INCREASING TRANSFER SECURITY FOR SECURITIES: APPLICATION OF THE SECTION 546(e) SAFE HARBOR TO TRUST INDENTURES

JAMES BRITTON, BETH BROWNSTEIN & JUSTIN KESSELMAN[*]

TABLE OF CONTENTS

Introduction 206
I. History, Function and Intent of Section 546(e) 207
II. History, Function and Intent of the Trust Indenture Act 210
III. Application of Section 546(e) to Payments in Connection with Indentures 215
A. Indentures as "Securities Contracts" under Section 741 215
1. Cases Against Treating Indentures as "Securities Contracts" 218
2. Cases in Favor of Treating Indentures as "Securities Contracts" 220
B. The Parallel Purposes of Section 546(e) and the TIA 224
Conclusion 229

[*] The authors are bankruptcy and restructuring attorneys practicing at ArentFox Schiff LLP. The views and opinions expressed in this Article are the authors' alone and should in no way be attributed to ArentFox Schiff LLP.

INTRODUCTION

The Bankruptcy Code[1] provides a debtor-in-possession or trustee with formidable powers to claw back transfers made prior to the bankruptcy case.[2] For instance, Code section 547 allows the debtor or trustee to "avoid" transfers made to a creditor within ninety days prior to the date that the debtor filed for bankruptcy if the payments were "preferential" to that creditor.[3] Further, Code section 548 allows the debtor or trustee to avoid actually or constructively fraudulent transfers made within two years prior to the bankruptcy case, and section 544 allows bestows the estate with additional avoidance powers that would otherwise be available to creditors under applicable state law.[4]

These powers are subject to important limitations that, among other things, preserve the sanctity of ordinary course business transactions, reclamation rights of trade creditors, warehousemen's liens, and participants in securities transactions.[5] This Article focuses on one of these limitations: a safe harbor for recipients of transfers involving or relating to "securities contract[s]," as that term is defined in Code section 741(7).[6] This safe harbor, set forth in Code section 546(e), was enacted in light of the special nature of payments related to securities and the possibility of market-wide disruptions and destabilization if such payments could be unwound post hoc without any showing of actual fraud.[7] Both the rationale and practical impact of this policy are well-reasoned and effective, although their application to certain types of contracts—notably, trust indentures—remains unsettled.

A plain reading of section 546(e), along with section 741(7)'s definition of "securities contract" incorporated therein, would appear to encompass the majority of trust indentures providing for the issuance of notes (i.e., securities), because such indentures commonly feature an agreement for the repurchase of the notes by the debtor under certain conditions.[8] Code section 741(7) defines a securities agreement as an agreement for the repurchase of securities and, of course, section 101 includes "notes" within the definition of "securities."[9] This reading of the Code is consistent with the safe harbor's underlying objective of maintaining stabilities in securities markets—an objective that undeniably extends to trust indentures, as reflected by the Trust Indenture Act of 1939.[10]

---

[1] 11 U.S.C. §§ 101–1532, referred to herein as the "Code." Unless otherwise indicated, all section citations are to sections of the Code.

[2] *See, e.g.*, 11 U.S.C. § 547 (2018) (permitting avoidance of any transfer made on or within 90 days before the date of filing the petition).

[3] *Id.* § 547(b)(4)(A).

[4] *Id.* §§ 548(a)(1)(A), 544(a).

[5] *See id.* § 546(a) (establishing limitations on avoiding powers under sections 544, 545, 547, 548, and 553).

[6] *Id.* § 741(7)(A)(i).

[7] *See id.* § 546(e).

[8] *See id.*; *see also id.* § 741(7)(A)(i).

[9] *Id.* § 741(7)(A)(i); *id.* § 101(49)(A)(i).

[10] *See* Trust Indenture Act of 1939, Pub. L. No. 76-253, 53 Stat. 1149 (1939) (codified as 15 U.S.C. §§ 77aaa–77bbbb).

