

BEFORE THE DIVISION OF SECURITIES

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

	:	
	:	RECOMMENDED ORDER ON
IN THE MATTER OF	:	MOTION TO DISMISS
FIRST WESTERN ADVISORS, INC., CRD #13623;	:	Case Nos. SD-07-0015
GARY W. TERAN, CRD #1076442;	:	SD-07-0016
DAVID A. RUSSON, CRD #1194052;	:	SD-07-0017
BRIAN G. KASTELER, CRD #2182796; and	:	SD-07-0018
CARL A. PAGE, CRD #710908	:	SD-07-0019
	:	
	:	

Appearances:

Mark W. Pugsley and Maria E. Heckel for Respondent First Western Advisors, Inc.

D. Scott Davis for the Division of Securities

BY THE ADMINISTRATIVE LAW JUDGE:

This adjudicative proceeding was initiated pursuant to the issuance of a February 16, 2007 Notice of Agency Action, accompanied by a February 15, 2007 Petition. The notice recites that Wayne Klein, Director of the Division of Securities, is the presiding officer in this case. The notice also recites an administrative law judge may be assigned after the initial pre-hearing conference and that Laurie Noda, Assistant Attorney General, would represent the Division in this proceeding.

Pursuant to an April 24, 2007 notice, Mr. Klein recused himself from serving as the hearing officer in this proceeding.

The notice recites that this proceeding as to Respondents Teran, Russon, Kasteler and Page has been resolved. The notice also recites a tentative agreement had been reached with Respondent First Western Advisors, Inc., but that agreement was withdrawn before it was entered.

The April 24, 2007 notice also recites that Mr. Klein believed this proceeding had been resolved as to all Respondents and he was involved in some discussions with Division staff regarding this proceeding after the tentative agreement with Respondent First Western Advisors, Inc. had been reached. Accordingly, Mr. Klein recused himself under those circumstances and ordered that this case be transferred to Administrative Law Judge J. Steven Eklund for further proceedings.

Respondent First Western Advisors, Inc. filed a June 1, 2007 motion and supporting memorandum to dismiss this proceeding as untimely. The Division - through substitute counsel D. Scott Davis - filed an October 12, 2007 memorandum opposing Respondent's motion to dismiss. Respondent filed an October 25, 2007 reply memorandum. Respondent also filed an October 25, 2007 notice that its motion is fully briefed, at issue and ready for oral argument.

Oral argument was conducted on November 27, 2007. At the conclusion of oral argument, the Court granted Respondent two (2) weeks (until December 11, 2007) to file a supplemental submission

regarding the legislative history of statutes relevant to the motion under review. The Court ordered Respondent to provide that supplemental submission to the Division for its review and possible response prior to filing with this Court. The Court informed respective counsel that it would then contact said counsel within the following two (2) weeks to advise counsel of its action on the pending motion.

Respondent's December 11, 2007 supplemental submission was received by the Court on December 12, 2007. Respondent provided a copy of that submission to Mr. Davis. The Court received a December 27, 2007 electronic submission from Mr. Davis, which recites the Division received Respondent's December 11, 2007 letter and, since that submission was made separately to the Court, respective counsel agreed the Division could file a brief response.

The Division's December 27, 2007 electronic transmission sets forth that response and recites a copy was provided to counsel for Respondent. The Division also submitted a December 27, 2007 notice that Respondent's motion is ripe for decision.

Based on a review of the above described submissions and oral argument, the Court now enters the Undisputed Facts, its Conclusions of Law and submits the following Recommended Order to Mr. Klein for his review and action as the presiding officer in this proceeding:

UNDISPUTED FACTS

1. Respondent First Western Advisors, Inc. is, and at all time relevant to this proceeding has been, licensed as a broker-dealer in this state. Respondent became so licensed November 10, 1983.

2. The allegations of wrongdoing in the February 15, 2007 Petition are primarily based on allegedly inappropriate mutual fund sales which occurred between 1998 and June 2003. The allegations in the February 15, 2007 Petition are largely premised on an investigation conducted by the Securities and Exchange Commission (SEC), which includes testimony taken by the Commission prior to the Fall and Winter of 2003.

