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Section 546(e) Bankruptcy Safe Harbor Exemptions: Recent Developments

Avoiding or Defending Fraudulent Transfer and Preference Challenges to Securities Transactions, LBO Shareholder Payments, Derivatives, Swaps and Other Financial Contracts

THURSDAY, JUNE 28, 2012

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

Today's faculty features:

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Mark Sherrill
July 28, 2012

Latest Developments in Bankruptcy Safe Harbors: Minimizing Risks of Avoidance for Financial Transactions

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Roadmap

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- Overview of Section 546 Defenses
- Caveats
- Commonly Litigated Issues
  - Leveraged Buyouts
  - Commodity Cases
  - Repo Cases
  - "Acting As" Qualified Party
  - Illegality Cases
  - "Commonly Used In Securities Trade"

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Overview of Section 546 Defenses

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- Section 546(e), (f), (g) and (j): substantially similar
- For (f), (g) and (j):
  - Trustee cannot avoid a transfer, except involving actual fraud, made by or to (or for benefit of) a Qualified Party in connection with a Qualified Contract
- For 546(e), slightly different – trustee cannot avoid:
  - Transfer that is Qualified Transfer, by or to (or for benefit of) Qualified Party
    - OR
  - Transfer that is made by or to (or for benefit of) Qualified Party in connection with Qualified Contract

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Overview of Section 546 Defenses

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- Qualified Party?
  - 546(e): commodity broker, forward contract merchant, stockbroker, financial institution, financial participant or securities clearing agency
  - 546(f): repo participant or financial participant
  - 546(g): swap participant or financial participant
  - 546(j): master netting agreement participant

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Overview of Section 546 Defenses

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- Qualified Contract?
  - 546(e): in connection with a securities contract, a commodity contract or a forward contract
  - 546(f): in connection with a repurchase agreement
  - 546(g): under or in connection with any swap agreement
  - 546(j): under or in connection with any master netting agreement or any individual contract covered thereby

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Overview of Section 546 Defenses

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- Qualified Transfer?
  - Recall: only regarding first prong of 546(e)
  - Transfer must be margin payment or settlement payment
  - Definitions of those terms are impossibly circular
    - A margin payment is a margin payment; a settlement payment is a settlement payment. 11 U.S.C. § 101(38) and (51A)
    - Courts complain of definitions being "circular and cryptic," *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1998), or "self-referential and unhelpful" *Geltzer v. Mooney (In re MacMenamin's Grill Ltd.)*, 450 B.R 414 (Bankr. S.D.N.Y. 2011)
    - "…brings to mind Gertrude Stein's often quoted tautological reference to the essential nature of a rose" *In re Quebecor World (USA) Inc.*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011)

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Caveats

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- Statutory language for 546(j) creates carve-out:
  - no exemption if trustee could otherwise avoid a transfer under an individual contract covered by master netting agreement
- No protection from avoidance of fraudulent transfers involving actual fraud
  - But fraudulent intent is only required of *transferor* (debtor), not transferee (defendant)
  - Good faith transferee may not have protections it assumes are available. *See Gredd v. Bear, Stearns Securities Corp. (In re Manhattan Investment Fund Ltd.)*, 310 B.R. 500 (Bankr. S.D.N.Y. 2002)
- "in connection with" vs. "under or in connection with"

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Commonly Litigated Issues

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- Does 546(e) defense extend to leveraged buyouts?
  - What about to transactions involving privately held securities?
- What qualifies as a forward contract or a swap agreement in the commodity context?
- Scope of protected repo transactions
- Must a Qualified Party be acting in a certain way to be protected?
- Does defense apply if underlying transaction was illegal?
- Are only transfers protected, or the incurrence of obligations too?

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Leveraged Buyouts

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- Generic Factual Context:
  - Shareholders receive payments for their equity interests, often in amounts in excess of recent market value
  - Payments are usually processed through banks or other financial intermediaries
  - When company later enters bankruptcy, fraudulent conveyance action is commenced to recover amounts paid for equity interests
  - In big picture, recovery of such payments may be integral to these companies' reorganizations

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Leveraged Buyouts

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- Legal Context: 546(e)
  - Trustee "may not avoid a transfer that is a … settlement payment … made by or to (or for the benefit of) a … financial institution." 11 U.S.C. § 546(e).
  - Settlement payment (re securities): "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).
  - Legislative history: "Congress's purpose was to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." H.R. Rep. No. 420, 97th Cong., 2d Sess. (1982).