Although some courts have expressed a healthy skepticism toward applying section 546(e) to trust indentures,[11] it does not appear that the issue has been fully developed or analyzed holistically in terms of the text and purpose of the applicable statutory provisions, their interaction with common trust indenture provisions, and the effects of recognizing or not recognizing a safe harbor for indenture participants. To that end, this Article begins by examining the purpose of section 546(e), and then moves on to an analysis of its actual text and effect. We will then explain why indentures fit—both literally and as a matter of practice—within section 546(e), and why such a reading furthers the ends for which section 546(e) was placed in the Code.

I. HISTORY, FUNCTION AND INTENT OF SECTION 546(E)

When the Code was adopted in 1978, the securities safe harbor was codified under chapter 7, in section 764(c).[12] Its inclusion was largely motivated by events surrounding the activities of the Allied Crude Vegetable Oil Refining Corporation and its commodities broker, Ira Haupt & Co.[13] Allied purchased outsized amounts of futures contracts on a produce commodities exchange through Haupt, which were collateralized by non-existent stores of vegetable oil—a result of Allied's fraud.[14] Following a precipitous downturn in the relevant futures market, a margin call was put out, which Haupt was unable to answer as a result of Allied's deception.[15] Haupt was forced into bankruptcy.[16] In the bankruptcy case, the trustee attempted to avoid millions of dollars of pre-petition margin payments made by Haupt to its clearing association for the commodities exchange.[17] While the commodities exchange was granted summary judgment in its favor, the clearing association's own motion was denied, despite the fact that its only activity in relation to the case was accepting margin payments from Haupt on behalf of Allied's futures contracts.[18]

---

[11] *See, e.g., In re* Bernard L. Madoff Inv. Sec., 515 B.R. 117, 138 (Bankr. S.D.N.Y. 2014).

[12] *See* Enactment of Title 11 of the United States Code, Pub. L. No. 95-598, § 764, 92 Stat. 2549, 2618 (1978) ("Notwithstanding sections 544, 545, 547, 548, and 724(a) of this title, the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization and that occurs before the commencement of the case, except under section 548(a)(1) of this title."). Note that, from the outset, the "actual fraud" exception, previously section 548(a)(1) and now section 548(a)(1)(A), always applied to the safe harbor.

[13] *See* Peter V. Marchetti, *A Note to Congress: Amend Section 546(e) of the Bankruptcy Code to Harmonize the Underlying Policies of Fraudulent Conveyance Law and Protection of the Financial Markets*, 26 AM. BANKR. INST. L. REV. 1, 20 (2018); *see also* FTI Consulting, Inc. v. Merit Mgmt. Grp., 830 F.3d 690, 696 (7th Cir. 2016), *aff'd*, 138 S. Ct. 883 (2018).

[14] *See* Marchetti, *supra* note 13, at 14; Seligson v. N.Y. Produce Exch., 394 F. Supp. 125, 126–27 (S.D.N.Y. 1975) (reciting facts leading up to Haupt's bankruptcy filing).

[15] *See Seligson*, 394 F. Supp. at 127.

[16] Marchetti, *supra* note 13, at 14; *Seligson*, 394 F. Supp. at 127.

[17] *See* Marchetti, *supra* note 13, at 15; *see also Seligson*, 394 F. Supp. at 127; *see also FTI Consulting Inc.*, 830 F.3d at 696.

[18] *Seligson*, 394 F. Supp. at 136, 138. The clearing association attempted to rely on the principle expounded in *United States v. Cambridge Trust Co.* that "a known agent who receives money paid to him by mistake is protected from liability if innocently and in good faith he has paid money over to his principal before receipt of a notice of the payor's mistake." *Id.* at 134 (citing United States v. Cambridge Tr. Co., 300 F.2d 76, 78 (1st

