COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN JUDICIAL CENTER
SUPERIOR COURT

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; AND MBIA INSURANCE CORPORATION
Plaintiff

v.

UBS FINANCIAL SERVICES, INC. ET AL.

CIVIL No.: **SJ2019CV07932**

COURT No.: **806**

IN RE: **DAMAGES FOR *ACTOS PROPIOS* (OWN ACTS), AND UNILATERAL DECLARATION OF WILL**

DECISION

Under consideration before us are the *Application to Dismiss,* submitted on September 16, 2020 by Defendants (hereinafter "Investment Banks"); *Objection to the Application to Dismiss*, submitted on October 7, 2020 by Plaintiff (hereinafter "National"); *Reply to the "Objection" to the "Application to Dismiss,"* submitted on November 6, 2020 by Investment Banks; and *Rejoinder*, submitted on November 25, 2020 by National.

I. BRIEF PROCEDURAL BACKGROUND

On August 8, 2019, National submitted a *Complaint* for damages under the doctrines of *actos propios* (own acts) and unilateral declaration of will, against UBS Financial Services Inc.; UBS Securities LLC; Citigroup Global Markets Inc.; Goldman Sachs & Co. LLC; J.P. Morgan Securities LLC; Morgan Stanley & Co. LLC; Merrill Lynch, Pierce, Fenner & Smith Inc.; Rbc Capital Markets, LLC; and Santander Securities LLC (hereinafter "Investment Banks"). In it, it claimed that, in order to facilitate the marketing and sale to investors of bonds issued by the Commonwealth of Puerto Rico and its instrumentalities, Investment Banks solicited irrevocable insurance on these bonds from National. National asserted that Investment Banks submitted drafts of the Official Statements, and subsequently a final version thereof, along with the insurance application for each of the bonds.

It stated that, in doing so, Investment Banks represented to National that the issuances complied with federal laws and municipal bond market customs and norms, which require Investment Banks to reasonably investigate the bond offering documents and information, and to report if any part of the information is false or substantially incomplete. Thus, National asserted that the Official Statements submitted by Investment Banks along with the insurance application were key when it came time to assess the risks inherent to insuring each bond. According to National, these Official Statements described the bonds, including representations on the solvency of the issuing entities, their ability to repay the debt, and the proposed uses of the money that would be raised, among others. National claimed that from these Official Statements arises Investment Banks' responsibility to conduct a thorough and reasonable investigation on the truth and completeness of the bond terms, to thereby have a reasonable basis to believe that the information is true and complete.

National stated that, relying in good faith on Investment Banks' representations in the Official Statements, it issued billions of dollars in irrevocable insurance policies on the bonds. However, Plaintiff argued that, contrary to these representations, Investment Banks did not do their due diligence and did not investigate the information contained in the Official Statements, which turned out to be false and incomplete. National added that the Official Statements overestimated the issuers' debt service coverage ratios and projected revenues, and hid the fact that the issuers had not spent and were not going to invest the funds as represented. It asserted that, due to the issuers' default on the debt, National has had to pay out over $720 million in claims from investors. National stated that, though Investment Banks were not obligated to give National the Official Statements, by

doing so, they voluntarily assumed the obligation to reasonably investigate the information contained therein, with the insurer having the right to rely in good faith on the fact that the legally required investigation was done. According to National's assertions, a special study conducted by the Puerto Rico Fiscal Control Board—published in August 2018—revealed that Defendants failed to meet this obligation.

Thus, National contended that when it came time to decide whether or not it would insure each bond, it relied in good faith on Investment Banks' representations on the investigation of the information contained in the Official Statements. It specified that there was very little reliable information that was publicly available on these bonds, and therefore Plaintiffs relied on the investigation and information provided by Investment Banks, which had direct access to the issuers. Furthermore, National claimed that the described acts, and the extraordinary circumstances thereof, justify application of the doctrines of *actos propios* and unilateral declaration of will, under claims in equity as provided by the laws of the Commonwealth. It claimed that, as a general rule in the municipal bond market, bond insurers and underwriters (in this case, Defendants) do not enter into contracts with one another; rather, insurers rely in good faith on underwriters, who have access to information on issuers—information that, according to National, they would not have been able to reasonably verify independently. Consequently, National argued that, unlike the investors, they do not have contractual or statutory remedies to vindicate their rights, as no contract exists between the parties, and National is not in the business of buying or selling bonds. Lastly, National stated that, in order to insure each bond, it focused on the likelihood of issuer default based on the assessment of the draft and final Official Statements provided by Investment Banks, and that the failure to conduct the promised review resulted in them insuring bonds using

false and incomplete information, resulting in catastrophic damages for the insurer.

Following various procedural steps, on September 16, 2020, Investment Banks submitted a *Motion to Dismiss* requesting the dismissal of the entire complaint under Rule 10.2 (5) of the Rules of Civil Procedure.[1] Essentially, they argued that the *Complaint* did not present a claim that would justify a remedy. However, firstly, they invoked the doctrine of *forum non conveniens* and argued that Puerto Rico is not the appropriate forum to resolve this claim. They argued that New York is the appropriate forum, as the majority of the parties are headquartered there and the key events occurred in said state.

Additionally, Investment Banks pointed out that the doctrines of *actos propios* and unilateral declaration of will are causes of action in equity under Art. 7 of the Puerto Rico Civil Code, and are only used when there is no law applicable to the case. To this end, they claimed that Art. 1802 of the Civil Code applies to actions for false representation or when a third party fraudulently induces another to enter into a contract. Likewise, they contended that the Uniform Securities Act of Puerto Rico (hereinafter "Securities Act") covers National's claims, and that, though it does not grant it a private cause of action to claim damages for the alleged conduct, it does allow other remedies, such as administrative penalties. Investment Banks argued that Art. 7 does not apply when another law prohibits the alleged conduct, even if it does not grant the potential plaintiff the right to claim damages for such conduct.

