be used to "provide redress to eligible consumers," in contrast with the *Kokesh* complaint, which sought "to disgorge an amount equal to the funds and benefits obtained illegally."[43] Notably, the FTC stated that its proposed order "recognizes the fundamental distinction between restitution and disgorgement by providing primarily for restitution while allowing for disgorgement of any residual funds for which distribution to

consumers is not feasible." And the agency all but conceded that a five-year statute of limitations applies to disgorgement by representing to the court that it intended to eliminate disgorgement from its proposed order, at least as to any "putatively time-barred claims."[44]

In August 2017, the district court denied DirecTV's motion on the basis that DirecTV was not diligent in asserting these affirmative defenses, expressly declining to "apply *Kokesh* to make broad generalizations."[45] The court did, however, state in dicta that "[a] fair reading of the first line of footnote 3 in *Kokesh* does not support the argument that the FTC is barred from seeking restitution" because "the Court explicitly declined to make any finding whatsoever, much less one relevant to whether the FTC has authority to seek restitution."[46]

FTC v. J. William Enterprises. In October 2017, defendants filed a partial motion for summary judgment based on Kokesh, asserting that (1) the Justices' comments during oral argument and the "ominous footnote" in the *Kokesh* decision "cast[] considerable doubt" on courts' authority to order restitution, rescission, refunds, or disgorgement in FTC enforcement actions; and (2) the three-year statute of limitations in Section 19 of the FTC act applies.[47] In response, the FTC maintained its position that *Kokesh* "involve[d] an entirely different and distinct statutory scheme" and "did not change the law . . . regarding the scope of remedies under the FTC Act." The agency also asserted that Section 19 of the FTC Act "has no bearing" on relief the FTC seeks under Section 13(b). But the agency again also indicated that it was willing to apply a five-year limit on its claims in order to "effectively render[] a ruling that *Kokesh* applies moot."[48]

The court accepted the FTC's arguments and held that *Kokesh* "provides no basis for this Court to disregard decades of precedent" permitting the equitable remedies sought by the FTC and contains "nothing . . . that indicates that the Court should apply section 19(b)'s statute of limitations to the FTC's claims under section 13(b)."[49]

FTC v. Credit Bureau Center, LLC. In November 2017, defendants filed a motion to modify a preliminary injunction entered against them based on *Kokesh*. Defendants argued that terms in the preliminary injunction continuing an asset freeze and appointing a receiver were improper because they were intended to hold assets for disgorgement and restitution. As such, the "principles" set forth in *Kokesh*, they contended, confirm that disgorgement and restitution are "penalties" that the FTC is not authorized to seek under Section 13(b).[50]

In response, the FTC again asserted that *Kokesh* "did not alter, let alone reverse" the scope of remedies available under the FTC Act, but instead narrowly held that "a five-year statute of limitations applies when the SEC seeks punitive disgorgement under the securities laws" and "expressly disclaimed any broader application."[51] The FTC also cited the *DirecTV* and *J. William Enterprises* matters discussed above, stating that "the only two courts to have considered the issue have similarly concluded that *Kokesh* does not disturb established precedent under Section 13(b)."[52] Nevertheless, the FTC again emphasized that "compensating victims is the primary goal" in the agency's case because the agency asked for relief "necessary to redress injury to consumers" and proposed to measure consumer recovery as "the full amount of consumer loss."[53] And again, the FTC maintained that even if *Kokesh* applies to FTC actions, "its only possible effect would be to impose a five-year statute of limitations on an award of disgorgement to the Treasury to the extent that the disgorgement amount exceeded defendants' gains," which would not affect the case because the alleged misconduct dates back only to 2014.[54]

In January 2018, the district court denied the defendants' motion, stating that the defendants' interpretation of *Kokesh* was a "considerable overstatement" because the decision said nothing about "whether disgorgement and restitution were, as defendants claim, 'authorized' under the securities statute."[55] The court held that controlling Seventh Circuit law "specifically authorizes disgorgement and restitution in FTC suits," that it saw nothing in the "principles of *Kokesh* undermining these decisions," and that it is "rather reckless to contend" that Justices' comments during oral argument in *Kokesh* "render existing precedent infirm."[56]

