SELECTING THE APPROPRIATE BLUE SKY LAW(S) UNDER WHICH TO BRING A CLAIM - A CASE STUDY

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Introduction

As seasoned securities practitioners know, every state, as well as the District of Columbia, Guam, Puerto Rico, and U.S. Virgin Islands, has a securities anti-fraud statute, also known as a "Blue Sky law," containing provisions aimed at curtailing the sale or purchase of securities based on fraudulent misrepresentations or omissions. Most Blue Sky laws are modeled after the Uniform Securities Act of 1956, the Uniform Securities Act of 1985, or the Uniform Securities Act of 2002, or a combination of the foregoing. Moreover, every such Blue Sky law, except New York's "Martin

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Act," provides a private right of action[2] to those who have been defrauded or deceived in connection with the sale and/or purchase of securities.[3]

However, these Blue Sky laws often times differ in three important respects, including: (1) whether a state's or territory's law applies to a particular transaction; (2) the availability of attorneys' fees to an injured investor; and (3) the applicable statutes of limitations.

Understanding these three factors, and how the various Blue Sky laws differ in these respects, will permit claimant's counsel to select the proper Blue Sky law or laws under which to assert a claim. This article suggests how to analyze and select the Blue Sky law or laws under which to assert a claim arising from fraudulent or deceptive acts or omissions of a registered representative and/or broker-dealer, by focusing mainly on the foregoing aspects.

Hypothetical Fact Pattern

Imagine a scenario with the following facts:

> (1) a registered representative sells securities from his home office in Boca Raton, Florida;
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> (2) a New Jersey resident, while visiting family in Pennsylvania, is convinced to purchase a security over the telephone through the registered representative;
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> (3) however, the registered representative makes material misstatements and omissions regarding the attributes and risks of the investment in selling the security;

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2. In 1996, Congress passed the National Securities Markets Improvement Act of 1996 ("NSMIA"). It has been argued from time to time by the securities industry that the NSMIA somehow preempts state securities claims, including common law and Blue Sky law claims. Courts have rejected this argument, holding that the NSMIA's savings clause, 15 U.S.C. 77r(c)(1), and its legislative history, permit states to retain jurisdiction over fraudulent conduct. The case of *Zuri-Invest AG v. Natwest Finance, Inc.,* 177 F.Supp.2d 189 (S.D.N.Y. 2001), provides a helpful discussion of the foregoing.

3. The Blue Sky laws also impose requirements regarding registration of securities and those selling securities. This article does not examine causes of action or liability based on the failure to adhere to any registration requirements imposed by the Blue Sky laws.

(4) the registered representative is supervised from the broker-dealer's branch in Connecticut, which is where the registered-representative previously worked before moving to Florida several years before;

(5) all of the customer's trade confirmations and account statements are sent to the customer's New Jersey residence and they state that the Connecticut branch is the, "office serving [the customer's] account";

(6) the broker-dealer's principal place of business is in New York;

(7) a year and a half after discovering, using reasonable care and due diligence, that she had purchased the securities based on fraudulent misrepresentations and omissions, the claimant has decided that she wants to sue in arbitration to recover her losses; and

(8) the FINRA arbitration regarding the securities transaction at issue will take place in New York.

Applicability of Particular States' Blue Sky Laws

The first question that arises is which states' securities laws can apply?

An attorney's first instinct may be to conduct an amorphous conflict of laws analysis,[4] the rules for which differ from state to state, to attempt to

4. Many brokerage agreements contain "choice of law" provisions that often select New York law for various reasons, including its lack of a private right of action under the Martin Act. Whether such a choice of law provision prevents the application of an otherwise pertinent Blue Sky law depends on the law of the jurisdiction. Courts that decline to enforce the choice of law provision often do so based on public policy (because such laws are intended to protect investors and the investing public) and/or based on the Blue Sky law's anti-waiver provision. *See e.g., R & L Ltd. Investments, Inc. v. Cabot Inv. Properties, LLC*, 729 F.Supp.2d 1110, 1113-14 (D. Ariz. 2010); *Hall v. Superior Court*, 150 Cal. App. 3d 411, 197 Cal. Rptr. 757 (4th Dist. 1983); *State ex rel. Geil v. Corcoran*, 623 S.W.2d 557 (Mo. Ct. App. E.D. 1981); *Pursuit Partners, LLC v. UBS AG*, 2009 WL 3286011at *3-4 (Conn. Super. 2009); *Gilbert v. Atlantic Trust Co., N.A.*, 2006 WL 1049707 (D.N.H. 2006); *Ito Int'l Corp. v. Prescott, Inc.*, 83 Wash. App. 282, 288–89, 921 P.2d 566 (1996); *Brenner v. Oppenheimer & Co. Inc.,* 273 Kan. 525, 44 P.3d 364 (2002). Other courts hold that certain, usually inartfully drafted, contractual choice of law provisions only govern a cause of action sounding in contract. *See e.g., Klock v. Lehman Bros. Kuhn Loeb, Inc.*, 584 F.Supp. 210, 215 (S.D.N.Y.1984).

