

[Securities Regulation Daily Wrap Up, ENFORCEMENT—Kan. App.: NASAA defends extraterritorial application of Kansas Blue Sky law, \(Dec. 1, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [John M. Jascob, J.D., LL.M.](#)

NASAA has urged a state appellate court to reverse a lower court ruling that Kansas lacked territorial jurisdiction over offers of securities made in California by a Kansas-based issuer. In an amicus brief filed with the Kansas Court of Appeals, NASAA argued that Kansas does have territorial jurisdiction over the case under either of the two tests used by courts to determine whether an offer has "originated from" a state ([State v. Lundberg](#), November 28, 2016).

The defendants in the case were members or sponsors of four Kansas limited liability companies that owned real property and had "substantial operations" in Kansas. The LLCs prepared and issued promissory notes that were signed by the defendants and were offered and sold to individuals both inside and outside of Kansas. The offers outside of Kansas were facilitated by California-based selling agents, and all investors wired their investments to bank accounts in Minnesota. The trial court concluded that Kansas lacked territorial jurisdiction to prosecute the defendants for violations involving the out-of-state offers because the offers did not "originate from within" Kansas within the meaning of the Kansas Uniform Securities Act.

Statutory misconstruction. NASAA began by arguing that the trial court had misconstrued basic securities law terms and principles, including what it means to be an "issuer" or an "offeror." Although the trial court thought that "an issuer has to be a person and not an entity," NASAA pointed out that for partnerships and closely-held corporations, the entity and any natural person controlling the entity will be considered issuers of the entity's securities. Thus, both the Kansas LLCs sponsored by the defendants and the defendants themselves were "issuers" under Kansas law.

In addition, NASAA argued, the trial court erroneously concluded that the California selling agents were the only "offerors" because they were the only ones actually soliciting investors. Rather, both federal and state courts have accepted the view that an offeror can either be an issuer or a broker-dealer or agent selling a security on behalf of the issuer. By construing the California selling agents as the sole offerors, the trial court committed legal error in its jurisdictional analysis, NASAA contended.

Question of origination. Although a majority of states have, like Kansas, adopted the "originates from" standard of the 1956 and 2002 Uniform Securities Acts for extraterritorial offers, NASAA observed that there is no consensus as to how courts should evaluate the issue. Nevertheless, both the *Newsome* test and the *Lintz* test adopted by the courts ask whether out-of-state offers are traceable back to in-state activities.

Under *Newsome*, an out-of-state offer or sale originates from the state if "any portion of the selling process" occurred in the state. Under *Lintz*, territorial jurisdiction exists if there is a sufficient "territorial nexus" between the state and an out-of-state offer or sale. In NASAA's view, the facts of the case support territorial jurisdiction under either the *Newsome* test or the *Lintz* test. The trial court, however, applied neither test, nor did it evaluate whether the activities of the California selling agents related back to the defendants' sponsorship of the Kansas LLCs' securities. Accordingly, the trial court erred when it concluded that Kansas lacked territorial jurisdiction, NASAA concluded.

The case is [No. 15114897-A](#) and [No. 15114898-A](#).

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