

Corporate & Financial Weekly Digest

Posted at 1:07 PM on February 11, 2011 by [William M. Regan](#)

Securities Fraud Claims Dismissed for Failure to Plead with Particularity

Co-authored by [Jessica M. Garrett](#)

Individual plaintiffs residing in Switzerland and France brought suit against four corporate defendants, as well as certain corporate officers thereof, for, among other things, violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Two of the corporate officers, Jason Beckman and Jason Colodne, moved to dismiss the Amended Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and failure to plead fraud with particularity pursuant to Fed. R. Civ. P. 9(b).

The Amended Complaint alleges that plaintiffs were presented with an "investment opportunity" called the BLF, which was essentially a fund that made bridge loans to friends and clients of the Chimay family in order to facilitate business transactions. Plaintiffs claim that their investments were not used to facilitate bridge loans, but rather, were used for the defendants' personal benefit. Defendants' offer and sale of the purportedly fraudulent investment scheme ultimately resulted in the alleged misappropriation of plaintiffs' \$4.2 million.

Mr. Beckman and Mr. Colodne first moved to dismiss the Section 10(b) claim under Rule 12(b)(6), arguing that the BLF investment was a loan, rather than a security. An investment contract is a security if there is (1) an investment of money, (2) in a common enterprise, and (3) with profits derived solely from the efforts of others. (*SEC v. Howey, Co.*, 328 U.S. 293 (1946)) The court rejected defendants' argument and concluded that the transaction at issue constituted a security.

The court found that plaintiffs invested money in the BLF, a common enterprise with the Chimays and others. The element of "common enterprise" was established because plaintiffs tied their fortunes to the fortunes of others who invested in the BLF, and the assets contributed by the plaintiffs to the BLF were (or at least were supposed to be) pooled with the assets of the Chimay family and others and used for a common purpose (the making of short-term bridge loans). Finally, plaintiffs put money into the BLF with the expectation that the anticipated profits would be derived solely from the efforts of persons other than themselves.

Mr. Beckman and Mr. Colodne also sought to dismiss the Section 10(b) claim on the grounds that plaintiffs failed to plead either material misrepresentation or scienter as against them with the requisite particularity under Fed R. Civ. P. 9(b). The court concluded that the Amended

Complaint did not adequately plead what, if anything, Mr. Beckman and Mr. Colodne said to one of the investors at a 2009 meeting to induce that investor to contribute more money to the fund, and that a second investor didn't have any contact with Mr. Beckman or Mr. Colodne at all. Moreover, plaintiffs made no attempt to allege facts indicative of an agreement among defendants to defraud plaintiffs.

Accordingly, the court dismissed the fraud causes of action without prejudice. (*Jacquemyns v. Spartan Mullen Et Cie, S.A.*, 2011 WL 348452 (S.D.N.Y. Feb. 1, 2011))

Katten Muchin Rosenman LLP

Charlotte Chicago Irving London Los Angeles New York Washington, DC