ALERTS

Second Circuit Denies Enron's Petition for Rehearing on Commercial Paper Settlement Payment Decision

December 6, 2011

The U.S. Court of Appeals for the Second Circuit, on Dec. 2, 2011, ruled in favor of SRZ client Alfa, S.A.B. de C.V., denying Enron's petition for rehearing in *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011). The court had previously ruled against Enron more than five months ago, holding that its redemptions of commercial paper were "settlement payments" and thus not voidable as preferential or fraudulent transfers under Bankruptcy Code § 546(e), one of the code's so-called "safe harbor" provisions. *Id.* (Payments "made to redeem commercial paper, which the code defines as a security . . . constitute the 'transfer of cash . . . made to complete [a] securities transaction' and are settlement payments" under the code). An SRZ *Alert* , published June 29, 2011, summarized the opinion.

Lower courts have subsequently relied on *Enron* to insulate pre-bankruptcy transfers. *See, e.g.*, *In re Quebecor World (USA) Inc.*, 543 B.R. 201 (Bankr. S.D.N.Y. July 27, 2011) (pre-bankruptcy repurchase of $376 million in private notes not voidable because of § 546(e)); *Picard v. Katz*, 2011 U.S. Dist. LEXIS 109595 (S.D.N.Y. Sept. 27, 2011) (held, trustee's fraudulent transfer and preference claims dismissed under § 546(e) because "settlement payment" to defendants was made by a stockbroker on a "securities contract.").

Practitioners have also noted the purported "immediate and enormous direct financial impact" of the *Enron* decision. *See, e.g.*, David A. Pisciotta & Oscar N. Pinkas, *To Go Boldly Where No Court Has Gone Before: Enron*

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and the Application of § 546(e), 28 Am. Bankr. Inst. L. Rev 28, (Oct. 2011). But the Second Circuit's *Enron* ruling merely affirmed a two-year-old District Court decision handed down in November, 2009. *In re Enron Creditors Recovery Corp.*, 422 B.R. 423, 442 (S.D.N.Y. Nov. 20, 2009) (reversing bankruptcy court). Indeed, one bankruptcy judge put the District Court's *Enron* decision in its proper perspective: Enron's transactions "involved a financial intermediary and a broker/financial institution and thus qualified as 'settlement payments.' Noting the SEC's argument that 'reversing the $1.1 billion in actual transfers of funds could be acutely disruptive to the affected market,' [the District Court] applied the exemption." *In re MacMenamin's Grill Ltd.*, 450 B.R. 414, 424 (Bankr. S.D.N.Y. Apr. 21, 2011).

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the author.

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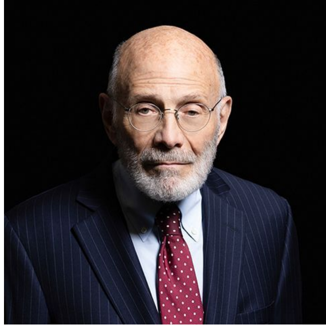

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