determine which law applies. However, in most jurisdictions, such a conflict of laws analysis is, and should be, unnecessary with regard to the Blue Sky laws. Although a minority of courts utilizes a conflict of laws analysis, most jurisdictions that do not have a jurisdictional limitation provision in their Blue Sky laws permit a claimant to assert a claim under any states' Blue Sky law having a sufficient factual nexus to the securities transaction at issue.[5,6]

However, as one might expect, some courts take the opposite position that a choice of law provision is fully enforceable and can prevent application of Blue Sky laws. *See e.g., Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 224 fn. 28 (3d. Cir. 2006); *Costa v. Carambola Partners, LLC*, 590 F.Supp.2d 1141, 1151-53 (D. Minn. 2008); *Organ v. Byron*, 435 F.Supp.2d 388, 391-93 (D. Del. 2006); *WTM, Inc. v. Henneck*, 125 F.Supp.2d 864, 867-68 (N.D. Ill. 2000). Of course, the choice of law clause may not be enforceable in any event based on FINRA Rules and Rule interpretations. *See* FINRA Rule 2268(d) (formerly NASD Rule 3110(f)(4)); NASD NTM 95-16; NASD NTM 95-85 (reiterating the provisions of NASD NTM 95-16); NASD NTM 05-09; SEC Release No. 34-26805 at Pg. 23 (1989); and Report of Arbitration Policy Task Force to the NASD (Jan. 1996).

5. The first court to adopt the "sufficient factual nexus" test for Blue Sky laws in a published opinion was *Lintz v. Carey Manor Ltd*., 613 F.Supp. 543 (W.D. Va. 1985). In that decision, the Court relied mainly on law review articles by Professor (and PIABA member) Joseph C. Long, and by Professor Louis Loss (who drafted the original Uniform Securities Act), as well as upon the underlying purposes of state securities acts, which are protecting its citizens in the purchase or sale of securities and regulating and controlling securities activities deemed to have taken place at least partially within the borders of the state. The court explained that applying multiple overlapping states' Blue Sky laws to a single securities transaction serves the purposes of such laws and does not conflict with them. *See also, Simms Inv. Co. v. E.F. Hutton Co., Inc.*, 69 F.Supp. 543 (1988) ("Simms II") and *Barnebey v. E.F. Hutton & Co.,* 715 F.Supp. 1512 (M.D. Fla. 1989). Most of the later decisions adopting the "sufficient factual nexus" test for Blue Sky laws have cited to *Lintz, Simms II* and/or *Barnebey. See e.g., Chrysler Capital Corp. v. Century Power Corp.*, No. 91 Civ. 1937, 992 WL 163006 (S.D.N.Y. June 24, 1992).

The first modern era court to *reject* the "sufficient factual nexus" test in favor of a conflict of laws analysis was *Simms Inv. Co., v. E.F. Hutton & Co.,* 688 F.Supp. 193 (N.D.N.C. 1988) ("Simms I"). However, on a motion for reconsideration, that court reversed its previous decision and applied the "sufficient factual nexus" test. *Simms Inv. Co. v. E.F. Hutton Co. Inc.,* 699 F.Supp. 543 (1988) ("Simms II").

