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Introduction: Thank you for joining us for this episode of Reasonably Speaking. Today our panelists are going to discuss the recent Supreme Court case Liu v. Securities Exchange Commission, as well as the history of the law and the court cases on remedies that led to this decision and its potential future implications. Our first panelist today is Andrew Kull. Andrew is a Distinguished Senior Lecturer at The University of Texas at Austin School of Law. Andrew is one of the nation's leading experts in the area of Restitution and is also a well-known Constitutional historian. He served as Reporter on The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment.

Our second panelist is Caprice Roberts. Caprice is a Visiting Professor of Law at the George Washington University Law School. Throughout her academic career, Caprice has devoted scholarly attention to proper judicial role and the advancement of the law of remedies. She recently completed the new edition of the seminal treatise Dobbs & Roberts's Law of Remedies and has published the 9th edition of a leading Remedies casebook with Doug Rendleman, as well as a coauthored casebook in Federal Courts.

Finally, the moderator for today's episode is Douglas Laycock. Doug is perhaps the nation's leading authority on the law of religious liberty and also on the law of remedies -- Having taught and written on these topics for four decades. He has testified frequently before Congress and has argued many cases in the courts, including the U.S. Supreme Court, where he has served as lead counsel in six cases. He is the author of the leading casebook Modern American Remedies, and the award-winning monograph The Death of the Irreparable Injury Rule

Doug recently took emeritus status on The American Law Institute's Council in order to serve as Reporter on the Restatement Fourth of Torts – Remedies.

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Doug and Caprice, among others, filed an Amicus Brief in Liu v. SEC, which heavily cited the Restatement Third of Restitution and Unjust Enrichment. I will now turn over the microphone to Doug.

Douglas Laycock: Well, hello. I'm Douglas Laycock at the University of Virginia. I have with me Caprice Roberts from George Washington University and Andrew Kull from the University of Texas, and we're talking today about a series of Supreme Court cases that have given a lot of attention to remedies that do not award the plaintiffs damages, they award the defendants profits. It was a major decision this year in Liu v. The Securities and Exchange Commission. Caprice and I and some other scholars, filed an Amicus brief in that case and heavily cited the Restatement Third of Restitution Unjust Enrichment. Andrew was the Reporter for that. It granted two Federal Trade Commission cases that have been held for Liu, so there's a lot going on at the court, and it did not just begin this year.

Six years ago in Petrella v. MGM, they upheld a remedy that awarded MGM's copyright infringement profits to the copyright holder, and they said in that case that although these remedies have roots both in common law and in equity, we're going to treat them as equitable. So, these are restitutionary remedies, which the court treats as derived from equities. They heavily were. They were called quasi-contract at law. They were called accounting for profits and equity, and more recently they are often called disgorgement.

In 2015 in Kansas vs. Nebraska, they awarded a profits remedy for breach of contract against Nebraska. This was about dividing the water from the Republican River. The part of the river in Nebraska is a lot further west and a part of the river in Kansas, so it's more arid and the water's more valuable there, and Nebraska's profits from taking more than its share were greater than Kansas' damage from not getting all of its share. So, that's a bit of background leading up to Liu. There have been some other cases that Caprice and Andrew will talk about. Individual victims of securities fraud can sue for their damages or they can sue for the fraudsters wrongful profits. More commonly, the Securities and Exchange Commission sues for the fraudsters wrongful profits, and that brings us to the Liu.

The Securities and Exchange Act authorizes the SEC to sue for, and I'm quoting now, "Any equitable relief that may be appropriate or necessary for the benefit of investors." That includes recovery of the profits of

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securities fraud because recovering the bad guy's profits is a form of equitable relief. The SEC persuaded lower courts over the years to award judgment against each defendant for the gross receipts of all the defendants. So, profits got defined as gross receipts, and it was joint and several liability. Three years ago in a case called Kokesh v. the SEC, the Supreme Court said that's a penalty. You're awarding more than the actual profits of any one defendant. That makes it a penalty. That makes it subject to a five year statute of limitations on government actions to recover penalties.

In Kokesh v. the SEC, the Supreme Court said that's a penalty. It's subject to the five year statute of limitations on actions to recover penalties, and that set up Liu. The defendants in Liu argued equity doesn't award penalties. Kokesh said it's a penalty, and that means it's not equitable relief, and the [inaudible 00:04:09] revision here authorizes equitable relief. There are other provisions for penalties, but they weren't followed here and they weren't invoked here. You can't get disgorgement from us anymore after Kokesh.

SEC said, "Look, equity's very flexible. It can evolve. It can include whatever we want it to include, and it can include disgorgement of gross receipts and that's still equitable." Caprice and I and others filed an Amicus brief in support of neither side, and we started out by saying, "Both sides are clearly wrong." Disgorgement is just another name for accounting for profits. Accounting for profits has a long history in the Supreme Court. It has a clearly defined measure of recover. There are subtle rules here. You can read them in the Restatement. Courts don't just make it up as they go along. The disgorgement remedy is for the net profits of each defendant, not gross receipts, not joint and several liability, but the net profits of each defendant. We cited a long line of intellectual property cases in the Supreme Court going far back into the 19th century before intellectual property law was [countified 00:05:17]. We cited Justice Story's Treatise on Equity, and of course we cited the Restatement. The Supreme Court agreed eight to Thomas. It did not cite our brief, but it cited most the intellectual property cases that we had cited, and it repeatedly cited Andrew's [inaudible 00:05:35] statement.

