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Supreme Court Interprets Scope of Section 546(e) Safe Harbor

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Unanimous Court in *Merit Management Group, LP v. FTI Consulting, Inc.*, No. 16-784, resolves circuit court split, holds that the Bankruptcy Code's Section 546(e) safe harbor protects only transfers by, to, or for the benefit of protected entities.

In an opinion dated February 27, 2018, the Supreme Court unanimously affirmed a Seventh Circuit decision and held that Section 546(e)'s safe harbor protects transfers from avoidance only if the transfer sought to be avoided is a transfer by, to, or for the benefit of a "protected entity," an entity enumerated in 546(e) (for example, a "financial institution" as defined by Section 101(22) of the Bankruptcy Code). Where a protected entity is neither the transferee, transferor, or beneficiary of the transfer, a transfer will not be protected even if the property transferred passed through a financial institution or other protected entity acting as an intermediary.

The Supreme Court's *Merit Management* ruling resolves a longstanding circuit split on the application of Section 546(e). Prior to the Supreme Court's decision, the Second, Third, Sixth, Eighth, and Tenth Circuits had all held that the safe harbor protects transfers that occur through protected entities acting only as intermediaries. Until the Seventh Circuit's decision in 2016, only the Eleventh Circuit had previously held that Section 546(e) did not safe-harbor transfers for which a protected entity acted only as an intermediary.

The decision may have wide-ranging implications regarding the finality of securities transactions and, in particular, tender offers, leveraged buyouts, and other transactions that have been challenged in bankruptcy proceedings.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Donald S. Bernstein
+1 212 450 4092
donald.bernstein@davispolk.com

Marshall S. Huebner
+1 212 450 4099
marshall.huebner@davispolk.com

Tina Hwa Joe
+1 212 450 3541
tina.joe@davispolk.com

Ben Kaminetzky
+1 212 450 4259
ben.kaminetzky@davispolk.com

Elliot Moskowitz
+1 212 450 4241
elliot.moskowitz@davispolk.com

Brian M. Resnick
+1 212 450 4213
brian.resnick@davispolk.com

Marc J. Tobak
+1 212 450 3073
marc.tobak@davispolk.com

Eli J. Vonnegut
+1 212 450 4331
eli.vonnegut@davispolk.com

Erika D. White
+1 212 450 4183
erika.white@davispolk.com

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