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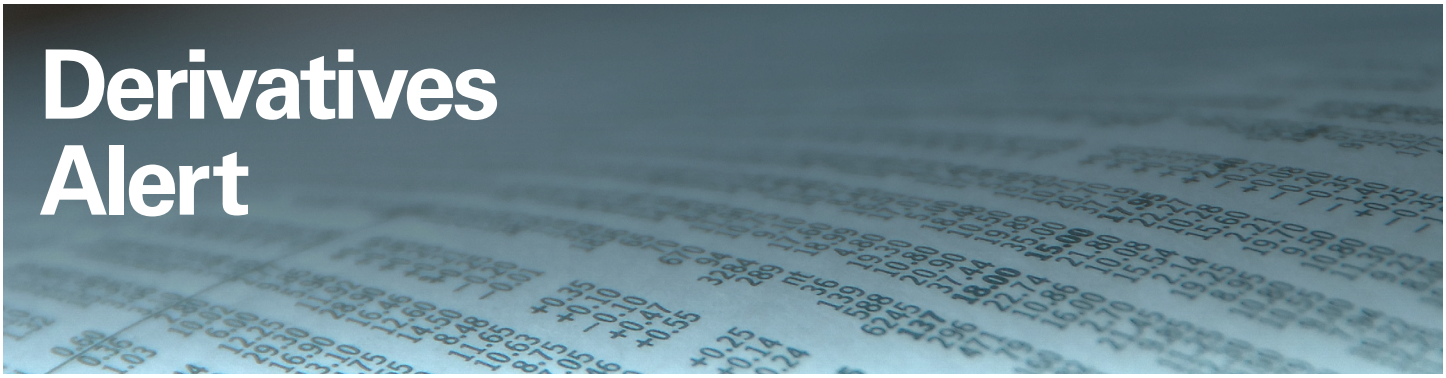

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Southern District Decision Dismisses Commodity Exchange Act Claims Based on *Morrison*

The U.S. District Court in the Southern District of New York recently dismissed a class action lawsuit alleging, among other claims, that a large number of entities and individuals in the market for producing, refining and trading Brent crude oil (together, Defendants) manipulated the prices of Brent crude oil and Brent crude oil futures and other derivatives contracts traded on the New York Mercantile Exchange (NYMEX) and the Intercontinental Exchange (ICE Futures Europe), in violation of Sections 6(c)(1) and 9(a) of the Commodity Exchange Act (CEA), 7 U.S.C. §§ 1-26 (2012 & Supp. I-III), and engaged in anticompetitive behavior, in violation of the Sherman Act, 15 U.S.C. §§ 1-7 (2012). *In re N. Sea Brent Crude Oil Futures Litig.*, No. 13-md-02475 (ALC), 2017 WL 2493135 (S.D.N.Y. June 8, 2017) (*Brent Crude Oil*).[1]

The district court based its dismissal on the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), which held that U.S. law presumptively does not apply extraterritorially to civil actions,[2] and the manner in which the U.S. Court of Appeals for the Second Circuit has applied *Morrison* to complaints alleging CEA[3] and securities law violations.[4] Following closely on the heels of another Southern District decision dismissing CEA manipulation claims, *Harry v. Total Gas & Power N. Am., Inc.*, 2017 WL 1134851 (S.D.N.Y. Mar. 27, 2017) (*Total Gas*),[5] the district court's opinion illustrates the efficacy of defendants' efforts to highlight the geographic and economic distance between their alleged misconduct in one market and the plaintiffs' trading activity in another. While *Brent Crude Oil* involved a foreign market (North Sea oil) and *Total Gas* did not (domestic natural gas), both decisions homed in on the absence of a sufficient connection between the physical market that the defendants allegedly manipulated and the market in which the plaintiffs traded derivatives.

