Parties Push to Enforce Statutory Time Limits on SEC Enforcement Actions

Tuesday, April 14, 2015

Two cases now before US Courts of Appeals carry the possibility of placing meaningful new limits on the US Securities and Exchange Commission’s (SEC) time horizon for bringing enforcement actions. The SEC has long argued that certain statutory provisions which appear on their face to create time limits on SEC actions are either limited in their scope or merely establish internal policy guidelines for the agency, and do not actually circumscribe its jurisdiction to bring actions. These impending appellate decisions, depending on their outcomes, may expand the defenses available to parties subject to SEC enforcement actions when those actions are not undertaken in a timely fashion.

SEC v. Graham, pending in the 11th Circuit, involves 28 U.S.C. § 2462, a generally applicable statute of limitations providing that “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.” The US Supreme Court’s 2013 Gabelli decision held that in SEC enforcement actions seeking civil penalties, § 2462 applies and the claim accrues (thus the limitations period begins to run) when the conduct giving rise to the claim occurred and the fraud was complete.¹ The SEC had argued that the claim should only accrue when the fraud was discovered, not when it occurred. The Court in Gabelli left open the question of whether § 2462 may apply similarly to enforcement actions seeking equitable relief, including disgorgement and various forms of injunctive relief.

The District Court in Graham held first that § 2462 is no mere administrative “claims processing” rule, but rather a “jurisdictional” statute of limitations that removes courts’ power to hear actions brought too late. Furthermore, it held that § 2462 applies to disgorgement, injunctive relief, and any other remedy sought by the SEC that operates in effect—regardless of formal title or label—as a “civil fine, penalty, or forfeiture, pecuniary or otherwise.”²

On appeal to the 11th Circuit, the SEC argued that under Gabelli, and by its own terms, § 2462 does not apply at all to enforcement actions seeking relief that the agency terms “equitable.” Mr. Graham and amicus curiae counter that the equitable relief sought by the SEC is really not in the nature of a

¹
²
compensatory remedy as it is sometimes claimed: in practice, more often, disgorgement operates as a punitive forfeiture and declaratory and injunctive relief operates as a non-pecuniary penalty. Indeed, they cite compelling precedent holding certain SEC injunctive remedies to be punitive in effect for purposes of the general statute of limitations. For example, disgorgement payments frequently go to the US Treasury instead of to compensate victims, and industry bars in particular—a common form of injunctive relief sought by the SEC—clearly do more to punish culpable individuals than to remedy any damage they have caused. While these forms of relief are sometimes warranted and appropriate, one can reasonably question why they should be granted broad exemption from Gabelli’s holding that the five-year limitations period in § 2462 applies to SEC enforcement actions.

With regard to industry bars, it would seem hard to take seriously the SEC’s claims about their purportedly prospective value (the urgent need to protect investors from potential recurrence of past unlawful behavior) if the SEC has waited more than five years following the previous violation to seek such relief.

If the 11th Circuit is persuaded by these arguments, the SEC may have to bring many more of its actions for equitable relief within five years of a claim’s accrual. This will be particularly the case for equitable and injunctive actions that seem to differ from penalties in name only. While amici in Graham note that the SEC already files roughly 60% of its actions within two years of starting an investigation, and the agency may still seek tolling agreements to allow it to extend the limitations period, the SEC would certainly face heightened pressure to act in a more timely manner.

In Montford v. SEC, pending before the DC Circuit, the potential time-limiting provision at issue was enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The statute provides that “[n]ot later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.”

This statute would seem on its face to set a firm deadline, 180 days after issuing a Wells notice, by which the SEC must decide whether or not to commence an action—notwithstanding that the statute leaves room for the Commission and the Division of Enforcement to take steps to extend the deadline. And yet, before the Montford case, the few courts to consider the provision held that it did not prevent the SEC from bringing actions past the 180-day deadline, regardless of whether any extensions were properly obtained.

In the case currently before the DC Circuit, the SEC brought charges against Montford in an administrative proceeding on the 187th day after issuing its Wells notice. An administrative law judge ruled that the claim was not time-barred by the 180-day limitation in Dodd-Frank. The Commission itself turned down Montford’s appeal of the administrative ruling, and held that “this provision is intended to operate as an internal timing directive, designed to compel our staff to complete investigations, examinations, and inspections in a timely manner and not as a statute of limitations.” Montford has now sought review of the Commission’s ruling in federal court. According to press reports the SEC’s brief, filed under a protective order, argues that the DC Circuit should
defer to the Commission’s interpretation of ambiguous language in the Dodd-Frank 180-day limit, even though the statute appears unambiguous in what it prescribes, if not in the remedy for a violation.

Whether the DC Circuit follows the interpretation of the Commission (and the district courts in New York and Florida), or departs in favor of a seemingly plain-text reading of the statute’s language, could affect SEC conduct in its investigations, including whether or when it chooses to issue Wells notices. The court is scheduled to hear oral argument in Montford on April 23.

Both Graham and Montford have the potential to focus greater attention on the timelines of SEC investigations and enforcement decisions. If the courts accept the defendants’ arguments, others subject to the SEC investigation and enforcement may gain a new weapon in their defensive arsenals.


4 Montford and Co., Inc. v. SEC, No. 14-1126 (D.C. Cir.).


