

# How 9th Circ. Ruling Deepens SEC Disgorgement Circuit Split

By **Kiersten Fletcher, Adam Mintz and Mary Hornak** (November 4, 2025)

When the U.S. Securities and Exchange Commission brings a civil enforcement action in a securities fraud case, it has a range of potential remedies it can seek, including injunctive relief, disgorgement and financial penalties. Historically, the SEC has treated disgorgement as a means to recoup the illicit gains received by the perpetrator of an alleged fraud.

Recent federal court opinions, however, are divided on the purpose of disgorgement and whether the SEC can disgorge a defendant's ill-gotten gains without showing that investors suffered pecuniary harm.

In October 2023, the U.S. Court of Appeals for the Second Circuit held in *SEC v. Govil*[1] that such a showing was necessary, and in July 2024, the U.S. Court of Appeals for the First Circuit reached the opposite conclusion in *SEC v. Navellier & Associates Inc.*[2]

The U.S. Supreme Court declined to resolve this circuit split on June 6, 2025,[3] but the U.S. Court of Appeals for the Ninth Circuit's Sept. 3 decision in *SEC v. Sripetch* will likely give the justices another opportunity to weigh in.

In *Sripetch*, a panel from the Ninth Circuit agreed with the First Circuit's reasoning and held that an award of disgorgement in a civil enforcement action under Title 15 of the U.S. Code, Sections 78u(d)(5) and (d)(7), does not require a showing that investors experienced pecuniary harm.[4]

The Ninth Circuit's decision, which deepens the preexisting circuit split, creates opposing rules in the two circuits where the SEC brings a large proportion of litigated enforcement actions — the Second and the Ninth — and increases the likelihood that the Supreme Court will step in to resolve the split.[5]

## Background on Disgorgement in SEC Civil Enforcement Actions

Disgorgement is a profit-based remedy arising under the law of restitution and unjust enrichment that reflects the principle that a "person is not permitted to profit by his own wrong," according to the Restatement (Third) of Restitution and Unjust Enrichment.[6] Generally speaking, it is a form of restitution that is measured by a defendant's gain and requires a defendant to give up those gains.

Before the Second Circuit's decision in *Govil*, the SEC and the courts proceeded on the assumption that disgorgement was the SEC's analog to forfeiture in the criminal context. Because disgorgement was designed to prevent unjust enrichment, the SEC and the courts took the position that a wrongdoer could be forced to disgorge all ill-gotten gains, regardless of victim harm.



Kiersten Fletcher



Adam Mintz



Mary Hornak

Although Govil did not tackle the distinction between unjust enrichment and restitution head-on, the Second Circuit reasoned that any award of disgorgement must comport with traditional equitable principles, including that it be "awarded for victims." [7]

Initially, the SEC lacked statutory authorization to seek monetary remedies, and it would ask courts to "order disgorgement as an exercise of their 'inherent equity power to grant relief ancillary to an injunction,' per the Supreme Court's 2017 decision in *Kokesh v. SEC*." [8] In 2002, Congress passed the Sarbanes-Oxley Act, which included Title 15 of the U.S. Code, Section 78u(d)(5), and granted the SEC authority to seek "any equitable relief" in civil enforcement actions. [9]

It was not until 2020, however, that the Supreme Court addressed whether disgorgement qualified as equitable relief authorized by Section 78u(d)(5).

In *Liu v. SEC*, [10] the Supreme Court held that while disgorgement did qualify as equitable relief, lower courts had erred in awarding disgorgement in circumstances beyond the remedy's "common-law limitations." [11]

The court ruled that (1) disgorgement awards under Section 78u(d)(5) must be limited to the "net profits from wrongdoing after deducting legitimate expenses"; (2) a defendant's gains should be returned to wronged investors when practical; and (3) disgorgement liability should not be imposed on a wrongdoer for benefits that accrue to his nonculpable affiliates. [12]

Months after the Supreme Court's ruling in *Liu*, Congress passed the 2021 National Defense Authorization Act, creating a second statutory basis on which the SEC could pursue disgorgement awards: Title 15 of the U.S. Code, Section 78u(d)(7). [13] That legislation provides that "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement." [14]

Since then, two circuit splits concerning the permissible nature and scope of disgorgement in SEC civil enforcement actions — including the split at issue in *Sripetch* — have developed.

