Cahill

September 26, 2025

Ninth Circuit Decision Deepens Circuit Split on Whether SEC Can Seek Disgorgement in Civil Enforcement Actions Involving Uninjured Investors

When the Securities and Exchange Commission ("SEC") brings a civil enforcement action in a securities fraud case, it has a range of potential remedies it can seek, including injunctive relief, disgorgement, and financial penalties. Historically, the SEC has treated disgorgement as a means to recoup the illicit gains received by the perpetrator of an alleged fraud.

Recent federal court opinions, however, are divided on the purpose of disgorgement, and whether the SEC can disgorge a defendant's ill-gotten gains without showing that investors suffered pecuniary harm. In 2023, the Second Circuit held in *SEC* v. *Govil*[1] that such a showing was necessary, and in 2024, the First Circuit reached the opposite conclusion in *SEC* v. *Navellier & Associates, Inc.*[2] The U.S. Supreme Court declined to resolve this circuit split,[3] but the Ninth Circuit's recent decision in *SEC* v. *Sripetch* will likely give the Court another opportunity to weigh in.

On September 3, 2025, in *Sripetch*, a panel from the Ninth Circuit agreed with the First Circuit's reasoning and held that an award of disgorgement in a civil enforcement action under 15 U.S.C. § 78u(d)(5) and (d)(7) does not require a showing that investors experienced pecuniary harm.[4] The Ninth Circuit's decision, which deepens the pre-existing circuit split, creates opposing rules in the two circuits where the SEC brings a large proportion of litigated enforcement actions (the Second and Ninth) and increases the likelihood that the U.S. Supreme Court will step in to resolve the split.

Background on Disgorgement in SEC Civil Enforcement Actions

Disgorgement is a profit-based remedy that arises under the law of restitution and unjust enrichment and that reflects the principle that "[a] person is not permitted to profit by his own wrong."[5] Generally speaking, it is a form of restitution that is measured by a defendant's gain and that requires a defendant to give up those gains. Before the Second Circuit's decision in *Govil*, the SEC and courts proceeded on the assumption that disgorgement was the SEC's analogue to forfeiture in the criminal context. Because disgorgement was designed to prevent unjust enrichment, the

[1] *SEC* v. *Govil*, 86 F.4th 89, 98 (2d Cir. 2023).

[2] *SEC* v. *Navellier & Associates, Inc.*, 108 F.4th 19, 41 (1st Cir. 2024), *cert. denied*, 2025 WL 1603606 (June 6, 2025), *reh'g denied*, 2025 WL 2382100 (Aug. 18, 2025).

[3] *See Navellier & Associates* v. *SEC*, 2025 WL 1603606 (June 6, 2025), *reh'g denied*, 2025 WL 2382100 (Aug. 18, 2025).

[4] *SEC* v. *Sripetch*, No. 24-3830, 2025 WL 2525848, at *1 (9th Cir. Sept. 3, 2025).

[5] *Id.* (citing *Restatement (Third) of Restitution and Unjust Enrichment* § 3).

SEC and courts took the position that a wrongdoer could be forced to disgorge all ill-gotten gains, regardless of any victim harm. Although *Govil* did not tackle the distinction between unjust enrichment and restitution head-on, the Second Circuit reasoned that any award of disgorgement must comport with traditional equitable principles, including that it be "awarded for victims."[6]

In the context of enforcement actions, the SEC, in the period before the passage of the Securities Enforcement Remedies and Penny Stock Reform Act in 1990, was limited to seeking injunctions barring future violations of securities laws.[7] Given the lack of statutory authorization providing for monetary remedies, the SEC began to ask courts to "order disgorgement as an exercise of their 'inherent equity power to grant relief ancillary to an injunction.'"[8] The Commission's legal bases for seeking—and courts' bases for awarding—disgorgement were strengthened in 2002 with the passage of the Sarbanes-Oxley Act, through which Congress adopted 15 U.S.C. § 78u(d)(5), granting the SEC authority to seek "any equitable relief" in civil enforcement actions.[9]

