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Securities Law Alert

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–*The Legal 500* 2018

Supreme Court: *American Pipe* Does Not Permit Unnamed Class Members to Bring a New Class Action After the Expiration of the Applicable Limitations Period

On June 11, 2018, the Supreme Court unanimously held that the tolling of individual claims established in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974),[1] does not toll limitations periods for successive class claims. *China Agritech v. Resh*, 2018 WL 2767565 (2018) (Ginsburg, J.). Thus, individual claimants that could invoke *American Pipe* tolling for their individual claims may not bring putative class claims if such class claims would be barred by the applicable statute of limitations.

In concluding that *American Pipe* tolling does not permit follow-on class actions after the expiration of the relevant statute of limitations, the Court focused heavily on the reasoning behind *American Pipe*. The Court explained that "[t]he watchwords of *American Pipe* are efficiency and economy of litigation" and stated that "[e]xtending *American Pipe* tolling to successive class actions does not serve that purpose." The Court observed that the "'efficiency and economy of litigation' that support tolling of individual claims . . . do not support maintenance of untimely successive class actions." Instead, the Court noted that class claims should be made soon after the first action seeking class certification. The Court reasoned that while economy of litigation favors delaying the limitation period for individual claims until class certification is denied because a certification grant would eliminate the need for individually asserted

1. The *American Pipe* Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."

claims, the opposite is true for competing class representative claims: when class treatment is appropriate, it is best for all possible representatives to be known so the district court can select the best plaintiff.

The Court also analyzed the impact of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995 ("PSLRA") on class litigation and securities suits. Rule 23 mandates that class certification be resolved at "an early practicable time," indicating a preference for the preclusion of untimely class actions. The Court noted that the PSLRA—which governs the *China Agritech* litigation—requires publication of class notices shortly after commencement of a securities class action. The Court reasoned that this rule aims to alert all potential class representatives to the litigation and to afford them an opportunity to demonstrate their suitability to serve as lead plaintiff.

The Court also explained that plaintiffs usually must show that they have been diligent in pursuing their claims to benefit from equitable tolling. In *American Pipe*, the Court noted that tolling was permissible because the intervening individual plaintiffs had not "slept on their rights," but instead relied on the class representative to protect their interests. Here, however, a "would-be class representative who commences suit after expiration of the limitation period . . . can hardly qualify as diligent in asserting claims and pursuing relief."

The Court expressed concern that applying *American Pipe* tolling to successive class claims would permit the statute of limitations to be extended indefinitely, noting that "[e]ndless tolling of a statute of limitations is not a result envisioned by *American Pipe*."

Additionally, the Court rejected concerns that its decision would lead to a "needless multiplicity" of class action filings because: (i) there is no showing that the Circuits that declined to apply *American Pipe* to class actions have experienced a disproportionate amount of protective class action filings; and (ii) a plaintiff that wants to lead a class already has incentive to file early and little reason to delay.

The Court also rejected the argument that limiting *American Pipe* tolling to individual claims was contrary to the Rules Enabling Act, noting that claimants have no substantive right to bring untimely claims. The Court explained that Rule 23 does not require class actions to be revived when individual claims are tolled. Indeed, "the [Federal] Rules do not offer . . . a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims."

Justice Sotomayor concurred with the outcome, but opined that the majority erred in adopting an unnecessarily broad rule. Justice Sotomayor expressed her view that the *American Pipe* tolling doctrine should apply to permit plaintiffs to file new class actions in cases that are not subject to the PSLRA. Justice Sotomayor pointed to the Court's precedent in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), which held that there must be a special reason for treating class actions differently from individual claims. The PSLRA and its procedural requirements, particularly the requirement to notify potential lead plaintiffs of a pending class action, distinguishes securities law class actions from those not governed by the PSLRA. Justice Sotomayor observed that Rule 23 generally lacks a requirement to provide precertification notice to putative class members and "in no way ensures that potential lead plaintiffs know about the putative class action or about their opportunity to represent the class." She disagreed with the majority's view that its ruling would encourage class representatives to come forward early in the process to "aid" the court in selecting the best lead plaintiff. Justice Sotomayor stated that "in suits not covered by the PSLRA, absent class members may not know of the pending class action early enough to 'aid' the court, and will likely have to file a completely separate lawsuit if what they seek is lead-plaintiff status."

