

Notably, all statutes of limitations for any claims released under the Settlement Agreement are tolled from the date on which the agreement was signed.

In the event that the Fund fails to pay the \$45 million described above by December 31, 2009, Jeepers may elect, in its sole discretion, to terminate the Settlement Agreement in its entirety. In such a case, the releases discussed above would be declared null and void, the statutes of limitations would once again begin to run, and Jeepers could assert any claim it wishes as against the Fund or its principals and agents. In the event that Jeepers does not receive its full \$45 million payment by December 31, 2009, under paragraph 7 of the Settlement Agreement, it will have until **January 15, 2010** to terminate. After such date, Jeepers will have waived any right to terminate the Settlement Agreement.

(b) Substantive Claims against the Fund, its Principals, and its Agents

Should Jeepers elect to terminate the Settlement Agreement by the mechanism described above, Jeepers could pursue claims both for breach of contract and for fraud. Under Section 15.2 of the Fund's Second Amended and Restated Limited Partnership Agreement ("LP Agreement"), Jeepers has agreed to arbitrate all disputes arising between it and the Fund. *See* LP Agreement at § 15.2 ("The Partners waive their right to seek remedies in court, including any right to a jury trial. The partners agree that in the event of any dispute arising between the parties, such dispute shall be settled by arbitration..."). The substantive laws of the state of Delaware would apply to resolve any claim brought in an arbitration under this provision. It should be noted that the scope of this arbitration provision is quite broad and that if Jeepers attempted to file claims against the Fund in a court it would almost assuredly be met with a motion to compel arbitration. Such a motion would be difficult to defeat given the strong policies favoring arbitration.¹

The following subsections explore the relative strengths and weaknesses of the claims Jeepers might bring against the Fund.

(i) Breach of Contract

Under the terms of the Fund's Confidential Memoranda and other investor communications, for purposes of defining withdrawal dates under the Amended and Restated Limited Partnership Agreement each investment tranche is treated as an individual Capital Account. Because each of Jeepers's investment tranches are subject to a two year lock-up (per the January 11, 2005 side letter), the only two tranches that would have been eligible for redemption in November 2006 are the June 2003 and January 2005 tranches -- precisely the tranches for which Jeepers is entitled to payment under the Settlement Agreement.

¹ The arbitration provision applies to "the parties . . . and their respective successors, executors, administrators, legal representatives, heirs and assigns," such that claims against the Fund's counsel, Schulte Roth & Zabel, would likely fall within the scope of this clause but claims against other parties, including Dubin and Highbridge, likely would not. *See* LP Agreement at § 15.9.

Under this contractual analysis the best case recovery for Jeepers under a contract theory would be the full value of the June 2003 and January 2005 investment tranches. However, under the Settlement Agreement, Jeepers is already entitled to this best case scenario, effectively receiving 100 cents on the dollar for its contract claim.² Indeed, the Settlement Agreement places Jeepers in a more favorable position than it would otherwise be in should it sue on a contract theory, as the agreement groups it with a small number of limited partners who made valid redemption requests prior to December 31, 2007 -- effectively putting Jeepers at the front of the line and guaranteeing payment on the same terms as these other limited partners. Moreover, the Settlement Agreement values the June 1, 2003 investment as of June 30, 2007 and the January 1, 2005 investment as of March 31, 2007, both of which are sure to be greater than their present value.³