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Leveraged Buyouts

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- Most Courts of Appeal apply 546(e) defense in LBO context
  - *See Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011); *Brandt v. B.A. Capital Co. (In re Plassein Int'l Corp.), 590 F.3d 252 (3d Cir. 2009)*; *QSI Holdings, Inc. v. Alford (In re QSI Holdings Inc.)*, 571 F.3d 545 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981 (8th Cir. 2009); *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505 (3d Cir. 1999); *Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230 (10th Cir. 1991)
  - *But see Munford v. Valuation Research Corp. (In re Munford, Inc.),* 98 F.3d 604 (11th Cir. 1996)

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Leveraged Buyouts

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- Lower courts less consistent, more likely to conclude LBOs (especially involving privately held securities) are ineligible for protections
  - Opinions typically point to Congressional intent, absence of impact on public markets
  - *See Zahn v. Yucaipa Capital Fund*, 218 B.R. 656 (D.R.I. 1998); *Jewel Recovery, L.P. v. Gordon*, 196 B.R. 348 (N.D. Tex. 1996); *KSC Recovery, Inc. v. First Boston Corp. (In re Kaiser Merger Litigation)*, 168 B.R. 991 (D. Colo. 1994); *Raleigh v. Schottenstein (In re Wieboldt Stores, Inc.)*, 131 B.R. 655 (N.D. Ill. 1991); *Geltzer v. Mooney (In re MacMenamin's Grill Ltd.)*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011)

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Leveraged Buyouts

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- *MacMenamin's Grill*: widely noted 2011 case
  - LBO payment from financial institution to 3 shareholders
  - Judge Drain found ambiguity in definition of settlement payment; therefore looked to legislative intent
    - Declined to apply section 546(e) defenses, applying standard of whether transaction had any impact on financial markets -- court determined no impact in such a small transaction
    - "… exempting transactions like the sale of the three Shareholders' stock in their bar and grill from avoidance is so far removed from achieving Congress' professed intent to protect the financial markets that it would be absurd to apply section 546(e)…"
  - Side note: transfer vs. obligation issue

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Commodities Cases

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- LBO cases mostly about whether payment is Qualified Transfer; commodity cases focus on whether defendant is Qualified Party (i.e., forward contract merchant or swap participant)
- Leading cases:
  - *Williams v. Morgan Stanley Capital Group (In re Olympic Natural Gas Co.)*, 294 F.3d 737 (5th Cir. 2002) – finding Morgan Stanley Capital group was FCM and declining to distinguish between financial and physical contracts
  - *Hutson v. E.I. du Pont de Nemours & Co. (In re Nat'l Gas Distrib., LLC)*, 556 F.3d 247 (4th Cir. 2009) – giving broad meaning to "commodity forward agreement," which is part of definition for swap agreement

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Commodities Cases

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- Again, less predictability among lower courts:
  - *U.S. Bank, N.A. v. Plains Mktg. Canada (In re Renew Energy LLC)*, 463 B.R. 475 (Bankr. D. Wis. 2011) (application of defenses on piecemeal basis where one contract was spot transaction)
  - *Lightfoot v. MXEnergy Elec., Inc. (In re MBS Mgmt. Servs. Inc.)*, 432 B.R. 570 (Bankr. E.D. La. 2010) (electricity agreement is forward contract, despite lack of set quantity in agreement)
  - *Hutson v. M.J. Soffe Co. (In re Nat'l Gas Distrib., LLC)*, 412 B.R. 758 (Bankr. E.D.N.C. 2009) (commodity forward agreement must have fixed quantity, price and time)
  - *Hutson v. United States (In re Nat'l Gas Distrib., LLC)*, 415 B.R. 209 (Bankr. E.D.N.C. 2009) (gas supply agreements were commodity forward agreements, except to extent of spot transactions where performance began less than two days after execution)