Supreme Court: SEC's Administrative Law Judges Are "Officers" Subject to the Appointments Clause

On June 21, 2018, the Supreme Court held that the administrative law judges ("ALJs") for the SEC's in-house courts are "Officers" subject to the Appointments Clause of the United States Constitution. [*Lucia v. S.E.C.*, 2018 WL 3057893 (2018) (Kagan, J.)](). Pursuant to the Court's ruling, SEC staff members may no longer name ALJs. The SEC's ALJs may only be appointed by the SEC itself, a court of law, or the President.

Background

The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The Appointments Clause further provides that "Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

In *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), the D.C. Circuit held that the SEC's ALJs are not "Officers of the United States" within the meaning of the Appointments Clause because they have no authority to issue "final decisions" of the SEC. The D.C. Circuit found it significant that the SEC has a discretionary right to review the action of any ALJ as it sees fit, either on its own initiative or upon a petition for review filed by a party or aggrieved person. In the event that "no review of the initial decision is sought or ordered," the SEC will issue an order stating that it has declined review and specifying the date that the ALJ's sanctions, if any, will take effect. The D.C. Circuit emphasized that the ALJ's initial decision becomes final only upon issuance of the SEC's order.

In *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), however, the Tenth Circuit rejected final decision-making power as the key criterion for assessing whether the Appointments Clause applies. The Tenth Circuit relied on the Supreme Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991) to hold that the SEC's ALJs are "inferior officers" who must be appointed in conformity with the Appointments Clause.

The defendant in *Lucia* petitioned the Court for certiorari to resolve the circuit split, in hopes of erasing the adverse judgment of the SEC's ALJ against him. The defendant argued that if the SEC ALJ who presided over his case was not properly appointed, then the ALJ lacked the constitutional authority to issue the ruling in that matter.

Court Relies on *Freytag* to Hold That SEC ALJs Are Officers Within the Meaning of the Appointments Clause

The Court explained that the "sole question" before the Court was whether the SEC's ALJs "are 'Officers of the United States' or simply employees of the Federal Government."[2] If the SEC's ALJs were considered "part of the broad swath of 'lesser functionaries' in the Government's workforce," then it would not matter how the ALJs were appointed. But if the SEC's ALJs were deemed to be "Officers," then the ALJs could be constitutionally appointed only by the President, a court of law, or the head of a department. The Court noted that the SEC itself "counts as a Head of a Department" for Appointments Clause purposes. Instead of appointing the ALJs itself, however, the SEC "left the task of appointing ALJs . . . to SEC staff members."

The Court stated that there are two key requirements for an individual to qualify as an officer under the "Court's basic framework for distinguishing between officers and employees." First, "an individual must occupy a 'continuing' position established by law to qualify as an officer." Second, the individual must "exercis[e] significant authority pursuant to the laws of the United States." The Court explained that the "significant authority" test is "focused on the extent of power an individual wields in carrying out his assigned functions."

The Court found it unnecessary to elaborate on the "'significant authority' test" established in *Buckley v. Valeo*, 424 U.S. 1 (1976) to resolve the question of whether the SEC's

2. The Court declined the Government's invitation to consider the constitutionality of statutory restrictions on the removal of SEC ALJs. The Court explained that it did not grant certiorari to review this question, and noted that no court has yet addressed the issue.

ALJs are officers. The Court found that its ruling in *Freytag v. Commissioner*, 501 U.S. 858 (1991) "necessarily decides this case." The Court stated that in *Freytag*, it "applied the unadorned 'significant authority' test to adjudicative officials who are near carbon copies of the [SEC's] ALJs."