Furthermore, Defendants maintained that National's claims do not satisfy the elements of a cause of action under the doctrine

[1] On September 9, 2019, Defendants submitted a Notice of Removal to the United States District Court for the District of Puerto Rico. On September 12, 2019, we issued a *Judgment* ordering the stay of the proceedings, but we retained jurisdiction to order their reopening in the event the case is remanded to this Court. On July 29, 2020, the United States District Court issued an order of remand, and on August 2, 2020, we declared that the motion to reopen was *Granted.*

of unilateral declaration of will. They note that a claim of unilateral declaration of will must be based on the intent to be obligated to perform a future act, and that, in this case, there was no promise regarding the future, but rather a representation that an act had already occurred—the review of the information in the Official Statements. Additionally, they claimed that the underwriters'—that is, Defendants'—representation on their review of the Official Statements complies with federal securities laws, and what it indicated was the intent to be bound vis-à-vis the "investors" who purchased the securities, as federal securities laws impose a duty only vis-à-vis these buyers. Also, Investment Banks stressed that, in the Official Statements, the underwriters represented that they did not guarantee the accuracy or correctness of the information contained therein, in addition to stating a clear intent to be bound only vis-à-vis the securities buyers.

With regard to the insurers' responsibility, Investment Banks stated that National's arguments are inconsistent with the way sophisticated commercial entities—like Plaintiff—manage very high risks, as they rely on their own due diligence and are obligated to act reasonably. Thus, they contended that requiring Defendants to compensate the Plaintiff insurers would be contrary to public policy, as allowing this claim would unjustly enrich National at Investment Banks' expense, discourage anyone providing support for Puerto Rican efforts from raising money in the future, and cause delays in Puerto Rico's already difficult recovery.

Likewise, Investment Banks claimed that National does not satisfy the elements of a cause of action under the doctrine of *actos propios*. In this regard, they maintained that the doctrine of *actos propios* works to prevent one party from withdrawing a prior act, whereas the *Complaint* argues that Defendants asserted that they had carried out the due diligence required by federal securities laws, but in reality had not;

therefore, National's claim is based on a present representation on past conduct, not an unfulfilled promise regarding future conduct. They added that Investment Banks also did not perform any contradictory subsequent acts. Furthermore, Defendants emphasized that the *Complaint* does not adequately establish that the Official Statements formed an appropriate "basis of trust" on which the insurers could rely.

Moreover, Investment Banks asserted that National's claim does not meet the requirement of causation, and that it does not establish that the alleged erroneous representation or omission by the underwriters in the Official Statements were the proximate cause of the alleged damage. They argued that, following the alleged false representations, Puerto Rico experienced a decade-long recession and assumed an additional debt of approximately $20 billion; these circumstances were the proximate cause for Puerto Rico's default on its repayment obligations and, therefore, Plaintiffs' losses.

Additionally, Investment Banks contended that National's claims are late. They stated that the Securities Act establishes that a civil suit may not be brought under the provisions of that law once 2 years have passed since the sales agreement. They specified that, although the Securities Act provides a private cause of action solely for buyers, the limitations period for this law does apply to this claim. Investment Banks concluded that this 2-year period not only applies to causes of action due to violations of this law or claims involving investors, but also to other claims related to securities—including those submitted under the Civil Code—and any dispute involving entities whose core business is trading securities. Therefore, they argued that the limitations period of the Securities Act applies to National's claim since, according to

Plaintiffs, the insurers were major players in the securities business.

Furthermore, Investment Banks stated that Art. 1658 (b) (2) of Title 28 of the United States Code establishes that "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than 5 years after such violation." Defendants argued that this 5-year federal term applies to National's claims given that they involve "fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws." They concluded that the claims are barred under this statute of repose: the bonds were issued between 2001 and 2007, and the 5-year term expired between 2006 and 2012.

For its part, on October 8, 2020, National submitted its *Objection to the "Application to Dismiss."* With regard to Defendants' argument on the appropriate forum, National asserted that, by arguing last year in its pleadings to remove the case to the US District Court for the District of Puerto Rico, Investment Banks admitted that litigating this case in the forum of Puerto Rico was appropriate. National stated that its claims are based on representations by Investment Banks that they would do their due diligence in Puerto Rico, which in turn led National to underwrite insurance policies in Puerto Rico governed by the law of Puerto Rico that insured the debt of Puerto Rican entities. Furthermore, it added that one of the defendants (Santander) is headquartered in Puerto Rico, whereas the others have offices on the island and continuously do business in Puerto Rico.

In addition, National stressed that the majority of the evidence relating to these claims is in Puerto Rico, whereas evidence that may be in the hands of third parties in New York is easily accessible.

It further stated that the *Complaint* was submitted under equitable doctrines particular to our civil law. It argued that, in the Commonwealth, removal due to *forum non conveniens* is only justified in "exceptional circumstances" when the defendant intending to stay a proceeding demonstrates that "the domestic forum is clearly inappropriate" and the other court with jurisdiction "is clearly the more appropriate one." Additionally, National emphasized that the essence of this *Complaint* is that Investment Banks solicited bond insurance from National, and represented to it that they had done their due diligence with regard to the information provided by the issuers, and this due diligence could only take place in Puerto Rico. Thus, it argued that National issued irrevocable insurance policies subject to Puerto Rican law, granted in Puerto Rico, to cover the risk of default by Puerto Rican issuers.

Moreover, National asserted that, contrary to what Investment Banks maintain, the doctrine of *actos propios* does not include any requirement that these representations must only refer to future conduct in order to be actionable. It argued that the trust National placed in the representations on the investigations Investment Banks would perform was certainly justified, given the special access Banks had to information from the issuers, to which National did not have access. National stated that, while Investment Banks cited the suggestion by a Spanish treatise writer—C.I. Jaramillo—that the contrary behavior by a defendant must be "later in time" than the "initial" behavior generating the trust under Spanish law, this specific criterion was not adopted in Puerto Rico, where *International General Electric v. Concrete Builders*, 104 DPR 871 (1976) is decisive. It added that, in any event, the matter presents an issue of fact that, like the aspects related to trust and good faith, are typically issues of fact that are not appropriate to adjudicate by means of a motion to dismiss.