First, the Second Circuit and the U.S. Court of Appeals for the Fifth Circuit have disagreed over whether the common-law limitations discussed in *Liu* apply to disgorgement under both Sections 78u(d)(5) and 78u(d)(7), or only under Section 78u(d)(5). [15] Second, and relevant to the holding in *Sripetch*, the Second and First Circuits have split on whether an award of disgorgement under Sections 78u(d)(5) and 78u(d)(7) requires a showing of pecuniary harm to victims. [16]

### **Circuit Splits on Common-Law Limitations on Disgorgement and the Pecuniary Harm Requirement**

The Fifth Circuit was the first appellate court to revisit the issue of disgorgement following the NDAA's passage and the introduction of Section 78u(d)(7).

In *SEC v. Hallam*, the Fifth Circuit held in July 2022 that Section 78u(d)(7) "authorizes disgorgement in a legal — not equitable — sense," meaning that disgorgement under Section 78u(d)(7) is not limited by the equitable principles recognized in *Liu* but instead follows the standards the federal courts developed before *Liu*. [17]

Accordingly, the First Circuit held that to recover under Section 78u(d)(7), the SEC must,

consistent with the pre-Liu framework, approximate a defendant's unjust enrichment. The court made no mention of the SEC's need to show pecuniary harm to investors.[18]

In October 2023, a panel from the Second Circuit, in *Govil*, considered whether disgorgement was appropriate where the court had made no finding that the investors suffered pecuniary harm.[19] The U.S. District Court for the Southern District of New York ordered disgorgement, and the defendant appealed, arguing that the disgorgement award was not authorized by the relevant statutory authority because such authority requires a showing that investors have been harmed and that the court had made no such finding.[20]

The Second Circuit vacated the disgorgement order, reasoning that "[f]unds cannot be returned if there was no deprivation in the first place,"[21] and that a victim, for purposes of Section 78u(d)(5), is "one who suffers pecuniary harm from the securities fraud." [22]

Rejecting the SEC's counterarguments that no finding of pecuniary harm was necessary because there is no requirement to quantify harm to a particular investor to obtain disgorgement, the Second Circuit explained that "[w]hether an investor has suffered pecuniary harm — bringing the investor into the category of victims — is a different issue from how to quantify the ill-gotten gains." [23]

In short, the Second Circuit's analysis clarified that (1) Sections 78u(d)(5) and (d)(7) authorize disgorgement that constitutes equitable relief; (2) equitable relief is relief awarded for victims; and (3) such award "requires a finding of pecuniary harm." [24] Because no pecuniary harm had been shown, the order of disgorgement was, in the Second Circuit's view, improper.

In July 2024, a panel from the First Circuit, in *Navellier*, disagreed with the Second Circuit and affirmed an award of disgorgement absent a showing of pecuniary harm.[25]

The First Circuit rejected the argument that disgorgement was not an available remedy because the purported victims suffered no pecuniary harm, explaining that "[d]isgorgement is a 'profit-based measure of unjust enrichment,' which reflects the foundational principle that 'it would be inequitable that [a wrongdoer] should make a profit out of [their] own wrong.'" [26]

The First Circuit emphasized that disgorgement is "tethered to a wrongdoer's net unlawful profits," [27] and expressly disagreed with the Second Circuit's analysis that had turned on the presence of victim harm.[28] Recognizing that equitable relief is available even absent direct economic loss to the complaining party, the First Circuit concluded that disgorgement was an available remedy in the case before it, despite the absence of pecuniary harm.