It was not until 2020, however, that the Supreme Court addressed whether disgorgement qualified as "equitable relief" authorized by 15 U.S.C. § 78u(d)(5). In *Liu* v. *SEC*, which arose from an enforcement action about defendant-petitioners' scheme to defraud foreign nationals by soliciting investments in a cancer-treatment center and by misappropriating the funds raised, the Supreme Court held that while disgorgement *did* qualify as equitable relief, lower courts had erred in awarding disgorgement in circumstances beyond the remedy's "common-law limitations."[10] The Court ruled that (i) disgorgement awards under § 78u(d)(5) must be limited to the "net profits from wrongdoing after deducting legitimate expenses," (ii) a defendant's gains should be returned to wronged investors when practical, and (iii) disgorgement liability should not be imposed on a wrongdoer for benefits that accrue to his non-culpable affiliates.[11]

In 2021, a year after the Supreme Court's ruling in *Liu*, Congress, through the passage of the National Defense Authorization Act ("NDAA"), created a second statutory basis on which the SEC could pursue disgorgement awards: 15 U.S.C. § 78u(d)(7).[12] That legislation provides that "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement."[13]

Since then, two circuit splits concerning the permissible nature and scope of disgorgement in SEC civil enforcement actions—including the split at issue in *Sripetch*—have developed. First, the Second and Fifth Circuits have disagreed over whether the common-law limitations the Supreme Court discussed in *Liu* apply to disgorgement under both § 78u(d)(5) and § 78u(d)(7) or only under § 78u(d)(5).[14] Second, and relevant to the Ninth Circuit's holding in

---

[6] *Govil*, 86 F.4th at 98. *But cf. id.* at 107–08 ("Because disgorgement aims to divest profits, not to 'compensate victims,' it does not matter whether the property lacks value in the victim's hands." (internal citation omitted)).

[7] *Kokesh* v. *SEC*, 581 U.S. 455, 458 (2017).

[8] *Id.* (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970), *aff'd in part and rev'd in part*, 446 F.2d 1301 (2d Cir. 1971)).

[9] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305(b), 116 Stat. 745, 779 (2002); 15 U.S.C. § 78u(d)(5).

[10] *Liu* v. *SEC*, 591 U.S. 71, 85–87 (2020); *see also Sripetch*, 2025 WL 2525848, at *2 n.1 (noting that "[a]lthough *Liu* held that disgorgement awards that adhere to common-law limitations qualify as 'equitable relief' under § 78u(d)(5), the Court did not attempt to classify disgorgement as either 'equitable' or 'legal' in nature").

[11] *Liu*, 591 U.S. at 84, 88, 90.

[12] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 6501, 134 Stat. 3388, 4625–26 (2021).

[13] *See id.*

[14] *Compare SEC* v. *Ahmed*, 72 F.4th 379, 396 (2d Cir. 2023), *with SEC* v. *Hallam*, 42 F.4th 316, 339 (5th Cir. 2022).

Sripetch, the Second and First Circuits have split on whether an award of disgorgement under § 78u(d)(5) and § 78u(d)(7) requires a showing of pecuniary harm to victims.[15]

Circuit Splits on Common-Law Limitations on Disgorgement and the Pecuniary Harm Requirement

The Fifth Circuit was the first appellate court to revisit the issue of disgorgement following the passage of the NDAA and introduction of § 78u(d)(7). In *SEC* v. *Hallam*, the Fifth Circuit considered an award of disgorgement ordered in an SEC enforcement action arising from defendants' orchestration of a massive scheme involving the unregistered and fraudulent offer and sale of investments in oil and gas prospects and the distribution of confidential information memoranda that were "replete with material misrepresentations and omissions."[16] The Fifth Circuit held that § 78u(d)(7) "authorizes disgorgement in a legal—not equitable—sense," meaning that disgorgement under § 78u(d)(7) is not limited by the equitable principles recognized in *Liu* but instead follows the standards the federal courts developed before *Liu*.[17] Accordingly, the Firth Circuit held that to recover under § 78u(d)(7), the SEC must, consistent with the pre-*Liu* framework, approximate a defendant's unjust enrichment. The court made no mention of the SEC's need to show pecuniary harm to investors.[18]

