IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SEAN A. BRADY,	)	
Respondent,	)	
	)	
v.	)	**WD84470**
	)	
JOHN R. ASHCROFT and DAVID M. MINNICK,	)	**FILED: January 18, 2022**
	)	
Appellants.	)	

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem, Judge

Before Special Division: Alok Ahuja, P.J.,
Mark D. Pfeiffer, J., and W. Ann Hansbrough, Sp.J.

The Securities Division of the Office of the Secretary of State filed an administrative petition requesting that the Commissioner of Securities order civil penalties, restitution, and other remedies against Sean A. Brady. The petition alleged that Brady had violated multiple provisions of the Missouri Securities Act of 2003, § 409.1-101 *et seq.*,[1] while acting as an investment adviser.

While the Securities Division's administrative petition was pending, Brady filed a petition for a writ of prohibition in the Circuit Court of Cole County, contending that the Commissioner lacked authority to take enforcement action against him. The circuit court granted a writ of prohibition barring the Commissioner from proceeding. The circuit court concluded that the Commissioner lacked regulatory jurisdiction over Brady because he was no longer a "registrant"

[1] Unless otherwise indicated, statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2021 Cumulative Supplement.

subject to the strictures of the Securities Act. The court also concluded that the administrative enforcement action was barred because Brady had reached a settlement with the private investors he was accused of defrauding.

The Commissioner appeals. Because we conclude that the Commissioner has statutory authority to proceed against Brady on at least some of the legal theories asserted in the Securities Division's petition, we reverse the circuit court's judgment.

Factual Background

We recite the underlying facts as alleged in the Securities Division's administrative petition. We assume these facts to be true for purposes of the present appeal.

Between 2012 and 2017, Brady was employed as an investment adviser representative and broker-dealer agent with First Allied Securities, Inc. Brady was based in the St. Louis area. He was registered with the Commissioner of Securities under the Securities Act.

First Allied terminated Brady's employment on October 20, 2017, based on Brady's violations of First Allied policies and procedures, including falsifying client signatures on documents. First Allied filed a Uniform Termination Notice for Securities Industry Registration (Form U-5) with the Financial Industry Regulatory Authority ("FINRA"), a private investment-industry self-regulatory agency. FINRA investigated Brady's termination, and subsequently barred him from the securities industry on May 20, 2018. First Allied's termination of Brady's employment caused his registration with the Commissioner to become ineffective. *See* § 409.4-404(c).

Brady's alleged acts of misconduct involve his dealings with ten investors, nine of whom were Missouri residents, and one a Florida resident. Brady and First Allied entered into settlement agreements with all ten of the affected investors in 2019. Each of the settlements contained a broad release clause, in which the

investors released all claims against Brady and First Allied based on the underlying transactions at issue here, on their own behalf and on behalf of "anyone claiming through or under them."

On April 22, 2020, the Enforcement Section of the Secretary of State's Securities Division filed its Petition for Order to Cease and Desist and Order to Show Cause Why Restitution, Civil Penalties, Costs and Other Administrative Relief Should Not Be Imposed. The petition was filed before the Commissioner. *See* 15 CSR 30-55.010(1)(A). The Securities Division's claims relate to transactions which occurred between 2010 and September 2017, in which Brady recommended and sold various real estate investment trusts ("REITs") and variable annuities to the ten investors. The petition alleged that Brady: forged the investors' signatures on transaction documents; invested the investors' money in REITs and variable annuities without the investors' knowledge or consent; directed the investors' funds to investments which were unsuitable given the investors' investment objectives and risk tolerance; and made misrepresentations to the investors concerning the financial instruments in which he advised them to invest. The petition alleged that Brady's actions constituted dishonest and unethical practices in violation of § 409.4-412(d), employed a device to defraud in violation of § 409.5-502, and subjected Brady to discipline under § 409.6-604. (In the remainder of this opinion we frequently omit the reference to chapter 409 in our citation to relevant provisions of the Securities Act.)

The Securities Division's administrative petition requested multiple forms of relief. It prayed that the Commissioner order Brady to cease and desist from engaging in similar misconduct. It also requested that the Commissioner order Brady to pay civil penalties for violations of §§ 4-412(d)(5), 4-412(d)(13), and 5-502. The petition requested that Brady be ordered "to pay restitution for any loss" with interest, and that he be ordered "to disgorge at least $422,872 as profits in the form

of commissions" arising from his violations of the Securities Act. Finally, the petition prayed that the Securities Division recover from Brady its costs of investigation, and "such other relief as [the Commissioner] deems just."

Brady filed a Motion to Dismiss the Securities Division's petition on July 10, 2020, arguing that the Commissioner lacked subject matter jurisdiction, that the Securities Division's claims were barred by the statute of limitations, and that the Securities Division should not be allowed to obtain restitution for investors in excess of the settlement amounts to which those investors had previously agreed. The Commissioner denied Brady's Motion to Dismiss on July 22, 2020. The case was scheduled for a final administrative hearing commencing on August 25, 2020.

On August 6, 2020, Brady filed a petition for a writ of prohibition in the Circuit Court of Cole County, seeking to prohibit the Commissioner from conducting further proceedings in the administrative enforcement action. Following briefing and argument, the circuit court granted a writ of prohibition barring the Commissioner from proceeding further in the administrative case. The circuit court held that the Commissioner did not have jurisdiction over Brady under § 4-412(c), because the statute only applies to current "registrants," or those who have held registration within the year prior to the filing of an administrative petition. The circuit court also held that Missouri's common law rule against double recovery prevented the Commissioner from seeking relief on behalf of the investors whom Brady had defrauded, given that those investors had settled their personal claims directly with First Allied and Brady. The circuit court ordered that the Commissioner and the Secretary of State "cease, desist, and refrain from taking any further action against Relator Sean A. Brady in the Enforcement Action other than dismissing the Enforcement Action Petition and all of its claims with prejudice."

The Commissioner appeals.

Standard of Review

"The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991) (*citing Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. 1985)). The Missouri Supreme Court has limited "the use of prohibition to three, fairly rare, categories of cases." *State ex rel. Riverside Joint Venture v. Missouri Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo. 1998) (citing *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862–63 (Mo. 1986)).