Following the First Circuit's decision in *Navellier*, the defendants filed a petition for a writ of certiorari on March 3, 2025, asking the Supreme Court to address whether the SEC can seek, and the courts are authorized to award, disgorgement for investor-victim clients who suffered no pecuniary harm.[29] The Supreme Court denied the petition on June 6 and further denied the defendants' petition for rehearing on Aug. 18.[30]

### **The Ninth Circuit's Decision in *SEC v. Sripetch***

In 2020, the SEC brought a civil enforcement action against Sripetch and 14 other defendants, alleging that the defendants engaged in "numerous fraudulent schemes and other violations of the federal securities laws." [31]

The alleged schemes involved at least 20 penny stock companies and followed the same general pattern: (1) The defendants obtained shares of a microcap issuer through convertible debt agreements and converted the debt to stock; (2) the defendants would promote the issuer; (3) the promotions neither identified the defendants as the funders nor disclosed that the promotions' actual funders planned to sell stock in the issuers being promoted; and (4) the defendants promptly sold their stock once, following the promotions, the liquidity of the issuer's stock increased and the share price rose.[32]

The SEC further alleged that the defendants collected \$6 million in proceeds from their illegal conduct and harmed investors who purchased stock during the scheme.[33] In its enforcement action, the SEC sought an order requiring the defendants to disgorge all ill-gotten gains obtained because of the alleged violations.[34]

After consenting in 2023 to the entry of judgment against him, Sripetch opposed the SEC's request for disgorgement under Section 78u(d)(5) or (d)(7).[35]

Citing *Govil*, Sripetch argued that disgorgement under Section 78u(d) requires a showing of pecuniary harm, and that the SEC had made no such showing.[36] The SEC argued that the court should reject *Govil* and, in the alternative, find that Sripetch's victims had indeed suffered pecuniary harm.[37]

Without deciding whether a showing of pecuniary harm was required, the U.S. District Court for the Southern District of California concluded in February 2024 that the SEC had made such a showing.[38]

The Ninth Circuit rejected the Second Circuit's reasoning, followed the First Circuit's analysis and held that a showing of pecuniary harm is not required.

The Ninth Circuit first reasoned that the Second Circuit's approach contradicts the common law, which requires that a claimant seeking disgorgement need only show that a defendant has actionably interfered with the claimant's legally protected interests.[39] The Ninth Circuit then found that the Second Circuit in *Govil* misapprehended legal authority and the relationship between private securities actions and SEC civil enforcement actions by too narrowly defining a "victim" as one who has suffered pecuniary harm.[40]

According to the Ninth Circuit, the Second Circuit's conclusion that pecuniary harm is required for an order of disgorgement "ignores the fundamental distinction between compensatory damages, which are designed to compensate the victim for her losses, and restitution, which is designed to deprive the wrongdoer of his ill-gotten gains." [41]

The Ninth Circuit further disagreed with the Second Circuit's interpretation of the Restatement (Third) of Restitution and Unjust Enrichment and apparent equation of "impoverishment" with "pecuniary harm." [42] Specifically, the Ninth Circuit disagreed with the Second Circuit's interpretation by pointing to language in the reporter's note to the Restatement, which the Ninth Circuit reasoned makes clear that a claimant need only show a violation of his rights, not impoverishment.[43]

Rejecting the Second Circuit's finding of support for a pecuniary harm requirement in private securities actions, which require a showing of economic loss, the Ninth Circuit reasoned that the economic loss requirement in private securities actions is designed to curb abusive litigation by private parties.[44] Meanwhile, the Ninth Circuit noted that civil enforcement actions brought by the SEC are "not subject to abusive litigation by private

parties."[45]

## Impact

When bringing an enforcement action, whether the SEC is required to make a showing of pecuniary harm to investors when seeking disgorgement of a defendant's ill-gotten gains has profound implications for the enforcement of the securities laws.

The Ninth Circuit's decision deepens the existing split among federal appeals courts regarding the pecuniary harm requirement. And it creates a split in the two circuits, the Second and Ninth, where the SEC brings the vast majority of its enforcement actions.

