The Boat Sank in The Safe Harbor, The Goods Weren't Received, The Credit Report Was Wrong, The Golden Share Wasn't Gold, The License Was Lost and Other, Horrible Secret Stuff

Presented by

The Honorable Stacey G.C. Jernigan
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1) *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018)[1]

Synopsis**:**

A claim for a creditor's violation of the discharge injunction under § 524 is not subject to the FAA's preference for arbitration because it is a "core proceeding" under the Bankruptcy Code and arbitration of it would inherently conflict with the Code's central purpose of providing debtors with a fresh start.

Procedural History:

Anderson filed a voluntary chapter 7 petition on January 31, 2014 and received a discharge on May 6, 2014. Anderson's claim at issue arises from a creditor's (Credit One Bank) refusal to remove a charge-off notation on his credit reports. In December 2014, the bankruptcy court allowed Anderson to reopen his case and proceed with a putative class action complaint against Credit One alleging that Credit One's refusal to change his credit report was an attempt to coerce Anderson into paying a discharged debt in violation of the bankruptcy court's discharge injunction. Credit One moved to compel mandatory arbitration under the cardholder agreement with Anderson. The bankruptcy court held that Anderson's claim was non-arbitrable because it was a "core proceeding" that went to the heart of the "fresh start" guaranteed to debtors under the Bankruptcy Code.

Credit One filed an interlocutory appeal of that ruling, as allowed under the Federal Arbitration Act, 9 U.S.C. § 169(a)(1)(A), but the District Court agreed with the bankruptcy ruling. Credit One appealed to the Second Circuit.

Facts:

In 2002, Anderson opened a credit card account with First National Bank of Marin, a predecessor in interest of Credit One. Anderson's cardholder agreement contained an arbitration clause that provided: "either [Anderson] or [Credit One] may, without the other's consent, require that any controversy or dispute… be submitted to mandatory, binding arbitration." In September 2011, Anderson's account became delinquent and remained so until March 2012, when Credit One "charged off" the account reclassifying the debt from a receivable to a loss, as required under federal regulations (if past due over 180 days). In May 2012, Credit One sold off the account to a third-party debt purchaser and then reported the charge-off and sale to the three major consumer credit reporting agencies: Equifax, Experian, and TransUnion.

In September 2014, Anderson asked Credit One to remove the charge-off from his credit reports as the debt had been discharged in the bankruptcy proceeding. Credit One refused. In December 2014, the bankruptcy court allowed Anderson to reopen his case and file an amended class action complaint alleging that Credit One violated 11 U.S.C. § 524(a)(2) by knowingly and willfully failing to update the credit reports of class members to signal that the debts owed had been discharged in bankruptcy, in essence alleging that Credit One refused to update the credit reports in an effort to coerce payment of discharged debts.

Subsequently, Credit One moved to compel arbitration pursuant to the cardholder agreement clause in March 2015. A hearing was held on May 5, and, nine days later, the motion was denied. Within

[1] A special thanks to Mr. Daniel Atkinson, 2018 Judicial Extern to the Honorable Stacey G. C. Jernigan and 2018 *Juris Doctor* Candidate at Southern Methodist University Dedman Law School. The materials provided herein for the *Anderson* case summary were prepared by Mr. Atkinson.

a month Credit One had filed an interlocutory appeal of the bankruptcy court's order denying compulsion of arbitration, which was affirmed by the district court a year later. Credit One filed its notice of appeal and oral argument was held in the Second Circuit on October 11, 2017. The Second Circuit requested supplemental briefs on the issue of mootness because Credit One had agreed to stipulate that it update the credit reports of Anderson and other consumers, but ultimately the Circuit found that it was not moot because the question presented and relief sought both remained unsettled, thus allowing them to retain jurisdiction under Art. III's case or controversy requirement.

Issue:

Must arbitration be compelled, pursuant to the FAA's preference, in a bankruptcy proceeding where the underlying cause of action is for an alleged violation of the discharge injunction in 11 U.S.C. § 524?

Holding:

No. A complaint of an alleged violation of § 524 is a "core proceeding" which concerns the foundational tenet and purpose of the Code, providing a fresh start for debtors, thus there is an inherent conflict between the FAA and the federal preference for arbitration with the fundamental purposes of the Bankruptcy Code such that a bankruptcy court has discretion whether to compel arbitration.

Analysis:

I. Standard of Review

Bankruptcy court decisions are subject to appellate review by the District Court, pursuant to the statutory scheme articulated in 28 U.S.C. § 158. The same section of the code grants jurisdiction to the circuit courts to hear appeals from orders of the district court in § 158(d). Because the district court operates as an appellate court in this scheme, the appellate court reviews their decision de novo. *In re Manville Forest Prod's Corp.*, 896 F.2d 1384, 1388 (2d Cir. 1990). The circuit court must then apply the same standard of review the district court used in reviewing the bankruptcy court: findings of fact are reviewed for clear error and legal conclusions de novo. *In re U.S. Lines, Inc.*, 197 F.3d 631, 640-41 (2d Cir. 1999).

In order to determine whether arbitration may be compelled in the bankruptcy proceeding, the bankruptcy court must first determine whether the proceeding is "core" or "non-core." If the proceeding is "non-core," the bankruptcy court must generally stay the proceedings in factor of arbitration. *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir. 2000). However, if it is "core," the bankruptcy court must determine whether arbitration would create a "severe conflict with the purposes of the Bankruptcy code and it has discretion to conclude that "congress intended to override the Arbitrations Act's general policy favoring the enforcement of arbitration agreements." *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006).

Therefore, the circuit court engages in a de novo review of the bankruptcy court's determination of whether the proceeding is core or non-core, and whether arbitration would present the sort of "severe conflict" that would make arbitration inappropriate. *Hill*, 436 F.3d at 108. If the bankruptcy court's legal analysis was correct, the decision to stay proceedings or decline to enforce arbitration is reviewed for abuse of discretion. *In re U.S. Lines, Inc.*, 197 F.3d at 641.