FTC v. Publishers Business Services. In this pending Ninth Circuit appeal, Publishers Business Services contests a monetary judgment of nearly $24 million, arguing (among other things)[57] that *Kokesh* makes clear that FTC disgorgement is a penalty that is outside the scope of permissible equitable relief under Section 13(b).[58]

In response, the FTC reiterated the position taken by the agency in both *DirecTV* and *J. William Enterprises*: *Kokesh* was a narrow decision that left undisturbed "decades of consistent law on the availability of equitable remedies under the FTC Act."[59] Yet again, however, the FTC was careful to state in its briefing that even if *Kokesh* did apply, it has no "practical application" to the present case because the entire judgment seeks "equitable monetary relief for consumers" that falls within Section 2462's five-year statute of limitations.[60]

FTC v. AMG Capital Management. In this pending Ninth Circuit appeal, the appellants filed a brief approximately one month after *Kokesh* was decided, citing to the Supreme Court's decision as a basis for challenging a $1.3 billion monetary judgment.[61] The appellants argued that *Kokesh* "mandates the application of a statute of limitations to FTC 13(b) enforcement actions" and that the Truth in Lending Act's one-year statute of limitations applies to the case or, in the alternative, that the three-year statute of limitations in Section 19 of the FTC Act applies. They also urged the Ninth Circuit to reconsider "[t]he availability of monetary awards under Section 13(b)—regardless whether a court labels them 'damages' or 'equitable restitution,'" and to apply the *Kokesh* factors to "determine whether the FTC improperly uses Section 13(b) to pursue penal monetary relief under the guise of equitable authority."[62]

In response, the FTC again characterized *Kokesh* as a narrow decision limited to disgorgement judgments "with the purpose of punishment and deterrence" under the Securities Exchange Act.[63] At the same time, the agency took pains to note that the judgment in the present case was intended to be used to "compensat[e] a victim for his loss" and that the Ninth Circuit "need not reach the issue" of whether *Kokesh* applies to FTC "requests for monetary relief" because the monetary judgment did not extend beyond five years.[64]

While these matters are likely just a taste of the *Kokesh*-related disputes the FTC can expect to encounter in the future, several recurrent themes seem to be emerging from the Commission's advocacy. First, the FTC is not explicitly conceding that *Kokesh* applies to it. Given that the government's briefing in *Kokesh* argued that the ruling would apply to the FTC, it will be interesting to see if the FTC will maintain this position in future *Kokesh*-related disputes. Second, the FTC is largely abandoning efforts to seek disgorgement outside of Section 2462's five-year statute of limitations, and may thereby minimize the likelihood of court rulings applying the core holding of *Kokesh* to the agency. Finally, the FTC appears to be emphasizing that the agency is primarily seeking restitution, as opposed to disgorgement, and characterizing the purpose of its monetary remedies as victim compensation—for example, by stating that its monetary relief demand is "necessary to redress injury to consumers" (*DirecTV* and *Credit Bureau Center*), constitutes "equitable monetary relief for consumers" (Publishers Business Services), and will be used to "compensat[e] a victim for his loss" (*AMG Capital Management* and *Credit Bureau Center*).[65] This presumably reflects an effort by the agency to distance its monetary remedies from the SEC disgorgement remedy directly at issue in *Kokesh*.

Can FTC Restitution Constitute a Penalty?

The FTC's apparent effort to emphasize that its primary monetary remedy request is in the form of restitution and that it is seeking funds for victim compensation raises the question whether FTC restitution can be classified as a "penalty" under *Kokesh*. For the reasons outlined above, this would call into question whether the FTC can obtain such relief beyond the five-year statute of limitations specified by 28 U.S.C. § 2462 and could lead to a finding that the FTC may not obtain such relief ancillary to an injunction under Section 13(b).

The FTC has previously described restitution and disgorgement as "related" equitable remedies that serve distinct purposes.[66] According to the agency, disgorgement is "designed to deprive a wrongdoer of his unjust enrichment and to deter others from future violations," and restitution is "intended to restore the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation."[67] Although the FTC's description of restitution emphasizes victim compensation and makes no mention of deterrence, the *Kokesh* decision suggests that the label attached to the monetary remedy is irrelevant—what matters is the remedy's objective, how it was calculated, and how it is used.