[1] Plaintiffs also brought claims under the Sherman Act, and various state and common law theories. *Brent Crude Oil*, 2017 WL 2493135, at *1. The district court dismissed these claims as well. *Id.* at *12-14. Two of the Defendants also moved to dismiss for lack of personal jurisdiction. The district court dismissed the claims against one of the two defendants on that basis in a separate opinion and order. *See generally In re N. Sea Brent Crude Oil Futures Litig.*, No. 13-md-02475 (ALC), 2017 WL 2535731 (S.D.N.Y. June 8, 2017).

[2] *See* "U.S. Supreme Court Greatly Restricts Extraterritorial Application of Civil Securities Fraud Actions," Skadden Client Alert, July 2010.

[3] *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014).

[4] *Parkcentral Global Hub Ltd. v. Porsche Auto Holdings SE*, 763 F.3d 198 (2d Cir. 2014).

[5] *See* "Southern District Decision Highlights Challenges for Private Litigants Pursuing Manipulation Claims Under the CEA," Skadden Client Alert, April 2017 (Skadden Total Gas Client Alert).

In *Brent Crude Oil*, Plaintiffs included a putative class of U.S. individuals and entities that traded Brent futures and derivatives contracts on NYMEX and ICE Futures Europe (the Trader Plaintiffs) and a putative class of the owners of landholding and lease-holding interests in U.S. oil-producing property (the Landowner Plaintiffs) (together, Plaintiffs).[6] 2017 WL 2493135, at *1. Plaintiffs alleged that Defendants engaged in manipulation of the physical Brent oil market in Europe between 2010 and 2012 by, among other conduct, making spoofing-type offers to move the price of "Dated Brent," the primary benchmark for physical Brent oil; manipulative reporting to Platts, a price-reporting agency; and conducting wash transactions. *Id.* at *3. Plaintiffs further alleged that Defendants' allegedly manipulative conduct had "ripple" effects throughout the derivatives markets, including on Brent futures and derivatives traded on NYMEX and ICE Futures Europe. *Id.* Defendants moved to dismiss the complaints on several grounds, including on the basis that *Morrison* barred Plaintiffs from bringing their CEA claims. *Id.* The district court's application of *Morrison* here demonstrates that even claims arising from transactions entered into by plaintiffs in the U.S. futures markets may not be sufficient to overcome an extraterritoriality challenge where defendants' alleged misconduct is committed abroad and the connection between that conduct and plaintiffs' domestic trading is too attenuated.

CEA Claims: *Morrison* and the Presumption Against Extraterritoriality

In *Morrison*, the Supreme Court applied the presumption against the extraterritorial application of U.S. law to Section 10(b) of the Securities and Exchange Act of 1934 (and Rule 10b-5 promulgated thereunder).[7] In determining whether the presumption applied, the *Morrison* Court explained that only a "clear indication" of congressional intent to apply the law extraterritorially would suffice to overcome the presumption. The Court considered both the language of Exchange Act Section 10(b) and the language in provisions describing the SEC's jurisdiction and the Exchange Act's purposes, 561 U.S. at 261-266, and concluded that none of these sources contained the requisite "clear indication" that could overcome the presumption, including a general reference to foreign commerce in the Exchange Act's definition of "interstate commerce." *Id.* at 265.

Having determined that the presumption applied, the Court addressed the plaintiffs' contention that their claims did not require extraterritorial application of Section 10(b). *Id.* at 266.