II. Core v. Non-Core Bankruptcy Proceedings

In the current case, the parties now agree that Anderson's claim is a "core" proceeding. The Second Circuit notes that "[b]ankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters." *Hill*, 436 F.3d at 108. A Non-exhaustive list of 16 types of proceedings Congress has designated as "core" bankruptcy matters can be found at 28 U.S.C. § 157(b)(2). The Court now turns to whether Congress intended for this statutory right to be non-arbitrable, such that the bankruptcy court had discretion to refuse to compel arbitration in this core proceeding.

III. Congressional Intent

The FAA establishes a federal policy favoring arbitration that may be overridden by a contrary congressional command. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The burden of proof is on the party opposing arbitration to demonstrate that Congress intended to require a judicial forum for resolution of the matter. *Id*. at 227. Although this intent may typically be discerned from the text or legislative history, these arguments were not raised by the parties below and thus the Second Circuit focuses only on whether there is an "inherent conflict between arbitration" and the Bankruptcy Code. *Id.*

In order to determine whether there is an inherent conflict between enforcing an arbitration agreement and the Bankruptcy code, the court engages in a "particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *Hill*, 436 F.3d at 108. The relevant objectives of the Code include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Id.*

Anderson's complaint alleging that Credit One's refusal to update his credit report was for the purpose of collecting a discharged debt in violation of § 524(a)(2) concerns the "foundation upon which all other portions of the Bankruptcy Code are built." Anderson argues that this conduct is commonplace across a class of debtors, and has alleged that the debt marked as "charged-off" rather than "discharged" makes it more valuable to third-party debt purchasers who believe debtors will be compelled to pay this in order to clear it from their credit reports. The "fresh start" procured by discharge is the "central purpose of the bankruptcy code" as shaped by Congress, and permits debtors to start in life unburdened by old debts. *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002). Violations of the discharge injunction damage the foundation of bankruptcy.

Consequently, arbitration of a claim based on an alleged violation of § 524(a)(2) would "seriously jeopardize a particular core bankruptcy proceeding" because: (1) the discharge injunction is integral to the debtors fresh start that is the very purpose of the Code; (2) the claim regards an ongoing bankruptcy matter that requires ongoing court supervision; and (3) the equitable powers of the bankruptcy court to enforce its own orders are central to the structure of the Code. The fact that Anderson's claim comes in the form of a class action does not undermine this conclusion.

A. In re Hill is Distinguishable

First, in *Hill*, the Second Circuit distinguished a claim involving the automatic stay in an already-closed bankruptcy case from those in which courts found the claim to be non-arbitrable by noting that the bankruptcy case was closed and Hill had already received her discharge. 436 F.3d at 110. Thus, Hill's claim could not affect an ongoing reorganization, and arbitration would not conflict with the objectives of the code. In non-arbitrable cases, "resolution of the arbitrable claims directly implicated matters central to

the purposes and policies of the Bankruptcy Code. *Hill*, 436 F.3d at 110. There is no matter more central to the purpose of the Bankruptcy Code that the fresh start provided for by discharge, thus arbitration of Anderson's claim presents and inherent conflict.

Second, Anderson's claim alleges violations of a discharge injunction that was, and still is, eligible for active enforcement. This is distinguishable from *Hill*, where the debtor "no longer required protection of the stay to ensure her fresh start" because her estate had been fully administered. *Id.* The integrity of the discharge must be protected indefinitely, and thus enforcement of the arbitration agreement would interfere with the fresh start bankruptcy promises debtors and conflict with the Code.

Third, enforcement of injunctions is a crucial pillar of the powers of bankruptcy courts and central to the statutory scheme. In *Hill*, the Second Circuit acknowledged that it must consider this "undisputed power of the bankruptcy court to enforce its own orders" as part of their "particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *Id.* at 108. However, in *Hill*, the Circuit determined that the automatic stay, "which arises by operation of statutory law," was not "so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions." *Id.* at 110. Although the discharge injunction itself is statutory, the Second Circuit determined that the bankruptcy court retains a unique expertise and that Congress afforded bankruptcy courts wide latitude to enforce their own orders under § 105; thus the bankruptcy courts alone possess the power and unique capability to enforce the discharge injunction. Arbitration of the claim would thus present an inherent conflict with the Code.

Lastly, in *Hill*, the class action posture cut against the argument that Hill's claim was "integral to her individual bankruptcy proceeding." However, having already established that the discharge injunction is absolutely integral to the fresh start assured by Anderson's bankruptcy, the Second Circuit found that the same posture was not similarly relevant to this claim because, unlike violations of stays, violations of § 524 are not mooted by the conclusion of the bankruptcy.

IV. Discretion to Decline to Enforce Arbitration Agreement

The Second Circuit concluded that there is an inherent conflict between arbitration of Anderson's claim and the Bankruptcy code, thus the bankruptcy court had discretion to decline to enforce the arbitration agreement. The bankruptcy court did not abuse this discretion by declining to enforce arbitration because it properly considered the conflicting policies in accordance with law. *In re U.S. Lines, Inc.*, 197 F.3d at 641.

2) *Momentive Performance Materials Inc. v. BOKF, NA v. Wilmington Savings Fund Society, FSB (In re MPM Silicones L.L.C.)*, 874 F.3d 787 (2d Cir. 2017)

Synopsis:

Momentive Performance Materials Inc. ("MPM") MPM was a leading producer of silicon but was substantially over-leveraged. The Chapter 11 plan for MPM gave its two levels of senior secured lien note holders the option of accepting the plan and immediately receiving a cash payment of the outstanding principal and interest due on their notes or rejecting the plan and receiving replacement notes with a present value equal to the allowed amount of the holder's claim. The note holders rejected the plan. In determining the cram-down rate the bankruptcy court utilized the formula approach of *Till v. SCS Credit Corp*, 541 U.S. 465 (2004) and arrived at rates of 4.1% and 4.85% for the two categories of secured claims. The note holders argued that a market existed and that the market rate would generate interest in

the 5% to over 6% range. The bankruptcy court rejected that approach and concluded that a cram down interest rate should not take market factors into account.