The SEC can still get disgorgement after Kokesh. It's equitable, it is limited net profits, there's no joint in several liability, and a point we had not made, the SEC must distribute the money to defrauded investors if possible. Andrew, Caprice, anything to add on Liu itself before we talk on how we got there?

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Andrew Kull: Let me try to give my version of a brief history. I do want to keep it brief, but I want to start one step back with your indulgence. I think the story starts with a New York case, Falk v. Hoffman in 1922. It's a Cardozo opinion. Very simple kind of fraudulent inducement. Somebody was fraudulently induced to sell his securities to the bad guys. The private plaintiff or plaintiffs came into New York court and said they wanted the securities and the proceeds of the ones that had been sold held for them in constructive trusts. That's an interesting feature that the things were identifiable, it was a constructive trust case. The idea that you could have constructive trusts relief against a non-fiduciary bad guy had been a very important feature of American restitution law, I would say since Newton v. Porter, 1870s. So, so far so good. Falk v. Hoffman, as far as I know, the first example of securities fraud restitution along these lines. Again, private action, Cardozo, so it has one of his great lines.

This is the case where Cardozo says, "Equity will not be over nice where action may baffle and inaction may confirm the purpose of the wrongdoer. That's not just so characteristic of him, but when you've been looking at these securities cases, I think it's amazingly the same without the rhetorical sheen to what the Second Circuit is saying 50 years later in SEC v. Texas Gulf Sulfur where Judge Waterman, I think it was, said, "It would severely defeat the purpose of the Exchange Act if we couldn't do this." The thinking is the same; however, Falk v. Hoffman 1922, now the statutes.

In 1934 the Securities Exchange Act, as people ... When I went to law school everyone had to take securities law. I don't think they do anymore, but if you remember anything, you probably remember the Exchange Act. The 1934 Act didn't forbid very much along these lines. It says, "You may not have a manipulative or deceptive device or contrivance." It didn't even say fraud. That was left to The Commission when they put up their rules, I guess, a year or two later, and they wrote the famous Rule 10b-5, which says, "A scheme to defraud is illegal and making an untrue material statement or failure to make a statement you should have made is illegal."

On the remedy side, the SEC, there was no private right of action at all. The SEC had the right to investigate and seek an injunction. Finally, towards the end, it said the Federal District Courts have jurisdiction of all suits in equity and actions at law. The point of this ancient history is just to say that in this particular area, remedy for security fraud, the whole course of our law has been no notably incremental, and with the agency and the courts making their way with an idea of what needs to be done, most of

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the time Congress playing catch up. They're doing the best they can, but that pattern is continued. We have Rule 10b-5. It was very quickly found that the bare jurisdictional grant just signed that District Courts have jurisdiction of suits in equity meant that they could not only give injunctions in a proper case, but apply remedies that were ancillary to injunctions. I think the first thing that was decided is they could appoint receivers.

I think it's also the case, Doug, you know this history better than I do, that the very same evolution was happening with other statutes. Equity jurisdiction in other statutes, it was not simply a matter of the Securities Law being special. Okay, so things sit there for a while. Federal District courts decided in the late 40s, early 50s that a private right of action under the Securities Laws was implied. Okay, so as far as I know, the first really memorable attempt to bring an action for recovering the ill-gotten gains of securities fraud was private action brought under the implied right of action from Rule 10b-5. In a case call Janigan v. Taylor, 1965. The appeal is in the First Circuit. There was no tracing. There was no constructive trust. They did show the profits and the causation between the fraudulent misrepresentations. The First Circuit said in 1965 it's simple equity that the wrongdoer should disgorge. He used the word disgorge, disgorge his fraudulent enrichment. At least they said enrichment. The citations for this were Falk v. Hoffman, Cardozo, also Restatement of Restitution from 1937. Scott on trusts relevant sections, which is his gloss on the Restatement of Restitution, which he had written. That was 1965.

So, as far as I'm aware, the first time the SEC ever tries this is the case of SEC v. Texas Gulf Sulphur and the opinion in the Second Circuit in 1971. It was an insider trading case. The court refers to restitution, they're calling it at this point. They said it is fine as an ancillary remedy to the injunction so long as it is remedial and not a penalty. There's nothing new under the sun, although we forget things. When it is first introduced, they're saying this is fine because it is remedial and not a penalty. The SEC was only asking the defendants to restore what had been profits as the direct result of the misrepresentation. There was some time made that fairly easy to distinguish. They had a pretty careful system setup that all of the profits would be paid into an escrow, which would be held for five years to pay the claims of defrauded investors, so the extent they could be found, and at the end of five years anything that had not been claimed by investors would be paid to the company, Texas Gulf Sulphur, which I believe is standard thinking about insider trading cases.