The *Freytag* Court held that special trial judges ("STJs") of the United States Tax Court were "inferior officers" subject to the Appointments Clause. In relatively minor matters, STJs had the authority to issue final decisions. In more substantial matters, STJs prepared proposed findings and an opinion for the Tax Court judge to consider. The *Freytag* Court determined that STJs were subject to the Appointments Clause because they held ongoing statutorily established positions and "exercise[d] significant discretion" in the course of executing "important functions" in connection with adversarial tax hearings.

The *Lucia* Court found that "*Freytag* says everything necessary to decide this case." First, the SEC's "ALJs, like the Tax Court's STJs, hold a continuing office established by law." Second, the SEC's "ALJs exercise the same 'significant discretion' when carrying out the same 'important functions' as STJs do." The Court emphasized that "[b]oth sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges." The Court explained that the SEC's ALJs, like the STJs at issue in *Freytag*, (1) "take testimony," (2) "conduct trials," (3) "rule on the admissibility of evidence," and (4) "have the power to enforce compliance with discovery orders." The *Lucia* Court emphasized that "point for point—straight from *Freytag*'s list—the [SEC's] ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries."

The *Lucia* Court further found that SEC "ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect." The Court explained that in major cases, a Tax Court judge must "always review an STJ's opinion." An STJ's "opinion counts for nothing unless the regular judge adopts it as his own." The Court noted that "[b]y contrast, the SEC can decide against reviewing an ALJ decision at all." The ALJ's decision then becomes final and stands as a decision of the SEC. The Court concluded that this "last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the [SEC's] ALJs must be too."

Court Holds Petitioner Is Entitled to a New Hearing Before a Different SEC ALJ

As a remedy, the Court held that petitioner was entitled to a hearing before a different SEC ALJ than the one who initially heard and ruled on his case. The Court reasoned that even if that ALJ has "received (or receives sometime in the future) a constitutional appointment," he "cannot be expected to consider the matter as though he had not adjudicated it before." The Court found that "[t]o cure the constitutional error, another ALJ (or the [SEC] itself) must hold the new hearing to which [petitioner] is entitled."

Justices Thomas and Gorsuch, Concurring, Posit That the Test for an Officer Is the Exercise of an Ongoing Statutory Duty

In a concurring opinion, Justice Thomas, joined by Justice Gorsuch, observed that "this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*." Justice Thomas stated that any individual who is "continuously responsible" for an "an ongoing statutory duty" is an officer under the Appointments Clause.

Justice Breyer, Concurring, States That the Court Should Have Resolved the Case on Statutory Rather Than Constitutional Grounds

In an opinion concurring in the judgment in part and dissenting in part, Justice Breyer, joined in part by Justices Ginsburg and

Sotomayor, expressed the view that the Court should have decided the case based on an application of the Administrative Procedure Act rather than an interpretation of the Appointments Clause. Justice Breyer stated that it was not possible to resolve the constitutional question "without knowing the answer to [the] different, embedded constitutional question"—"the constitutionality of the statutory 'for cause' removal protections that Congress provided for administrative law judges," which the majority declined to consider. Justice Breyer observed that holding that ALJs are officers "is, *perhaps*, to hold that their removal protections are unconstitutional." Finally, Justice Breyer, joined here by Justices Ginsburg and Sotomayor, stated that he saw "no reason why" the same ALJ could not rehear petitioner's case, as the same judges routinely preside over new trials on reversal.

Justices Sotomayor and Ginsburg, Dissenting, State That Only Individuals With Final Decision-Making Authority Are Officers Subject to the Appointments Clause

In a dissenting opinion, Justice Sotomayor, joined by Justice Ginsburg, expressed the view that "one requisite component of 'significant authority' is the ability to make final, binding decisions on behalf of the Government." Justice Sotomayor concluded that "[SEC] ALJs are not officers because they lack final decision-making authority." She observed that "a person who merely advises and provides recommendations to an officer would not herself qualify as an officer."