Decision:

The Second Circuit adopted the two-part test of *In re Am. HomePatient Inc.*, 420 F.3d 559, 568 (6th Cir. 2005) and concluded that a market rate should be applied in Chapter 11 cases where there exists an efficient market, but where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by *Till*. The secured note holders presented expert testimony that would have established a market rate. In preparation for the possibility that the secured note holders would accept the plan, MPM went into the market seeking lenders to provide financing for the cash payment. Those lenders quoted MPM rates of interest ranging between 5% and over 6%. Citing note 14 in *Till*, the Second Circuit stated that where an efficient market exists that generates an interest rate that is apparently acceptable to sophisticated parties dealing at arm's length, such rate is preferable to a formula improvised by a court. The cram down rate is to put the creditor in the same economic position that it would have been in had it received the value of its allowed claim immediately.

Conclusion:

The Second Circuit remanded the case to the bankruptcy court to determine if an efficient market rate existed and, if so, apply that rate, instead of the formula rate. It is interesting to note that the Second Circuit is the court that decided *In re Valenti*, 105 F.3d 55 (2d Cir. 1997), which is often cited for the proposition that the rate must be between 1% and 3% over the prime rate.

3) *In re World Imports, Ltd.*, 862 F.3d 338 (3d Cir. 2017)

Synopsis:

On July 10, 2017, the United States Court of Appeals for the Third Circuit delivered a precedential opinion concerning the operative date goods are deemed "received" under section 503(b)(9) of the United States Bankruptcy Code. On appeal from the United States District Court for the Eastern District of Pennsylvania, the Circuit Court reversed the District Court's affirmation of the Bankruptcy Court's ruling that goods are "received" for section 503(b)(9) purposes when title and risk of loss are transferred to the purchaser upon placement with a common carrier. In the traditional international shipping context, risk of loss passed when the goods were placed on board and the vessel left the dock mooring overseas. Consequently, this operative date goods were deemed to be "received" for purposes of section 503(b)(9). In the international shipping industry, this date is typically much earlier and often outside the 20 calendar days prior to the petition date. The Third Circuit reversed course and held that goods are deemed "received" upon physical possession, notwithstanding the shipping date or when title and risk of loss pass to the buyer.

Background:

Under Title 11 U.S.C. section 503(b)(9), sellers of goods are entitled to administrative expense priority treatment in a bankruptcy proceeding for the value of goods delivered to the debtor in the ordinary course of business during the 20 days immediately preceding the date of the bankruptcy filing. Given the short look-back time period, the operative date in which such goods are deemed to be "received" under the statute becomes an important issue. The date goods are "received" by the debtor appears to be disputed among certain industry terms and developed courses of dealing. In the specific

context of the Third Circuit's ruling in *World Imports*, the issue arose when a foreign seller shipped goods to the debtor "F.O.B" or "free on board," which means the risk of loss and title to the goods passed to the debtor immediately upon placement of such goods with the common carrier. The debtor argued that the goods were "received" under 503(b)(9) at the foreign port when its carrier's ship departed from the dock's mooring. The shipping date was ***outside*** of section 503(b)(9)'s 20-day look-back window. Conversely, the seller argued that such goods were "received" when the debtor obtained physical possession when the goods were in the hands of its agent. The goods arrived at the debtor's stateside location ***within*** section 503(b)(9)'s 20-day look-back window. The Bankruptcy Court and District Court agreed with the Debtor. The Circuit Court, however, agreed with the seller and created new precedent for the operative date international goods are deemed "received" under section 503(b)(9).

The Third Circuit considered section 503(b)(9) and its relationship with another important vendor protection—reclamation rights under section 546 and related non-bankruptcy law. The Third Circuit reversed lower court rulings that the phrase "received by the debtor" in section 503(b)(9) includes constructive possession of goods at the time title is transferred, in addition to physical possession of the goods. The Circuit Court based its holding on (i) the ordinary meaning of "received," (ii) the legislative context of the Bankruptcy Code, and (iii) persuasive decisions finding that U.S. Congress meant to use the UCC definitions for this particular amendment to the Bankruptcy Code.

The Third Circuit makes a critical distinction in *World Imports*: The holding is that goods are "received" under 503(b)(9) when in the physical possession of the debtor or its agent. In this opinion, the Third Circuit clarified that common carriers are not agents of the debtor in the standard commercial shipping context.

Potential Impact:

The *World Imports* opinion is the seminal case on this issue at this time. It will be interesting to see how bankruptcy courts outside the Third Circuit choose to apply this new ruling. Although persuasive authority for such courts, other federal courts may choose to adopt the Third Circuit's analysis and apply a closer "receipt" date for 503(b)(9) claimants. Depending on a particular debtor's administrative solvency, the *World Imports* precedent could cause problems for some recent debtors with an international shipping component to operations. Such debtors should evaluate the potential impact this ruling may have on the number of administrative claims required to satisfy before exiting chapter 11 bankruptcy.

The Circuit Court's opinion can be found at Document Number 003112669586 in Appellate Case Number 16-1357 before the Third Circuit Court of Appeals.

Early Reactions:

In *In re SRC Liquidation*, LLC, 573 B.R. 537 (Bankr. D. Del. 2017), the U.S. Bankruptcy Court for the District of Delaware relied on *World Imports* in ruling that goods drop-shipped directly to a debtor's customers were not "received by the debtor" for purposes of section 503(b)(9). Although the "drop-ship" issue is separate from the "constructive vs. actual possession" distinction addressed by *World Imports*, it appears at least one lower court is following suit and joining the "actual possession" school of thought delivered in *World Imports*. An interesting split in results between *World Imports* and *SRC Liquidation*, though – In *World Imports*, "actual possession" worked in favor of the administrative claimant by changing the date of "receipt" from outside the 20-day window to within the 20 days prior to bankruptcy; whereas in *SRC Liquidation*, "actual possession" deprived the administrative claimant of 503(b)(9) priority.

4) *In re Thomas*, --- B.R. ---, No. 17-20527, 2018 WL 1162523 (Bankr. E.D. Ky. Mar. 1, 2018)

Synopsis:

A motion to seal a Settlement Agreement in the bankruptcy context will be denied absent a showing under § 107 that it is protected "commercial information" or that there are compelling reasons justifying the non-disclosure. For both of these above mentioned purposes, the settlement amount is an insufficient justification.

