CASES & MATERIALS

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Second Circuit Rejects Manifest Disregard of Law as a Basis for Vacating Arbitration Award

Pfeffer v. Wells Fargo Advisors, LLC, et al., No. 17-1819-cv (2d. Cir. Feb. 15, 2018)

A FINRA arbitration panel dismissed Claimant Pfeffer's state law claims arising from Wells Fargo Advisors failure to follower her late husband's instructions to transfer all assets from a trust naming his children as beneficiaries to a trust naming her as the beneficiary. Pfeffer testified that her now deceased husband requested the transfer because the Pfeffers became concerned about the management of the accounts. The Wells Fargo broker testified that he did not transfer the assets because he was worried that Mr. Pfeffer was not competent and was being unduly influenced by Mrs. Pfeffer. After receiving two letters from physicians confirming that Mr. Pfeffer was not capable of making financial decisions, Wells Fargo froze both trust accounts. After a five-and-a-half-day hearing, during which both parties presented testimony and other evidence, the Panel denied Mrs. Pfeffer's claim.

Mrs. Pfeffer filed a complaint challenging the arbitration award and Wells Fargo moved to dismiss the complaint and confirm the award. The district court confirmed the award and this appeal followed. On appeal, Mrs. Pfeffer argued that the award was procured by undue means, evident partiality, and misconduct because the Panel was intimidated by defense counsel and refused to consider relevant evidence. Pfeffer alleged that the Panel exhibited manifest disregard for the law and facts.

Under the Federal Arbitration Act, a district court may vacate an arbitration award if: (1) the award was procured by "corruption, fraud, or undue means"; (2) the arbitrators exhibited "evident partiality" or "corruption"; (3) the arbitrators were guilty of "misconduct" such as "refusing to hear evidence pertinent and material to the controversy" or "any other misbehavior" that prejudiced the rights of any party; or (4) the arbitrators "exceeded their powers." 9 U.S.C. § 10(a); *see also AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011). The court reasoned that the second circuit does not recognize manifest disregard of the evidence as a proper grounds for vacating an arbitration panel's award, and will only

find a manifest disregard for the law where there is no colorable justification for a panel's conclusion. *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004).

The court held that Mrs. Pfeffer failed to meet her "very high" burden to demonstrate that vacatur was appropriate. *Id.* at 103. The court found that the transcript of the arbitration reveals no suggestion that the award was produced by undue means, evident partiality, or misconduct. Mrs. Pfeffer's allegations that the Panel failed to abate defense counsel's abrasive manner and that it was intimidated by him are belied by the record. The court found that contrary to Mrs. Pfeffer's allegations, the transcript of the proceedings shows that the Panel considered her evidence, understood the issues underlying her claims, and afforded her latitude because she was *pro se*. Therefore, the court found no support for the conclusion that the panel had manifestly disregarded the law and affirmed the lower court's decision confirming the award.

Dismissal of a Counterclaim is an Appropriate Sanction for Flagrant Discovery Abuse

Simons vs. Fox, No. 17-1012 (7th Cir., February 1, 2018)

This appeal addresses the propriety of sanctions against a litigant for discovery abuses. In a highly contested dispute between the ex-CEO of a trading firm and its founder, the founder and defendant, asks the appellate court to vacate the dismissal of his counterclaim as a sanction for his discovery abuse. Simons sued Fox for firing him for uncovering Fox's alleged violations of corporate and securities laws. Fox then countersued Simons for defamation. Throughout the acrimonious litigation, Fox asserted that Simons lied in order to destroy Fox's companies. Rather than prove that assertion with evidence, Fox obstructed Simons's discovery. This led to sanctions and ultimately the dismissal of Fox's counterclaim. Fox appeals the orders leading up to the dismissal.

Fox repeatedly refused Simons's discovery requests, he refused to produce documents he possessed or controlled, and he was an uncooperative deponent. The district court judge directed the production of documents in at least three separate orders, yet Fox declined to produce discovery. The judge sanctioned Fox and he refused to pay the monetary sanction. Fox was then held in contempt of court and ordered to pay a fine for everyday he remained in contempt. Fox refused to pay the fine for contempt. After Fox asserted that he lacked funds to pay any fines, the judge entered an alternative sanction of

dismissing his counterclaim as the sanction for Fox's obstruction. The court found that when presented with the dismissal of claims as a sanction, "we weigh not only the straw that finally broke the camel's back, but all the straws that the recalcitrant party piled on over the course of the lawsuit." *Domanus*, 742 F.3d at 301 (quoting *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 643 (7th Cir. 2011)).