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They said the investors have a higher equity than the corporation, but both the investor and the corporation are entitled to these profits ahead of the bad officers and directors. So, I draw a little line mentally at Texas Gulf Sulphur. It's 1971, and Janigan v. Taylor. I would say, for purposes of just our ALI orientation at this point the law restitution for securities fraud is 100% in accordance with the thinking of Restatement Restitution against enrichment. What happened? How did we go off the track?

There were a number of circuit court decisions, I believe a lot of them, I think mostly in the 1990s, in 2000s as very conveniently recounted in the Kokesh decisions three years ago that showed that the SEC was just becoming more aggressive, more self-aggrandizing in its attitude toward what it was calling disgorgement. There was no netting, no attempt to decide what are the legitimate expenses so that we really are not awarding more than profits. They would ask for gross receipts. No attempt necessarily to make any sort of restitution to injured investors. No attempt to justify what they were doing in terms of unjust enrichment. On the contrary, they aggressively defended what they were doing both in court and in Congress as an appropriate remedy for what they said is after all it's an offense against the laws of the United States. We're not worried, especially that of fraud on investors, and the point here is deterrent and not compensation. This was there allowed position. Naturally, they are setting themselves up eventually for the reaction they get in Kokesh, which is what you are doing here is applying a penalty. It's punitive, so the statute of limitations kicks in, and we say, "Finally."

Meanwhile, the Congress continuing its attempt to bring some order here. In 1990, they amended the statutes so that they say, "The SEC can seek equitable remedies in civil action." You no longer had to say, "Well, it's implicit because it's ancillary to an injunction." I think in 1990 people knew what equitable remedies were. To this extent they knew they included this one, and then 10 years later in another statute they finally used the word disgorgement, saying that an administrative proceeding as opposed to civil action they could seek disgorgement.

Final thing, how did all of this happen? Here, this is just my hypothesis, I'm guessing. I would say educated guess. I would say first the SEC sees themselves on the side of the angels. They are interested in catching bad guys, not particularly in equity or unjust enrichment. This burden of disgorgement is the line of least resistance for them, so long as the courts will let them do it. I will say I think I'm sure about this, it is impossible to imagine that we could have this same development without the gradual weakening, professional grasp of this whole area of the law. The part that we talk about in the Restatement of Restitution of Unjust Enrichment, everything that goes by the name equity, so far as that's relevant to these questions. I won't start in on a impromptu speech about it here, but that can't be news and it can't be controversial. For complicated reasons, these things are not as visible to lawyers and judges as they were back around 1971, time of Texas Gulf Sulphur. I would say finally everyone who's ever tried to say anything about restitution knows how bad the terminology is here. It is just so harmful and in so many ways produces confusion, and people talking past each other, and so forth.

Nowhere [inaudible 00:21:39] acknowledging problems in this area are worse than they are here with this word disgorgement. We use it in the resentment, I would say as long as everyone understands, as we did, that when we say this it means surrender of unjust enrichment, and that this is become common usage for that form of a restitution remedy. No harm done, I hope, but the word itself, the SEC has no trouble whatsoever using this word in a way that described a penalty. I would guess, this is a guess, that somewhere within the SEC there is an in-house practice book that tells how claims are to be formulated, and I bet you anything that at some point they began telling the staff to use the word disgorgement. I think probably they liked it because it has a dramatic sound to it once the courts began to accept it. The name makes a difference.

Just concluding thought experiment, if somehow by some power the SEC lawyers had been obliged to give this remedy exclusively in all of their pleadings and briefs and arguments, exclusively referred to it as something like equitable restitution, just supposed they'd had to call it that, it is impossible to imagine the same development and it is impossible to imagine the decisions in Kokesh or Liu. You couldn't do it. Anyway, I've said too much, but there's my historical survey.

Laycock: Justice Thomas seemed to think disgorgement is not just a new name for accounting for profits. It's a completely different remedy. It's recently made up. It's not equitable, it had no basis of history in the statute, and it shouldn't be available. The courts should repudiate it. That didn't happen. The majority was not as exclusive as it could have been, but I think they treated disgorgement as just a new name for accounting for profits, and accounting for profits remedies go back a very long time.

Caprice, what can we predict about how Liu's going to be implemented? What happens next in going forward?

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Caprice Roberts: Sure. Thank you for the opportunity to do this, this issue further. Just as Andrew was mentioning about the basically conundrum that's raised by all the labels and the sometimes severe lack of knowledge about this topic, it's creates somewhat of a perfect storm that on the back of the wind that's coming from the SEC having taken all of these as been described as aggressive, maneuvers in using courses to their advantage to talk about seeking gross profits or seeking joint and several liability among other things. That led to the Kokesh opinion, which in some ways we could describe as not really moored to restitution in the same way, but we can get to that in a minute.

In terms of what's coming out of the Liu opinion, I think what's nice is even though we're in the midst of this perfect storm, we're seeing the Supreme Court having new interests increasingly in hearing more and more of these cases and maybe trying to, perhaps, reconcile and make more sense of the doctrines of unjust enrichment and retying the remedy of profits to the principles of unjust enrichment and to the principles of equity. Of course when it uses the idea of principles of equity, part of the problem is the court really talking about one identifiable set of principles. Same Bray has talked about perhaps it's creating a usable equity versus being accurate all the time. Then the Supreme Court has to deal with its own befuddlement in prior cases where perhaps it's used incorrect labels, incorrect decisions between law and equity, and it may well find itself in that position again with having to do some clean up on aisle five over the Kokesh opinion after the Liu opinion.

