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Highlights

The most noteworthy decisions this month are the following:

• In *Matrixx Initiatives, Inc., v. Siracusano*, Case No. 09-1156 (U.S. March 22, 2011), on March 22, 2011, the United States Supreme Court unanimously affirmed the Ninth Circuit's decision in *Matrixx*, holding that plaintiffs suing a pharmaceutical company are not required to plead that adverse event reports established a "statistically significant" risk in order to adequately allege a material misstatement or omission. Is so holding, the Court rejected a "bright line" test for materiality in favor of a more "holistic" evaluation. The Court also held that scienter had been adequately alleged given allegations from which it could be inferred that Matrixx Initiatives, Inc. was "significantly concerned" about the adverse event reports.

• In *Hill v. Gozani*, No. 10-1048 (1st Cir. March 18, 2011), on March 18, 2011, Judge Ripple of the federal district court for the First Circuit Court of Appeals affirmed the dismissal of an action claiming that a company failed to disclose prospective problems with reimbursement for its new medical device, including warnings from its internal experts. The company did disclose the possible risk of reimbursement problems. It was not required to disclose internal dissension about its practices, and the complaint was weak on allegations of actual reimbursement problems and their timing.

• In *City of Pontiac General Employees' Retirement System v. MBIA, Inc.*, No. 09-4609-cv (2nd Cir. February 28, 2011), on February 28, 2011, Judge Jacobs, writing for the Second Circuit Court of Appeals, vacated and remanded the dismissal of securities fraud claims under the statute of limitations.

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Limitations on the SEC: The Application of 28 U.S.C. § 2462 in SEC Proceedings

by

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Although there is no express statute of limitations for lawsuits instituted by the SEC,[1] numerous courts have held—and the SEC has acknowledged[2]—that the federal "catch all" statute of limitations, 28 U.S.C. § 2462, applies to claims brought by the SEC.[3] Section 2462 provides that "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 . . . ."[4] As shown below, section 2462 has served as an important deterrent to untimely claims brought by the SEC in federal courts. This Article analyzes three common questions that arise in litigating that provision: what type of claims are subject to the statute, when does a claim accrue, and what tolling doctrines does the SEC invoke in attempting to bring untimely claims.

What Relief Is Considered a "Penalty" and Thus Subject to the Statute?

Section 2462 applies only to claims that seek a "civil fine, penalty, or forfeiture, pecuniary or otherwise." Claims for monetary penalties or forfeiture are undoubtedly subject to the statute. But what about everything else? Courts have generally answered that question in one of two ways.

Case-Specific Approach

Many courts hold that section 2462 applies to any claim that seeks to punish the offender, rather than merely to provide a private remedy to those injured by the wrong. The D.C. Circuit took this approach in *Johnson v. SEC*.[5] In that case the court held that a sanction is a "penalty" within the meaning of section 2462 if it (1) has "collateral consequences" beyond merely remedying a wrong, and (2) is based mostly on the defendant's past misconduct rather than a risk of future violations.[6] The D.C. Circuit explained that "where a legal action is essentially private in nature, seeking only compensation for the damages suffered, it is not an action for a penalty."[7] But where a sanction has "collateral consequences" beyond the immediate sanction, and is based mostly upon past conduct rather than a current "risk [that the defendant] poses to the public," the sanction is a "penalty" subject to section 2462.[8] For example, in *Johnson*, a censure and six-month suspension was a "penalty" because the suspension had "longer-lasting repercussions on [the manager's] ability to pursue her vocation,"[9] and because "the sanctions [] were not based on any general finding of [the defendant's] unfitness as a supervisor, nor any showing of the risk she posed to the public, but rather were based on [her past acts]."[10] The *Johnson* court stated that courts should engage in this type of analysis in every case because "the degree and extent of the consequences to the subject of the sanction must be considered."[11]

Numerous courts have since followed the D.C. Circuit's approach in *Johnson*. In doing so, they have applied that court's two-prong test and held that the following claims seek a "penalty":

- A claim "for **civil monetary penalties**," which is "unquestionably a penalty" under section 2462.[12]
- A claim seeking "**a permanent injunction prohibiting Defendants from committing future**