Similarly, the circuit court held that the trial court did not commit reversible error by allowing Simons to voluntarily dismiss the claims against Fox after Fox's counterclaim was dismissed. Federal Rules of Civil Procedure 41(a)(2) allows a Plaintiff to dismiss claims voluntarily at any time "on terms the court considers proper." The court reasoned that at the time of dismissal, Fox was in contempt of court, and he showed no prospect of respecting his long-ignored discovery obligations. Therefore, Fox cannot show prejudice from the judge allowing Simons to dismiss his claims voluntarily to end the case. Finally, Fox contended that the district judge was biased and should have disqualified himself. The court found that judicial rulings, even those that "are critical or disapproving of, or even hostile to" a party, do not constitute a valid basis for disqualification except in the "rarest circumstances" in which "deep-seated favoritism or antagonism" makes fair judgement impossible. *Liteky v. United States*, 510 U.S. 540, 555 (1994). The circuit court found that Fox presented no persuasive reason to disturb the district judge's fair and patient approach to managing the case and affirmed the decision.

Arbitration Award Will Be Upheld Unless Completely Irrational

Freedom Investors Corp. vs. Gantan, No. C 17-3914, 2018 U.S. Dist. LEXIS 57044 (N.D. Cal., April 3, 2018)

The court denied a petition to vacate a FINRA arbitration award and grants the cross-petition to confirm the award, holding that the petitioner failed to present any compelling grounds for vacatur. A FINRA arbitration panel rendered an award in favor of Claimant Gantan, and thereafter, Freedom filed a Petition to Vacate. As grounds for vacatur, the petition alleged arbitrator misconduct and that the arbitration panel exceeded its authority. The district court reasoned that "under the statute, confirmation is required even in the face of erroneous findings of fact or misinterpretations of law." *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.,* 341 F.3d 987, 997 (9th Cir. 2003). Judicial review under the FAA is "both limited and highly deferential." *Sheet Metal Workers' Int'l. Assn. Local Union No. 359 v. Madison Indus., Inc. of Ariz.,* 84 F.3d 1189, 1190 (9th Cir. 1996). The FAA creates "an extremely

limited review authority" that is "designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures." *Kyocera*, 341 F.3d at 998. "The burden of establishing grounds for vacating an arbitration award is on the party seeking it." *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010).

Freedom's motion relied on section 10(b)(4), which applies to cases "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). A party seeking relief under section 10(a)(4) faces a "high hurdle". *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 559 U.S. 662, 671 (2010). "It is not enough for petitioners to show that the panel committed an error- or even a serious error." *Id*. Rather, a court must uphold an arbitrator's decision unless it is "completely irrational…or exhibits a manifest disregard of law." *Kyocera,* 341 F.3d at 997. The court held that the mere fact that the arbitration panel was unpersuaded by Freedom's argument that it was not a successor to Merrimac, even if that decision was erroneous, does not warrant vacatur of the Award. The court further held that Freedom's assertion that the Panel ignored controlling law is unsupported as is the contention that the panel exercised a manifest disregard for the law. The court concluded that Freedom's arguments were nothing more than an invitation to reconsider the arbitration panel's decision which it had no power to do. As a result, the court found that Freedom failed to present any compelling grounds for vacating the award, denied the Petition to Vacate and granted Gantan's Cross Petition to Confirm.

