

A Notable Footnote In High Court Merit Management Decision

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On Feb. 27, 2018, the U.S. Supreme Court issued its decision in *Merit Management Group LP v. FTI Consulting Inc.*, resolving a circuit court split regarding the scope of the Bankruptcy Code's Section 546(e) "safe harbor," which protects certain securities-related transfers from avoidance. Much of the discussion surrounding the decision has characterized the ruling as a narrowing of the safe harbor, given the court's holding that a transfer is not protected from avoidance merely because the funds passed through a "financial institution" or other protected entity. However, footnote 2 of the decision — which states that the court's holding does not address whether a "customer" of a financial institution is encompassed within the statute, because the argument was not presented by the parties — could mean that the safe harbor remains applicable to additional participants in securities transactions, beyond those obviously covered under the statute. This article examines the strength of that argument.