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Lehman Team Seals Victory With Certiorari Denial in Repo Case

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Hughes Hubbard & Reed sealed its precedent-setting Second Circuit win for Lehman Brothers Trustee Jim Giddens when the U.S. Supreme Court denied investment manager CarVal UK's petition for certiorari review of the appeals court's decision that the company's \$44 million in repurchase (repo) claims did not qualify for customer protection.

On Feb. 29, the high court denied without comment CarVal's petition for writ of certiorari, declining to re-examine the Second Circuit's ruling in June 2015 that CarVal's repo claims don't satisfy the entrustment requirement for the firm to be recognized as a customer under the Securities Investor Protection Act (SIPA).

The victory will allow the Lehman liquidation to continue in earnest and ratifies the long-standing policy and practice that repo agreements are akin to commercial borrowings, not customer transactions.

CarVal had sought customer protection for its claims under SIPA, the law covering failed broker-dealers. SIPA covers customer losses of up to \$500,000 and gives customers of a failed brokerage priority over other creditors in the distribution of assets.

But a bankruptcy judge in 2013 and a federal judge in 2014 found that the repo claims should be reclassified as general creditor claims because CarVal failed to show entrustment of property to the broker-dealer.

The Second Circuit's ruling in June 2015 affirming the two lower court decisions relied heavily upon, and simultaneously reinforced, a precedent-setting decision won by Hughes Hubbard in 1974. In that case, in which Giddens and Jim Kobak served as counsel to the trustee, the Second Circuit found that the courts must look beyond the literal words of the SIPA "customer" definition in determining whether a claimant entrusted securities to a failed broker.

The Supreme Court action paves the way for Giddens to move forward reclassifying more than \$75 million of other repo claims, which will provide a greater recovery for LBI's general creditors.

Michael Salzman argued the case before the Second Circuit. Chris Kiplok also worked on the repo litigation.

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