> First, prohibition lies where a judicial or quasi-judicial body lacks personal jurisdiction over a party or lacks jurisdiction over the subject matter the body is asked to adjudicate. Second, prohibition is appropriate where a lower tribunal lacks the power to act as contemplated. Third, prohibition will issue in those very limited situations when an "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to [an administrative agency's or] a trial court's order," or where there is an important question of law decided erroneously that would otherwise escape review on appeal ***and*** the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.

Id. (citations omitted); *see also State ex rel. Zimmerman v. Blanc*, 548 S.W.3d 396, 401 (Mo. App. W.D. 2018).

A writ of prohibition is discretionary. *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 760 (Mo. App. W.D. 2007). The circuit court's judgment granting such a writ is accordingly reviewed for an abuse of discretion. A circuit court abuses its discretion when its "ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. 2003). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.* (citation omitted).

"A trial court can abuse its discretion . . . through the application of incorrect legal principles. . . . [W]hen the issue is primarily legal, no deference is warranted and appellate courts engage in *de novo* review." *State v. Carpenter*, 605 S.W.3d 355, 359 (Mo. 2020) (quoting *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009)); *see also Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. W.D. 2009) ("the trial court necessarily abuses its discretion where its ruling is based on an erroneous interpretation of the law" (citation omitted)).

Discussion

I.

As a preliminary matter, we address the Commissioner's contention that the circuit court abused its discretion in granting a writ of prohibition, because Brady failed to exhaust his administrative remedies, and had an adequate remedy by seeking judicial review following the completion of the administrative proceedings.

As a "general rule," "a party must exhaust all administrative remedies before the party may seek judicial review." *Donaldson v. Mo. State Bd. of Reg'n for the Healing Arts*, 615 S.W.3d 57, 65 (Mo. 2020); *see also, e.g.*, *State ex rel. Robison v. Lindley-Myers*, 551 S.W.3d 468, 472-73 (Mo. 2018). However, as the cases cited above in the Standard of Review section make clear, an extraordinary writ may be available to arrest ongoing administrative proceedings in certain limited circumstances: where the administrative agency lacks jurisdiction or wholly lacks the authority to act; or where irreparable harm may occur to the petitioner by being forced to submit to the administrative proceeding itself.

Our recent decision in *Zimmerman*, 548 S.W.3d 396, provides a paradigm example. In *Zimmerman*, this Court affirmed the circuit court's grant of a writ of prohibition. The writ interrupted an ongoing administrative proceeding: it prohibited the State Tax Commission from deciding taxpayers' appeals from decisions of county boards of equalization, in which the taxpayers challenged the

assessed valuation of their properties. This Court disagreed with the circuit court's determination that the taxpayers lacked statutory authority to appeal to the Commission. *Id.* at 405. Nevertheless, we held that the circuit court's grant of a writ of prohibition was justified, because even though the State Tax Commission had authority to *hear* the taxpayers' appeal, "the Commission had no authority to afford the remedy [the taxpayers] requested" – modification of their property-tax assessments. *Id.* at 404.

The taxpayers in *Zimmerman* argued that a writ of prohibition was unwarranted, because the county assessor could seek judicial review of any adverse decision by the State Tax Commission, after the administrative proceedings had concluded. We rejected this argument, because the Tax Commission proceeding was an exercise in futility to which the assessor should not be required to submit.

> Though we agree that Assessor could have appealed any adverse Commission decision, and though the availability of a remedy on appeal can be a basis for denying a discretionary writ of prohibition, the availability of a remedy on appeal does not preclude a trial court from exercising its discretion to grant a permanent writ of prohibition. Instead, . . . prohibition is appropriate to prevent unnecessary, inconvenient, and expensive litigation, even though it is axiomatic that appellate review would be available at the conclusion of the litigation. The issue is not strictly whether an appeal would have been available without the issuance of a writ, but whether the remedy of appeal would have been adequate.
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> Here, the trial court found that Assessor's appellate remedy would be inadequate given the high number of properties involved in this proceeding. That finding, coupled with the fact that Taxpayers were not entitled to any of the relief they sought from the Commission as a matter of law, supports the trial court's conclusion that requiring Assessor to litigate Taxpayers' appeals before the Commission was not an adequate remedy for Assessor.

Id. at 405-06 (citations omitted).

Although a court-issued writ may be available in limited circumstances, judicial interference with ongoing administrative proceedings through the issuance

of extraordinary writs should be the exception and not the rule. *State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 969 S.W.2d 218 (Mo. 1998), illustrates the relevant distinction between arguments which may justify issuance of a writ, and issues which should be addressed at the conclusion of administrative proceedings through the usual judicial review process. In *Riverside*, riverboat gaming companies argued that the Gaming Commission had no authority to take disciplinary action against them for their purported violation of provisions of state law (rather than for violation of the terms of their licenses themselves). The Supreme Court recognized that, "[i]f the Commission does not have authority to impose sanctions for this violation [of state law] under the [gaming] statute, prohibition is the appropriate remedy to prohibit the Commission from proceeding to hearing." *Id.* at 220. Thus, *Riverside* recognized that, if the Commission wholly lacked authority to proceed against the gaming boat operators, then a writ might be appropriate (even though the operators had not fully exhausted the administrative process).[2]

Riverside rejected the gaming companies' claim that the Gaming Commission lacked statutory authority to address their alleged violations of state law. 969 S.W.2d at 221. The Court then explained that the _other_ issues the licensees sought to raise could be addressed in judicial review proceedings after the Gaming

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[2] *See also, e.g.*, *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 920 (Mo. App. W.D. 2003) ("Where a presiding officer [in an administrative proceeding] is wholly lacking in jurisdiction to hear a case, an appeal is not an adequate remedy because any action by the officer 'is without authority and causes unwarranted expense and delay to the parties involved,'" and "a petition for writ of prohibition is a proper way to challenge an administrative decision-maker's participation in a case" (citation omitted)); *Southwestern Bell Tel. Co. v. Mo. Comm'n on Human Rights*, 863 S.W.2d 682, 686 (Mo. App. E.D. 1993) ("Writs of prohibition are frequently employed to prevent boards, commissions, and other public bodies exercising quasi-judicial powers from performing unauthorized acts or acts in excess of the authority vested in them.").

Commission's final decision, and were not appropriate for relief by way of a writ of prohibition.

