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## Second Circuit Hears Arguments in Important Test of Safe Harbor Provisions

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**November 11, 2014** - On November 5, 2014, the Second Circuit (Judges Winter, Droney, and Hellerstein) held oral arguments in *In re Tribune Litigation* (Case No. 13-3992) and *Whyte v. Barclays Bank PLC* (Case No. 13-2653). As we outlined [here](#), both cases consider the reach of the safe harbor provisions found in section 546 of the Bankruptcy Code that protect certain financial transactions from constructive fraudulent avoidance claims. The District Court dismissed the plaintiffs' state law constructive fraudulent conveyance claims in both cases, but reached different decisions on the key question of whether the Bankruptcy Code's safe harbor provisions impliedly preempt state law causes of action brought by creditors. Judge Rakoff held that implied preemption applied in *Barclays* while Judge Sullivan held that the express language of the safe harbors did not preempt state law claims brought by creditors in *Tribune*. The defendants in both cases garnered support from numerous amici, including the U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, the Chicago Mercantile Exchange Inc., the Security Industry and Financial Markets Association, and the International Swaps and Derivatives Association.

At argument, counsel for the creditors' representative of SemGroup and Tribune both argued that it is clear from the plain language and legislative history of the safe harbor statute that Congress did not intend to preempt state law. In support of this argument, the creditors' counsel pointed to, among other things, (i) the express limitation in the statute to claims brought by the trustee (rather than creditors), (ii) language in a separate section of the Bankruptcy Code expressly preempting state law causes of action for avoidance of charitable contributions, (iii) the numerous amendments to the safe harbor provisions without the addition of an express preemption clause, and (iv) a 1976 congressional committee report that shows that the committee did not incorporate the U.S. Commodities Futures Trading Commission's request for an express preemption provision. In response, counsel for the defendants in both cases argued that (i) allowing the state law fraudulent transfer claims to proceed would conflict with Congress' stated purpose in enacting the safe harbor – to ensure stability of the financial markets, (ii) that the creditor representatives should not be permitted to end run federal law by applying state law; (iii) that the

scenarios at issue – non-trustee “creditor representatives” pursuing claims under state law that are barred by section 546 – would occur in every case if not barred here.

The court reserved judgment, but early interpretation of oral argument suggests that the majority of the court was persuaded that the safe harbors impliedly preempted the state law causes of action, with one judge noting that the creditors’ state law claims were “the very evil” that Congress intended to avoid when it passed the safe harbor provisions.

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