Other courts to reject the "sufficient factual nexus" test have been limited to those within the 6th and 7th Circuits. For instance, in *McInnis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 706 F.Supp. 1355 (M.D. Tenn. 1989), the court applied a conflict of laws analysis relying on the decision in *Simms I* while ignoring the fact that the decision had been reversed upon reconsideration in *Simms II*. In *In re*

Rospach Securities Litigation, Nos. 1:90-CV-805 and 1:90-CV-806, 1992 WL 226912 (W.D. Mich. July 8, 1992), the Court held that it would be "impractical, confusing and unfair to apply more than one state [Blue Sky] law to a claim … [because it] could require both plaintiff and defendants to deal with conflicting theories of liability or defenses … [and] would undoubtedly promote jury confusion." The Rospach court relied mainly on the Supreme Court's decision in *Lampf, Pelva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), wherein it was held that there was a uniform statute of limitations for all federal securities claims. Although it is unclear, at best, why *Lampf* would be relevant to *state* securities claims, nonetheless *Lampf* was overruled when Congress passed Public Law 102–242 § 476, which explicitly applied state statutes of limitation to federal securities claims. In *Brenner v. Oppenheimer & Co. Inc.,* 273 Kan. 525, 44 P.3d 364 (2002), the Supreme Court of Kansas utilized a choice of law analysis in connection with the Blue Sky laws without even mentioning the "sufficient nexus to the transaction" test, presumably because the plaintiff brought claims only under the Kansas Securities Act and the issue was whether Kansas law could apply despite a contractual choice of law provision selecting New York law. In *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56 (Tex. App. 2004), the court decided to utilize New York law, including the Martin Act, instead of Texas or Pennsylvania law, through a conflict of laws analysis without ever mentioning the "sufficient factual nexus" test. Lastly, in *Anderson v. Aon Corp.,* No. 06 C 6241, 2008 WL 4865574 (N.D. Ill. June 16, 2008), the court refused to apply both the Blue Sky laws of Illinois and California where Illinois did not recognize the cause of action at issue while California did. The court explained that since the two laws "do not overlap" and instead "directly conflict" it would utilize a conflict of laws analysis and apply Illinois law.

For further discussion of the "sufficient nexus to the transaction" test versus conflict of laws analysis, *see* J. McClard, *The Applicability of Local Securities Acts to Multi-State Securities Transactions*, 20 U. Rich. L. Rev. 139 (Fall, 1985); J. Long, 1985 Blue Sky Law Handbook § 3.02 (1985); J. Long, *The Conflict of Laws Provisions of the Uniform Securities Acts*, 31 Okla.L.Rev. 781 (1978); and L. Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 Harv. L. Rev. 209 (Dec. 1957).

6. It has been argued that the application of a particular state's Blue Sky law to an interstate securities transaction violates the commerce clause and fourteenth amendment. However, courts have upheld the ability of states to regulate such transactions, generally based on a state's ability to reasonably exercise its police power, so long as the conduct being regulated did not occur wholly outside of the regulating state's borders. *See Houston v. Seward & Kissel, LLP*, 2008 WL 818745 (S.D.N.Y. 2008) (*citing*, *Merrick v. N.W. Halsey & Co.,* 252 U.S. 568 (1917), *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), *Caldwell et al. v. Sioux Falls Stock Yards Co. et al.*, 242 U.S. 559 (1917), and *A.S. Goldmen & Co. v. New Jersey*, 163 F.3d 780, 789 (3d. Cir. 1999)).

Despite this general rule, many states and territories have provisions in their Blue Sky laws jurisdictionally limiting the applicability of their statute to transactions having a closer connection to the state.[7] Although Connecticut and Florida[8] do not have a jurisdictional limitation provision in their statutes and, therefore, would likely apply the "sufficient nexus to the transaction" test, New Jersey and Pennsylvania each have a jurisdictional limitation provision in their Blue Sky laws.[9]

In the scenario set forth above, it is possible that the securities laws of Connecticut, Florida, New Jersey, New York, or Pennsylvania could apply. As explained hereinabove, New York can quickly be crossed off the list quickly because New York's "Martin Act" does not provide a private right of action. Notwithstanding this fact, New York has a weak nexus to the *transaction*. Therefore, we are left with the Blue Sky laws of Connecticut, Florida, New Jersey, and Pennsylvania as possibilities under which to sue.

It is likely that a court or arbitration panel would find that the Blue Sky laws of both Connecticut and Florida have a sufficient factual nexus to the transaction at issue in the fact pattern. With regard to Florida, the registered representative made the sale and the misrepresentations from Florida. With regard to Connecticut, the registered representative was supervised out of the broker-dealer's Connecticut branch and the Connecticut branch was the branch servicing the claimant's account.

New Jersey's Blue Sky law is likely inapplicable under the fact pattern based on the jurisdictional limitation provision in its statute. New Jersey's jurisdictional limitation provision states as follows:

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7. These states and territories are Alaska, Arizona, Arkansas, California, District of Columbia, Florida, Georgia, Guam, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, U.S. Virgin Islands, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. Please note that the author did not examine any jurisdictions' long arm statutes or other sources of law to determine any other general limitations on jurisdiction that may apply.

