IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATE OF IDAHO, Department of Finance, Plaintiff, -vs- FIRST LENDERS INDEMNITY CORPORATION, a Florida corporation and NICK J. ANDROLEWICZ, Defendant.	Case No. CV 99-05261 MEMORANDUM DECISION ON SUMMARY JUDGMENT

I.

PRELIMINARY STATEMENT

This matter is before the Court on Motions for Summary Judgment filed by the State of Idaho, Department of Finance against the defendant, Nick J. Adrolewicz (hereafter referred to as Androlewicz) and also the Motion for Summary Judgment filed by Adrolewicz. The State of Idaho, Department of

Finance, is represented by Deputy Attorney General Scott B. Muir. Nick J. Adrolewicz is represented by Jeffery J. Ventrella, of ELAM & BURKE, P.A.

The Court has been advised in oral arguments that the remaining defendant, First Lenders Indemnity Corporation, is presently in bankruptcy. The Court assumes that a Federal stay order is in effect in the Bankruptcy Court. By this opinion, the Court intends to deal solely with the claims and defenses pertaining to Adrolewicz.

II.
STATEMENT OF FACTS

The Court finds that the following facts are shown by the record without dispute. Androlewicz is an independent insurance agent with offices in Canyon County. He has been engaged in this business for 18 years and sells life, health, annuities, and other related insurance products. Androlewicz is not registered as a security broker under Idaho State laws.

In mid-1995,Androlewicz became an agent or authorized salesman for First Lenders Indemnity Corporation (hereinafter FLIC) in the sale of 9 month notes being issued by FLIC. Neither FLIC or the 9 month notes were registered with the Department of Finance, State of Idaho.

During the summer of 1996,Androlewicz was able to sell three of the notes to individuals as follows:

Purchaser	Date of Issuance	Amount of Note	Due Date
Gross	6/15/1996	$32,000	3/11/1997
Arellano	8/01/1996	$30,000	4/27/1997
Lassley	8/15/1996	$25,000	5/11/1997

None of the notes were paid, and counsel indicated to the Court in oral arguments that FLIC is in bankruptcy.

The record does not contain any evidence thatAndrolewicz made any independent investigation concerning the trustworthiness of FLIC or the notes being issued by FLIC. Apparently, the only investigation conducted by Androlewicz was to read the sales literature sent to him by FLIC. The record of devoid of any evidence that Androlewicz made an independent investigation into the company whose products he was selling. The states of Minnesota, Missouri, and Kansas had each issued Cease and Desist orders to FLIC during 1994 concerning the investments being issued by it. In addition, FLIC was under investigation by the Securities and Exchange Commission, presumably for unlawful practices.

III.
ISSUES

1. Are the Notes in question a "security" under the Idaho Securities Act.

2. If the Notes are a security, are they an exempt security under the Idaho Securities Act.

3. If the Notes are non-exempt securities, has the Statute of Limitations run against any or all of the causes of action being brought by the State.

IV.
ANALYSIS

1. <u>The Notes are a "security" under the Idaho Securities Act.</u>

The Idaho Securities Act contains a definition of "security" in I.C. § 30-1402(12) as follows:

(12) "Security" means any note, stock treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, collateral-trust certificate..."

Thus, under the wording of the statute, a note is a security which is covered by the Securities Act. This fact is conceded by Androlewicz in his brief.

However, Androlewicz invites the Court to interpret the meaning of the word "note" in the statute and to substitute the definition set forth in the federal statute 15 U.S.C.§78c(10) which defines a note to exclude a note having a maturity date not exceeding nine months. Androlewicz argues that such linguistic gymnastics are necessary under I.C. § 30-1457 in order to effectuate the stated purpose of making uniform the laws of other states having a similar Securities Act.

The Court must decline Androlewicz's invitation to engage in the interpretation of the statute. The phrase "security means any note..." is not ambiguous in any way. It is very direct and blunt. One of the principal rules of statutory construction is that if the statute is unambiguous it should be given effect as written. The courts should engage in statutory construction only when the statute is ambiguous. *State v. Barnes*, 124 Idaho 379, 859 P.2d 1387 (1993); *State v. McCoy*, 128 Idaho 362, 913 P.2d 578 (1996). This statute is not ambiguous. The statute contains the very simple and direct statement that *any* note is a security. This does not need interpretation. *State v. Sheets,* 610 P.2d *760* (N.Mex. 1980.

