

Second Circuit Affirms That Syndicated Term Loans Are Not Securities

August 28, 2023

On August 24, 2023, the Second Circuit issued a highly anticipated decision in *Kirschner v. JP Morgan*, affirming that a syndicated term loan is not a “security.”

JP Morgan Chase and other financial institutions arranged a \$1.775 billion term loan to Millennium Health LLC in 2014 and subsequently agreed to syndicate the term loan.¹ Embroiled in civil and criminal litigation, Millennium filed for Chapter 11 bankruptcy in 2015.² Kirschner, serving as trustee for lenders who purchased Millennium notes, brought Blue Sky and common law securities claims in New York state court. The claims were later removed to the Southern District of New York in 2017.³ In 2020, the district court dismissed Kirschner’s claims, finding that the syndicated term loan did not meet the definition of a security under the Supreme Court’s four-factor “family resemblance” test established in *Reves v. Ernst & Young*.⁴

In affirming the district court’s decision, the Second Circuit’s analysis focused on the *Reves* test.⁵ The court found that three factors—the plan of distribution, the reasonable expectations of the public and the existence of other risk-reducing factors—favored a conclusion that the term loan should not be classified as a security. The court found that only one factor, the investment-focused motivation of the sophisticated parties to whom the term loan was syndicated, favored classifying the term loan as a security. However, the court determined this motivation was outweighed by the other three *Reves* factors.⁶

The Second Circuit’s affirmation of the district court’s decision is significant because it maintains the regulatory status quo for syndicated term loans, thereby avoiding the significant upheaval in the syndicated loan market that could have resulted if the

¹ *Kirschner v. JP Morgan Chase*, No. 21-2726, at 7-8 (2nd Cir. Aug 24, 2023).

² *Id.* at 16.

³ *Id.* at 16.

⁴ 494 U.S. 56 (1990).

⁵ The court previously requested that the Securities & Exchange Commission provide its views on whether term loans are securities, but the SEC declined the court’s invitation. See our Debrief [here](#).

⁶ *Kirschner*, No. 21-2726, at 38-39.

district court's decision had been overturned or if the Second Circuit had otherwise signaled that term loans should be considered securities.

The plaintiff has 14 days to petition for rehearing before the Second Circuit and has 90 days to petition the Supreme Court to review the decision. We will continue to monitor the case.

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Please do not hesitate to contact us with any questions.



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