With regard to Investment Banks' argument that its representations were only directed at investors, National put forth that Defendants made these representations to National by submitting the insurance applications and indicating therein that they complied with industry customs and norms, and by affixing their names thereto they used their reputation to bolster both the draft and final Official Statements that were submitted. It stressed that, though in the Official Statements Investment Banks did not guarantee the accuracy of the information contained therein, they promised that they would do reasonable investigations—pursuant to federal securities laws—on said information, and at no time did they state that they were relinquishing this responsibility. Moreover, National argued that Investment Banks submitted these Official Statements as part of the act of soliciting insurance, and that the Statements did not explicitly or implicitly exclude Investment Banks' responsibility vis-à-vis non-investors, including insurers like National.

Additionally, National reiterated that its *Complaint* had set forth the necessary elements to demonstrate the causal relationship between the damages suffered and Investment Banks' conduct under Art. 1060 of the Civil Code. It stated that the doctrines of *actos propios* and unilateral declaration of will relate to extracontractual relationships, and that, in this claim, the *actos propios* and/or unilateral declaration that Defendants made were the reasons National decided to insure the bonds. With regard to its responsibility, National assured that it had done the diligence required of a bond insurer, including reviewing the probability of default, how the issuers spent and would spend their funds, and the issuers' debt ratios, income, debt and appropriations. However, it noted that the diligence of insurers like National does not include investigating the truthfulness of issuers' representations, which diligence is only done by the underwriter. It maintained that, in August 2018, the Financial Oversight and Management Board for Puerto Rico ("FOMB") published a special

investigation report (the "Special Investigation Report"), which concluded that Investment Banks did not do this due diligence.

Additionally, National argued that, contrary to Investment Banks' arguments, there is no other law prohibiting its causes of action in equity. It specified that the Securities Act is not applicable to this case, as National is not a buyer of securities and is not challenging a sale or offer of securities. It added that the Securities Act only regulates the "offer" or "sale" of securities—as defined in that law—whereas its claim seeks compensation for the damage caused by Banks' lack of good faith in obtaining insurance from National. Furthermore, it argued that Art. 1802 of the Civil Code does not present an obstacle hindering claims in equity, given that National is not alleging fraud or negligence. It also maintained that, since Art. 7 of the Civil Code refers to the tradition of equity in Puerto Rican civil law, it implies that only the application of a statute under the Puerto Rican legal system can hinder a claim in equity. It added that the US District Court determined that National's claims do not arise from federal securities laws and do not contemplate a federal issue.

Lastly, National asserted that its *Complaint* is not time-barred, as the limitations period that applies to claims under the doctrines of *actos propios* and unilateral declaration of will is 15 years. It argued that neither the Securities Act nor the Securities Exchange Act of 1934 apply to this claim, and, therefore, neither do their respective limitations periods. National argued that, according to the Securities Exchange Act itself, this federal statute of repose does not apply to claims in equity submitted under Puerto Rican law, since they are claims that do not involve fraudulent intent in the sale of a security. National maintained that it did not submit a claim under federal securities laws because it is an insurer—not a buyer of securities; in contrast, it argued that Investment Banks did not fulfill their promises, which is enforceable under local law. It concluded that, because National's claims

arise under the Puerto Rican civil law system, Section 1658(b) of the Securities Exchange Act cannot apply in this case.

Subsequently, on November 6, 2020, Investment Banks submitted their *Reply to the "Objection" to the "Application to Dismiss."* In summary, Defendants restated the arguments they presented in their previous pleading. They maintained that New York law applies to claims for damages and causes of action in equity, and therefore, it continues to be the "statute" under Art. 7 of the Civil Code; therefore, there is not a gap allowing National's claims in equity. Likewise, they emphasized that the doctrines of unilateral declaration of will and *actos propios* do not apply to the claims on past conduct asserted by National. Investment Banks put forth that Plaintiffs insured the bonds after Banks did their due diligence, and after the Official Statements that stated what the Underwriters had already done were issued. They argued that, when the insurers insured the bonds, they could not have acted in reliance on any expectation of future due diligence, because there was no such future promise in the Official Statements, and because the alleged obligation of future due diligence would not benefit the insurers, since, when they insured the bonds, they did so irrevocably.

Furthermore, Investment Banks insisted that National's claims are time-barred. They argued that the limitations period of the Securities Act applies broadly, including to securities-related disputes, even if they are not submitted under this law.

Lastly, on November 25, 2020, National submitted its *Rejoinder.* In essence, it restated the arguments it previously presented in its pleadings. With regard to the forum, it stated that the applicable standard of *Ramírez Sainz v. S.L.G. Cabanillas*, 177 DPR 1 (2009) requires that Investment Banks establish that the Commonwealth is a "clearly inappropriate" forum, whereas New York is "clearly the most appropriate one," and that Defendants did not comply with this core requirement. National added that Investment Banks do not dispute the

fact that there is no cause of action available to Plaintiffs in New York, and that the Supreme Court of Puerto Rico has established that an action cannot be dismissed or removed due to *forum non conveniens* if it is time-barred based on the applicable time period in an alternate jurisdiction.

What's more, National clarified that, although it claimed that Investment Banks' promises were prospective, representations on past acts give rise to obligations enforceable under the doctrine of *actos propios.* It also added that, contrary to what Defendants suggested, National did not assert the elements of a claim under Art. 1802 of the Civil Code and, therefore, as no other cause of action is available, it may invoke equity under Art. 7 of the Civil Code. National stressed that Investment Banks' argument that the unfulfilled promises on past conduct exclusively fall under Art. 1802 conflicts with our case law, which permits and contemplates damages as the appropriate remedy for National's claims in equity. Furthermore, it reiterated that its claims in equity arise from Investment Banks' breach of its obligations to act in good faith, and not the violation of a law or of the duty to not cause harm to others.