Supreme Court: Grants Certiorari to Consider Whether a Misstatement Claim That Does Not Satisfy the *Janus* Standard Can Be Pursued as a Fraudulent Scheme Claim

On June 18, 2018, the Supreme Court granted certiorari to consider whether a misstatement claim that does not satisfy the standard set forth in *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135 (2011) for Rule 10b-5(b) claims can serve as the basis for a fraudulent scheme claim under Rules 10b-5(a) and (c), as well as Sections 17(a)(1) and (3) of the Securities Act of 1933.[3] *Lorenzo v. SEC*, No. 17-1077.

Rule 10b-5(b) renders it unlawful "[t]o make" any material misstatement or omission "in connection with the purchase or sale of any security."[4] The *Janus* Court limited the scope of liability under Rule 10b-5(b) by holding that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." The Court made it clear that "[o]ne who prepares or publishes a statement on behalf of another is not its maker" and therefore cannot be subject to liability for that statement under Rule 10b-5(b).

In *Lorenzo v. SEC*, 872 F.3d 578 (D.C. Cir. 2017), the District of Columbia Circuit relied on *Janus* to hold that a broker who distributed false statements that were authored and approved by his boss could not be liable under Rule 10b-5(b). The broker claimed that "he [had] sent the email messages at the behest of his boss" who had

3. Rules 10b-5(a) and (c) render it unlawful "[t]o employ any device, scheme or artifice to defraud," or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Section 17(a)(1) and (3) of the Securities Act of 1933 similarly prohibit the "employ[ment] of any device, scheme, or artifice to defraud" or "engage[ment] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser" in connection with "the offer or sale of any securities (including security-based swaps) or any security-based swap agreement."

4. Section 17(a)(2) similarly prohibits "obtain[ing] money or property by means of any" material misstatement or omission in connection with "the offer or sale of any securities (including security-based swaps) or any security-based swap agreement."

"supplied the content of the false statements" and "approved the messages for distribution." The D.C. Circuit found that the broker's boss, rather than the broker, had "ultimate authority over the substance and distribution of the emails" within the meaning of *Janus*.

Although the D.C. Circuit found no basis for holding the broker liable under Rule 10b-5(b), the D.C. Circuit found the broker liable under Rules 10b-5(a) and (c) and Section 17(a)(1) of the Securities Act of 1933. The court determined that the broker's "own active role in producing and sending the emails constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of liability" under Rules 10b-5(a) and (c) and Section 17(a)(1). The D.C. Circuit found that there was "no blanket reason . . . to treat the various provisions as occupying mutually exclusive territory, such that false-statement cases must reside exclusively within the province of Rule 10b-5(b)." The court held that "Rules 10b-5(a) and (c), as well as Sections 10(b) [of the Securities Exchange Act of 1934] and 17(a)(1) [of the Securities Act], may encompass certain conduct involving the dissemination of false statements even if the same conduct lies beyond the reach of Rule 10b-5(b)."

Like the D.C. Circuit, the Eleventh Circuit has determined that "even a person . . . who is not the 'maker' of an untrue statement of a material fact, nonetheless could be liable as a primary violator of Rule 10b-5(a) and (c)." *SEC v. Big Apple Consulting USA,* 783 F.3d 786 (11th Cir. 2015). However, the Second, Eighth and Ninth Circuits have held that misstatements and omissions alone cannot give rise to a claim for scheme liability under Rules 10b-5(a) and (c).[5]

Citing this circuit split, the broker-defendant in *Lorenzo* petitioned the Court for certiorari to address the question of "whether a misstatement claim that does not meet the elements set forth in *Janus* can be repackaged and pursued as a fraudulent scheme claim." Petition for a Writ of Certiorari, *Lorenzo v. SEC*, 2018 WL 656234 (Jan. 26, 2018). The broker-defendant argued that the D.C. Circuit's decision will enable private plaintiffs to "sidestep" the *Janus* standard by bringing misstatement claims as fraudulent scheme claims under Rules 10b-5(a) and (c). The broker-defendant contended that "allow[ing] a private plaintiff to use a fraudulent scheme theory to pursue primary liability against a defendant who did not make a misstatement would erase the distinction between primary and secondary liability."