8. Although Florida's securities act section relating to boiler rooms, F.S.A. § 517.312, limits its applicability to those who, "offer or sell, *in this state or from this state*, any security or investment when such offer or sale is [fraudulent or deceitful]," there is no jurisdictional limitation applicable to Florida's general civil anti-fraud provision, F.S.A. § 517.211.

9. *See*, N.J.S.A. 49:3-51 (New Jersey); and 70 P.S. § 1-702 (Pennsylvania).

> (a) [The provision providing a private right of action for securities fraud applies] to persons who sell or offer to sell when (1) an offer to sell is made in this State, or (2) an offer to buy is made or accepted in this State;
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> (b) [Other provisions, including an anti-fraud provision for which it appears there is no private right of action][10] apply to persons who buy or offer to buy when (1) an offer to buy is made in this State, or (2) an offer to sell is made or accepted in this State;
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> (c) For the purpose of this section … an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer (1) originates from this State or (2) is directed by the offeror to this State and received at the place to which it is directed (or at any post office in this State in the case of a mailed offer);
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> (d) For the purpose of this section, an offer to buy or to sell is accepted in this State when acceptance (1) is communicated to the offeror in this State and (2) has not previously been communicated to the offeror, orally or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State, when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State and it is received at the place to which it is directed (or at any post office in this State in the case of a mailed acceptance).

Despite the fact that the claimant is a New Jersey resident, it is unlikely that New Jersey's Blue Sky law will apply in the fact pattern because the claimant was in Pennsylvania for the telephone call with the registered representative wherein the misrepresentations were made and wherein she received and accepted the offer to sell the securities at issue. In other words, the New Jersey statute probably does not apply because the offer to sell did not originate from New Jersey and the claimant did not accept the offer in New Jersey.

Pennsylvania's Blue Sky law is likely applicable based on the language of its jurisdictional scope provision, which states:

> (a) The provisions of this act concerning sales and offers to sell apply to persons who sell or offer to sell when (i) a

10. *See,* N.J.S.A. 49:3-32.

> sale or offer to sell is made in this State or when (ii) an offer to purchase is made and accepted in this State. The provisions concerning purchases and offers to purchase apply to persons who buy or offer to buy when (i) a purchase or offer to purchase is made in this State or when (ii) an offer to sell is made and accepted in this State.
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> (b) For the purpose of this section, an offer to sell or to purchase is made in this State, whether or not either party is then present in this State, when the offer originates from this State or is directed by the offeror to this State and received by the offeree in this State ….
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> (c) For the purpose of this section, an offer to purchase or to sell is accepted in this State when acceptance is communicated to the offeror in this State, and has not previously been communicated to the offeror, orally or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State, when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State, and it is received by the offeror in this State.
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> (d) An offer to sell or to purchase is not made in this State when the publisher circulates, or there is circulated on his behalf in this State, any bona fide newspaper or other publication of general, regular and paid circulation which is not published in this State, or a radio or television program originating outside this State is received in this State.

Since the registered representative directed the offer to the claimant while the claimant was in Pennsylvania, it is likely that Pennsylvania's Blue Sky law will apply.

Therefore, the claimant may bring a claim pursuant to the anti-fraud provisions of the Blue Sky laws of Connecticut, Florida, and Pennsylvania. The question is: should she?

Remedies, including Attorneys' Fees

Once a practitioner determines the Blue Sky law(s) under which the claimant may bring a claim,[11] he or she must then analyze whether a particular Blue Sky law provides helpful remedies, such as attorneys' fees.

Although the specific measure of damages permitted by each of the states' Blue Sky laws is beyond the scope of this article,[12] under most Blue