3. Licenses issued by the Division to broker-dealers and agents expire on December 31 of each year. Broker-dealers and agents are required to annually file a renewal application to maintain their licensure. Broker-dealers and agents are also required to amend any document filed with the Division at any time if the information set forth in the initial document becomes inaccurate or incomplete in any material respect.

4. Respondent's agents filed amendments to their license renewal applications in August 2004 with the Central Registration Depository (CRD), thus notifying the Division that an SEC investigation was pending regarding allegedly improper sales of Class B mutual funds. The Division renewed Respondent's broker-

dealer license at the close of 2004.

5. Respondent's agents again filed amendments with the CRD to their license renewal applications in March 2005, thus disclosing that the SEC closed its investigation of Respondent and its agents. The SEC investigation was closed on March 21, 2005 and the just described amendments were filed with the CRD on March 26, 2005.

6. The Division received the SEC's investigative files in late Spring or early Summer 2005. The Division renewed Respondent's license at the close of December 2005. The Division again renewed Respondent's license at the close of December 2006.

7. The February 15, 2007 Petition recites the Division is seeking the revocation of Respondent's broker-dealer license. That Petition also recites the Division seeks to bar Respondent from the securities industry and to impose a fine.

8. The February 15, 2007 Petition has not been amended since it was filed. However, the Division's October 12, 2007 memorandum opposing Respondent's motion recites the Division will not seek a revocation or suspension of Respondent's broker-dealer license in this proceeding. Rather, the Division has certified it will now only seek the entry of judicial findings that Respondent's alleged conduct violated the law and it will confine the relief sought in this proceeding to the imposition of a fine.

CONCLUSIONS OF LAW

Respondent contends this proceeding should be dismissed as barred by the statute of limitations set forth in Utah Code Ann. §61-1-6(5). Respondent asserts this proceeding, which was filed on February 16, 2007, is based on the prior SEC investigation and the Division had knowledge of that investigation as early as August 2004, yet nevertheless repeatedly renewed Respondent's license in 2004, 2005 and 2006. Accordingly, Respondent urges this proceeding should be dismissed because it was not timely initiated, as required by the above referenced statute.

Respondent alternatively contends this proceeding should be dismissed as untimely filed based on the statute of limitations established by §61-1-21.1(1). Specifically, Respondent asserts that alleged violations of securities law prior to February 2002 should be dismissed as barred by the five (5) year limitation period established by that statute.

The Division contends it does not seek to revoke or suspend Respondent's license in this proceeding and, given the express terms of §61-1-6(5), that statute does not apply to any other sanction which the Division may pursue based on its allegations of Respondent's misconduct.

The Division next asserts that, if §61-1-6(5) applies to this proceeding, the limitation period established by that statute does not commence so long as the Division exercised

reasonable diligence in its investigation of possible wrongdoing by Respondent. The Division also urges that a "fact or transaction", as that language is used in §61-1-6(5), does not become known based solely on an investigation, but only when there has been a judicial or administrative adjudication as to that matter.

Specifically, the Division contends it received the information from the SEC investigation in late Spring or early Summer 2005, the case was assigned to a Division investigator in August 2005 and voluminous documents and transcripts had to be reviewed before the Division's investigation was completed with the filing of the February 15, 2007 Petition. Given those circumstances, the Division asserts it acted with reasonable diligence and §61-1-6(5) does not apply in this proceeding.

The Division next contends §61-6-21.1(1) only applies to criminal prosecution of securities violations. Relying on *Rogers v. Division of Real Estate*, 790 P.2d 102 (Ut. App. 1990), the Division contends that "an administrative disciplinary hearing is not a civil proceeding", but rather "a special, somewhat unique, statutory proceeding" and that civil statutes of limitation are inapplicable to administrative disciplinary proceedings. *Id.* at 105-06.

The Division thus argues neither §61-1-6(5) nor §61-1-21.1(1) apply to this case and there is no other specific

legislative authority which establishes any limitation period governing this proceeding. The Division urges Respondent's motion should be denied.

§61-1-6(1) generally provides:

Subject to the requirements of Subsections (2) and (3), the director, by means of adjudicative proceedings conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act, may issue an order:

- (a) denying, suspending, or revoking any license;
- (b) barring or censuring any licensee... from employment with a licensed broker-dealer or investment advisor;
- (c) restricting or limiting a licensee as to any function or activity of the business for which a license is required in this state;
- (d) imposing a fine; or
- (e) any combination of Subsections (1)(a) through (d).