(ii) Fraud

In theory, Jeepers would have the ability to seek recovery of the full amount of the money it invested with the Fund under a fraud theory. Such a claim would be premised upon the idea that the Fund talked Jeepers out of making a request for a complete redemption at a time when, according to the Fund's own admission, Jeepers would have had a right to do so. There is, however, a significant weakness to Jeepers's potential fraud claim in that the Fund will argue that Jeepers cannot show the requisite element of reasonable reliance necessary to state a claim for fraud. *See Caldera Properties-Lewes/Rehoboth VII v. Ridings Development, LLC*, 2009 WL 2231716, at *28 (Del. Supr. 2009) (noting elements of fraud as a false representation made by defendant, knowledge that it was false, that the statement was made with the intent to induce the plaintiff to act or refrain from acting, that plaintiff's inaction or action was taken in justifiable reliance thereupon, and that plaintiff suffered damage as a result of such reliance). The argument would be made that, because Jeepers was a sophisticated party with counsel advising it as to its redemption rights, Jeepers's reliance on statements made by the Fund with respect to such rights was not reasonable. Thus, the Fund will argue, Jeepers could not reasonably have relied on Zwirn's statement that Jeepers had no redemption rights in November 2006 and could not prove that it was defrauded out of removing its money at that time. Such an argument is inherently factual, and is unlikely to be resolved without significant litigation expense. Additionally, the litigation risks of asserting such a claim must be weighed against the fact that if Jeepers were to terminate the Settlement Agreement it would lose its preferred status guaranteeing it payment at

² Of course, Jeepers still has the right to receive the value of its three other investment tranches, as explicitly reserved in the final sentences of paragraphs 6(a) and 6(b).

³ To the extent that the Fund may have consented to different terms for the partial withdrawal of funds under Section 9.2 of the LP Agreement, any such oral consent would be invalid under Section 15.3 which requires all "notices, demands, elections, requests or other communications that any party to [the] Agreement may desire or be required to give" to be "in writing." Any argument that Jeepers relied on the oral statements made by the Fund would sound in fraud, not contract, and would be subject to the same caveats identified with respect to the fraud claims discussed herein.

the same time and under the same terms as the small group of limited partners who had submitted valid requests before December 31, 2007. Thus, if the Fund were to start satisfying such requests after Jeepers terminates, it would lose its right to preferential payment and would run the real risk that, even if it were to obtain a favorable judgment on its fraud claim down the line, the Fund would lack sufficient funds to satisfy that judgment.⁴

2. Potential Claims Against Glenn Dubin and Highbridge Capital

You have also asked us to examine what claims, if any, Jeepers might have against Glenn Dubin and/or Highbridge based upon representations made by Dubin that Jeepers should not withdraw its complete investment from the Fund. A threshold question exists as to the scope of the release contained in the Settlement Agreement and whether such release extends to protect Dubin and Highbridge. Such question is explored in subsection 2(a). Subsection 2(b) then discusses some of the various claims that might be asserted against Dubin and Highbridge, and when such claims could be raised.

(a) The Scope of the Settlement Agreement Release vis-à-vis Dubin and Highbridge

The releases described in paragraph 6 of the Settlement Agreement are broad in scope, both with respect to the types of claims released and the parties against whom such claims are released. The first question that must be addressed is whether Dubin and Highbridge are one of the parties against whom claims have been released under the Settlement Agreement. If that is so, claims may only be pursued as against them if Jeepers terminates as described above. Paragraph 6(a) reads, in pertinent part, that Jeepers:

fully and irrevocably release[s] the Fund, D.B. Zwirn Partners, LLC, D.B. Zwirn & Co., L.P., DBZ GP, LLC, Zwirn Holdings, LLC, and each of their predecessors, successors, parents, subsidiaries, affiliates, divisions, officers, present and former directors, members partners, principals, employees, **agents**, shareholders, assigns, heirs, executors, administrators, trusts, trustees, and counsel...

(emphasis added).

There is authority to suggest that a party may be released under a settlement agreement in one capacity but not released in another. In *Behkor v. Bear, Stearns & Co., Inc.*, No. 96 Civ.

⁴ In the case of termination, Jeepers might have a separate fraudulent inducement claim against Schulte Roth & Zabel, the Fund's counsel, for withholding material information from Jeepers during the course of the settlement negotiations and for wrongfully inducing Jeepers to enter into the Agreement. However, it is clear that no claim against Schulte Roth could be pursued absent termination, as they are released under the terms of paragraph 6.

4156 (LMM), 2004 WL 2389751, at *4-5 (S.D.N.Y. Oct. 25, 2004), for example, the court analyzed a settlement and release under New York law and found that, because the parties seeking the benefit of a release were released in their capacity as agents of the signatory, the scope of the contractual release would apply only to cover those transactions where the parties acted as agents, and not as to acts taken outside that capacity. (“[T]he release applies only to those transactions where either BSSC or Bear Stearns acted as Josephthals’ “agent.” . . . Therefore, the release’s application to Bear Stearns is limited to those transactions where BSSC (Bear Stearns’s subsidiary) or Bear Stearns itself acted as Josephthal’s agent . . .”)