Given the significance of the issue, unless and until the Supreme Court resolves the split, the circuits' competing views on the existence of that requirement may influence where the SEC decides to bring litigated civil enforcement actions, the remedies it seeks and its willingness to resolve the financial components of its claims.

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*Kiersten A. Fletcher is a partner at Cahill Gordon & Reindel LLP. She previously served as an assistant U.S. attorney at the Southern District of New York.*

*Adam S. Mintz is counsel at Cahill Gordon.*

*Mary Hornak is an associate at the firm.*

*Cahill Gordon law clerk Joseph Molloy contributed to this article.*

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[1] SEC v. Govil, 86 F.4th 89, 98 (2d Cir. 2023).

[2] SEC v. Navellier & Assocs. Inc., 108 F.4th 19, 41 (1st Cir. 2024), cert. denied, 2025 WL 1603606 (June 6, 2025), reh'g denied, 2025 WL 2382100 (Aug. 18, 2025).

[3] See Navellier & Assocs. Inc. v. SEC, 2025 WL 1603606 (June 6, 2025), reh'g denied, 2025 WL 2382100 (Aug. 18, 2025).

[4] SEC v. Sripetch, No. 24-3830, 2025 WL 2525848, at \*1 (9th Cir. Sept. 3, 2025).

[5] As of the date of this publication, Sripetch has filed petition for a writ of certiorari, which remains pending. Petition for Writ of Certiorari, Sripetch v. SEC, No. 25-466 (Oct. 14, 2025).

[6] Id. (citing Restatement (Third) of Restitution and Unjust Enrichment § 3).

[7] Govil, 86 F.4th at 98. But cf. id. at 107-08 ("Because disgorgement aims to divest profits, not to 'compensate victims,' it does not matter whether the property lacks value in the victim's hands." (internal citation omitted)).

[8] *Kokesh v. SEC*, 581 U.S. 455, 458 (2017) (quoting *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970), *aff'd in part and rev'd in part*, 446 F.2d 1301 (2d Cir. 1971)).

[9] See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305(b), 116 Stat. 745, 779 (2002); 15 U.S.C. § 78u(d)(5).

[10] The Supreme Court's decision in *Liu v. SEC* arose from an enforcement action about defendant-petitioners' scheme to defraud foreign nationals by soliciting investments in a cancer-treatment center and by misappropriating the funds raised.

[11] *Liu v. SEC*, 591 U.S. 71, 85-87 (2020); see also Sripetch, 2025 WL 2525848, at \*2 n.1 (noting that "[a]lthough *Liu* held that disgorgement awards that adhere to common-law limitations qualify as 'equitable relief' under § 78u(d)(5), the Court did not attempt to classify disgorgement as either 'equitable' or 'legal' in nature").

[12] *Liu*, 591 U.S. at 84, 88, 90.

[13] See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 3388, 4625-26 (2021).

[14] See *id.*

[15] Compare *SEC v. Ahmed*, 72 F.4th 379, 396 (2d Cir. 2023), with *SEC v. Hallam*, 42 F.4th 316, 339 (5th Cir. 2022).

[16] Compare *Govil*, 86 F.4th at 106, with *Navellier*, 108 F.4th at 41 n.14.

[17] *Hallam*, 42 F.4th at 338. In *Hallam*, the Fifth Circuit considered an award of disgorgement ordered in an SEC enforcement action arising from defendants' orchestration of a massive scheme involving the unregistered and fraudulent offer and sale of investments in oil and gas prospects and the distribution of confidential information memoranda that were "replete with material misrepresentations and omissions." *SEC v. Faulkner*, 2021 WL 75551, at \*1 (N.D. Tex. Jan. 8, 2021), *aff'd sub nom. SEC v. Hallam*, 42 F.4th 316 (5th Cir. 2022).