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violations" of securities laws, where the SEC focused on the Defendants' "past alleged wrongdoing," not on any "cognizable danger of recurrent violation," and the "collateral consequences . . . would be to stigmatize Defendants in the investment community and significantly impair their ability to pursue a career.[13]

- A claim seeking "**an officer and director bar**" for securities law violations.[14]
- A claim seeking reimbursement under **Sarbanes-Oxley Act Section 304**.[15]

Courts routinely hold that a claim seeking **disgorgement** is *not* a penalty because disgorgement is usually "limited to remedying the harm done," rather than punishing the wrongdoer for past misconduct.[16] As the D.C. Circuit explained in *Johnson*: "where the effect of the SEC's action is to restore the status quo ante, such as through a proceeding for restitution or disgorgement of ill-gotten profits, § 2462 does not apply."[17] But if the SEC were to seek under the guise of disgorgement an amount unrelated to the wrongdoing, then a court might treat that amount as a penalty. For example, the Fifth Circuit has explained that disgorgement of "ill-gotten gain" is typically "remedial and not punitive," but that disgorgement of any amount in addition to "the amount . . . by which the defendant profited from his wrongdoing . . . would constitute a penalty assessment."[18] Alternatively, if the SEC sought disgorgement primarily "to fill the Federal Government's coffers," rather than "to make the wronged party whole," then a court might treat disgorgement under those circumstances like a "forfeiture" and therefore subject to section 2462.[19]

Categorical Approach

Other courts have taken a categorical approach to determining which claims are subject to section 2462, treating certain forms of relief as non-penal without regard to the facts of the case.[20] For example, in *SEC v. Berry*, the court held that claims seeking a permanent injunction, disgorgement, or an officer and director bar were not "penalties" within the meaning of section 2462 because they were "equitable" in nature.[21] The court rejected the case-specific approach in *Johnson v. SEC*. According to *Berry*, the Ninth Circuit's decision in *SEC v. Rind*[22] required that result because the *Rind* court held that there was no statute of limitations governing SEC enforcement actions seeking equitable relief. Although the court in *Rind* failed even to mention section 2462, the *Berry* court felt compelled to conclude that "the only thing barred by section 2462 is the civil penalty for conduct occurring more than five years before the complaint was filed."[23]

When Do Claims "Accrue" and Start the Limitations Clock?

Section 2462 provides that the limitations period is "five years from the date when the claim first accrued." Most courts have interpreted this to mean the date of the underlying violation, but the SEC often argues that a claim accrues when the Commission discovers it. At least one court has concluded that it does not matter when a claim accrues because the effect is the same under either approach.

Date of Violation

In 1985, the Fifth Circuit held in *United States v. Core Laboratories, Inc*. that "both the courts and Congress have construed the 'first accrual' language of § 2462 to mean the date of violation."[24] Section 2462 "is derived from predecessor statutes dating from 1799," and "a respectable body of decisional law" interpreting these statutes "clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run."[25] In addition, the Fifth Circuit stated, this interpretation of section 2462 ensures that the congressional purpose is properly fulfilled: to protect a person's "right to be free of stale claims, which comes in time to prevail over the [government's] right to prosecute them."[26] A few years later, the D.C. Circuit agreed, holding in *3M Company v. Browner* that "the term 'accrued' in § 2462 has been taken to mean that the running of the limitations period in penalty actions is measured from the date of the violation."[27] "In 1839," the D.C. Circuit held, "when Congress used the word 'accrued,' it could not possibly have intended the word to incorporate any discovery of violation rule."[28]

Other courts have followed suit,[29] including numerous lower courts in securities fraud cases brought by the SEC.[30] For example, the district court in *SEC v. Jones* held that the SEC's claims accrued "when the factual and legal prerequisites for filing suit were in place, not when the Commission discovered those prerequisites."[31] The SEC in that case had argued that the accrual rule established by the Fifth and D.C. Circuits was "inapplicable because [those cases] did not involve fraud," and that "the discovery rule should apply here—*i.e.*, that the statute of limitations [does] not begin to run until the whistleblower alerted it to Defendants' conduct."[32] The district court rejected that argument, noting that those courts "did not limit [the] holding to cases in which violations are undetected because of fraud," that "an agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses, and discarded documents," and that "nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations."[33]