In terms of what Liu, the heart of it, again, ties back to this idea of simple equity and that case that Andrew quoted from which is the Janigan v. Taylor, which is an implied private right of action under securities law that was in 1965. In that case, the First Circuit talked about making sure that the wrongdoer should disgorge their unjust or fraudulent enrichment in that case and in fact that the defrauded party should get the benefit of any windfall if there were any, but at the same time that there are limits on this disgorgement of unjust enrichment. But the court didn't go too far down the road, it's a very short opinion. It talked a little bit about an example of a limit, and used an art example. If an artist acquires a painting by fraud they're not suggesting the defrauded party would be entitled to the portrait, for example, or even the proceeds of the sale. They basically say that example of a limit isn't applicable to the given case because the case was about the conveyance of property to a fraudulent party.

Laycock: If I may interrupt, I think they said-

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Roberts: Sure.

Laycock: ... if the artist acquires the paints and canvas by fraud of theft-

Roberts: Yes.

Laycock: ... and then creates the Mona Lisa, the hardware store doesn't get the Mona Lisa.

Roberts: Right. Yeah, sorry. Exactly right. So, they're trying to distinguish that from what was actually going on in the case at hand. They end up not using that, but saying instead that all of the wrongful profits should be disgorged, and that is wedded to this simple equity again, but simple equity having some limits. I think what the Supreme Court is attempting to do in the Liu opinion is to clarify first of all that this disgorgement or the word disgorgement in the stripping of profits is a remedy that is available under equitable remedies, but with that it is sometimes the court calls is constricted or limitations from equitable principles that those have to be enforced. Then the opinion what goes on to give examples of how those limits will apply doesn't resolve them. So, that's ones important thing to remember.

Again and again, the court will say they're trying to answer something that was left open, explicitly left open by the Kokesh case, but at the same time they're not running it all the way to ground because they are saying that on remand we're confident the lower courts can make these final determinations. The big on is who should get the money, and of course as already has been mentioned, the SEC in many of these cases was attempting to keep all the money in the government treasury as opposed to going and finding the victims of the fraud in the first place and making sure that they get these funds that are taken and stripped from the defendant.

On that question of who gets the money, the court said, "Well, there is a perimeter to that, and the perimeter is going back to the statute itself and the benefit of the investors, that's the whole purpose of it." But the court did open a door to the government's argument saying, "Well, we would like to talk about what if it's not feasible for us to find these investors?" The court said, "Again, the District Court is perfectly capable of hearing that argument and attaining it, but that doesn't mean you don't have to try to do that, that you don't have to try to give the monies that you are taking from the defendant." It doesn't just get to be government windfall, but there is some import to the idea of the government wanted to argue it's simply a matter of that the disgorgement type of remedy should end with the discussion of get the profits from the wrongdoer and the court shouldn't be involved in anything after that and the government didn't have a responsibility to get the money back to investors.

Here, I think, importantly the Liu case establishes that yes, the government does have that responsibility and that there is in order to keep with unjust enrichment principles and equitable limitations that there is this tie to getting it back to the investors. Again, they can argue on remand or before district court, or magistrates about exactly whether they're capable and feasible to find and actually get the money to those investors.

Another big point, and Andrew mentioned this as well, which is the proper deduction that should be made and how to get to net profit as opposed to gross. Again, SEC had every reason to want to go ahead and ask for gross, start with that and finish with that, but the court did a nice a job, I think, clarifying and we argued and I signed on to the Amicus Brief that Doug was the author of. We argued that net is appropriate with unjust enrichment and not gross. That keeps with everything that's in the Restatement Third of Restitution of Enjust Enrichment. Then the question is what can you deduct, and in keeping with the Restatement, the court clarifies that it should be necessary to a legitimate expense. It goes on to describe legitimate business expenses, even gives ... The court says it doesn't need to give further guidance, which Justice Thomas and the defense says, "Yes, you do," but the majority says, "We don't really need to give guidance, but we'll give you am example. They talk about even in the case [inaudible 00:31:53] that there were perhaps some lease payments, and they talk about cancer treatment equipment that perhaps. But it doesn't resolve it. Again, it basically says on remand, lower court's perfectly capable of figuring out and hearing the claims.

Of course, keep in mind the burden would be on the defrauder there to try to deduct, make an argument for deducted those business expenses that are legitimate from the larger amount from the gross receipts in order to get down to a net profits number. They had argued below about the exception of what if the whole thing is fraught with and unlawful or wrongful and it's all being used for that and that's something that the district court listened to quite closely and tried to go that direction, and that's why they didn't have the deduction. Here the court is saying, "No, you need to do this evaluation of what are in fact legitimate business expenses and try to hear those arguments and make the analysis in more of a way than the court did.

Another question that to think will come up out of the case is a third traditional limit on unjust enrichment and equitable principles is how far can the profits go before they become to remote? There are other cases like [inaudible 00:33:16], I think, that talk about that. But at any rate, that's something that would also be a traditional limit that could be talked about on remand.