Applying the *Kokesh* factors to FTC restitution does not yield a clear answer. As to the first factor, which focuses on whether the case proceeds for law enforcement purposes, there is little the FTC can do to avoid the conclusion that the cases in which the agency seeks restitution may proceed "even if victims do not support or are not parties to the prosecution," and thus redress the violation of a public law under *Kokesh*.[68] Indeed, this is true of *all* FTC actions under Section 13(b).

Application of the other two *Kokesh* factors to FTC restitution is less clear-cut. As to the second factor—the degree to which the remedy is "punitive" and "deterrent" in nature—as noted above, the FTC describes restitution as focused on victim compensation, a purpose that is, generally speaking, remedial rather than punitive or deterrent.[69] In practice, however, FTC restitution has been calculated in a manner that has resulted in defendants being liable for amounts that significantly exceed the alleged harm to victims caused by the offending conduct. This occurs because some courts have permitted the FTC to base restitution amounts on rough approximations of consumer harm[70] that may fail to account for the fact that some purchasers of the product at issue (a) received significant value, and/or (b) were unaffected by the offending conduct because they did not see the deceptive advertisement or experience the unfair conduct.[71] If a restitution amount exceeds the amount of consumer harm caused by the conduct, the remedy arguably imposes costs on defendants that are punitive and serve to deter future violations. Thus, because the restitution amounts the FTC has sought and obtained have, at least in some cases, not been closely linked to the consumer harm actually caused by the defendant's conduct, the second *Kokesh* factor arguably supports the conclusion that the remedy is a penalty.

The third *Kokesh* factor turns on whether the recovered funds are actually paid to victims as compensation. The FTC has stated that, where it is feasible to do so, it endeavors to remit funds obtained as restitution to victimized consumers.[72] However, the FTC has not always accomplished this goal and, in some cases, the agency has sought instead to at least have the discretion to direct restitutionary funds to the U.S. Treasury, given difficulties in successfully remitting funds to affected consumers. To the extent such funds are not returned to consumers, one might think of this component of a monetary remedy as equitable disgorgement, not restitution.[73] *Kokesh* can be read to suggest that the relevant question when analyzing this factor is whether all of the funds collected go to the victims, as opposed to the government. Hence, because the FTC does not consistently remit *all* of the funds obtained as restitution to consumers, this may cut in favor of concluding that restitution obtained by the FTC does indeed function as a penalty.

Conclusion

What ultimate implications *Kokesh* may have for the FTC remains unclear. What is clear is that the agency is already confronting arguments that *Kokesh* significantly limits its ability to obtain monetary relief in Section 13(b) matters. While no court to date has issued a decision applying the reasoning of *Kokesh* to the FTC, there are strong arguments that FTC disgorgement is a "penalty" subject to the statute of limitations in 28 U.S.C. § 2462, and that this remedy may be entirely unavailable as relief ancillary to the Commission's statutory injunctive authority.

The agency does appear to be shifting its approach to equitable monetary remedies to avoid requiring a court to squarely decide these issues, including by imposing limitations on how far back in time its disgorgement calculations reach, and characterizing its monetary relief as restitution designed to facilitate victim compensation. Whatever courts conclude after delving more deeply into these issues, *Kokesh* already makes clear that the scope of the FTC's authority to obtain monetary relief under Section 13(b) is less settled than some previous commentators have suggested. ■

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1 Press Release, Fed. Trade Comm'n, Vemma Agrees to Ban on Pyramid Scheme Practices to Settle FTC Charges (Dec. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/vemma-agrees-ban-pyramid-scheme-practices-settle-ftc-charges; Press Release, Fed. Trade Comm'n, Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans (Jan. 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc; Press Release, Fed. Trade Comm'n, Sensa and Three Other Marketers of Fad Weight-Loss Products Settle FTC Charges in Crackdown on Deceptive Advertising (Jan. 7, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/sensa-three-other-marketers-fad-weight-loss-products-settle-ftc; Press Release, Fed. Trade Comm'n, FTC Approves Final Order in Case About Google Billing for Kids' In-App Charges Without Parental Consent (Dec. 5, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/ftc-approves-final-order-case-about-google-billing-kids-app.

