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Is Time Up for Equitable Relief? Examining Whether the Statute of Limitations Contained in 28 U.S.C. § 2462 Applies to Claims for Injunctive Relief

Douglas Edward Pittman

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* Candidate for J.D. Washington and Lee University School of Law, May 2014; B.A., University of Virginia, May 2009. Many thanks to Professor Doug Rendleman, who provided me with invaluable assistance and guidance as I explored the complexities of this Note. Finally, thanks to all my family and friends—especially my parents, Ed and Gail—who unwaveringly support me in all endeavors.

I. Introduction

Richard Schediwy and Laura Strauss were property owners who owned land along the Tulloch Reservoir near Copperopolis, California.[1] The two obtained a permit to build a retaining wall and a dock along the reservoir, and they did so in 2004.[2] On April 21, 2004, Tri-Dam, the owner and operator of the Tulloch Hydroelectric Project, conducted a survey that concluded the retaining wall and the dock were built below the appropriate elevation level.[3] Over the next several years, Tri-Dam, Schediwy, and Strauss attempted to resolve the matter but were unsuccessful.[4] Seven years later, litigation ensued as Tri-Dam sought a permanent injunction that would effectively force

1. *See* Tri-Dam v. Schediwy, No. 1:11–CV–01141 AWI–SMS, 2011 WL 6692587 at *4 (E.D. Cal. Dec. 21, 2011) (describing the property in question owned by defendants Schediwy and Strauss).

2. *See id.* (discussing the construction of Schediwy's dock).

3. *See id.* ("Defendants' contractor built the retaining wall at the 504- to 505-foot elevation contour, in violation of the permit . . . . Tri-Dam further alleges that the SMP requires that all shoreline protection devices be located above the 510-foot elevation contour level of Tulloch Reservoir.").

4. *See id.* ("Over the course of the next several years, Tri-Dam and Defendants exchanged numerous communications attempting to resolve the matter . . . . The retaining wall, however, has never been corrected or removed.").

Schediwy and Strauss to remove their dock.[5] The litigation focused on whether a statute of limitations that was generally applicable to the government specifically applied to injunctive relief.[6] Though the court eventually ruled in favor of Tri-Dam, the case highlighted the practical consequences of a current judicial split affecting a wide variety of actions initiated by the government.[7]

In 1948, Congress passed 28 U.S.C. § 2462.[8] That Act, which recodifies several pieces of prior legislation,[9] states as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.[10]

In line with Supreme Court precedent that reasons: "'[i]n a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture,'"[11] § 2462 establishes

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5. *See id.* at *5

> The [First Amended Complaint] seeks a permanent injunction: (1) prohibiting defendants from installing, possessing, or maintaining property within the Tri-Dam project boundary without seeking prior approval and obtaining a permit from Tri-Dam; (2) prohibiting Defendants from installing, possessing, or maintaining property within the Tri-Dam project boundary that is not in compliance with a permit obtained from Tri-Dam; and (3) requiring Defendants within ten days of the permanent injunction to submit plans to Tri-Dam for removal of the wall.

6. *See id.* at *6 (discussing the application of 28 U.S.C. § 2462 to Tri-Dam's claims for equitable relief).

7. *See id.* (finding that "Tri-Dam may seek equitable relief beyond the five-year statute of limitation in § 2462 because there is no concurrent legal remedy that would be barred by the statute").

8. 28 U.S.C. § 2462 (2012).

9. *See* 3M Co. v. Browner, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994) (tracing the origins of the Act through its prior iterations—28 U.S.C. § 791 and Revised Statutes § 1047, 18 Stat. 193—which were passed in 1911 and 1874, respectively).

10. 28 U.S.C. § 2462.

11. *3M Co.*, 17 F.3d at 1457 (quoting Adams v. Woods, 6 U.S. (2 Cranch)

a generally applicable statute of limitations for certain actions instigated by the U.S. government.[12] Specifically, the statute of limitations period applies to actions brought by the federal government[13] that are not controlled by other acts of Congress.[14] As indicated by its plain language, the statute only applies to civil proceedings.[15]

Due to the broad nature of the statute, it affects diverse types of litigation. For example, in *3M Co. v. Browner*[16] the U.S. Court of

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336, 341 (1805)).

12. *See* FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 17 (D.D.C. 1995) ("Section 2462 provides a catch-all statute of limitations in situations where Congress did not specifically include a time limitations in the statute.").

13. *See* Bertha Bldg. Corp. v. Nat'l Theatres Corp., 269 F.2d 785, 788–89 (2d Cir. 1959) ("The federal statute of limitations for penal actions applies only to actions on behalf of the United States and qui tam actions."); SEC v. Williams, 884 F. Supp. 28, 30 (D. Me. 1995) ("Courts have construed § 2462 as a general statute of limitations applicable 'to the entire federal government.'" (quoting *3M Co.*, 17 F.3d at 1461)); United States v. Magnolia Motor & Logging Co., 208 F. Supp. 63, 65 (N.D. Cal. 1962) ("The legislative history, taken together with the specific language of § 2461, indicates an intent to limit the sections within Chapter 163 of the Judicial Code [including 28 U.S.C. § 2462] to violations of Acts of Congress, and not to include reference to state proceedings.").

14. *See Nat'l Republican Senatorial Comm.*, 877 F. Supp. at 17 ("Section 2462 provides a catch-all statute of limitations in situations where Congress did not specifically include a time limitations in the statute.").

15. *See* United States v. Memphis Retail Package Stores Ass'n, 334 F. Supp. 686, 688 (W.D. Tenn. 1971) ("After consideration of the statutory language and the tenor of the decisions interpreting both statutory provisions, the Court is of the opinion that 28 U.S.C. § 2462 is applicable only in those actions which involve civil fines and penalties as opposed to criminal fines.").

16. 17 F.3d 1453 (D.C. Cir. 1994). In *3M Co.*, the Minnesota Mining and Manufacturing Company (3M) learned that it had violated the Toxic Substance Control Act (TSCA) between August 1980 and July 1986. *Id.* at 1454. 3M subsequently self-reported the violations to the Environmental Protection Agency (EPA) on September 16, 1986. *Id.* at 1455. The EPA filed an administrative complaint against 3M on September 2, 1988, seeking $1.3 million in civil penalties under the TSCA. *Id.* Invoking § 2462, 3M argued that the statute barred prosecution of any infractions committed more than five years prior to the filing of EPA's complaint. *Id.* The Administrative Law Judge (ALJ) found § 2462 not applicable because, in relevant part, the statute applied only to judicial, and not administrative, proceedings. *Id.* The ALJ subsequently entered judgment against 3M, which the company appealed. *Id.* The U.S. Court of Appeals for the District of Columbia rejected the ALJ's finding and held § 2462 applicable in administrative proceedings. *Id.* at 1457. In doing so, the

Appeals for the District of Columbia Circuit ruled that the statute applied to matters instigated by federal agencies.[17] Consequently, analysis of § 2462 features prominently not only in diverse litigation matters, but also actions brought by the Securities and Exchange Commission,[18] Federal Trade Commission,[19] Federal Aviation Administration,[20] and the Federal Election Commission,[21] as well as various environmental proceedings.[22]

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court recognized that, although few courts had directly addressed the issue, decisions from other jurisdictions indicated the statute should, in fact, be applied to administrative proceedings. *Id.* at 1455–57. The court then reasoned that an agency's adjudication of a civil penalty case readily fit within the description of an "action, suit or proceeding" as described by the statute. *Id.* at 1456. Finally, the court concluded that an administrative agency's adjudicatory action would fall within the scope of language contained in § 2462's predecessor statutes. *Id.*

17. *See id.* at 1457 ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency.").

18. *See, e.g.*, SEC v. Wyly, 788 F. Supp. 2d 92, 102 (S.D.N.Y. 2011) ("Section 21(d)(3) [of the Exchange Act] does not contain a statute of limitations. Therefore, the catch-all five-year statute of limitations of 28 U.S.C. § 2462 . . . governs punitive relief sought by the SEC under section 21(d)(3)."); SEC v. Williams, 884 F. Supp. 28, 29 (D. Mass. 1995) ("This case presents an issue of first impression in the First Circuit: whether S.E.C. actions for an injunction and disgorgement are subject to the five-year statute of limitations of 28 U.S.C. § 2462, the general statute of limitations for government actions aimed at imposing a 'fine, penalty, or forfeiture.'").

19. *See, e.g.*, FTC v. Lukens Steel Co., 454 F. Supp. 1182, 1185 n.2 (D.D.C. 1978) (finding that in an action brought by the Federal Trade Commission "[t]he plaintiff's recovery is limited to violations occurring within the five years prior to the date of the complaint, June 18, 1974, because the five-year statute of limitations for civil penalty actions, 28 U.S.C. § 2462 (1970), is applicable").