Then I think the last couple of items I want to discuss were just what are some other questions coming out of the case and one has already been mentioned by Andrew Kull, irreconcilability of Kokesh. I think that's true because Kokesh talks about penalty and that's why you have the argument coming forward in Liu that if it's a penalty then it's not allowed here. Of course the court instead views the profits remedy as being reconstitutionary and being equitable and fitting within that history of equity, but now does that reopen what Kokesh decided with whether or not the SEC should have the power to ever go after on the penalty side and use that statute of limitations. I think as Doug mentioned, that's not yet resolved, but you can bet that will be litigated.

Last point was just the idea of joint and several liability. We had argued in the Amicus Brief that the history shows there's not joint and several liability and should not be, that instead each individual wrongdoer should have to disgorge their net profits as attributed to them but not collectively or joint and severally. The court, though, and the majority opinion in Liu, opens the door to a type of joint and several determination being made by the lower court and looking for do you have partners that are in concert, again, not really clarifying what it means by that. We argued in the Amicus Brief that it shouldn't be a practical partnership. If you don't have a real partnership, basically, then you shouldn't be able to go that route. We would continue to maintain that the court should now allow the joint and several because again, all of this, all of these limitations are to try to make sure that all we are doing with a profits based remedy is disgorging what is the unjust enrichment and not penalizing, punishing, or having anything punitive going on.

Laycock: The partnership issue was a little odd in Liu because the defendants were husband and wife, so they had commingled finances presumably, even if they weren't legally partners. Andrew, did you have anything to add on the joint and several point?

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Kull: Yes, I think this may be one point at which my ... I am more curious about this than I think my friend's Doug and Caprice are. When we talked about it, it occurred to me that I don't think the Restatement says anything about this. I don't think we ever thought about it. I would be inclined to say it's not because there are no instances. Why might there be joint and several liability in securities fraud case? If I were trying to argue it, I'd say, "Well, if we said these people, the defendants have both been lying to the claimant we could sue them for torte and deceit. They'd be joint torte fees, what's the difference? If they are fiduciaries, if they're co-trustees there's nothing to say. But I think also by at least the Second Restatement of Trust and a lot of case law, if you have somebody who is not strictly a co-trustee but is nevertheless participating in the breach of trust, there's joint and several liability there. In any situation like Falk v. Hoffman where constructive trust is possible, there will in effect be a joint and several liability. In fact, although, you wouldn't use that name.

Finally, when I was reading, I guess it was the Liu case, I was not aware that there had been so many circuit court of appeals decisions in the last 20 years that seemed to have devoted quite a lot of attention to this. There's one, I think it's called Whitamore, something like that, Judge Rogers. There's quite an extensive discussion about the different things that courts have said about it and she says, "Well, some people say there has to be either a close relationship or a collaboration in the fraud, and the question is there has to be both of these, or is it an and/or, etc., etc." When Caprice says this remains to be determined, yeah absolutely, but I'm thinking I'm not sure that on unjust enrichment principles we would reject it out of hand. Husband and wife, assets commingle, they seem to have been collaborating I'm mean hand and glove on manipulating the fraudulent scheme, I'm not sure that it's inappropriate.

Laycock: The [inaudible 00:38:38] point is different. Joint torte fees here have joint and several liability because they each helped cause an indivisible harm to the plaintiff. The starting point in unjust enrichment is you're liable for your profits, and I don't profit from money that went to one of my co-conspirators. So, there has to be something more than just an unjust enrichment through be partnership while it clearly does it and maybe some of these other possibilities that we talked about, co-fiduciaries or close cooperation may do it as well. We'll see, but the starting point treats defendants profits here very differently from the plaintiff's damages.

There were two Federal Trade Commission cases that the court had held waiting for Liu, and after Liu they granted cert in both of them. These are

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similar in some ways, more difficult, I think, for the government in other ways. The SEC Act authorizes the Trade Commission to obtain a temporary retraining order, a interlocutory injunction, or a permanent injunction whenever it has reason to believe that any person is violating or is about to violate any law that the FTC enforces. It doesn't say equitable relief. It says injunction, which may be narrower or is narrower. FTC injunctions for a long time now and the lower courts have ordered violators to refund money wrongfully taken from consumers.

The Ninth Circuit affirms such an injunction one of these two cases AMG Capital against the Federal Trade Commission. In the other one, Federal Trade Commission against Credit Bureau Center, the Seventh Circuit said, "Injunction obviously does not mean monetary relief, and doesn't include monetary relief." We know what an injunction is. An injunction is not disgorgement or accounting for profits. The court took both cases and agreed to resolve the split.

I think the history here would be [disposity 00:40:42] if the court knew it and if the court followed it, but there's a good chance the court doesn't know it and won't follow it if anyone tells them. The nineteenth century intellectual property cases, which are heavily relied on in Liu for the net profits and joint and several liability points, they granted accounting for profits as relief incidental to an injunction. The incidental relief didn't require separate authorization, and for a long time it couldn't be awarded as an independent claim, only incident to an injunction. The courts would always enjoin continually wrongdoing, so the incidental awarded profits became generally available against any kind of continuing and intentional wrongdoer.