2. The Notes involved in this action are not exempt.

Androlewicz contends that even if the notes are considered as securities that they are exempt under one of exemptions set out in the Securities Act. A party claiming an exemption under the Securities Act has the burden of establishing all of the elements of the exemption claimed. *State v. Shama Resources Ltd.*, 127 Idaho 267, 899 P.2d 977 (1995); *Mayfield v. H.B. Oil & Gas*, 745 P.2d 732 (Okla,1982); *All-State Const.Co. v. Gordon* 425 P.2d 16 (Wash 1967).

Specifically the defendant claims that the notes involved in this matter are exempt under the provisions of I.C. § 30-1434 (j) which states as follows:

"(j) any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transaction and which evidences an obligation to pay cash within nine (9) months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited or any guarantee of such paper or of any such renewal when such commercial paper is sold to the banks or insurance companies,"

Under the section, in order to qualify for the exemption Androlewicz must establish the following elements: 1) that the note is commercial paper; 2) arising out of or used in a current transaction; 3) due in nine (9) months from issue; and 4) sold to the banks or insurance companies. The last element, the sale to banks or insurance companies, was grafted onto the Uniform Securities Act by the Idaho legislature. However, it is consistent with the intention of the uniform act,

and of the Federal Securities Act.[1] This particular exemption is generally construed to apply to high grade, short term promissory notes and other negotiable paper issued and held by commercial entities. *S.E.C.v. American Bd. Of Trade, Inc.*, 751 F.2d 529 (2nd Cir.1984); *Zabriskie v. Lewis*, 507 F.2d 546 (10th Cir. 1974); *S.E.C. v. Coffey*, 493 F. 2d 1304 (6th Cir. 1974). The exemption came about in the Federal Securities Act at the prompting of the Federal Reserve Board, who sought to exempt bankers acceptances or to short-term paper used for obtaining funds for current transactions in commerce. [2] It appears that the Idaho Legislature intended to restrict the scope of this exemption by making it apply solely and specifically to banks and insurance companies. The Court finds that the notes involved in this action were sold and purchased as investments and that the notes do not fall within the commercial exemption contained within I.C. § 30-1434 (j).

Androlewicz also claims that his transactions are exempt from regulation under the provisions of I.C. § 30-1435(i) which exempts "any transaction pursuant to an offer directed by the offeror to not more than ten (10) persons in this state...." Androlewicz argues that since he only made three presentations of the offering to the three persons named in the complaint that he comes within this exemption. However, Androlewicz is not the "offeror"; the offeror in all of these transactions is FLIC. The record does not support a finding that FLIC limited its sales effort to only ten persons within Idaho. The record would support

[1] The Court specifically rejects as nonsensical,Androlewicz's argument that the reference to banks and insurance companies only apply to "renewals" of commercial paper and not to the original issue.

an assumption that FLIC was anxious to sell as many of its notes as it could within Idaho. The fact that Androlewicz only made three presentations of the FLIC investment does not prove that the *offeror* had limited the offer to only 10 Idaho residents.

3. The Three Year Statute of Limitations.

Androlewicz contends that the Statute of Limitations has run against all causes of action which could be asserted against him either under the provisions of I.C. § 30-1446 (3) (ISA civil liabilities); or under the provisions of I.C. § 5-218 (an action upon a liability created by statute).

The State argues that since this action is brought under the provisions of I.C. § 30-1442 (which directs the State take action "whenever" the Department of Finance discovers a violation) there is no statute of limitations.

The Idaho Securities Act provides a civil remedy for victims harmed by the violation of the statute. Such private actions are required to be filed within three years from the contract of sale. Specifically I.C. 30-1446(3) provides: "No person may sue under this section more than three (3) years after the contract of sale." Under this section, any action brought by the victims in this matter, Gross, Arrellano, and Lassley, would have to be brought within 2 years of the acceptance of their money and the issuance of the notes.