Procedural History:

Debtor Brittany R. Thomas filed a class action in this Court as an adversary proceeding against AT&T Corp. and DirecTV, LLC ("AP Defendants") during the course of a Chapter 13 case. Debtor settled her individual claims with the AP Defendants and then moved under Bankruptcy Rule 9019 for court approval along with motions to seal the Settlement Agreement and a Supplemental Memorandum.

Facts:

Co-Debtors Brittany Thomas and Andrew Thomas filed a Chapter 13 petition on April 19, 2017. Shortly thereafter, Debtor Brittany Thomas filed an adversary proceeding, proposed as a class action, against the AP Defendants, alleging that they generally engaged in repeated conduct that violated the automatic stay under § 362 by attempting to collect prepetition debts from debtors by and large. Approximately seven weeks after this complaint, the parties filed a notice of Settlement in the adversary proceeding. Debtor then filed the Settlement Agreement along with a Motion to Seal and Motion to Compromise, stating that Debtor and the AP Defendants have entered into the Settlement Agreement which will be filed under seal and asking the Court to approve the Agreement. The Court noted that the Debtor halted her class action lawsuit in favor of a quick settlement of her own claims.

Debtor's Seal Motion quotes § 107(b) and Bankruptcy Rule 9018, but fails to mention the primary right of public access in § 107(a). "Debtor inaccurately aver[ed] that 'a bankruptcy court may enter a seal order under the broad confidentiality protections in bankruptcy proceedings where necessary to protect confidential information,' citing *In re Global Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y 2003). Additionally, Debtor asserted that the Settlement Agreement contains confidential settlement terms, i.e. the settlement amount, and that no other method would adequately protect the agreement. The Court determined that the Motion to Seal did not offer any evidence to show that the Settlement Agreement was within the scope or category of documents subject to protection from disclosure under § 107(b) and that Debtor's proposed order did not contain any findings of fact or conclusions of law and would seal the entire agreement in perpetuity. In addition, the Settlement Agreement itself did not purport to settle the claims in the Complaint on behalf of the proposed class.

Debtor and AP Defendants were allowed to file a Second Motion to Seal and Supplement. The Court noted that Debtor's Second Seal Motion was virtually identical to the first, and that there was no evidence to establish that either the Settlement Agreement or the Supplemental Memorandum may be sealed under § 107(b)(1). AP Defendants' Supplement explained that they were unwilling to enter into the Settlement Agreement unless the terms remained confidential and that the Court should allow the agreement to be filed under seal because it would "promote the efficient disposition of this dispute and further the public policy favoring settlement agreements." The Supplement also asserts a sealing period of only five years, which directly contradicts the Debtor's proposed order that contemplated sealing indefinitely.

Issue:

Absent a showing of compelling justifications for sealing the Settlement Agreement, should the Court seal a Settlement Agreement because it contains allegedly confidential information such as the amount?

Holding:

No, the fact that a Settlement Agreement contains the amount of the settlement does not constitute "commercial information" protected by § 107 and as such it does not warrant sealing the document in light of the presumption of public access without compelling justifications.

Analysis:

I. § 107 of the Bankruptcy Code

The Court begins its analysis of whether the Settlement Agreement and Supplement should be sealed by examining § 107. The only issue here under § 107 is whether the Settlement Agreement and its terms constitute "commercial information" under §107(b)(1) and thus may be sealed. Commercial information has been defined as that "which would cause an unfair advantage to competitors by providing them information as to the commercial operations of the debtor or another party." *In re Frontier Group, L.L.C.*, 256 B.R. 771, 773 (Bankr. E.D. Tenn. 2000) (internal citations omitted). The Court frames the standard as "commercial information is information so critical to an entity's operation that disclosing the information will unfairly benefit that entity's competitors such that its disclosure must reasonably be expected to cause commercial injury." *In re Waring*, 406 B.R. 763, 768-769 (Bankr. N.D. Ohio 2009) (internal citations omitted).

II. The Parties Failed to Establish that the Settlement Agreement and Supplement are Entitled to Protection under § 107(b)(1)

The Court notes that, "the party seeking protection under § 107(b) 'has the burden of proving that the information should be protected.'" *Waring*, 40 B.R. at 768. Here, the parties have not established that the Settlement Agreement or Supplement constitute "commercial information" subject to protection and broad statements regarding the parties' desire for confidentiality is not a basis to seal the records from public view. Neither the Seal Motions nor the Supplement provide any evidence of this assertion of "commercial information" and the Court has no evidentiary basis whatsoever to conclude that the documents are entitled to protection.

The Court explains that the arguments the parties have proffered in support of sealing the documents are inadequate and not supported with any valid legal explanation to establish why the confidentiality provision of the Settlement Agreement requires sealing under § 107. The Court determined that while the Settlement Agreement itself does contain a provision for confidentiality, the terms thereof do not state that a failure to seal would render it null and void and the terms of the agreement further imply that the parties understood that the Court would independently decide whether to seal. "If [the Court] were to permit movant to file documents under seal simply because it unilaterally agreed to keep matters confidential, then the Court would never have control over motion practice… and § 107 would be meaningless." *Muma Servs.*, 279 B.R. at 485; c.f. *Togut v. Deutsche Bank AG (In re Anthracite Capital, Inc.)*, 492 B.R. 162, 172 (Bankr. S.D.N.Y. 2013) ("The Movants[']argument that the 'no seal, no deal' condition is reason enough for sealing a document under § 107 is not only wrong under the law, it is also illogical. If that were the standard for sealing, every settlement in a bankruptcy case would be sealed whenever a party insisted that a document be sealed. Such a test would remove the need for analysis

under § 107 and would directly conflict with the statute, the common law, and the legislative history of § 107.").