In October 2023, a panel from the Second Circuit Court of Appeals, in *Govil*, considered whether disgorgement was appropriate where the court had made no finding that the investors suffered pecuniary harm. The case was predicated on an enforcement action the SEC brought against a single defendant who had caused a public industrial and technology company to engage in three fraudulent securities offerings. Specifically, the SEC alleged that Govil caused the company to represent to investors that the offering proceeds would be used for corporate purposes, when in fact, Govil misappropriated the more than $7 million in proceeds and used those funds to pay for unrelated personal expenses.[19] The district court ordered disgorgement, and the defendant appealed, arguing that the disgorgement award was not authorized by the relevant statutory authority because such authority requires a showing that investors have been harmed and the court made no such finding.[20] The Second Circuit vacated the disgorgement order, reasoning that "[f]unds cannot be returned if there was no deprivation in the first place,"[21] and that a "victim" for purposes of 15 U.S.C. § 78u(d)(5) is "one who suffers pecuniary harm from the securities fraud."[22] Rejecting the SEC's counterarguments that no finding of pecuniary harm was necessary because there is no requirement to quantify harm to a particular investor to obtain disgorgement, the Second Circuit explained that "[w]hether an investor has suffered pecuniary harm—bringing the investor into the category of victims—is a different issue from how to quantify the ill-gotten gains."[23] In short, the Second Circuit's analysis clarified that (i) 15 U.S.C. § 78u(d)(5) and (d)(7) authorize disgorgement that constitutes "equitable relief," (ii) equitable relief is relief that is

---

[15] *Compare Govil*, 86 F.4th at 106, *with Navellier*, 108 F.4th at 41 n.14.

[16] *SEC* v. *Faulkner*, 2021 WL 75551, at *1 (N.D. Tex. Jan. 8, 2021), *aff'd sub nom. SEC* v. *Hallam*, 42 F.4th 316 (5th Cir. 2022).

[17] *Hallam*, 42 F.4th at 338.

[18] *Id.* at 341. A year later, the Second Circuit reached the opposite conclusion in *Ahmed*, reasoning that the use of the word "disgorgement" in § 78u(d)(7) and the cross-reference to "unjust enrichment" in a related provision (§ 78u(d)(3)(A)(ii)) refers to a "remedy grounded in equity" and therefore must "be deemed to contain the limitations upon its availability that equity typically imposes." *See Govil*, 86 F.4th at 101 (discussing *Ahmed*).

[19] *SEC* v. *Govil*, 2022 WL 1639467, at *1 (S.D.N.Y. May 24, 2022), *vacated and remanded*, 86 F.4th 89 (2d Cir. 2023).

[20] *Govil*, 86 F.4th at 98.

[21] *Id*. at 103.

[22] *Id.* at 102.

[23] *Id*. at 105 (further reasoning that the SEC's argument "does not address the separate question of when disgorgement qualifies as 'equitable relief'").

"awarded for victims," and (iii) such award "requires a finding of pecuniary harm."[24] Because no pecuniary harm had been shown, the order of disgorgement was, in the Second Circuit's view, improper.