20. *See, e.g.*, Coghlan v. Nat'l Transp. Safety Bd., 470 F.3d 1300, 1304 (11th Cir. 2006) ("We agree with the FAA that § 2462 did not apply to Coughlan's revocation proceedings, and that even if it did, it did not preclude revocation of his ATP certificate.").

21. *See, e.g.*, FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 17–19 (D.D.C. 1995) (applying § 2462 to alleged violations of the Federal Elections Campaign Act).

22. For examples of § 2462 applying to actions brought under the Clean Air Act, see, e.g., Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth., 480 F.3d 410, 415–16 (6th Cir. 2007) (holding that § 2462 applied to actions brought under the Clean Air Act when the United States declined to raise sovereign immunity as a threshold defense); United States v. Walsh, 8 F.3d 659, 662 (9th Cir. 1993) (stating that because the Government's action was for the

Although § 2462 generally applies to a wide range of matters, courts disagree as to the specific claims that should be subject to the federal statute of limitations. Particularly, the federal circuit courts of appeals disagree as to whether § 2462 bars only claims for legal relief, or whether § 2462 also bars claims for injunctive relief.[23] This Note provides an in-depth look at the relevant circuit split and concludes that § 2462 does not bar claims for injunctive relief.

Part II examines important legal principles applicable to an analysis of § 2462, focusing on the significance of the doctrines of laches, the concurrent remedy rule, and sovereign immunity.[24] Part III discusses the varying approaches the U.S. Courts of Appeals for the Fifth, Ninth, Tenth, and Eleventh Circuits have taken in applying § 2462 to claims for injunctive relief.[25] Part IV argues that the plain language of § 2462 does not apply to claims for injunctive relief and rejects a case-by-case analysis of this issue that focuses on each individual injunction's characteristics.[26] Additionally, Part IV argues that courts have misapplied the concurrent remedy rule when they discuss whether § 2462 bars claims for injunctive relief.[27] Part V provides recommendations for how courts should treat claims for injunctive relief under § 2462.[28]

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enforcement of a civil penalty under the Clean Air Act, the appropriate statute of limitations was 28 U.S.C. § 2462). For examples of § 2462 applying to actions brought under the Clean Water Act, see, e.g., Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 73–77 (3d Cir. 1990) (ruling that § 2462 applies to citizens suits brought under the Clean Water Act); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987) ("Application of section 2462 to citizen enforcement suits [brought under the Clean Water Act] is in keeping with the language of the statute; a citizen enforcement suit is also an 'action . . . for the enforcement of [a] civil fine.'" (quoting 28 U.S.C. § 2462 (2012))).

23. *Infra* Part III.
24. *Infra* Part II.
25. *Infra* Part III.
26. *Infra* Part IV.
27. *Infra* Part IV.
28. *Infra* Part V.

II. Analysis of the Doctrines of Laches, the Concurrent Remedy Rule, and the Government's Sovereign Immunity

A. Laches

Before discussing whether the statute of limitations contained in § 2462 should apply to claims for injunctive—as well as legal—relief, it is helpful to consider the types of time restrictions that bar suits in American common law. Under the American common law system, specific statutes of limitations govern actions at law, while the doctrine of laches controls suits in equity.[29] Because this Note focuses on whether § 2462 should control claims for injunctive relief, a traditional equitable remedy,[30] it is necessary to examine the doctrine of laches and its application.

The doctrine of laches stems from the equitable maxim "equity aids the vigilant."[31] Historically, chancery courts established the doctrine of laches because statutes of limitation did not apply in equitable courts.[32] The doctrine primarily holds that equitable claims "must be asserted in a reasonable time, or equitable relief will be refused."[33] Because laches is a doctrine

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29. *See* DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 250 (2010) ("American law has two time bars: the statute of limitations for a common-law action and . . . the judge-made doctrine of laches for an [e]quitable remedy.").

30. *See* DAN. B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 9 (2d ed. 1993) ("The damages remedy was historically a legal remedy. The injunction and most other coercive remedies were equitable.").

31. *See* JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE 52 (1901) (stating that "[e]quity aids the vigilant, not the indolent"); RENDLEMAN, *supra* note 29, at 251 (stating the maxim as "[e]quity aids the vigilant, not those who slumber in their rights").

32. *See* RENDLEMAN, *supra* note 29, at 251 ("Chancery courts developed laches because [e]quity lacked a statute of limitations.").

33. EATON, *supra* note 31, at 53; *see also* Russell v. Todd, 309 U.S. 280, 287 (1940) ("[E]quity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant."); A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1028–29 (Fed. Cir. 1992) ("In a legal context, laches may be defined as the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with laps of

sounding in equity, it generally bars equitable claims regardless of whether a statute of limitations bars the corresponding legal claim for relief.[34] Further, because laches is an equitable doctrine, its enforcement is typically less rigid than enforcement of an analogous statute of limitation.[35] Finally, laches is the standard time bar for injunctions.[36]

Both the doctrine of laches and statutes of limitation advance numerous public policies. Specifically, these time bars promote the policies of "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."[37] Thus, these time restrictions foster just results by ensuring that evidence remains reliable and that all litigants are aware of their rights.[38]

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time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar."); Lake Dev. Enters., Inc. v. Kojetinsky, 410 S.W.2d 361, 367 (Mo. Ct. App. 1966) ("Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.").

34. *See* RENDLEMAN, *supra* note 29, at 251 ("'[A] court of equity may refuse relief on the ground of laches although the pursuit of a legal remedy on the same cause would not be barred by the applicable statute of limitations . . . .'" (quoting WILLIAM DE FUNIAK, A HANDBOOK OF MODERN EQUITY 42 (2d ed. 1956))).

35. *See Lake Dev. Enters. Inc.*, 410 S.W.2d at 367–68 ("There is no fixed period within which a person must assert his claim or be barred by laches. The length of time depends upon circumstances of the particular case."); *see also* RENDLEMAN, *supra* note 29, at 250 ("The statute of limitations is a fixed period, ostensibly a rigid, and arbitrary all-or-nothing rule. The court-made rules that comprise laches require both plaintiff's unreasonable delay and defendant's prejudice; these imprecise factors and the chancellor's discretion create individualized, flexible, and contextual decisions.").

36. *See* RENDLEMAN, *supra* note 29, at 250 (listing injunctions, specific performance, and constructive trusts as types of equitable remedies generally controlled by the doctrine of laches).

37. Rotella v. Wood, 528 U.S. 549, 555 (2000).

38. *See* Wilson v. Garcia, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.").

B. Concurrent Remedy Rule

As discussed above,[39] the doctrine of laches often applies to claims for equitable relief even when the expiration of the relevant statute of limitations renders a related legal claim not actionable. The concurrent remedy rule describes the interplay between concurrent legal and equitable claims affected by a time bar. In its decision in *Cope v. Anderson*,[40] the Supreme Court described the rule:

> Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which gives equity concurrent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.[41]

The concurrent remedy rule states that if the expiration of a statute of limitations bars a legal claim, then a "concurrent" equitable claim should be barred as well.[42] Consequently, courts

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39. *Supra* Part II.A.

40. 331 U.S. 461 (1947). In *Cope*, the plaintiff brought equitable suits in the federal district courts of Ohio and Pennsylvania, attempting to enforce assessments against resident stockholders of a debtor bank. *Id.* at 463. The Courts of Appeals for the Sixth and Third Circuits disagreed upon whether the state statutes of limitations should bar the equitable actions, and the Supreme Court granted certiorari in order to decide the issue. *Id.* First, utilizing the concurrent remedy rule, the Court determined that the state statutes of limitations applied to these suits in equity. *Id.* The Court then considered whether a five-year statute of limitations in Kentucky should bar the actions due to "borrowing statutes" promulgated in Ohio and Pennsylvania, which required that courts "bar suits against [that state's] resident if the right to sue him had already expired in another state where the combination of circumstances giving rise to the right to sue had taken place." *Id.* at 466. Because the debtor bank was authorized only to conduct business in Louisville, Kentucky, the Court concluded that the cause of action arose in Kentucky. *Id.* at 467. Thus, the Court ruled that the Kentucky cause of action barred the plaintiff's equitable claims for relief. *Id.* at 468.

41. *Id.* at 463–64.

42. *See* Russell v. Todd, 309 U.S. 280, 289 (1940) ("Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that of law . . . equity will withhold its remedy if the legal right is barred by the local statute of limitations."); Williams v. Walsh, 558 F.2d 667, 671 (2d. Cir. 1977) ("The distinction between different

must consider whether an equitable claim is "concurrent" with a legal claim when they evaluate the applicability of the concurrent remedy rule.