> As we have previously concluded, the Commission has subject matter authority to consider a license holder's failure to comply with the law. In addition, the Commission has the authority to act in furtherance of that power. Its consideration of the issues raised in its notice to the license holders is within the grant of authority to the Commission in section 313.812.14. As to the ["irreparable harm" justification for writ relief], the Commission has the authority to make a mistake of law in its deliberations and decision provided that decision does not irreparably harm a party. Section 536.100, RSMo 1994, permits judicial review of a decision of the Commission. Any decision of the Commission may be stayed on appropriate grounds either by the Commission or by a reviewing court pending review. Section 536.120, RSMo 1994. These safeguards avoid irreparable harm to a license holder receiving an adverse decision of the Commission and make prohibition an improper remedy under these circumstances. The trial court's decision to employ prohibition to pretermit the Commission's consideration of the issues before it . . . falls outside the recognized purposes for a writ of prohibition. The trial court erred in making its preliminary writ of prohibition absolute.

Id. at 221-22.

A writ of prohibition against ongoing administrative proceedings is an extraordinary measure which should be employed only if the agency wholly lacks power to act as contemplated, or if irreparable harm would otherwise occur. If a writ petition satisfies those limitations, however, the petitioner need not exhaust their administrative remedies before seeking judicial intervention.

II.

The circuit court relied on two grounds to justify the issuance of a permanent writ of prohibition. First, the circuit court found that the Commissioner could not take enforcement action against Brady under § 409.4-412(c), because that statute only applies to persons who are current "registrants" under the Securities Act, or those who have withdrawn their registration in the year prior to the filing of an enforcement action. *See* § 409.4-409. Second, the court found that, to the extent

that the Securities Division sought to proceed under § 409.6-604(d), its petition was barred because the affected investors had settled their own private claims against Brady and First Allied. Given the private settlements, the circuit court concluded that the common-law rule prohibiting double recoveries barred the Securities Division's enforcement action.

Section 409.4-412(c) provides:

> If the commissioner finds that the order is in the public interest and subsection (d)(1) to (6), (8), (9), (10), or (12) and (13) authorizes the action, an order under this act may censure, impose a bar, or impose a civil penalty in an amount not to exceed twenty-five thousand dollars for each violation on a registrant and, if the registrant is a broker-dealer or investment adviser, on any partner, officer, or director, any person having similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser.[3]

Section 409.4-409 provides:

> Withdrawal of registration by a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective sixty days after the filing of the application to withdraw or within any shorter period as provided by rule adopted or order issued under this act unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as required by rule adopted or order issued under this act. The commissioner may institute a revocation or suspension proceeding under section 409.4-412 within one year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which registration was effective if a proceeding is not pending.

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[3] In this opinion we cite to and quote the current versions of the relevant statutory provisions. *See* note 1, above. In 2020, the General Assembly amended §§ 409.4-412 and 409.6-604 to increase the amount of the civil penalties which could be imposed. *See* S.B. 599, 100th Gen. Assembly, 2d Reg. Session (2020). Those amendments became effective on August 28, 2020 – after Brady's underlying conduct, and after the filing of the Securities Division's administrative petition. Although we quote the current versions of the relevant statutes, we take no position as to the amount of any penalty which could be imposed against Brady, if the Commissioner were to find that he had in fact committed any of the statutory violations alleged by the Securities Division.

Based on these provisions, the circuit court concluded that the Commissioner could only maintain enforcement actions under § 4-412(c) against individuals who were either *current* registrants under the Securities Act, or persons who had withdrawn their registration within the year prior to the filing of an enforcement action. The circuit court found that Brady's registration terminated with the termination of his employment with First Allied in October 2017. *See* § 409.4-402(c). Because the Securities Division's petition was not filed until April 2020, the circuit court concluded the Commissioner had no authority to proceed against Brady under § 4-412(c).

We need not review the circuit court's conclusion that § 4-412(c) only authorizes enforcement action against current, or recently-withdrawn, "registrants." As the circuit court recognized, the Securities Division's petition invokes both § 4-412(c) and § 6-604 as authority for this enforcement action. Whether or not the Commissioner was entitled to proceed against Brady under § 4-412(c), the Commissioner would be entitled to award much of the same relief, for many if not all of Brady's alleged acts of misconduct, under § 6-604. And § 6-604 is not limited to "registrants" – even if § 4-412(c) is.

Section 409.6-604(a) provides that the Commissioner may take enforcement action if he:

> determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act . . . .

Section 409.6-604(d) provides that, in a proceeding brought under the section, the Commissioner is authorized to:

> (1) Impose a civil penalty up to twenty-five thousand dollars for each violation;

> (2) Order a person subject to the order to pay restitution for any loss, including the amount of any actual damages that may have been caused by the conduct and interest at the rate of eight percent per year from the date of the violation causing the loss or disgorge any profits arising from the violation;
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> (3) In addition to any civil penalty otherwise provided by law, impose an additional civil penalty not to exceed fifteen thousand dollars for each such violation if the commissioner finds that a person subject to the order has violated any provision of this act and that such violation was committed against an elderly or disabled person.

In addition, § 409.6-604(e) provides that, "[i]n a final order, the commissioner may charge the actual cost of an investigation or proceeding for a violation."

Section 6-604 is not limited to current or former "registrants," but applies to any "person" who has violated, is violating, or is about to violate the Securities Act or its implementing regulations. The Securities Act's definition of a "person" is broad, and is plainly not limited to current or former registrants. *See* § 409.1-102(20).

Section 6-604 was intended to complement § 4-412, by authorizing enforcement actions against persons not otherwise subject to a § 4-412 proceeding. The Missouri Securities Act of 2003 is patterned after the Uniform Securities Act drafted by the National Conference of Commissioners on Uniform State Laws. The Official Comments to § 604 of the Uniform Securities Act make clear that § 604 was intended to authorize enforcement actions against persons who are not subject to § 412.

> Sections 603 and 604 are intended to be available to the administrator against persons not subject to stop orders under Section 306 or proceedings against registered broker-dealers, agents, investment advisers, or investment adviser representatives under Section 412. ***All persons or securities not subject to Section 306 or 412 will be subject to Sections 603 and 604. A person must be covered by either (1) Sections 306 or 412 or (2) Sections 603 or 604***.

Official Comment 2 (emphasis added). "When the legislature has adopted a model act, the applicable comments of the drafting committee for the model act will often be influential in the interpretation of the language of the statute adopted." *State v. Porter*, 241 S.W.3d 385, 391 (Mo. App. W.D. 2007) (citations omitted).