Finally, National argued that it also did not assert any potential claim for damages under New York law. It concluded that it is not necessary to conduct an analysis on the applicable law, since, regardless of whether Puerto Rico or New York law applies to any hypothetical claim for damages, National's claims in equity would not be affected.

Having reviewed the motions set forth above, we proceeded to make our decision.

II. APPLICABLE LAW

A. Motion to Dismiss

The relevant section of Rule 10.2 of Civil Procedure, 32 LPRA Ap. V, R.10.2 stipulates:

> Every defense, in law or fact, to a claim shall be asserted in the responsive pleading, except that the

> following defenses may, at the option of the pleader, be made by a well-founded motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim that would justify granting a remedy; (6) failure to join an indispensable party.

The motion to dismiss under Rule 10.2 of Civil Procedure, *supra*, is a defense asserted by the defendant before submitting their answer to the complaint or as a part thereof. *Autoridad de Tierras v. Moreno & Ruiz Dev. Corp.*, 174 DPR 409, 428 (2008); *Colón v. Lotería*, 167 DPR 625, 649 (2006). In general, Rule 10.2 of Civil Procedure, *supra*, lists the defenses the defendant may raise in support of a motion to dismiss. *González v. Mayagüez Resort & Casino*, 176 DPR 848, 855 (2009). Number 5 of this rule allows the defendant in a lawsuit to request the dismissal of the complaint lodged against it before submitting its answer thereto, by asserting that the complaint does not state a claim that would justify granting a remedy. *Torres Torres v. Torres et al.*, 179 DPR 481, 501 (2010).

In reviewing a motion to dismiss, the judge must consider as true all the facts asserted in the complaint. *Torres Torres v. Torres et al.*, *supra*, p. 501; *Sánchez v. Autoridad de los Puertos*, 153 DPR 559, 569-570 (2001). Thus, when faced with a motion to dismiss, the court is obliged to consider as good and true all the factual pleas in the complaint that have been asserted in a clear manner. *Roldán Rosario v. Lutrón, S.M., Inc.,* 151 DPR 883, 891 (2000). In other words, this rule only applies to facts that have been well pled and expressed in the complaint. *Pressure Vessels P.R. v. Empire Gas P.R.,* 137 DPR 497, 505 (1994). Thus, in this exercise, it is understood that the pleadings made in the complaint must be interpreted jointly, liberally and in the light most favorable to the plaintiff. *Sánchez v. Autoridad de los Puertos*, *supra*, p. 570.

Now, the current rule of law in our jurisdiction stipulates that, in the pleadings in the complaint, the plaintiff is not obligated to state the precise legal provision under which it is making the claim. It only requires that the facts outlined in the complaint give rise to a cause of action under a legal provision. *Dorante v. Wrangler of P. R.*, 145 DPR 408, 414 (1998); *Rivera Flores v. Cía. ABC*, 138 DPR 1, 8 (1995). The Supreme Court has reiterated that "in order for a defendant to prevail on a motion to dismiss under the above precept of civil procedure, it must demonstrate, with all certainty, that the plaintiff is not entitled to any remedy under any rule of law that may be proven in support of its claim, even when interpreted as liberally as possible in its favor." *Asoc. Importadores de Cerveza v. E.L.A.,* 171 DPR 140, 149 (2007).

It is incumbent upon the movant to demonstrate with certainty that the plaintiff is not entitled to any remedy under any rule of law that may be established in support of its claim, even when applying a liberal interpretation to its cause of action. *Rivera Sanfeliz et al. v. Jta. Dir. First Bank*, 193 DPR 38, 49 (2015). Therefore, a court may only proceed to dismiss the complaint if the defendant demonstrates that the plaintiff is not entitled to the granting of any remedy, independently of the facts that may be proven in support of its claim. *Autoridad de Tierras v. Moreno & Ruiz Dev. Corp.*, *supra*, p. 429. Lastly, we courts must do everything in our power to resolve cases on their merits. *Soto López v. Colón*, 143 DPR 282, 291 (1997).

B. Doctrine of "Clearly Inadequate Forum"

In *Ramírez Sainz v. Cabanillas*, *supra*, p. 38, the Supreme Court adopted a mechanism—similar to the common law doctrine of *forum non conveniens*—allowing judges to refuse to exercise their jurisdiction in exceptional circumstances, in favor of the interests of the parties and justice. *Ramírez Sainz v. Cabanillas*, *supra*, established the methodology that our courts should use when faced with a petition to stay

an action based on *forum non conveniens. Id.*, p. 37. This methodology constitutes an analysis based on the criteria of clearly inappropriate forum. *Id.* Thus, the doctrine is invoked when there is concurrent jurisdiction between a local forum and a foreign forum to adjudicate a dispute in order to determine whether the local forum is most appropriate or suitable. *Id.*

It should be noted that, before analyzing whether it is appropriate to admit a motion of *forum non conveniens*, the court must determine whether it has jurisdiction and authority over the parties and subject matter. *Ramírez Sainz v. Cabanillas*, *supra*, p. 38. If it does, the defendant attempting to stay a dispute based on the doctrine of *forum non conveniens* must demonstrate that the local forum is clearly inappropriate and that there is another court that also has jurisdiction and is clearly more appropriate to resolve the dispute. *Id.* Once this has been demonstrated, the Puerto Rican court must stay the proceedings and grant the plaintiff a deadline by which to submit its claim in the appropriate forum. *Id.*