Statute says injunction to tell the court you can also award accounting for profits as relief incidental to an injunction may run afoul the courts increasingly frequent demand that Congress specify all the details of remedies in the statue. The law used to be, before the conservative revolution on this issue, it used to be Congress passes a statute, courts assume that Congress meant for it to be enforced and the courts will apply the inventory remedies that are available under common law and equity. More and more the Supreme Court says if you want to remedy you have to get Congress to spell it out in the statute. Whether relief incidental to the in the injunction will run afoul that, I think, is a major issue in these two FTC cases. Plenty of precedent in the Supreme Court for accounting for profits is relief incidental to an injunction. They may not know that and they may not follow it even if they do.

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The FTC is not even relying on, so far, the cert papers. We don't have the merits brief yet. FTC is not relying on traditional ability to award relief incidental to injunction. The FTC just says an injunction can order a defendant to do things, and one of the things it can order the defendant to do is to pay money. So, the injunction orders the defendant to disgorge its profits or account for its profits and refund that money, pay it into the government.

We, in general, courts have done that from an identified fund if we can still find the very proceeds of the fraud and the defendants hands, we'll order the defendant to turn those over to the court or to the plaintiff, but we do not in general order by injunction defendants to pay money out of the defendant's general assets because an injunction to pay money enforceable by the contempt power winds up looking like imprisonment for debt. We order the defendant to pay. The defendant says I can't pay, I don't have enough money anymore. The plaintiff files a contempt proceeding and the court sends the defendant to jail until he pays or the court tries to go through the budget and figure out whether he really can pay or can't pay. We take all these difficulties up for child support, but we don't take it up for other kinds of debt. The government gets special treatment, but it looks like that's going to be the line of argument for the FTC and the Supreme Court, that we can get an injunction that orders the defendant to pay money.

One other interesting wrinkle here is the Trump Administration may be refusing to support the FTC. It has so far not prevented the FTC from litigating on its own behalf, but the Solicitor General did not oppose AMG cert petition. It filed a very short op cert that just said hold this case from Liu, and the FTC's petition and Credit Bureau is signed only by council for the FTC. It is not signed by the Solicitor General or by anyone at the Department of Justice. Next year's news will be whether statute authorizes an injunction can also support an accounting for profits.

Caprice, Andrew, any other thoughts on those two cases?

Kull: If I can offer one idea, Doug. I am less familiar with these cases than you are. In fact, I didn't know a thing about them until you mentioned them the other day. I did read the Circuit Court opinions in the two that are going to be considered. It seems to me if you'd take a step back so that we're seeing the forest, to the trees, maybe the most striking thing about these cases and the reason we should be talking about them today along with Liu and Kokesh is the way that it's true, these FTC cases do not involve any sale of securities. Okay, it's not a question of the 34 Act, but they sure involve fraudulent misrepresentations causing consumers to send in a lot of money to bad guys. The very basic instinct that suggests if we're not running the FTC as a consumer protection operation, which in large part now they are, why would be stop with an injunction if we couldn't, you could maybe help them frame their argument. But if we couldn't also offer them some ancillary relief in the form of they can call it disgorgement if they want to.

It was also impressive to me that until the Seventh Circuit opinion two years ago when a majority turned coat on this question, apparently every circuit that had said anything on the question had agreed that this was part of the FTC remedial arsenal. I would have said they agreed that because it seemed so common sense the same way it did to the people in SEC v. Texas Gulf Sulphur. Maybe with the head of the team that they got from the Liu case, some of this will carry over to help the SEC. They can say this is equitable. [crosstalk 00:47:26] that was just my-

Roberts: Yeah, and I would add that I'm also somewhat empathic to what the FTC is trying to accomplish with the remedy and if I remember correctly, in distinction from the SEC, I think the FTC does try to get the disgorge money or the profits to the victims of the fraud. So, I think maybe they'll be able to fit into ... Now of course, they're under a different statute and these are not SEC cases. These are FTC cases, but what types of legal arguments they should make in addition to that it's the under injunction power maybe your point's well taken there, but I think that they're at least on to something that as Andrew said makes some common sense why some courts have allowed that up to this point. It's interesting that the administration might not join in those arguments. That's probably fairly to be expected here that they wouldn't, but I think hopefully the FTC will make a full threaded argument as to why it makes sense for them to be able to do it both as a matter of the statutory, which I agree with you. The court increasingly seems to want to statute to be more explicit, but that they'll also add a traditional court powers.

Laycock: These two sets of cases are entirely parallel, except for the wording of the statute. The securities cases and the Federal Trade Commission cases both involve fraud, the both involve pretty egregious flagrant fraud. They both involve a lot of money. They both involve the question of how to do you measure profits. They're lower court cases, in FTC cases awarding gross receipts and not merely net profits. The Supreme Court hasn't gotten to those yet. So, all that is parallel, but the statutes are worded differently and

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the Supreme Court is increasingly focused on the text in the statute and on requiring Congress to specify the remedies.

