

BofA, Others Tell Court To Toss NJ Bond Marketing Claims

By Jeannie O'Sullivan

Law360 (August 24, 2021, 4:43 PM EDT) -- Bank of America NA and other companies acting as New Jersey's agents for state-issued bonds urged a judge Tuesday to toss a complaint alleging they failed to market the securities at the best possible prices for each, arguing that they weren't required to set individually tailored interest rates.

During an oral dismissal motion held remotely, defense attorney Lawrence S. Lustberg of Gibbons PC argued that an amended version of the long-running False Claims Act litigation doesn't identify the contractual obligations the financial institutions allegedly shirked with respect to selling the tax-exempt bonds, known as variable rate demand obligations or VRDOs.

Lustberg said those purported obligations and other specifics were missing from a municipal adviser's whistleblower lawsuit accusing BofA, along with Citigroup, JPMorgan Chase, Morgan Stanley and Wells Fargo & Co., of "robo-resetting" interest rates using a standardized method instead of factoring in current market conditions and doing other legwork to fetch the lowest rates for each bond. As a result, the rates were inflated and New Jersey allegedly overpaid for the services.

"You will see the relator has identified no — no — contractual provision to reset VRDO rates actively and individually," Lustberg told Mercer County Superior Court Judge Douglas Hurd.

The fourth amended version of the 2015 complaint may include "somewhat greater detail" and "numerous new paragraphs," Lustberg said, but it's the exact same argument the court previously rejected for its lack of particulars.

Attorney Daniel W. Levy of McKool Smith, representing plaintiff Edelweiss Fund LLC, said the defendants were correct that they're not expressly required to "actively and individually" reset the bond rates. However, the need to factor in prevailing market conditions in setting the interest rates "encompasses actively and individually," he said.

The defendants further argued the lawsuit is also precluded by the public disclosure bar, meaning that the complaint is based on public reports such as news stories, instead of on the firsthand knowledge required to support FCA claims.

The facts informing the lawsuit were made publicly available by the media and on the industry website Electronic Municipal Market Access, or EMMA, argued Morgan Stanley attorney Kathleen L. Carlson of Sidley Austin LLP.

"Relator has no firsthand knowledge of alleged fraud," Carlson told the court.

Edelweiss Fund has filed more than 20 FCA lawsuits around the nation, Carlson said. The Massachusetts Supreme Court dismissed one of them earlier this year on public disclosure bar grounds, she said.

Levy countered that the public disclosure bar didn't apply because the information came at a cost. Edelweiss Fund spent \$100,000 on a forensic analysis to determine how the financial institutions set the VRDO interest rates, he said.

"This is not a parasitic relator who found a delicious nugget in the news," Levy told the court.

Levy repeatedly said he was "shocked" at his adversaries' arguments, and at one point alluded to the standard governing dismissal motions. A complaint can survive "as long as the facts alleged suggest a cause of action," he said.

"Fact-finding and looking for plausible explanations is not the function of the court at this stage," Levy said.

The financial institutions since 2009 have served as remarketing agents for more than 200 New Jersey VRDOs, roughly valued at \$7.7 billion at issuance, court records show.

Edelweiss Fund principal B. Johan Rosenberg, a registered municipal adviser, conducted a years-long investigation uncovered a coordinated scheme, according to an amended version of the complaint filed in March.

Under the alleged scheme, the financial institutions "mechanically set the rates en masse without any consideration of the individual characteristics of the bonds or the associated market conditions and without any effort to broadly market the bonds to those investors who would have been willing to hold the bonds at the lowest interest rates possible."

One rate resetting method detailed in the complaint entailed determining by how many basis points a VRDO's interest rate should differ relative to the Securities Industry and Financial Markets Association index. That rate would be placed in a formula to dictate the rest of the rates, "without regard to changes in any individualized characteristics."

The scheme allows the banks to collect millions of dollars annually in remarketing fees from the state, despite doing "the exact opposite of what New Jersey hires them to accomplish," the complaint said.

During Tuesday's argument, Levy blasted the defendants' "complete and utter failure of judgment" in failing to research prevailing market conditions by, for example, consulting VRDO investors.

But Lustberg questioned where those obligations were specified.

"Now they're adding more detailed requirements that could have been placed in the contracts, but were not," Lustberg said.

Edelweiss Fund LLC is represented by Robert A. Magnanini and Michael A. Clore of Stone & Magnanini LLP and Daniel W. Levy of McKool Smith.

The defendants are represented by Aguilar Bentley LLC, Gibbons PC, Greenberg Traurig LLP, Harrison Law LLC, Jones Day, Pashman Stein Walder Hayden PC, Paul Weiss Rifkind Wharton & Garrison LLP, Sidley Austin LLP and Wilmer Cutler Pickering Hale and Dorr LLP.

The case is New Jersey ex. Rel. Edelweiss Fund LLC v. JPMorgan Chase et al., case number MER-L000885-15, in the superior Court of New Jersey, Mercer County.

--Editing by Amy Rowe.

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