



Southern District of New York Enjoins Bank from Selling Loan Participation

On January 28, 2010, the United States Court for the Southern District of New York issued a decision in the case of *Empresas Cablevisión, S.Z.B. de C.V. v. JPMorgan Chase Bank, N.A.* The District Court enjoined JPMorgan Chase Bank N.A. and J.P. Morgan Securities Inc. (collectively, “JPMorgan”) from selling a participation interest to Banco Inbursa of loans made to Empresas Cablevisión, S.Z.B. de C.V. (“Cablevisión”). This decision has implications for parties that purchase and sell loans and for borrowers.

I. Facts

JPMorgan loaned Cablevisión, a Mexican telecommunications operator, \$225 million pursuant to a credit agreement. When JPMorgan entered into the credit agreement, it intended to syndicate the loans but did not because of deteriorating market conditions in 2008. In 2009, JPMorgan coordinated with Cablevisión’s parent and attempted, but failed, to syndicate the loans to several internationally recognized financial institutions.

In mid-2009, JPMorgan reached an agreement to sell a substantial portion of the loans to Banco Inbursa, a bank controlled by Carlos Slim Helú. Slim also has a controlling interest in Telmex, a Mexican conglomerate that owns more than 80% of the telephone land lines in Mexico and is Cablevisión’s primary competitor.

Because the Credit Agreement restricted assignments without Cablevisión’s prior consent if Cablevisión was not in default, JPMorgan sought Cablevisión’s approval to assign 90% of the loans to Banco Inbursa. Cablevisión did not consent to the assignment because of the relationship between Banco Inbursa and Telmex. In response, because the Credit Agreement did not require Cablevisión’s consent for JPMorgan to sell a participation interest in the loans, JPMorgan informed Cablevisión that it would sell a participation interest to Banco Inbursa instead. It is important to note that the Participation Agreement allowed Banco Inbursa to receive all financial reports and information regarding Cablevisión’s business affairs that the credit agreement required Cablevisión to deliver to JPMorgan. It also obligated JPMorgan to request information from Cablevisión at Banco Inbursa’s direction. In the Participation Agreement, JPMorgan and Banco Inbursa also agreed that if an event of default occurred (and Cablevisión’s consent to the assignment was no longer needed), the parties would “elevate” Banco Inbursa’s participation interest to a direct assignment.

Cablevisión sought to enjoin the participation on two grounds. First, Cablevisión argued that the participation would cause irreparable harm to its business because its major competitor would gain access to Cablevisión’s confidential and competitively sensitive information. Second, by agreeing to elevate the participation to an assignment post default, Banco Inbursa would have the ability to compete with Telmex and the potential ability to exert control over Cablevisión’s business. Cablevisión argued that JPMorgan deliberately subverted its right to approve assignments and in doing so, breached the covenant of good faith and fair dealing.

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JPMorgan argued that the District Court should not enjoin the participation to Banco Inbursa because JPMorgan complied with the express provisions of the credit agreement governing participations.

II. The District Court's Decision

The District Court granted Cablevisión's request for a preliminary injunction enjoining JPMorgan's participation of the Cablevisión loans to Banco Inbursa. It found that Cablevisión had demonstrated a likelihood of success on the merits on the question of whether JPMorgan had violated the implied covenant of good faith in fair dealing. The District Court also found that circumventing Cablevisión's right to consent to the assignment constituted irreparable harm.

In its opinion, the District Court reasoned that in entering the participation agreement, JPMorgan and Banco Inbursa deliberately "undercut" the assignment provisions. The District Court appeared most concerned by the provision of the participation agreement that not only gave Banco Inbursa access to Cablevisión's confidential information, but allowed Banco Inbursa to direct JPMorgan to demand additional reporting from Cablevisión. If Cablevisión failed to comply with the additional reporting requests, that could create an event of default under the credit agreement, which would then permit Banco Inbursa and JPMorgan to convert the participation into an assignment, giving Banco Inbursa the right to direct 90% of the voting rights under the credit agreement and seriously impact Cablevisión's access to credit.

III. Potential Implications

This *Empresas* decision may impact the long-standing and well established market practice whereby lenders sell loan participations where consent is unlikely or impractical but participations may still remain a viable option where approval of assignments has been halted. This "trading freeze" is often imposed by the administrative agent under the credit agreement because of, for example, an impending amendment or other vote.

As a result of the *Empresas* decision, if a borrower, or perhaps even an administrative agent, deems a potential assignee undesirable, it may now be emboldened to withhold consent to a loan assignment if the assignment will result in a competitor obtaining control over it or its confidential information. Although the holding is limited in scope, borrowers may try to use this decision as a basis for disapproving assignments to assignees that are viewed as hostile to the borrower. This decision would appear to give borrowers some leverage in that context, but it is likely that a borrower will need to prove some direct commercial harm, such as the sharing of confidential information with a competitor, to successfully withhold consent.