NJ Supreme Court Rules that NJ Uniform Securities Law Does Not Bar Investment Adviser From Seeking Damages Over Verbal Job Offer

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The Supreme Court of New Jersey recently cast doubt on the applicability of the federal "family office" exception for investment advisers under the New Jersey Uniform Securities Law (NJUSL) while allowing the plaintiff to seek reliance damages based on an oral promise of employment despite the express language of the NJUSL prohibiting enforcement of an investment advisory agreement not in writing. While the long-term impact of this decision remains to be seen, investment advisers and those who hire them should be mindful of the issues presented in this case when discussing and entering into employment relationships.

In *Goldfarb v. Solimine*, A-24 083256 (N.J. Feb. 18, 2021), Jed Goldfarb, an investment research analyst offering investment advice, alleged that David Solimine offered him a job managing the Solimine family investment portfolio. Though neither the job offer nor the terms of employment were reduced to writing, Goldfarb left his lucrative job in reliance on the oral offer and began providing Solimine with investment advice. Solimine later told Goldfarb that he would not employ him, leading to the suit. Following a jury trial, Goldfarb obtained a judgment in his favor on his promissory estoppel claim, allowing him to recover damages based on the promises of employment made by Solimine and relied on by Goldfarb to his detriment. The parties appealed.

The Supreme Court of New Jersey addressed two issues. First, the Court addressed whether the NJUSL, which requires investment advisory contracts to be reduced to writing, barred a promissory estoppel claim and, if not, whether Goldfarb may obtain reliance damages as opposed to expectation damages. Solimine argued that Goldfarb could not bring an action based on an oral contract because the NJUSL's regulations prohibit entering into investment advisory contracts not in writing. Goldfarb countered that his claim was not based on an unwritten employment agreement, but rather on Solimine's oral promise of employment.

The Court agreed that the NJUSL, and its regulations regarding dishonest and deceptive practices, intends to forbid the enforcement of an investment advisory contract that has not been reduced to writing. The Court further acknowledged that the purpose of the requirements under the NJUSL, such as the writing requirement, is to prevent fraud from being perpetrated upon the

public. Nevertheless, the Court determined that promissory estoppel and breach of contract are not equivalent causes of action, such that the NJUSL's ban on suits on "the contract" would also prohibit suits based on promissory estoppel. Moreover, the Court reasoned that Goldfarb's promissory estoppel claim did not seek enforcement of the employment agreement or that he receive the benefit of the bargain, but instead that he be placed in the position he would have been in had the relied-upon promise not been made and later broken. The Court, therefore, held that the NJUSL does not bar a promissory estoppel claim for reliance damages, and remanded the matter for a new trial on damages.

Justice Albin dissented. In his view, the NJUSL barred an investment adviser from bringing any suit based on an oral contract, whether on legal or equitable grounds. Justice Albin further predicted that this decision opens the door to future litigation, as it creates an opportunity for investment advisers to seek reliance damages for any work rendered under oral agreements.

Second, the Court considered whether the federal family office exception to the definition of an investment adviser is incorporated into the NJUSL. Goldfarb claimed an exemption from the writing requirement under the family office exception, stating that he was not an investment adviser within the meaning of the NJUSL. Under N.J.S.A. 49:3-49(g)(2)(vi), an investment adviser does not include any person excluded from the definition of an "investment adviser" under the federal Investment Advisers Act of 1940. Specifically excluded from the definition of investment adviser under 15 U.S.C. 80b-2(a)(11)(G) is "any family office, as defined by rule, regulation, or order of the [Securities and Exchange] Commission." The Court declined to determine the issue but expressed "serious doubt" regarding its incorporation because the NJUSL was enacted in 1997 and the federal family office exception was not adopted until 2010. In doing this, the Court explained that when a statute incorporates another, only the terms of the incorporated statute, *as it then exists*, become part of the incorporating statute, absent language to the contrary.

Those in the investment advisory sector in New Jersey should be mindful of the implications of this case when discussing future employment opportunities. The fact-driven nature of claims for promissory estoppel and reliance damages, including the reasonableness of any reliance, will be the subject of future debate by counsel in settlement negotiations and litigated matters. In addition, investment advisers that have relied on the federal family office exception to provide investment advice without adhering to the duties and obligations of the NJUSL, including the writing requirement, should pay particular attention to the Court's concern regarding whether that exception has been incorporated into the NJUSL.

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