Thus depending on the claim Jeepers brings against Dubin and/or Highbridge, such claim may or may not have been released under the Settlement Agreement. More specifically, should Jeepers wish to bring a fraud or negligent misrepresentation claim against Dubin or Highbridge, based upon statements made at the Fund’s behest, such claims would be covered by the release above because Dubin would have made such comments in his capacity as agent for the Fund. However, if Jeepers were to bring a fiduciary duty claim against Dubin or Highbridge, on the theory that they breached an independent duty to you or Jeepers as an investment advisor (for instance), there is an argument to be made that such a claim would not fall under the releases in paragraph 6(a) because they are not dependent upon Dubin’s status as an agent of the Fund, but are rather premised upon a wholly independent duty.

(b) Substantive Claims Against Dubin and Highbridge

To the extent that Jeepers wishes to pursue claims against Dubin and Highbridge, whether now or at some time in the future, Jeepers likely would have the right to bring such claims in a court rather than before an arbitrator. Dubin and Highbridge are not parties to the LP Agreement entered into between the Fund and Jeepers, and Section 15.9 of that Agreement does not appear to inure to the benefit of Dubin or Highbridge. Such claims would have to be brought in a court where both venue and jurisdiction over the defendants is proper.⁵

(i) Breach of Fiduciary Duty

In order to state a claim for breach of fiduciary duty under New York law, Jeepers would need to plead and prove (1) the existence of a fiduciary duty; (2) misconduct of the defendant; and (3) damages that were directly caused by that misconduct. *See Kurtzman v. Bergstol*, 40 A.D. 3d 588, 590 (2d Dep’t 2007). Thus, as a prerequisite Jeepers would need to identify and establish that Dubin and Highbridge owed it a fiduciary duty and that Dubin and Highbridge

⁵ It is our understanding that venue would be proper in New York because the misrepresentations to Jeepers took place in that state, and that jurisdiction could be held over Dubin and Highbridge as they are domiciled in New York. Should Jeepers wish to pursue claims as against Dubin or Highbridge in another jurisdiction, including the Virgin Islands, it would need to establish personal jurisdiction and state a basis as to why venue would be proper there. At present, we do not know of a basis to assert either venue or proper jurisdiction outside of New York as against these defendants.

violated that duty by urging Jeepers not to remove its money. Inherent to this claim is the assertion that Dubin was acting in a fraudulent or negligent manner when making such statements, and that the statements were actually false when made. To the extent that the fiduciary duty claim is dependent upon such a fraud theory, it suffers from the same defects identified above.

New York law does not provide a uniform statute of limitations for a breach of fiduciary duty claim; rather such claim is dependent upon the nature of the allegations supporting such a breach claim. Where, as here, an allegation of fraud is essential to a breach of fiduciary duty, courts have applied a six year statute of limitations, running from the date of the alleged injury. *See* CPLR 213(8); *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003) (noting six year statute applicable to breach of fiduciary duty claim premised on underlying claim that partner misappropriated business opportunities). Thus, the statute of limitations on a fiduciary duty claim should run from the date of the alleged misrepresentations (November 2006) and expire in November 2012.⁶ If, however, the breach of fiduciary duty claim is premised upon another underlying theory, or the court declines to follow the precedent applying a six year statute of limitations to a fraud-based breach of fiduciary duty claim, the statute of limitations would expire in November 2009.

(ii) Fraud

Jeepers currently is barred from pursuing a fraud claim as against Dubin and Highbridge pursuant to the releases in the Settlement Agreement, as explained above. However, for this reason the statute of limitations for such a claim is tolled. Should Jeepers elect to terminate the Settlement Agreement, the statute will begin to run again and Jeepers might be able to bring a fraud claim against Dubin and Highbridge. However, the hurdles to such a claim as discussed above in section 1(b)(ii) equally are applicable to Dubin and Highbridge, including the difficulty of establishing actual reliance. Moreover, Jeepers would have to establish that any statements made by Dubin which induced him to remain invested were both false and known to be false by Dubin at the time they were made.