The SEC responded that "nothing in the text, structure, history or purpose of the relevant provisions suggests that the references to 'statement[s]' in Section 17(a)(2) and Rule 10b-5(b) mean that a fraud claim based on false claims can proceed *only* under those two provisions." Brief for the Respondent in Opposition, *Lorenzo v. SEC*, 2018 WL 2063084 (May 2, 2018). The SEC argued that a person may be liable for "*disseminating* a false statement" under the scheme liability provisions of Rule 10b-5 and Section 17(a) regardless of whether that person can face liability for *making* that same statement.

The Court will hear the *Lorenzo* case in October Term 2018. A date for oral argument has not yet been set.

Tenth Circuit: A Company Has No Duty to Disclose Preliminary Merger Discussions Provided It Does Not Say Anything "Inconsistent" With the Existence of Such Discussions

On May 11, 2018, the Tenth Circuit held that an energy company and its executives had no duty to disclose preliminary merger discussions with a competing energy firm because defendants had not made any statements that were "inconsistent" with the possibility that the company was engaging in such discussions. *Emps. Ret. Sys. of Rhode Island v. Williams Cos.*, 889 F.3d 1153 (10th Cir. 2018) (Hartz, J.). The Tenth Circuit further found that the merger discussions were not material under the probability/

5. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005) (holding that plaintiffs cannot assert "a market manipulation claim under Rule 10b-5(a) and (c)" if "the sole basis for such claims is alleged misrepresentations or omissions"); *Public Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972 (8th Cir. 2012) ("[A] scheme liability claim must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)."); *WPP Luxembourg Gamma Three Sarl v. Spot Runner*, 655 F.3d 1039 (9th Cir. 2011) ("A defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions.").

magnitude test set forth in *Basic v. Levinson*, 485 U.S. 224 (1988).

The merger discussions at issue took place shortly after defendants announced that the company intended to merge with its affiliate, which was majority-owned by the company. Following the announcement, plaintiffs purchased shares in the affiliate company. Several weeks later, the competing energy firm announced that it intended to merge with the company, and that this merger would preclude the company's planned merger with its affiliate. The stock price of shares in the affiliate company subsequently dropped. Plaintiffs brought suit alleging that they overpaid for the affiliate's shares because of defendants' failure to disclose the merger discussions with the competing energy firm. Plaintiffs also contended that defendants falsely represented that the company's merger with its affiliate "was a done deal." The district court dismissed plaintiffs' claims, and plaintiffs appealed.

Rule 10b-5 Does Not Impose a Stand-Alone Duty to Disclose Merger Discussions

The Tenth Circuit held that the company had "no duty under the securities laws to disclose the merger talks" with the competing energy firm. The court emphasized that "Rule 10b-5 does 'not create an affirmative duty to disclose any and all material information.'" *Id.* (quoting *Matrixx Initiatives v. Siracusano*, 563 U.S. 27 (2011)). Rather, Rule 10b-5 requires disclosure "only when necessary to make statements made, in the light of the circumstances in which they were made, not misleading." *Id.* (quoting *Matrixx*, 563 U.S. 27). The Tenth Circuit found defendants had no duty to disclose the merger discussions at issue because defendants did not speak to the possibility that the company might merge with any entities other than, or in addition to, its affiliate company. The court reasoned that defendants did not make any statements that were "inconsistent" with the fact that the company was engaging in merger discussions with a competing firm.

