

PUBLICATIONS

The Code's Safe Harbor Defense: Still Vital and 'Extremely Broad'

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Appellate courts continue to agree on the vitality and breadth of the safe harbor defense contained in Bankruptcy Code (Code) § 546(e). It insulates from the trustee's fraudulent transfer or preference attack a "settlement payment" or "margin payment" on a "securities contract," "commodity contract" or "forward contract" except when the debtor's payment is made with "actual intent to hinder, delay, or defraud" creditors. Despite policy arguments by trustees and creditors, the Courts of Appeals have refused to add requirements to the Code's plain language. *In re Quebecor World (USA) Inc.*, 2013 WL2460726, *1 (2d Cir. June 10, 2013) (*held*, payments by debtor to noteholder trustee for noteholders "in exchange for private placement notes ... clearly fell within the safe harbor for 'transfers made ... in connection with a securities contract.'"); *In re Derivium Capital LLC*, 2013 WL2284876, *8 (4th Cir. May 24, 2013) (*held*, commission payments to stockbroker shielded from recovery by "settlement payment" defense; no exception in context of Ponzi scheme); *In re MBS Management Services, Inc.*, 690 F.3d 352, 355 (5th Cir. 2012) (*held*, pre-bankruptcy payments to power company for supplying electricity to debtor's apartment complexes were settlement payments on "forward contract" for purchase of a "commodity"; definition of "forward contract" clear on its face). In this article, SRZ business reorganization partner Michael L. Cook discusses how the safe harbor defense is still a good defense to fraudulent transfer and preference claims.

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