11. Be sure that you are reviewing and relying on the correct version of the applicable Blue Sky law(s). A. Blue Sky law that has been recently replaced with a new or significantly amended version often has a transition provision stating that the prior version remains applicable to all actions or proceedings pending on the effective date of the new law, or which may be instituted on the basis of conduct occurring before such effective date. Blue Sky laws that have been replaced or significantly amended since 2003, and which contain a transition provision, are as follows (state and effective date are in parentheses): Ga. Code Ann. § 10-5-90 (Georgia, Jul. 1, 2009); HRS § 485A-701 (Hawai'i, Jul. 1, 2008); I.C. § 30-14-701 (Idaho, Sept. 1, 2004); IA Legis. 1161 (2004) (H.F. 2257) (Iowa, Jan. 1, 2005); K.S.A. § 17-2a703 (Kansas, Jul. 1, 2005); 32 M.R.S.A. § 16702 (Maine, Dec. 31, 2005); M.C.L.A. 451.2703 (Michigan, Oct. 1, 2009); M.S.A. § 80A.90 (Minnesota, Aug. 1, 2007); Miss. Code Ann. § 75-71-701 (Mississippi, Jan. 1, 2010); V.A.M.S. 409.7-703 (Missouri, Sept. 1, 2003); N.M.S.A. § 58-13C-701 (New Mexico, Jan. 1, 2010); 71 Okl.St.Ann. § 1-701 (Oklahoma, Jul. 1, 2004); Code 1976 § 35-1-701 (South Carolina, Jan. 1, 2006); SDCL § 47-31B-703 (South Dakota, Jul. 1, 2004); VT Legis. 11 (2005) (H. 128) (Vermont, Jul. 1, 2006); and W.S.A. 551.703 (Wisconsin, Jan. 1, 2009).

12. Although also beyond the scope of this article, in addition to common law claims, Blue Sky law claims, and claims under Section 10(b) of the Securities Exchange Act of 1934, practitioners should consider a claim under any relevant and applicable state consumer protection statute. Many states have promulgated consumer protection statutes providing a private right of action to consumers who have been subjected to fraudulent or deceptive conduct. To the extent that such statutes, by their plain terms or as interpreted by the courts, apply to the purchase or sale of securities and/or the provision of brokerage or investment services, they often provide for significant remedies, such as treble damages and attorneys' fees. For example, see the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201.1, et seq. (the "UTPCPL"), which provides an award of actual damages, up to treble damages, and attorneys' fees, for consumers harmed by fraudulent or deceptive conduct, including the provision of deceptive brokerage services. *See e.g., Denison v. Kelley*, 759 F. Supp. 199, 202 (M.D. Pa. 1991) (UTPCPL applies to brokerage services, including, churning investors' accounts and purchasing inappropriate investments); *Algrant v. Evergreen Valley Nursery Limited Partnership*, 126 F.3d 178, 187-88 (3d. Cir. 1997) (Although UTPCPL does not apply to sale of securities because securities are not "goods," UTPCPL does apply to

Sky laws, if the claimant has been defrauded and continues to own the security at issue, she may recover the consideration paid for the security, together with interest at the rate set forth in the statute from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security.[13] *See e.g.*, C.G.S.A. § 36b-29(a) (Connecticut). Under most Blue Sky laws, if the claimant no longer owns the security (for instance, if the claimant sold it at a loss in an attempt to mitigate damages or access needed funds), she may usually recover "damages." *Id.* The majority of Blue Sky laws define "damages" as "the amount that would be recoverable upon a tender [of the security], less the value of the security when the buyer disposed of it, and interest at the statutory rate from the date of disposition."[14] *See e.g.,* M.C.L.A. 451.2509(2)(c) (Michigan).

In addition, nearly all Blue Sky laws permit the recovery of reasonable attorneys' fees in an action for rescission or damages under state Blue Sky laws. The only jurisdictions that do not permit recovery of attorneys' fees are California, New Jersey, New York (which does not permit a private right

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conduct relating to the brokerage services); *Perry v. Markman Capital Management*, No. 02-744, 2002 WL 31248038 (E.D. Pa., Oct. 4, 2002) (UTPCPL applies to claims arising from the investment services provided, including, investing beyond authority granted, investing outside of plaintiff's goals, and failing to inform plaintiff of the risks involved). The author intends to make a survey of state consumer protection statutes vis-à-vis securities fraud the subject of a subsequent article.

13. Note that many Blue Sky laws permit the seller of the securities at issue to make a qualifying settlement offer to the customer, which can result in the loss of the right to bring a claim under the Blue Sky Law. An example of this potential pitfall is set forth in Connecticut's Blue Sky Law, which provides the following:

> No person may bring an action … (1) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six per cent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty days of its receipt, or (2) if the buyer received such an offer before bringing a cause of action and at a time when he did not own the security, unless he rejected the offer in writing within thirty days of its receipt.

C.G.S.A. § 36b-29(g).

