Securities Regulation Daily Wrap Up, ENFORCEMENT—N.Y. App. Div.: Residual limitations period preserves AG's claims against Credit Suisse, (Dec. 14, 2016)

Securities Regulation Daily Wrap Up

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

The applicable statute of limitations did not bar the New York attorney general's claims against Credit Suisse for fraud in the sale of residential mortgage backed securities, a state appellate court has held. As the attorney general's claims under the Martin Art and the Executive Law were based on the common-law tort of investor fraud, they were subject to the residual six-year limitations periods contained in CPLR 213(8) and 218(1), respectively, and not the three-year limitations period prescribed in CPLR 214. Accordingly, the trial court correctly found that the attorney general's claims were not time-barred (*People v. Credit Suisse Securities (USA) LLC*, December 13, 2016, per curiam).

Alleged RMBS fraud. Credit Suisse Securities (USA) LLC and various affiliates (collectively, Credit Suisse) were involved in the creation and sale of residential mortgage-backed securities (RMBS) in 2006 and 2007. After the parties had entered into a tolling agreement, the attorney general commenced an action in November 2012 alleging that Credit Suisse made false representations in order to induce investors to purchase the securities in violation of the Martin Act and Executive Law Section 63(12). Specifically, the attorney general alleged that Credit Suisse failed to abide by its representations that it was taking a variety of steps to ensure the quality of the loans underlying its RMBS.

Neither the Martin Act nor Executive Law Section 63(12) contains its own statute of limitations. Credit Suisse moved to dismiss the complaint as time-barred, however, contending that the three-year statute of limitations of CPLR 214(2) applied to the attorney general's claims. The trial court denied the motion, however, ruling that the claims sought to impose liability "based on the classic, longstanding common-law tort of investor fraud, thus invoking the residual six-year statute of limitations contained in CPLR 213.

Statute of limitations. Citing its prior ruling in *State v. Bronxville Glen I Assoc.* (N.Y. App. Div. 1992), the appellate court quickly dispensed with the challenge to the Martin Act claim, ruling that the statute of limitations for an action brought by the attorney general under the Martin Act alleging investor fraud is six years pursuant to CPLR 213(8), and not three years pursuant to CPLR 214. With regard to the Executive Law claim, the appellate court reasoned that the conduct targeted under Section 63(12) parallels the conduct covered under the Martin Act's definition of fraud in that both statutes target wrongs that existed before their enactment, as opposed to targeting wrongs that were not legally cognizable before enactment. Accordingly, Section 63(12) is not subject to the three-year statute of limitations under CPLR 214.

Dissent. Writing in dissent, Judge Andrias argued that the three-year statute of limitations period of CPLR 214(2) should apply because all of the attorney general's claims fell within the category of claims that would not exist but for the statutes. Among other things, Judge Andrias noted that the Martin Act claim did not allege scienter or justifiable reliance, and liability would be imposed based solely on a misrepresentation or an omission of a material fact. The claim would not exist at common law, therefore, because it makes actionable conduct that does not necessarily rise to the level of fraud. Accordingly, the dissent would have dismissed the claims as time-barred because the attorney general was seeking relief under a broader definition of fraud created by the statutes.

The case is No. 451802/12-1336.

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