Nearly a year later, in July 2024, a panel from the First Circuit Court of Appeals, in *Navellier*, disagreed with the Second Circuit and affirmed an award of disgorgement absent a showing of pecuniary harm. In *Navellier*, the SEC brought an enforcement action against investment advisors, alleging that the defendants had made materially false and misleading statements and omissions to investment advisory clients and further engaged in a scheme to defraud those clients by concealing material information regarding the performance of the investment strategies it touted.[25] The district court ordered disgorgement, reasoning that the remedy was appropriate to deprive defendants of the unjust profits they collected.[26] The defendants appealed, arguing that disgorgement was not an available remedy because the purported victims suffered no pecuniary harm.[27] The First Circuit rejected this argument, explaining that "[d]isgorgement is a 'profit-based measure of unjust enrichment,' which reflects the foundational principle that 'it would be inequitable that [a wrongdoer] should make a profit out of [their] own wrong.'"[28] The First Circuit emphasized that disgorgement is "tethered to a *wrongdoer's* net unlawful profits"[29] and expressly disagreed with the Second Circuit's analysis that had turned on the presence of victim harm.[30] Further recognizing that equitable relief is available even absent direct economic loss to the complaining party, the First Circuit concluded that disgorgement was an available remedy in the case before it, despite the absence of pecuniary harm.

Following the First Circuit's decision in *Navellier*, the defendants filed a petition for a writ of certiorari on March 3, 2025, asking the U.S. Supreme Court to address whether the SEC can seek, and the courts are authorized to award, disgorgement for investor-victim clients who suffered no pecuniary harm.[31] The Supreme Court denied the petition on June 6, 2025 and further denied the defendants' petition for rehearing on August 18, 2025.[32]

The Ninth Circuit's Decision in SEC v. Sripetch

In 2020, the SEC brought a civil enforcement action against Sripetch and fourteen other defendants alleging the defendants engaged in "numerous fraudulent schemes and other violations of the federal securities laws."[33] The alleged schemes involved at least twenty penny stock companies and followed the same general pattern: (i) the defendants obtained shares of a microcap issuer through convertible debt agreements and converted the debt to stock; (ii) the defendants would promote the issuer; (iii) the promotions neither identified the defendants as the funders nor disclosed that the promotions' actual funders planned to sell stock in the issuers being promoted; and (iv) the defendants promptly sold their stock once, following the promotions, the liquidity of the issuer's stock increased and the share price rose.[34] The SEC further alleged that the defendants collected $6 million in proceeds

[24] *Id.* at 106.

[25] *Navellier*, 108 F.4th at 32–33.

[26] *SEC* v. *Navellier & Assocs., Inc.*, 2021 WL 5072975, at *2 (D. Mass. Sept. 21, 2021), *aff'd*, 108 F.4th 19 (1st Cir. 2024).

[27] *Navellier*, 108 F.4th at 41.

[28] *Id.*

[29] *Id*.

[30] *Id.* at 41 n.14 (explaining that neither U.S. Supreme Court precedent nor First Circuit case law "require[s] investors to suffer pecuniary harm as a precondition to a disgorgement award").

[31] *See* Petition for Writ of Certiorari, Navellier & Associates v. SEC, No. 24–949 (Mar. 3, 2025).

[32] *See Navellier & Associates* v. *SEC*, 2025 WL 1603606 (June 6, 2025), *reh'g denied*, 2025 WL 2382100 (Aug. 18, 2025).

[33] *Sripetch*, 2025 WL 2525848, at *4.

[34] *See SEC v. Sripetch*, 2024 WL 5320196, at *2 (S.D. Cal. Feb. 6, 2024), *vacated*, 2024 WL 628018 (S.D. Cal. Feb. 14, 2024).

from their illegal conduct and harmed investors who purchased stock during the scheme.[35] In its enforcement action, the SEC sought an order requiring the defendants to disgorge all ill-gotten gains obtained because of the alleged violations.[36]

After consenting in 2023 to the entry of judgment against him, Sripetch opposed the SEC's request for disgorgement under 15 U.S.C. § 78u(d)(5) or (d)(7).[37] Citing the Second Circuit's decision in *Govil*, Sripetch argued that disgorgement under 15 U.S.C. § 78u(d) requires a showing of pecuniary harm and that the SEC had made no such showing.[38] The SEC argued that the court should reject *Govil* and, in the alternative, find that Sripetch's victims had indeed suffered pecuniary harm.[39] Without deciding whether a showing of pecuniary harm was required, the district court concluded that the SEC had made such a showing.[40]