Discovery Rule

Notwithstanding these cases, the SEC has repeatedly asserted that the "discovery rule" should apply to securities fraud claims. In *SEC v. Alexander*, for example, the SEC argued that its claims "did not accrue until the Commission discovered the fraud or should have discovered the fraud upon which the claims are based."[34] The SEC claimed that the common understanding of "accrual" in section 2462 does not apply "in the context of a penalties claim arising from fraud."[35] Citing four Supreme Court decisions, the SEC argued that "fraud claims have generally been held to accrue pursuant to a discovery rule."[36] Although none of those decisions addressed section 2462, the SEC argued that they stand generally for the proposition that a discovery rule is built into every statute of limitations in cases arising out of fraud.[37]

Although the court in *SEC v. Alexander* avoided deciding the issue, at least one lower court has adopted the SEC's position. In *SEC v. Buntrock*, the district court in the Northern District of Illinois held that "the five-year statute of limitations for civil penalties does not accrue when the fraud occurs, but rather when 'the plaintiff learns, or should have learned through the exercise of ordinary diligence in the protection of one's legal rights, enough facts to enable him . . . to sue within five years.'"[38] The court relied heavily on *Law v. Medco Research, Inc.*,[39] in which the Seventh Circuit applied the discovery rule to the one-year statute of limitations governing Rule 10b-5 claims.[40] But a few years later, another judge in the same district criticized *Buntrock* as relying on an inapposite case that analyzed a different, shorter statute of limitations.[41] Although this did "not necessarily mean that the court reached the wrong result in *Buntrock*," the reasoning of *Law v. Medco Research* "does not flow perfectly into the conclusion that the 'discovery rule' should apply here."[42]

One recent decision may make it more difficult for the SEC to argue for the discovery rule in any case. In *United States v. Rutherford Oil Corp.*, the court extensively analyzed the text and history of section 2462 and concluded that "§ 2462's statute of limitations runs from the date of the violation, not the date of discovery."[43] The court noted that section 2462 includes "a provision for tolling limitations if the defendant is absent from the United States[44] . . . but does not include any provision for tolling based on the discovery rule."[45] This "weighs against applying the discovery rule."[46] "When a statue of limitations designates particular exceptions to the rule that the statute runs from the time of accrual and does not include the discovery rule in those exceptions, that ordinarily means that Congress intended to exclude the application of the discovery rule."[47] The "explicit exception" for absent defendants "indicates that Congress did not intend courts to read other unmentioned, open-ended, equitable exceptions into the statute that it wrote."[48]

SEC v. Koenig

The SEC asked the Seventh Circuit to adopt the discovery rule in *SEC v. Koenig*,[49] but the court avoided the issue. The court noted that the discovery rule does not apply to every statute of limitations, and that a court should consider "each provision's text, context, and history" before deciding when a claim "accrues."[50] But "we need not decide" that question here, the court explained, because "equitable tolling" applies.[51] The defendant in *Koenig* had concealed the fraudulent transactions until the company issued a press release announcing a restatement, and did not argue that "a diligent SEC should have nosed things out earlier." As a result, the "claim for penalties is timely."[52] The court concluded: "Whether a court says that a claim for fraud accrues only on its discovery (more precisely, when it could have been discovered by a person exercising reasonable diligence) or instead says that the claim accrues with the wrong, but that the statute of limitations is tolled until the fraud's discovery is unimportant in practice."[53] "Either way, a victim of fraud has the full time from the date that the wrong came to light, or would have done had diligence been employed."[54]

What Tolling Doctrines Will the SEC Try To Invoke To Save Old Claims?

When section 2462 applies to claims brought by the SEC, the Commission typically argues that the claims are tolled as a result of fraudulent concealment or the continuing violations doctrine.

