

# Second Circuit Recognizes ‘Customer’ Safe Harbor in *Tribune* LBO Litigation

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As we had anticipated in our prior client alerts,<sup>1</sup> the “customer” safe harbor defense to constructive fraudulent conveyance claims challenging securities transactions — which was flagged by the U.S. Supreme Court in *Merit Management* — has replaced the “conduit defense” struck down in that same decision.<sup>2</sup> Most recently, the Second Circuit confirmed the availability of the customer defense in its amended decision in *In re Tribune Co. Fraudulent Conveyance Litigation*.<sup>3</sup> As the second written opinion to apply the customer defense to dispose of constructive fraudulent conveyance claims — and the second one involving the Tribune Company’s \$11 billion leveraged buyout — the Second Circuit’s decision now adds appellate-level support for the defense.<sup>4</sup>

## Merit’s Impact on the Second Circuit’s Initial Tribune Holding

In its initial *Tribune* decision, the Second Circuit held that, while creditors asserting state law constructive fraudulent conveyance claims had standing to do so, Section 546(e) preempted such claims as a matter of federal bankruptcy law based on the conduit defense.<sup>5</sup> In light of *Merit*’s elimination of the conduit defense, Justices Anthony Kennedy and Clarence Thomas issued a statement suggesting the Second Circuit recall its mandate, and the appellants filed a motion seeking recall.<sup>6</sup> The Second Circuit did so, and, upon further panel review, issued an amended opinion disposing of the fraudulent conveyance claims once again; this time on the basis of the “customer” defense embedded in Section 546(e).

## The Second Circuit’s Application of the Customer Defense

To reach its revised decision, the Second Circuit analyzed whether Tribune was a covered entity under Section 546(e). In particular, if Tribune itself qualified as a “financial institution” because it was a “customer” of a financial institution and such financial institution was acting as Tribune’s agent, then Tribune would be covered by Section 546(e)’s safe harbor, insulating the LBO transfers from constructive fraudulent transfer claims.

<sup>1</sup> See “[Bankruptcy Code’s Safe Harbor ‘Conduit’ Defense Eliminated by Supreme Court; Variant Defense May Survive](#)” and “[District Court Applies Section 546\(e\) Safe Harbor to Customer of Financial Institution, Revitalizing Key Defense](#).”

<sup>2</sup> Each of the “customer” and now-defunct “conduit” safe harbors originate from Section 546(e) of the Bankruptcy Code. This provision bars avoidance of “a transfer that is ... a settlement payment ... made by or to (or for the benefit of) ... a financial institution ... in connection with a securities contract.” The Supreme Court’s *Merit* decision held that this safe harbor does not protect transfers in which financial institutions served as “mere conduits” for the overarching transaction.

Section 101(22) defines “financial institution” to include “an entity that is a commercial or savings bank ... trust company, ... and, when any such ... entity is **acting as agent or custodian for a customer** ... in connection with a securities contract ... **such customer**.” (Emphasis added.) The “customer defense” invokes the safe harbor based on this definition.

<sup>3</sup> *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 13-3875-CV, 2019 WL 6971499, at \*9 (2d Cir. Dec. 19, 2019) (*Tribune III*). Skadden currently represents, among others, certain of the selling shareholders in the underlying action, as well as members of the special committee for the board of directors of Tribune Company.

<sup>4</sup> We previously discussed Judge Denise Cote’s April 2019 decision applying the customer safe harbor to dismiss federal constructive fraudulent conveyance claims arising from the Tribune LBO. See *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11MD2296 (DLC), 2019 WL 1771786 (S.D.N.Y. Apr. 23, 2019) (*Tribune II*).

<sup>5</sup> *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 120 (2d Cir. 2016) (*Tribune I*), opinion amended and superseded, No. 13-3875-CV, 2019 WL 6971499 (2d Cir. Dec. 19, 2019).

<sup>6</sup> See *Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Found.*, 138 S. Ct. 1162, 1163, 200 L. Ed. 2d 735 (2018).