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“Acting As” Qualified Party

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- Grows out of *Olympic*: court must determine whether MSCG was acting as forward contract merchant in transactions with debtor
  - Emphasized in dicta in *Mirant Am. Energy Mktg, L.P. v. Kern Oil & Refg. Co. (In re Mirant Corp.)*, 310 B.R. 548 (Bankr. N.D. Tex. 2004)
- Later cases take rule further:
  - *Newhouse v. Texas Eastern Transmission Corp. (In re Aurora Natural Gas, LLC)*, 316 B.R. 481 (Bankr. N.D. Tex. 2004); *GPR Holdings, L.L.C. v. Duke Energy Trading & Mktg., L.L.C. (In re GPR Holdings, L.L.C.)*, 316 B.R. 477 (Bankr. N.D. Tex. 2004)
  - *But see Hays v. Morgan Stanley DW Inc. (In re Stewart Fin. Co.)*, 367 B.R. 909 (Bankr. M.D. Ga. 2007)

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Illegality Cases

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- Enron bought back own shares while insolvent, which violated Oregon law. Court held 546(e) did not apply where underlying transaction was illegal. *Enron Corp. v. Bear, Stearns Int'l Ltd. (In re Enron Corp.)*, 323 B.R. 857 (Bankr. S.D.N.Y. 2005)
  - *See also Cooper v. Centar Investments (Asia) Ltd. (In re Trigem Am. Corp.)*, 431 B.R. 855 (Bankr. C.D. Cal. 2010) (denying summary judgment because court can't determine if transaction was legal)

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“Commonly Used In Securities Trade”

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- *Enron/Bear Stearns* rationale based on definition of “settlement payment”
- Recall definition:
  - “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).

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“Commonly Used In Securities Trade”

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- *Enron/Bear Stearns* court applied “commonly used in the securities trade” as if it modified each preceding clause
- Therefore, an illegal or otherwise unusual transaction couldn’t involve a payment commonly used in securities trade
  - Several other opinions out of *Enron* bankruptcy court impose requirement that <u>any</u> settlement payment must be commonly used in securities trade
  - Rule became conventional wisdom. *See QSI Holdings*, 571 F.3d at 549; *Contemporary Indus.,* 564 F.3d at 988

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- *But see Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011)
  - Pre-petition, Enron paid $1.1 billion to retire unsecured and uncertificated commercial paper before stated maturity dates at accrued par value
  - Three broker-dealers and DTC participated in redemption by receiving commercial paper from noteholders and paying redemption price
  - Enron initiated adversary proceeding to avoid and recover redemption payments; defendants moved to dismiss based on 546(e)

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“Commonly Used In Securities Trade”

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- *But see Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011)
  - Bankruptcy court denied motion to dismiss, citing fact question of whether redemption payments were “commonly used in securities trade” under section 741(8)
  - District court reversed, applying safe harbor
  - Second Circuit affirmed district court
    - Pointed to legislative intent, other circuit courts
    - “Commonly used in the securities trade” modifies only final term “any other similar payment”
    - Therefore, no basis to limit 546(e)
    - Absence of financial intermediary that takes title is insufficient reason to deny application of 546(e)

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Follow-on to *Enron* Opinion

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- *In re Quebecor World (USA), Inc.*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011)
  - Inside preference period, debtor paid noteholders $376 million (in part due to cross-default provision)
  - After commencement of avoidance action, noteholders moved for summary judgment
  - Judge Peck granted summary judgment, based on:
    - *Stare decisis*
    - The "direction given by the *Enron* majority with respect to [the settlement payment] definition is both uncomplicated and crystal clear – a settlement payment, quite simply is a 'transfer of cash … made to complete a securities transaction.'"