Fraudulent Concealment

To toll limitations on the basis of fraudulent concealment, courts have held that the SEC must show "[1] fraudulent conduct by the defendant resulting in concealment of the operative facts, [2] failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and [3] due diligence by the plaintiff until discovery of those facts."[55] It is the SEC's burden to establish each element.[56]

To show concealment, the SEC sometimes argues that securities fraud is "self-concealing."[57] According to the SEC, the Supreme Court has held in *Holmberg v. Albrecht* and other cases that, where the underlying cause of action is fraud, the concealment is inherent in the fraud and thus there is no need to show active concealment.[58] But courts have largely rejected this argument, holding that "allegations of fraud are generally insufficient to demonstrate that a particular act is self-concealing."[59] The SEC must therefore show that the "defendant actively concealed her fraud through some 'trick' or 'contrivance' or conduct 'designed to mask' the fraud."[60] The concealment, moreover, must "actually result[] in the concealment of operative facts."[61] For example, the court in *SEC v. Berry* held that the SEC had properly alleged an act of concealment in a stock option backdating case where it alleged that the defendant "concocted a paper trail of falsified minutes to conceal her fraudulent scheme."[62]

The second prong of the fraudulent concealment doctrine requires the SEC to show that it did not discover the facts underlying its claims "within the limitations period."[63] For example, the court in *SEC v. Microtune* refused to toll the limitations period under section 2462 because the SEC in that case had "clearly discovered the operative facts that are a basis of its claim within the limitations period."[64] "[I]f a plaintiff discovers his claims within the limitations period, especially if he still has two years or more remaining in which to file his complaint (as is the case here), there is obviously a lesser need, if any, to toll his claims."[65] Because the SEC "was on inquiry notice of backdating at Microtune as of August 26, 2003," which was just a few months after the option grants at issue, tolling did not apply.[66]

Finally, the SEC must show that it acted diligently in pursuing its claims.[67] The court in *SEC v. Fraser*, for example, held that the SEC had adequately alleged diligence by alleging that the defendant initially misrepresented the reasons for a restatement and that, when the true reasons later came to light, the Commission immediately "opened its own investigation."[68] "These facts are sufficient at the pleading stage to show that the SEC exercised due diligence in trying to uncover the facts."[69] Indeed, the diligence prong requires the SEC to show that it acted diligently after it was on inquiry notice. "[G]iven that fraudulent concealment allows the court to toll the statute of limitations under principles of equity, the Court gleans from this doctrine a requirement that the SEC must have acted diligently in filing its complaint in a timely manner once it had inquiry notice."[70] In *SEC v. Microtune*, for example, the court held that the SEC received notice of its claims in 2003, yet "apparently took no more action to investigate until 2006," and thus could not rely on equitable tolling to save its untimely claims.[71]

Continuing Violations

The SEC has also argued in some cases that the "continuing violations doctrine" should toll the limitations period in section 2462. The continuing violations doctrine, which normally arises in the employment discrimination context,[72] permits a plaintiff to bring a claim based upon conduct that falls outside the limitations period, as long as the "continuing violation" occurred within the limitations period. The SEC has been only marginally successful in making this argument in securities fraud cases.[73] The majority of courts have held that the doctrine does not apply because misconduct in a securities fraud case typically consists of several "discrete acts," each of which "starts a new clock for filing charges alleging that act."[74]

Conclusion

Section 2462 will not apply to every case. But because courts routinely rely upon it to bar old claims, litigants would do well to analyze the claims in their case to determine whether it governs, and be prepared to defend against the Commission's efforts to avoid its application.

Notes

1 *SEC v. Calvo*, 378 F. 3d 1211, 1218 (11th Cir. 2004).

2 *See SEC v. McKasky*, 56 F. Supp.2d 323, 326 (S.D.N.Y. 1999) ("The parties agree that the five year statute of limitations embodied in 28 U.S.C. § 2462 applies to the civil penalty claims.").

3 *See, e.g., Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996).

4 28 U.S.C. § 2462 (emphasis added). The statute provides in full:

> 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.

5 87 F.3d 484, 488 (D.C. Cir. 1996).

6 *Id*. at 488-90.

7 *Id*. at 487.

8 *Id*. at 488-490. "Suspended brokers must forever after disclose the sanction, and it becomes part of their permanent file." *Id*. at 489. "These collateral consequences . . . suggest [] punishment-like qualities." *Id*.

9 *Id*. at 489.

10 *Id*. at 489.

11 *Id*. at 488.

12 *E.g*., *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007).

