

## Securities Regulation Daily Wrap Up, INVESTMENT ADVISERS—N.D. III.: SOX limitations period does not apply to claims not requiring showing of fraudulent intent, (Jul. 23, 2013)

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By Rodney F. Tonkovic, J.D.

A complaint seeking rescission of advisory agreements between an investment adviser and investment funds was dismissed by a district court. The plaintiffs alleged violations of Section 206(a)(4) and Rule 206(4)-2 under the Investment Advisors Act, breach of fiduciary duties and legal malpractice. The court declined to exercise supplemental jurisdiction over the complaint's state law claims (*Alonso v. Weiss*, July 22, 2013, Lefkow, J.).

The plaintiffs in this action are limited partners in investment funds managed by The Nutmeg Group, LLC, a registered investment adviser. In 2009, the SEC obtained a temporary restraining order prohibiting Nutmeg from managing the funds. In August 2009, Leslie J. Weiss was appointed receiver with the authority to oversee Nutmeg's business, including serving as investment adviser to the funds. The plaintiffs claimed that since her appointment, Weiss and Nutmeg have failed to disseminate quarterly account statements to the limited partners of the funds in violation of Section 206(4) and Rule 206(4)-2 and sought rescission of the advisory agreements between Nutmeg and the funds.

**Statute of limitations.** The defendants argued that the Advisers Act claim was barred by the one-year statute of limitations borrowed from the securities laws. According to the defendants, the injury should have been discovered once the plaintiffs failed to receive a quarterly statement after the third quarter of 2009. The suit was filed in late 2011. The plaintiffs, on the other hand, argued for the application of the longer Sarbanes-Oxley limitations period under 28 U.S.C. Section 1658(b).

The court noted that Section 1658(b) applies only to fraud-based claims. The court observed, however, that courts are divided as to whether the SOX limitations period applies to Advisers Act claims that do not require a finding of fraudulent intent. The court held that the SOX extended limitations period applies only to claims requiring fraudulent intent, and that the Advisers Act claim in this case did not require such a showing. Accordingly, the one-year limitations period applied, and the complaint was dismissed with prejudice.

The case is No. 12 C 7373.

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Companies: The Nutmeg Group, LLC

LitigationEnforcement: InvestmentAdvisers IllinoisNews