

ALS

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11377

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 17, 2004

SECURITIES AND EXCHANGE COMMISSION
MAILED FOR SERVICE

FEB 19 2004

FIRST CLASS

In the Matter of :
:
GRANT THORNTON LLP, :
DOEREN MAYHEW & CO. P.C., : ORDER
PETER M. BEHRENS, CPA, :
MARVIN J. MORRIS, CPA, and :
BENEDICT P. RYBICKI, CPA :

The Securities and Exchange Commission ("Commission") instituted this proceeding, against two accounting firms and three individual certified public accountants ("CPAs") employed at those firms, on January 20, 2004, and ordered that the Administrative Law Judge issue an initial decision no later than 300 days after service of the Order Instituting Proceedings ("OIP"). It is essential to expedite the proceeding and resolve issues prior to hearing to the extent possible.

The proceeding is authorized pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934; the OIP authorizes cease-and-desist orders and disgorgement pursuant to those sections. The proceeding is also authorized pursuant to Rule 102(e) of the Commission's Rules of Practice ("Rule 102(e)"); the OIP authorizes "remedial action" pursuant to that rule. The OIP charges Respondents with causing, aiding and abetting, or committing various violations of the securities laws, and with improper professional conduct within the meaning of Rule 102(e). Respondents' Answers to the OIP include an affirmative defense that the proceeding and the relief requested in the OIP are barred, in whole or in part, by the statute of limitations.

The Respondents' alleged misconduct relates to an audit performed for MCA Financial Corporation ("MCA"). The OIP alleges that, on April 28, 1998, Respondents issued a report containing an unqualified audit opinion on MCA's annual financial statements, which were included in MCA's 1998 annual report on Form 10-K filed with the Commission. Also, the OIP alleges, on May 19, 1998, Respondents consented to the inclusion of their report in MCA's Post-Effective Amendment to a Form S-1 Registration Statement for a debenture offering. However, the OIP alleges, the financial statements, which MCA used to entice investors to purchase its debentures, were materially false and misleading and failed to comply with generally accepted accounting principles. The OIP alleges that MCA ceased operations on January 22, 1999, and filed a voluntary Chapter 11 bankruptcy petition on February 10, 1999.

The OIP does not identify any alleged conduct by Respondents after May 19, 1998. This raises the question as to whether the proceeding and the relief authorized in the OIP are barred, at

least in part, by 28 U.S.C. § 2462, a statute of general applicability that provides a five-year statute of limitations for “an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.” See Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996).¹ Specifically, the OIP authorizes “remedial action” pursuant to Rule 102(e).² Such “remedial action” may be subject to the five-year statute of limitations in 28 U.S.C. § 2462.³ Rule 102(e) provides, “The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing [to have engaged in improper professional conduct, violated the securities laws, etc.]” The Commission has not explicitly determined whether such sanctions against a CPA fall within the ambit of 28 U.S.C. § 2462.⁴

It may be possible to streamline the proceeding and avoid wasting public and private resources by dismissing the Rule 102(e) aspect of the proceeding as barred by the five-year statute of limitations provided by 28 U.S.C. § 2462. Before the undersigned decides this issue, the parties will have an opportunity to brief it. The parties may file opening briefs on or before February 27, and responsive briefs on or before March 5.



Carol Fox Foelak
Administrative Law Judge

¹ In Johnson, the court ruled that a Commission “proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was a proceeding ‘for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise,’ within the meaning of § 2462.” 87 F.3d at 485.

² Disgorgement, which restores the status quo ante, is not barred by the five-year statute of limitations in 28 U.S.C. § 2462. Johnson, 87 F.3d at 491; Joseph J. Barbato, 53 S.E.C. 1259, 1279 (1999). Likewise, cease-and-desist orders are not subject to 28 U.S.C. § 2462. Herbert Moskowitz, 77 SEC Docket 481, 500-02 (Mar. 21, 2002).

³ The censure and suspension in Johnson were described as “remedial action.” Johnson, 87 F.3d at 486; Patricia A. Johnson, 52 S.E.C. 253, 260 (1995).

⁴ See George Craig Stayner, 67 SEC Docket 425, 425-26 (May 14, 1998) (dismissing a proceeding against a CPA who argued, citing Johnson, that the proceeding, instituted eight years after his alleged misconduct, was barred by the statute of limitations. The Commission declined to address the statute of limitations issue, but noted the age of the events at issue.) See also, Russell Ponce, 73 SEC Docket 442 (Aug. 31, 2000) (barring a CPA from practice before the Commission with a right to reapply in five years). The Commission, acknowledging the holding in Johnson, held that the CPA had waived any statute of limitation defense by failing to raise it. The Commission stated that there was serious misconduct within the five-year period preceding the institution of the proceeding and that additional, earlier misconduct could be considered to determine motive, intent, or course of conduct. Ponce, 73 SEC Docket at 465-67.