

GABELLI V. SEC: THE SUPREME COURT'S STATUTE OF LIMITATIONS RULING PUTS PRESSURE ON FEDERAL AGENCIES TO INVESTIGATE MORE AGGRESSIVELY AND SUE MORE QUICKLY

By Stephen A. Fogdall

In a sweeping decision that could impact numerous enforcement actions by a number of federal agencies, the U.S. Supreme Court rejected the federal government's argument that an agency should be entitled to the protection of the discovery rule in an enforcement action seeking a civil penalty for an alleged act of fraud.

The decision is *Gabelli v. Securities and Exchange Commission*, issued on February 27, 2013. The SEC had brought suit under the Investment Advisers Act against alleged participants in a putative fraud involving "market timing." Because the SEC sought a civil penalty, the action was subject to 28 U.S.C. § 2462, which states that "an action, suit or proceeding for the enforcement of any civil fine ... shall not be entertained unless commenced within five years from the date when the claim first accrued" This Section provides a general statute of limitations for any action seeking a civil penalty by a federal agency, unless a different limitations period applies under a particular statute. As the Supreme Court emphasized, Section 2462 "governs many penalty provisions throughout the U.S. Code." Slip Op. at 2.

The action in *Gabelli* had been filed nearly six years after the alleged fraud had occurred, so the

government attempted to invoke the discovery rule, under which the claim would not be deemed to have "accrued" until the alleged fraud "could have been discovered" "in the exercise of reasonable diligence." *Id.* at 6. The government argued that agencies should receive the benefit of this rule "to the same extent as private parties." *Id.* at 7.

The Court rejected this argument because the SEC was "not a defrauded victim seeking recompense," but rather an agency "bringing an enforcement action for civil penalties." *Id.* at 6. The SEC is "a different kind of plaintiff" than a private party, because a private party does "not live in a state of constant investigation," and does not "spend [its] days looking for evidence that [it was] lied to or defrauded," whereas the "central mission of the [SEC] is to investigate potential violations of the federal securities laws." *Id.* at 7-8 (internal alterations and quotation marks omitted). At the same time, the SEC "seeks a different kind of relief" than a private party, because a private party seeks "recompense" for alleged harms, but civil penalties "are intended to punish, and label defendants wrongdoers." *Id.* at 8. Thus, reading a discovery rule exception into Section 2462 would be inappropriate. *Id.* at 11.

(continued on page 2)

(continued from page 1)

The Court emphasized that most federal agencies possess powerful tools for investigating alleged violations. In the case of the SEC, these include the ability to demand production of “books and records at any time,” and to “subpoena any documents and witnesses [the SEC] deems relevant or material to an investigation,” “even without filing suit.” *Id.* at 8. Obviously, *Gabelli* puts pressure on agencies to use these tools more aggressively, and to move from an investigative mode to a litigation posture more promptly. Thus, the practical effect of *Gabelli* may be to promote more rapid and less discriminating investigation and enforcement activity by some agencies to minimize the risk of a limitations bar. ◆

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client rela-

tionship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader’s Financial Services Litigation Practice Group or to speak with a member of the Firm, please contact:

Stephen J. Shapiro, Co-Chair
215-751-2259
sshapiro@schnader.com

Christopher H. Hart, Co-Chair
415-364-6707
chart@schnader.com

Stephen A. Fogdall
202-419-4208
sfogdall@schnader.com

www.schnader.com

©2013 Schnader Harrison Segal & Lewis LLP