Besides containing no reference to a "registrant," §§ 6-604(d) and (e) authorize a wide range of remedies, including the same $25,000 per violation civil penalties authorized under § 4-412(c). Indeed, § 6-604(d)(3) authorizes heavier sanctions: it authorizes *double* penalties if the victim of a violation is elderly or disabled. In addition, §§ 6-604(d) and (e) authorize restitution for injured parties' losses, disgorgement of the offender's profits, and recovery of the agency's costs of investigation. *See State ex rel. Lavender Farms, LLC v. Ashcroft*, 558 S.W.3d 88, 94 (Mo. App. W.D. 2018) (noting that "[s]ection 409.6-604 provides the Commissioner distinct remedies not available to a purchaser in a civil action," including the power to "order a party to cease and desist engaging in prohibited conduct, impose monetary penalties, order restitution and disgorge profits, deny exemptions, and charge the cost of the underlying securities investigation").

In this case, the Securities Division alleged that Brady's misconduct violated § 409.4-412(d)(5), § 409.4-412(d)(13), and § 409.5-502. We put to one side whether the Commissioner could sanction Brady in a § 6-604 action for violations of §§ 4-412(d)(5) or (13) (which describe circumstances in which a registrant, or an applicant for registration, may be subject to discipline). But whether § 6-604 can be invoked in this case to remedy violations of § 4-412(d), it plainly can be employed to enforce § 5-502, which provides:

> (a) It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

> (1) To employ a device, scheme, or artifice to defraud another person; or
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> (2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Like § 6-604 itself, § 5-502(a) is not limited to "registrants," but applies to any person who advises others concerning securities for compensation. Moreover, the statute broadly proscribes the employment of a "device, scheme, or artifice to defraud" by any compensated securities adviser. This broad prohibition on fraudulent activity comprehends many, if not all, of the acts alleged in the Securities Division's petition.

Sections 5-502 and 6-604 are not limited to "registrants" under the Securities Act, and authorize the same types of relief, with respect to the same types of misconduct, as § 4-412(c). Accordingly, it is unnecessary to decide whether an action under § 4-412(c) is limited to persons who are current "registrants" under the Securities Act, or to those who have withdrawn their registration within the prior year. As explained in § I, above, judicial interference in ongoing administrative proceedings through issuance of an extraordinary writ should be limited to situations in which an agency wholly lacks jurisdiction or authority to act, or in which irreparable harm would otherwise occur. In this case, even if the Commissioner was not entitled to proceed under § 4-412(c) because Brady is not a current or recent "registrant," Brady would ***still*** be subject to an administrative enforcement action under §§ 5-502 and 6-604 involving most of the same underlying allegations of misconduct, and subjecting him to similar remedies. In such circumstances, there is no justification for a writ of prohibition. As the Supreme Court explained in *Riverside*, because he has statutory authority to proceed, the Commissioner "has the authority to make a mistake of law in [his] deliberations and decision," and Brady can seek judicial review following the conclusion of the

administrative process to challenge any allegedly erroneous legal conclusions. 969 S.W.2d at 221. We also note that, because the prohibited conduct and remedies under §§ 4-412(c) and 6-604 are largely overlapping, the Commissioner may find it unnecessary to rely on the authority granted by § 4-412(c) in his final order, even if he orders relief against Brady. Therefore, it may ultimately be unnecessary for the courts to ever address the scope of § 4-412(c) in this case.

Judicial resolution of any issues concerning the scope of § 4-412(c) can await the conclusion of the administrative proceeding, and the circuit court abused its discretion by issuing a writ of prohibition on this basis.

III.

In addition to its conclusions concerning § 409.4-412(c), the circuit court also held that the Commissioner had no authority to proceed under § 409.6-604, because Brady had entered into private settlements with the ten investors whom the Securities Division accused him of defrauding. The circuit court erred as a matter of law in ruling that the investors' private settlements wholly divested the Commissioner of authority to proceed.

Missouri applies the "common law rule that a plaintiff is entitled to only one satisfaction for the same wrong." *Sanders v. Ahmed*, 364 S.W.3d 195, 213 (Mo. 2012); *see also, e.g.*, *Ellison v. Fry*, 437 S.W.3d 762, 776-77 (Mo. 2014). At the same time, Missouri law also holds that persons who are not parties to a contract are not generally bound by the agreement.

> In order for a party to be bound by a contract a court must find there was privity of contract. Privity of contract is the relationship between the parties to a contract, which allows them to sue one another but prevents a third party from doing so. "The doctrine of privity means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party." The doctrine is intended to shield contracting parties from unlimited liability and to prevent encumbering parties with duties not voluntarily assumed.

Baisch & Skinner, Inc. v. Bair, 507 S.W.3d 627, 632 (Mo. App. E.D. 2016) (citations omitted).

Missouri courts have not applied these principles in the specific context we face here: where both a private party, and a governmental enforcement agency, seek remedies for a regulated entity's acts of misconduct. Federal courts *have* addressed this scenario in numerous cases, however. Those cases hold that a private party's settlement with a wrongdoer does not wholly bar a governmental agency from seeking additional relief against the same wrongdoer, for the same underlying misconduct. Thus, in *U.S. Commodity Futures Trading Commission v. Kratville*, 796 F.3d 873 (8th Cir. 2015), the United States Court of Appeals for the Eighth Circuit held that a district court could award relief to the Commodities Futures Trading Commission (the "CFTC") for statutory violations, even though the individual investors who had been injured "had brought private lawsuits against [the defendant], settled their cases for compensation, and signed releases." *Id.* at 889. The Court held that the private-party settlements could not bar the CFTC from seeking additional relief from the defendant, for the same underlying actions:

> Rarely will privity be found "between a private party in one action and a party in a later action when the party in the later action is a governmental agency." Furthermore, "It is a well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." The doctrine of res judicata does not bar the government "'from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded.'" "[G]overnmental agencies have statutory duties, responsibilities, and interests that are far broader than the discrete interests of a private party."
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> . . . [T]he present case involves the CFTC [¶] seek[ing] to protect a public interest that far exceeds the interests of individual citizens. That is, the [CFTC] seeks to protect the integrity of a public market.