In bankruptcy, courts across the county have held that settlement terms (including settlement amount) are not confidential "commercial information" that is subject to seal under § 107. (citations omitted). While the AP defendants cited *In re Hemple*, 295 B.R. 200 (Bankr. D. Vt. 2003) for support, the Court distinguished it explaining that the case actually denied a motion to seal because the movant had "not demonstrated that the filing of the settlement agreement falls with the articulated exceptions to the Bankruptcy Code's general rule that all documents in a bankruptcy case be available to the public." Further, in *Geltzer*, the Second Circuit explained the presumption in *Hemple* was that "absent compelling circumstances all documents filed in bankruptcy cases should be available to the public. *Geltzer v. Anderson Worldwide, S.C.*, 2007 U.S. Dist. LEXIS 6794, at *10–12 (quoting *Hemple*, 295 B.R. at 202).

III. Sixth Circuit Authority Confirms that Sealing Documents in the Public Record is Disfavored

Lastly, the Court relies on the Sixth Circuit precedent that the burden of overcoming the presumption of public disclosure is a heavy one, one that is borne by the party seeking to seal, and that only the most compelling reasons can justify non-disclosure of judicial records." *Shane Grp., Inc., et al. v. Blue Cross Blue Shield of Mich., et al.*, 825 F.3d 299 (6th Cir. 2016). The Court also explains that this burden applies even where "neither party objects to the motions to seal" as "[a] court's obligation to keep its records open for public inspection is not conditioned on an objection from anybody."

5) *Mission Product Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 879 F.3d 389 (1st Cir. 2018)

Synopsis:

Prior to filing bankruptcy, the debtor, Tempnology, LLC, manufactured specialized products such as towels, socks, headbands, and other accessories designed to remain at low temperatures even when used during exercise. It marketed these items under the "Coolcore" and "Dr Cool" brands and granted Mission Product Holdings, Inc. ("Mission") distribution rights to certain of the its products within the United States. The debtor also granted Mission a royalty-free, non-exclusive, irrevocable, fully paid-up, perpetual, worldwide, fully transferable license to certain of the debtor's intellectual property and a non-exclusive, non-transferable, limited license to use the debtor's trademark and logo. Although the agreement had been contractually terminated, Mission was entitled to retain its distribution and trademark rights for approximately two years, and it's nonexclusive intellectual property rights in perpetuity. The debtor then filed Chapter 11 and rejected its agreement with Mission pursuant to section 365 of the Bankruptcy Code. Mission exercised its option under section 365(n) to retain its exclusive distribution rights and the trademark license, neither of which appears in the list of defined items which constitute intellectual property in section 365(n).

Proceedings:

The bankruptcy judge's ruling was appealed to the First Circuit BAP which followed the Seventh Circuit ruling in *Sunbeam Products, Inc. v Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), which held that because section 365(g) deems the effect of rejection to be a breach of contract, and a license or breach of a trademark agreement outside the bankruptcy context does not necessarily terminate the licensees rights; rejection under section 365(g) likewise does not necessarily eliminate those rights. The ruling of the BAP was appealed to the First Circuit which concluded that section 365(n) does

not apply to Mission's right to be the exclusive distributor of the debtor's products, or to its trademark license and that missions right to use the debtors trademarks did not survive rejection of the agreement. The Circuit Court cited *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc*., 756 F.2d 1043 (4th Cir. 1985), which held that the rejection of an executory contract terminated intellectual property licenses. section 365(n) was enacted in response to *Lubrizol*, but specifically excluded trademarks from the definition of intellectual property due to confusion regarding the continuing obligations of a trademark licensor to protect the mark and monitor and exercise control over the quality of the goods sold to the public under cover of the trademark. The First Circuit noted that the trademark owner had the right and duty to control quality to ensure that the public is not deceived as to the nature or quality of the goods sold. Importantly, failure to monitor and exercise control results in a so-called "naked" license, which could result in abandonment by the licensor of the trademark. According to the Court, the Seventh Circuit approach would allow Mission to retain the use of the debtor's trademarks in a manner that would force the debtor to choose between performing executory obligations arising from the continuance of the license or risk the permanent loss of its trademarks, thereby diminishing the value to the debtor. The Court concluded that Mission's rights had been converted into an unsecured claim against the debtor's estate.

6) ***Barnes v. Sea Hawaii Rafting, LLC*, --- F.3d ---, No. 16-15023, 2018 WL 1870090 (9th Cir. April 19, 2018)**

Background:

Chad Barnes ("Barnes") was a seaman who was injured when the vessel on which he was working exploded. Barnes had worked for six years as a captain and crew member of the Tehani, a 25-foot rigid hull inflatable boat powered by twin outboard engines. The boat was owned by Sea Hawaii Rafting, LLC ("SHR"). Kris Henry ("Henry") was the owner of SHR and he paid Barnes "under the table" with personal checks made out to cash. Barnes's injuries occurred when Henry and Barnes were launching the boat into the water. Henry was in his truck towing the boat on an attached trailer. Henry backed the trailer down into the water. Barnes was on the boat and when he started the engine the boat exploded. The boat's hatch struck Barnes on his back and head and knocked him into the ocean. The United States Coast Guard determined that the explosion was caused by a missing screw in the fuel tank.

The boat, which was insured, was subsequently repaired and returned to service. Barnes, however, was much less fortunate. There was no insurance to cover his injuries. Barnes required 12 staples to reattach parts of his scalp, and due to his head injuries, he can no longer drive a car or swim. He cannot afford rent and has been living on friends' couches since the accident. He receives approximately $300 per month in disability income from the state of Hawaii.

Proceedings:

Barnes filed suit in the United States District Court for the District of Hawaii for maintenance and cure and asserted a seaman's lien on the boat. Two weeks before a summary judgment hearing and just over a month before the scheduled trial, Henry filed for chapter 13 and SHR filed Chapter 7. The bankruptcy court lifted the automatic stay so that the District Court could adjudicate the validity, extent, amount and date of perfection of any maritime lien. However, the Bankruptcy Court expressly kept in place the stay to bar the enforcement of any maritime lien. The District Court dismissed Barnes's complaint on procedural grounds because he had failed to verify an amended complaint.

Barnes appealed that order and while the appeal was pending the Bankruptcy Court approved the sale of the boat to Henry's new company for $35,000. The Ninth Circuit, after determining that the lack

of verification of the amended complaint in the District Court did not deprive the District Court of jurisdiction, then turned to the jurisdiction and rulings of the Bankruptcy Court and determined that the Bankruptcy Court did not have jurisdiction to dispose of Barnes's maritime lien.