Whether an equitable claim is concurrent with a corresponding legal claim centers on the jurisdictional division of the Anglo-American judicial system. In medieval England, two distinct courts—the Court at Law and the Court at Equity—comprised the judicial system.[43] The Court at Equity, also called the Court at Chancery, developed in order to provide a more flexible legal approach than the Court at Law employed.[44] Because the Court at Equity developed specifically to foster just results,[45] the legal issues that fell under the jurisdiction of this court were fundamentally different than those adjudicated in the Court at Law.[46] Vestiges of this jurisdictional distinction remain today, as "[c]ontemporary 'equitable' substantive subjects include

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causes of action and different remedies is important, however, because, in contrast to the true independence of limitations periods controlling different causes of action, the limitations periods governing two concurrent remedies, one legal and the other equitable, are not independent of one another."); *see also* GEORGE L. CLARK, PRINCIPLES OF EQUITY 31 n.4 (1919) ("Where an equity court applies the statute of limitations by analogy, it is not necessary to plead the statute . . . . Where law and equity jurisdictions are strictly concurrent, equity courts consider themselves bound by the statute."); EATON, *supra* note 31, at 53–54 ("Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases . . . because, where the legal remedy is barred, the spirit of the statute bars the equitable remedy also.").

43. *See* DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 5 (2011) (discussing the effects the dual judicial system had upon a plaintiff's remedial opportunities).

44. *See id.* at 264 ("Medieval Chancery was a separate judicial system developed by the Chancellors in response to rigid or unsatisfactory legal rules. Early Chancellors prided themselves on the flexibility to dispense with legal rules that created justice."); Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith* Case, 81 MICH. L. REV. 1571, 1572 (1983) (stating that "equity created the greater part of its jurisdiction by abstractions from the common law").

45. *See* Devlin, *supra* note 44, at 1572 (explaining that, historically, a plaintiff had to demonstrate the court at law was acting unjustly to be heard by the Chancellor).

46. *See* RENDLEMAN, *supra* note 43, at 264. ("Today several substantive fields are classified as equitable because the medieval Chancellors developed them. The Chancellors' most important substantive contributions were to trusts, mortgages, and bankruptcy.").

quiet title, partition, liens and mortgages, trusts, fiduciaries, guardianships, dissolution of marriages, and adoptions."[47] Moreover, modern courts categorize possible remedies for plaintiffs as either "equitable" or "legal."[48] Equitable remedies, such as an injunction or specific performance, were available in the Court at Equity, while the legal remedy of damages was available in the Court at Law.[49]

Considering the historic division of the Courts at Law and Equity, the meaning of "concurrent remedy" becomes clearer: equitable remedies and legal remedies are concurrent when a court can award either type of remedy in a particular action.[50] Said another way, the concurrent remedy rule applies when a court has jurisdiction to adjudicate both legal and equitable matters.[51]

Because the modern American legal system merges the distinct courts of law and equity into one court, the existence of concurrent jurisdiction is extremely common.[52] Courts exercising general jurisdiction have the power to adjudicate both legal and equitable matters.[53] In fact, prominent legal scholar Zechariah

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47. *Id.*

48. *See id.* (discussing the distinctions between legal and equitable remedies in the modern American legal system).

49. *See id.* (discussing equitable, as opposed to legal, remedies).

50. *See id.* ("In these concurrent areas, a court may award a successful plaintiff an injunction or compensatory damages, sometimes both.").

51. *See* Devlin, *supra* note 44, at 1573–74 ("Thus, in addition to exclusive equity, in which there was never any suit at common law at all, there arose what came to be called concurrent equity made up of suits at common law that, in effect, the Chancellor decided himself.").

52. *See* Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 312 (2002)

> The merger of law and equity meant that ordinary legal rights, which otherwise would have been cognizable in law courts that had previously lacked jurisdiction over equitable remedies, had the benefit of such remedies. Equity no longer could be defined as the ability of a certain court to create a remedy for a theretofore unrecognized right, but now meant the ability of all courts, including the federal courts, to use the remedies that once were the province of equity courts in any dispute that they determined deserved such treatment and which met the qualifications established by the courts.

53. *See* RENDLEMAN, *supra* note 43, at 264 ("Today a court with general jurisdiction decides what used to be called actions at law and suits in equity.").

Chafee, Jr. argued that traditional equity jurisdiction was dependent not on judicial power, but rather on judicial discretion and restraint.[54] Chafee argued that a trial judge always has the power, or jurisdiction, to issue both legal and equitable remedies as he deems appropriate.[55] Thus, according to Chafee, legal and equitable jurisdictions are always concurrent.[56] Although Chafee's view of the complete fusion of legal and equitable jurisdiction may be extreme, it is widely accepted that courts have concurrent jurisdiction in many legal areas, such as contracts, torts, property, and constitutional law.[57] Thus, for the purposes of this Note, it is assumed that the courts discussed have concurrent jurisdiction to award both legal and equitable remedies.

Once a court has concurrent jurisdiction to adjudicate both legal and equitable matters, the concurrent remedy rule applies. Although the text of the rule may seem unclear or confusing, the rule simply reflects the impact that a statute of limitations has on proving a claim of laches. The concurrent remedy rule states "equity will withhold its relief in such a case where the applicable

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54. *See* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 304 (1950) ("The opposite view, which I shall advocate as desirable, is that today, with law and equity merged in a single court, 'equity jurisdiction' like exercise of jurisdiction is simply a bundle of sound principles of decision concerning particular kinds of relief."); *see also* RENDLEMAN, *supra* note 43, at 264–65 ("Properly answered today these questions are addressed to the judge's wisdom and fairness, not to the judge's basic power to decide . . . . In other words, the court's 'equity jurisdiction' is not jurisdictional.").

55. *See* CHAFEE, *supra* note 54, at 304 ("'If the court has jurisdiction of the subject matter and of the parties nothing further is required' to make the decree an order which must be obeyed . . . . If the court gives specific relief contrary to all the precedents, that is merely reversible error and not absence of power." (quoting O'Brien v. People, 216 Ill. 354, 363 (1905))).

56. *See id.* at 304–05

> In other words, when a suit for some kind of specific relief is brought in a regular trial court and the parties are properly served or appear voluntarily . . . then in my opinion the judge has power to decide, rightly or wrongly, whether to give the relief sought or a different kind of relief or no relief at all.

57. *See* RENDLEMAN, *supra* note 43, at 264 ("Equitable remedies, an injunction or specific performance, and the legal remedy, damages, are 'concurrently' available to plaintiffs in contracts, torts, property, and constitutional law.").

statute of limitations would bar the concurrent legal remedy."[58] This language corresponds with the notion that a court's dismissal of a claim due to a statute of limitations bar evidences a proper dismissal of any corresponding equitable claims on the grounds of laches.[59] Consequently, the concurrent remedy rule does not indicate a statute of limitations intended to control legal relief should apply directly to equitable relief. Instead, the rule provides that the expiration of a statute of limitations should be used as powerful evidence of laches. In this way, equity still withholds its relief, but the statute of limitations does not directly apply to the equitable claim.

C. Statutes of Limitations and the Government's Sovereign Immunity

1. General Rule

In addition to considering the doctrine of laches and the concurrent remedy rule, it is crucial to understand how a government action affects the application of statutes of limitation.[60] The general rule regarding statutes of limitation and the government is that "the government is not subject to any time constraints in bringing its actions."[61] This rule stems from the

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58. Cope v. Anderson, 331 U.S. 461, 464 (1947).

59. Harvard Law Review Ass'n, *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1184 (1950)

> In the absence of a controlling statute, courts enforcing rights formerly cognizable in equity are still free to exercise discretion in determining where the plaintiff should be barred. However, in areas of concurrent jurisdiction with courts of law, equity has usually considered the passage of time equivalent to the comparable statute of limitations as presumptive of laches.

See also CLARK, *supra* note 42, at 31 ("[E]xcept in recent years [statutes of limitations] have applied only to common law actions and not to suits in equity, but equity courts have been accustomed, in the absence of special circumstances, to apply the statute to equity suits by way of analogy.").

60. *See supra* Part I (discussing § 2462 as it applies to actions brought by the government, including actions brought by administrative agencies).

61. Mary V. Laitos et al., *Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context*, 17 PACE ENVTL. L. REV. 273, 302 (2000); *see also* Guar. Trust Co. of N.Y. v. United States, 304 U.S. 126, 132

legal maxim *quod nullum tempus occurrit regi*, which literally means "no time runs against the King."[62] Historically, the doctrine of *nullum tempus* grew from the common law principles that justified the sovereign immunity of the government.[63] English courts reasoned that because the crown could not be guilty of general negligence, it could not be guilty of negligent delay.[64] Courts justified this doctrine by claiming it prevented the loss of public rights and property due to the negligence of crown officials.[65]

Although these policy justifications for the doctrine of *nullum tempus,* rooted in the power of the English monarch, may seem inadequate today, additional modern considerations also support the doctrine.[66] Specifically, "the rule is supportable now because its benefit and advantage extends to every citizen . . . whose pleas of laches or limitation it precludes."[67] In sum, the general rule that statutes of limitations do not apply against the government is widely accepted.[68]

Despite this wide acceptance, an important caveat applies to the statute of limitations imposed by § 2462. Namely, the

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(1938) (stating that the "sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations").

