

[Securities Regulation Daily Wrap Up, ENFORCEMENT—Eleventh Circuit upholds most aspects of lower court decision favoring CFTC, reverses and remands others, \(Jan. 23, 2018\)](#)

Securities Regulation Daily Wrap Up

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By [Brad Rosen, J.D.](#)

An Eleventh Circuit panel upheld a district court judgment in favor of the CFTC finding that defendants Southern Trust Metals, Inc., Loreley Overseas Corporation, and Robert Escobio violated the Commodities Exchange Act. That judgment was based on commission claims that the defendants failed to register as futures commission merchants, transacted the purchase and sale of contracts for the future delivery of a commodity future outside of a registered exchange, and promised to invest customers' money in precious metals but instead invested the funds in futures. Notwithstanding, the appellate court rejected and vacated the portion of the judgment relating to a restitution award for a group of investors whose losses were associated solely with the registration violations. That portion of the judgment was remanded to the district court (*CFTC v. Southern Trust Metals, Inc.*, January 22, 2018, Gilman, R.).

District court proceedings. The lower court [previously held](#) that Southern Trust Metals defrauded its customers under the CEA, by ruling for the CFTC in a summary judgment motion. Specifically, the court found Robert Escobio jointly and severally liable as a control person for the company's violations, and entered final judgment ordering payment of \$2,103,617 in restitution and a \$357,032 civil monetary penalty.

Issues upheld on appeal. In affirming the lower court's judgment and findings, the court relied on the following analysis and reasoning:

- **Equitable estoppel does not bar the CFTC's claims.** The Defendants challenged the district court's summary judgment ruling that their earlier settlement with the NFA precluded the CFTC's claims. The appellate court rejected this claim upholding the lower court's finding that equitable estoppel does not apply because (1) the defendants did not dispute that the NFA is a private, nongovernmental organization through which the commodities-trading industry regulates itself, (2) the CFTC was not a party to the settlement, and (3) settlements with private, nongovernmental organizations do not preclude subsequent claims by government regulators.
- **There was no error concluding the defendants committed fraud.** The appellate court concluded that the plaintiff proved the three elements to establish liability under applicable fraud provisions which included "(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." The court further found, "[u]nlike a cause of action for fraud under the common law of [t]orts, 'reliance' on the representations is not a requisite element."
- **There was no error in permanently enjoining the defendants from employment in the commodities-trading industry.** The appellate court concluded that the district court correctly applied the abuse-of-discretion standard in issuing its injunction. Moreover, the court concluded the lower court's decision did not amount to a clear error of judgment.
- **Reversal regarding a portion of the restitution award.** The appellate court reversed the lower court judgment for losses sustained in the unregistered-futures scheme, but affirmed the portion of the judgment awarding restitution for losses sustained in the leveraged-metals scheme where the district court awarded restitution in the amount of \$1,543,892. These losses were sustained in connection with the defendants' acceptance of customers' money for investment in metals but where they invested the funds in futures instead.

In contrast, the portion of the judgment awarding \$559,725 for losses sustained in the unregistered-futures aspect of the scheme was reversed. Here, the defendants accepted customers' money for investment in futures, and actually invested the funds in futures through defendant Loreley's account, but failed to register as futures commission merchants or to conduct the transactions on a registered exchange.

In rejecting this portion of the judgment, the appellate court determined that the district court relied on a definition of proximate cause which relied solely on a foreseeability standard that was subsequently rejected by the Supreme Court. Moreover, the Eleventh Circuit concluded that the district court erred in finding that the defendants' registration violation alone proximately caused losses.

The portion of the judgment that was reversed relating to the restitution award for the group of investors whose losses were associated solely with the registration violations was remanded to the district court with instructions to consider other equitable remedies.

The case is [No. 16-16544](#).

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Companies: Southern Trust Metals, Inc.; Loreley Overseas Corp.

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