



Supreme Court to Hear Case on Scope of Section 546(e)'s Safe Harbor

On May 1, 2017, the U.S. Supreme Court agreed to hear *Merit Management Group v. FTI Consulting*, No. 16-784, on appeal from the U.S. Court of Appeals from the Seventh Circuit. The Court's decision could resolve a circuit split as to whether section 546(e) of the Bankruptcy Code can shield from fraudulent conveyance attack transfers made through financial institutions where such financial institutions are merely "conduits" in the relevant transaction. The Court's decision could resolve a question of great significance for financial institutions and those who use their services in transactions: Whether the safe-harbor provision in section 546(e) protects transfers made through a financial institution to a third party regardless of whether the financial institution had a beneficial interest in the transferred property.

Section 546(e) provides that pre-bankruptcy transfers made by or to a "financial institution," among other entities, may not be avoided as a fraudulent transfer, unless the transfer was made with the *actual intent* to hinder, delay or defraud creditors. The general purpose of section 546(e) is to prevent "the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583, 1982 WL 25042. With the enactment of section 546(e), Congress sought to promote customer confidence in the markets by protecting market stability. *See Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846 (10th Cir. 1990) (citing Sen. Rep. No. 989, at 8 (1978)).

The Seventh and Eleventh Circuits have held that section 546(e) does not apply to transfers with financial institutions that receive no beneficial interest in the property transferred. By contrast, the Second, Third, Sixth, Eighth, and Tenth Circuits have found that section 546(e) applies even if the financial institution involved is merely a "conduit" for the transfer of funds from the debtor to another party.

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