2 Fed. Trade Comm'n, Office of Claims and Refunds Annual Report (2017) [hereinafter FTC Office of Claims and Refunds Annual Report (2017)], https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effected-july/redressreportformattedforweb122117.pdf.

3 David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, Antitrust, Fall 2016, at 89.

4 *Id.*

5 Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017).

6 *See* M. Sean Royall & Richard H. Cunningham, *Will* "Kokesh v. SEC" *Put a Kink in the Federal Trade Commission's Disgorgement Hose?* (July 10, 2017), https://wlflegalpulse.com/2017/07/10/will-kokesh-v-sec-put-a-kink-in-the-federal-trade-commissions-disgorgement-hose/.

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

8 Transcript of Oral Argument at 29:16–19, *Kokesh*, 137 S. Ct. at 1635.

9 Tull v. United States, 481 U.S. 412, 424 (1987).

10 Vladeck, *supra* note 3, at 94.

11 568 U.S. 442, 444 (2013); 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.").

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

13 *Id.* Similar provisions found in each act provide the SEC with the authority to seek injunctions. *See* 15 U.S.C. 78u(d)(1) (Securities Exchange Act) (providing SEC may bring an action in the district court "to enjoin [certain unlawful] acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond"); 15 U.S.C. 80b-9(d) (Investment Advisors Act) (providing SEC may bring an action in district court "to enjoin [certain unlawful] acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder"); 15 U.S.C. 80a-41(d) (Investment Company Act) (same).

14 *Kokesh*, 137 S. Ct. at 1640.

15 *See* Transcript of Motion for Entry of Final Judgment at 22:17–24:13, SEC v. Kokesh, 2015 WL 12670314 (D.N.M. Mar. 9, 2015).

16 SEC v. Kokesh, 834 F.3d 1158, 1164 (10th Cir. 2016).

17 *Kokesh*, 137 S. Ct. at 1643.

18 *Id.* at 1642 (quoting Huntington v. Attrill, 146 U.S. 657, 667 (1892)).

19 *Id.* at 1643–44.

20 *Id.* at 1643.

21 *Id.*

22 *Id.* at 1643–44.

23 *Id.* at 1644.

24 *Id.*

25 FTC v. Bronson Partners, LLC, 654 F.3d 359, 373 (2d Cir. 2011).

26 *Id.*

27 *Id.* (recognizing that the "primary purpose of disgorgement orders is to deter violations of the" FTC laws); FTC v. Gem Merch. Corp., 87 F.3d 466, 469 (11th Cir. 1996) (recognizing "the deterrence function of section 13(b)" disgorgement).

28 *See* Brief for Respondent at 48, *Kokesh*, 137 S. Ct. at 1635.

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

30 *See* Transcript of Oral Argument at 52:18–21, *Kokesh*, 137 S. Ct. at 1635 ("Ms. Goldenberg: There are almost 50 years of precedents on how this should work and I think the way it worked is—; Justice Gorsuch: Not in this Court.").

31 *Id.* at 52:14-16. For a Supreme Court tracker, Justice Gorsuch's choice of words may be of particular note. The precedents that agencies, like the SEC, rely on to justify disgorgement and restitution remedies as ancillary to injunctive authority—Porter v. Warner Holding Co., 328 U.S. 395 (1946), and Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960)—have been described as relics from an era in which the Supreme Court considered it a "duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," rather than to hone to the statute's text. Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)). Over the last two decades, the Court has cautioned against the judicial crafting of statutory remedial schemes in excess of those Congress carefully delineated, warning that important policy (and thus legislative) judgments are implicated by the choice of remedies available in a given statutory scheme. *See, e.g.*, *Alexander*, 543 U.S. at 286–87.

32 Transcript of Oral Argument at 33:12-18, *Kokesh*, 137 S. Ct. at 1635 ("They're—they're sort of backing and filling. I mean, this remedy is out there, and yes, [Congress is] saying this. But it does seem to me that we kind of have a special obligation to be concerned about how far back the government can go when it's something that Congress did not address because it did not specify the remedy.").

