

Southern District of New York: Underwriting a Tranche of Securities Does Not Subject the Underwriter to Section 11 Liability for the Entire Securitization

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On March 11, 2020, the Southern District of New York held that the underwriter of one tranche of securities was not subject to liability under Section 11 of the Securities Act of 1933 (“Securities Act”) with respect to a different tranche of securities from the same securitization that it did not underwrite. *Federal Deposit Ins. Corp. v. First Horizon Asset Securities*, 2020 WL 1165848 (S.D.N.Y. 2020) (Stanton, J.).^[1] The court granted the underwriter's motion for summary judgment on the Section 11 claim.

The court rejected plaintiff's contention that a defendant's “liability as an underwriter is not limited to the tranche or class of subordinated certificates” that the defendant actually underwrote. The court explained that “the right to sue that Section 11 gives a purchaser of a security is to sue ‘every underwriter with respect to such security,’ or underwriters of the security at issue.” *Id.* (quoting 15 U.S.C. § 77k(a)). The court held that this “right does not encompass suing every underwriter with respect to the entire securitization and each of its securities.”

The court also found meritless plaintiff's alternative argument that even though the defendant underwriter “did not directly purchase or sell the senior certificates” at issue, the defendant was nonetheless subject to Section 11 liability “because of its ‘direct or indirect participation’ in the distribution of the senior certificates.” *Id.* (quoting 15 U.S.C. § 77b(a)(11)). The court recognized that “[p]ersons may be liable [under Section 11] for participation [in the distribution of securities] even though they did not themselves directly sell or offer securities or purchase securities for resale.” *Id.* (quoting *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167 (2d Cir. 2011)). However, the court emphasized that Section 11 does not reach “persons who provide services that facilitate a securities offering, but who do not themselves participate in the statutorily specified distribution-related activities.” *Id.* (quoting *Lehman Bros.*, 650 F.3d 167).

Here, plaintiff asserted that the defendant “participated in the distribution of the [senior] certificates by performing due diligence on the loans backing the certificates in the securitization” and reviewing the prospectus supplements. Plaintiff contended that “[b]ecause many of the loans backing the senior certificates are the same as those backing the subordinated certificates” that the defendant underwrote, the defendant's “contribution to the securitizations was not limited to the subordinated certificates.” The court held that while the defendant's efforts “helped facilitate the securities offerings, those activities do not involve the purchase, offer, or sale of the securities and are thus not part of their distribution.”

Plaintiff also argued that the senior certificates “would never have been offered without [the defendant’s] participation” because “the collateral underlying the subordinate certificates, and the credit protection they provided, was material to investors” who purchased the senior certificates. The court held that “[e]ven if those statements are true, those relationships are not part of the purchase, offer, or sale of the senior certificates.”

The court concluded that “there is no genuine issue whether [the defendant] is an underwriter of the senior certificates at issue; it is not.”

[1] Simpson Thacher represented NatWest Markets Securities Inc. (f/k/a RBS Securities Inc.) in this matter.

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