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BLOG

Second Circuit's Holding That Syndicated Loan Notes Are Not Securities Stands; U.S. Supreme Court Denies Petition for Writ of Certiorari in Kirschner

MARCH 7, 2024

On February 20, 2024, the United States Supreme Court denied a petition for writ of certiorari[1] and declined to review the 3-0 decision of the United States Court of Appeals for the Second Circuit (the Second Circuit) in *Kirschner v. JP Morgan Chase Bank, N.A.*,[2] which held that certain syndicated loan notes were not securities. By refraining from hearing the case, the Supreme Court left the Second Circuit's decision in place. The result is that syndicated loan lenders do not need to comply with securities laws in the ordinary course of selling syndicated loan notes to other lenders.

This case arose out of JP Morgan Chase Bank, N.A.'s (JP Morgan) approximately $1.775 billion term loan to Millennium Health LLC f/k/a Millennium Laboratories (Millennium). The term loan was allocated and apportioned to other lenders who could then resell it subject to certain assignment restrictions. Following the loan, the United States Department of Justice brought a *qui tam* action against Millennium for its billing practices, which was settled for $256 million. Millennium subsequently filed for Chapter 11 bankruptcy protection, and a trustee for the Millennium Lender Claim Trust was appointed. The trustee brought an action against the defendants, including JP Morgan, alleging, *inter alia*, state securities law violations in connection with the loan. The United States District Court for the Southern District of New York dismissed the state securities law claims, holding that the syndicated loan notes were not securities. This decision was appealed to and affirmed by the Second Circuit.

In reaching its decision, the Second Circuit applied the *Reves*[3] "family resemblance" test and reasoned that the syndicated loan notes resembled other debt instruments that fall outside the meaning of securities.[4] The court found that, although the buyers of the syndicated loan had an investment expectation, the syndicated loan was subject to assignment restrictions, sold to sophisticated institutional parties and not offered to the general public, secured by collateral, and subject to federal bank regulators that issued their own policy guidance addressing syndicated loans. After weighing these factors, the court concluded that the syndicated loan was not a security.

The Supreme Court has refrained from hearing the case and ruling on the issue of whether syndicated loans are securities, thereby maintaining the status quo. The *Kirschner* case had the potential to create fundamental changes in the syndicated loan market if the Supreme Court had held that syndicated loans were securities. The denial of the petition allows lenders to continue to make syndicated loans and conduct business as usual without fear of syndicated loan notes being subject to securities laws.

The Loan Syndications & Trading Association (LSTA) had filed amicus briefs in support of the finding that syndicated loans are not securities and expressed its satisfaction with the outcome, stating, "This is a great – and critical – result." The LSTA stated that the case, if decided adversely, could have had a "devastating effect on the $1.4 trillion market [for syndicated loans]."

Winston's Capital Markets and Securities Law Watch will continue to provide insights on securities litigation related to syndicated loans and post additional updates as they become available.

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[1] *Kirschner v. JP Morgan Chase Bank, N.A.*, 2024 U.S. LEXIS 841 (2024).

[2] *Kirschner v. JP Morgan Chase Bank, N.A.*, 79 F.4th 290 (2d Cir. 2023).

[3] *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

[4] *Kirschner*, 79 F.4th 290, at 303–11.

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