The Ninth Circuit rejected the Second Circuit's reasoning, followed the First Circuit's analysis, and held that a showing of pecuniary harm is not required. In its opinion, the Ninth Circuit presented two primary disagreements with the Second Circuit's analysis. The Ninth Circuit first reasoned that the Second Circuit's approach contradicts the common law, which requires that a claimant seeking disgorgement need show only that a defendant has actionably interfered with the claimant's legally protected interests.[41] The Ninth Circuit then found that the Second Circuit in *Govil* misapprehended legal authority and the relationship between private securities actions and SEC civil enforcement actions by too narrowly defining a victim as one who has suffered pecuniary harm.[42]

According to the Ninth Circuit, the Second Circuit's conclusion that pecuniary harm is required for an order of disgorgement "ignores the fundamental distinction between compensatory damages, which are designed to compensate the victim for her losses, and restitution, which is designed to deprive the wrongdoer of his ill-gotten gains."[43] The Ninth Circuit further disagreed with the Second Circuit's interpretation of the *Restatement (Third) of Restitution and Unjust Enrichment* and apparent equation of "impoverishment" with "pecuniary harm."[44] Specifically, the Ninth Circuit disagreed with the Second Circuit's interpretation by pointing to language in the reporter's note to the *Restatement*, which the Ninth Circuit reasoned makes clear that a claimant need show only a violation of his rights, not impoverishment.[45] Rejecting the Second Circuit's finding of support for a pecuniary harm requirement in private

---

[35] *Sripetch*, 2025 WL 2525848, at *4.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at *5.

[42] *Id.* at *6.

[43] *Id.*

[44] *Id*. at *7. The relevant portion of the reporter's note to the *Restatement* provides:

> There is an understandable temptation to limit the far-reaching notion of unjust enrichment within the manageable confines of a checklist, but the attempt usually leads to trouble. *See LaSalle Nat'l Bank* v. *Perelman*, 82 F. Supp. 2d 279, 294–295 (D. Del. 2000) ("The elements of unjust enrichment are: 1) an enrichment, 2) an impoverishment, 3) a relation between the enrichment and the impoverishment, 4) the absence of justification and 5) the absence of a remedy provided by law"). The first four elements of this list might make a plausible definition, though the reference to "impoverishment" is too narrow: there is often no "impoverishment" other than a violation of the claimant's rights. The fifth element is plainly erroneous, since so much of unjust enrichment is legal in origin.

Sripetch, 2025 WL 2525848, at *7 n.8 (alteration omitted) (quoting *Restatement (Third) of Restitution and Unjust Enrichment* § 1, reporter's note d).

[45] *Id*.

securities actions, which require a showing of economic loss, the Ninth Circuit reasoned that the economic loss requirement in private securities actions is designed to curb abusive litigation by private parties.[46] The Ninth Circuit noted that civil enforcement actions brought by the SEC are "not subject to abusive litigation by private parties."[47]

Impact

The Ninth Circuit's decision deepens the existing split among federal courts of appeal regarding the pecuniary harm requirement for disgorgement in enforcement actions brought by the SEC. Given the significance the requirement has on the remedies the SEC can recover in such cases, unless and until the Supreme Court resolves the split, the circuits' competing views on the existence of that requirement may influence where the SEC decides to bring litigated civil enforcement actions, the remedies it seeks, and its willingness to resolve the financial components of its claims.

* * *

If you have any questions about the issues addressed in this alert, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Kiersten A. Fletcher (partner) at 212.701.3365 or kfletcher@cahill.com; Adam S. Mintz (counsel) at 212.701.3981 or amintz@cahill.com; Mary Hornak (associate) at 212.701.3486 or mhornak@cahill.com; Joseph Molloy (law clerk) at 212.701.3153 or jmolloy@cahill.com; or email publications@cahill.com.

[46] *Id.*

[47] *Id.*