13 *Jones*, 476 F. Supp. 2d at 383-85 (internal quotation omitted). *See also SEC v. Microtune*, 2011 U.S. Dist. LEXIS 14850, *49 (N.D. Tex. Feb. 15, 2011); *SEC v. Leslie*, 2010 U.S. Dist. LEXIS 76826, *111-12 (N.D. Cal. July 29, 2010); *SEC v. DiBella*, 409 F. Supp.2d 122, 128 n.3 (D. Conn. 2006); *Federal Election Comm'n v. Nat'l Right to Work Comm., Inc*., 916 F. Supp. 10, 13 15 (D.D.C. 1996) (claim seeking a "permanent injunction" barring defendant from engaging in similar conduct in the future was punitive, where the FEC had not proven that the defendant posed any future threat).

14 *DiBella*, 409 F. Supp.2d at 128 n.3. *See also Proffitt v. Federal Deposit Ins. Corp*., 200 F.3d 855, 860-62 (D.C. Cir. 2000) (FDIC's attempt to remove a bank director and bar him from the banking industry was punitive because its "purpose plainly goes beyond compensation of the wronged party" and the FDIC had focused only on the director's "long past conduct," not on "his present fitness or competence") (internal quotation omitted); *SEC v. Microtune*, 2011 U.S. Dist. LEXIS 14850, *49 (N.D. Tex. Feb. 15, 2011).

15 *SEC v. Microtune*, 2011 U.S. Dist. LEXIS 14850, *51-55 (N.D. Tex. Feb. 15, 2011) (rejecting argument that the relief sought under Section 304 is "akin to disgorgement" because that provision "contains no personal wrongdoing element," and explaining that in that case the amount sought under Section 304 "is not limited to the amount of harm caused to the company" and is therefore a "penalty" under section 2462).

[16] *E.g., SEC v. Berry*, 580 F. Supp.2d 911, 918 (N.D. Cal. 2008); *see also, e.g., SEC v. Jones*, 467 F. Supp.2d 374, 385 (S.D.N.Y. 2007) ("because disgorgement is a remedy aimed at public protection rather than investor compensation, the remedy is decidedly remedial rather than punitive").

[17] 87 F.3d at 491.

[18] *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *see also SEC v. Tesley*, 144 B.R. 563 (B.R. S.D. Fla. 1992) ("disgorgement order in this case" seeks to deter future conduct and is therefore "penal" and should be treated as a "fine, penalty, or forfeiture" under Bankruptcy Code).

[19] *Riordan v. SEC*, 627 F.3d 1230, 1234 n.1 (D.C. Cir. Dec. 28, 2010). The D.C. Circuit explained in *Riordan* that disgorgement "is not a 'civil penalty,'" but "[i]t could be argued that disgorgement is a kind of forfeiture covered by § 2462, at least where the sanctioned party is disgorging profits not to make the wronged party whole, but to fill the Federal Government's coffers." *Id*.

[20] *See, e.g., SEC v. Gabelli*, 2010 WL 1253603, *5 (S.D.N.Y. Mar. 17, 2010) (citing *Johnson v. SEC* but holding that claims seeking permanent injunctive relief or disgorement are not subject to section 2462, without regard to facts of case); *SEC v. Berry*, 580 F. Supp.2d 911 (N.D. Cal. 2008); *SEC v. Fisher*, 2008 WL 2062699, *2 n.5 (N.D. Ill. May 13, 2008); *see also SEC v. Alexander*, 248 F.R.D. 108, 115-16 (E.D.N.Y. 2007) (noting that some courts "have held that at least some of the forms of relief at issue here are equitable as a matter of law").

[21] *Berry*, 580 F. Supp.2d at 919.

[22] 991 F.2d 1486 (9th Cir. 1993).

[23] 580 F. Supp.2d at 919.

[24] 759 F.2d 480, 482 (5th Cir. 1985).

[25] *Id*. at 482 (citing cases).

[26] *Id*. at 483.

[27] 17 F.3d 1453, 1462 (D.C. Cir. 1994) (citing *Core Labs*, among other cases).

[28] *Id*.

[29] *See, e.g., Trawinski v. United Tech*., 313 F.3d 1295, 1298 (11th Cir. 2002) (limitations period in section 2462 "begins with the violation itself . . . not upon discovery of harm"); *Federal Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (same).