Form U4 Amendments Supplement Rather than Supersede Initial Application

Hotvet vs. First Wilshire Securities Management, Inc., No. B271092, 2018 Cal. App. Unpub. LEXIS 1549 (Cal. App., 2Dist., March 6, 2018)

Hotvet ("Plaintiff") sued her former employer, First Wilshire Securities Management, Inc. ("Defendant"), in connection with alleged wage theft occurring in 2010 and her alleged wrongful termination occurring in 2015. Defendant, a FINRA member until May 2012, petitioned to compel arbitration of Plaintiff's claims, relying on Plaintiff's Form U4 application, which contained an agreement to arbitrate any dispute between herself and Defendant in accordance with FINRA rules. Defendant further asserted that Plaintiff was acting in her role as a securities representative of a FINRA member subject to FINRA arbitration rules. Plaintiff opposed, arguing that the arbitration agreement was superseded by her subsequent Form U4 amendments, which did not contain arbitration agreements. Furthermore, Plaintiff argued that

FINRA rules compelling arbitration were inapplicable because Defendant was no longer a FINRA member and she was not an "associated person" because she was working as an investment advisor and not a securities representative. The trial court denied Defendant's Petition, holding that the arbitration agreement was superseded by Plaintiff's subsequent Form U4 amendments and that Defendant failed to prove it was a FINRA member or that Plaintiff was an "associated person." Defendant appealed.

The appellate court reasoned that Defendant satisfied its burden of proving the existence of an arbitration agreement governed by FINRA, because Form U4 amendments supplement, rather than supersede, the initial application. Here, Defendant established that it was a FINRA member from the time it hired Plaintiff in 2003 through May 2012. The claims that indisputably arose after May 2012 – specifically, those relating to Plaintiff's wrongful termination – fall outside the arbitration agreement. Accordingly, the court affirms the trial court's denial of Defendant's Petition as to these claims. However, the court finds that Defendant presented a *prima facie* showing that the remaining claims, those relating to the wage theft in 2010, are subject to arbitration because it is feasible, based on the allegations in the complaint and Petition, that Plaintiff was acting as a securities representative during the relevant time.

As a result, the appellate court reversed the denial of Defendant's petition to compel arbitration regarding Plaintiff's claims arising while Defendant was a registered FINRA member, and affirmed the denial as to the claims arising after Defendant had terminated its FINRA membership. The court held that the valid arbitration agreement set forth in Plaintiff's Form U4 application was not superseded by Plaintiff's subsequent Form U4 amendments. The court further held that Plaintiff failed to rebut Defendant's *prima facie* showing that her claims fell within the arbitration agreement because she presented no evidence supporting that she was not an "associated person" of a FINRA member. Accordingly, because the trial court misallocated the appropriate burdens of proof, the court reversed the denial of Defendant's Petition as to the claims arising before 2012, and remanded for further proceedings.

Virginia Stands Firm on Statute of Limitations

Snapp vs. Lincoln Fin. Sec. Corp., No. 5:17-cv-00059 (W.D. Va., March 2, 2018)

Plaintiffs brought an action asserting various claims arising from Defendants' alleged securities fraud. Defendants argue that Plaintiffs' claims

are time barred. Watts was a FINRA registered representative of Lincoln Financial Securities Corporation ("Lincoln") and professional authorized to sell RiverSource variable annuities. Watts recommended that the Snapps invest their life savings in RiverSource variable annuities. Watts told them that the investment "would never go below the initial amount they would be investing" and that "it would be paid out in full as a death benefit". The quarterly and annual statement received by the Snapps contradicted Watts' representation that the value would never decline below the initial investment and that the death benefit would equal the initial investment. The Snapps asked Watts about the annuity and he repeatedly assured them that their investment would not decline.

Watts purportedly committed suicide after he was contacted by an investigator regarding thefts from customers. After his death, the Snapps called his office "and found out for the first time" that their death benefit had substantially declined. Thereafter, the Snapps filed a FINRA arbitration claim against Lincoln and RiverSource and the arbitration panel granted Defendants' Motion to Dismiss based on FINRA's six-year "eligibility" rule for the submission of claims.

The court held that the statute of limitations and statutes of repose are affirmative defenses that may be raised in a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). *United States v. Kivanc*, 714 F.3d 782, 789 (4th Cir. 2013). While a Rule 12(b)(6) motion "invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011).