In reaching this conclusion, the Tenth Circuit found persuasive the Ninth Circuit's decision in *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997 (9th Cir. 2002) and the Second Circuit's decision in *Glazer v. Formica Corp.*, 964 F.2d 149 (2d Cir. 1992). In *Brody*, the Ninth Circuit found a company had no duty to disclose acquisition proposals when it announced its plan to buy back thousands of the company's shares. The Ninth Circuit held that the securities laws do not require "complete" disclosures because "[n]o matter how detailed and accurate disclosure statements are, there are likely to be additional details that could have been disclosed but were not." Similarly, in *Glazer*, the Second Circuit held that "the mere fact that exploration of merger or LBO possibilities may have reached a stage where that information may be considered material does not, of itself, mean that the companies have a duty to disclose."

Merger Discussions Are Typically Not Material Unless the Parties Have Evidenced "a Serious Commitment to Consummate the Transaction"

The Tenth Circuit further held that even if defendants had a duty to disclose the merger discussions with the competing energy firm, plaintiffs "failed to adequately allege that the discussions were material." The court explained that *Basic*'s "probability/magnitude" test governs the question of "when preliminary merger discussions are material." This "fact-specific" inquiry requires courts to "analyze the probability that a merger will succeed and the magnitude of the transaction." The Tenth Circuit explained that "merger discussions are generally not material in the absence of a serious commitment to consummate the transaction."

The Tenth Circuit noted that in *Jackvony v. RIHT Financial Corp.*, 873 F.2d 411 (1st Cir. 1989), a decision authored by now-Justice Stephen Breyer, the First Circuit held that merger talks were not material because there were "no concrete offers, specific discussions, or anything more than vague expressions of interest." The First Circuit reasoned that announcements of such "'tentative feelers' . . . would more likely confuse, than inform, the marketplace." Similarly, in *Taylor v. First Union Corp. of S.C.*, 857 F.2d 240 (4th Cir. 1988), the Fourth Circuit found that the merger discussions at issue were not material because they were "preliminary, contingent, and speculative." The Fourth Circuit explained that requiring disclosure of such discussions would "threaten to bury the shareholders in an avalanche of trivial information."

"Guided by these decisions," the Tenth Circuit found that plaintiffs failed to plausibly allege that, at the time of the claimed omission, the company was likely to merge with the competing energy firm. The court noted that there were no allegations of "concrete offers, specific discussions, or anything more than vague expressions of interest." The court determined that the allegations were "fully consistent with there being no commitment whatsoever." The court also found that there were no factual allegations that investors "would reasonably view such a combination as fatal to" the company's planned merger with its affiliate.

New York Court of Appeals: Three-Year Statute of Limitations Applies to Martin Act Claims

On June 12, 2018, the New York Court of Appeals (the "Court of Appeals") held that claims brought under the Martin Act, New York's blue sky law, are governed by the three-year statute of limitations set forth in New York Civil Practice Law and Rules ("CPLR") 214(2), which applies to actions "to recover upon a liability, penalty or forfeiture created or imposed by statute." [*People by Schneiderman v. Credit Suisse Sec. (USA)*, 2018 WL 2899299 (N.Y. 2018)](#) [(DiFiore, C.J.)](#). The Court of Appeals reversed the ruling of the Appellate Division, First Department, which held that the six-year statute of limitations set forth in CPLR 213(8) for actions "based upon fraud" applies to Martin Act claims. The Court of Appeals also found CPLR 213(1), which establishes a six-year statute of limitations for actions "for which no limitation is specifically prescribed by law," inapplicable to Martin Act claims.

The Court of Appeals explained that CPLR 214(2)'s three-year statute of limitations applies "where liability would not exist but for a statute." CPLR 214(2) does not govern "claims which, although provided for in a statute, merely codify or implement an existing common law liability." To determine whether CPLR 214(2)'s three-year statute of limitations applies to Martin Act claims, the Court of Appeals considered "whether the Martin Act creates liabilities that did not exist at common law."