33 *Id.* at 7:20–8:2; 9:5–11.

34 *Id.* at 7:20–8:2.

[35] *Id.* at 9:5–11.

[36] *Tull*, 481 U.S. at 424.

[37] *Kokesh*, 137 S. Ct. at 1644–45.

[38] *Id.* at 1644.

[39] *Id.* at 1644–45.

[40] FTC v. DirecTV Inc., No. 15-cv-01129-HSG (N.D. Cal. 2017); FTC v. J. William Enters., LLC, No. 6:16-cv-2123 (M.D. Fla. 2017); FTC v. Publishers Bus. Servs., Inc., No. 17-15600 (9th Cir. 2017); FTC v. AMG Capital Mgmt., LLC., No. 16-17197 (9th Cir. 2017); FTC v. Credit Bureau Ctr., LLC, No. 17-CV-194 (N.D. Ill. 2017).

[41] DirecTV's Motion for Leave to File Third Amended Answer at 1–3, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. June 20, 2017), ECF No. 323.

[42] Federal Trade Commission's Opposition to DirecTV's Motion for Leave to File Third Amended Answer at 6–8, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. June 30, 2017), ECF No. 330.

[43] *Id.* at 5 (citing Complaint at 14, ¶ 55, SEC v. Kokesh, No. 1:09-cv-01021 (D.N.M. Oct. 27, 2009), ECF No. 1).

[44] *Id.* at 7 n.6.

[45] FTC v. DirecTV Inc., No. 15-cv-01129-HSG, 2017 WL 3453376, at *6 (N.D. Cal. Aug. 12, 2017).

[46] *Id.* at *5.

[47] Defendants' Joint Motion for Partial Summary Judgment at 3–10, FTC v. J. William Enterprises, LLC, No. 6:16-cv-2123 (M.D. Fla. Aug. 2, 2017), ECF No. 146.

[48] Plaintiff's Response in Opposition to Defendants' Joint Motion for Partial Summary Judgment at 2, 7, FTC v. J. William Enterprises, LLC, No. 6:16-cv-2123 (M.D. Fla. Sept. 8, 2017), ECF No. 159.

[49] FTC v. J. William Enterprises, LLC, No. 6:16-cv-2123, 2017 WL 4776669, at *2 (M.D. Fla. Oct. 23, 2017).

[50] Defendants' Motion to Modify Preliminary Injunction at 1–2, FTC v. Credit Bureau Center, LLC, et al., No. 17-CV-194 (N.D. Ill. Nov. 9, 2017), ECF No. 156.

[51] Federal Trade Commission's Memorandum in Opposition to Defendants' Motion to Modify Preliminary Injunction at 5–6, FTC v. Credit Bureau Center, LLC, et al., No. 17-CV-194 (N.D. Ill. Nov. 28, 2017), ECF No. 164.

[52] *Id.* at 7.

[53] *Id.* at 8.

[54] *Id.* at 1, 9.

[55] FTC v. Credit Bureau Ctr., LLC, No. 17-CV-194, 2018 WL 482076, at *1 (N.D. Ill. Jan. 14, 2018).

[56] *Id.* at *2 (internal quotations and citations omitted).

[57] Publishers Business Services has also raised on appeal the argument that Section 13(b) has "common-law foundations," so actions brought pursuant to Section 13(b) are therefore subject to a common-law proximate cause analysis. Initial Brief of Appellants at 32–39, FTC v. Publishers Bus. Servs., Inc., No. 17-15600 (9th Cir. Aug. 30, 2017), ECF No. 13.

[58] Initial Brief of Appellants at 18–26, FTC v. Publishers Business Servs., Inc., No. 17-15600 (9th Cir. Aug. 30, 2017), ECF No. 13.

[59] Brief of the Federal Trade Commission at 22, FTC v. Publishers Business Servs., Inc., No. 17-15600 (9th Cir. Oct. 30, 2017), ECF No. 22.

[60] *Id.* at 38.

[61] Opening Brief of Relief Defendants-Appellants at 84–86, FTC v. AMG Capital Management, LLC, No. 16-17197 (9th Cir. July 21, 2017), ECF No. 14.

