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District Court Bolsters The Five-Year Statute Of Limitations Defense To SEC Civil Enforcement Actions

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A recent decision by a federal district court judge in the Southern District of Florida held that the five year statute of limitations in 28 U.S.C. § 2462 applies to civil enforcement actions by the Securities & Exchange Commission regardless of the relief requested. The district court's holding in *SEC v. Graham*, Case No. 4:13-10011 (S.D. Fla. Ruling May 12, 2014), is an important expansion of the US Supreme Court's ruling in *Gabelli v. SEC*, 568 U.S. __ (2013). In *Gabelli*, the Supreme Court held that the five-year statute of limitations in section 2462 for the SEC to bring a civil enforcement action begins to tick when the fraud occurs, not when it is discovered. Since the *Gabelli* decision, the SEC has argued that the five-year statute of limitations in Section 2462 only applies to enforcement actions seeking civil penalties, not declaratory relief, an injunction, or disgorgement. The *Graham* court rejected this argument and held that the five-year statute of limitations in section 2462 applies regardless of the relief requested. In *Graham*, the SEC alleged that the five defendants defrauded at least 1,400 unsuspecting investors to the tune of more $300 million. The defendants allegedly used a vast web of entities, collectively known as Cay Clubs Resorts and Marinas, to offer and sell unregistered securities to investors under the guise of real estate investments. The defendants promised to use their expertise in real estate development to turn individual investors' purchase of units in condominium projects nation-wide into immensely profitable investments. But, in a Ponzi scheme fashion, the defendants allegedly paid investors from the funds of later investors. The defendants' allegedly fraudulent conduct ended at some point prior to December 31, 2007. On January 30, 2013, the SEC filed a five-count complaint against the defendants alleging various securities fraud violations. From each defendant, the SEC sought declaratory relief, an injunction, and disgorgement of ill-gotten gains. The SEC also sought civil monetary penalties from three of the defendants. On its own initiative, the district court held that the five-year statute of limitations in section 2462 divested the court of subject-matter jurisdiction over the SEC's claims against the five defendants. In reaching that holding, the district court explained that section 2462 is a "jurisdictional" statute of limitations. In other words, if the SEC brings an action more than five years after the last act giving rise to the claim then a court does not have jurisdiction over the claim. The SEC argued that section 2462 did not apply because the SEC sought declaratory and injunctive relief and disgorgement. Reviewing the plain language of section 2462 and the *Gabelli* decision, the district court held that the statute of limitations applies regardless of the relief sought. Finally, the SEC had the burden to establish that the court had subject-matter jurisdiction over its claims against all defendants. The district court found that the SEC had not established that the last act of any defendant giving rise to the SEC's claims against such defendant had occurred within five years prior to the SEC's filing of its complaint. Thus, the court dismissed the claims against defendants with prejudice. The *Graham* decision provides defense counsel with another powerful tool against untimely SEC enforcement actions. This decision, however, may encourage unreasonable investigatory and Wells Notice

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practices by the SEC. At times, the SEC mandates unreasonably short deadlines for a response to an investigatory inquiry or Wells Notice. This firm five-year statute of limitations to enforcement actions will compress investigatory and Wells Notice timelines in those cases in danger of running up against the time bar.