> The continued integrity and hence vitality of that public market has huge implications for the national economy.
>
> Therefore, even though a private litigant "understandably" may believe it wise "to compromise claims to gain prompt and definitive relief," such a settlement "does not further the broader national public interests represented by the [CFTC] and reflected in Congress's delegation of [the Act's] enforcement powers to the [CFTC.]" Indeed, and quite apart from whether the individual victims are satisfied with their private settlements, full and ample restitution, and other equitable remedies such as disgorgement of profits, serve distinct deterrence functions that are vital to the "national public interest." Therefore, when private parties settle their disputes without the approval or consent of the [CFTC], those settlements cannot preclude the [CFTC] from later seeking additional or more full restitution or any other remedy.

Id. (citing and quoting *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1290-91 (11th Cir. 2004); *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc); *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1426 (11th Cir. 1998); and *CFTC v. Comm'l Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1060–61 (D. Neb. 2006)); *see also, e.g.*, *California v. IntelliGender, LLC*, 771 F.3d 1169, 1177-78 (9th Cir. 2014); *Linton v. Consumer Prot. Div.*, 225 A.3d 456, 467 (Md. 2020).[4]

The same principles should apply here. Because the Commissioner of Securities' enforcement of the Missouri Securities Act of 2003 seeks to vindicate the

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[4] The circuit court relied on *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), to support its conclusion that the private settlements precluded the Commissioner from taking enforcement action. *Baldwin-United* is distinguishable, however. That case involved a trial court's issuance of a preliminary injunction in connection with ongoing efforts to settle a large number of consolidated private securities actions. The preliminary injunction expressly limited the rights of state agencies to initiate enforcement action involving the same underlying conduct. This case does not involve a similar court order purporting to explicitly preclude state governmental enforcement actions. Moreover, in *Baldwin-United*, the Second Circuit emphasized that the district court's injunction was intended only to prevent interference with the ongoing efforts to settle the private-party litigation. Thus, the district court's injunction only barred state enforcement actions which were taken "to induce the defendants to contribute more toward the settlement being reached in the federal court," and did "not enjoin the states from seeking prospective injunctive relief against unlawful business practices by defendants or from exercising law enforcement or regulatory powers, provided these actions do not 'seek to in any way affect the rights of any plaintiff or purported class member.'" *Id.* at 341.

broader public interest, private settlements which a wrongdoer reaches with injured parties do not preclude the Commissioner from later bringing an enforcement action involving the same underlying misconduct. The Securities Act makes clear that the Commissioner's statutory duties extend well beyond merely obtaining compensation for the specific private parties who may be injured by particular statutory violations. Instead, the Commissioner's enforcement activities are intended to punish prior misconduct, deter future misconduct and prevent future investor harm, maintain high professional standards and integrity in the securities industry, and foster and maintain public confidence in the securities markets. Thus, the Commissioner may issue orders: suspending or revoking registration statements for securities, § 3-306; suspending or revoking the registration of broker-dealers or investment advisers, § 4-412(b); censuring or barring registrants from practicing, § 4-412(c); requiring persons to cease and desist from unlawful practices, § 6-604(a)(1); and ordering wrongdoers to contribute to an "investor education and protection fund." § 6-603(b)(2)(E). The Commissioner may order that wrongdoers provide restitution to injured parties, or "disgorge any profits arising from the violation," § 6-604(d)(2), may require reimbursement of his costs of investigation, § 6-604(e), and may impose civil penalties. *See* §§ 4-412(c), 6-603(b)(2)(C), § 6-604(3)(1). The Commissioner may also obtain orders freezing a wrongdoer's assets and appointing a receiver or conservator over the wrongdoer's assets. § 6-603(b)(2)(A).

In *State ex rel. Lavender Farms, LLC v. Ashcroft*, 558 S.W.3d 88 (Mo. App. W.D. 2018), we observed that the Securities Act "provides the Commissioner distinct remedies" not available to private parties, and that it fell "within the purview of the legislature to provide the Securities Division enforcement powers which extend beyond" the limitations placed on "an individual purchaser's ability to receive a monetary recovery in a civil action." *Id.* at 94. Under the statute, "[t]he

Securities Division is charged with enforcement duties that may reasonably extend beyond a limitation on a private party's civil suit." *Id.*

Of the various remedies available to the Commissioner, only restitution directly seeks to compensate the victims of individual statutory violations; the Commissioner's _other_ remedies are not specifically directed to remedying individual harm. There appears to be some disagreement in the federal caselaw concerning the effect of a private-party settlement on a government agency's ability to later seek additional restitution on behalf of injured parties. Some federal cases suggest that a private-party settlement _bars_ the government agency from seeking additional restitutionary relief on behalf of the settling victim;[5] while other cases suggest that the amount of the private party's settlement would merely *reduce the amount* of restitution the agency could recover.[6]

For two reasons, we need not decide whether the investors' private settlements prevent the Commissioner from ordering restitution, or instead simply limit the scope of any restitutionary remedy. First, the Commissioner may plainly award _other_ remedies which are exclusively available to the Securities Division, such as civil penalties and costs of investigation. Those other, exclusively governmental remedies are not precluded by Brady's settlements with the affected

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[5] *See, e.g.*, *IntelliGender*, 771 F.3d at 1180 (although state agency might be seeking a different *amount* of restitution for violations of unfair competition and false advertising statutes than in earlier private class action, "the appropriate inquiry is not what relief was ultimately granted, but whether the government is suing for the same relief already *pursued* by the plaintiff. Here, the class pursued restitution, and the government now seeks the same." (citation omitted)).

[6] *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 282, 296-97 (2002) (in a case in which the EEOC sought "victim-specific judicial relief," the Court observed that, if the victim "had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly," under the principle that "'the courts can and should preclude double recovery by an individual'" (citation omitted)); *Herman*, 140 F.3d at 1428 (despite private-party settlement, holding that "[t]he Secretary [of Labor]'s action may proceed against the Ficklings as 'parties in interest' for civil penalties and equitable relief, including but not limited to disgorgement of profits, rescission, and restitution of Plan losses").

investors. Given the availability of those <u>other</u> remedies, a writ of prohibition preventing the Commissioner from proceeding <u>at all</u> is unwarranted.

