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Commercial Litigation

September 2014

Loginovskaya v. Batratchenko: The Second Circuit Limits the Reach of Commodities Fraud Claims

In *Loginovskaya v. Batratchenko* ("*Loginovskaya*"),[1] the US Court of Appeals for the Second Circuit ruled in a 2-1 opinion that private commodities fraud claims under the Commodity Exchange Act (the "CEA") may proceed only if the plaintiff has alleged a commodities transaction within the United States, *even though* the defendants and their allegedly fraudulent conduct were in the United States. With this, the Second Circuit has applied to the CEA the same territorial limitations that apply to securities fraud cases under the US Supreme Court's decision in *Morrison v. National Australia Bank Ltd.* ("*Morrison*").[2] Significantly, *Loginovskaya* applied *Morrison's* presumption against the extraterritorial application of US law to the CEA provision that gives individual plaintiffs the right to sue for CEA violations generally, as opposed to just the CEA's anti-fraud provision. Thus, *Loginovskaya* can be read as broadly limiting the extraterritorial reach of the CEA not only as to prohibited conduct, but also as to who may sue under the CEA for alleged violations of the statute or its associated regulations.

Background

The plaintiff, Loginovskaya, is a Russian national living in Russia.[3] The defendants are a group of entities belonging to the Thor Group, an investment manager based in New York, and two of its principals.[4] Several Thor entities were registered participants in US commodities markets as commodity pool operators or commodity trading advisors.[5]

Loginovskaya alleged that she was solicited in Russia by Thor's CEO, who allegedly made oral and written representations regarding the benefits of investing in a commodities fund managed by Thor.[6] Loginovskaya entered into two investment contracts with Thor and wired US$720,000 to Thor in New York.[7] Over time, her account statements showed positive returns, but when Loginovskaya tried to withdraw her funds and close her account, Thor never returned her money.[8] Loginovskaya alleged that Thor misappropriated her investment

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1 No. 13-1624-CV,— F.3d—, 2014 WL 4358439 (2d Cir. Sept. 4, 2014) ("*Loginovskaya*").

2 561 U.S. 247 (2010). *Morrison* held that, absent a clear statement by Congress in a statute, US federal laws are presumed not to have extraterritorial reach. *Id.* at 255.

3 *Loginovskaya* at *1.

4 *Id.*

5 *Id.*

6 *Id.* at **1 – 2.

7 *Id.* at *2.

8 *Id.*

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and used it to fund an unrelated New York real estate venture in which the two defendant Thor principals had a personal financial interest.[9]

Loginovskaya sued under CEA § 4o, the CEA's anti-fraud provision, which prohibits fraud by commodity trading advisors and commodity pool operators (and associated persons),[10] and CEA § 22, which provides a private cause of action for damages resulting from a violation of § 4o in connection with one of four types of commodities transactions.[11] The lower court dismissed the case as impermissibly extraterritorial.[12] Loginovskaya appealed.

The Ruling: Applying *Morrison* to the CEA

The Second Circuit held that a private plaintiff can only assert a claim for violations of CEA § 4o if it can show that one of the four types of transactions listed in CEA § 22 occurred in the United States. The Court held that *Morrison's* presumption against extraterritoriality applies equally to the prohibition against commodities fraud in CEA § 4o and to the private right of action under CEA § 22. The Court rejected the plaintiff's argument that the *Morrison* presumption should be limited to "substantive (conduct-regulating) provisions rather than procedural provisions such as § 22,"[13] noting that *Morrison* does not draw this distinction and otherwise "discouraged courts from making fussy distinctions in deciding whether or not the presumption applies."[14]

Finding no affirmative sign that Congress intended for CEA § 22 to apply extraterritorially, the Court analyzed the section for the "focus of congressional concern" to determine when a private claim could fall within Congress's domestic concerns.[16] As in the securities fraud context, the Court held that the focus of congressional concern in the CEA's private right of action "is clearly transactional."[17] Accordingly, the Court ruled that the "domestic transaction" standards for when a securities fraud claim is sufficiently domestic apply equally to private commodities fraud claims under CEA §§ 4o and 22. A plaintiff alleging a CEA claim must therefore plead facts showing "that the transfer of title or the point of irrevocable liability for [the applicable commodities interest] occurred in the United States."[18]

Here, the Court affirmed the dismissal of Loginovskaya's claims because she had not pleaded a domestic commodities transaction. Specifically, Loginovskaya failed to allege (i) a US transfer of title, since she bought her Thor interest in Russia; and (ii) that she incurred irrevocable liability in the United States, since the negotiation, "meeting of the minds" and execution of her transactions with Thor took place in Russia.[19]

In a vigorous dissent, Judge Lohier argued that the majority "misunderstands both the commodities laws of the United States and the presumption against extraterritoriality."[20] In his view, the territorial limitations articulated in *Morrison* applied only to CEA § 4o, as the substantive prohibition on commodities fraud, and not to CEA § 22, which simply limits the categories of persons who may seek remedies under the statute.[21] Judge Lohier believed the defendants' alleged conduct was sufficiently domestic to fall within CEA § 4o. He argued that limiting a private claim for damages resulting from this domestic fraud to plaintiffs whose commodities transactions occurred in the United States created an unjustified extraterritoriality hurdle that would "close our courts…to legitimate claims that [US] laws have been violated."[22]

9 *Id.*

10 7 U.S.C. § 60(1).

11 7 U.S.C. § 25(a)(1). These four circumstances may be summarized as "receiving trading advice for a fee, making a contract of sale of any commodity for future delivery or the payment of money to make such a contract, placing an order for purchase or sale of a commodity, or market manipulation in connection with a swap or contract for sale of a commodity." *Loginovskaya* at *3.

12 *Loginovskaya v. Batratchenko*, 936 F. Supp. 2d 357 (S.D.N.Y. 2013).

13 *Loginovskaya* at *5.

14 *Id.* Moreover, after *Morrison*, the Supreme Court in *Kiobel v. Royal Dutch Petroleum Corp.*, 133 S.Ct. 1659, 1664 (2013) applied the Morrison presumption to the Alien Tort Statute, a US federal jurisdictional statute.

15 *Loginovskaya* at **5 – 6.

16 *Id.* at *5.

17 *Id.*

18 *Id.* at *7.

19 *Id.* at **7 – 8.

20 *Id.* at *9 (Lohier, J., dissenting).

21 *Id.* at **10 – 11.

22 *Id.* at *10.

Implications

Loginovskaya is yet another post-*Morrison* decision in which the Second Circuit has reinforced territorial limits on US law. Plaintiffs pursuing fraud claims under the CEA must ensure that they have a domestic commodities *transaction* on which to sue. Moreover, given recent rulings by the Second Circuit under *Morrison*, plaintiffs pursuing CEA fraud claims also must be prepared to allege other US connections, as alleging a US commodities transaction, although necessary, may not in all cases be sufficient to assert a domestic claim under the CEA.[23]

As important, the Court in *Loginovskaya* applied *Morrison's* presumption against extraterritorial application of US laws to the CEA provision which limits *who may sue* under the CEA. Accordingly, standing under the CEA may now raise issues of extraterritoriality, and defendants in CEA cases with significant foreign components would be well advised to carefully examine both the procedural and substantive rules underlying the claims asserted as they evaluate potential defenses under *Morrison*.

The authors gratefully acknowledge the work of Kim Haviv, an associate at the Firm, on this Alert.

23 *See ParkCentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, No. 11-397-CV L,— F.3d—, 2014 WL 39773877 (2d Cir. Aug. 15, 2014).