Defendants argued that the Snapps' Virginia Securities Act claims were time-barred under the two-year limitation period. The fourth circuit has emphasized that the two-year limitation is "an absolute cutoff." *Caviness v. Derand Res. Corp*., 983 F.2d 1295, 1305-06 (4th Cir. 1993) (holding that the limitations period is not subject to equitable tolling because "we conclude from the plain meaning of the statute that the Virginia legislature intended to provide unqualifiedly that a claim must be brought within two years"). The court reasoned that in order to successfully maintain a claim for fraud, Plaintiffs "bear the burden to prove that [they] acted with due diligence and yet did not discovery the fraud or mistake until within the statutory period of limitations immediately preceding the commencement of the action." *Terry Phillips Sales, Inc. v. SunTrust Bank. No*. 3:13-cv-468, 2014 WL 670838, at 5 (E.D. Va. Feb. 20, 2014). The court found that because every quarterly and annual statement from RiverSource directly contradicted Watts' representation that the annuity account values would never fall below the initial investment the Plaintiffs'

assertion that they did not discover the fraud until Watts death is not credible. The court then analyzed each cause of action asserted by the Plaintiffs and dismissed every cause of action.

Bring It in Arbitration

Sayre vs. JP Morgan Chase & Co., Nos. 17-449 & 17-2285 (S.D. Cal., February 26, 2018)

Sayre worked for JP Morgan as a financial advisor. Sayre argued that JP Morgan wrongfully terminated his employment after he complained about policies and protocols he contended were unlawful. Sayre was represented by attorneys, Mr. and Mrs. Mirch, who were a husband and wife attorney team. The case proceeded to arbitration and the parties participated in a morning hearing session. After lunch, Sayre's counsel became ill and went to the doctor. Sayre's attorneys requested a continuance of the hearing to the next day which was granted. The next morning, Mrs. Mirch appeared and requested a continuance because neither Mr. Mirch nor Mr. Sayre could be present. Mr. Mirch was in the emergency room and Mr. Sayre's wife was about to have a baby. The Panel denied the motion to continue the hearing. The hearing concluded and the Panel found in favor of JP Morgan. Sayre filed a Petition to Vacate or Modify the Arbitration Award.

The court reasoned that an arbitration award is generally upheld if there was "any reasonable basis" for denying the requested continuance. *Cortina v. Citigroup Global Markets, Inc.* No. 10Cv2423-L RBB, 2011 WL 3654496, at 5 (S.D. Cal. Aug. 19, 2011). Here the Panel cited the "reasonable basis" for its denial of a continuance. The Panel determined it could make an impartial decision with or without Mr. Sayer and Mr. Mirch's presence. The Panel reviewed the evidence submitted by both parties. The Panel reasonably found an indefinite postponement of the arbitration hearing was unnecessary given there was sufficient evidence available that would allow it to make a fair and impartial decision. The court found no "manifest disregard for law" in the Panel's denial of Mr. Sayre's request to continue the hearing. The Court found that the Panels decision was not arbitrary, but was based on a reasonable decision by the Panel. Therefore, the court denied Mr. Sayre's Petition to Vacate.

Mr. Sayre also filed a Complaint against JP Morgan in court alleging, *inter alia,* violations of the Dodd-Frank Act. JP Morgan moved to dismiss the Complaint. JP Morgan argued that res judicata bared Plaintiff's lawsuit due to the FINRA arbitration award. The court reasoned that "[a]n arbitration

decision can have res judicata or collateral estoppel effect." *C.D. Anerson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987). "Res judicata bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits. It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought." *Id*.

The court found that it was undisputed that the claims in the FINRA Arbitration differ from the claims in the present suit. Defendant's position was that Plaintiff waived his right to litigate the claims in court when he litigated claims based on the same underlying facts and alleged conduct in the FINRA Arbitration. The court examined the issue of whether the claims in Plaintiff's Complaint arose out of the same nucleus of facts as the FINRA claims and "could have been brought" in the FINRA arbitration. The court held that Plaintiff was not barred from bringing his Dodd-Frank Act whistleblower claims in arbitration. Therefore, the Court concluded that the arbitration involved the same claim or cause of action as the current suit and the first element of res judicata was met. As a result, the court granted Defendant's Motion to Dismiss.