Explanation:

The Circuit Court concluded that because 11 U.S.C. § 362(a)(4) did not specifically reference maritime law, Congress did not intend for section 362(a)(4) to apply to maritime liens but, instead, evidenced its intention to limit the reach of that provision to land-based transactions where a recording of a lien interest is required and the creditor first-in-time is entitled to priority. The court stated that maritime liens, when owed to seamen as a consequence of their service, are sacred liens entitled to protection as long as a plank of the ship remains. The court concluded that Congress would not have overruled this sacred principle of admiralty law in the Bankruptcy Act *sub silencio* and that the automatic stay did not apply to an effort to enforce a maritime lien for maintenance and cure.

The Bankruptcy Court lacked jurisdiction to adjudicate the maritime lien because the admiralty court had already obtained jurisdiction over the boat. As between two courts of concurrent jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference. The District Court took constructive control of the boat in order to adjudicate the maritime lien when Barnes filed his complaint. The bankruptcy, filed nearly two years later, could not have vested the Bankruptcy Court with the same jurisdiction. Even if the Bankruptcy Court had jurisdiction over the boat, it is questionable whether the Bankruptcy Court had the effective ability to sell the boat free and clear of maritime liens. A maritime lien accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only in a proceeding *in rem* by an admiralty court and a maritime lien cannot be extinguished except through the application of admiralty law. The central bankruptcy scheme of pro rata distribution among creditors deprives the secured creditors of immediate enforcement and is obviously at odds with the complex maritime system providing for priority between various creditors and distinguishing between maritime and non-maritime creditors.

Policy Considerations:

Maritime creditors have secret liens, enforceable without formal or substantial documentation which are antithetical to bankruptcy practice. Unique aspects of maritime liens place seamen in a preferred position. Here, the Bankruptcy Court applied bankruptcy law rather than admiralty law and Barnes did not submit voluntarily to the Bankruptcy Court's jurisdiction. The Bankruptcy Court's attempt to dispose of his maritime lien was ineffectual. The Ninth Circuit reversed the District Court and issue a writ of mandamus directing the District Court to award Barnes the maintenance relief asserted in his complaint.

7) ***JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Properties Inc. (In re Transwest Resort Properties, Inc.),*** **881 F.3d 724 (9th Cir. 2018)**

Synopsis:

In this case, a brief overview of the debtors' corporate structure is instructive. The subject debtors controlled two resort properties maintained in a holding company structure consisting of a single parent company, two mezzanine subsidiaries and two operating subsidiaries of the mezzanine entities. The debtors' five (5) bankruptcy cases were jointly administered, but not substantively consolidated. The senior secured lender, whose claim was under-secured, elected to have its entire claim treated as a secured claim pursuant to section 1111(b)(2) of the Bankruptcy Code. The debtors' Chapter 11 plan restructured

the secured lender's loan to a term of 21 years with a balloon principal payment due at the end of the term. The plan included a due on sale clause, but the due on sale clause did not apply if the debtors completed a sale of the resorts between plan years 5 and 15.

Although substantive consolidation never occurred, the Bankruptcy Court treated the debtors' plan confirmation proceeding as though the cases had been substantively consolidated. The secured lender never objected to the Bankruptcy Court's treatment of the cases and plan confirmation proceedings. The lender argued that since it was the only class member for the mezzanine debtors, and did not vote to approve the plan, the plan did not satisfy section 1129(a)(10) which requires the affirmative vote of at least one class of claims. The lender also argued that the absence of a due on sale clause between years 5 and 15 of the loan partially diminished the benefits of its section 1111(b)(2) election.

Due on Sale Issue:

The court first addressed the issue regarding the due on sale clause and noted that there is no requirement in the statute for a due on sale provision in either section 1111 or section 1123, which describes the required contents of a chapter 11 plan. Instead, section 1123(b)(5) indicates that a plan may modify the rights of holders of secured claims. In addition section 1129(b)(2)(A)(i)(I) requires that in order for a plan to be fair and equitable the holder of a secured claim must retain its lien securing that claim even when the property subject to such lien is transferred to another entity. Consequently, the statute expressly allows a debtor to sell the collateral to another entity as long as the creditor retains the lien securing his claim, yet the statute does not mention any due on sale requirements. The court noted in a footnote that its holding was not meant to imply that a due on sale provision was irrelevant to whether the plan is fair and equitable under section 1129(b), but the lender had waived any argument that the plan was not fair and equitable.

"Per Debtor" vs. "Per Plan":

The court then addressed the issue regarding whether an affirmative accepting class was required on a per plan or per debtor basis. The lender argued that cram down requires plan approval from at least one impaired class of claims for each debtor involved in the plan. The debtors, however, argued that the plain language of the statute contemplates an approach in which a plan only requires approval from one impaired creditor class for any of the debtors involved. The court determined that section 1129(a)(10) requires that only one impaired class under the plan approve the plan. Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so.

The lender argued that section 102(7), which provides that the singular shall include the plural, requires a "per debtor" vote. The court rejected that argument, concluding that a "per plan" approach was consistent with section 102(7). The court then addressed *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011), which concluded that section 1129(a)(10) must apply on a "per debtor" basis because other subsections apply on a "per debtor" basis. This argument failed for two reasons:

(1) Nothing in the plain text indicates that it must apply on a "per debtor" basis, particularly since the Bankruptcy Code phrases each subsection differently.

(2) To the extent that the lender argued that the "per plan" approach would result in a "parade of horribles" for lenders, such hypothetical concerns over policy considerations are best left to Congress.

A concurring opinion was sympathetic to the lender's position, but ultimately determined that any unfairness resulted not from the interpretation of section 1129 that the lender challenged in the appeal, but

instead from the fact that the reorganization treated the 5 debtor entities as if they had been substantively consolidated, which the lender waived by failing to object on those grounds in the Bankruptcy Court.

