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U.S. District Court Dismisses Commodity Exchange Act Claims as Impermissibly Foreign

INTRODUCTION

On August 27, 2020, Judge George B. Daniels of the U.S. District Court for the Southern District of New York granted a Rule 12(c) motion for judgment on the pleadings made by financial institutions facing benchmark-rigging claims brought by a putative class of individuals who purchased futures contracts on the Chicago Mercantile Exchange ("CME"). *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12 Civ. 3419 GBD, 2020 WL 5077186 (S.D.N.Y. Aug. 27, 2020). The plaintiff in *Laydon* alleged violations of the Commodity Exchange Act ("CEA")[1] based on the defendants' alleged manipulation of the Euroyen TIBOR, Yen LIBOR, and the prices of Euroyen TIBOR futures contracts from January 1, 2006 to December 31, 2010.[2] In granting the defendants' Rule 12(c) motion, Judge Daniels dismissed the plaintiff's CEA claims as so "predominantly foreign" as to be "impermissibly extraterritorial" and thus not actionable under the CEA.[3]

THE *LAYDON* DECISION

The plaintiff in *Laydon* sought to recover for losses suffered in connection with his short positions in Euroyen TIBOR futures contracts, which he alleged were proximately caused by defendants' unlawful manipulation of Yen LIBOR and Euroyen TIBOR. Specifically, the plaintiff alleged defendants made "artificial" benchmark submissions to profit from derivatives tied to the price of Japanese Yen. In moving for a judgment on the pleadings, the defendants argued that the alleged conduct at issue was "so predominantly foreign as to render Plaintiff's claims impermissibly extraterritorial" under the CEA.[4] The court agreed.

A plaintiff alleging a CEA claim must show that (1) the transactions at issue are domestic and (2) the conduct affecting such transactions was sufficiently domestic so to warrant a proper domestic application of the CEA.[5] The *Laydon* court relied heavily on the U.S. Court of Appeals for the Second Circuit's decision last year in *Prime International Trading, Ltd.*

v. BP P.L.C. holding that a private plaintiff asserting claims under the CEA "must allege not only a domestic transaction, but also domestic—not extraterritorial—*conduct* by Defendants that is violative of a substantive provision of the CEA."[6] The *Prime International* decision marked a change in prior Second Circuit law, departing from existing Southern District precedent holding that a domestic transaction alone was enough to plead a CEA claim regardless of where the conduct occurred.[7] The *Laydon* court and the Second Circuit in *Prime International* both emphasized "the Supreme Court's clear guidance that the [CEA's] presumption against extraterritoriality cannot evaporate any time' *some* domestic activity is implicated in the action."[8]

In *Prime International*, the Second Circuit affirmed the district court's dismissal of CEA claims on the basis that the plaintiffs there had asserted an attenuated "ripple effects" theory whereby alleged manipulative trading activity in the North Sea affected Brent crude oil prices (a foreign commodity), which affected a foreign benchmark, the Dated Brent Assessment, which was then disseminated by a foreign price reporting agency, which was then allegedly used (in part) to price futures contracts on exchanges around the world.[9] The Second Circuit pointed out that nearly every link in the alleged chain of wrongdoing was "entirely foreign," so the claims were impermissibly extraterritorial under the CEA.[10]

The *Laydon* court found that the plaintiff had relied on a similarly attenuated "ripple effects" theory that must be rejected under the *Prime* International precedent. The plaintiff in *Laydon* claimed the alleged manipulative Yen LIBOR submissions occurred abroad, which affected the setting of Yen LIBOR, which was disseminated by the British Bankers' Association in London, which affected Euroyen TIBOR, which was set in Tokyo, which finally, in turn, impacted the trading prices of Euroyen TIBOR futures contracts on the CME. The court found that the "ripple effects" theory here was, as in *Prime International*, "predominantly foreign" because it involved "alleg[ed] manipulation of Japanese Yen benchmark rates, by foreign financial institutions, on foreign soil," and thus was "impermissibly extraterritorial" and "not actionable under the CEA."[11]

TRENDS AND TAKEAWAYS

The *Laydon* decision confirms a trend of benchmark and market manipulation cases being dismissed in the Southern District as too foreign to be actionable under the CEA, in the wake of *Prime International*. In 2018, U.S. District Judge Valerie Caproni held in the *London Silver* case that CEA claims based on factual allegations with "only an attenuated connection to Plaintiffs' domestic transactions" and "based primarily on foreign bad acts" must be dismissed as "impermissibly extraterritorial" under the CEA.[12]

Earlier this year, in March 2020, U.S. District Judge Gregory H. Woods granted in part and denied in part defendants' motions to dismiss a suit alleging fixing of platinum and palladium prices and granted defendants' motion for reconsideration of plaintiffs' CEA claims as impermissibly extraterritorial, reversing an earlier decision in light of the intervening change in controlling law under *Prime International*.[13] The *Platinum & Palladium* court noted that *Prime International* required an assessment of "whether Plaintiffs have pleaded an appropriately domestic application of the CEA," and to do that "the Court must assess whether Plaintiffs' CEA claims are predominantly foreign" by looking at where the allegedly unlawful manipulation occurred.[14] The plaintiffs' claims in *Platinum & Palladium* were found to be impermissibly extraterritorial because the alleged manipulation occurred in London and the price was set in London or Zurich.[15]

- Financial institutions facing benchmark-rigging suits under the CEA should take heed of this trend dismissing such suits as "predominantly foreign" and carefully examine the location of each step in the alleged chain of causation.
- Allegations of domestic *effects* will not suffice; courts will look to the location of the *conduct* at issue.

- *Some* domestic conduct is not enough to overcome a presumption against extraterritorial application of the CEA. In *Platinum & Palladium*, for example, it was not enough that some U.S.-based traders communicated with fixing participants; the court focused on the fact that the fix price was set abroad.
- Nor will a "ripple effects" theory be actionable under the CEA if the chain of activity is predominantly foreign, as in *Prime International* and *Laydon*.

[1] 7 U.S.C. § 1 *et seq*.
[2] *Laydon*, 2020 WL 5077186 at *1.
[3] *Id*. at *2.
[4] *Id*. at *1.
[5] *Id*. at *2.
[6] 937 F.3d 94, 105 (2d. Cir. 2019).
[7] *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 695-97 (S.D.N.Y. 2013) (sustaining exchange-based plaintiffs' claims under the CEA because alleged manipulation of Eurodollar futures contracts affected prices on the CME, a domestic exchange, and so did not involve extraterritorial application of the CEA).
[8] *Laydon*, 2020 WL 5077186 at *2 (quoting *Prime Int'l Trading*, 937 F.3d at 106 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010))).
[9] *Prime Int'l Trading*, 937 F.3d at 106-7.
[10] *Id*. at 107.
[11] *Laydon* at *2.
[12] *In re London Silver Fixing Ltd. Antitrust Litig*, 332 F. Supp. 3d 885, 918 (S.D.N.Y. 2018) (following *In re N. Sea Brent Crude Oil Futures Litig.*, 256 F. Supp. 298, 308-10 (S.D.N.Y. 2017), *aff'd sub nom. Prime Int'l Trading*, 937 F.3d 94).
[13] *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-CV-9391-GHW, 2020 WL 1503538 (S.D.N.Y. Mar. 29, 2020).
[14] *Id*. at *29.
[15] *Id*. at *29-30.