***S.E.C.* v. *Graham*: S.D. Fla. Holds that 28 U.S.C. § 2462's Five-Year Statute of Limitations is Jurisdictional, Applies to All Forms of Relief**

On May 12, 2014, Judge James Lawrence King of the United States District Court for the Southern District of Florida held in *S.E.C.* v. *Graham*[1] that the general five-year statute of limitations governing civil penalty actions brought by the government, 28 U.S.C. § 2462, jurisdictionally barred the Court from considering a complaint brought by the Securities and Exchange Commission ("SEC") more than five years after the last sale or offering of securities alleged to have violated the securities laws occurred.

I. Background

On January 30, 2013, the SEC filed a five-count complaint against five individual defendants, alleging that their sale of real estate-related investments had violated the registration and anti-fraud provisions of the federal securities laws.[2] The SEC sought civil monetary penalties, declaratory relief, disgorgement, and injunctions prohibiting future violations.[3] Defendants moved for summary judgment arguing, among other things, that the action was barred by the five-year statute of limitations in 28 U.S.C. § 2462. That provision states:

> 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.

II. The District Court's Decision

The Court granted the motions for summary judgment and dismissed the case with prejudice. In reaching its decision, the Court made three key holdings:

First, 28 U.S.C. § 2462 is Jurisdictional: The provision directs that a civil penalty suit "shall not be entertained" unless brought within five years of when a claim first accrues.[4] The Court held this provision was jurisdictional, noting that it speaks directly to a court's power to adjudicate a case.[5] Congress used this language, the Court said, to indicate it intended to divest courts of subject-matter jurisdiction in cases where the government had failed to meet the five-year time limit in filing its action.[6]

Second, 28 U.S.C. § 2462 Applies to All Forms of Relief: By its terms, the provision applies to all actions "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." Based on the text

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[1] Case No. 13-10011-CIV-KING (S.D. Fla. May 12, 2014).

[2] *Id.* at 6. The SEC brought claims under both the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id.* at n.5.

[3] *Id.* at 6.

[4] In *Gabelli* v. *S.E.C.*, 133 S. Ct. 1216 (2013), the Supreme Court held that, under 28 U.S.C. § 2462, a claim first accrues—and the five-year period begins to run—when the allegedly fraudulent conduct occurs. 133 S. Ct. at 1220-21. In so holding, it refused to read into the statute a "discovery rule" that would have instead started the running of the statute of limitations when the fraud was discovered (or could have been discovered with reasonable diligence) by the SEC.

[5] *Id.* at 11. The Court addressed this issue *sua sponte*. *Id.* at 7.

[6] *Id.* at 11-12.

of, and policies[7] underlying, the statute, the Court held it applied to all forms of relief sought by the SEC.[8] The statute expressly covers civil monetary penalties,[9] and disgorgement is a form of forfeiture, the Court said.[10] And while the statute does not expressly refer to declaratory or injunctive relief, the Court said these were nonetheless "penalit[ies]" within the meaning of the statute—the SEC was seeking to punish the defendants for prior conduct, not to prevent some continuing harm.[11]

Third, The SEC Had Not Met Its Burden To Establish Jurisdiction: The Court said the SEC had not met its burden to show by a preponderance of the evidence[12] that any of the alleged violations of the securities laws had occurred after January 30, 2008 (five years before the SEC filed its action). While the SEC had shown that some of the defendants conducted activities related to the business after this date, it had not shown that any of the defendants had sold (or offered for sale) securities after it.[13] The Court thus dismissed the case with prejudice because the SEC could not—"after nearly seven years of investigation, after the close of all discovery and motion practice, after full and exhaustive oral argument" and after the opportunity to reopen the record—carry its burden of showing the facts necessary to establish subject-matter jurisdiction.[14]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Jack Herman at 212.701.3654 or jherman@cahill.com.

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7 The Court noted that, in interpreting § 2462, the Supreme Court had in *Gabelli* "invoke[ed] the powerful words of Chief Justice Marshall that 'it would be utterly repugnant to the genius of our laws if actions for penalties could be brought at any distance of time.'" *Id.* at 15 (quoting *Gabelli*, 133 S. Ct. at 1223).

8 The Supreme Court in *Gabelli*, declined to address whether 28 U.S.C. § 2462 applied to claims for equitable relief. *See* 133 S. Ct. at 1220 n.1.

9 Slip Op. at 19.

10 *Id.* at 15.

11 *Id.* at 15.

12 *Id.* at 17.

13 *Id.* at 18-23.

14 *Id.* at 24.