

Memorandum

Second Circuit Holds That *Kirschner* Syndicated Term Loans Are Not Securities

August 25, 2023

On August 24, 2023, the Second Circuit Court of Appeals issued its opinion in *Kirschner v. JP Morgan Chase Bank, N.A.*,¹ affirming the District Court's finding that the defendants-appellees did not violate securities laws in connection with the syndication of term loans because the term loans did not constitute securities and thus were not subject to state securities laws.

To determine whether the term loans constituted securities, the Second Circuit applied the four-factor test established by the Supreme Court in *Reves v. Ernst & Young*.² The four factors of the *Reves* test are: (1) the motivations underlying the sellers and buyers' entrance into the transaction, (2) the plan of distribution for the instrument, (3) the reasonable expectations of the investing public and (4) whether an alternate regulatory scheme exists that may protect buyers. Beginning with the presumption that every note is a security, the Second Circuit found that the second, third and fourth *Reves* factors favored concluding that the term loans at issue did not constitute securities by relying in particular on the following facts:

- the syndicated loans were offered and sold only to sophisticated investors and included assignment restrictions;
- the loan documents received by the lenders, including the lenders' representations, most consistently referred to the instruments as "loans" and the participating parties as "lenders";
- lenders were protected from risk because the loans were secured; and
- specific policy guidelines addressing syndicated term loans have been issued by regulators such as the Office of the Comptroller of the Currency, the Federal Reserve and the FDIC, rendering the application of securities laws unnecessary.

Notwithstanding its ruling, the Second Circuit found the investment motivations of the lenders (though mitigated by the borrower's commercial motivations) weighed in favor of concluding the loans were securities; however, this factor did not overcome the contrary conclusion on the other factors.

¹ *Kirschner v. J.P. Morgan Chase Bank, N.A.*, No. 21-2726-cv, 2023 U.S. App. LEXIS 22330 (2d Cir. August 24, 2023).

² *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

The ruling by the Second Circuit in favor of the defendant banks preserves the existing legal framework for the syndicated lending market, allowing the market to continue to operate using current practices.

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The plaintiff-appellant may appeal to the Supreme Court of the United States. For additional background on the *Kirschner* case, please refer to our previous client alert [here](#). Simpson Thacher will continue to monitor further developments in this important area of the law.

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