62. *See* Joseph Mack, Nullum Tempus*: Governmental Immunity to Statutes of Limitations, Laches, and Statutes of Repose*, 73 DEF. COUNS. J. 180, 180 (2006) (describing the meaning of the *nullum tempus* doctrine).

63. *See id.* at 185–86 (describing the relationship between the doctrines of sovereign immunity and *nullum tempus*).

64. *See id.* ("The crown could not be negligent, and therefore could not suffer from any negligent delay, just as [it] could not suffer for negligently causing its citizens injury.").

65. *See id.* ("Thus, the 'great public policy of preserving the public rights, revenues and property from injury and loss, [*sic*] by the negligence of public officers' justifies immunity to statutes of limitations, just as it had justified sovereign immunity." (quoting United States v. Hoar, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821))).

66. *See id.* at 186 ("*[N]ullum tempus* has evolved its own policy justifications that are separate from, but nevertheless close to, the policies driving sovereign immunity.").

67. Guar. Trust Co. of N.Y. v. United States, 304 U.S. 126, 133 (1938).

68. *See id.* at 134 ("So complete has been [the general rule's] acceptance that the implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included . . . .").

doctrine of *nullum tempus* does not apply if the legislature specifically indicates otherwise.[69] This caveat to the general rule is important because § 2462 is a statute of limitations created by Congress with the explicit intention that it apply to government action.[70] Thus, the statute of limitations contained in § 2462 applies to claims brought by the government. Even though the absolute bar does not apply to § 2462, it is helpful to consider the law's unfavorable treatment of statutes of limitation against the government when discussing whether § 2462 applies to claims for equitable relief.

Moreover, *nullum tempus* applies to the defense of laches as well.[71] Thus, unless Congress specifically indicates otherwise, a laches defense should not be used against the government. The text of § 2462 does not explicitly mention laches.[72] As a result, laches should not be used against the government to bar injunctive relief pursuant to § 2462, even though a similar action barring a legal claim may be proper. This interpretation of § 2462 supports the traditional position that the defense of laches should not be used against the government acting in its sovereign capacity.[73]

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69. *See* United States v. Weintraub, 613 F.2d 612, 619 (6th Cir. 1979) ("While the general rule . . . is that the sovereign is exempt from the operation of statutes of limitations, an exception to that general rule exists when the sovereign (through the legislature) expressly imposes a limitation period upon itself."); State v. City of Columbia, 528 S.E.2d 408, 412 (S.C. 2000) ("Under the nullum tempus doctrine, statutes of limitation do not run against the sovereign unless the [l]egislature specifically provides otherwise.").

70. *See* Teresa A. Holderer, *Enforcement of TSCA and the Federal Five-Year Statute of Limitations for Penalty Actions*, 91 MICH. L. REV. 1023, 1032 (1993) (describing § 2462 as a statute of limitation that "clearly include[s] the government").

71. *See* United States v. Insley, 130 U.S. 263, 266 (1889) ("This doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity.").

72. 28 U.S.C. § 2462 (2012).

73. *See* United States v. Summerlin, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."); United States v. Thompson, 98 U.S. 486, 489 (1878) ("Laches, however gross, cannot be imputed to [the United States government]."); DOBBS, *supra* note 30, at 75–76 (stating that laches may not be invoked to defeat the public interest).

2. Statutory Construction

The law shows its disfavor of statutes of limitation barring government action through statutory construction. When a court determines that a statute of limitation should accrue against the government, it will strictly construe the statute in favor of the government.[74] Courts strictly construe these statutes by reading the statute closely, narrowly interpreting its language, and choosing a meaning that favors the government when two possible statutory interpretations exist.[75] Like the bar against statutes of limitation running against the government, the strict statutory construction of these statutes in favor of the government is not absolute. This rule of statutory construction does not apply when the statute is explicitly intended for use against the government.[76] In fact, some scholars argue that § 2462 should not be entitled to a strict construction because Congress wrote the statute with the express purpose of controlling government action.[77] However, because § 2462 does not expressly apply to actions for injunctive relief, the statutory language should be strictly construed for purposes of this analysis.

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74. *See* E.I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924) ("Statutes of limitation sought to be applied to bar rights of the government, must receive a strict construction in favor of the government."); Holderer, *supra* note 70, at 1031 ("As a corollary to government immunity, courts accept that statutes of limitations that purportedly apply to the government must be strictly construed in its favor.").

75. *See* Holderer, *supra* note 70, at 1031 ("[Strict construction] means that courts will read the statute closely and rigidly and will not broaden the statute's reach by implication. Further, where a statute is susceptible to more than one interpretation, courts will choose the reading which favors the government.").

76. *See id.* at 1032 ("'Where a statute expressly includes the government there is no room for the operation of the strict construction rule, and a statute of this nature, like any other, is entitled to receive a sensible and reasonable treatment.'" (quoting 3 SUTHERLAND STATUTORY CONSTRUCTION § 62.02 (4th ed. 1986))).

77. *See id.* ("But, even if strict construction of statutes of limitations in favor of the government persists, it should not be invoked when considered section 2462's application to a governmental penalty action.").

III. Circuit Splits

A. Eleventh Circuit

United States v. Banks[78] is the leading case in the Eleventh Circuit advocating that § 2462 should not bar claims for injunctive relief. In *Banks,* Park Banks purchased three lots located in Big Pine Key, Florida in 1980.[79] Banks began to fill the lots, and in March 1983 an Army Corps of Engineers biologist "informed Banks that parts of [his lots] were wetlands and that discharges onto those areas were unlawful without a permit."[80] Section 1344(a) of the Clean Water Act (CWA)[81] gives the Secretary of the Army power to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites."[82] In April 1983, the "Corps issued a cease and desist order, threatening enforcement action if Banks continued his discharges."[83] The Army Corps of Engineers then denied Banks's application for an "after-the-fact permit," and informed Banks that "to avoid an enforcement action, he [would need to] negotiate a restoration plan with them."[84] Banks failed to negotiate such a plan and continued to discharge fill onto his property.[85] Furthermore, Banks acquired additional property in 1988, on which he added fill.[86]

In 1991, after issuing Banks four additional cease and desist orders, the Government filed suit against Banks, seeking an injunction as well as a civil penalty.[87] Banks challenged the suit,

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78. 115 F.3d 916 (11th Cir. 1997).

79. *See id.* at 917 (describing relevant facts and background information of the case).

80. *Id.* at 918.

81. 33 U.S.C. § 1344 (2012).

82. *Id.* § 1344(a).

83. *Banks*, 115 F.3d at 918.

84. *Id.*

85. *See id.* (describing early interactions between Banks and the Army Corps of Engineers).

86. *See id.* (noting that from 1988 to 1991 Banks continued to discharge fill on his property and prepare additional lots for coconut farming).

87. *See id.*

In December 1991, the government filed this suit against Banks,

partly on the grounds that § 2462 barred the government from seeking relief, both in the form of an injunction and civil penalty, for actions conducted outside of the five-year period.[88] The Government argued that § 2462 should not apply to the injunctive relief because "'statutes of limitations are not controlling measures of equitable relief.'"[89] In contrast, Banks argued that § 2462 applied to claims for equitable relief due to the concurrent remedy rule.[90]

Agreeing with the Government, the Eleventh Circuit concluded "that the concurrent remedy rule cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity."[91] In its analysis, the court relied on the "well-established rule that 'an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.'"[92] Additionally, the court cited the canon of statutory construction that "any statute of limitations sought to be applied against the United States 'must receive a strict construction in favor of the Government.'"[93] The court determined that "absent a clear expression of Congress to the contrary, a statute of limitation does not apply to claims brought by the federal government in its

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requesting that the district court enjoin future discharge of additional dredged or fill materials into the wetlands on the property, require Banks to restore the wetlands to their undisturbed condition before such unlawful discharge by removing the fill and otherwise implementing a restoration plan, and require Banks to pay an appropriate civil penalty.

88. *See id.* at 918 (stating that while both parties agreed that § 2462 applied to the CWA, they disagreed as to "the applicability of this statute of limitations to claims for equitable relief").

89. *Id.* at 919 (citing Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)).

90. *See id.* (discussing the tenets of the concurrent remedy rule).

