LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

TUESDAY, NOVEMBER 13, 2025

Why the Supreme Court should revisit SEC disgorgement remedy

Five years after *Liu v. SEC*, courts remain split on how to appy its limits on disgorgement, leaving the SEC's most potent remedy in need of Supreme Court clarification.

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Disgorgement of ill-gotten gains is one of the SEC's most powerful remedies. In its last fiscal year, the SEC obtained a whopping $6.1 billion in disgorgement and prejudgment interest. While disgorgement is intended to be an equitable remedy, the courts have struggled with confining disgorgement to equitable principles.

In a landmark decision five years ago, the Supreme Court reshaped the contours of disgorgement in SEC enforcement actions. *See Liu v. SEC*, 591 U.S. 71 (2020). *Liu*, addressing the circumstances under which disgorgement is a permissible equitable remedy, concluded that "[a] disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under [15 U.S.C. §] 78u(d)(5)." 591 U.S. at 74. Justice Clarence Thomas, the lone dissenter, correctly predicted that the majority decision failed to provide clear guidance to the lower courts on how to implement its ruling. *Id.* at 93, 99 (Clarence, J., dissenting). Since then, the circuits have disagreed on several important aspects of implementing *Liu*, and these disagreements are ripe for further clarification from the Supreme Court.

Liu's core holdings

The holding in *Liu* would appear to be straightforward: Disgorgement is permissible in SEC enforcement actions only when it is consistent with traditional equitable principles, including (1) limiting disgorgement awards to the wrongdoer's net profits, (2) awarding disgorgement only for the benefit of victims and (3) avoiding joint-and-several liability and penalty-like overreach. But the second prong has generated much judicial dissonance.

The *Liu* Court recognized that "[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity." *Id.* at 79. But it also recognized that "to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims." *Id.* In other words, the "wrongdoer should not be punished by paying more than a fair compensation to the person wronged." *Id.* at 80 (citation modified). Under this reasoning, the SEC should not be entitled to disgorgement when the purported victims of a securities violation have not lost any money.

A circuit split exists regarding the need for the SEC to show pecuniary harm

Circuit courts have disagreed whether the SEC must show pecuniary harm to victims to justify disgorgement. The 2nd Circuit has required a finding of pecuniary harm for disgorgement awards under § 78u(d)(5), *see SEC v. Govil*, 86 F.4th 89 (2d Cir. 2023), while the 1st and 9th Circuits have rejected this approach, *see SEC v. Navellier & Assocs., Inc.*, 108 F.4th 19 (1st Cir. 2024); *SEC v. Sripetch*, 154 F.4th 980, 982 (9th Cir. 2025).

The 2nd Circuit in *Govil* focused on *Liu*'s requirement that disgorgement must be "awarded for victims" and reasoned that "a defrauded investor is not a 'victim' for equitable purposes if he suffered no pecuniary harm." 86 F.4th at 94. There, the court concluded that amounts paid by the defendant back to his company in private litigation should offset any disgorgement judgment in the SEC action. *See id.* at 106.

The 1st Circuit in *Navellier & Assocs., Inc.* expressly disagreed with *Govil*. 108 F.4th 19. The court affirmed a disgorgement award to the SEC, even though all investors profited from their investments. *Id.* at 41. The court rejected *Govil*'s approach that disgorgement required that the investors suffered pecuniary harm: "Neither *Liu* nor our case law ... require investors to suffer pecuniary harm as a precondition to a disgorgement award." *Id.* n.14.

The 9th Circuit, acknowledging the circuit split, chose to follow the 1st Circuit's lead, holding that a finding of pecuniary harm is not required. *Sripetch*, 154 F.4th at 985. The court reasoned that under common law principles and traditional equity practices, disgorgement was intended to deprive a securities wrongdoer of ill-gotten gains, not to compensate victims. *Id.* at 986. Under such principles, disgorgement is appropriate even when the victim has not suffered any pecuniary loss. *Id.* at 986-87. In reaching this holding, the court observed that disgorgement is a "profit-based measure of unjust enrichment" because it is intended to deprive wrongdoers of their ill-gotten gains – without regard to whether investors suffered any monetary loss. *Id.* The court also concluded that the 2nd Circuit defined "victim" too narrowly as someone who suffered pecuniary harm. *Id.* at 987. Rather, a "victim" for disgorgement purposes is anyone who suffered an "interference" of their legally protected rights. *Id.* The 9th Circuit echoed the 1st Circuit's ruling by observing that *Liu* "neither adopted a pecuniary harm requirement nor discarded the common law's definition of victim." *Id.* at 988.

One month prior to *Sripetch*, the 9th Circuit in *SEC v. Barry*, 146 F.4th 1242 (9th Cir. 2025) had an opportunity to address whether *Liu* required a finding of pecuniary harm but chose to sidestep the issue. In *Barry*, the court affirmed a disgorgement award of a portion of commissions earned by three sales agents who purportedly sold unregistered securities, even though the investors were expected to fully recover their investments. *Id.* at 1263. Sidestepping whether *Liu* required a finding of pecuniary harm, the court merely concluded that investors had suffered pecuniary harm "through the loss of the time value of their money." *Id.* at 1263-64 ("We do not need to address the question of whether disgorgement is permissible in the absence of pecuniary harm."). At first blush, this ruling may not appear to be controversial, but if left unclarified, it would allow disgorgement in almost any SEC case in which investors claim to have incurred delays in recovering their investment. See *Id.* (defining pecuniary harm as the loss of the "use of [one's] money"). This is particularly troublesome because, in *Barry*, the returns on the investors' original investment – fractionalized interests in life insurance policies – were paid to investors only when the insured died. *Id.* at 1249. Delays in recovery of their original investment, therefore, were not related to any securities violation but rather to the longevity of the insured.

The Supreme Court should resolve the circuit split

Last month, Sripetch petitioned for certiorari, providing the Supreme Court an opportunity to address the split between the 1st, 2nd and 9th Circuits. While *Govil* appears to be faithful to *Liu*'s admonition that disgorgement should be awarded to victims to qualify as an equitable remedy, Navellier & Assocs., Inc. and Sripetch have applied pre-*Liu* principles by construing disgorgement to require securities wrongdoers to disgorge their ill-gotten gains without regard to investor losses. *Liu* makes clear, however, that equitable principles are served neither by returning to victims more than they lost nor by depositing undistributed disgorgement funds in the U.S. Treasury. Much is at stake as the SEC continues to collect billions each year in disgorgement. The Supreme Court should grant certiorari and provide a much-needed clarification of *Liu*.

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