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## SEC's \$186M Case Can Proceed After Defendant's Death, Court Rules

Celia Ampel, Daily Business Review

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A Miami federal judge ruled the Securities and Exchange Commission can seek recovery of nearly \$186 million from the heirs of a deceased fraudster.

U.S. District Judge Cecilia Altonaga ruled Thursday the SEC's claims for disgorgement of ill-gotten gains can go forward against David Brooks' estate, dismissing defense counsel's argument that a June U.S. Supreme Court decision meant the claims should perish with him. The Supreme Court's ruling only applies to disgorgement for the purposes of determining the statute of limitations, not in other contexts, Altonaga ruled.

Brooks, the former CEO and chairman of body armor supplier DHB Industries, died in October while in prison after he was convicted. The SEC's original 2007 complaint alleged he "engaged in a pervasive accounting fraud, systematically looted company coffers and took advantage of DHB's artificially inflated stock price to dump millions of his shares on the market for proceeds of approximately \$186 million."

Altonaga's order is one of the first to interpret the implications of the unanimous Supreme Court decision in Kokesh v. SEC, which held SEC disgorgement claims are bound by a five-year statute of limitations. The holding was based on the finding that disgorgement is a "penalty" within the context of the statute of limitations. A penalty is meant to punish a defendant, as opposed to "remedial" claims meant to help the fraud's victims.

In Brooks' case, defense counsel for his estate argued the Kokesh ruling meant the SEC claims can't be passed on to Brooks' estate after his death.

"The survivability of the SEC's claims against David Brooks ... is based on a determination of whether they are penal or remedial sanctions," wrote defense attorneys Michael Pineiro and Jeffrey Marcus of Marcus Neiman & Rashbaum in Miami. "Penal sanctions abate on the death of a party, while remedial actions can be asserted against an estate. ... The Kokesh decision is definitive, controlling law that SEC disgorgement is a penalty."

But Altonaga ruled the defense read the decision too broadly. Disgorgement can be compensatory, she ruled, and the SEC intends to give all proceeds from the disgorgement in Brooks' case to investors.

"Kokesh's holding cannot be plucked from the statutory context that gives it force," Altonaga wrote. "Kokesh is about statutes of limitations, and its holding is embedded in this context. Its first paragraph could not make this sentiment plainer: "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of [section] 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues."

She also allowed the SEC to pursue reimbursement for Brooks' former company under the Sarbanes-Oxley Act.

Pineiro declined to comment on the order. The SEC's regional office also declined to comment.

Fort Lauderdale solo practitioner David Chase, a former SEC prosecutor who now focuses on SEC defense, said Brooks' case is likely not the last time defense counsel will read the Kokesch decision expansively when it benefits their clients.

"My takeaway from this is that Kokesch is going to be used by defense counsel in very creative ways to make arguments that the Supreme Court may have not intended to go quite that far," Chase said. "But language like 'disgorgement is a penalty' starts to have some potentially broad consequences when you're dealing with, for example, forfeiture statutes, even in the SEC context."

The U.S. Court of Appeals for the Second Circuit wondered about the same issue in an SEC case against the estate of Charles Wyly, a Dallas billionaire who died in 2011. The court asked the parties how Kokesch would affect the case, and the Wyly estate argued the "disgorgement is a penalty" holding required the claims be dropped. That court agreed Friday to hold off on any rulings because of a tentative settlement.

Whether the SEC decides to go after an estate is a matter of discretion, usually based on whether there is money to recover and investors to repay.

In Brooks' case, the SEC's persistence indicates significant funds were left after he allegedly spent millions on "luxury cars, jewelry, horse racing, extravagant vacations, and \$122,000 worth of iPods given as favors to guests at a multimillion-dollar bat mitzvah party for his daughter." The bat mitzvah also featured 50 Cent and Aerosmith.

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