Securities Regulation Daily Wrap Up, TOP STORY—N.Y. App.: New York high court shortens clock on AG's Martin Act authority, (Jun. 13, 2018)

Securities Regulation Daily Wrap Up

Click to open document in a browser

By John M. Jascob, J.D., LL.M.

The three-year limitations period governing certain statutory claims under New York law barred the attorney general's securities enforcement action against Credit Suisse for fraud in the sale of residential mortgage-backed securities (RMBS). New York's highest court ruled that the three-year statute of limitations in CPLR 214(2) controlled because the state's Blue Sky statute, the Martin Act, expands liability for "fraudulent practices" beyond that recognized under the common law. The Court of Appeals remanded the attorney general's claim under New York Executive Law § 63(12), however, for further proceedings to determine if the alleged conduct underlying the claim amounted to a type of fraud recognized at common law (*People v. Credit Suisse Securities (USA) LLC*, June 12, 2018, DiFiore, J.).

Three years or six years? After the parties had entered into a tolling agreement, the attorney general commenced this action in November 2012, asserting that the issuance of RMBS by Credit Suisse Securities (USA) LLC and affiliated entities (collectively, Credit Suisse) in 2006 and 2007 violated the Martin Act. Among other things, the attorney general contended that the defendants misrepresented the quality of the mortgage loans underlying the securities as well as their due diligence process.

The defendants then moved to dismiss the complaint, arguing that the action was time-barred because the operative statute of limitations is the three-year period found in CPLR 214(2) applicable to liabilities or penalties arising under statute. The Supreme Court denied the motion to dismiss, however, concluding that Executive Law § 63(12) and Martin Act cases based on investor fraud are governed by the residual six-year statute of limitations for fraud claims under CPLR 213. The intermediate appellate court affirmed, reasoning that both the Martin Act and Executive Law 63(12) target wrongs that existed before the statute's enactment, as opposed to targeting wrongs that were not legally cognizable before enactment.

Majority opinion. Writing for the four-judge majority, Chief Judge Janet DiFiore disagreed, observing that the Martin Act imposes numerous obligations—or "liabilities"—that did not exist at common law, thereby justifying the imposition of a three-year statute of limitations under CPLR 214(2). For example, the Martin Act's broad definition of "fraudulent practices," which has been repeatedly amended by the legislature and interpreted by the courts since the statute was enacted in 1921, encompasses "wrongs" not cognizable under the common law. Moreover, the Martin Act dispenses with any requirement that the attorney general prove scienter or justifiable reliance on the part of investors. Accordingly, the three-year statute of limitations in CPLR 241(2)—applicable to "a liability, penalty or forfeiture created or imposed by statute"—governs Martin Act claims.

Turning to the attorney general's Executive Law claim, the majority observed that even though the definition of fraud and fraudulent practices in Executive Law Section 63(12) is virtually identical to language found in Martin Act Section 352, it was undisputed that Executive Law Section 63(12) also gives the attorney general standing to redress liabilities recognized elsewhere in the law, expanding the scope of available remedies. As a result, the court was required to "look through" Executive Law § 63(12) and apply the statute of limitations applicable to the underlying liability. Accordingly, the Court of Appeals remitted the matter to the trial court to examine whether the conduct underlying the Executive Law § 63(12) claim amounted to a type of fraud recognized in the common law. If so, the action will be governed by a six-year statute of limitations.

Dissent. Writing in dissent, Associate Judge Jenny Rivera accused the majority of misreading the court's precedent, contending that her colleagues had conflated the elements a private party must establish to be granted a remedy with the attorney general's authority to seek relief on behalf of the state. She observed that under the approach endorsed by the majority, a private investor would have six years to file an action for intentional fraud, but the attorney general seeking to assert a cause of action for the same conduct under the Martin Act would only have three. This would lead to a result that is "patently absurd," she opined, given that the New York legislature has clearly invested the attorney general with greater, not lesser, authority to seek redress than a private investor. "Nevertheless, at a stroke, the majority's holding today makes the attorney general less able to police the markets than a member of the general investing public," she stated.

The case is No. 40.

Attorneys: Richard W. Clary (Cravath, Swaine & Moore LLP) for Credit Suisse Securities [USA] LLC. Barbara D. Underwood, Attorney General's Office, for the People of the State of New York.

Companies: Credit Suisse Securities [USA] LLC

MainStory: TopStory BrokerDealers Enforcement FraudManipulation NewsFeed NewYorkNews