[30] *See, e.g*., *SEC v. Microtune*, 2011 U.S. Dist. LEXIS 14850, *13 n.7 (N.D. Tex. Feb. 15, 2011) (discovery rule does not apply to § 2462); *SEC v. Huff*, 2010 U.S. Dist. LEXIS 103314, * (S.D. Fla. Sept. 30, 2010) (same); *SEC v. Leslie*, 2010 U.S. Dist. LEXIS 76826, *103 (N.D. Cal. July 29, 2010) (same); *SEC v. Gabelli*, 2010 WL 1253603, at *5 (S.D.N.Y. Mar. 17, 2010) (same); *SEC v. Leslie*, 2008 WL 3876169, at *9 n.13 (N.D. Cal. Aug. 19, 2008) (same); *SEC v. Richie*, 2008 WL 2938678, at *11 (C.D. Cal. May 9, 2008) (same); *SEC v. Berry*, 580 F. Supp. 2d 911, 919 (N.D. Cal. 2008) (same); *SEC v. Jones*, 2006 WL 1084276, at *6 (S.D.N.Y. April 25, 2006) (same); *SEC v. Scrushy*, 2005 WL 3279894, *2 (N.D. Ala. Nov. 29, 2005) (same).

[31] *SEC v. Jones*, 476 F. Supp.2d 374, 381 (S.D.N.Y. 2007) (citing *SEC v. Jones*, 2006 U.S. Dist. LEXIS 22800, *10 (S.D.N.Y. 2006)).

[32] 2006 U.S. Dist. LEXIS 22800, *10.

[33] *Id*. at *15-16 (quoting *Browner*, 17 F.3d at 1461).

[34] 248 F.R.D. 108, 116 (E.D.N.Y. 2007).

[35] *Id*. at 118.

[36] *Id*. at 118-120.

[37] *See id*. at 118-120.

[38] *SEC v. Buntrock*, 2004 U.S. Dist. LEXIS 9495, *37 (N.D. Ill. 2004), *aff'd in part and remanded in part by* 557 F.3d 736 (7th Cir. 2009) (quoting *Fujisawa Pharm. Co., Ltd. v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997)). The *Buntrock* court relied heavily on *Law v. Medco Research, Inc*., 113 F.3d 781 (7th Cir. 1991), in which the Seventh Circuit applied the discovery rule to the one-year statute of limitations governing Rule 10b-5 claims.

[39] 113 F.3d 781 (7th Cir. 1991).

[40] *Buntrock*, 2004 U.S. Dist. LEXIS 9495, *35-38.

[41] *SEC v. Fisher*, 2008 WL 20626999, *4 (N.D. Ill. May 13, 2008).

[42] *Id*. at *4. The *Fisher* court avoided deciding the issue because "the ultimate outcome of this case

is the same whether I conclude that the discovery rule does or does not apply." *Id.*

[43] 2010 U.S. Dist. LEXIS 89975, *13-21 (S.D. Tex. Aug. 21, 2010).

[44] Section 2462 provides that a claim is barred "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*." (Emphasis added.)

[45] *Id.* at 16.

[46] *Id.* at 16-17.

[47] *Id.* at 17.

[48] *Id.* at 17 (citations and quotations omitted).

[49] 557 F.3d 736 (7th Cir. 2009).

[50] 557 F.3d at 739.

[51] 557 F.3d at 739.

[52] 557 F.3d at 740.

[53] 557 F.3d at 739.

[54] 557 F.3d at 739. At least one district court has stated that it would follow the Seventh Circuit's approach. In *SEC v. Kearns*, 691 F. Supp.2d 601, 613 (D.N.J. 2010), the court cited *Koenig* and held that "claims bound by the limitations period in § 246t2 but sounding in fraud are equitably tolled until the date of discovery, so long as the SEC pursued its claim with due diligence."

[55] *E.g., Federal Election Comm'n v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996). *See also, e.g., SEC v. Microtune*, 2011 U.S. Dist. LEXIS 14850, *14 (N.D. Tex. Feb. 15, 2011); *SEC v. Brown*, 2010 U.S. Dist. LEXIS 10143, *14 (D.D.C. Sept. 27, 2010) (with modification of three-prong test); *SEC v. Fraser*, 2010 U.S. Dist. LEXIS 7038, *31-32 (D. Az. Jan. 28, 2010); *SEC v. Gabelli*, 2010 WL 1253603, *6 (S.D.N.Y. Mar. 17, 2010); *SEC v. Berry*, 580 F. Supp.2d 911, 919 (N.D. Cal. 2008); *SEC v. Jones*, 476 F. Supp.2d 374, 382 (S.D.N.Y. 2007) (with modification of three-prong test).