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## Step 1: Computershare as a ‘Financial Institution’

Applying the facts to the law, the Second Circuit concluded that Tribune retained Computershare to act as a “depository” to hold, receive and distribute funds and shares as part of the LBO.<sup>7</sup> As a trust company and bank recognized by the Office of the Comptroller of the Currency, Computershare qualified as a “financial institution” covered under Section 546(e).<sup>8</sup> Tribune would also qualify as a “financial institution” in connection with the LBO payments if it was Computershare’s “customer,” and Computershare was acting as Tribune’s agent.<sup>9</sup>

## Step 2: Tribune as Computershare’s ‘Customer’

To determine whether Tribune was Computershare’s customer, the Second Circuit reviewed the services Computershare performed for Tribune in the LBO. Because, in exchange for fees paid by Tribune, Computershare received and held Tribune’s deposit of the aggregate purchase price for the shares, received the tendered shares, retained the tendered shares on Tribune’s behalf and remitted payment to the tendering shareholders, the Second Circuit concluded that Tribune was Computershare’s “customer” in connection with the LBO payments.

In so holding, the court reviewed Bankruptcy Code Section 101(22)’s definition of “financial institution.” As noted above, that section defines “financial institution” to include, among other things, “an entity that is a commercial or savings bank ... trust company, ... and, when any such ... 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.” (Emphasis added.) Because Section 101(22) “plainly states that its definition of ‘customer’ is not limited by” Section 741, the Second Circuit concluded that Section 741’s “specialized definition of customer” does not apply when determining if an entity qualifies as a financial institution.<sup>10</sup>

Instead, the court adopted the plain meaning of “customer,” referring to prior Second Circuit precedent: “We have previously recognized that the ‘core’ ordinary definition of ‘customer’ is ‘someone who buys goods or service.’”<sup>11</sup>

<sup>7</sup> *Tribune III* at \*7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Moreover, the Second Circuit also noted that Black’s Law Dictionary’s “more granular definition” of the word includes “a person ... for whom a bank has agreed to collect items.”<sup>12</sup> Under either definition, the Second Circuit was satisfied that Tribune qualified as Computershare’s customer.

## Step 3: Computershare as Tribune’s ‘Agent’

Finally, the court considered whether Computershare acted as Tribune’s agent in connection with the LBO, as required by Section 101(22)’s definition of “financial institution.” Here, the Second Circuit stated that “the parties have not identified any reason why the term ‘agent,’ for the purposes of Section 101(22), should be given anything other than its common-law meaning” and accordingly applied the common law definition. Under common law, agency “arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>13</sup>

Once again applying the facts to the law, the Second Circuit determined that Tribune demonstrated its intent to give Computershare authority by “depositing the aggregate purchase price for the shares with Computershare and entrusting Computershare to pay the tendering shareholders.” And the court determined that Computershare demonstrated its assent by “accepting the funds and effectuating the transaction.” Finally, “as the transaction proceeded, Tribune maintained control over key aspects of the understanding.” Thus, Computershare acted as Tribune’s agent in connection with the LBO.

Based on this three-step analysis, the court held that Tribune fit into the statutory definition of “financial institution”: Computershare (a bank and trust company) acted as an agent for Tribune (its customer) in connection with the LBO (a securities contract).<sup>14</sup> The Second Circuit concluded that the transfers Tribune made to the selling shareholders were therefore covered by Section 546(e) as “settlement payments” “made by or to (or for the benefit of)” a “financial institution.”

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*8.

<sup>14</sup> The Second Circuit also disposed of the appellants’ argument that a portion of the transfers made in the LBO were not “in connection with a securities contract” because they involved the redemption, rather than the purchase, of shares. The court reasoned that “redemption” in the securities context means “repurchase” and further noted that Section 741(7) defined “securities contract” broadly to include the repurchase of securities. *Id.* at \*9. As a result, the Second Circuit concluded that all of the payments at issue, including the redeemed shares, were “in connection with a securities contract.”

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## Takeaways

As the first circuit-level decision to endorse the customer defense, the Second Circuit’s *Tribune* decision reinforces the strength of the defense after Judge Cote’s seminal opinion applying it. With these two important decisions now on record, the customer defense is likely to continue gaining momentum. And parties structuring LBO’s will likely seek to retain federally recognized financial institutions to act as their agents in holding and distributing the various forms of currency in such transactions to ensure they meet the “financial institution” and “customer” criteria methodically articulated by the Second Circuit. Moreover, litigants will likely continue to parse the language of Sections 101(22) and 546(e) as they argue over the parameters of the customer defense.