One other interesting thing going on here about the difference between damages and defendants profits, very often the reason the plaintiff wants defendants profits is that for whatever reason it's profits are greater than the plaintiff's damages. Here that's probably not true. The victim's in these cases, both the security fraud and the consumer fraud, the victims lost all the money they sent in. Only some of that turns out to be defendant's net profits because part of it got spent trying to run the business. So, the profits remedy is actually smaller, but the profits remedy's much easier to prove. The government has trouble finding all the victims and proving that their individual damages is laborious and difficult focusing just on the defendant and proving its profits is attractive in part because it's a lot easier.

We also had a profits case this term in a private cause of action with a private point of suing. Caprice, can you tell us about that one?

Roberts: Absolutely. Again, very interesting to me that the court is granting certain number of these cases. The ones we're talking about for the future like the FTC cases and just this year it decided a case in April 23rd 2020 that was Romag Fasteners v. Fossil. The underlying claims involve trademark, so under the Lanham Act and the allegations included that basically Fossil had infringed on the trademark, in addition to other claims of dilution, but they had basically used the trade mark fasteners from Romag. There were some agreements between the two, between Fossil and Romag, but ultimately Romag claimed that it was an infringing worthy offense or against the statute. The jury found that Fossil had in fact infringed. So, all of this becomes relevant because the jury awarded trademark damages or what they call trademark damages. We wouldn't call profits damages, but they basically included two theories and one was that they would be an 90,000 in profits to prevent unjust enrichment and 6.7 million in profits to deter future trademark infringement. Lots of interesting questions coming out of the case.

In the limited time we have together I'll boil it down to this is another opportunity for the court to think about the phrasing that it's using and how to clarify this connective tissue to unjust enrichment and to the principles of equity. Again, as I mentioned before, the court often isn't very clear on what it means by those principles of equity. In particular case it was a nine to zero opinion and Justice Gorsuch authored the majority opinion. So, as you can imagine, his approach was very textualist. There are two concurrences, one by Alito, which had a couple of Justices joining in, and one by Justice Sotomayor, but in the majority opinion, the big issue is whether or not the Lanham Act requires willfulness to get to profits or what's called a disgorgement remedy here, Ultimately, under hat textual analysis that Justice Gorsuch and the majority utilized, intercepted the statute, then looked closely to the statute and said, "We're not going to conjure up this willfulness requirement if it's not explicit in the statute." The court held that the statute did not include or require this willfulness to get to the type of profit remedies that were at issue.

The thing that's problematic about that, regardless of what method of interpretation you want to use, the court also talked about that Congress surely didn't intend to make it a requirement. Again, regardless of interpretive method types of textual interpretation like another constitutional cases, here the court does this and it does it despite the fact that there's the entire Restatement Third of Restitution Unjust Enrichment that is loaded with the foundation for any profits based restitution remedy that it would require conscious wrongdoing. There is a discussion of defaulting fiduciaries, but every other example there's the conscious wrongdoing as a part of it, and so there would be a willfulness or some type of intent analysis.

In the Romag case, Romag actually agreed that it was not willful behavior and instead only alleged callus disregard on the part of Fossil. Again, what the Supreme Court's determination ultimately means is you can still go for a profits type remedy under the Lanham Act without having to prove a willfulness component, but the majority did state and along with the concurrences as well that the intent could be a relevant consideration. The [inaudible 00:54:33] concurrence said it needs to be a very highly important consideration and the Sotomayor concurrence, again concurrence, not a dissent, says that awarding a profit type award without the willfulness and purely based on a good faith infringement seems to be not concinnate. That's what she says for it. Not concinnate with the principles of equity or reflected in the cases that majority cites.

I find it to be interesting that it's a nine to zero opinion, and again, I think that's largely based on that it became a statutory interpretation case as opposed to what would be more befitting the principles of equity and the principles of unjust enrichment present in The American Law Institute

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Restatement Third of Restitution, which I think would want. There is no profits remedy without keying it to conscious wrongdoing.

Laycock: And even the statute said principles of equity.

Roberts: Exactly. I should have probably included the reading of the statutory language, which did say that it could have different types of trademark infringements or willful violations, but that the plaintiff shall be entitled to subject to the principles of equity to recover the defendants profits and any damages sustained by plaintiff and cost of the action. So, right in the statute it says the principles of equity. That fits right in with what the courts already had been doing in the Liu case and then adds to it here. It's coming from the statutory language, so that would have been the perfect opportunity to say that equity is already embedded in all of the limits and doctrines that are required, including that you would want to have some type of conscious wrongdoing. We can debate which words, willfulness or as the court did in Kansas v. Nebraska, conscious disregard, that there are other ways of perhaps stating it, but again, some type of willfulness, I think, would have made sense and it would have already fit within the statute, but not according to nine on the court. According to the court, looking at strict textualist, they don't see anything en viewed in that principles of equity that would include a requirement for conscious wrongdoing.

Laycock: One recurring in these cases is too many lawyers, too many courts think about these issues cause of action by cause of actions. The court viewed this as a trademark case and they debated what the rule had been in trademark cases, but they said whatever the rule was we won't assume Congress is thinking about a narrow trademark rule when it said principles of equity. They seemed too oblivious to the fact that there so much broader principle of equity that cuts across all kinds of causes of action. Since you don't get the defendant's province in this who is a fiduciary or unless he was consciously or intentionally engaging in the wrongdoing. Andrew, did you have anything to add on Romag?