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July 28, 2012

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Safe Harbor Recent Developments

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Cases Interpreting Safe Harbor

- Brief Review of 2011 Cases:
  - *MacMenamin's Grill, Ltd.,* 450 B.R. 414 (Bankr. S.D.N.Y. 2011).
  - *Lehman Brothers Holdings, Inc. ("Ballyrock")*, 452 B.R. 31 (Bankr. S.D.N.Y. 2011).
  - *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011).
  - *Quebecor World (USA), Inc.*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011).
- 2012 Cases:
  - *Lehman Brothers Holdings Inc. v. JPMorgan Chase Bank*, 2012 WL 1355659 (Apr. 19, 2012)
  - *Bernard L Madoff Invest. Sec. LLC*, 2011 WL 3897970 (S.D.N.Y. Aug. 31, 2011)
  - *Picard v. Katz*, 462 B.R. 447 (S.D.N.Y. 2011) ("Picard v. Katz I")
  - *Picard v. Katz*, 466 B.R. 208 (S.D.N.Y. 2012) ("Picard v. Katz II")
  - *SIPC v. BLMIS*, 2012 WL 1505349 (S.D.N.Y. Apr. 30, 2012)
  - *In re Lancelot Investors Fund, L.P.*, 467 B.R. 643 (Bankr. N.D. Ill. 2012)
  - *Qimonda Richmond, LLC v. EPLG I, LLC*, 467 B.R. 318 (Bankr. D. Del. 2012)
  - *Appleseed's Intermediate Holdings*, LLC, 2012 WL 748652 (D. Del. Mar. 7, 2012)

Quebecor v. MacMenamin's – Transition to 2012

- In *MacMenamin's*, Judge Drain held that the safe harbor in section 546(e) does not cover relatively inconsequential private transactions that, if avoided, would only have a modest impact on the broader securities market.
- One open question following Enron was whether it's holding overruled *MacMenamin's*
  - Would the safe harbor apply to a small LBO that had no impact on the broader securities markets?

2012

LBHI v. JPMorgan Chase Bank

- Brief Overview of the Facts:
  - JPMorgan was the principal clearing bank for Lehman
  - JPMorgan and Lehman later altered the clearance agreements by (i) adding LBHI and other subsidiaries, (ii) having LBHI guaranty all obligations owed to JPMorgan, and (iii) granting JPMorgan a lien on several LBHI accounts in which LBHI posted collateral (the "August Agreement")
  - As LBHI's financial condition deteriorated, LBHI execute another new set of documents.
  - Result: (i) expanded the Lehman entities' obligations; (ii) expanded LBHI's liabilities to include all obligations of Lehman entities to all JPMC entities; (iii) granted JPMC a lien on all LBHI's accounts at JPMC or its affiliates; and (iv) perfected JPMC's security interest

LBHI v. JPMorgan Chase Bank

- Facts (cont.)
  - Thereafter, in response to JPMorgan's request for additional collateral, Lehman deposited $8.6 billion with JPMC
  - Debtor and creditors' committee filed complaint against JPMC containing over 49 claims to recover approximately $8.6 billion in prepetition transfers made to JPMC in the days leading up to LBHI's bankruptcy, including claims under 547 and 548 of the Code
  - JPMC moved to dismiss based on Section 546(e) Safe Harbor

LBHI v. JPMorgan Chase Bank
Bankruptcy Court's Ruling:

- Court reaffirmed breadth of the safe harbor
  - *Enron* and *Quebecor* stand for the proposition that Section 546(e) is to be "strictly construed [i.e. broadly construed] even when the outcome may be prejudicial to the interests of the estate and its creditors."
- Key Issue: Whether the Agreements were "securities contracts"
  - Initial Clearance Agreement: A securities contract because it was "an extension of credit for the clearance or settlement of securities transactions"
  - The subsequent agreements: Securities contracts because they were credit enhancements "related to" and "in connection with" other "securities contracts"

LBHI v. JPMorgan Chase Bank

Bankruptcy Court's Ruling:

- The Court also found that the liens granted under the September Agreements and the perfection of those liens were transfers pursuant to safe harbored securities contracts
- Finally, the Court also found that the transfer/pledge of $8.6 billion in collateral transfers was protected
  - Court rejected Lehman's claim that these collateral transfers were not protected by the safe harbor because they had "nothing to do with" any JPMC "exposure" under the clearance agreement
- Of note, the Court held that the "in connection with" requirement of Section 546(e) does not contain a temporal requirement

LBHI v. JPMorgan Chase Bank

Bankruptcy Court’s Ruling:

- The Court also held that Section 546(e) shielded LBHI’s obligations under the guarantees from avoidance even though “obligations” does not appear in the text of Section 546(e)
  - “Although the Plaintiffs are correct that the obligations themselves are not shielded by section 546(e), . . . The liens and related collateral transfers remain independently immune from avoidance regardless of whether Plaintiffs can succeed in avoiding the Guarantees.”
- Again, however, the Court reconfirmed that actual fraud is excluded from the safe harbor.