Fraud claims are subject to a six year statute of limitations under CPLR 213(8). Thus, Jeepers's fraud claim would expire in August 2013 (six years from the date of injury plus the nine months of tolling assuming Jeepers terminates the agreement in January 2010).

(iii) Negligent Misrepresentation

Jeepers might also be able to bring a negligent misrepresentation claim against Dubin and Highbridge if it elects to terminate the Settlement Agreement. New York courts generally

⁶ To the extent that the Settlement Agreement bars a fiduciary duty claim, the statute of limitations on any such claim would be tolled under paragraph 7.

recognize that negligent misrepresentation involves most of the same elements as does fraud, with a negligence standard substituted for the scienter requirement. *See Mia Shoes, Inc. v. Republic Factors Corp.*, 1997 WL 525401, at *3 (S.D.N.Y. 1997); *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 300 A.D. 2d 963 (3d Dep't 2002). A plaintiff can only recover for negligent misrepresentation where "there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another. The special relationship requires a closer degree of trust than that in an ordinary business relationship." *Wright v. Selle*, 27 A.D. 3d 1065, 1066-67 (4th Dep't 2006). Thus, Jeepers would need to establish that Dubin had a special relationship of trust that created a duty on his part to impart correct information. Against that backdrop, Jeepers would have to plead and prove that (1) Dubin knew that the statement was going to be used by Jeepers for a particular purpose; (2) that Jeepers did in fact rely on the statement in furtherance of that purpose; and (3) that Dubin acted in a way that linked him to Jeepers and understood that Jeepers would rely on the statement. Of course, the statements made by Dubin would have to be false in order to be actionable as well. *See Portnoy v. Am. Tobacco Co.*, No. 96/16323, 1997 WL 638800, at *6 (N.Y. Sup. Ct. Suffolk Co. Sept. 26, 1997).

Negligent misrepresentation claims are subject to a six year statute of limitations under CPLR 213(8) running from the date on which the plaintiff relied on the misrepresentation. *See Milin Pharmacy, Inc. v. Cash Register Systems, Inc.*, 173 A.D.2d 686, 687 (2d Dep't 1991) ("The Supreme Court properly determined that the plaintiff's cause of action sounding in negligent misrepresentation is governed by a six-year statute of limitations and that it was therefore timely interposed."); *Lasher v. Albion Central School Dist.*, 38 A.D.3d 1197 (4th Dep't 2007). Thus, like Jeepers's fraud claim, its claim for negligent misrepresentation would expire in August 2013 (six years from the date of injury plus the nine months of tolling assuming Jeepers terminates the agreement in January 2010).

3. Recommendations for Future Action

We understand that you have negotiated an extension until August 10, 2009 in which to decide whether to exercise your rights under paragraph 7 of the Settlement Agreement to terminate that Agreement. We believe at this time that the only compelling reason to exercise those rights at this time -- rather than in January 2010 -- would be out of concern that any statute of limitations might run. As discussed above, the statutes of limitations for any claims against the Fund or its principals and agents is tolled by operation of that same paragraph. With respect to claims against Dubin or Highbridge, to the extent those claims are covered by the Settlement Agreement they are tolled as well and to the extent claims are not so covered, the earliest date upon which the statute may run is November 2009.

Under C.P.L.R. 306-b, a party has 120 days from the date it files a complaint in New York state court to serve that complaint on the defendants. This means that Jeepers could elect to file a complaint against Dubin and Highbridge this Fall before the earliest possible date when the statute of limitations for a breach of fiduciary duty claim might run and then hold service in abeyance until after December 31, 2009 when Jeepers can make a determination as to whether it wishes to terminate the Settlement Agreement in accordance with paragraph 7. If it elects to do

so, Jeepers could then, to the extent proper, amend its complaint to join any of the potential defendants and claims discussed above and serve such complaint at that time.