Perturbed by the possibility of a clearing house being held liable for a pre-petition transfer from an insolvent entity after the fact, the drafters of the Code included the commodities safe harbor as a direct response to *Seligson*.[19] Originally limited strictly to commodities brokers, forward contract merchants, and clearing organizations, the safe harbor was expanded to include "stockbrokers" in 1982, while also importantly changing the word "by" to "by or to."[20] Congress expanded the safe harbor's scope again in 1984 by adding "financial institution" to the list of covered entities,[21] and again in 2005 when the broader-still "financial participant" was added,[22] and once more in 2006 with the addition of the parenthetical "by or to (or for the benefit of)" the covered entities.[23]

The legislative history tells us plainly that the safe harbor was "intended to prevent the insolvency of one commodity firm from spreading to other brokers or

---

Cir. 1962)). The court described the association's activities thusly: "The Association collects variation margin from members in a net debit position, and makes payments of excess variation margin to [credit] members in a net credit position." *Id.* The association thus asserted that "in receiving margin payments from Haupt . . . it acted as a disclosed agent for its credit members." *Id.* at 135. The court rejected this argument, as the association failed to show that Haupt's obligations were owed directly to the credit members (as putative "principals") rather than the association itself (as a putative "agent"), along with other failings concerning the existence of a true agency relationship. *See id.* at 135–36. For its part, the commodities exchange was let off the hook on the basis that it simply was not the actual recipient of Allied's margin payment. *See id.* at 137. Consider whether this result would still be preserved following the Supreme Court's decision in *Merit Management*, discussed *infra* text accompanying notes 96–103, if not for the existence of the safe harbor.

[19] Marchetti, *supra* note 13, at 20 (noting that the safe harbor was enacted "[i]n response to concerns surrounding the decision in *Seligson* . . . ."). *See* Merit Mgmt. Grp., v. FTI Consulting, Inc., 138 S. Ct. 883, 889 (2018); *see also FTI Consulting Inc.*, 830 F.3d at 696 ("Congress responded [to *Seligson*] by creating [a] safe harbor, which enabled financial institutions that were recipients of transfers of the kind that took place in *Seligson* to invoke a safe harbor from avoidance."); *see also* Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846, 849 n.4 (10th Cir. 1990) ("Commodities markets were singled out because the measure was a response to the decision in [*Seligson*] that a trustee could recover a margin payment made to a commodities clearinghouse.").

[20] Act of July 27, 1982, Pub. L. No. 97-222, § 4, 96 Stat. 235, 236 (1982) (repealing section 764(c) and replacing it with what was then section 546(d) stating "Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment . . . or settlement payment . . . made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1) of this title."); *Merit Mgmt. Grp.*, 138 S. Ct. at 890; Marchetti, *supra* note 13, at 21.

[21] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 461, 98 Stat. 333, 377 (1984) (also redesignating the former § 546(d) to its current location at § 546(e)); *Merit Mgmt. Grp.*, 138 S. Ct. at 890; Marchetti, *supra* note 13, at 21. The term "financial institution" was also provided with a definition in 11 U.S.C. § 101(19) (currently codified in its present form under section 101(22)). Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421, 98 Stat. 333, 367–68 (1984).

[22] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 907(o)(3), 119 Stat. 23, 170, 182 (2005) ("Title 11, United States Code, is amended . . . in section 546(e), by inserting 'financial participant,' after 'financial institution.'"); *Merit Mgmt. Grp.*, 138 S. Ct. at 890; Marchetti, *supra* note 13, at 21.

[23] Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, § 546(1), 120 Stat. 2692, 2967–98 (2006) ("[I]nserting '(or for the benefit of)' before 'a commodity broker,' and . . . inserting 'or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(d), or forward contract,' after 'securities clearing agency' . . . ."); *Merit Mgmt. Grp.*, 138 S. Ct. at 890; Marchetti, *supra* note 13, at 21.

clearing agencies and possibly threatening the collapse of the market."[24] These protections were necessary because of the "complex system of accounts and guarantees" of the commodities and securities markets and their "sometimes volatile nature," which could lead to a "ripple effect" throughout the entire market if a single entity went bankrupt and thus exposed its transferees to avoidance liability.[25]