In re Bernard Madoff Investment Securities, LLC

- Facts:
  - Merkin, a sophisticated investment manager and financier, and several feeder funds were sued by Picard for preferential and fraudulent transfers
  - Merkin and his affiliated entities served as one of the largest feeders of new capital to Madoff's criminal enterprise (placed $1 billion with Madoff)
  - The complaint alleges that the defendants cashed out of the scheme at least 11 times during the six years prior to the commencement of the Madoff bankruptcy, withdrawing a total of $494.6 million.
  - Of this amount, $313.6 million was transferred within two years of the bankruptcy and one payment of $45 million was made within 90 days of the filing.
  - Defendants moved to dismiss.
  - Bankruptcy court denied.

In re Bernard Madoff Investment Securities, LLC

- On appeal, the district court (Judge Wood) affirmed the Bankruptcy Court.
- The bankrutpcy court held that:
  - (1) it couldn't determine whether Madoff was a "stockbroker . . . engaged in the business of effecting transactions in securities" as a matter of law
    - BLMIS never purchased securities
  - (2) it could not determine whether the account agreements governing the funds' relationship with BLMIS constitutes "securities contracts"
    - No party conducted a purchase, sale, or loan of a security under the agreements
- Due to disputes concerning Madoff's activities, premature to decide whether Section 546(e) applied at the pleading stage.

Picard v. Katz I (Sept. 2011)

- Facts:
  - Picard sued to avoid and recover over a billion dollars from defendant-customers under theories of actual and constructive fraud, preferences, equitable subordination, and the like
  - Defendants moved to dismiss, asserting that the safe harbor absolves them of liability
- Holding:
  - Applying *Enron*, Judge Rakoff dismissed Picard’s claims to avoid payments to BLMIS customers as preference payments, constructive fraudulent conveyances, and both actual and constructive fraudulent conveyances under New York state law

Picard v. Katz I (Sept. 2011)

- Key Difference, the Court made factual findings:
  - "Because Madoff Securities was a registered stockbrokerage firm, the liabilities of customers . . . are subject to the 'safe harbor' . . . in section 546(e) of
  - Plain meaning of the statute barred the claims:
    - "By its literal language, therefore, the Bankruptcy Code precludes the Trustee from bringing any action to recover from any of Madoff's customers any of the monies paid by Madoff Securities to those customers except in the case of actual fraud." the Bankruptcy Code."
    - Even resorting to legislative history, the court independently found that undoing such large transfers would have a substantial negative effect on the market.

Picard v. Katz II (Jan. 2012)

- After some of Picard's claims were dismissed, Picard moved to certify Judge Rakoff's decision for interlocutory appeal, which Judge Rakoff denied
  - Picard wanted to argue on interlocutory appeal that Madoff was not a "stockbroker" because he was not "engaged in the business of effecting transactions in securities" and that a customer of a stockbroker operating a Ponzi scheme cannot be protected under the safe harbor
    - Court held that the safe harbor on its fact protected not only stockbrokers but also investors.
    - Court also noted that if it adopted Picard's interpretation, there would be difficulties in drawing the line between a stockbroker whose Ponzi scheme was all encompassing and a stockbroker who only fakes part of his business

SIPC v. BLMIS (April 2012)

- Applies the September 2012 *Katz* ruling to an additional 84 cases and adopts the reasoning in *Katz* based on collateral estoppel
- Picard, however, raised a few new arguments, which Judge Rakoff addressed:
  - Although Picard argued that you could separately analyze different Madoff components (because some were purely fraudulent, court disagreed. Madoff Securities was a stockbroker because its marketing and proprietary trading divisions engaged in "legitimate trading," although investment advisory unit did not
  - Madoff Securities held itself out to all its customers as a firm engaged in the business of effecting transactions in securities
  - The customers had "securities contracts" within the purview of § 741(7)
  - The customers believed that withdrawals from Madoff Securities completed securities transactions

Lancelot Investors Fund, L.P.

