CADWALADER

Final Final Answer: Loans Are Not Securities

February 23, 2024

By **Leah Edelboim**
Partner | Fund Finance

A lawsuit that has worked its way through New York federal courts since 2017, including up to the Second Circuit Court of Appeals, has met its final stop at the United States Supreme Court.

This week, the Supreme Court denied a petition for a writ of certiorari in the *Kirchner* case. This case raised the question of whether broadly syndicated term loans are “securities” and therefore should be subject to state and federal securities regulations.

We previously reported **here** that we had a final answer to whether a term loan is a security when, last summer, the Second Circuit Court of Appeals affirmed a 2020 decision from the U.S. District Court for the Southern District of New York which held that broadly syndicated term loans are not securities. Most legal and regulatory experts expected that the Court’s decision would be the end of this litigation.

Now the Supreme Court has spoken, or perhaps we should say has declined to speak, and therefore we have our final *final* answer. Without providing any explanation, the Court declined to grant the petition that Kirschner submitted for the Supreme Court to hear the case.

For our non-lawyer readers out there, when parties are not satisfied by a ruling of a lower court they have to file a petition with the U.S. Supreme Court asking the Court to hear (and therefore determine) their case. The way this is generally done is to ask the court to grant a writ of certiorari, which is a request that the Supreme Court order the lower court in question to send the case record to the Supreme Court for review. Generally speaking, unlike other courts where you can file an original lawsuit or file an appeal of a decision of a lower court by following court procedure, the Supreme Court is not obligated to hear all cases and it can be choosy about the cases that it does hear. To put it in perspective, according to the Court, it is asked to review thousands of cases each year and it generally actually hears less than 100.

When the Supreme Court declines to grant a petition for certiorari, the existing decision in the case will stand as final, which is what has happened here. Hence, final answer: syndicated term loans are NOT securities.

Loan market constituents have been watching this case over the years with great interest. The Loan Syndications Tradition Association ("LSTA") has been quite vocal in this case and has urged that a determination that syndicated term loans are securities could pose an case as an “existential threat” to the $1.4 trillion syndicated loan market in the U.S. with the fear that a determination that securities laws should apply to the syndicated loan market would completely upend that market as we know it. We explained the implications in one of our previous articles on this case **here**.

The LSTA and others filed amicus briefs in support of their position when the case was before the Second Circuit Court of Appeals. The case generated a great deal of excitement when the Court asked that the SEC weigh in on the question before it. After a number of extensions of time, the SEC declined to comment.

It is interesting to note that this is not the first time the Supreme Court was ask to grant a petition of certiorari on this topic. In 1992, the Second Circuit Court of Appeals found in *Banco Espanol de Credito v. Security Pacific National Bank* that loan participations are not securities. An appeal was filed following the Court’s decision and the Supreme

Court denied certiori in that case. Perhaps more significantly, in that case, in the context of briefings submitted to the court, the SEC had indicated that loans could be securities although court ultimately ruled the other way.

You can read about the different phases of the case as we reported them here in Fund Finance Friday **here**.