[18] *Hallam*, 42 F.4th at 341. A year later, the Second Circuit reached the opposite conclusion in *Ahmed*, reasoning that the use of the word "disgorgement" in § 78u(d)(7) and the cross-reference to "unjust enrichment" in a related provision (§ 78u(d)(3)(A)(ii)) refers to a "remedy grounded in equity" and therefore must "be deemed to contain the limitations upon its availability that equity typically imposes." See *Govil*, 86 F.4th at 101 (discussing *Ahmed*).

[19] The case was predicated on an enforcement action the SEC brought against a single defendant who had caused a public industrial and technology company to engage in three fraudulent securities offerings. Specifically, the SEC alleged that *Govil* caused the company to represent to investors that the offering proceeds would be used for corporate purposes, when in fact, *Govil* misappropriated the more than \$7 million in proceeds and used those funds to pay for unrelated personal expenses. See *SEC v. Govil*, 2022 WL 1639467, at \*1 (S.D.N.Y. May 24, 2022), vacated and remanded, 86 F.4th 89 (2d Cir. 2023).

[20] *Govil*, 86 F.4th at 98.

[21] Id. at 103.

[22] Id. at 102.

[23] Id. at 105 (further reasoning that the SEC's argument "does not address the separate question of when disgorgement qualifies as 'equitable relief'").

[24] Id. at 106.

[25] In *Navellier*, the First Circuit considered the district court's award of disgorgement in an enforcement action the SEC brought against investment advisors. The SEC had alleged that the defendants had made materially false and misleading statements and omissions to investment advisory clients and further engaged in a scheme to defraud those clients by concealing material information regarding the performance of the investment strategies it touted. See *Navellier*, 108 F.4th at 32-33. The district court ordered disgorgement, reasoning that the remedy was appropriate to deprive defendants of the unjust profits they collected. *SEC v. Navellier & Assocs., Inc.*, 2021 WL 5072975, at \*2 (D. Mass. Sept. 21, 2021), *aff'd*, 108 F.4th 19 (1st Cir. 2024).

[26] *Navellier*, 108 F.4th at 41.

[27] Id.

[28] Id. at 41 n.14 (explaining that neither U.S. Supreme Court precedent nor First Circuit case law "require[s] investors to suffer pecuniary harm as a precondition to a disgorgement award").

[29] See Petition for Writ of Certiorari, *Navellier & Assocs. Inc. v. SEC*, No. 24-949 (Mar. 3, 2025).

[30] See *Navellier & Assocs. Inc. v. SEC*, 2025 WL 1603606 (June 6, 2025), *reh'g denied*, 2025 WL 2382100 (Aug. 18, 2025).

[31] *Sripetch*, 2025 WL 2525848, at \*4.

[32] See *SEC v. Sripetch*, 2024 WL 5320196, at \*2 (S.D. Cal. Feb. 6, 2024), *vacated*, 2024 WL 628018 (S.D. Cal. Feb. 14, 2024).

[33] *Sripetch*, 2025 WL 2525848, at \*4.

[34] Id.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id. at \*5.

[40] Id. at \*6.

[41] Id.

[42] Id. at \*7. The relevant portion of the reporter's note to the Restatement provides:

There is an understandable temptation to limit the far-reaching notion of unjust enrichment within the manageable confines of a checklist, but the attempt usually leads to trouble. See *LaSalle Nat'l Bank v. Perelman*, 82 F. Supp. 2d 279, 294-295 (D. Del. 2000) ("The elements of unjust enrichment are: 1) an enrichment, 2) an impoverishment, 3) a relation between the enrichment and the impoverishment, 4) the absence of justification and 5) the absence of a remedy provided by law"). The first four elements of this list might make a plausible definition, though the reference to "impoverishment" is too narrow: there is often no "impoverishment" other than a violation of the claimant's rights. The fifth element is plainly erroneous, since so much of unjust enrichment is legal in origin.

*Sripetch*, 2025 WL 2525848, at \*7 n.8 (alteration omitted) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1, reporter's note d).

[43] Id.

[44] Id.

[45] Id.