- Facts:
  - Defendants were investors in hedge funds operated by Gregory Bell
  - Bell formed Lancelot in 2002 as a single-investment hedge funds, which invested in notes from Petters Company, Inc.
  - Petters was a Ponzi scheme.
  - Lancelot replaced the notes at the suggestion of Petters through a series of transactions.
  - Petters took the money from the new notes and gave it right back to Lancelot to make it appear to Bell's investors as though the delinquent notes had been paid off
  - Bell and Petters were convicted of wire fraud. Petters is serving a 50 years.
  - Claims against the Debtor totaled $2.1 billion, mostly from investors who were unable to redeem their interests

Lancelot Investors Fund, L.P.

- Facts (cont.)
  - The Trustee sued the defendants who had their interests redeemed to recover nearly $200 million
  - The defendants moved for summary judgment, contending the safe harbor barred avoidance
  - The trustee argued that the safe harbor does not shield payments and transfers tainted by fraud, contending that the monies should be recovered so the investors could share pro rata

Lancelot Investors Fund, L.P.

- The bankruptcy court granted summary judgment in favor of the defendants on constructive fraud and preference counts and denied summary judgment on the actual fraudulent transfer claims.
- Reasoning:
  - The court did not accept the Trustee's position that the safe harbor did not apply because of a "taint" of fraud.
  - "Congress did not exempt all fraudulent transfers from safe harbor protection, only those involving actual fraud. . . ."
  - Defendants need not prove that avoidance of their transfers would destabilize the markets. The statute is plain on its face and imposes no such requirement.

Qimonda

- Payment to collateralize letter of credit in a bond redemption not protected by the safe harbor
- Facts:
  - Debtor issued $33.68MM in revenue bonds,
  - Citi issued the letter of creditor ("LC") to backstop the bonds
  - As financial crisis worsened in 2008, Citi obtained an additional pledge in Debtor's cash collateral account
  - Citi notified Debtor it would not renew the LC and Debtor agreed to redeem bonds
  - Debtor increased its cash collateral account from $0.00 to $47.9MM, and Citi debited the cash collateral account and paid off the bonds
  - Debtor filed bankruptcy a month later
  - Trustee sued to avoid and recover the transfers under 547 and 548, and Citi moved to dismiss the complaint using the safe harbor as a defense (relying on *Quebecor*)

Qimonda

- Bankruptcy Court held that the deposit and debit of the cash collateral account did not constitute a "settlement payment"
  - The only purpose of the payment in *Quebecor* was to effectuate a securities transaction
  - Here, unlike *Quebecor*, the payment fulfilled an obligation independent from any securities transaction. Debtor paid Citibank to collateralize its exposure under the LC.
  - LC is specifically excluded from the definition of security and thus cannot constitute a settlement payment under § 101(49)(B)(i).
  - The deposit and debit also were not "in connection with a securities contract," even if the LC was a credit enhancement to the bonds

Appleseed's Intermediate Holdings

- A dividend, which is part of a multi-faceted transaction, is not protected by safe harbor just because one element of the transaction (an LBO) may be protected
- Facts:
  - Dispute concerning a 2007 acquisition and dividend recapitalization that caused debtor's insolvency
  - Debtors entered into $710MM credit facility to fund $158MM acquisition, retire $138MM in existing debt, and to make a $310MM dividend to private equity shareholders
  - Trustee brought an adversary proceeding against the private equity funds, seeking to, among other things, avoid the dividend payment as a fraudulent transfer
  - Defendants moved to dismiss, contending that the dividend was protected by the safe harbor

Appleseed's Intermediate Holdings

- "Although the Third Circuit has held that a payment for shares during a leveraged buyout is a settlement payment, those transactions involved security exchanges."
- Both parties exchanged value
- Here, the dividend transaction was not an exchange, but a one-way payment.
- While the LBO may fall within the meaning of settlement payment, it cannot be conflated with the payment of the dividend.