In addition, under § 6-604(d)(2), the Commissioner is authorized to order a violator to "disgorge any profits arising from the violation," as an alternative to an "order to pay restitution for any loss." While restitution may be a remedy designed to compensate losses suffered by private parties, disgorgement serves a different, public-interest purpose. Federal courts have held that "'[d]isgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions.'" *FTC v. LoanPointe, LLC*, 525 Fed. Appx. 696, 698 (10th Cir. 2013) (quoting *FTC v. Bronson Ptrs, LLC*, 654 F.3d 359, 372 (2d Cir. 2011)). Thus, the Supreme Court of the United States has recognized that the disgorgement remedy authorized by the federal securities laws is imposed to remedy violations "committed against the United States rather than an aggrieved individual," and is "imposed for punitive purposes" and to deter future wrongdoing, rather than primarily for compensation. *Kokesh v. SEC*, 137 S.Ct. 1635, 1643 (2017). "Disgorgement typically is not used for restitution. The purpose of disgorgement is to force a defendant to give up the amount by which he was unjustly enriched rather than to compensate the victims of fraud." *SEC v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998) (citation and internal quotation marks omitted), overruled on other grounds by *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004). Because "[t]he primary purpose of disgorgement is *not* to refund others for losses suffered but rather to deprive the wrongdoer of his ill-gotten gain," courts recognize that monies received through disgorgement may properly be retained by the government, rather than paid out to the victims of statutory violations. *FEC v. Craig for U.S. Senate*, 816 F.3d 829, 847 (D.C. Cir. 2016) (citations and internal quotation marks omitted); *see also, e.g.*, *SEC v. Kahlon*, 873 F.3d 500, 509 (5th Cir. 2017) (quoting *SEC v. Blatt*, 583 F.2d 1325,

1335 (5th Cir. 1978)); *Herman*, 140 F.3d at 1422 ("Even though disgorgement of profits may produce money, . . . disgorgement of profits is a distinctly equitable remedy different from the legal remedy of compensatory damages . . . .").[7] *Even if* the Commissioner were to order a remedy against Brady under § 6-604(d)(2), that remedy might be a disgorgement remedy fundamentally different from the restitution available to the investors themselves.

The circuit court erred in concluding that Brady's direct settlements with the ten affected investors had the effect of wholly precluding the Commissioner from proceeding under § 6-604 of the Securities Act. While Brady's private settlements may limit the scope of the remedies available to the Commissioner, a permanent writ of prohibition was not justified on this basis. Issues concerning the precise scope of the remedies available to the Commissioner can be addressed on a full factual record, as necessary, following the conclusion of the administrative proceeding.

IV.

In the circuit court, Brady asserted two additional arguments to support the issuance of a writ of prohibition: that the Securities Division's administrative petition was time-barred; and that the challenged transactions do not involve "securities" subject to the Securities Act's restrictions. Because these arguments could provide alternative grounds to affirm the circuit court's grant of a permanent writ of prohibition, we address these additional arguments below.

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[7] Under § 409.6-603(e), "[t]he commissioner may create an 'Investor Restitution Fund' for the purpose of preserving and distributing to aggrieved investors, disgorgement or restitution funds obtained through enforcement proceedings under this act." Even if we assume that funds recovered by the Commissioner in the form of disgorgement of profits under § 6-604(d)(2) may be payable into the "Investor Restitution Fund," and may ultimately be disbursed to aggrieved investors, this does not alter the fact that the disgorgement remedy is only available to the Commissioner, and is not measured by the damages necessary to compensate a defrauded investor for their loss.

As an initial matter, the Commissioner argues that Brady is not entitled to argue alternate grounds for affirmance, because Brady did not cross-appeal from the circuit court's judgment. The Commissioner is mistaken. Brady was not required to appeal from a judgment which awarded him all of the relief he sought (a permanent writ of prohibition requiring the Commissioner to dismiss the administrative proceeding with prejudice). Because he received all that he had asked for, Brady was not "aggrieved" by the circuit court's judgment, and thus had no right – and no incentive – to appeal from that decision. *See* § 512.020. "A party cannot appeal from a judgment wholly in his favor, one that gives him all he asks[.]" *Smith v. City of St. Louis*, 395 S.W.3d 20, 26-27 (Mo. 2013) (citation omitted). "A claimant who suffers no harm, adverse ruling, or unfavorable decision cannot reasonably be expected to bring a cross-appeal to challenge a judgment entirely in its favor." *Treasurer v. Mickelberry*, 606 S.W.3d 150, 158 (Mo. App. W.D. 2020). The caselaw is clear that a respondent need not file a cross-appeal merely to raise alternate grounds for affirmance of the circuit court's judgment, so long as the respondent does not seek to alter or expand the relief awarded by the circuit court. *See, e.g.*, *Ritter v. Ashcroft*, 561 S.W.3d 74, 83 n.3 (Mo. App. W.D. 2018); *Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 239 n.12 (Mo. App. W.D. 2012); *Holman v. Holman*, 228 S.W.3d 628, 633-34 (Mo. App. S.D. 2007).

A.

Brady argues that the Securities Division's petition is barred, in whole or in part, by three statutes of limitations found in chapter 516 of the Revised Statutes of Missouri. The three statutes – §§ 516.380, .390, and .400 – provide:

> All actions and suits, upon any statute, for any penalty or forfeiture given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the commission of the offense, and not after.

§ 516.380.

> If the penalty is given in whole or in part to the state, or to any county or city, or to the treasury thereof, a suit therefor may be commenced, by or in behalf of the state, county or city, at any time within two years after the commission of the offense, and not after.

§ 516.390.

> All actions upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after.

§ 516.400.

We conclude that the statutes of limitation found in §§ 516.380, .390, and .400 do not apply to the Securities Division's administrative enforcement petition. Brady has not cited this Court to any case in which a statute of limitations found in chapter 516 of the Revised Statutes of Missouri has been applied to an administrative proceeding, and we are aware of none. At argument, Brady cited two cases which he contended involved the application of chapter 516 limitations periods to administrative proceedings: *Div. of Labor Standards v. Walton Constr. Mgmt Co.*, 984 S.W.2d 152 (Mo. App. W.D. 1998), and *State ex rel. Sure-Way Transp., Inc. v. Div. of Transp.*, 836 S.W.2d 23, 28 (Mo. App. W.D. 1992). But both cases involved petitions filed in the circuit court – not administrative proceedings. *See Walton Constr.*, 984 SW.2d at 154; *Sure-Way*, 836 S.W.2d at 27-28. Indeed, in *Sure-Way*, this Court held that the running of the two-year statute of limitations found in § 516.390 was tolled while the Division of Transportation prosecuted an administrative proceeding to obtain authorization to file the judicial civil-penalty action. *Sure-Way*, 836 S.W.2d at 28. Notably, the Court's analysis in *Sure-Way* never suggested that § 516.390 should apply to the administrative proceeding itself. Instead, we held that the administrative process to authorize the filing of a lawsuit was simply outside the scope of § 516.390, and should be excluded from the two-year limitations period. *Id.* at 27 (holding that "[t]he legislature granted the Division a full two years between the offense and the filing of its suit in circuit court," and that

"[s]ection 516.390 does not contemplate any [administrative] process between the date of offense and the date on which the suit for penalties commences").