The plaintiffs were Australians who had purchased shares in one of the defendants, National Australia Bank. The shares were sold on the Australian Stock Exchange after the bank had acquired a mortgage servicing company in Florida. *Id.* at 252. The plaintiffs alleged that the defendants engaged in deceptive conduct in Florida by manipulating the mortgage company's financial models and making misleading statements. *Id.* at 252-253. The Court held that the plaintiffs' allegations required it to determine the "focus of congressional concern," *id.* at 266-267 (internal quotation marks omitted), and concluded that the plaintiffs' allegations failed to establish a domestic case because "the focus of the Exchange Act [was] not upon the place where the deception originated, but upon purchases and sales of securities in the United States," *id.* at 266. Courts applying *Morrison* thus conduct a one or two-step inquiry. First, they determine whether a statute gives a clear indication of extraterritorial application; and second, if the statute does not, they ascertain the "focus of congressional concern" in order to determine whether the plaintiff's claims in fact require extraterritorial application of the law. The *Brent Crude Oil* decision is one of several cases applying *Morrison* to the CEA in the Second Circuit[8] and other circuits.[9] The *Brent Crude Oil* court relied on the Second Circuit's 2-1 decision in *Loginovskaya v. Batratchenko*, the first and (to date) only court of appeals decision applying *Morrison* to a private cause of action under the CEA. The plaintiff in *Loginovskaya* was a Russian citizen residing in Russia who had entered into investment contracts with the defendants, who allegedly operated a group of firms based in New York that invested in commodity futures among other products.[10] The plaintiff claimed that the defendants violated Section 40 of the CEA, 7 U.S.C. § 6o (2012), which prohibits fraud by a commodity trading advisor or commodity pool operator. The Second Circuit held that *Morrison* required dismissal of the plaintiff's claims. *Loginovskaya*, 764 F.3d at 275. The court concluded that, like the Exchange Act, "the CEA as

[6] The two sets of Plaintiffs filed separate actions; their cases were consolidated before Judge Carter in October 2013. *Brent Crude Oil*, 2017 WL 2493135, at *3. Both groups filed Second Amended Complaints in 2015. *Id.* at n. 3.

[7] The Court explained that Rule 10b-5 could not extend further than Section 10b permits. *Morrison*, 561 U.S. at 261-262.

[8] *See, e.g., Loginovskaya*, *supra* note 3; *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-CV-9391-GHW, 2017 WL 1169626, at *27 (S.D.N.Y. Mar. 28, 2017) (concluding that Morrison did not bar plaintiffs' private price manipulation claims); *Sullivan v. Barclays PLC*, No. 13-CV-2811 (PKC), 2017 WL 685570, at *28-30 (S.D.N.Y. Feb. 21, 2017) (dismissing plaintiffs' CEA claims under *Morrison*)); *Myun-Uk Choi v. Tower Research Capital LLC*, No. 14 CV 9912 (KMW), 2017 WL 532302, at *3-4 (S.D.N.Y. Feb. 8, 2017) (same); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 CIV. 7789 (LGS), 2016 WL 5108131, at *26-27 (S.D.N.Y. Sept. 20, 2016) (same)); *Chan Ah Wah v. HSBC N. Am. Holdings Inc.*, No. 15 CIV. 8974 (LGS), 2016 WL 4367976, at *3 (S.D.N.Y. Aug. 11, 2016) (same); *Starshinova v. Batratchenko*, 931 F. Supp. 2d 478, 486-487 (S.D.N.Y. 2013) (same).

[9] S*ee, e.g., CFTC v. Vision Fin. Partners, LLC*, infra note 16; *CFTC v. Garofalo*, No. 10 C 2417, 2010 U.S. Dist. LEXIS 145379, at *18 (N.D. Ill. Dec. 21, 2010) (*Morrison* did not bar the CFTC's claims where the defendant, who was a foreign citizen and resided outside the United States, traded on a U.S. exchange).

[10] The plaintiff alleged that some of the defendant firms were registered in the United States as commodity pool operators or commodity trading advisors. *Loginovskaya*, 764 F.3d at 268.

a whole … is silent as to extraterritorial reach." *Id.* at 271.[11] Because the presumption against extraterritoriality therefore applied, the court had to decide whether the plaintiff's case ran afoul of it. In determining the "focus of congressional concern [in the CEA]," *id.* at 272 (internal quotation marks omitted), the Second Circuit reasoned that the relevant provision to examine was the CEA's private cause of action, Section 22, 7 U.S.C. § 25 (2012), because a private plaintiff "must satisfy [its] threshold requirement[s]" in order to bring suit, *Loginovskaya*, 764 F.3d at 272. Section 22, the court explained, allows private claims in only four circumstances, each of which is focused on transactions in the commodities markets. *Id.* The Second Circuit accordingly held that the CEA's focus, at least for private claims, was the same as the Exchange Act's: "*Morrison*'s domestic transaction test in effect decides the territorial reach of CEA § 22." *Id.*[12] Applying that test, the court held that the plaintiff fell short because her investment contracts were negotiated and signed in Russia. *Id.* at 274.