§61-1-6(5) provides:

The division may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to it when the license became effective unless the proceeding is instituted within the next 120 days.

This Court initially concludes the language of those statutes should be applied with due regard for the specific words and phrases used in each statute. If either statute is ambiguous, a review of the legislative history of these statutes

is appropriate to ascertain - if possible - the intent of the legislature regarding the application of §61-1-6(5).

§61-1-6(1) contains the phrase "adjudicative proceedings", which is defined in §63-46b-2(1)(a) as "an agency action or proceeding described in §63-46b-1". Subsection (1)(a) of that statute provides that the Administrative Procedures Act governs:

...all state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all agency actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license... .

§61-1-6(1) identifies the various agency actions which the Division may take in adjudicative proceedings governed by the Administrative Procedures Act.

§61-1-6(2) authorizes the Division to impose the sanctions permitted by Subsection (1) based on conduct set forth in §61-1-6(2). The Court notes §61-1-6(2)(f) allows the Division to impose the sanctions of Subsection (1) if the licensee is the subject of:

(i) *an adjudication or determination, within the past five years by a securities or commodities agency or administration of another state, Canadian province or territory, or a court of competent jurisdiction...or*

(ii) *an order entered within the past five years by the securities administrator of another state or Canadian province or territory or by the Securities and Exchange Commission denying or revoking license as a broker-dealer...*

(Emphasis added).

The Court also notes §61-1-6(2)(f), which provides as follows:

(iii) the division may not commence agency action *to revoke or suspend any license* under Subsection (2)(f) more than one year from the date of the order relied on... (Emphasis added).

Significantly, the just quoted italicized language differs from the phrase "a suspension or revocation proceeding" used in §61-1-6(5). The Court readily concludes that, if the Division initiates an adjudicative proceeding to revoke or suspend a license, §61-1-6(5) would apply to such a proceeding and, based on the application of the remaining provisions of that statute, might bar the Division from initiating the proceeding.

When the Division initiates an adjudicative proceeding to revoke or suspend any license pursuant to §61-1-6(1)(a), §61-1-6(5) could potentially bar that proceeding. If the Division initiates a proceeding to bar any licensee from employment with a licensed broker-dealer, to censure that licensee, to restrict or limit the licensee as to any function or activity for which a license is required or to impose a fine, as respectively authorized by §61-1-6(1)(b), (c) and (d), the Court concludes §61-1-6(5) would not apply as to potentially preclude any of those proceedings.

Given the specific language of §61-1-6(5), that statute only provides a limitations period for a proceeding pursuant to §61-1-6(1)(a). §61-1-6(5) contains no broad language that all disciplinary actions taken by the Division are subject to the

limitation period established by that statute. See §58-1-401(5), which reflects such general applicability of limitation periods to disciplinary actions by the Division of Occupational and Professional Licensing.

The complicating factor in the instant case is that the February 15, 2007 Petition clearly recites the Division initiated this proceeding to prompt entry of an order revoking Respondent's broker-dealer license, barring all Respondents from the securities industry and imposing fines. The prayer for relief in that Petition reiterates the Division's request that an order be entered to revoke Respondent's broker-dealer license, to bar all Respondents from association from any broker-dealer and to fine all Respondents in an amount to be determined at the hearing in this proceeding.

The Court duly acknowledges the Division's urgency that it no longer seeks the entry of an order to revoke Respondent's license and would now only pursue the entry of a fine in this proceeding. Nevertheless, the relief sought in the February 15, 2007 Petition squarely establishes that this proceeding was initiated as a "revocation or suspension proceeding" within the meaning of §61-1-6(5). The fact that the Division also initially sought the entry of a fine and the Division no longer seeks to revoke or suspend Respondent's license does not alter the nature of this proceeding as it was initiated or the potential

applicability of §61-1-6(5) to this proceeding.

While this Court cannot reasonably conclude that the just referenced statute applies to all of the potential actions identified in §61-1-6(1), it is readily apparent to this Court that the statute of limitations under review may bar any proceeding initiated by the Division which includes the possible revocation or suspension of a license.

