



Safe Harbor under Bankruptcy Code Section 546(e)

Presented by:

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Bankruptcy Code Section 548(a)(1)

The Bankruptcy Code gives the trustee the power to avoid any transfer of an interest in the debtor in property, or an obligation incurred by the debtor, that was made or incurred within 2 years of the bankruptcy petition, if the debtor voluntarily or involuntarily:

- made such transfer or incurred such obligation with the actual intent to hinder delay or defraud [a creditor]; or

Bankruptcy Code Section 546

Limitations on Avoiding Powers

A trustee may not avoid a transfer that is

- A margin payment (as defined in section 101, 741, or 761) or settlement payment (as defined in Section 101, or 741) made to ... a financial institution or financial participant, or
- A transfer made by or to (or for the benefit of) ...a financial institution [or] financial participant ...in connection with a securities contract, as defined in section 741(7) or a commodities contract as defined in section ... that is made before the commencement of the case ...

Congressional intent

- Congress enacted Section 546(e) “to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting these industries.” H.R. Rep No. 97-420

Safe Harbor has been interpreted broadly by numerous courts

Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.), 719 F.3d 94 (2d Cir. 2013):

- A “financial intermediary” is not required in order to invoke safe harbor, only a “financial institution”
- Securities need not be publically traded for safe harbor to apply

State law fraudulent conveyance claims of individual creditors

- Barred by 546(e): *Whyte v. Barclays Bank PLC*, 494 B.R. 196 (S.D.N.Y. 2013)(appeal pending 2nd Cir.)
- Not barred by 546(e): *Tribune Co. Fraudulent Conveyance Litigation*, 499 B. R. 310 (S.D. N.Y. 2013)(appeal pending 2nd Cir.); *In re Lyondell Chem. Co.* 503 B.R. 348 (Bankr. S.D.N.Y. 2014)

Storm clouds over the safe harbor

- American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 is discussing the scope of Section 546(e)
- The Commission has noted that Courts have applied the safe harbor to situations that go far beyond the context Congress envisioned.
- Section 546(e) has been applied to small transactions of privately held securities

Storm Clouds, continued

- The House Judiciary Committee has heard testimony that the Section 546(e) safe harbor is too wide