



California Corporate & Securities Law

NY District Court Finds That Same Plaintiff In ARS Case Has No California Securities Law Claims

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In this Friday the 13th [post](#), I wrote about The Anschutz Corporation's (TAC) success in having California law apply to its negligent representation claims against the defendant New York rating agencies. Thus, it may come as a surprise to learn that a different federal district court judge has rejected TAC's California securities law claims.

TAC had filed a complaint alleging various federal and state law claims against various underwriters of auction rate securities (ARS) and rating agencies. TAC's claims against certain of these defendants were transferred to the Southern District of New York. *In re Merrill Lynch Auction Rate Secs. Litig.*, 2011 U.S. Dist. LEXIS 14053, *31-32 (S.D.N.Y. Feb. 9, 2011). TAC alleged that the underwriting defendants had violated California Corporations Code Sections 25400 and 25401. Chief District Court Judge Loretta Preska, however, found that TAC had failed allege that it had been injured by any conduct in California.

Judge Preska's requirement that the injury occur in California is not consistent with the statutes. The statutes proscribe certain conduct "in this state". Therefore, a violation occurs when the *conduct*, not necessarily the *injury*, occurs "in this state". The "in this state" requirement in Section 25400 was extensively analyzed in *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036 (1999). Section 25401, moreover, refers specifically to someone who offers or sells a security (or buys or offers to buy). These terms are defined in painstaking detail in Corporations Code Section 25008, a topic that I discuss in this July 2009 [article](#).

Judge Susan Illston in the California action, *The Anschutz Corp. v. Merrill Lynch & Co.*, Fed. Sec. L. Rep. (CCH) P96,258 (N.D. Cal. March 27, 2011), was aware of Judge Preska's ruling but found that TAC's allegations were different:

Here, unlike the cases relied on by the Court in the Merrill Lynch opinion, there is conduct in California that resulted in the alleged harm to plaintiff. The ARS at issue were purchased in California by plaintiff's agent. That conduct is sufficient to allow plaintiff to bring claims under California's Corporation Code.

By the way, if you suffer from friggatriskaidekaphobia, you are in the clear for the rest of this year as last Friday was the one and only Friday the 13th of the year. However, your respite is only temporary as next year Friday will fall on the thirteenth in three months (January, April and July).

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