The underlying administrative proceeding before the Commissioner of Securities is not the type of proceeding subject to chapter 516's limitations periods. Section 516.100 provides that "*[c]ivil actions* . . . can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued[.]" (Emphasis added.) "Civil actions" have generally been understood to be *judicial* proceedings for the redress of private wrongs. Thus, in *Bailey v. Innovative Management & Investment, Inc.*, 890 S.W.2d 648 (Mo. 1994), the Missouri Supreme Court cited to § 516.100 and stated: "The statute of limitations is written in terms of when an action can be commenced. Rule 53.01 provides that '[a] civil action is commenced by *filing a petition with the court*.'" *Id.* at 650 (emphasis added; footnote omitted). Similarly, *Ostermueller v. Potter*, 868 S.W.2d 110 (Mo. 1993), held that, for purposes of the limitations periods in chapter 516, "[a] civil action is commenced by filing a petition with the court." *Id.* at 111 (citation omitted). *Ostermueller* noted that § 506.110.2 "defines the commencement of a civil action as '[t]he filing of a petition in a court of record, . . . and suing out of process therein.'" *Id.*

This court recognized that a "civil action" is a *judicial* proceeding in a somewhat different context in *Minx v. State Department of Social Services*, 945 S.W.2d 453 (Mo. App. W.D. 1997). In *Minx*, the Department of Social Services' Division of Child Support Enforcement filed an administrative child-support modification order with the circuit court, to obtain judicial enforcement of the order. We held that Rule 55.03 required that the Division's court filing be signed by an attorney. Like *Bailey* and *Ostermueller*, *Minx* emphasized that "[a] 'civil action' is commenced upon the filing of a petition with the court." 945 S.W.2d at 454. The Court held that, "[b]y filing the [administrative child-support modification] order with the circuit court, the director is effectively petitioning the court to review,

adopt, and enforce the order. We find the filing of the director's order with the circuit court institutes a 'civil action' under Rule 41." *Id.* at 455. Notably, *Minx* never suggested that *the contested administrative proceeding* which preceded the issuance of the administrative order itself constituted a "civil action"; instead, we held that the "civil action" was commenced when the Division requested relief *from the court*. *See also, e.g.*, *Grissom v. Grissom*, 886 S.W.2d 47, 55 (Mo. App. W.D. 1994) ("a civil action, as that term is used in Rule 51.05[, authorizing a peremptory change of judge], is an independent suit with new issues, new parties, and new relief which constitutes a final judgment reviewable by an appellate court").

In addition to § 516.100's statement that the statutes of limitation in chapter 516 govern only "civil actions," the fact that these limitation statutes do not apply to administrative proceedings is also confirmed by § 516.103. Section 516.103 provides:

> The time for commencement of any suit provided for in sections 516.380, 516.390 and 516.400, shall not be tolled by the filing or pendency of any administrative complaint or action and no such suit may be brought or maintained unless commenced within the time prescribed by said sections. An administrative order authorizing the commencement of any such suit shall not be considered as evidence of the violations alleged in any such suit.

(It appears that § 516.103 was adopted in 1993 to legislatively overrule the result reached in *Sure-Way Transportation*, 836 S.W.2d 23.) Section 516.103 distinguishes between "any suit provided for in sections 516.380, 516.390 and 516.400," on the one hand, and "any administrative complaint or action," on the other. While the statute provides that the "pendency of any administrative complaint or action" does not toll the limitations periods specified in §§ 516.380, .390, or .400, the wording of § 516.103 strongly suggests that those limitations periods do not apply to an "administrative complaint or action" itself.

The Missouri Supreme Court's decision in *Excel Drug Co. v. Missouri Department of Revenue*, 609 S.W.2d 404 (Mo. 1980), confirms that the statutes of limitation in chapter 516 apply only to judicial, but not administrative, proceedings. In *Excel Drug*, a Department of Revenue official made a sales tax assessment against a retail store, including a fraud penalty. The taxpayer-business filed a Petition for Reassessment, and the Department affirmed the assessment and penalty following a formal administrative hearing.

The taxpayer then filed a petition for judicial review of the Department's tax and penalty assessment in the circuit court. The taxpayer argued, among other things, that *the Department's administrative assessment* was time-barred, because it was not made within three years of the underlying transactions, as required by § 516.130(2) (which provides a similar limitations period to § 516.400). The Supreme Court rejected the taxpayer's claim that § 516.130(2) was applicable to the administrative assessment of sales taxes and related penalties. The Court quoted § 516.100, which provides that the statutes of limitations in chapter 516 govern the commencement of "[c]ivil actions." The Court then cited two fundamental principles:

> It is a well-known and often-repeated rule of law that actions and proceedings not clearly within the terms of statutes of limitations cannot be brought in by reason of extending the application of the statute through construction.
>
> It is another well-established rule of law that the statute of limitations does not begin to run until a cause of action accrues, and accrual does not occur until there exists the right of the injured party ***to bring and maintain a claim in a court of law***.

Id. at 409 (emphasis added; citations omitted).