91. *Id.*

92. *Id.* (quoting E.I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)); United States v. Alvarado, 5 F.3d 1425, 1427 (11th Cir. 1993). Moreover, the court specifically addressed the importance of the United States acting in its governmental capacity, stating "[t]he statute is enforced against the government only when the government is acting to vindicate *private* interests, not a sovereign or public interest." *Id.*

93. United States v. Banks, 115 F.3d 916, 919 (11th Cir. 1997) (quoting *Alvarado*, 5 F.3d at 1428).

sovereign capacity."[94] The court then concluded that § 2462 did not apply to claims of injunctive relief because there existed no clear expression of congressional intent in the statutory language indicating that § 2462 should indeed bar these equitable claims.[95]

B. Ninth Circuit

Federal Election Committee v. Williams[96] is the leading Ninth Circuit case arguing that § 2462 should bar claims for injunctive relief. The Federal Election Committee (FEC) investigated Larry Williams for alleged violations of election laws during the 1988 presidential election campaign.[97] Williams's alleged violations occurred between the autumn of 1987 and January of 1988; however, the FEC did not file suit until October 19, 1993, at which time it sought the enforcement of civil penalties as well as declaratory and injunctive relief.[98]

Williams filed a motion to dismiss, arguing that the FEC filed its complaint after the five-year statute of limitations contained in § 2462 had expired.[99] The district court denied Williams's motion and granted partial summary judgment in favor of the FEC.[100] Williams appealed the decision, at which time the FEC argued that "§ 2462 does not apply to actions for injunctive relief."[101] The Ninth Circuit concluded that the FEC's argument contradicted the Supreme Court's decision in *Cope*, which enforced the concurrent remedy rule.[102] In doing so, the

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94. *Id.*

95. *See id.* ("Because Congress did not expressly indicate otherwise in the statutory language of section 2462, its provisions apply only to civil penalties; the government's equitable claims against Banks are not barred.").

96. 104 F.3d 237 (9th Cir. 1996).

97. *See id.* at 239 (describing the factual background of the *Williams* case).

98. *See id.* (describing the factual background of the *Williams* case).

99. *See id.* ("Williams argues that [§ 2462] applies on its face to FEC suits to impose civil penalties.").

100. *See id.* ("The district court denied Williams' motion to dismiss on limitations grounds and partially granted FEC's motion for summary judgment on January 31, 1995.").

101. *Id.* at 240.

102. *See id.* ("*Cope* holds that 'equity will withhold its relief in such a case

Ninth Circuit stated, "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both."[103] The Ninth Circuit ultimately decided that all of the FEC's claims were untimely filed and reversed the district court's decision in favor of Williams.[104] Although the court in *Williams* does not address its acceptance of the concurrent remedy rule in great detail, this case provides a clear example of a court holding that § 2462 applies to claims for both injunctive and legal relief.

C. Tenth Circuit and Fifth Circuit

As discussed above, the Eleventh Circuit fundamentally rejected the notion that § 2462 applies to injunctive relief, while the Ninth Circuit adopted the concurrent remedy rule without significant explanation.[105] The Tenth and Fifth Circuits, however, undertook an in-depth analysis of § 2462 and adopted a more nuanced approach when deciding whether the statute of limitations should apply to claims for injunctive relief.

1. Tenth Circuit

The most significant case on this issue in the Tenth Circuit is *United States v. Telluride Co.*[106] In *Telluride*, the United States alleged that Telluride Co. (Telco) had violated provisions of the Clean Water Act and subsequently filed suit on October 15, 1993.[107] The Government claimed that Telco had illegally filled approximately forty-five acres of wetland between 1981 and 1989,

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where the applicable statute of limitations would bar the concurrent legal remedy.'"(quoting Cope v. Anderson, 331 U.S. 461, 464 (1947)).

103. *Id.*

104. *See id.* at 241 (finding that the FEC's suit was "untimely and should have been dismissed").

105. *Supra* Parts III.A–B.

106. 146 F.3d 1241 (10th Cir. 1998).

107. *See id.* at 1243 ("On October 15, 1993, the United States filed a civil action against Telco in the United States District Court for the District of Colorado under § 309 of the Clean Water Act, 33. U.S.C. § 1319.").

and sought civil monetary penalties and injunctive relief.[108] Specifically, the Government "sought to enjoin Telco from discharging additional material, and to require Telco to restore damaged wetlands to their prior condition or create new wetland to replace those that could not be restored."[109]

Telco then filed a motion for partial summary judgment on the Government's claims for violations that occurred before October 15, 1988, arguing that the five-year statute of limitations contained in § 2462 barred these actions.[110] Although the Government conceded that the statute of limitations prohibited claims for civil penalties, it argued that § 2462 did not apply to claims for injunctive relief and, thus, their equitable claims were not barred.[111] The district court, however, applied the concurrent remedy rule and withheld the Government's claim for injunctive relief because § 2462 barred its claims for civil penalties.[112]

The Government appealed the district court's decision, arguing that the court "erred in applying § 2462 to bar its claims for equitable relief, because the ruling is contrary to the well-settled principles restricting the applications of time limitations against the government, and is contrary to the plain language of the statute."[113] As the Eleventh Circuit did in *Banks*, the Tenth Circuit interpreted the language of § 2462 narrowly.[114] The court

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108. *See id.* (discussing the background facts of the case).

109. *Id.*

110. *See id.* ("Telco subsequently filed a motion for partial summary judgment on all of the Government's claims for violations that occurred before October 15, 1988, contending these claims were barred by the five-year statute of limitations in 28 U.S.C. § 2462.").

111. *See id.* ("The Governnment conceded § 2462 applied to its claim for civil penalties, but argued the statute did not bar its claims for injunctive relief.").

112. *See id.* at 1243–44 ("Consequently, because § 2462 barred the Government's claims for legal relief, civil monetary penalties, the court held § 2462 barred the Government's claims for injunctive relief.").

113. *Id.* at 1244.

114. *See id.* at 1244–45

> We interpret § 2462 narrowly because "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it." In addition, "statutes of limitation sought to be applied to bar rights of the government, must receive a strict construction in favor of the government." (quoting E.I. du Pont de Nemours & Co. v.

then conducted a thorough analysis focusing on the statutory construction of § 2462, departing from the Eleventh Circuit's discussion.[115] The court primarily focused on whether the phrase "pecuniary or otherwise" modified only the term "forfeiture," as claimed by the Government, or whether it modified the term "penalty" as well.[116] Citing previously amended versions of § 2462, the Tenth Circuit concluded that the term "pecuniary or otherwise" should modify both "penalty" and "forfeiture."[117] Likewise, the court then construed § 2462 "as applying to non-monetary penalties."[118]

The Tenth Circuit next addressed the Government's claim that the "plain language of § 2462 does not apply to claims for equitable relief."[119] In doing so, the court recognized that "actions for equitable relief typically are not actions for penalties or fines,"[120] and that "'statutes of limitation are not controlling measures of equitable relief.'"[121] Telco, however, argued that the proposed injunction was a nonmonetary penalty and, therefore, was subject to the statute of limitations imposed by § 2462.[122] Because § 2462 did not contain a definition for the term "penalty," the court conducted its own analysis, concluding that a penalty, for the purpose of § 2462, was "a sanction or punishment imposed for violating a public law which goes beyond compensation for the injury caused by the defendant."[123] Moreover, the court focused its definition of penalty on "whether the sanction seeks compensation unrelated to, or in excess, of the

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Davis, 264 U.S. 456, 462 (1924) (citations omitted)).

115. *See id.* at 1245 (discussing statutory interpretation of § 2462).

116. *See id.* (discussing statutory interpretation of § 2462).

117. *See id.* ("Based on this construction, we view 'pecuniary or otherwise' as modifying both the terms penalty and forfeiture.").

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)).

122. *See id.* ("Telco contends the restorative injunction is a penalty under § 2462 since it imposes a sanction for violating a public law which is not determined or predicated on actual damages to the [g]overnnment.").

123. *Id.* at 1246.

damages caused by the defendant."[124] Ultimately, the Tenth Circuit concluded that the restorative injunction at issue could not be considered a penalty.[125] Consequently, the court determined that the government's claim for injunctive relief was not barred by § 2462.[126] Furthermore, the Tenth Circuit decided that the concurrent remedy rule did not apply in the instant case.[127] In doing so, the court relied on the rationale espoused in *Banks* and refused to apply the concurrent remedy rule against the government acting in its sovereign capacity.[128]

Although the Tenth Circuit's final ruling in *Telluride* is similar to that of the Eleventh Circuit in *Banks*, the *Telluride* decision is significant because the Tenth Circuit's analysis focuses on whether an injunction might be considered a penalty, rather than summarily dismissing the notion. *Telluride* did not apply a general standard, but instead chose to tackle the issue on a case-by-case basis. As a result, it seems possible that, under this standard, there may be a scenario in which equitable relief could be deemed a penalty, and, thus, be barred by § 2462.