The Court of Appeals noted that the Martin Act "authorizes the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State." To prevail in enforcement proceedings brought under the Martin Act, "the Attorney General need not prove scienter or intentional fraud [or] reliance on the part of any investor." The Court of Appeals observed that it has "repeatedly held that the Martin Act does not create a private right of action in favor of parties injured by prohibited fraudulent practices." The court has also previously ruled that "a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute." *Id.* (quoting *Assured Guaranty (UK) Ltd. v. J.P. Morgan Inv. Mgmt.*, 18 N.Y.3d 341 (N.Y. 2011) (emphasis omitted)). The Court of Appeals found these decisions confirm that "the Martin Act covers some fraudulent practices not prohibited elsewhere in statutory or common law." Based on its determination that "the Martin Act imposes numerous obligations—or 'liabilities'—that did not exist at common law," the Court of Appeals held that the three-year statute of limitations set forth in CPLR 214(2) "governs Martin Act claims."

The Court of Appeals also considered the statute of limitations applicable to claims brought under § 63(12) of New York's Executive Law, which empowers the Attorney General to bring enforcement proceedings in connection with fraudulent practices. The court observed that the statutory language is "virtually identical to language found in section 352 of the Martin Act." Nevertheless, because Executive Law § 63(12) "gives the Attorney General standing to redress liabilities recognized elsewhere in the law," the Court of Appeals held that courts must "'look through' Executive Law § 63(12) and apply the statute of limitations applicable to the underlying liability." If the "conduct underlying the Executive Law § 63(12) claim amounts to a type of fraud recognized in the common law," then "the action will be governed by [the] six-year statute of limitations" set forth in CPLR 213(8). But if the conduct at issue is actionable only under the Martin Act, then CPLR 214(2)'s three-year statute of limitations applies.

In a lengthy dissenting opinion, Judge Rivera expressed her view that the majority opinion "reads the CPLR and the Martin Act in a way that undermines the Legislature's purpose." She opined that "[a] construction that limits actions under the Martin Act to three years must be rejected as unsound." She further opined that the majority's decision with respect to the applicable statute of limitations for claims brought under Executive Law § 63(12) was based on the same "flawed analysis" as the rest of the majority's opinion.

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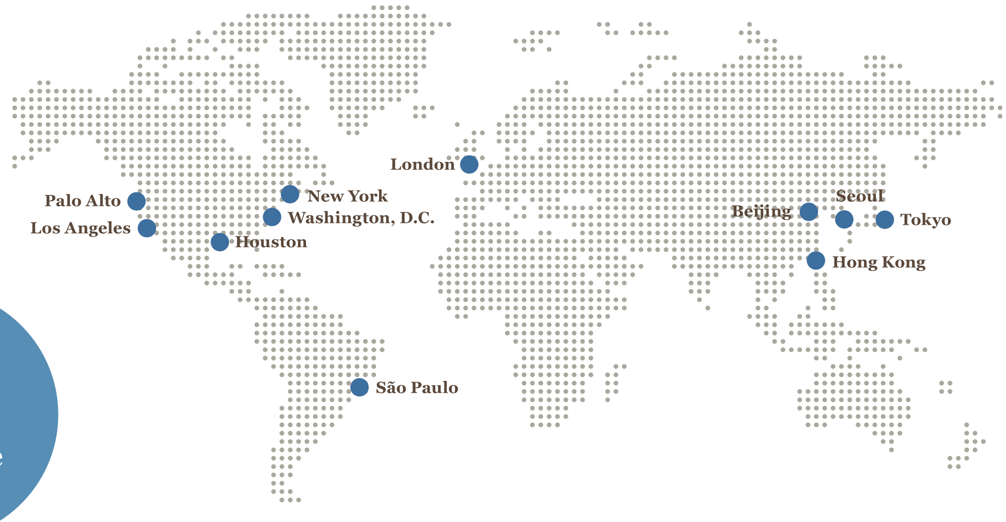

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