In relying on *Loginovskaya*, the district court in *Brent Crude* Oil faced a wrinkle because Plaintiffs, unlike the *Loginovskaya* plaintiff, clearly engaged in domestic transactions — at a minimum their trading of Brent futures on NYMEX[13] — but those transactions were not conducted with Defendants. Rather, the transactions that Plaintiffs alleged formed the basis for the manipulative scheme were physical Brent crude oil transactions in the North Sea, and Defendants claimed it was those transactions that mattered under *Morrison* and *Loginovskaya*. The district court thus needed to consider which transactions were relevant for purposes of conducting the *Morrison* and *Loginovskaya* analysis. Observing that *Loginovskaya* focused on the plaintiff's "commodity transaction rather than the conduct that allegedly gives rise to a violation," the district court determined that Plaintiffs had "the better argument" that their transactions were the relevant ones. *Brent Crude Oil*, 2017 WL 2493135, at *6.

But the district court ultimately found it unnecessary to decide the question, because another Second Circuit decision, *Parkcentral Global Hub Ltd. v. Porsche Auto Holdings SE*, 763 F.3d 198 (2014) (per curiam), made clear that, while a domestic securities transaction was "'*necessary* to a properly domestic invocation of § 10(b), such a transaction is not alone *sufficient* … .'" *Brent Crude Oil*, 2017 WL 2493135, at *7 (quoting *Parkcentral*, 763 F.3d at 215 (emphasis in *Brent Crude Oil*)). *Parkcentral* involved security-based swap agreements based on the value of Volkswagen (VW) stock. The plaintiffs were hedge funds that executed the agreements in the United States and claimed that Porsche Automobil Holding SE and its executives violated Section 10(b) by making false statements about Porsche's plans with respect to the acquisition of VW stock. The Second Circuit ruled that while the plaintiffs' transactions may have been domestic — they executed the security-based swap agreements in the United States — those transactions were too far removed from the defendants' alleged fraudulent conduct, which involved "statements made primarily in Germany with respect to stock in a German company traded only on exchanges in Europe." *Parkcentral*, 763 F.3d at 216. On these facts, the court of appeals explained, "the application of § 10(b) to the defendants would so obviously implicate the incompatibility of U.S. and foreign laws that Congress could not have intended it *sub silentio*." *Id.*

Similar to *Parkcentral*, the *Brent Crude Oil* court ruled that, while Plaintiffs engaged in domestic transactions, the connection between those transactions and the defendants' conduct — "allegedly manipulative and misleading reporting to Platts in London about physical Brent crude oil transactions conducted entirely outside of the United States" — was too attenuated. *Brent Crude Oil*, 2017 WL 2493135, at *7. The court elaborated that Plaintiffs' Brent futures and derivatives trades were "not priced by reference to the Dated Brent assessment published by Platts (which allegedly was inaccurate by virtue of Defendants' manipulative reporting), but instead to derivations of the ICE Brent Index, which does not incorporate the Dated Brent assessment." *Id.* The domestic location of Plaintiffs' transactions thus was insufficient to overcome the *Morrison* presumption.

Together, the *Loginovskaya* and *Brent Crude Oil* decisions make clear that *Morrison* presents a daunting obstacle to private CEA claims (at least with respect to futures transactions) that involve

[11] The Second Circuit noted that the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the CEA to cover swaps and that the amendments may apply to activities outside the United States in "some circumstances." *Loginovskaya*, 764 F.3d at 271 n.4 (citing CEA Section 2(i), 7 U.S.C. § 2(i)). The court explained that it did not need to address the Dodd-Frank amendments, however, because "no swaps or transactions involving swaps [were] at issue" in the case. *Id.*

