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COMMENTARY & ANALYSIS

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Goldfarb v. Solimine: Promissory Estoppel Claim for Reliance Damages Not Barred by New Jersey Uniform Securities Law's "Writing Requirement" for Investment Advisory Contracts; Applicability of Federal "Family Office Exception" to the Definition of "Investment Adviser" in Doubt

On February 18, 2021, the New Jersey Supreme Court, in *Goldfarb v. Solimine*, __ N.J. __, 2021 N.J. LEXIS 161 (2021), held that the New Jersey Uniform Securities Law, *N.J.S.A.* 49:3-47 to -89 (the "Act")—which prohibits entering into "any investment advisory contract, unless such contract is in writing," *N.J.S.A.* 49:3-53(a), and forecloses "any suit on [such a] contract," *N.J.S.A.* 49:3-71(h)—did not bar the plaintiff's promissory estoppel claim seeking reliance damages on an alleged oral agreement of employment. The Court did, however, express its "reservations" about whether the federal "family office exception" applies to state law, raising new questions about whether New Jersey family offices may be subject to the Act and its requirements.

Promissory Estoppel Claims Not Barred by "Writing Requirement"

Plaintiff Jed Goldfarb, an investment adviser, alleged that the defendant, businessman David Solimine, had made to Mr. Goldfarb an oral promise of employment to "manag[e] defendant's family's sizable investment portfolio." *Goldfarb*, 2021 N.J. LEXIS 161, at *14. The investment adviser allegedly relied on that oral promise and quit his job. The would-be employer, Mr. Solimine, allegedly then reneged on the oral promise of employment. In his lawsuit, the plaintiff sought to recover not "expectation" damages or "benefit-of-the-bargain" damages—*i.e.*, damages equal to the amount of money that the plaintiff would have received if the defendant had upheld his end of the alleged agreement—but rather "reliance damages," that is, damages equal to the amount of money that the plaintiff would not have lost or forgone had he never met the defendant.

The Act's no-suit provision declares that "[n]o person who has made or engaged in the performance of any contract in violation of any provision [of the Act or rule thereunder, such as the requirement that investment advisory contracts must be in writing] may base any suit on the contract." The New Jersey Supreme Court focused on the phrase "on the contract," and concluded that because the plaintiff's promissory estoppel claim was not a claim for breach of

contract and did not seek expectation damages, it was not "a suit base[d] on the contract" and thus not barred by the Act. *Goldfarb*, 2021 N.J. LEXIS 161, at *26.

Doubts Raised as to Applicability of Federal "Family Office Exception"

The Court did, however, express its "reservations" about whether the federal "family office exception" is incorporated into the Act. The plaintiff had argued that he was not an "investment adviser" within the meaning of the Act because the Act specifies that an "investment adviser" does not include "any person that is . . . excluded from the definition of an 'investment adviser' under . . . 15 U.S.C. § 80b-2(a)(11)," and that federal statute expressly excludes any "family office," as defined by rule, regulation or order of the Securities and Exchange Commission, 15 U.S.C. § 80b-2(a)(11)(G). Because "the employment he was offered would fit within th[e] federal definition of 'family office,'" *Goldfarb*, 2021 N.J. LEXIS 161, at *31, the plaintiff argued, he was not an "investment adviser" within the meaning of the Act, and therefore not subject to the Act's proscription against unwritten investment advisory contracts.

The Court observed that the "family office exception" was enacted in 2010 as part of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act—thirteen years after the Act was passed, thus casting doubt on whether the earlier adopted Act could be construed to incorporate the later adopted federal exception. Although the Court did not reach the issue, it suggested that the Act does *not* incorporate the federal "family office exception." *See Goldfarb*, 2021 N.J. LEXIS 161, at *34 ("[W]e underscore our reservations about the portion of the Appellate Division's reasoning that has its foundation in the belief that [the plaintiff's] claim was saved from application of the [Act] by operation of the federal family office exception.").

The Court's "reservations" could have significant effects on investment professionals. After *Goldfarb*, a "family office" in New Jersey may potentially be considered an "investment adviser" under the Act, even if it is not considered an "investment adviser" under federal law. To the extent that New Jersey-based family offices have until now operated believing that they are not subject to the Act, those family offices arguably could find themselves subject to state registration requirements (*see N.J.A.C.* 13:47A-2.1) (requiring the filing of Form ADV with the New Jersey Bureau of Securities), regulations governing the maintenance of books and records (*see N.J.A.C.* 13:47A-2.6) and the supervision of employees (*see N.J.A.C.* 13:47A-2.12), and other compliance obligations. Absent clarification from the legislature, state regulators, or a definitive holding from the New Jersey Supreme Court, the applicability at the state level of the federal "family office exception" will remain in doubt.

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