

# Court Throws Cold Water on SEC Disgorgement Remedy

September 03, 2020

The SEC may continue to seek disgorgement of a wrongdoer's profits, but the amount must be:

- Awarded to the wrongdoer's victims; and
- Net of the wrongdoer's legitimate expenses.

The U.S. Supreme Court recently determined that court-ordered disgorgement is an available remedy to the SEC in an enforcement action. This is so even though Congress did not expressly authorize disgorgement and disgorgement, at least by that name, is not a traditional equitable remedy.

The Supreme Court's chief determination balanced two countervailing principles. First, an equitable remedy — whether called restitution, an accounting, or disgorgement — should be available to deprive wrongdoers of their profits from unlawful activity. Second, wrongdoers should not be punished by paying more than fair compensation to the persons wronged.

However, a number of questions remain. The Supreme Court remanded the case for the Ninth Circuit to determine whether, consistent with the following equitable principles:

- An SEC order directing any disgorgement proceeds to the U.S. Treasury, rather than directly to the victims, would be for the benefit of investors;
- Wrongdoers can be found liable for profits as partners in wrongdoing or whether individual liability of wrongdoers is required; and
- Any legitimate expenses that wrongdoers have incurred should be deducted from wrongdoers' profits.

The SEC has typically sought disgorgement of the full amount that wrongdoers raised from victims. The Supreme Court's decision means that victims stand to receive less than they invested.

The wrongdoers in this case solicited foreign nationals to invest in the construction of a cancer treatment center but misappropriated much of the funds in violation of the terms of a private offering memorandum.

The case is *Liu v. SEC*, decided 8–1. Justice Thomas dissented on the ground that the statute authorizes the SEC to seek only “equitable relief that may be appropriate or necessary for the benefit of investors” and that disgorgement is not a traditional equitable remedy.

## Authored By



Gary O. Cohen

## Related Practices

[Financial Services Regulatory](#)

## Related Industries

[Life, Annuity, and Retirement Solutions](#)

[Securities & Investment Companies](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.