[62] *Id.* at 89, 90.

[63] Brief of the Federal Trade Commission at 90–92, FTC v. AMG Capital Management, LLC, No. 16-17197 (9th Cir. Nov. 28, 2017), ECF No. 37-2.

[64] *Id.* at 91–92.

[65] Federal Trade Commission's Opposition to DirecTV's Motion for Leave to File Third Amended Answer at 5, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. June 30, 2017), ECF No. 330; Brief of the Federal Trade Commission at 38, FTC v. Publishers Business Servs., Inc., No. 17-15600 (9th Cir. Oct. 30, 2017), ECF No. 22; Brief of the Federal Trade Commission at 91, FTC v. AMG Capital Management, LLC, No. 16-17197 (9th Cir. Nov. 28, 2017), ECF No. 37-2.

[66] Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2003) [hereinafter FTC 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases], https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular (withdrawn July 31, 2012).

[67] *Id.*

[68] *Kokesh*, 137 S. Ct. at 1643.

[69] *See* FTC 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, *supra* note 66.

[70] *See, e.g.*, FTC v. Febre, 128 F.3d 530, at 535–36 (7th Cir. 1997) ("The Commission must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate."); FTC v. JK Publ'ns, Inc., No. 99-0044, 2000 WL 35594143, at *17 (C.D. Cal. Aug. 9, 2000) (requiring the FTC's restitution amount to "reasonably approximate the amount of consumer loss"). The Ninth Circuit's recent decision in *FTC v. Commerce Planet, Inc.* highlights how approximate the FTC's estimate can be. In Commerce Planet, the defendant contested the amount of the FTC's restitution award of $18.2 million as being "arbitrarily" determined because the FTC failed to account for the fact that "not all of the consumers who purchased [the product at issue] were deceived." FTC v. Commerce Planet, Inc., 815 F.3d 593, 604–04 (9th Cir. 2016). The district court noted that the FTC met its initial burden based on expert testimony that "most" people who saw the advertisement at issue would have been deceived. FTC v. Commerce Planet, 878 F. Supp. 2d 1048, 1092 (C.D. Cal. 2012). The district court accepted ipso facto that 50 percent is the lower bound of "most," and then multiplied the defendant's net revenues of $36.4 million by that fraction to calculate the appropriate monetary remedy. *Id.* The Ninth Circuit specifically affirmed this methodology, which included no specific assessment of how many of the defendant's customers were deceived by the advertising practice the FTC successfully challenged or received some value from the service. *Commerce Planet*, 815 F.3d at 605.

[71] *See* FTC v. Nat'l Urological Group, Inc., 645 F. Supp. 2d 1167, 1212 (N.D. Ga. 2008) (stating that the "primary purpose of restitution in the context of deceptive advertising is to restore victims to their position prior to the deceptive sales" and that "the court looks to the price paid by consumers and does not deduct any value received" when calculating the remedy amount). Notably, the FTC very recently took the position in motions practice in the *FTC v. DirecTV LLC* matter described above that it could have demanded all of DirecTV's net revenues during the applicable time period, even though DirecTV offered "legitimate products that some customers valued." Federal Trade Commission's Opposition to DirecTV's Motion for Partial Findings at 25, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. Sept. 25, 2017), ECF No. 401.

[72] *See, e.g.*, FTC Office of Claims and Refunds Annual Report (2017), *supra* note 2, at 7 ("As part of its mission to protect American consumers, the FTC works to get money back to people who are harmed by illegal business practices. . . . In all of its activities, the Bureau works to provide consumer refunds whenever feasible, and then develops customized refund programs that are designed to get as much money back to as many injured consumers as possible.").

[73] *See, e.g.*, *Gem Merchandising*, 87 F.3d at 470 ("[B]ecause it is not always possible to distribute the money to the victims of defendant's wrongdoing, a court may order the funds paid to the United States Treasury."); *Febre*, 128 F.3d at 537 (stating that the FTC "often requests orders directing equitable disgorgement of the excess money to the United States Treasury" because "they cannot identify all the consumers entitled to restitution and cannot distribute all the equitable relief ordered to be paid").