



Bankruptcy & Financial Restructuring ADVISORY ■

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REMIC Trust Payments Adrift After Losing Clarity of Their Safe Harbor

As we [previously reported](#), in April 2015 Judge Jacqueline P. Cox (U.S. bankruptcy judge for the Northern District of Illinois) issued an opinion that broadly interpreted the safe harbor provisions of Bankruptcy Code Section 546(e) in the context of payments on loans securitized using real estate mortgage investment conduit (REMIC) trusts.

In short, Judge Cox held that payments by the debtor to a bank that was the master servicer of a REMIC trust (which included a loan on which a debtor-affiliate was obligated) were protected by the Section 546(e) safe harbor because all elements of the statute were satisfied: (1) the payments were made to a financial institution; and (2) the payments were made in connection with a securities contract. The court held that full satisfaction of Section 546(e) warranted dismissing Count VI of the trustee's complaint (the count for avoidance and turnover of the payments). Much of the April 2015 opinion's analysis focused on whether the payments satisfied the second element: if the payments were made in connection with a securities contract.

However, following the April 2015 ruling, the defendants filed a statement before the bankruptcy court in which they disclosed that certain factual statements that they had made, which were relied upon by the court in its ruling, were incorrect. Specifically, the defendants' corrected statement noted that the master servicer was not a bank or a "financial institution"—the master servicer was a separate legal entity that was an affiliate of the commercial bank originally identified as the master servicer.

The trustee filed a motion for reconsideration. And on September 10, 2015, Judge Cox granted the motion for reconsideration and vacated the April 2015 order dismissing Count VI. The trustee's count for avoidance and turnover has survived the motion to dismiss and the defendants may be required to return the payments to the trustee. Although not expressly articulated in the September 2015 order (Judge Cox stated that she will not issue a further ruling), Section 546(e) applies only when both elements are satisfied. Presumably, the court found that Section 546(e) does not protect the payments from avoidance and turnover because the first element of Section 546(e) is not satisfied: the payments were not made to a financial institution.

Whether Judge Cox's reasoning on the second element—that REMIC trust payments can qualify as payments made in connection with a securities contract—can be relied on is unclear. A logical reading of the April 2015 and September 2015 opinions would be that had the master servicer been a financial institution, Judge Cox would hold that such payments would be protected from avoidance. This can be deduced by noting that the only change between the April 2015 opinion (that found the payments protected from avoidance) and the September 2015 order (vacating the

prior opinion and holding that the payments are in fact subject to the trustee's avoidance claim) is that the master servicer was alleged to be a financial institution in April, and was determined to not be a financial institution in September. However, the value of citing these opinions for that proposition is unclear, given that the court vacated the April 2015 order entirely (depriving the trustee of the ability to appeal the aspect of the April 2015 order that held that the payments were made in connection with a securities contract) and declined to issue a further ruling.

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