2. Fifth Circuit

Like the Tenth Circuit, the Fifth Circuit considered whether an injunction could be considered a penalty under the meaning of § 2462. Unlike the Tenth Circuit, the Fifth Circuit concluded in *Securities Exchange Commission v. Bartek*[129] that an injunction

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124. *Id.*

125. *See id.* (explaining that the "injunction does not seek compensation unrelated to or in excess of the damages caused by Telco's acts").

126. *See id.* at 1248 ("Based on the consideration addressed above, and in light of the traditional notions statute of limitations should be strictly construed in favor of the [g]overnment, we do not consider the [g]overnment's request for injunctive relief an action for a 'civil penalty' barred by § 2462.").

127. *See id.* at 1249 (concluding that the "concurrent remedy rule does not bar the Government's claims for equitable relief").

128. *See id.* at 1248 ("Specifically, the *Banks* [c]ourt refused to apply the concurrent remedy rule based on the principles that a suit by the United States in its governmental capacity is not subject to a time limitation unless Congress explicitly imposes one . . . .").

129. 484 Fed. App'x 949 (5th Cir. 2012).

was a penalty, and therefore, § 2462 controlled claims for both equitable and legal relief.[130]

In *Bartek*, the Securities and Exchange Commission (SEC) filed a complaint on June 30, 2008, charging the defendants—officers of the company Microtune—with fraud.[131] The charges related to questionable stock dating practices exercised by the defendants from 2000 to 2003.[132] In its original complaint, the SEC sought "civil penalties, . . . permanent injunctions and officer and director bars against the defendants."[133] Both parties filed motions for summary judgment, and the district court granted the defendants' motion, which asked that all forms of relief be barred by the statute of limitations found in § 2462.[134] In doing so, the district court ruled that § 2462 barred the SEC's claim for injunctive relief in addition to the legal remedies at issue.[135]

In *Bartek*, the Fifth Circuit primarily considered when the § 2462 statute of limitations accrues in a fraud action.[136] The court, however, also reviewed whether the district court erred in deciding that § 2462 barred claims for injunctive relief.[137] The

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130. *See id.* at 957 ("Based on the severity and permanent nature of the sought-after [equitable] remedies, the district court did not [err] in denying the SEC's request on grounds that the remedies are punitive, and are thus subject to § 2462's time limitations.").

131. *See id.* at 951 ("The SEC filed its original Complaint on June 30, 2008 . . . . The SEC alleged that the Defendants committed fraud.").

132. *See id.* at 950 ("The SEC alleges that from 2000 to 2003, the Defendants improperly backdated stock options that the company granted to newly hired and existing employees and executives.").

133. *Id.*

134. *See id.* at 951 ("The parties filed cross-motions for summary judgment on various issues including a statute of limitations defense . . . . The district court granted summary judgment to the Defendants on statute of limitations grounds.").

135. *See id.* ("All forms of relief were found to be penalties under § 2462, and thus subject to its time limitations.").

136. The Supreme Court recently decided this issue, ruling in *Gabelli v. SEC* that the statute of limitations contained in § 2462 accrues for a fraud action at the time the fraud is committed, not at the time the fraud is discovered. *See* Gabelli v. SEC, 133 S. Ct. 1216, 1224 (2013) ("Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of § 2462, we decline to do so.").

137. *See supra* note 130 and accompanying text (discussing the court's analysis in *Bartek*).

appellate court first cited the district court's rationale for concluding, as a matter of law, that the officer–director bars and injunctive relief were penalties under § 2462.[138] The district court concluded that these claims for relief were penalties, stating that "these remedies would have significant collateral consequences to the Defendants; they do not address the past harm caused by the Defendants; and the remedies do not focus on preventing future harm due to the low likelihood that the Defendants would engage in similar harmful behavior in the future."[139]

The appellate court then considered many possible definitions for the term "penalty," all of which focused on the punitive nature of the remedy.[140] The SEC argued that the term "penalty" should be construed narrowly to include only sanctions involving money and property.[141] The appellate court, however, concluded that "penalty," as used in § 2462, should be interpreted broadly to include a wide variety of punishments.[142] The court determined that "whether an injunction here is a 'penalty' or simply remedial requires a look at the nature or characteristic of the injunction."[143] Ultimately, after considering the nature of the injunction at issue, the appellate court decided that the district court had not erred in determining that the injunction was a penalty as a matter of law.[144] For these reasons, the appellate court affirmed the district court's decision to subject the SEC's

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138. *See* SEC v. Bartek, 484 Fed. App'x 949, 956 (5th Cir. 2012) ("The [district] court denied the request finding that injunctive relief and O/D bars, as a matter of law, are construed as penalties . . . .").

139. *Id.*

140. *See id.* (listing various legal definitions for the term "penalty").

141. *See id.* ("The SEC cites various authorities to argue that § 2462 is limited to a sanction that involves the collecting of money or property.").

142. *See id.* at 957 ("The term 'penalty' is not strictly used for monetary or property sanctions but rather encompasses a variety of punishments (e.g. death penalty). The SEC's narrow interpretation is incorrect.").

143. *Id.*

144. *See id.* ("The SEC's sought-after remedies would have a stigmatizing effect and long-lasting repercussions . . . . Here, the SEC is essentially seeking a lifetime ban against the Defendants. Courts have held that such long term bans can be construed as punitive.").

claims for injunctive relief to the statute of limitations included in § 2462.[145]

The Fifth Circuit in *Bartek*, like the Tenth Circuit in *Telluride*, took a nuanced approach to the question of whether § 2462 applies to claims for injunctive and legal relief. The court rejected the notion that injunctions could not be construed as penalties per se. By finding that the injunctive relief sought by the SEC had punitive qualities, the court opened the door for § 2462 to control certain types of injunctions, dependent upon the specific characteristics of the individual claim. If *Bartek's* rationale is accepted, § 2462 would control certain injunctions regardless of whether the concurrent remedy rule barred them as well.

IV. Analysis

Although the circuit courts discussed in Part III differed in their opinions on whether § 2462 applies to claims for injunctive relief, each court's analysis followed essentially the same path. Specifically, each court considered whether the statute, on its face, controlled claims for injunctive relief, or whether the concurrent remedy rule could be used to bar a claim for injunctive relief when the statute of limitation barred corresponding legal claims. Consequently, it is helpful to follow this same logical roadmap when analyzing whether § 2462 applies to claims for injunctive relief.

A. Statutory Text

While each court discussed in Part III considered, at least implicitly, whether the language of § 2462 directly controlled actions for injunctive relief, the Tenth Circuit and Fifth Circuit made statutory construction and interpretation the focal point of

145. *See id.* ("Based on the severity and permanent nature of the sought-after remedies, the district court did not [err] in denying the SEC's request on grounds that the remedies are punitive, and are thus subject to § 2462's time limitations.").

their analyses.[146] In doing so, each court discussed whether the injunctive relief sought could be deemed a penalty and thus fall within the scope of the statute.[147] This approach, however, is incomplete. In order to determine whether the statute of limitations contained in § 2462 applies to claims for injunctive relief, courts must study the fundamental characteristics of injunctions and decide whether such relief qualifies as a civil fine, penalty, or forfeiture within the meaning of the statute. When a court conducts this mode of analysis, it is imperative that it interprets § 2462 strictly because it is a statute of limitation applied against the government.[148]

1. Characteristics of Injunctive Relief

The injunction is the quintessential form of equitable relief.[149] An injunction differs from forms of legal relief because of its coercive nature.[150] This means that an injunction is "intended to force the defendant to act or cease from acting in specified ways."[151] To accomplish this goal, injunctions act against the person, or in personam.[152] Courts enforce these personal orders with their power to hold an individual who disregards an injunction in contempt, which is an exertion of the court's power over the "person" of a defendant.[153] In this way, the in personam

146. *See supra* Part III.C.1–2 (discussing those courts' analysis).

147. *See supra* notes 119–28, 138–45 (discussing the circuit courts' analyses of the nature of injunctions).

148. *See supra* Part II.C (discussing the concept of sovereign immunity).

149. *See* DOBBS, *supra* note 30, at 9 ("The damages remedy was historically a legal remedy. The injunction and most other coercive remedies were equitable.").

150. *See id.* at 49 ("Most often, however, equitable remedies are coercive. The coercive remedies in equity are variants of the injunction.").

151. *Id.* at 51.

152. *See id.* at 49 ("Variations on the injunctive remedy will quickly appear. The essence of the remedy in most instances, however, is the *in personam* order, enforced by the distinctive power of contempt.").