[12] The panel majority acknowledged that, by treating CEA Section 22 as the gateway for determining whether private claims that are not purely domestic may proceed under *Morrison*, it was establishing a distinction between private suits and CFTC enforcement actions, whose compliance with *Morrison* would turn on the focus of the substantive provision the CFTC contends the defendant violated. The panel majority observed that such a distinction was "not remarkable." *Loginovskaya*, 764 F.3d at 273. Judge Lohier dissented on this basis, concluding that there is "no evidence that Congress intended …. a dual regime …" *Id.* at 278-79 (Lohier, J., dissenting). Noting that the panel majority "will not dispute that the defendants' allegedly fraudulent acts were sufficiently domestic to fall with the scope of CEA § 40," *id.* at 276, Judge Lohier contended that the majority erred in applying the *Morrison* presumption to CEA Section 22, which "does not purport to regulate conduct, impose liability for particular actions, or define a plaintiff's claims under the CEA," *id.* at 278. Instead, Judge Lohier would have focused on CEA Section 40 — the provision the defendants allegedly violated — and determined that the law applied to the plaintiff's allegations of fraudulent conduct in the United States consistent with *Morrison* because it prohibits fraud without requiring a transaction and is focused "on the regulated commodity entities" rather than "individual transactions." *Id.* at 281.

[13] The district court noted that the parties disputed whether the ICE Futures Europe constituted a "domestic exchange" and whether the transactions conducted on the exchange could be considered to be domestic transactions. *Brent Crude Oil*, 2017 WL 2493135, at *6 n.5.

some element of foreign conduct. *Loginovskaya* indicates that plaintiffs alleging CEA violations based on their foreign transactions — even when those transactions are with CFTC registrants and involve allegedly fraudulent conduct in the United States — will face difficult, if not insurmountable, *Morrison* challenges.[14] And *Brent Crude Oil* portends similar headwinds for plaintiffs who engaged in domestic futures transactions but allege CEA violations arising from different transactions conducted abroad.

It also bears noting that while *Brent Crude Oil* turned on an application of *Morrison*, its reasoning was reminiscent of *Total Gas*, where another district court in the Southern District dismissed CEA manipulation claims on the ground that the plaintiffs failed to plead a sufficient connection between the plaintiffs' futures transactions in one market and the defendants' allegedly manipulative conduct in a different market: the physical market for the commodity underlying the futures contracts. *See* "Skadden Total Gas Client Alert." Indeed, it is possible that the *Brent Crude Oil* Plaintiffs' claims could not have survived, even absent *Morrison*, on the *Total Gas* ground that the complaints did not plausibly allege that Defendants' allegedly manipulative conduct caused Plaintiffs economic harm or "actual damages."[15] Given the close scrutiny courts are applying to CEA manipulation claims based on conduct in one market that is allegedly related or correlated to the market in which plaintiffs were trading, defendants facing private CEA manipulation suits would do well to focus on the asserted nexus between their alleged misconduct and the plaintiffs' trading, in addition to whether the allegations implicate the presumption against extraterritorial application of U.S. law.

CFTC Enforcement Under *Morrison*

Although *Loginovskaya*'s CEA Section 22 "domestic transaction" test does not pose a problem for the CFTC's enforcement program, *Morrison* could nevertheless still serve as a promising avenue of defense, at least in cases alleging manipulation or attempted manipulation of the futures markets (*see* note 11, *supra*). The Second Circuit did hold, after all, that the CEA "as a whole … is silent as to extraterritorial reach." *Loginovskaya*, 764 F.3d at 271. So, the CFTC must establish in the Second Circuit that the particular provision it is seeking to enforce contains clear language to overcome the presumption; failing that, it must establish that the conduct it is challenging is sufficiently domestic in nature to avoid the conclusion that the CFTC's action is "impermissibly extraterritorial" because "[t]he potential for regulatory and legal overlap and conflict" with foreign regulatory authorities is too great. *Parkcentral*, 763 F.3d at 216. Given that the key CFTC manipulation provisions do not contain any language, much less clear affirmation, of extraterritorial application, CFTC manipulation cases implicating some foreign conduct will require a careful, fact-bound analysis to determine whether the case is predominantly foreign or domestic.[16]