8) Memorandum Opinion, *In re Franchise Servs. of N. Am., Inc.*, Ch. 11 Case No. 17-02316-EE (Bankr. S.D. Miss. December 18, 2017) ECF No. 254

Synopsis:

In *Franchise Services of North America* the debtor operated more than 650 rental car locations throughout the United States. The certificate of incorporation of the debtor provided that the corporation could not effect a liquidation event without the consent of the holders of a majority of the shares of the Series A Preferred Stock. The definition of a liquidation event included the filing of a petition for bankruptcy. A provision like this is sometimes referred to as a "golden share".

While courts have held that contractual provisions against filing bankruptcy are unenforceable, bankruptcy law is equally clear that corporate formalities and state corporate law must be satisfied in commencing a bankruptcy case. The long-standing policy against contracting away bankruptcy benefits is not necessarily controlling when what defeats the rights in question is a corporate control document instead of a contract. In reaching its conclusion, the *Franchise Services* Court reviewed several prior cases involving a "golden share".

Case Law Review:

In *In re Global Ship Systems LLC*, 391 B.R. 193, 203 (Bankr. S.D. Ga. 2007), the debtor owned a shipyard and was engaged in a litigation with Drawbridge Special Opportunities Fund, L.P. ("Drawbridge"), an equity owner and creditor of the debtor. The debtor's operating agreement granted Drawbridge a blocking provision. An involuntary petition was filed against the debtor, however, the court eventually found that due to the debtor's acts in orchestrating the filing, the involuntary was, in reality, a voluntary chapter 11. Drawbridge filed a motion to dismiss based upon its lack of consent to the filing of the bankruptcy case. The court concluded that since Drawbridge wears two hats, as a shareholder it had the unquestioned right to prevent a voluntary bankruptcy case. The court dismissed the case.

The next case analyzed by the *Franchise Services* Court was *In re Bay Club Partners-472, LLC*, No. 14-30394, 2014 WL 1796688 (Bankr. D. Or. May 6, 2014), where the creditor required the debtor to add a bankruptcy waiver provision in favor of the creditor to the debtor's operating agreement. This maneuver by the creditor was deemed unenforceable by the court.

In *In re Lake Michigan Beach Pottawattamie Resort, LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016), the creditor required the debtor to include in its operating agreement a provision making the creditor a special member of the LLC with the power to block the filing of any bankruptcy petition. The court found that the blocking provision was void because it allowed the special member to consider only its interest to the exclusion of the interests of other parties.

In *In re Intervention Energy Holdings, LLC*, 553 B.R. 258, 265-66 (Bankr. D. Del. 2016), the debtor agreed to give the creditor one share in order to make the creditor a common member of the LLC. The debtor also amended its operating agreement to require unanimous consent of all members in order to file bankruptcy. The court held that because the substance of the creditor's relationship with the debtor was not as an equity holder, but primarily as a creditor, the provision was void as contrary to federal public policy.

The next court to address the validity of a golden share, or blocking member interest, was *In re Tara Retail Group, LLC*, 2017 WL 1788428 (Bankr. N.D. W. Va. May 4, 2017). In *Tara*, the secured lender required an independent director, and a bankruptcy filing required the unanimous consent of the directors. Although the court rejected the debtor's argument that the blocking provision violated public policy, the Court held that the independent director, who failed to act, had, by his silence, ratified the debtor's bankruptcy filing.

The final case addressed by the court was *In re Lexington Hospitality Group, LLC*, 577 B.R. 676 (Bankr. E.D. Ky. 2017), where PCG Credit Partners ("PCG") provided the financing to purchase a hotel property owned by the debtor. The debtor's operating agreement provided an affiliate of PCG with a 30% membership interest. The debtor's operating agreement also required a 75% vote of the members to file bankruptcy. The court found that because the PCG affiliate had no restrictions and no fiduciary duties to the debtor to possibly limit the affiliate's self-interested decisions, the blocking provision was ruled unenforceable by the bankruptcy court.

After analyzing these cases, the *Franchise Services* Court effectively ruled that a blocking provision held by an equity owner was enforceable, but a blocking provision held by a party that is solely a creditor is unenforceable. Since the holder of the blocking position in *Franchise Services* wore two hats, the court concluded that the blocking provision was enforceable.

Parting Thoughts:

The take away from these cases appears to be that a court will look to the actual interest of the party holding the blocking position. If the primary interest is as an equity holder, the blocking position will likely be enforceable. Conversely, if the primary interest is that of a creditor, the blocking position will likely be unenforceable. If the creditor truly wears two "hats", then the blocking position will likely be enforceable if asserted under the creditor "hat".

9) *Merit Management Group, L.P. v. FTI Consulting, Inc.*, 583 U.S. ---, 138 S.Ct. 883 (2018)

With permission from Haynes and Boone, LLP, the following article sets forth an excellent summary of the United States Supreme Court's February 27, 2018, opinion resolving a "Circuit split" concerning the 11 U.S.C. § 546(e) safe harbor provision.

Supreme Court Limits the Scope of Safe Harbor Protection in Avoidance Actions

3/02/2018
Henry Flores, Autumn D. Highsmith, Kelsey Zottnick

On February 27, 2018, the Supreme Court resolved a split between the Second, Third, Sixth, Eighth, and Tenth Circuit, and the Seventh and Eleventh Circuit in its ruling in *Merit Management Group, L.P. v. FTI Consulting, Inc. ("Merit Management")* 583 U. S. ____ (U.S. Feb. 27, 2018). The Supreme Court sided with the Seventh and Eleventh Circuit, holding that the presence of a "financial institution" in a multi-step transfer is insufficient to invoke a Bankruptcy Code safe harbor if the financial institution is a mere conduit (i.e. if the financial institution does not have an interest in the transferred property). The safe harbor at issue, Bankruptcy Code Section 546(e), prohibits the trustee from avoiding certain transfers made by, to or for the benefit of a list of enumerated financial market participants.[1]

Background

In *Merit Management*, Valley View Downs, LP, ("Valley View") and Bedford Downs Management Corp. ("Bedford") entered into an agreement where Valley View agreed to acquire all of the shares of Bedford for $55 million as part of larger transaction. Two banks served as intermediaries in the transaction, wiring and disbursing the money from Valley View to Bedford's shareholders, including Bedford's largest shareholder, Merit Management ("Merit"). Additionally, one of the banks held an escrow that served as security for Bedford's post-closing indemnity obligation to Valley View.

