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NEW YORK COURT OF APPEALS DECIDES MARTIN ACT DOES NOT PREEMPT PRIVATE COMMON LAW CLAIMS

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The New York Court of Appeals has given a holiday gift to New York securities plaintiffs: yesterday, the court handed down its decision in *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.,* 2011 NY Slip Op 09162, New York Supreme Index Number 603755/2008 (available at http://www.courts.state.ny.us/CTAPPS/Decisions/2011/Dec11/227opn11.pdf), at long last determining that New York's Martin Act does not preclude private plaintiffs from pursuing common law claims such as fraud and negligent misrepresentation related to securities transactions. Until now, the court had not spoken on the issue.

The Martin Act, New York State's "blue sky" law, N.Y. Gen. Bus. Law, Art. 23-A, § 352 *et seq.* (McKinney 1996), was enacted in 1921 to protect New York investors from fraud in the offer and sale of securities. Since then, the Act has been strengthened by the Legislature and has been interpreted broadly, making it an extremely powerful weapon in the hands of the state attorney general. During his tenure as New York Attorney General, Eliot Spitzer resurrected the until then fairly dormant Martin Act, using its broad regulatory and damages powers to bring companies to task for securities violations, and earning him the moniker "Sheriff of Wall Street." The statute has gained a measure of notoriety as a mighty – some would say too mighty – sword. Most notably, as it was strengthened in 1955, the statute permits the attorney general to seek criminal penalties and to pursue claims without proving either "scienter" (the knowing commission of an illegal act) or intent to defraud. The Act also allows far-reaching investigation by the attorney general, adding broad administrative, pre-litigation discovery provisions to the attorney general's already existing subpoena power. After Spitzer, his successor, Andrew Cuomo, used the Martin Act to go after the energy industry, seeking information regarding companies' corporate disclosures concerning climate change risk.

The question addressed in yesterday's New York Court of Appeals decision concerns the right and ability of private investors to bring Martin Act-type claims related to securities transactions. It has long been settled that the statute does not provide for a private right of action; it is a sword the attorney general alone may wield. *See CPC Int'l v. McKesson Corp*, 70 N.Y.2d 268 (1987) (dismissing Martin Act claims brought by private litigant but allowing pursuit of common-law fraud claims); *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236 (2009) (purchaser's claims for failure in condominium plan disclosures was precluded because it was premised entirely on the Martin Act). However, many state and federal courts in New York have gone even further, interpreting the CPC and Kerusa decisions to mean that private litigants' non-fraud common law claims – sounding in, for example, misrepresentation, breach of fiduciary duty, or gross negligence – were precluded. (Most courts, on the other hand, had allowed pursuit of claims such as common-law fraud, reasoning that such claims do not overlap exactly with Martin Act claims, because they require a showing of additional elements like intent). Some New York courts, however, had ruled that common law claims were not precluded. Judges in the Southern District were also split. *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 354 (S.D.N.Y. 2010) (Marrero, J.) (common law claims not precluded*); In re J.P. Jeanneret Associates*, 769 F. Supp. 2d 340 (S.D.N.Y. 2011) (McMahon, J.) (common law claims precluded).

Now the Court of Appeals has resolved the issue, meaning that the defense of Martin Act preclusion will no longer be available to securities defendants in New York. The court, in a 6-0 opinion authored by Judge Victoria A. Graffeo, holds in *Assured Guaranty* that "an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies." Observing that the Martin Act "does not expressly mention or otherwise contemplate the elimination of common-law claims" and finding *CPC* and *Kerusa* to stand only "for the proposition 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," the court now finds investors may pursue such common-law claims regardless of the Martin Act.

The court rejected policy arguments advanced by J.P. Morgan – accepting those made by Attorney General Eric T. Schneiderman – and opined that "the purpose of the Martin Act is not impaired by private common-law actions that have a legal basis independent of the statute because proceedings by the attorney general and private actions further the same goal – combatting fraud and deception in securities transactions."

As it resolves a longstanding indecision in the courts, yesterday's decision from New York's highest appellate court is likely to have a significant impact.