Based on the submissions made by the parties following the oral argument conducted on Respondent's motion, the Court concludes the legislative history of §61-1-6(1) and (5) provides only limited guidance for purposes of ruling on this motion. §61-1-6(1), which was enacted in 1963, authorized the Division to deny, suspend or revoke any registration subject to the remaining provisions of that statute. Subsection (2)(b) also provided that "a suspension or revocation proceeding" could not be instituted "on the basis of a fact or transaction known to it when the registration became effective" unless the proceeding were instituted within the next thirty days.

§61-1-6(1), as enacted in 1990, expanded the actions which the Division may take as to any registration. Specifically, the Division was granted the authority to bar or censure any registrant, to restrict or limit a registrant as to any function or activity of the business for which registration were required and to impose a fine. §61-1-6(3) was also modified to lengthen

the limitations period to 120 days. However, that statute continued to reference only "a suspension or revocation proceeding".

§61-1-6(1), as amended in 2003, separately delineated the various actions which the Division may take pursuant to that statute. §61-1-6(3) was renumbered as §61-1-6(5). However, the substantive language of that statute remained unchanged.

Thus, the array of sanctions available to the Division under §61-1-6(1) was expanded in 1990, but there has never been any substantive change to §61-1-6(5) regarding the nature of proceedings to which a limitation period may apply. The Court concludes such a discrepancy provides no measurable guidance in review of Respondent's motion. However, the Court reiterates that the nature of this proceeding was duly identified by the February 15, 2007 Petition, such a proceeding falls within the scope of §61-1-6(5) and the Division's subsequent election to forego seeking a revocation or suspension of Respondent's license does not alter that fact.

The next question to be addressed is whether this proceeding is based on a fact or transaction known to the Division when Respondent's license became effective. The Court initially notes the phrase "fact or transaction", as used in §61-1-6(5), is distinct from "an adjudication or determination", as contained in §61-1-6(2)(f)(i). The Division urges it did not "know" of the

"fact or transaction" on which this proceeding is based until the Division completed its investigation of all Respondents and decided to file the February 15, 2007 Petition.

Specifically, the Division asserts:

...a fact known... is limited to a judicially determined fact and does not include information discovered by the state during investigations. *In re Shearson Loeb Rhoades, Inc. & Burleson, Blue Sky Law Rep. (CCH) para. 71, 666 (Mass. Sec. Div. Sept.24, 1981).*

However, the Iowa Supreme Court in *Blinder Robinson & Co. Inc. V. Goettsch, 431 N.W.2d 336, 339 (Iowa 1988)* concluded to the contrary. The *Blinder* Court stated:

It does not seem reasonable that the legislature intended the statute of limitations to apply only to those investigations based on judicially determined facts and not to proceedings based on other information. If this was the legislature's intention, that intention would have been clearly stated. We do not interpret the word "fact" ...to be limited to judicial determinations. *Id.* at 340.

The *Blinder* Court proceeded to explain as follows:

...*facts* are not limited to judicial determinations, they consist of information which the plaintiff has actual notice of, or, upon the exercise of reasonable diligence should have known of. *Id.* (Emphasis in original).

Moreover, the *Blinder* Court also stated:

Here, *Blinder's* registration was renewed twice before the superintendent made a detailed investigation of the material provided by *Blinder*. While the superintendent has forcefully argued the necessity of diligent

enforcement of Iowa's Blue Sky laws, this argument is undercut by the untimely undertaking of this investigation...Our holding requires the administrator to exercise reasonable diligence in reviewing information provided for investigation. Id. at 341.

The *Blinder* Court finally concluded as follows:

While the production of documents does not, in itself, provide the superintendent with actual notice, the two-year delay in undertaking a detailed review of those documents does not demonstrate the exercise of reasonable diligence. Id. at 340-41.

The *Blinder* Court concluded that the statute of limitations under review does not "take effect so long as the superintendent exercises reasonable diligence." Id. at 341.

