

# Fraudulent Transfer Claims After Merit Management v. FTI: Implications for Safe Harbor Litigation

TUESDAY, JANUARY 29, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

James T. Bentley, Special Counsel, **Schulte Roth & Zabel**, New York

William H. Gussman, Jr., Partner, **Schulte Roth & Zabel**, New York

Brandon M. Hammer, Attorney, **Cleary Gottlieb Steen & Hamilton**, New York

Sean T. Scott, Partner, **Mayer Brown**, Chicago

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

# Exhibit A

# Section 546(e)



Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of [the Bankruptcy Code], the trustee may not avoid a transfer that is a **margin payment**, as defined in section 101, 741, or 761 of [the Bankruptcy Code], or **settlement payment**, as defined in section 101 or 741 of [the Bankruptcy Code], 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 [the Bankruptcy Code]**.

- Section 101 provides general definitions used throughout the Bankruptcy Code.
- Section 741 provides definitions used in Subchapter III of Chapter 7, called "Stockbroker Liquidation."
- Section 761 provides definitions used in Subchapter IV of Chapter 7, called "Commodity Broker Liquidation."

# Margin Payment



- (i) means, for purposes of the forward contract provisions of [the Bankruptcy Code], payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments. 11 U.S.C. §101(38)
- (ii) means payment or deposit of cash, a security, or other property, that is commonly known to the securities trade as original margin, initial margin, maintenance margin, or variation margin, or as a mark-to-market payment, or that secures an obligation of a participant in a securities clearing agency. 11 U.S.C. §741(5)
- (iii) means payment or deposit of cash, a security, or other property, that is commonly known to the commodities trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, settlement payments, variation payments, daily settlement payments, and final settlement payments made as adjustments to settlement prices. 11 U.S.C. §761(15)

# Settlement Payment



- (i) means, for purposes of the forward contract provisions of [the Bankruptcy Code], a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade. 11 U.S.C. § 101 (51(A))
- (ii) means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade. 11 U.S.C. §741(8).

# Commodity Broker



A "futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of [the Bankruptcy Code], with respect to which there is a customer, as defined in section 761 of [the Bankruptcy Code].  
11 U.S.C. §101(6)

# Customer



## (A) with respect to a futures commission merchant—

- (i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission merchant on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such futures commission merchant's business as a futures commission merchant from or for a commodity contract account of such entity; or
- (ii) entity that holds a claim against such futures commission merchant arising out of—
  - (I) the making, liquidation, or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph;
  - (II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or
  - (III) the making or taking of delivery on such a commodity contract. 11 U.S.C. §761(9)

# Forward Contract Merchant



A Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade. 11 USC § 101(26)

# Stockbroker



## A person

- (A) with respect to which there is a customer, as defined in section 741 of [the Bankruptcy Code]; and
- (B) that is engaged in the business of effecting transactions in securities—
  - (i) for the account of others; or
  - (ii) with members of the general public, from or for such person's own account.

# Customer



## Includes

(A) [an] entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity—

(i) for safekeeping;

(ii) with a view to sale;

(iii) to cover a consummated sale;

(iv) pursuant to a purchase;

(v) as collateral under a security agreement; or

(vi) for the purpose of effecting registration of transfer; and

(B) [an] entity that has a claim against a person arising out of—

(i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or

(ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security;

(3) “customer name security” means security—

(A) held for the account of a customer on the date of the filing of the petition by or on behalf of the debtor;

(B) registered in such customer's name on such date or in the process of being so registered under instructions from the debtor; and

(C) not in a form transferable by delivery on such date. 11 U.S.C. §741(5)

# Financial Institution



(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a “customer”, as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940. 11 U.S.C. §101(22)

# Financial Participant



(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than \$1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991). 11 USC § 101(22)(B).

# Securities Clearing Agency



A person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A. (11 USC § 101(48))

# Securities Contract

(A) means—

- (i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a “repurchase agreement”, as defined in section 101);
- (ii) any option entered into on a national securities exchange relating to foreign currencies;
- (iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi));
- (iv) any margin loan;
- (v) any extension of credit for the clearance or settlement of securities transactions;
- (vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction;
- (vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;
- (viii) any combination of the agreements or transactions referred to in this subparagraph;
- (ix) any option to enter into any agreement or transaction referred to in this subparagraph;
- (x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or
- (xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;

# Commodity Contract



- (A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;
- (B) with respect to a foreign futures commission merchant, foreign future;
- (C) with respect to a leverage transaction merchant, leverage transaction;
- (D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;
- (E) with respect to a commodity options dealer, commodity option;
- (F)
  - (i) any other contract, option, agreement, or transaction that is similar to a contract, option, agreement, or transaction referred to in this paragraph; and
  - (ii) with respect to a futures commission merchant or a clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization;
- (G) any combination of the agreements or transactions referred to in this paragraph;
- (H) any option to enter into an agreement or transaction referred to in this paragraph;
- (I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or
- (J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, including any guarantee or reimbursement obligation by or to a commodity broker or financial participant in connection with any agreement or transaction referred to in this paragraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562;

# Forward Contract



(A) a contract (other than a commodity contract, as defined in) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of [the Bankruptcy Code], or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a “repurchase agreement”, as defined in this section) consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562. 11 USC § 101(25).

# Actual Fraud Carve-Out



- Payments made with actual intent to hinder, delay, or defraud creditors under section 548(a)(1) of the Bankruptcy Code are excluded from section 546(e)'s coverage.

## Disclaimer

This communication is issued by Schulte Roth & Zabel LLP for informational purposes only and does not constitute legal advice or establish an attorney-client relationship. In some jurisdictions, this publication may be considered attorney advertising. ©2019 Schulte Roth & Zabel LLP. All rights reserved. SCHULTE ROTH & ZABEL is the registered trademark of Schulte Roth & Zabel LLP. This communication displays certain trademarks and logos owned by the companies discussed herein. All such trademarks remain property of their respective owners, and are used only directly to identify or describe the companies being discussed herein. Their use is not intended to indicate and in no way indicates any sponsorship, endorsement or affiliation of Schulte Roth & Zabel LLP, on the one hand, and the owners of such trademarks and logos, on the other hand.