NY State Court Rules that Common Law Claims are not Preempted by Martin Act

On December 20, 2011, the New York Court of Appeals held that New York State's "blue sky" law, the Martin Act, does not preempt private plaintiffs from bringing traditional common law claims, including breach of fiduciary duty and gross negligence. See *Assured Guaranty (UK) Ltd.* v. *J.P. Morgan Inv. Mgmt. Inc.*, No. 227 (N.Y. Dec. 20, 2011). The practical consequence of the *Assured Guaranty* decision is that plaintiffs who do not participate in class actions will be able to bring New York common law claims, which may be less rigorous to plead and prove compared to fraud claims. As such, defendants likely will face significantly increased exposure to liability and protracted litigation.

Prior to the *Assured Guaranty* decision, U.S. federal and state courts typically held that the Martin Act did not preempt common law fraud claims because the Act, itself, did not require evidence of deceitful intent. However, the issue was unsettled as to whether the Martin Act preempted other common law claims that did not require evidence of deceitful intent, such as breach of fiduciary duty and negligence claims. Most courts had previously held that the Martin Act does preempt such claims, but more recently there has been a trend towards holding that the Martin Act does not preempt such claims.

The New York Court of Appeals has agreed with this recent trend. Assured Guaranty sued J.P. Morgan Investment Management for breach of fiduciary duty, gross negligence, and breach of contract for mismanaging the investment portfolio of an entity whose obligations were guaranteed by Assured Guaranty. In permitting these claims to proceed, the court stressed that the Martin Act does not expressly mention, or otherwise contemplate, the elimination of common law claims. The Court also reaffirmed its prior holding that there is no private right of action under the Martin Act but that did not otherwise preclude plaintiffs from bringing New York common law claims.

Although New York common law claims in class actions will continue to be preempted under the Securities Litigation Uniform Standards Act ("SLUSA"), individual plaintiffs will now have broader options to file New York common law claims that are more likely to survive than fraud claims.

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