Now, if the plaintiff does not submit its action in the alternative forum by the granted deadline, or if, once the claim has been submitted, the alternative forum assumes jurisdiction, the original complaint shall be dismissed. *Ramírez Sainz v. Cabanillas*, *supra*, p. 38. However, if the plaintiff submits its claim in a timely manner and the alternative forum decides not to assume jurisdiction, the original court must continue with the proceedings. *Id.* Plainly, "the purpose of this mechanism of return to the original forum is to ensure that a court with jurisdiction will in fact consider the claim by a diligent party." *Id.*

According to the doctrine adopted by our Supreme Court, when determining whether a forum is inappropriate, the court must take into consideration the following: a) the convenience for the parties to litigate in the State in which the forum is located; b) the location of the evidence and mechanisms to obtain it; c) whether the petition to stay was submitted at an appropriate time;

d) the limitations periods; and e) the recognition of judgments and the possibility of enforcing the judgment in the country where the defendant has its assets. *Ramírez Sainz v. Cabanillas*, *supra*, p. 39. However, these factors are illustrative, and the court must scrutinize the substance of the dispute and evaluate the criteria that are actually relevant. *Id.* Lastly, "public factors" should not be taken into consideration, nor should the court discriminate on the basis of the parties' nationality or habitual residence. *Id.*

In essence, according to the analysis adopted in our legal system, a complaint may be stayed—even if the court has jurisdiction—when the dispute has little connection to the domestic forum, would expose the defendant to excessive costs or other inconveniences and injustices, and, of course, if there is a forum with jurisdiction and authority that can hear the dispute. *Ramírez Sainz v. Cabanillas*, *supra*, p. 40.

In closing, it should be noted that the decision to stay a proceeding is discretionary. *Ramírez Sainz v. Cabanillas*, *supra*, p. 40. As such, appellate courts shall use the abuse of discretion standard during their review. *Id.* To this end, "the forum issuing the judgment must specify in its decision how it has applied the analysis adopted herein to the particular facts of the case." *Id.*

C. Equitable Doctrines

Art. 7 of the Civil Code of Puerto Rico, 31 LRPA sec. 7, provides that: "When there is no statute applicable to the case at issue, the court shall decide in accordance with equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration."

Equity arose precisely from the need to temper the strictness of the rule by appealing to the judge's conscience. *CMI Hospital v. Depto. Salud*, 171 DPR 313, 325 (2007). Thus, the Supreme Court has stated that "equity brings the decisional process back down to the pure world of values in search of the strict reason and rational and moral core of the Law where

the supreme value of justice resides." *Cruz Cruz v. Irizarry Tirado*, 107 DPR 655, 660 (1978). As such, "[E]quity involves more than a strictly legal justice, a justice that is natural and moral." J. Castán Tobeñas, *Derecho Civil Español, Común y Floral*, 11th Ed., Madrid, Editorial Reus S.A., 1975, Book 1, Vol. 1, p. 483.

Thus, by means of Art. 7 of the Civil Code, *supra*, courts are granted the power to use general principles of law based in equity to resolve disputes submitted for their consideration. *OCS v. Universal*, 187 DPR 164, 172 (2012). Consequently, pursuant to the principle of equity emanating from Art. 7 of the Civil Code, *supra*, we have incorporated the doctrines of *actos propios* and unilateral declaration of will in our case law. *Vivoni Farage v. Ortiz Carro*, 179 DPR 990 (2010); *Ortiz v. P.R. Telephone*, 162 DPR 715 (2004); *Int. General Electric v. Concrete Builders*, *supra*.

i. *Doctrine of* Actos Propios

It is not lawful for anyone to go or operate against their own acts. *Int. General Electric v. Concrete Builders, supra*, p. 876. The content of the rule that it is not lawful for anyone to go against their own acts is founded and rooted in the general principle of Law ordering that legal affairs proceed in good faith. *Id.*, p. 877. As such, the process between the members comprising this society is expected to be characterized by the qualities of honesty and sincerity, so that at all times it is possible to rely on the truthfulness of the representations or actions of another based on which it has acted. L. Díez Picazo, *La Doctrina de los Propios Actos*, Barcelona, Ed. Bosch, 1963, p. 157.

It is good faith that protects the trust placed by a party who has reasonably relied on the appearance created by another.[2] *OCS*

[2] Our Supreme Court has stated that "Good faith is loyalty in acting, proceeding honorably and loyally. It entails remaining faithful to one's word and not violating trust, or abusing it; it entails acting as is expected of all those who, with honorable thought, are parties to contracts. It aspires to achieve, it has been said, that the development of legal relationships, the exercise of rights and the compliance with obligations take place in accordance with a series of principles that the legal conscience considers necessary, even though they have not been formulated." *Colón v. Glamorous Nails*, 167 DPR 33, 45 (2006) citing Díez Picazo, *op.cit.* p. 157.

v. Universal, *supra*, p. 172. J. Puig Brutau, *Estudios de Derecho Comparado, La Doctrina de Actos Propios*, Barcelona, Ed. Ariel, 1951, pp. 106-107. Thus, it is understood that "[c]ontradictory conduct is a breach or violation of the duty of good faith." *OCS v. Universal*, *supra*, p. 173, citing L. Díez Picazo, *op. cit.*, p. 143. Indeed, the effect of the rule of not going against one's own acts is produced objectively, in which the true will of the perpetrator of the acts counts for nothing. *Int. General Electric v. Concrete Builders, supra*, p. 876. "The trust that these acts engender in third parties is protected, because going against them would obviously constitute an attack on good faith." *Id.*, p. 877.

In this regard, the Supreme Court cited Guillón Ballesteros as follows:

> The center of gravity of the rule [of *actos propios*] does not reside in the will of its perpetrator, but in the trust generated in third parties; nor is said rule a manifestation of the value of a declaration of business will manifested by conclusive facts or acts. The rule is not a derivation of the doctrine of legal transaction; it is independent in its own right, seated in the principle of good faith. A. Gullón Ballesteros in I. Sierra Gil de la Cuesta, *Comentario del Código Civil*, Barcelona, Ed. Bosch, 2000, Vol. 1, p. 397. *OCS v. Universal*, *supra*, p. 173.

