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AUCTION RATE SECURITIES - MASSACHUSETTS

Tutor Perini Corporation v. Banc of America Securities LLC

United States Court of Appeals, First Circuit - November 21, 2016 - 842 F.3d 71

Investor in student loan auction rate securities sued broker-dealer and its parent company, asserting securities fraud claims under federal and state law, by alleged misrepresentations and omissions regarding auction rate securities market that eventually collapsed, and asserting various state law claims.

The United States District Court for the District of Massachusetts granted defendants summary judgment. Investor appealed.

The Court of Appeals held that:

- Parent company was not liable for securities fraud as control person;
- Summary judgment was precluded on state securities fraud claim;
- Summary judgment was precluded on federal securities fraud claim;
- Investor waived any objection to summary judgment on federal securities fraud claim based on unsuitability;
- Summary judgment was precluded on state negligent misrepresentation claim;
- Investor waived any argument regarding state intentional misrepresentation claim; and
- Summary judgment was precluded on state unfair business practices claim.

Parent of subsidiary broker-dealer, that allegedly engaged in securities fraud in violation of federal and state securities laws in connection with sales of student loan auction rate securities to investor, was not liable as control person, due to actions of two employees of parent and two dual employees of parent and subsidiary who analyzed maximum rate waivers and liquidity risks for deciding which auctions to fail, since investor never in four years of litigation ever alleged any facts indicating that parent actually exercised control over subsidiary.

Investor waived argument that parent of subsidiary broker-dealer, that allegedly engaged in securities fraud in violation of federal and state securities laws in connection with sales of student loan auction rate securities to investor, was liable as control person due to broker-dealer needing parent’s approval to expand its inventory of auction rate securities, since investor failed to bring that argument to district judge’s attention, and made no argument that any exception to raise-or-waive rule applied.

Investor waived arguments concerning many instances of allegedly material misstatements by broker-dealer that sold student loan auction rate securities to investor, in violation of Massachusetts securities fraud law, since investor had not raised arguments before district court.

Investor waived argument that municipal securities rulemaking board issued rule creating independent disclosure duty for broker-dealers, where investor failed to raise argument in district court.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's securities fraud claim against broker-dealer under Massachusetts law.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse and whether investor reasonably relied on outdated information that broker-dealer disclosed regarding state of auction rate securities market, thus precluding summary judgment on investor's securities fraud claim against broker-dealer.

Investor waived any objection to district court's ruling that investor's suitability claim, under § 10(b), against broker-dealer that sold student loan auction rate securities to investor was barred due to investor holding non-discretionary brokerage account in which investor directed all investments made, since investor cited no authority to support its view that nondiscretionary account holders could bring unsuitability claims and investor's appellate pleadings failed to offer any convincing explanation of what law should be, assuming investor found no on-point authority.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's claim against broker-dealer for negligent misrepresentation under Massachusetts law.

Investor waived any arguments regarding dismissal of intentional misrepresentation claim against broker-dealer, under Massachusetts law, in connection with auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, where investor's opening appellate brief suggested district judge erred in dismissing claim, but investor's appellate papers never explained how that was so.

Genuine issues of material fact remained as to whether broker-dealer acted unfairly or deceptively by making material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's claim against broker-dealer for unfair business practices in violation of Massachusetts law.

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