

Securities Regulation Daily Wrap Up, PROXIES—S.D.N.Y.: Statute of repose on proxy violations begins to run at issuance; SOX's longer fraud period not applicable, (Mar. 12, 2014)

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By Amy Leisinger, J.D.

A federal district court concluded that the statute of repose for actions under Exchange Act Sec. 14(a) is three years and runs from the date of the alleged violation. According to the court, the Second Circuit has determined that the repose period is not subject to tolling under the U.S. Supreme Court's standard in *American Pipe & Construction Co. v. Utah*, and a Sec. 14(a) claim does not qualify for the fraud-based extended statute of repose under the Sarbanes-Oxley Act. As such, the court found that the plaintiff's late entry into the litigation resulted in its claims being time-barred (*Dekalb County Pension Fund v. Transocean Ltd.*, March 11, 2014, Schofield, L.).

Background. On September 30, 2010, a pension fund filed an action alleging that a false and misleading proxy statement was distributed to shareholders of GlobalSantaFe Corp. in connection with a proposed merger between that company and Transocean Inc. According to the complaint, the proxy statement contained false representations and material omissions regarding Transocean's compliance with environmental laws, which came to light after a Transocean drilling rig exploded. On December 3, 2010, Dekalb County Pension Fund made its first appearance in the action and moved to be appointed as lead plaintiff. The original fund was dismissed for lack of standing and Dekalb filed an amended class action complaint on April 16, 2012, alleging false statements in a proxy statement under Exchange Act Sec. 14(a) and control person liability under Sec. 20(a).

On February 15, 2013, the court stayed the action pending a Second Circuit determination on whether the Supreme Court's *American Pipe* tolling standard applies to statutes of repose. On June 27, 2013, the Second Circuit held that it does not so apply, and the defendants moved to dismiss the plaintiff's claims as time-barred by Sec. 14(a)'s three-year statute of repose.

Statute of repose. The plaintiff argued that limitation periods were modified by the Sarbanes-Oxley Act so that the statute of repose is five years for a private right of action that involves a claim of fraud or manipulation. The court rejected this argument, noting that a Sec. 14 claim may involve negligence and not necessarily fraud or manipulation, and that the extended repose period does not apply to claims under this section. According to the court, the plaintiff's contention that its particular Sec. 14(a) claim involves fraud and, therefore, warrants application of the five-year statute of repose is without merit. To hold as such would "create[] uncertainty in an area of the law the purpose of which is expressly to provide certainty for defendants as to when their exposure to liability ends," the court stated.

In addition, based on the Second Circuit precedent, the court found that the three-year repose period began to run when the allegedly false and misleading proxy statement was issued. "[A] statute of repose begins to run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action," the court stated. As such, the plaintiff was required to file its claim within three years from the issuance of the allegedly misleading proxy statement, which would have been October 2, 2010. Since the plaintiff did not appear in this action until December 3, 2010, its claims must be dismissed as time-barred.

Because the plaintiff failed to establish a primary violation of the federal securities laws, its controlling person claim under Sec. 20 was also dismissed.

The case is No. 10 Civ. 07498 (LGS).

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Companies: GlobalSantaFe Corp.; Transocean Inc.

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