The doctrine of *actos propios* is a general principle of law whose efficacy and binding nature have their own life and effect that protect the trust placed in appearance—which, by extension, protects a social interest or achievement of an ideal of justice. *Int. General Electric v. Concrete Builders, supra*, p. 878. In short, to be able to apply this legal rule, the following elements must be established: (1) A certain conduct by an individual, (2) that has engendered a situation that is contrary to reality or, in other words, apparent, and, through this appearance, could influence the conduct of others, and (3) that serves as the basis of trust for another party who proceeded in good faith and, therefore, acted in a way that would cause it injury if its trust was violated. *OCS v. Universal*, *supra*, p. 173; *Int. General Electric v. Concrete Builders*, *supra*, p. 878.

Lastly, as the doctrine of *actos propios* is not contemplated in the Civil Code, and, therefore, as there is no limitations period specified in law for said mechanism, the applicable limitations period is 15 years, as stipulated in Art. 1864 of the Civil Code, 31 LPRA sec. 5294.

ii. Doctrine of Unilateral Declaration of Will

The unilateral declaration of will is recognized as one of the sources of obligations in our legal system. Through it, a person may be bound, by their will alone, to give, do or not do something in favor of another person, as long as their intent to be bound is clear (is not ambiguous or dubious), arises from a suitable legal act, and is not contrary to law, morals or order. *Ortiz v. P.R. Telephone*, *supra*, pp. 723-724. Thus, in order for the unilateral declaration of will to be binding, it must be a "promise or statement of unilateral will by which we impose on ourselves the binding obligation to give, do or not do something in favor of another person, which can give said person the right to demand performance or to seek compensation for any consequential damages they suffered, as a result of the actions taken in reliance upon said promise or actually caused by it." *Id.*, p. 725, citing *Ramírez Ortiz v. Gautier Benítez*, 87 DPR 497, 501 (1963). It should be noted that this is a simple obligation, without typical cause and without any conditions, compensation or consideration in return. *Ortiz v. P.R. Telephone*, *supra*, p. 725.

Therefore, the following elements must come together in order for a unilateral declaration to be binding: (1) the sole will of the person seeking to be bound; (2) said person has sufficient legal capacity; (3) their intent to be bound is clear; (4) the obligation has a purpose; (5) there is certainty as to the form and content of the declaration; (6) it arises from a suitable legal act; and (7) the content of the obligation is not contrary to law, morals or public order. *Ortiz v. P.R. Telephone*, *supra*, pp. 725-726. Consequently, once the bond has been established, the promisor shall be responsible for paying any damages that arise due to its default,

in accordance with the provisions of Art. 1054 of the Civil Code, 31 LPRA sec. 3018, which refers to all types of obligations, regardless of their origin. *Id.*

In conclusion, the Supreme Court clarified in *Ortiz v. P.R. Telephone, supra*, that the 15-year limitations period under Art. 1864 of the Civil Code, *supra*, applies to actions under the doctrine of unilateral declaration of will and is counted from the moment when the creditor's claim was not satisfied. *Id.*, p. 733.

D. Civil Liability in Tort, Under Art. 1802 of the Civil Code

As is known, Art. 1802 of the Civil Code, 31 LPRA sec. 5141, governs everything in our legal system relating to civil liability for obligations originating in fault or negligence; that is to say, acts that violate the general duty to prevent fault-based or negligent acts or omissions that cause damage to others. Specifically, the above article stipulates:

> A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity. *Id.*

These obligations do not arise from the will of the parties, nor due to a contract or previous legal relationship between the parties, but rather from the default on obligations and duties imposed by law. *Maderas Tratadas v. Sun Alliance*, 185 DPR 880, 908 (2012); *Santiago Nieves v. A.C.A.A.*, 119 DPR 711, 716 (1987). That is to say, a tort consists of the violation of a right that is granted or the omission of a duty imposed by law. *Santiago Nieves v. A.C.A.A.*, *supra*, p. 716. Furthermore, whether the act was done in good faith or with intent does not have any effect on the liability of perpetrator of the damage vis-à-vis the aggrieved party. C. Irizarry Yunqué, *Responsabilidad Civil Extracontractual*, 6th ed., 2007, pp. 12-13.

Thus, for a cause of action based on liability in tort under Art. 1802 of the Civil Code, *supra*, the following elements must be present: (1) the existence of damage; (2) the existence of a fault-based or

negligent act or omission, and (3) a causal relationship between the damage and the fault-based or negligent conduct. *Hernández Vélez v. Televicentro*, 168 DPR 803, 812 (2006). With regard to omissions, it is necessary to examine whether the alleged perpetrator of the damage had a legal duty to act, and whether the damage would have been avoided if it had performed the omitted act. *Id.* "In order for it to be classified as negligence, as the result of an omission, there must be a duty of care imposed or recognized by law, and this duty must have been violated." *Hernández Vélez v. Televicentro*, *supra*, p. 813.

E. Uniform Securities Act of P.R.

The Uniform Securities Act, Act No. 60-1963, 10 LPRA sec. 851 *et seq.* (hereinafter "Securities Act") was created to establish regulations in the Commonwealth to protect investors in trading securities. *Paine Webber v. First Boston*, 136 DPR 541, 543 (1994). The purpose of the Securities Act was to protect investors and the general public by imposing certain requirements on persons who trade securities, in order to prevent fraudulent practices.[3] *Olivella Zalduondo v. Triple-S, Inc.*, 187 DPR 625, 635 (2013). As such, Art. 410 of the Securities Act, 10 LPRA sec. 890, provides that

> (a) Any person who:
> (1) Offers or sells a security in violation of § 861(a), 871, or 885(b) of this title [...], or
> (2) offers or sells a security by means of a false statement of a material fact or omitting to state a material fact needed to prevent that any statement made, in the light of the circumstances under which it was made, leads to misunderstanding [...], shall be liable to the person who buys the security, who may file suit to recover the price paid for the security, in addition to the interest at the rate applicable [...]
> (b) [...].
> [...].
> (e) No person may bring a civil suit pursuant to the provisions of this section

[3] This Act defines a security as "any note, share, stock on hand, bond, note, evidence of indebtedness, certificate of interest or share in any profit-sharing agreement or partnership, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, secured certificate of deposit, a hybrid instrument as defined in this section, undivided interest in oil, gas, or other mineral rights or generally, any interest or instrument commonly known as 'securities' [...]." 10 LPRA 881.