Valley View and its parent later filed for chapter 11 bankruptcy. After plan confirmation, the post-confirmation litigation trustee sued Merit seeking to recover $16.5 million that Merit received in exchange for its shares as a constructive fraudulent transfer. The trustee alleged that Valley View was insolvent at the time it paid for the Bedford shares, and that Valley View had significantly overpaid for those shares.

Merit sought dismissal of the lawsuit, arguing that the trustee was barred from avoiding the transfer because of the safe harbor protections of Section 546(e). The District Court agreed with Merit and dismissed the case, reasoning that the transfer was a settlement payment made by or to the type of financial institution covered by the safe harbor–namely, the two banks that handled the payments made to the Bedford shareholders. On appeal, the Seventh Circuit reversed the District Court's decision, holding that Section 546(e) does not protect transfers when the financial institution acts as a "mere conduit" in the transaction.

Supreme Court Ruling

In a unanimous ruling, the Supreme Court agreed with the Seventh Circuit's interpretation of Section 546(e). Though the parties disagreed whether the words "by or to (or for the benefit of)" required the financial institution to have a beneficial interest in the transfer, the Court stated that these inquiries "put the proverbial cart before the horse." See *Merit Management*, 583 U. S. ____, at 10. Instead, the relevant focus for purposes of a safe harbor analysis is on the specific transfer that the trustee seeks to avoid (in *Merit Management*, the $16.5 million payment from Valley View to Merit, not any flow of funds from Valley View to either bank). *See id*. The Court determined that a narrow reading of Section 546(e) is supported by the statute's text, context, and focus on the substantive nature of the transfer, as well as parallel language in other sections of the Bankruptcy Code. Merit also argued that the parenthetical "(or for the benefit of)" was used in a disjunctive sense to mean that the financial institution did not need to have a beneficial interest in the transfer to trigger the safe harbor. The Court rejected this argument, construing "(or for the benefit of)" as another way to protect a covered entity from avoidance, which did not extend to intermediaries lacking a beneficial interest in the transfer. *See id*. at 16. (stating that "a trustee seeking to avoid a preferential transfer under that creditor is a covered entity under § 546(e)…cannot now escape application of the § 546(e) safe harbor just because the transfer was not 'made by or to' that entity.").

Notably, the Court declined to consider the statutory purpose for Section 546(e) in making its decision. *See id*. at 18. The Court rejected Merit's argument that Section 546(e) was meant to be a

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"prophylactic" measure to protect the securities markets from the disruptive risk of avoidance liability, stating that such an argument was "nothing more than an attack on the text of the statute," and that the plain meaning of Section 546(e) protected the transfers that Congress intended to protect. *See id*. at 18. The Court's reasoning directly contrasts with that of courts like the Second Circuit, which have emphasized that in crafting Section 546(e), Congress intended to shield securities markets from the unwinding of securities transactions. In *In re Tribune Co. Fraudulent Conveyance Litigation*, the Second Circuit held that Section 546(e) protected transfers made to shareholders of a public company, reasoning that that the legislative history and broad language of Section 546(e) compel such a result:

> Section 546(e)'s protection of the transactions consummated through these intermediaries… was sought by the SEC—and corresponding provisions by the CFTC....to protect investors from the disruptive effect of after-the-fact unwinding of securities transactions… A lack of protection against the unwinding of securities transactions would create substantial deterrents, limited only by the copious imaginations of able lawyers, to investing in the securities market. The effect of appellants' legal theory would be akin to the effect of eliminating the limited liability of investors for the debts of a corporation: a reduction of capital available to American securities markets.

See In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98, 121 (2d Cir. 2016).

Due to the fact that the parties did not contend that either Valley View (the transferor) or Merit (the transferee) is a covered entity described in Section 546(e), the Court concluded that the transfer was not protected by the safe harbor. *See id*. at 19. The Court affirmed the Seventh Circuit and remanded the case for proceedings consistent with the Court's ruling.

Takeaways

It is difficult to predict the impact of *Merit Management*, because the court's analysis will require to a fact-dependent inquiry to determine whether a challenged transfer is protected under Section 546 (e). However, the opinion raises some issues for litigants to consider:

- The threshold issue in a Section 546(e) inquiry is whether the ultimate transfer meets the safe-harbor requirements. Using the Court's example, in examining the chain of events in a transfer that was executed through intermediaries B and C, such that the transfer is A → B → C → D, the relevant transfer is A → D. *See id*. at 1. The fact that B and C are "financial institutions" or other qualified entities under Section 546(e) is irrelevant if B and C are mere conduits in connection with the transfer.

- *Merit Management*'s impact in circumstances outside of the fact pattern the Court considered, which involved a relatively simple stock transaction structure between two private parties, is unclear. For instance, it is unclear how a court would approach a transfer-by-transfer Section 546(e) analysis with respect to transfers to individual shareholders of a public company. However, in *Merit Management*, the Court specifically rejected a safe harbor argument that was premised upon potential market disruption.

- The Section 546(e) analysis requires a factual inquiry for each defendant. In the future defendants may make additional arguments regarding their status as an entity qualified for the protection of Section 546(e). Interestingly, as the Supreme Court recognized, neither party in *Merit Management* briefed whether Valley View or Merit (as opposed to the intermediary banks) fell under the statutory definition of "financial institution" by virtue of their potential status as a "customer" of a financial institution (as contemplated by the relevant Bankruptcy Code sections). If a defendant's status as a "customer" of a financial institution results in that defendant being a "financial institution" under the Bankruptcy Code, the Section 546(e) safe harbor would apply to transfers by, to or for the benefit of that defendant. In a footnote, the Court specifically stated that the *Merit Management* decision does not address "what impact, if any, [the definition of "customer"] would have in the application of the §546(e) safe harbor." *See id*. at 5 n.2. This is a potential issue for litigants to consider in analyzing their defenses to an avoidance action.

If you have any questions, please contact one of the following attorneys.

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[1] The full text of §546(e) provides:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B),and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or

> forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C.§546(e).

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