While the scope of the provision itself has constantly expanded, its purpose has remained constant throughout its many amendments. The original 1982 amendment was intended to "exempt the liquidation and setoff of mutual debts and claims arising under securities contracts, commodity contracts, and forward contracts from the [Code]'s . . . avoidance provisions," and the 1984 amendment was required in order to "clarify the exemptions and extend them to cover repurchase agreements."[26] In 1990, the definition of "forward contract" was expanded for purposes of 546(e) protection to include "any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade."[27]

The BAPCPA amendments in 2005 were likewise clear in their intent to "limit the . . . impact of insolvencies upon other major market participants" and "further the goal of promoting the clearing of derivatives and other transactions as a way to reduce systemic risk."[28] The legislative history of the 2006 amendments repeatedly touches on the need to extend existing protections to intermediaries and related entities or transactions that might be exposed to avoidance liability without fitting into any of the existing definitions of covered entities, which will again "reduce systemic risk in the financial markets."[29]

---

[24] H.R. REP. NO. 97-420, at 2 (1982).

[25] *Id.* at 1 ("The Bankruptcy Code now expressly provides certain protections to the commodities market to protect against such a 'ripple effect.' One of the market protections presently contained in the Bankruptcy Code, for example, prevents a trustee in bankruptcy from avoiding or setting aside, as a preferential transfer, margin payments made to a commodity broker.") (citation omitted).

[26] H.R. REP. NO. 101-484, at 2 (1990).

[27] Act of June 25, 1990, Pub. L. No. 101-311, § 201, 104 Stat. 267, 268–69 (adding the definition of "swap agreement[s]" as 11 U.S.C. § 101(2)(49) and adding an exception to avoidability of certain transfers in connection with a swap agreement as 11 U.S.C. § 546(g)). This amendment provided a specific safe harbor with respect to swap agreements apart from the 546(e) safe harbor, but the legislative history speaks to the same type of concerns between swap agreements and forward contracts. As one commentator put it, "Congressional focus remained on stabilizing domestic and international markets and avoiding the disruption of 'an extremely important financial market.'" Jay Jaffe, *How Big Is the § 546(e) Forward Contract Safe Harbor?*, 32 AM. BANKR. INST. J., Feb. 2013 at 28, 72 (quoting 136 Cong. Rec. H2281-06 (daily ed. May 15, 1990)).

[28] H.R. REP. NO. 109-31, pt. 1, at 130–31 (2005). As before, in addition to expanding the scope of the type of *entities* covered by the safe harbor, the BAPCPA amendments also expanded the scope of the type of *transactions* covered as well, in this case by including "netting agreements" among the transactions covered by the safe harbor. *Id.* at 131–32. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 907(e), 119 Stat. 23, 177 (2005) (codified as 1 U.S.C. § 101(38A–B)).

[29] H.R. REP. NO. 109-648, pt. 1, at 2, 5 (2006) (noting that "[t]he common thread of [the newly covered transactions] is that they involved financial intermediaries—stockbrokers, financial institutions, financial participants or securities clearing agencies—that often hedge their risk on these transactions through other market transactions, repledge securities collateral received under these transactions, or both. As such[,] these transactions implicate the systemic risk concerns that are addressed by the safe harbors."); *id.* at 6 ("The

In short, the original purpose of the safe harbor was to avoid "systemic risk" by minimizing the possibility of a "ripple effect;" the subsequent amendments to the safe harbor were all aimed at furthering the goal of reducing systemic risk by broadening the types of entities and transactions that were protected from such ripples.[30] Accordingly, the section 546(e) safe harbor has grown both wider and deeper over time, encompassing more types of entities and more types of transactions (even going so far as to include transactions related to covered transactions). All of this has proceeded on the basis that the type of interconnectivity between buyers, purchasers, and their intermediaries peculiar to these transactions merits such protection, because otherwise the clawback provisions could trigger a destabilizing domino effect following a single bankruptcy.