> more than two (2) years after the sale contract has been executed.
> […].

However, this Act does not automatically apply to all disputes involving securities. *Olivella Zalduondo v. Triple S*, *supra*, p. 646. Instead, the statute regulates a specific type of commercial relationship, that is to say, commercial relationships between investors and entities that trade securities. *Id.* Now, though one of the main aims of this statute is to prevent entities that trade securities from committing fraud, this does not mean that the Securities Act only applies to those cases in which fraud is alleged. *Id.* However, it must necessarily be a dispute centered on a securities transaction that includes investors, or, at least, entities whose core business is trading securities. *Id.* Where relevant, the particular facts of each dispute must coincide with the scenarios stipulated in the law. In other words, in order to determine whether the Securities Act applies, we must analyze whether the dispute is based on a securities transaction made by entities that trade them, without losing perspective of the main, though not exclusive, aim of this Act, which is to prevent fraud and ensure that securities and broker-dealers are duly registered. *Id.* Of course, this is not a special law of broad scope. *Id.*

Furthermore, in *Olivella Zalduondo v. Triple-S, Inc.*, *supra*, p. 646, the Supreme Court stated that the efficacy of the Securities Act is limited by the very provisions therein. To this end, it concluded that:

> […] Article 410 of the Act limits civil causes of action subject to its provisions to those arising due to violations of Article 201(a) (that the person who sold the security is not duly registered), Article 301 (that the purchased or sold security is not duly registered), Article 405(b) (making illegal representations regarding registrations or exemptions), or its own Article 410(a)(2) (fraudulently offering or selling a security). **If the cause of action does not rest upon any of these elements, it is not subject to the limitations period established in Article 410(e).** (Emphasis ours). *Olivella Zalduondo v. Triple S*, *supra*, p. 647.

Lastly, Art. 410 (e) of the Securities Act, *supra*, provides a limitations period of 2 years to bring actions under this law.[4] This limitations period applies only and exclusively to the civil actions established in Art. 410 of the Act. *Méndez Moll v. AXA Equitable Life Ins.*, 2019 TSPR 104, 202 DPR __ (2019). As the Supreme Court concluded, the language of this Article is clear and unambiguous, and therefore does not allow for other interpretations. *Id.* Thus, it restated that the 2-year limitations period is of limited application, applying only to the civil action available to an investor in the above scenarios stipulated in the law. *Id.*[5]

F. Federal Time Limitations Under 28 USC sec. 164(b)

Art. 1658 (b) (2) of Title 28 of the United States Code establishes that "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought: (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

To this end, the statute establishes the following:

> **(a)** *Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.*
> **(b)** *Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 USC 78c(a)(47)), may be brought not later than the earlier of—*
>
> > **(1)** *2 years after the discovery of the facts constituting the violation; or*
> > **(2)** *5 years after such violation. (Added Pub. L. 101-650, title III, § 313(a), Dec. 1, 1990, 104 Stat. 5114; amended Pub. L. 107-204, title VIII, § 804(a), July 30, 2002, 116 Stat. 801.) 28 USC § 1658(b).*

[4] It should be noted that, in order to be a special law, this period must prevail over other provisions of general laws, such as the Commercial Code and the Civil Code, as and where applicable. *Paine Webber v. First Boston*, *supra*, pp. 544-545.

[5] It reiterated what was established in *Olivella Zalduondo v. Triple S, supra*, p. 647: **"[i]f the cause of action does not rest upon any of these [scenarios], it is not subject to the limitations period [of two (2) years] established in Article 410(e)."** (Emphasis ours).

III. CONCLUSIONS OF LAW

In our legal system, a motion to dismiss cannot be interpreted liberally and shall only result in dismissal if the defendant demonstrates that the plaintiff is not entitled to the granting of any remedy, independently of the facts that may be proven in support of its claim.[6] In light of the rules set forth above, we shall proceed to make our decision.

Firstly, Investment Banks requested a change of venue under the doctrine of *forum non conveniens*, arguing that the forum of Puerto Rico was clearly inappropriate, whereas New York was the appropriate forum. We do not agree. Before beginning this analysis, we shall assert our jurisdiction in this case. Not only do the defendants fully meet the requirements of the doctrine of minimum contacts, but they were also duly summoned, had appeared and had performed substantial acts establishing them as a party in this proceeding.

However, pursuant to the above-cited Law, and after performing the analysis adopted in *Ramírez v. Sainz, supra*, we determined that the exceptional circumstances enabling us to refuse to exercise our jurisdiction are not met in this case. *Ramírez Sainz v. Cabanillas*, *supra*, p. 38. Indeed, as National maintained, the alleged due diligence that Investment Banks were obligated to perform could only take place in Puerto Rico (the location of the issuers), the irrevocable insurance policies that National issued were granted in Puerto Rico (subject to Puerto Rican law), and the issuers of these bonds were Puerto Rican.

From this context we can deduce that the majority of the sources of evidence will be located in Puerto Rico, as they are in the possession of the bond issuers and other entities. Additionally, we understand that if there is any evidence in New York, the necessary tools are available so that it can be easily accessed by the parties.