Androlewicz contends that this section precludes a recovery of the victim's civil liability against him. He argues further that if this section does not preclude

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[2] For a general history of this exemption see 39 *University of Chicago Law Review* "Commercial Paper and Securities Acts" 364 at 380 (1972).

the action against him that the State's action is precluded by the general Statute of Limitations contained in I.C.§ 5-218 which provides, in relevant part:

> 5-218. Statutory liabilities, trespass, trover, replevin, and fraud. -- Within three(3) years:
> 1. An action upon a liability created by statute...."

The State argues that since its action was filed under the enforcement provisions of I.C. § 30-1442, which does not contain a specific limitation of actions, the State is never foreclosed from bringing action. The State directs focus to the word "whenever" and argues that the use of this word must be taken as meaning that there is no statute of limitations on the enforcement activities of the State under the act. As authority for this proposition the State relies on the District Court opinion of Judge Callister in the 1991 case of *State of Idaho v. A-Mark Precious Metals, Inc. et. al.* Case No. 89-1055, which, indeed, held that the use of the word "whenever" in both the Federal Commodities Exchange Act and the Idaho Securities Act negates the existence of any statute of limitation.[3] Judge Callister treated the Federal Commodities Exchange Act and the Idaho Securities Act alike solely because of the similarity of wording –both acts use the word "whenever" when referring to the commencement of enforcement actions by the government. Judge Callister also noted that the Idaho Securities Act is similar in wording to the federal securities act. However, it does not appear that there is a general statute of limitations statute in the federal system which is similar to I.C. § 5-218. If the word "whenever" is construed to mean that there is no statute of limitations on enforcement actions by the Department of Finance under the ISA it

would have the effect of repealing I.C.§5-218. The Court does not believe that the Idaho legislature intended by its innocuous use of the word "whenever" to repeal the general statute of limitation contained in § 5-218.

It is a general principal of statutory construction that statutes on the same subject matter must be harmonized when possible. This rule is stated in *Cox v. Mueller*, 125 Idaho 734, 874 P.2d 545, (1994) as follows:

> "It is axiomatic that this Court must assume that whenever the legislature enacts a provision it has in mine previous statutes relating to the same subject matter. Sutherland "Statutory Construction" § 51.02 (Norman J. Singer ed. 1992). In the absence of any express repeal or amendment the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Id. Therefore, statutes relating to the same subject, although in apparent conflict are construed to be in harmony if reasonably possible. Id.; *Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963).

There is also a presumption that the Legislature never intends to repeal a pre-existing statute by implication. *Greenwade v. Idaho State Tax Com'*. 119 Idaho 501, 808 P.2d 420 (1991); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

The word "whenever" does not necessarily refer to the time period for the filing of an action by the Director. In fact, such a construction seems strained at best. The word "whenever" could easily be replaced by the phrase "if conditions exist that" without changing the meaning of the statute ("If conditions exist that it appears to the director that any person...", etc). The word refers to the existence of a breach of law which requires or prompts action by the Director. The action that the Director takes must comply with the laws governing such actions

[3] Since this opinion is not filed in this case but appears only as an attachment on the State's Brief, the Court is appending a copy of Judge Callister's opinion to this decision so that it becomes a

including I.C.§ 5-218. When viewed in this manner the two statutes are entirely harmonious and correctly state the intentions of the Legislature.

The Court concludes that the Statute of Limitations has run against any action maintainable by the Department of Finance against Androlewicz and that Summary Judgment should be entered in favor of Androlewicz and against the State of Idaho dismissing the State's action against Androlewicz. The Court finds that this decision adjudicates all matters between the State and the defendant Androlewicz and that there is no reason to delay making this a final judgment against those parties.

Counsel for Androlewicz is directed to prepare a final judgment containing a Rule 54(b) certification for the Courts signature.

Dated this 12 day of January, 2000.

GERALD L. WESTON

Gerald L. Weston
District Judge

part of the record.

CERTIFICATE OF SERVICE

STATE OF IDAHO)
) ss
COUNTY OF CANYON)

I hereby certify that I served true and correct copies of the foregoing document upon the following:

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either by depositing the same in the U.S. mail, first class postage prepaid, or by personal service.

Dated this 7 day of January, 2000.

G. Noel Hales, Clerk
Clerk of District Court

Deputy Clerk