After reviewing the relevant statutes, the Court concluded that the relevant statutes of limitation only applied to the Department of Revenue's commencement

of *judicial proceedings*, but not to the Department's assessment of taxes and penalties in a contested administrative case:

> . . . [T]he legislature did not intend the Director to have the right to recover unpaid taxes by an action at law until a proper assessment has been made, i.e., until an assessment has been made that complies with the provisions of §§ 144.010 to 144.510 including the provisions for administrative and judicial review . . . . In conclusion, it should be abidingly clear that, in the case of one who has filed a fraudulent return, the Director does not have authority to request the Attorney General to commence an action at law to recover unpaid taxes until the Director's assessment has become final, i.e., not subject to further review administrative or judicial.
>
> ***The making of an assessment does not constitute the commencement of an action. Thus, the provisions of §§ 516.100 to 516.370, which set out the limitation periods for the commencement of actions, have no application to the question here***. In addition, under the fact situation we are considering, there is no provision in the sales tax law for a time limitation on the Director's authority to make an assessment. The legislature did provide in § 144.220 for a two-year limitation period on the Director's authority to make an additional assessment, but that section expressly excludes from its scope assessments which are made with respect to a fraudulent return. The fact that the legislature made such an express exclusion indicates that it did not intend to put a time limit on the Director's authority to assess those who file a fraudulent return.
>
> In light of the settled principles of law set forth above, it is clear that ***any statute in Chapter 516 can apply only to limit the Director's authority to bring suit in a court of law within a given period from the time the assessment becomes final***, i.e., when not subject to further administrative or judicial review. Therefore, no part of the assessment in this case is invalid by reason of its being outside the period of the statute of limitations.

Id. at 410 (emphasis added). Under *Excel Drug*, the filing of the Securities Division's administrative petition before the Commissioner of Securities "does not constitute the commencement of a[ ] [civil] action" subject to §§ 516.380–.400. *Id.*

We emphasize that we address only the specific issue Brady raises: whether the statutes of limitations found in §§ 516.380, .390, and .400 apply to the Securities Division's administrative petition. As in *Lavender Farms*, we reject Brady's

suggestion "that the question before this Court is one of 'forever liability.'" 558 S.W.3d at 94. Our rejection of Brady's specific argument

> does not mean that there are not other limitations on the time in which the Securities Division may bring an action. *See*, *e.g.*, *Patterson v. State Bd. of Optometry*, 668 S.W.2d 240, 244 (Mo. App. E.D. 1984) (holding there was no applicable statute of limitations to bar administrative action by Board of Optometry and finding that the action was brought within a reasonable time but noting that the action could be barred if it was brought "beyond a reasonable time period from the time the misconduct occurred").

Id. Our holding does not give the Securities Division limitless authority to commence an enforcement action at any time.

B.

Brady also contends that the Securities Division's administrative petition should be dismissed, to the extent that it challenges transactions in which Brady sold or recommended variable annuity contracts to his clients. Brady contends that these transactions are beyond the Commissioner's regulatory authority, because the Securities Act's definition of a "security" "[d]oes not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or other specified period." § 409.1-102(28)(B).

We need not determine if variable annuities are exempted from the Securities Act's definition of a "security," because one of the statutes on which the Securities Division relies, § 409.5-502, is not limited to transactions in "securities."

Section 409.5-502 states:

> (a) It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

> (1) To employ a device, scheme, or artifice to defraud another person; or
>
> (2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Section 5-502 only applies to individuals who advise others concerning securities transactions, or who analyze securities, for compensation – persons who could be labelled "securities professionals." But while § 5-502 only applies to securities professionals, the transactions which are subject to the statute need not themselves be securities-related. Instead, the statute prohibits a securities professional from employing "a device, scheme, or artifice to defraud," and from engaging in a practice "that operates or would operate as a fraud or deceit," without limitation.

Section 5-502 contrasts with § 5-501, which prohibits <u>*anyone*</u> from engaging in fraudulent activity "in connection with the offer, sale, or purchase of a security." Section 5-501 provides:

> It is unlawful for a person, ***in connection with the offer, sale, or purchase of a security***, directly or indirectly:
>
> (1) To employ a device, scheme, or artifice to defraud;
>
> (2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
>
> (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

(Emphasis added.) Section 5-501 is not limited to securities professionals, but applies to any "person" who engages in fraudulent activities. On the other hand, however, § 5-501 does not prohibit <u>*any*</u> employment of "a device, scheme or artifice to defraud," but instead <u>*only*</u> prohibits that activity if it occurs "in connection with the offer, sale, or purchase of a security."

The contrast between § 5-501 (which is explicitly limited to transactions in securities) and § 5-502 (which is not) is highly significant. "When different

statutory terms are used in different subsections of a statute, appellate courts presume that the legislature intended the terms to have different meaning and effect." *MC Dev. Co. v. Central R-3 School Dist.*, 299 S.W.3d 600, 605 (Mo. 2009) (quoting *Nelson v. Crane*, 187 S.W.3d 868, 870 (Mo. 2006)); *see also, e.g.*, *Spire Mo., Inc. v. Mo. Pub. Serv. Comm'n*, 607 S.W.3d 759, 772 n.3 (Mo. App. W.D. 2020) (quoting *McAlister v. Strohmeyer*, 395 S.W.3d 546, 552 (Mo. App. W.D. 2013)). Notably, the Official Comments to §§ 501 and 502 of the Uniform Securities Act state that, while "[s]ection 501 applies to any securities offer, sale or purchase," "[s]ection 502(a) applies to any person that commits fraud in providing investment advice." The Official Comments to § 502 contemplate that "[a] person can violate both Section 501 and Section 502 *if the person violates Section 502 in connection with the offer, purchase, or sale of a security*." (Emphasis added.) This Comment recognizes that a transaction may _*not*_ be subject to both statutes, but may only be subject to § 502, if it does _*not*_ involve "the offer, purchase or sale of a security."

While § 5-502 is limited to fraudulent activities engaged in by "securities professionals," it is not limited solely to transactions in securities. We reject Brady's contention that the Securities Division's petition exceeds the Commissioner's regulatory authority, because the petition challenges transactions which (according to Brady) do not involve "securities" as defined in § 1-102(28)(B).[8]

Conclusion

The Commissioner of Securities has statutory authority to proceed against Brady on at least some of the theories espoused by the Securities Division, and is

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[8] We recognize that, under our reading of § 5-502, the statute could potentially be invoked with respect to conduct of a securities professional having no relationship to their involvement in the securities industry. This case does not involve such transactions, but instead involves transactions integrally related to Brady's work as a securities professional. We need not address the outer bounds of § 5-502's coverage to resolve this case.

authorized to award meaningful relief with respect to many, if not all, of the underlying transactions the Securities Division has challenged. In these circumstances, the circuit court abused its discretion when it issued a permanent writ of prohibition directing the Commissioner to dismiss the Securities Division's petition with prejudice. The judgment of the circuit court is reversed.

Alok Ahuja, Judge

All concur.