[6] *Autoridad de Tierras v. Moreno & Ruíz Dev. Corp.*, *supra*, p. 429.

Furthermore, all the Defendants, with the exception of Goldman Sachs and RBV Capital Markets, maintain a Broker-Dealer and/or Investment Adviser License from the Puerto Rico Office of the Commissioner of Financial Institutions. They also continue to do business here on the Island, and most have physical offices in Puerto Rico. Defendants are companies with substantial resources and capital who have legal representation in Puerto Rico.

What's more, this petition—submitted over 1 year after the *Complaint*—did not demonstrate that the forum of New York would have a satisfactory remedy for National's claims. It also did not argue that any judgments issued by this court would not enforceable. The dispute unquestionably has a solid connection with the domestic forum, and if it is heard and decided by our court, this would not expose Defendants to excessive inconveniences or injustices. In view of the foregoing, we believe that Defendants did not demonstrate that the courts of the Commonwealth would be clearly inappropriate to resolve this dispute.

Secondly, Investment Banks argued that National's claims cannot be submitted under the equitable doctrine in Art. 7 of the Civil Code, *supra*, because other laws apply, such as Art. 1802 of the Civil Code or the Securities Act. We disagree.

We believe that National's claims do not meet the requirements of a cause of action under Art. 1802.[7] National's claims do not assert illegal or fraudulent acts, fraud, or fault-based or negligent omissions. The alleged source of Investment Banks' liability is that, when it solicited insurance from National, they voluntarily represented that they would investigate the content of the Official Statements that were submitted. This alleged conduct and obligation does not arise from Art. 1802 of the Civil Code*, supra.* Of course, there was no contract between the parties, but Banks' alleged duty is not imposed by any laws;

[7] *Hernández Vélez v. Televicentro*, *supra*, p. 812.

rather, the *Complaint* asserts that it arises from a preexisting relationship created for the insurance coverage application process carried out by Investment Banks vis-à-vis National.

Furthermore, application of the Securities Act is limited by its very provisions.[8] This law only regulates commercial relationships between investors and entities that trade securities.[9] From the law presented above, it can be deduced that it is an Act of strict scope, and that the mere presence of a security is not enough for it to apply automatically.[10] Thus, neither National's claims, the presented evidence, nor the Securities Act itself demonstrate that National—as an insurer—would be considered a bond investor or company in the business of buying or selling bonds. We cannot find any provisions in the Act, or in our case law, that indicate that the bond insurers would be considered companies in the bond trading business for these purposes. Similarly, the claims in the *Complaint* are not found in the list of Art. 410 of the Securities Act, *supra*, which limits causes of action thereunder.

Investment Banks also argued that National's claims were time-barred, as they fall outside of the limitations period in the Securities Act and the federal statute of repose. Investment Banks asserted that, although the Securities Act does not grant National a private cause of action to litigate for the alleged conduct, the 2-year limitations period established in that law does apply. Furthermore, they argue that the 5-year time limitation provided by 28 US sec. 1658(b) also applies to this case. We disagree. To wit:

Pursuant to the above-cited law, Art. 410 (e) of the Securities Act, *supra*, provides a limitations period of 2 years to bring actions under its

[8] *Olivella Zalduondo v. Triple S*, *supra*, p. 646.
[9] *Id.*
[10] *Id.*

provisions.[11] However, like the scope of this law, the limitations period it establishes is expressly exclusive to the civil actions listed in Art. 410 of the Securities Act, *supra.*[12] As we established above, National's claims are not found in the causes of actions stipulated in Art. 410 of the Securities Act; therefore, the limitations period in this law does not apply. Furthermore, Art. 1658 (b) (2) of Title 28 of the United States Code establishes 2- and 5-year time limitations for a "private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934, *supra.*" In this case, National's *Complaint* does not present a cause of action that involves a claim of fraud in contravention of federal securities laws. National's claims under equitable doctrines do not involve fraudulent intent. Moreover, given that National is an insurer—and not a buyer of securities—it did not submit a claim under the Securities Exchange Act, as the regulatory requirements and responsibilities that this law imposes on Investment Banks are vis-à-vis investors. The alleged responsibility Investment Banks had to National does not arise from the Securities Exchange Act, but from the appearance the representations Investment Banks made to National could have had.

As we set forth above, when faced with a motion to dismiss, the court is obliged to consider as good and true all the factual pleadings that have been clearly asserted in the complaint.[13] It is incumbent upon the party making the motion to conclusively demonstrate that the plaintiff is not entitled to any remedies under any rules of law that may be established in support of its claim, even when applying

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[11] While this Court recognizes that the language of the Securities Act hints at the existence of a statute of repose, in both *Paine Webber* and *Olivella Zalduondo*, the Supreme Court described this term as a statute of limitations. *Paine Webber v. First Boston*, *supra*; *Olivella Zalduondo v. Triple-S, Inc., supra*.
[12] *Méndez Moll v. AXA Equitable Life Ins*, *supra*; *Olivellas Zalduondo v. Triple-S Inc*., *supra*.
[13] *Roldán Rosario v. Lutrón, S.M., Inc., supra*, p. 891.

a liberal interpretation to its cause of action.[14] Consequently, we believe that it was not conclusively demonstrated that National is not entitled to any remedies. Therefore, it would be premature to dismiss the action at this stage.

IV. DECISION

In accordance with the foregoing, the Application to Dismiss submitted by Defendants, Investment Banks (Citigroup Global Markets Inc., Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC, RBC Capital Markets, LLC, Santander Securities LLC, UBS Financial Services Inc. and UBS Securities LLC), is **Denied**.

THIS DECISION SHALL BE SERVED ON THE PARTIES.

In San Juan, Puerto Rico, on June 1, 2021.

S/LADI V. BUONO DE JESÚS
SUPERIOR COURT JUDGE

[14] *Rivera Sanfeliz et al. v. Jta. Dir. First Bank*, *supra*, p. 49.