Antitrust Claims

The facts that created obstacles for the *Brent Crude Oil* Plaintiffs' CEA claims presented similar challenges for their antitrust claims. Specifically, the district court ruled that it did not have jurisdiction over Plaintiffs' antitrust claims because Plaintiffs did not have antitrust standing. *Brent Crude Oil*, 2017 WL 2493135, at *7-11. The first criterion for antitrust standing is sufficiently alleging an antitrust injury, a threshold the court ruled Plaintiffs failed to cross. *Id.* at *9. The flaws that defeated Plaintiffs' CEA claims were equally fatal to their case for antitrust injury. In particular, the district court concluded that Plaintiffs failed to establish that they were members of the "relevant market[s]" that would have been negatively affected by Defendants' alleged anticompetitive activities: the physical Brent crude oil market in which Defendants traded and the market for any derivative instruments "that directly incorporate[d] Dated Brent as [the] benchmark or pricing element." *Id.* While the Trader Plaintiffs traded Brent futures on NYMEX that were settled to the price of ICE Brent futures, those contracts were based on the ICE Brent index, which, in turn, did *not* use the Dated Brent assessment in its pricing. *Id.* at *10. The court noted that although there were some derivatives on NYMEX and ICE Futures Europe that did incorporate the Dated Brent assessment as a pricing element, Plaintiffs did not allege that they traded any of those products. *Id.* Similarly, while the Landowner Plaintiff was in the market for

[14] Plaintiffs whose transactions are arguably foreign can attempt to establish that the transactions are sufficiently domestic in one of two ways: establishing that (1) title to the security (or other investment product) was transferred within the United States; or (2) the parties incurred irrevocable liability within the United States. *Loginovskaya*, 764 F.3d at 273-74 (*citing Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012)).

[15] *See, e.g., Brent Crude Oil*, 2017 WL 2493135, at *7 (explaining that "most of the futures and derivatives contracts available on NYMEX and ICE Futures Europe" were not priced by reference to Dated Brent, but rather to the ICE Brent Index, which did not incorporate the Dated Brent assessment); *see also id.* at *14 (reasoning that "[t]he Landowner Plaintiff allege[d] that he suffered losses tied to suppressed WTI crude oil prices, but his factual allegations do not support the conclusory assertion that this alleged loss occurred as a result of Defendants' [actions]") (emphasis added).

[16] In *CFTC v. Vision Financial Partners, LLC*, 190 F. Supp. 3d 1126 (S.D. Fla. 2016), the district court rejected the defendants' *Morrison* challenge to fraud-based claims relating to the defendants' offering of binary options on foreign trading platforms. The court concluded that the CEA "*does* contain an affirmative indication that it applies to extraterritorial transactions, at least concerning suits brought by the Commission itself." *Id.* at 1131. The court cited CEA Section 4(b)(2), 7 U.S.C. § 6(b)(2) (2012), which authorizes the Commission to, among other things, adopt rules "proscribing fraud" by "any person located in the United States … who engages in the offer or sale of any contract of sale of a commodity for future delivery" on or subject to the rules of a board of trade, exchange or market outside the United States. The district court did not explain the relationship between this provision and the CFTC's allegations of CEA violations, which focused on the offering of binary options.

West Texas Intermediate (WTI) crude oil, Brent crude oil prices were not a benchmark for WTI, and the district court ruled that allegations of a correlation between WTI and Brent prices were insufficient to establish that the Landowner Plaintiff participated in the market allegedly harmed by defendants' anticompetitive conduct. *Id.* The district court accordingly dismissed Plaintiffs' complaints.[17]

Conclusion

Although the *Morrison* test provides a clear avenue for relief for defendants in cases where a plaintiff's transactions are foreign, the decision in *Brent Crude Oil* demonstrates that courts also will look past a plaintiff's domestic transactions to ensure that a claim does not pose the extraterritoriality concerns addressed in *Morrison*, especially where the connection between the plaintiff's domestic transactions and the defendant's foreign alleged misconduct is not readily apparent.

[17] *See* note 1.

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