153. *See id.* ("These coercive remedies were distinctive. They were enforced by the power of contempt if necessary. That is, the defendant might be fined or imprisoned for failure to comply with the order and might be held in prison until he complied or indicated a willingness to do so.").

nature of an injunction distinguishes it from other forms of relief historically available at law.[154]

Another important characteristic of injunctive relief stems from its role as the preferred remedy of courts at Chancery, which were primarily concerned with reaching just results.[155] Consequently, although injunctions are intended to force a person to act in a certain way, they are not generally considered punitive in nature.[156] It is important to remember that although an injunction will likely cause a party hardship, this does not mean it is fundamentally punitive.[157] Instead, injunctions are considered remedial in nature.[158]

In sum, courts must consider the fact that injunctions act in personam and are historically remedial—as opposed to punitive—in nature when they consider whether § 2462 controls claims for injunctive relief.

2. Fines and Injunctive Relief

According to the text of § 2462, the statute of limitations controls "an action, suit or proceeding for the enforcement of any *civil fine*."[159] Thus, if an injunction can be considered a civil fine, the statute of limitations will control it. A fine is defined as a "pecuniary criminal punishment or civil penalty payable to the

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154. *See id.* ("The old separate law courts did not issue injunctive orders; they rendered judgments instead. The law courts did not seek to enforce their orders by contempt powers, but by seizure of property.").

155. *See id.* at 55 ("Equity is said to be flexible rather than rigid, its interest justice rather than the law.").

156. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The historic injunctive process was designed to deter, not to punish.").

157. *See* United States v. Telluride Co., 146 F.3d 1241, 1247 (10th Cir. 1998) ("Telco's belief the sanctions is costly or painful does not make it punitive. If the determination of whether a sanction is a penalty was made from the defendant's perspective, then virtually every sanction would be considered a penalty since 'even remedial sanctions carry the sting of punishment.'" (quoting United States v. Halper, 490 U.S. 435, 447 n.7 (1989) (citations omitted))).

158. *See* Hartford-Empire Co. v. United States, 323 U.S. 386, 435 (1945) (stating that "relief in equity is remedial, not penal").

159. 28 U.S.C. § 2462 (2012) (emphasis added).

public treasury."[160] This definition contrasts with the traditional characteristics of injunctions in two significant ways.

First, a fine is "pecuniary" and "payable to the county treasury."[161] This language clearly denotes that fines are monetary in nature. As discussed above, injunctions are forms of relief that typically operate in personam.[162] This signifies that while a fine operates against a person's property, an injunction operates against a person's "person." Therefore, because fines and injunctions function in two completely different manners, courts must consider them distinct forms of relief.

Second, a fine is defined as a "criminal punishment" or "civil penalty"—language that denotes that fines are punitive in nature.[163] This characteristic is a stark contrast from the injunction's role as a form of remedial relief.[164] Because fines are inherently punitive in nature, while injunctions are traditionally remedial, the two must be categorized as distinct forms of relief.

Thus, a fine is a punitive remedy that is monetary in nature, while an injunction is a form of remedial relief that acts in personam. These two remedies are fundamentally at odds; consequently, courts should not consider an injunction a fine for the purpose of § 2462.

3. Penalties and Injunctive Relief

a. General Penalties

The statute of limitations contained in § 2462 pertains to an action for the enforcement of any "penalty."[165] A penalty is generally defined as a punishment imposed upon a wrongdoer, either in the form of imprisonment or a fine.[166] Therefore, a

160. BLACK'S LAW DICTIONARY 708 (9th ed. 2009).

161. *Id.*

162. *Supra* Part IV.A.1.

163. *See supra* note 160 and accompanying text (defining the term "fine").

164. *See supra* Part IV.A.1 (exploring the characteristics of injunctive relief).

165. 28 U.S.C. § 2462 (2012).

166. *See* BLACK'S LAW DICTIONARY 1247 (9th ed. 2009) ("Punishment imposed on a wrongdoer, [usually] in the form of imprisonment or fine; [especially] a sum

penalty, by definition, is punitive in nature. This characterization of a penalty clearly differs from the injunction's characterization as remedial relief.[167] Moreover, penalties are traditional forms of legal relief, while injunctions are traditional forms of equitable relief.[168] For these reasons, an injunction should not be considered a type of penalty for the purposes of § 2462.

Courts are prone to make mistakes when they consider whether injunctions are penalties for the purposes of § 2462. Indeed, both the Tenth Circuit and the Fifth Circuit undertook this question in their analyses of whether § 2462 barred claims for injunctive relief.[169] Only the Tenth Circuit, however, correctly concluded that the injunction at issue was not a penalty for the purposes of the statute.[170] In its decision in *Bartek*, the Fifth Circuit decided that injunctions that enjoined defendants from violating securities laws and serving as officers or directors of public companies were penalties under § 2462.[171]

The Fifth Circuit erred by interpreting the definition of penalty broadly, even though statutes of limitations against the government should receive a strict construction.[172] Additionally,

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of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss.").

167. *See supra* Part IV.A.1 (exploring the characteristics of injunctive relief).

168. *See* George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 19 (2007) ("The assessment of penalties or the application of punitive statutory provisions are not remedies in equity but rather remedies at law.").

169. *See supra* Part III.C.1–2 (exploring the Tenth and Fifth Circuits' analyses of the issue).

170. *See* Telluride Co. v. United States, 146 F.3d 1241, 1246 (10th Cir. 1998) ("Consistent with our definition, the restorative injunction in this case is not a penalty because it seeks to restore only the wetlands damaged by Telco's acts to the status quo or to create new wetlands for those that cannot be restored.").

171. *See* SEC v. Bartek, 484 Fed. App'x 949, 957 (5th Cir. 2012) ("Based on the severity and permanent nature of the sought-after remedies, the district court did not [err] in denying the SEC's request on grounds that the remedies are punitive, and are thus subject to § 2462's time limitations.").

172. *See id.* at 956 ("The SEC cites various authority to argue that § 2462 is limited to a sanction that involves the collecting of money or property. These authorities do not limit the term 'penalty' to the narrower definition that the SEC suggests."). *But see supra* Part II.C.2 (arguing that § 2462 should be construed narrowly because it is a statute of limitation acting against the

the Fifth Circuit misinterpreted the Supreme Court's statement that "even remedial sanctions carry the sting of punishment" when it decided whether the injunction in question was a penalty.[173] This statement, when considered in light of the traditional view of injunctions as nonpunitive relief, stands for the proposition that even though injunctions are typically remedial, their mandates may cause the affected party some degree of hardship.[174] This statement does not mean that some injunctions should be classified as a penalty, as this interpretation completely contradicts one of the central characteristics of injunctive relief. Therefore, the Fifth Circuit wrongly confused an injunction's coercive power to affect personal behavior with a penalty's power to punish.

As the Fifth Circuit displayed in its analysis in *Bartek*, it is easy to confuse the coercive power of an injunction with the punitive power of a penalty. Moreover, if a court erroneously labels an injunction as a penalty, that court will also incorrectly hold that § 2462 applies to injunctive relief. To avoid this result, courts should treat all injunctions as remedial per se, and refuse to engage in the case-by-case analysis advocated by the Tenth and Fifth Circuits. This approach will add a level of certainty to the issue of whether § 2462 applies to claims for injunctive relief, thus advancing one of the main public policy objectives common to all time restrictions.[175] Furthermore, this approach also conforms to the notion that courts should strictly construe the terms of a statute of limitation applied against the government.

b. Civil Penalties

While the Tenth and Fifth Circuits considered whether an injunction could generally be considered a penalty and therefore

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government).

173. *Id.* at 957 (quoting United States v. Halper, 490 U.S. 435, 447 n.7 (1989)).

174. *See supra* note 157 and accompanying text (discussing the falsity of considering an injunction punitive in nature).

175. *See supra* note 37 and accompanying text (describing the main policy objectives of time bars).

subject to the statute of limitations contained in § 2462, there is another possible reading of the statute that gives the term "penalty" an alternate meaning. Specifically, if courts construe "civil" to modify "penalty," then § 2462 would control claims for injunctive relief if the court deemed an injunction a civil penalty.[176]

A civil penalty is a "fine assessed for a violation of a statute or regulation."[177] Although courts have disagreed over whether injunctions can generally be considered penalties, jurisdictions agree that civil penalties are traditionally legal remedies.[178] Because injunctions are the quintessential form of equitable relief, an injunction cannot be a civil penalty. Therefore, if courts construe the language of § 2462 to include civil penalties, the statute cannot bar claims for injunctive relief.[179]

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176. *See* 28 U.S.C. § 2462 (2012)

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

177. BLACK'S LAW DICTIONARY 1247 (9th ed. 2009).

178. *See* Tull v. United States, 481 U.S. 412, 421 (1987)

> A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.