Form U5 Filings Serve to Protect

Sullivan vs. SII Investments, Inc., No. 18-CV-00666-SI, 2018 U.S. Dist. LEXIS 28067 (N.D. Cal., February 20, 2018)

Plaintiffs Sullivan and Cuenca worked in the securities industry for approximately two decades. Plaintiffs were registered representatives of Defendant SII Investments. Defendant announced it was selling itself to another brokerage firm, LPL. Following the announcement, Defendant informed its stockbrokers that letters would be sent to clients advising them that their accounts would be transferred to LPL and the clients would be assigned a new registered representative if the client's current SII broker elected not to register with LPL. Sullivan was told that LPL would not transfer his registration and subsequently another brokerage firm, IFG, hired both Plaintiffs. On the same day, Defendant terminated Plaintiffs and filed a Form U5 indicating the termination was "for cause". When Plaintiffs notified IFG of the termination, it rescinded its employment offer to Plaintiffs. Plaintiffs subsequently found another brokerage firm, IAA, and obtained an employment offer, under terms that were "markedly less attractive." Thereafter, Defendant

sent out a transfer letter to Plaintiffs' clients advising them that their accounts would be moved over to LPL unless they opted out. Plaintiffs filed a Complaint and a Motion for a Temporary Restraining Order asking the court to grant injunctive relief.

The court reasoned that "injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the Plaintiff is entitled to such relief." *Wachovia Sec., LLC v. Raifman*, No. C 10-04573 SBA, 2010 WL 4502360 at 4 (N.D. Cal. Nov. 1, 2010). In order to obtain a temporary restraining order, Plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, at 20 (2008).

The court denied Plaintiffs' Motion for a Temporary Restraining Order because the Defendant's U5 filing is protected by absolute privilege and reasoned that U5 filings are an important mechanism for protecting customers, and therefore, serves the public interest. The court held that Plaintiffs must address their disputes with Defendant through arbitration because they are bound by their contract with Defendant and through their registration with FINRA to resolve any disputes in arbitration.

Arbitrability (Who Decides?)

Wells Fargo Advisors, LLC vs. Sappington, Nos. 16-3833 & 16-3854 (2nd Cir., March 7, 2018)

Former Wells Fargo employees filed putative class arbitrations before the American Arbitration Association seeking unpaid overtime from Wells Fargo. The employees were entry-level financial advisors in various Wells Fargo branch offices. Each entered into an employment contract with Wells Fargo that included an arbitration clause. Wells Fargo sought to compel bilateral rather than class arbitration. The district court denied Wells Fargo's petitions, holding that an arbitrator, rather than a court, must determine whether the arbitration clause in the employee's employment contract authorizes class arbitration.

The second circuit was therefore presented with (1) determining whether the question of arbitrability is for a court to decided and, if so, (2) determining, on a case-by-case basis, whether there is clear and unmistakable evidence of the parties' intent to let an arbitrator decided that question. The court's analysis began with the presumption that questions of arbitrability are for a

court to decide. The court further reasoned that the presumption that a court should decide a question of arbitrability is overcome when there exists "clear and unmistakable evidence from the arbitration agreement, as constructed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by an arbitrator." *Paine Webber Inc. v. Bybyk,* 81 F.3d 1193, 1198-99 (2d Cir. 1996).

In this case, the court concluded that there was clear and unmistakable evidence that the parties to the case intended to arbitrate all questions of arbitrability, including whether they agreed to authorize class arbitration. Accordingly, the second circuit affirmed the district court's decision denying Wells Fargo's petition to compel bilateral arbitration.

Cristo vs. The Charles Schwab Corporation, No. 17-1843 (S.D. Cal., April 11, 2018)

Over the years, Plaintiff Cristo opened various Schwab accounts and the account applications contained arbitration clauses. Plaintiff sued Schwab for violation of the Federal Right to Privacy Act because, in response to a subpoena from the IRS for records of Plaintiff's 2002 transactions, Schwab supplied records of Plaintiff's transactions from 1995 to 2006. Schwab moved to compel arbitration and stay or dismiss the court proceedings arguing that the arbitration clauses in the Schwab application control.

The Federal Arbitration Act sets forth a general policy favoring arbitration agreements and establishes that a written arbitration agreement is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court…for an order directing that…arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. In interpreting the validity and scope of an arbitration agreement, the courts apply state law principles of contract formation and interpretation. *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1217 (9th Cir. 2008). Arbitration agreements, "[l]ike other contracts…may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010). The party opposing arbitration bears the burden of showing that the agreement does not cover the claims at issue. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-91 (2000).