14. Unlike other jurisdictions, Utah's Blue Sky law permits a claimant to recover, *inter alia*, three times the consideration paid for the security upon a showing that the violation was reckless or intentional. U.C.A. 1953 § 61-1-22(2).

of action), Ohio, Pennsylvania, and Tennessee. Of the jurisdictions permitting recovery of attorneys' fees, Florida mandates an award of attorneys' fees to the prevailing party unless such an award would be unjust,[15] Oregon permits an award of reasonable attorneys' fees to the prevailing party except in class actions,[16] Illinois mandates an award of reasonable fees and expenses of the plaintiff's attorney,[17] and Texas permits an award of reasonable attorneys' fees unless such recovery would be inequitable under the circumstances.[18] The remaining states and territories either mandate or permit an award of attorneys' fees, but only specify that such award must be "reasonable." A practitioner should review the statute and pertinent case law to determine whether the Blue Sky law mandates, or merely permits, the court or arbitrators[19] to award attorneys' fees.

With regard to the three states that remain relevant to the fact pattern, Pennsylvania follows the "American Rule"[20] and does not have a provision

15. F.S.A. § 517.211.

16. O.R.S. §§ 59.115(10) and (11), 59.127(10) and (11), and 59.137(4) and (5).

17. 815 ILCS 5/13(A).

18. Vernon's Ann.Texas Civ.St. Art. 581-33(D)(7) and 581-33-1(B)(4).

19. Interestingly, the Blue Sky laws of Georgia, Hawai'i, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, the U.S. Virgin Islands, Vermont, and Wisconsin permit an award of reasonable attorneys' fees as "determined by the court" with no mention of the ability of arbitrators to provide an award of attorneys' fees. Likewise, Florida permits an award of attorneys' fees to the prevailing party unless the "court" finds that such an award would be unjust. F.S.A. § 517.211. Moreover, Illinois' Blue Sky law states that the "court" shall assess reasonable attorneys' fees and expenses of plaintiff's attorney if the purchaser shall prevail in any action. 815 ILCS 5/13. Furthermore, Texas permits an award of reasonable attorneys' fees if the "court" finds that such recovery would be equitable under the circumstances. The foregoing is in contrast to Indiana's Blue Sky law, which permits an award of reasonable attorneys' fees as "determined by the court or arbitrator." IC 23-19-5-9. The author has been unable to find any cases wherein a court held that arbitrators cannot award attorneys' fees under Blue Sky laws because the statute only permits a "court" to assess such fees. Any decision holding that arbitrators cannot entertain a Blue Sky law claim or award attorneys' fees under those statutes would be suspect given the fact that "arbitrators possess the power to fashion the same relief as courts." *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d. Cir. 2000).

20. The "American Rule" provides that each party is responsible for paying its own attorneys' fees, unless specific authority to award attorneys' fees is granted by statute

in its Blue Sky law permitting the recovery of attorneys' fees, Connecticut permits the claimant to recover reasonable attorneys' fees, and Florida permits the *prevailing party* to recover attorney's fees unless it would be unjust to do so. As such, Connecticut law is the best choice, and Florida law, although it awards attorneys' fees to the prevailing party, may be an additional selection in a strong case.

Statutes of Limitations

Another potential issue to be aware of is the applicable statute of limitations. Although some courts do not apply their state's statutes of limitations in arbitrations,[21] many do. Those states that do not apply their statute of limitations to arbitrations generally do so because their statutes state that the statute of limitations only applies to "actions" and arbitrations are not "actions."

Assuming that statutes of limitations can apply in arbitration proceedings, Blue Sky law statutes of limitation vary greatly from state to state. For instance, both Connecticut's and Florida's Blue Sky law provides a statute of limitations of two years after the date when the fraud or misrepresentation is discovered or in the exercise of due diligence should have been discovered, but with an overall maximum of five years from the

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or contract. Note that all states that provide a private right of action but do not permit an award of attorneys' fees in their Blue Sky laws (California, New Jersey, Ohio, Pennsylvania, and Tennessee) follow the "American Rule."

