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The Martin Act and Common-Law Claims

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In a decision troublesome to the business community, the New York Court of Appeals has now determined that the New York Martin Act does not preempt private plaintiff lawsuits based solely upon traditional common-law causes of action such as negligence and breach of fiduciary duty — even where there may be overlap with statutory claims reserved to the New York Attorney General. From the fact that the Act itself had been held years ago not to give rise to a private cause of action, numerous rulings from both New York State and Federal courts held that the Act preempted non-fraud common-law tort claims. Deeming itself unable to find anything in either the text of the statute or its legislative history that would support such preemption, the Court affirmed a more recent ruling by the Appellate Division, First Department, and ruled the doctrine out. *Assured Guarantee (UK) Ltd. v. J.P. Morgan Investment Management Inc., No. 227 (N.Y. Dec. 20, 2011)*.

In doing so, the Court nevertheless reaffirmed its prior rulings that the Martin Act itself creates no private right of action and that preemption would continue to exist where the claim is entirely dependent upon a violation of the Martin Act or its implementing regulations, including certain specific real estate provisions that are part of the Act.

The holding does not mean that all such common-law claims may proceed unfettered. For example, third parties seeking to hold accounting firms liable in negligence for claimed erroneous certifications must still meet a rigorous test under New York law of establishing "actual privity of contract" or "a relationship so close as to approach that of privity" with the auditor. *See, e.g.*, *Parrott v. Coopers & Lybrand, L.L.P., 95 N.Y.2d 479 (N.Y. 2000)*. And albeit a class action claim may be predicated upon negligence, breach of fiduciary duty or contract, if the complaint nonetheless includes allegations of "misrepresentation or omission" in connection with the purchase or sale of an exchange-listed security, the action may be deemed precluded by the

Federal SLUSA statute. *See, e.g.*, *Romano v. Kazacos, 609 F.3d 512 (2d Cir. 2010)*. Moreover, any common-law claim must satisfy the essential elements of the particular cause of action involved. Nevertheless, the decision manifestly opens a wide variety of claims under New York State law — invoking standards less rigorous than intentional fraud — that for some years previous had been deemed foreclosed.