This Court concludes that most of the above-quoted rationale from the *Blinder* case is persuasive and should be relied upon to resolve the remaining issues presented by Respondent's motion. The Division received notice of the SEC investigation as to Respondent's agents. It is critically significant that the Division received the SEC's investigative files in the late Spring or early Summer of 2005 and the Division elected to renew Respondent's license at the close of 2005. The Division again renewed Respondent's license at the close of 2006.

Despite whatever independent and/or supplemental investigation which the Division elected to pursue beyond its review of the SEC investigative files, the fact remains that the Division renewed Respondent's license at the close of 2005 on an unconditional and pro forma basis. Whatever investigation the

Division believed was warranted during the approximate eighteen (18) months from mid 2005 to the close of 2006, the Division again renewed Respondent's license in late 2006 on an unconditional and pro forma basis with no apparent regard for the facts or transactions reflected in the SEC investigative file.

The Division is properly charged with knowledge of the facts and transactions set forth in the SEC's investigative file. The renewal of Respondent's license and any potential disciplinary action on that license represents licensing and enforcement actions, respectively. The Court concludes the Division's decision to renew Respondent's license with knowledge of the matters set forth in the SEC's investigative files and its decision to not initiate this disciplinary proceeding until February 16, 2007 reflects a lack of reasonable diligence.

Based on the foregoing, the Court reluctantly - but necessarily - concludes the Division failed to timely initiate this proceeding and §61-1-6(5) applies to bar this proceeding as to Respondent. One final matter should be addressed. The Court readily concludes §61-1-21.1(1) does not apply to this proceeding. As stated by the *Rogers* Court:

...an administrative disciplinary hearing is not a civil proceeding...It is a special, somewhat unique, statutory proceeding, in which the disciplinary board investigates the conduct of a member of the profession to determine if disciplinary action is appropriate to maintain sound professional standards of conduct and to protect the public. *Id.* At 105-06.

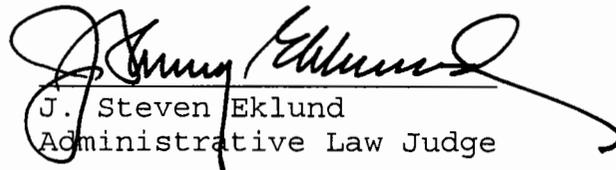
to maintain sound professional standards of
conduct and to protect the public. Id. At 105-06.

Accordingly, §61-1-21.1(1) does not apply to this revocation or
suspension proceeding.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED that Respondent's June 1, 2007
motion to dismiss the February 15, 2007 Petition is granted and
that Petition shall thus be dismissed with prejudice, consistent
with the views expressed herein.

I hereby certify that on the 7th day of January, 2008,
the foregoing Motion to Dismiss and Recommended Order was
submitted to Wayne Klein, Director of the Division of Securities,
for his review and action.


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF	:	ORDER
FIRST WESTERN ADVISORS, INC., CRD #13623;	:	Case Nos. SD-07-0015
GARY W. TERAN, CRD #1076442;	:	SD-07-0016
DAVID A. RUSSON, CRD #1194052;	:	SD-07-0017
BRIAN G. KASTELER, CRD #2182796; and	:	SD-07-0018
CARL A. PAGE, CRD #710908	:	SD-07-0019
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	:	

BY THE DIVISION:

The attached Undisputed Facts, Conclusions of Law and Recommended Order is hereby adopted by the Division, effective the date of this Order.

Dated this 8TH day of January 2008.

Wayne Klein

Wayne Klein
Director, Presiding Officer



Agency review of this Order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, within thirty (30) days after the date of this Order. The laws and rules governing agency review are found in Section 63-46b-12 of The Utah Code, and Section R151-46b-12 of The Utah Administrative Code.

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of January, 2008, a copy of the foregoing Recommended Order on Motion to Dismiss and Order was sent, by certified mail, postage prepaid, to Mark W. Pugsley and Maria E. Heckel, Ray, Quinney & Nebeker, P.C., 36 South Main Street, Suite 1400, P. O. Box 45385, Salt Lake City, Utah 84145-0385. A copy of the Motion to Dismiss, Recommended Order and Order was also hand delivered to D. Scott Davis, Assistant Utah Attorney General, 160 East 300 South, Fifth Floor, Salt Lake City, Utah 84114-0872.



Pamala Radzinski
Pamala Radzinski
Executive Secretary