21. *See e.g., Clayton v. Unsworth*, 188 Vt. 432, 440-41, 8 A.3d 1066, 1073 (2010); *Raymond James Fin. Servcs, Inc. v. Phillips*, No. 2D10-2144, 2011 WL 5555691 (Fla.App. 2 Dist. Nov. 16, 2011) (unreported); *Broom v. Morgan Stanley DW Inc.,* 169 Wash.2d 231, 240-45, 236 P.3d 182, 186-88 (2010); *Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co.,* 25 Conn. Supp. 76, 197 A.2d 83 (1963); *Lewiston Firefighters Assoc. v. Lewiston*, 354 A.2d 154 (Me. 1976); *Worcester v. Park Constr. Co.,* 361 Mass. 879, 281 N.E.2d 600 (1972); and *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 218 N.W.2d 751 (1974). Nonetheless, be aware that even if the statute of limitations does not apply, the arbitrators may still perhaps apply the equitable doctrine of laches. For further discussion of the applicability or non-applicability of statutes of limitations in arbitration, *see* J. Smith, *Statute of Limitations as Bar to Arbitration Under Agreement*, 94 A.L.R.3d 533; J. Long, *Re-Thinking the Application of Statutes of Limitations in Arbitration*, PIABA Bar Journal (Summer 2007); and S. Edwards, *From the Lone Star State: Overcoming Statute of Limitation Defenses in Securities Arbitration*, PIABA Law Journal (Summer 2005).

date that such fraud or misrepresentation occurred. C.G.S.A. § 36b-29; West's F.S.A. § 95.11. However, the statute of limitations under Pennsylvania's Blue Sky law is more restrictive, providing only one year after the date that the claimant knew or should have known of the violation, with a maximum of five years after the transaction at issue. 70 P.S. § 1-504.

Moreover, although most Blue Sky law statutes of limitation specifically incorporate the discovery rule, others do not do so, at least on their face.[22]

Under the fact pattern, and assuming statutes of limitations can be applied in her arbitration, the claimant would be barred from bringing her claim under Pennsylvania's Blue Sky law because it is been more than a year since the date that she discovered, or should have discovered, the fraudulent misrepresentations and omissions. However, the claimant would still be within the statute of limitations periods in Florida and Connecticut.

Therefore, it is very important to be cognizant of whether the statutes of limitations of relevant states applies in arbitrations and, if so, to determine whether the Blue Sky law claim at issue is barred by any of those relevant statutes of limitations.

The Practical Perspective and Conclusion

From a practical perspective, under the above fact pattern, the Connecticut statute is the best choice because it mandates an award of reasonable attorneys' fees to the claimant if he or she prevails.[23] Even if a claim under Pennsylvania's Blue Sky law were not barred by its statute of limitations, it adds nothing to assert such a claim due to the unavailability of

22. Those states and territories that do not specifically incorporate the discovery rule into their Blue Sky law statute of limitations are Arkansas, Delaware, Guam, Louisiana, Nebraska, New Hampshire, Puerto Rico, Virginia, West Virginia, and Wyoming. However, this does not necessarily mean that the statute of limitations cannot be tolled by the discovery rule or fraudulent concealment; it just may require additional legal research by counsel.

23. Pursuant to *Cotton v. Slone*, 4 F.3d 176, 181 (2d. Cir. 1993), the Connecticut Blue Sky law "mandates the award of attorney's fees to a prevailing plaintiff 'in order to encourage the enforcement of [the Connecticut Uniform Securities Act] by victims of improper securities transactions who might not otherwise be able to afford to do so.'" (*Quoting, Russell v. Dean Witter Reynolds, Inc*., 200 Conn. 172, 196, 510 A.2d 972, 985 (1986)). Therefore, according to the Second Circuit, "The only issue within the court's discretion on a request for attorney's fees under [Connecticut's Blue Sky law] is the reasonableness of the amount requested."

attorneys' fees or any remedies not otherwise available under Connecticut's Blue Sky law. Moreover, although Florida's Blue Sky law provides attorneys' fees to the prevailing party, asserting a claim thereunder would open the door to the unfortunate possibility of the assessment of attorneys' fees against the claimant in a proper case while providing no remedies that are not otherwise available under Connecticut's Blue Sky law. Nonetheless, where there is no discernible difference between several applicable Blue Sky laws, it makes practical sense to assert claims under each such law, thereby giving the court or arbitrators the option to choose.[24]

24. *See*, Lloyd Paul Stryker, *The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer* (Simon & Schuster 1954) ('No point is ever better made when not directly made at all, but is so presented that the jury itself makes it. Men pride themselves on their own discoveries, and so a point which the jury are allowed to think their own ingenuity has discovered can put the advocate in a position where the jury begin to regard him not only as their spokesman, but their colleague.")