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*Merit Management Group, LP v. FTI Consulting, Inc.*, No. 16-784

Section 546(e) of the Bankruptcy Code, 11 U.S.C. § 546(e), protects certain prepetition payouts by or to financial institutions from clawback by the trustee of the ensuing bankruptcy estate. In particular, the safe harbor protects transfers made by a debtor by or to a broker, financial institution, or similar intermediary in connection with a “securities contract,” unless the transfer was made with actual intent to hinder, delay, or defraud creditors.

The majority of circuits have construed this provision broadly to preclude clawback actions, even if the broker or financial institution had only a minor role in the transaction—*e.g.*, as a conduit. The Seventh Circuit, in the decision below, held otherwise, finding that a trustee was entitled to pursue a constructive fraudulent transfer claim to avoid a debtor’s purchase of the stock of a competing harness-racing company. In another petition pending before the Court, the Second Circuit adopted the majority position, holding that a creditors’ committee could not pursue a constructive fraudulent transfer claim against shareholders of The Tribune Company, in an attempt to claw back billions of dollars they received in a leveraged buyout before the company filed for bankruptcy.