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On Monday, Judge Richard Casey of the United States District Court for the Southern District of New York issued a significant decision regarding the application of the statute of limitations to actions brought by the Securities and Exchange Commission seeking civil penalties and injunctive relief. In *SEC v. Jones*, No. 05 Civ. 7044, Judge Casey granted summary judgment in favor of defendants Thomas Jones and Lewis Daidone, holding that the SEC had failed to establish that the statute of limitations should be tolled as a result of the defendants' alleged concealment of their actions and that the statute of limitations applied to the SEC's claim for a permanent injunction. The ruling hands a significant setback to the SEC, which had charged Jones, the former head of Citigroup Asset Management, and garnered much media attention in 2005.

According to the SEC, defendants Jones and Daidone were instrumental in recommending that Citigroup Asset Management, which provides investment adviser and management services to Citigroup-sponsored mutual funds, establish an affiliate that would act as transfer agent for the mutual funds at a profit to Citigroup. According to the SEC, when the defendants presented the arrangement to the various funds' boards of directors, they did not disclose the substantial profit that Citigroup would be reaping from the arrangement. The SEC's action alleged that by failing to disclose the true terms of the transfer agent arrangement, the defendants aided and abetted violations of § 206 of the Advisers Act. The SEC sought civil penalties, a permanent injunction barring the defendants from future violations of the Advisers Act and disgorgement of profits.

The defendants moved for summary judgment on the grounds that the SEC failed to commence the action within the five-year statute of limitations set forth in 28 U.S.C. § 2462. Regarding its claim for civil penalties, the SEC argued that the statute of limitations should be tolled because the defendants fraudulently concealed their actions. (In an earlier decision on the defendants' motion to dismiss, the court rejected the SEC's argument that the "discovery rule" — pursuant to which the statute of limitations would not begin to run until the violation is discovered — applies to the statute of limitations in § 2462. *See SEC. v. Jones*, No. 05 Civ. 7044, 2006 U.S. Dist. LEXIS 22800, at *14-16 (S.D.N.Y. Apr. 25, 2006).) The court held that in order to toll the statute of limitations for fraudulent concealment, the SEC must establish either (i) that the defendants took affirmative steps to prevent the discovery of the wrongdoing, or (ii) that the wrongdoing "was of such a nature as to be self-concealing." The court held the SEC could not satisfy the "self-concealing" prong simply by showing that it was unaware of the fraud; instead, the SEC must establish that the wrongdoing was "unknowable" or that the SEC could not, by the exercise of due diligence, have uncovered the wrongdoing. The court held that the SEC had not met its burden, noting that the SEC had been informed within the statute of limitations period of facts which indicated that Citigroup may have been involved in self-dealing, even if the full extent of the self-dealing was not made known to the SEC at that time. Accordingly, the court dismissed the SEC's claim for civil penalties as time-barred.

Regarding the SEC's claim for a permanent injunction, the court recognized that many courts have held that while the statute of limitations applies to claims for civil penalties, it does not apply to claims for equitable relief, such as an injunction. Drawing a distinction, however, and citing the D.C. Circuit Court of Appeal's decision in *Johnson v. SEC*, 87 F.3d 484, 486-492 (D.C. Cir. 1996), the court held that the statute of limitations does apply to claims for equitable relief where the remedy sought acts as a penalty, but that the statute of limitations does not apply where the equitable remedy is aimed at preventing future harm to the public. The court noted that in order to obtain a permanent injunction, Second Circuit caselaw requires the SEC to establish more than defendants' past violations; the SEC must also establish a realistic likelihood of recurrence. The court found that the SEC had produced no proof to suggest a realistic likelihood of recurrence, noting that several years had passed without incident since the defendants' alleged violations. Because the SEC had not established a reasonable likelihood of recurrence, the court held that the requested injunction was aimed at punishing the defendants and was not aimed at protecting the public from future harm. The court held that, as a penalty, the claim for an injunction was subject to the five-year statute of limitations and was thus time-barred.

Finally, the court addressed the SEC's claim for disgorgement. Although it was Citigroup, and not the defendants, which profited directly from its appointment as transfer agent, the SEC argued that the defendants profited because their compensation was based on how they performed on significant projects, of which the transfer agent arrangement was one. The court noted that in order to award disgorgement, the SEC must provide a "reasonable approximation of profits causally connected to the violation." The court held that the SEC had failed to provide the court with guideposts for determining what portion of defendants' compensation should be disgorged, and thus dismissed the SEC's disgorgement claim.