Charles Schwab argued that valid arbitration agreements exist because the arbitration provisions are "clear and unequivocal". Plaintiff does not dispute that he signed the Schwab account applications, but he asserted that he merely signed where his investment advisor told him to sign. Plaintiff further argued that the applications were not binding contracts but were merely

applications. The Court held that failure to read or negotiate agreements prior to signing does not negate the offer or asset required for a binding contract, that binding contracts existed, including a valid arbitration agreement.

Next, Charles Schwab argued that the causes of action arose out of transactions covered by the arbitration agreements. Plaintiff argued that his allegations were not subject to arbitration as they do not stem from his account relationship with Schwab, but rather concern Schwab's allegedly unlawful acts in responding to IRS summonses. The arbitration provisions in the account applications state that it covers "any controversy" or "in any way arising from the relationship with Schwab." The Court reasoned that provisions that include such language are construed broadly. The Plaintiff's allegations concerned a dispute between the parties relating to Plaintiff's Schwab accounts and arose out of the relationship between the two parties. Accordingly, the Court concluded that Plaintiff's claims fell within the arbitration provisions.

Lastly, Plaintiff argued that even if there was a contract to arbitrate, it is procedurally and substantively unconscionable. The court disagreed and found that while Plaintiff has demonstrated some "oppression or surprise" in the application process there was not enough procedural or substantive unconscionability to meet the burden of proof. Therefore, the Court found the arbitration provisions enforceable. As a result, the Court granted Schwab's Motion to Compel Arbitration and stayed the court case pending arbitration.

Each Act is a Violation and a New Limitation Period Runs

SEC vs. Kokesh, No. 15-2087, 2018 U.S. App. LEXIS 616 (10th Cir., March 5, 2018)

Defendant Kokesh owned and controlled two SEC registered investment adviser firms. The SEC alleged that Defendant misappropriated over $34.9 million and a jury found that Defendant had committed fraud. The district court ordered (1) that he pay a civil penalty of $2,354,593; (2) that he be enjoined from violating securities laws in the future; and (3) that he disgorge $34,927,329 (plus interest) holding that disgorgement does not constitute a penalty within the meaning of 28 U.S.C. Section 2462, and thus, Section 2462's five-year limitations period does not limit the amount of disgorgement claimed by the SEC. Defendant appealed.

The tenth circuit affirmed and Defendant sought Supreme Court review that the disgorgement claim was not subject to the five-year statute of limitations governing suits "for the enforcement of any civil fine, penalty, or forfeiture." The Supreme Court reversed, holding that "[d]isgorgement in the

securities-enforcement context is a 'penalty' and so disgorgement actions must be commenced within five years of the date the claim accrues." *Kokesh v. SEC*, 137 S.Ct. 1635,1639 (2017). On remand, the SEC contended that Kokesh must still disgorge $5,004,773 that was allegedly converted within Section 2462's five-year limitations period.

Defendant argued that the limitations period begins "when the claim first comes into existence'" and therefore, the SEC's claims accrued when he first began his fraudulent schemes and concludes that the entire action is time-barred. The SEC responded that a new limitation period applied to each improper conversion of funds, so the limitations period had not expired for the conversion of $5,004,773.

The court reasoned that a single violation continues over an extended period of time when the Plaintiff's claim seeks redress for injuries resulting from a series of separate acts that collectively constitute one unlawful act, as opposed to conduct that is a discrete unlawful act. That is, a violation is a continuing one, when the conduct as a whole can be considered as a single course of conduct. However, in this case the court concluded that Defendant's misappropriations of funds are properly viewed as discrete violations. Defendant's misconduct was not a continuing omission to act in compliance with a duty. The SEC's claim did not depend on the cumulative nature of Defendant's acts. Defendant's misconduct was taking funds without proper authority and without consent. The misappropriation constituted a series of repeated violations of an identical nature, with each unlawful taking being actionable for five years after its occurrence.

The court concluded that to hold that Defendant's misappropriations constituted only one continuing violation would do much more than provide repose for ancient misdeeds; it would confer immunity for ongoing repeated misconduct. The court concluded that it cannot countenance such a result and found that a proper interpretation of § 2462 would not require such a result. Therefore, the circuit court held that the judgement of the district court is reversed and remanded with instructions to enter an order requiring Defendant to disgorge $5,004,773.