

Why Justices Seem Skeptical Of Curbing SEC Disgorgement

By **Thomas Zaccaro, Mindy Vo and Samantha Tan** (April 24, 2026)

In a landmark decision from six years ago in *Liu v. U.S. Securities and Exchange Commission*, the U.S. Supreme Court reshaped the contours of disgorgement in SEC enforcement actions.[1]

The justices in *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 [Title 15 of the U.S. Code, Section] 78u(d)(5)."[2]

Justice Clarence Thomas, the lone dissenter, predicted that the majority had failed to provide clear guidance to the lower courts on how to implement its ruling.[3]

In *Sripetch v. SEC*,[4] argued on April 20, the Supreme Court has another opportunity to define the SEC's disgorgement powers and clarify *Liu*'s limits.

Lower Court Split Over *Liu*

In *Liu*, the Supreme Court ruled that disgorgement is permissible in SEC enforcement actions only when 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 penaltylike overreach.[5]

The court explained that "[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity." [6] But it also cautioned that the equitable remedy must not transform "into a punitive sanction," because courts historically "restricted the remedy to an individual wrongdoer's net profits to be awarded for victims." [7]

In other words, the "wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'" [8] By this reasoning, the SEC should not be entitled to disgorgement when the purported victims of a securities violation have lost no money.

Six months after *Liu*, Congress amended Section 78u(d) of the Securities Exchange Act to add Subsections 3(A)(ii) and 7. Subsection 3(A)(ii) allows a court to order disgorgement of any unjust enrichment received by a securities violator, while Section 7 expressly authorizes courts to award disgorgement in SEC enforcement actions.

Circuit courts have disagreed on whether the SEC must show pecuniary harm to victims to justify disgorgement. The U.S. Court of Appeals for the Second Circuit, in its 2023 decision in *SEC v. Govil*, required a finding of pecuniary harm for disgorgement awards under Section 78u(d)(5), [9] while the U.S. Court of Appeals for the First Circuit rejected this approach in its 2024 ruling in *SEC v. Navellier & Associates Inc.* [10]



Thomas Zaccaro



Mindy Vo



Samantha Tan

In *Sripetch*, the U.S. Court of Appeals for the Ninth Circuit — acknowledging the circuit split — chose to follow the First Circuit's lead, holding that a finding of pecuniary harm is not required.[11]

The Ninth Circuit reasoned on Sept. 3, 2025, 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.[12] Under such principles, disgorgement is appropriate even when the victim has suffered no pecuniary loss.[13]

In reaching this holding, the Ninth Circuit 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.[14]

The court also concluded that the Second Circuit defined "victim" too narrowly, as only encompassing someone who has suffered pecuniary harm.[15] Rather, a "victim" for disgorgement purposes is anyone who suffered an "interference" of their legally protected rights.[16]

The Ninth Circuit echoed the First Circuit's ruling by observing that Liu "neither adopted a pecuniary harm requirement nor discarded the common law's definition of victim." [17]

The Parties' Competing Positions

Not surprisingly, the briefs submitted by the parties to the Supreme Court in *Sripetch* echoed this divide.

Ongkaruck *Sripetch* argued that Liu requires pecuniary harm to the victim. In his view, Liu imposed two essential limitations: (1) disgorgement must prevent unjust enrichment by stripping wrongdoers of their ill-gotten gains; and (2) disgorgement must be "awarded for victims" and cannot exceed "a wrongdoer's net profits." [18]

According to *Sripetch*, the second principle overrides the first: A disgorgement award that exceeds victims' losses constitutes a penalty for which the defendant is entitled to a jury trial.[19] He also argued that Congress' amendments to Section 78u(d) adopted the term "disgorgement" without expanding it or addressing whether disgorgement can exceed victims' losses.[20]

By contrast, the SEC argued that disgorgement is meant to deprive a wrongdoer of his ill-gotten gains, not to compensate investors.[21] The SEC also argued that the addition of Section 78u(d)(3)(A)(ii) and its reference to "unjust enrichment" confirms that disgorgement is not restricted to investor losses.[22]

The SEC further argued that Congress did not intend to require pecuniary harm for disgorgement, having required economic loss elsewhere in the Exchange Act, yet omitted such a requirement in Section 78u(d)'s disgorgement provisions.[23]

Supreme Court's Seeming Reluctance to Limit SEC Disgorgement

The court heard oral argument in *Sripetch* on April 20. *Sripetch*'s counsel argued that for disgorgement to remain an equitable remedy, it must serve a compensatory function — i.e., to restore the status quo and return funds to investors. According to *Sripetch*, if the SEC attempts to recover more than the victim's actual losses, disgorgement becomes a penalty

for which a jury trial is required.

