

A "Black Swan Event": New York Federal Court Rules that Lenders are Entitled to Keep \$500 Million Mistakenly Paid by Citibank

02.19.2021

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We are closely following Revlon on behalf of several creditor interests.

In the context of a series of complex re-financings and roll-up transactions by Revlon in May, 2020, human error caused a \$500 million loss for Citibank. On February 16, 2021, in the case of *In re Citibank August 11, 2020 Wire Transfers*, a New York Federal District Court ruled that Revlon lenders who mistakenly received approximately \$500 million in payments from Citibank do not have to return the funds. Revlon authorized Citibank to make interest payments to the lenders totaling \$7.8 million. Instead, Citibank made wire transfers that paid the loans (which were due in 2023) in full in the amount of approximately \$894 million. Some of the lenders returned around \$393 million, upon demand by Citibank. However, 10 lenders, which were investment advisory firms, refused to return \$500 million that was paid to them. Of course, Citibank sued them for restitution and unjust enrichment.

The New York court ruled in favor of the "non-returning lenders" based upon the "discharge-for-value" exception to restitution claims, which provides that a creditor has no duty to make restitution for a mistaken payment if the creditor made no misrepresentation and did not have notice of the transferor's mistake (The Restatement (First) of Restitution, American Law Institute 1937). The court concluded that the evidence was clear that the "non-returning lenders" did not know the payments were a mistake, noting particularly that the payoffs were to the penny.

The court also noted that a mistaken payment of this magnitude (and under Revlon's financial circumstances) was so improbable that it was a "Black Swan" event, citing Nassim Nicholas Taleb's *The Black Swan: The Impact of the Highly Improbable*, a 36-week *New York Times* best-seller (and worth the read).

Bottom line, an employee who was making the payment transfers using a software app, failed to uncheck a box resulting in \$894 million early loan pay-offs rather than the intended interest payments of \$7.8 million.

For \$500 million, there is no doubt Citibank will appeal the ruling to the U.S. Second Circuit Court of Appeals.

It will be interesting to see if Citibank steps into the shoes of the "non-returning lenders" under the doctrine of equitable subordination. For sure, administrative agent fees will increase, loan agreements will be modified, and more insurance will be purchased to hedge against future Black Swans.

Stay tuned for more.

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