Kull: All of everything we've said is legitimately raised by the interesting questions surrounding this case, this SEC v. Liu case. Academics who offer Amicus Briefs to give the benefit of their insights when nobody has asked them, this very interesting case is, and I think extremely helpful decision, I think that putting Kokesh and Liu side by side, it is really moving the law in the area hard shove in the right direction back to make some sense. If you read Justice Sotomayor's opinion and you read the law professor's Amicus Brief, which I think I know was largely written by Doug Laycock, this is Doug's service to the law in this area and I haven't had a chance to tell him that face to face, but I'm sure Caprice agrees with me. It's very, very impressive. So, I think we're grateful.

Laycock: Very, very welcome. [crosstalk 00:59:55]

Roberts: I'm in agreement, 100%.

Laycock: We've talked some about the 19th century cases that we precedent for Liu, but of course, especially for this court, we also have arguments about what the rules were in 1789 when the judicial system was created. Andrew, you've been thinking about that probably a bit. Could you fill us in on it?

Kull: I don't find this very interesting and it's, I think, not the least of the interesting features of this Liu opinion. For people who don't have it fresh in their minds, the issue is the one that was raised or at least imposed as a barrier by Justice Scalia in the case known as Grupo Mexicano. The plaintiffs wanted an injunction temporarily freezing the assets of the defendants in the style that in most courts of the English speaking world is referred to as Mareva injunction and is very familiar, and I think it's fair to say most people thought was appropriate 20th century equity development. The Supreme Court in that case said that unless a remedy was characteristic of the ordinary chancery practice as it existed in 1789, it was not within the Federal Courts jurisdiction and it was beyond their power to grant. So, the question would be if you are trying to recover profits from somebody who had defrauded you, was that something you could have done in the ordinary chancery practice of 1789?

I am aware of only one case in which this argument was made by a securities defendant and taken seriously. It is a, I think, very interesting decision by Judge Cabranes. It is called SEC v. Cavanagh, and it was about 2005. Mr. Cavanagh tried to get out of his disgorgement liability on the basis that you could have disgorgement in the English chancery in 1789. The judge, and I think he's very industrious law clerks, make a heroic effort to show that yes, it was common place. Frankly, I think they said succeed in showing that you could have this remedy against fiduciaries. I don't know think they managed to show that you could have it against non-fiduciary wrongdoers. Doug, in the Liu context, Doug and his colleagues point to the patent infringement cases in the 19th century with injunction plus associate accounting as the source whatever we want to call it. This form of restitution for present purposes, I'm sure they're right about that. That doesn't really answer the question. That makes it relevant, well, how seriously do we take Grupo Mexicano as limitation on disgorgement in the United States these days, assuming that our defendants are not fiduciaries? They're not officers and directors of anything. They're just crooks.

This is why I think it is so interesting that in the SEC v. Liu, unless I somehow missed it, there is no reference to this Grupo Mexicano problem in the majority opinion. It has totally dropped off the table and only shows up in the dissenting opinion of Justice Thomas. He has unfortunately inherited a bee in a bonnet about disgorgement not being a real thing as opposed to what the three of us all agree, which is that it's just a perhaps unfortunate new name for and old thing. The fact that it's not even mentioned by the majority and relegated to and there's protests in the dissenting opinion makes me that the current Supreme Court is perhaps not as interested in this, most of would agree, very artificial limitation on equitable remedies in 21st century American law.

Laycock: They shouldn't be interested. The common law's evolved since 1789, equity evolved since 1789, weren't many structural injunctions in 1789. When we did the briefing Liu, we frankly didn't think about Grupo Mexicano and we didn't try to trace the patent cases back to 1789. Justice Story took them for granted in this treatise in the 1830s. I think they've been around for a while. Maybe we could have found them in 1789 or maybe not. Sounds like Judge Cabranes didn't find them when he went looking or maybe he thought the fiduciary cases were enough and didn't think about the distinction between fiduciary defendants and other defendants. It would be good if Grupo Mexicano faded into the past.

One of the big transitional cases in US law, apart from the patent cases Andrew mentioned briefly early on, Newton v. Porter in the New York Court of Appeals in 1877 or so. That was an outright theft. Thieves broke into a house and stole [inaudible 01:06:31] bonds. The New York court said it would be absurd if the victim of a theft had few rights than the victim of a trustee or fiduciary. I don't know if it was absurd or not, but it certainly made sense. You've got to be able to have a full and complete remedy against these people. So, the remedy for the defendants profits has been around for a very long time. Whether it's been around since 1789, I guess we don't really know. None of the three of us have done that research.

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There's a run in these case in the Supreme Court. There are lots of cases in the lower courts. One of my friends at Seton Hall Law School says the most common form of legal malpractice is to overlook the restitution claim. I suspect it's really to blow the statue of limitations, but overlooking the restitution claim can't be far behind. There's a lot of law here. It actually has rules. It is not just vague and mushy. You can find those rules in Andrew's Restatement and you can find some of them in opinions like Liu v. The SEC.

I hope you found this helpful and we've gone on too long. We're going to sign off now.

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