Several justices expressed skepticism with Sripetch's position. For instance, Justice Ketanji Brown Jackson questioned "why [doing so would be] a punishment if [the SEC is] not taking anything more from the defendant than he unlawfully gained?"[24] She also emphasized the lack of historical support under traditional equitable principles for requiring pecuniary harm, noting that courts routinely "exercise their equitable authority to deprive the defendant of ill-gotten gains, which they term 'unjust enrichment.'"[25]

Justice Amy Coney Barrett similarly questioned why disgorgement becomes a penalty when it exceeds victims' losses if disgorgement merely returns gains that a wrongdoer "isn't entitled to in the first place." [26] Sripetch's counsel responded that disgorgement becomes a penalty when it exceeds victims' losses because it no longer restores the status quo.[27]

Likewise, Justice Sonia Sotomayor, who wrote the majority opinion in *Liu*, challenged Sripetch's counsel on whether disgorgement as an equitable remedy requires a showing of pecuniary loss.[28] She also asked counsel — twice — to "assume [he is] losing," and choose whether he would rather lose on an interpretation of the common law or on a determination that Section 78u(d)(7) allows disgorgement even in the absence of investor losses.[29]

At the same time, the Supreme Court also challenged the government's position. In particular, Justice Neil Gorsuch focused on the Seventh Amendment implications of the government's position.

He questioned whether disgorgement should be treated as a legal remedy instead of an equitable remedy under Section 78u(d)(7), which would trigger a defendant's right to a jury trial on disgorgement issues when the SEC does not return funds to investors.[30] He pointed out that in 2025, the SEC returned only \$262 million to investors of \$6 billion in disgorgement orders obtained.[31]

When asked whether disgorgement would remain an equitable remedy if funds are not returned to investors, the government maintained that no jury trial would be required.[32] Justice Gorsuch described this position as "pretty perilous," emphasizing that the SEC must follow equitable principles or permit a jury trial.[33]

Ultimately, Justice Gorsuch acknowledged that the court need not decide whether disgorgement is a legal remedy if not returned to investors.[34]

Conclusion

While the outcome of *Sripetch* remains uncertain, the Supreme Court's questions suggest that at least several of the justices view disgorgement as an equitable remedy akin to unjust enrichment — even when the disgorged funds are not returned to investors. But where funds are not returned to investors, *Sripetch* may also leave open, or at least begin to define, circumstances in which defendants may demand a jury trial when the victims' losses are undetermined.

Should the Supreme Court rule that disgorgement does not require proof of pecuniary harm to victims, and instead requires only a showing of unjust enrichment, the SEC could be emboldened to seek disgorgement in cases where it may have been reluctant to do so after *Liu*. Insider trading cases are one such example because they typically lack identifiable victims.

Historically, the SEC may have avoided seeking disgorgement of illegal insider trading profits to sidestep Liu challenges, opting instead to recover those profits through additional penalties. But unlike penalties, nonpayment of disgorgement orders is punishable by contempt, providing the SEC with a more coercive means of enforcement.

If the SEC seeks to recover ill-gotten gains through disgorgement, it could also devote fewer resources to investigating and quantifying victims' losses, if any, to establish disgorgement amounts.

The court could also resolve Sripetch without addressing whether a defendant is entitled to a jury trial when the SEC fails to prove investor harm. If so, defendants should consider asserting a Seventh Amendment right to have a jury — as opposed to a court — decide whether to award disgorgement and the amount of any such award.

Thomas A. Zaccaro is a senior counsel at Hueston Hennigan LLP. He previously served as chief trial counsel of the SEC, an assistant U.S. attorney at the U.S. Attorney's Office for the Southern District of New York and as a trial attorney in the U.S. Department of Justice's Organized Crime and Racketeering Section.

Mindy Vo is an associate at Hueston Hennigan.

Samantha Tan is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Liu v. SEC, 591 U.S. 71 (2020).

[2] 591 U.S. at 74.

[3] Id. at 93, 99 (Thomas, J., dissenting).

[4] Sripetch v. SEC, No. 25-466.

[5] 591 U.S. at 79, 90–92.

[6] Id. at 79.

[7] Id.

[8] Id. at 80.

[9] See SEC v. Govil, 86 F.4th 89, 94 (2d Cir. 2023)("[A] defrauded investor is not a 'victim' for equitable purposes if he suffered no pecuniary harm.>").

[10] See SEC v. Navellier & Assocs., Inc., 108 F.4th 19, 41 n.14 (1st Cir. 2024) ("Neither Liu nor our case law ... require investors to suffer pecuniary harm as a precondition to a disgorgement award.>").

[11] Sripetch, 154 F.4th 980, 985 (9th Cir. 2025).

[12] Id. at 986–87.

[13] Id.

[14] Id. (quoting Navellier, 108 F.4th at 41).

[15] Id. at 987.

[16] Id.

[17] Id. at 988.

[18] Brief for the Petitioner at 5, Sripetch, No. 25-466.

[19] Id. at 27.

[20] Id. at 20–21.

[21] Brief for the Respondent at 10, Sripetch, No. 25-466.

[22] Id.

[23] Id. at 21–24.

[24] Transcript of Oral Argument ("Tr.") at 11:17–12:1, Sripetch, No. 25-466.

[25] Id. at 48.

[26] Id. at 45.

[27] Id. at 46–47.

[28] See id. at 32–33.

[29] Id. at 32–33, 37.

[30] See id. at 57–60, 62.

[31] Id. at 66.

[32] Id. at 60–61.

[33] Id. at 61.

[34] Id. at 62.