[56] *See, e.g., Jones*, 476 F. Supp.2d at 382.

[57] *See Jones*, 476 F. Supp.2d at 382.

[58] *Holmberg v. Albrecht*, 327 U.S. 392, 397 (1946).

[59] *E.g., Jones*, 476 F. Supp.2d at 382; *see also SEC v. Gabelli*, 2010 WL 1253603, *7 (S.D.N.Y. Mar. 17, 2010); *SEC v. Berry*, 2008 WL 4065865, *8 (N.D. Cal. Aug. 27, 2008) ("allegations [of stock option backdating] do not demonstrate that the defendant actively concealed her fraud through some trick or contrivance or conduct designed to mask the fraud").

[60] *E.g., SEC v. Berry*, 2008 WL 4065865, *8 (N.D. Cal. Aug. 27, 2008) (quoting *SEC v. Jones*, 467 F. Supp.2d 374, 382 (S.D.N.Y. 2007)).

[61] *SEC v. Leslie*, 2010 U.S. Dist. LEXIS 76826, *109 (N.D. Cal. July 29, 2010).

[62] 580 F. Supp. 2d 911, 919 (N.D. Cal. 2008). *Compare FEC v. Christian Coalition*, 965 F. Supp. 66, 70 (D.D.C. 1997) (no fraudulent concealment where defendant's "inability to discover the events at issue" was not the result of "acts of fraudulent concealment by [plaintiff]").

[63] *Federal Election Comm'n v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996).

[64] *SEC v. Microtune*, 2011 U.S. Dist. LEXIS 14850, *36-40 (N.D. Tex. Feb. 15, 2011) (citing cases applying this prong to other statutes of limitations).

[65] 2011 U.S. Dist. LEXIS 14850, *38.

[66] 2011 U.S. Dist. LEXIS 14850, *39-40.

[67] *E.g., SEC v. Berry*, 580 F. Supp.2d 911, 919 (N.D. Cal. May 7, 2008).

[68] 2010 U.S. Dist. LEXIS 7038, *33-36 (D. Az. Jan. 28, 2010).

[69] *Id.* at *34.

[70] 2011 U.S. Dist. LEXIS 14850, *26 (N.D. Tex. Feb. 15, 2011).

[71] 2011 U.S. Dist. LEXIS 14850, *26-36.

[72] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

[73] *See, e.g., SEC v. Huff*, 2010 U.S. Dist. LEXIS 103314, *132 (S.D. Fla. Sept. 30, 2010) (certain claims timely "under the continuing violation doctrine"); *SEC v. Kelly*, 663 F. Supp.2d 276,

287-88(S.D.N.Y. 2009) (although continuing violation doctrine does not ordinarily apply to securities fraud cases, it operates to toll limitations here because "the SEC has alleged a continuous, integrated scheme . . . over a period of time to achieve the same purpose – to artificially inflate [defendant's] advertising revenue") (internal quotations omitted).

[74] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). *See also, e.g.*, *SEC v. Fisher*, 2008 WL 2062699, *7-8 (N.D. Ill. May 13, 2008) (declining to apply continuing violations doctrine and noting that courts "have expressed a reluctance to apply the doctrine in securities cases"); *In re Affiliated Comp. Servs*. 540 F. Supp. 2d 695, 701 (N.D. Tex. 2007) (rejecting "argument that the 'continuing wrong' theory applies to toll limitations and repose" in backdating fraud case); *SEC v. Jones*, 2006 U.S. Dist. LEXIS 22800 (S.D.N.Y. Apr. 25, 2006) ("courts . . . have questioned the applicability of the continuing violation doctrine to securities fraud actions"); *SEC v. Caserta*, 75 F. Supp. 2d 79, 89 (E.D.N.Y 1999) ("[I]t is not at all certain that the continuing violation doctrine applies in securities fraud litigation.").