See also SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002) (stating that civil penalties are a legal, not equitable, form of relief).

179. It is worth noting that in a recent decision discussing the accrual of a fraud claim under § 2462, the Supreme Court referred to the SEC's requested relief as a "civil penalty." *See* Gabelli v. SEC, 133 S. Ct. 1216, 1219 (2013) (discussing the statute's requirement that an action for a "civil penalty" be brought within five years from the date it first accrued).

4. Forfeiture and Injunctive Relief

a. General Forfeiture

In addition to fines and penalties, the language of § 2462 also controls claims for forfeitures.[180] Forfeiture is defined as the "divestiture of property without compensation."[181] Forfeitures are typically penal judgments against money or property.[182] Thus, because injunctions are typically remedial and act in personam, courts should not construe injunctions as a type of forfeiture for the purposes of § 2462.

b. Civil Forfeiture

Like the term "penalty," if courts conclude that the term "civil" modifies "forfeiture" in the construction of § 2462, the statute of limitations applies to "civil forfeitures."[183] A civil forfeiture is "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity."[184] Because injunctions are traditionally proceedings that act in personam, a claim for injunctive relief should not be considered a civil forfeiture for the purposes of interpretation of § 2462.

5. Conclusion

One possible way for the statute of limitations contained in § 2462 to apply to claims for injunctive relief is for courts to conclude that injunctions fall within the forms of relief contained within the text of the statute. Namely, courts must construe injunctive relief as a civil fine, a penalty, or a forfeiture. If courts construe these terms strictly, they should find that injunctive

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180. 28 U.S.C. § 2642.

181. BLACK'S LAW DICTIONARY 722 (9th ed. 2009).

182. *See id.* ("Something ([especially] money or property) lost or confiscated by this process; a penalty.").

183. 28 U.S.C. § 2462 (2012).

184. BLACK'S LAW DICTIONARY 722 (9th ed. 2009).

relief, due to its remedial and in personam characteristics, falls outside the definitions of these terms. Consequently, § 2462 does not bar actions for injunctive relief based on a facial analysis of the statutory terms.

B. Concurrent Remedy Rule

When courts conclude that the text of the statute of limitations contained in § 2462 does not bar claims for injunctive relief, they should then consider whether the concurrent remedy rule bars such claims. The concurrent remedy rule stands for the proposition that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy."[185] As discussed above, this doctrine simply supports the notion that a court's dismissal of a legal claim due to the expiration of the applicable statute of limitations is strong evidence supporting a court's decision to dismiss a corresponding equitable claim due to the doctrine of laches.[186] Moreover, the concurrent remedy rule does not state that a statute of limitations should directly control claims for equitable relief, including injunctions.[187] In this way, both the Eleventh Circuit and the Ninth Circuit applied the concurrent remedy rule in error when considering whether the statute of limitations in § 2462 barred claims for injunctive relief.[188]

In *Banks*, the Eleventh Circuit failed to apply the concurrent remedy rule to the analysis of whether § 2462 bars claims for

185. Cope v. Anderson, 331 U.S. 461, 464 (1947).

186. *See supra* Part II.B (examining the nature of the concurrent remedy rule).

187. *Supra* Part II.B.

188. This subpart focuses on the analysis conducted by the Eleventh Circuit in *Banks* and the Ninth Circuit in *Williams*. In *Telluride*, the Tenth Circuit chose to follow the Eleventh Circuit's line of reasoning in *Banks* when discussing the concurrent remedy rule. *See* United States v. Telluride Co., 146 F.3d 1241, 1249 (10th Cir. 1998) ("For the same reasons applied in *Banks*, we conclude the concurrent remedy rule does not bar the Government's claims for equitable relief."). Consequently, the analysis of the Eleventh Circuit's reasoning can be applied to the Tenth Circuit. Additionally, in *Bartek*, the Fifth Circuit failed to consider the concurrent remedy rule in its analysis of § 2462. Therefore, the Fifth Circuit is omitted from this discussion.

injunctive relief.[189] In doing so, the court focused on the fact that "'[t]raditionally, 'statutes of limitation are not controlling measures of equitable relief.'"[190] Although this is true, it is also immaterial, as the concurrent remedy rule does not stand for the proposition that a statute of limitation should directly control claims for equitable relief. Additionally, the court refuses to apply the concurrent remedy rule to its analysis because "'an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.'"[191] Finally, the court refused to apply the concurrent remedy rule because "any statute of limitations sought to be applied against the United States 'must receive a strict construction in favor of the Government.'"[192] It is possible, however, to give these tenets of statutory construction their full effect and still apply the concurrent remedy rule.

Even applying a strict construction to the statute of limitation contained in § 2462, it is clear that Congress intended the provision to be applied against the government.[193] Because the statute of limitations of § 2462 applies against the government, its expiration can be used as evidence that a laches claim would also bar any concurrent claims for equitable relief. Thus, the concurrent remedy rule applies in this situation.

The application of the concurrent remedy rule, however, does not complete the analysis. Even though the concurrent remedy rule holds that a laches claim would technically be proper, the defense of laches should not be used against the government to bar injunctive relief under § 2462.[194] Therefore, even though the concurrent remedy rule applies, actions for injunctive relief are

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189. *See* United States v. Banks, 115 F.3d 916, 919 (11th Cir. 1997) ("We conclude, therefore, that the concurrent remedy rule cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity.").

190. *Id.* (quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)).

191. *Id.* (quoting E.I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1944); United States v. Alvarado, 5 F.3d 1425, 1427 (11th Cir. 1993)).

192. *Id.* (quoting *Alvarado*, 5. F.3d at 1427).

193. *See supra* notes 69–70 and accompanying text (discussing the government's intent in passing § 2462).

194. *See supra* notes 71–73 (discussing whether laches should be applied against the government).

not barred by § 2462. The Eleventh Circuit reached the correct result, but did so through an incorrect logical analysis.

Likewise, the Ninth Circuit applied an improper analysis of the concurrent remedy rule in *Williams*.[195] When the court applied the concurrent remedy rule in *Williams*, it stated that "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both."[196] As discussed above, the concurrent remedy rule does not state that the statute of limitations applies to both claims for legal and equitable relief.[197] Thus, the court applied the concurrent remedy rule incorrectly and failed to recognize that the expiration of the statute of limitations for a legal claim is evidence of laches, which cannot be applied against the government.

In sum, the concurrent remedy rule technically applies to § 2462 as evidence that a laches claim is proper when corresponding legal claims are barred. Injunctive relief, however, should not be barred because laches should not be applied against the government under § 2462.

V. Recommendations

The statute of limitations contained in § 2462 applies only against the U.S. government.[198] Consequently, courts must construe the terms of this statute strictly.[199] When courts apply this mode of analysis, they will find that injunctive relief, due to its remedial and in personam nature, does not constitute a civil fine, penalty, or forfeiture under the statute.[200] As a result, courts should reject outright the notion that § 2462 may bar injunctive

195. *See supra* notes 102–04 and accompanying text (discussing the court's treatment of the concurrent remedy rule).

196. FEC v. Williams, 104 F.3d 237, 240 (9th Cir. 1996).

197. *See supra* Part II.B (examining the meaning of the concurrent remedy rule).

198. *See supra* note 12 and accompanying text (discussing the scope of 28 U.S.C. § 2462).

199. *See supra* Part II.C.1 (discussing the statutory construction of 28 U.S.C. § 2462).

200. *See supra* Parts IV.A.2–4 (examining the types of remedies discussed in 28 U.S.C. § 2462).

relief depending on the characteristics of the individual injunction. In doing so, courts will provide a level of certainty to litigants and advance public policies common to all time restrictions by fostering consistent and predictable decisions.[201]

Furthermore, courts should generally apply the concurrent remedy rule in all actions where they have the power to grant both legal and equitable relief.[202] When courts apply this rule, they should treat the expiration of the applicable statute of limitations as evidence that an action for laches is proper.[203] Even though the concurrent remedy rule should normally bar actions for injunctive relief when the corresponding statute of limitation expires, courts must extend their analyses one step further and conclude that the defense of laches should not be used against the government under § 2462.[204] Thus, courts should rule that § 2462 does not bar claims for injunctive relief, advancing the fundamental policy that no time bars should run against the government unless Congress expresses a clear intention for them to do so.[205]

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201. *See supra* notes 37–38 and accompanying text (discussing public policy benefits of time bars).

202. *See supra* Part II.B (examining the nature of concurrent jurisdiction of law and equity).

203. *See supra* Part IV.B (discussing the applicability of the concurrent remedy rule).

204. *See supra* notes 71–73 (discussing the applications of the laches doctrine in actions against the United States government).

205. *See supra* Part II.C (discussing sovereign immunity).