II. HISTORY, FUNCTION AND INTENT OF THE TRUST INDENTURE ACT

The next question is whether trust indenture parties are within the scope of systemic risk that Congress has sought to protect through the safe harbor. A trust indenture is a means by which an "issuer" is able to raise capital from the public market by selling bonds, debentures, or other instruments of debt to a large class of potential purchasers.[31] Rather than every single purchaser being involved in individually monitoring and responding to the performance of their securities, a trustee is appointed to act on the debt holders' behalf; the indenture is the document governing this relationship.[32] The indenture thus serves to satisfy the capital needs of the issuer by providing it a way to raise potentially vast sums, while simultaneously providing a solution to the common-action and information problems that may face a purchaser of a relatively minor share of a large round of financing.

---

proposed amendments would change the reference to 'swap markets' to 'swap or other derivative markets' in order to avoid any suggestion that new developments are limited to transactions that are technically swaps as opposed to other types of derivatives, such as options."); *id.* at 8 ("[T]he inclusion of 'any extension of credit for the clearance or settlement of securities transactions' is intended to confirm that the definition encompasses credit extended for the execution, clearance and settlement of securities transactions, which provide important liquidity to the securities markets."); *id.* (amending section 546(e) to "conform[] the language . . . to the language in § 546(g), regarding the protection of transfers in connection with swap agreements.").

[30] *See* Jaffe, *supra* note 27, at 28 ("[I]t appears that Congress was focused on larger markets and disruptive 'ripples' that could affect and transcend markets."); *see also* Marchetti, *supra* note 13, at 22 ("[T]he legislative history indicates that the underlying policy of section 546(e) is to protect against systemic risk among entities that function as intermediaries in the commodities and securities clearing and settlement system.").

[31] *See* Efrat Lev, *The Indenture Trustee: Does It Really Protect Bondholders?*, 8 U. MIA. BUS. L. REV. 47, 50–52 (1999) (describing the historical development and proliferation of trust indentures). This practice first arose as early as 1830, and expanded rapidly with the explosion of railroad development at the very time that large institutional financing became limited; the solution was to attract many public investors by pooling all of their powers and responsibilities into a single instrument for purposes of the investors' protection and convenience, i.e., an indenture. *See id.* at 50–51.

[32] *See id.* at 51; *see also Indenture*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[C]orporate Indenture. . . . A document containing the terms and conditions governing the issuance of debt securities, such as bonds or debentures."). Black's also provides an interesting etymology of the indenture as arising from an antiquarian practice of having a "deed . . . written out twice on a single sheet of parchment, which was then severed by cutting it with an irregular edge [i.e., indented]; the two halves of the parchment thus formed two separate deeds which could be fitted together to show their genuineness." *Id.*

Unfortunately, the early usage of trust indentures lent itself to abuse by financial insiders, ultimately leading to the passage of the Trust Indenture Act of 1939 (the "TIA").[33] The TIA's mission statement declares that "the national public interest and the interest of investors in notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein, which are offered to the public, are adversely affected" by a number of practices and document provisions in the indenture industry, which "unless regulated, the public offering of notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein . . . is injurious to the capital markets, to investors, and to the general public . . . ."[34] The TIA sought to address these issues by imposing various mandatory provisions for qualified indentures.[35]

As one commentator observed shortly after adoption of the TIA, "[i]t is widely known that the experience during the early depression years following 1929 with various kinds of trust indenture securities ha[d] been an unhappy and often a

---

[33] Pub. L. No. 76-253, 53 Stat. 1149 (1939) (codified as 15 U.S.C. §§ 77aaa–77bbbb).

[34] 15 U.S.C. § 77bbb(a)–(b). The specific practices and procedures complained of are as follows:

> (1) when the obligor fails to provide a trustee to protect and enforce the rights and to represent the interests of such investors . . . ;
> (2) when the trustee does not have adequate rights and powers, or adequate duties and responsibilities, in connection with matters relating to the protection and enforcement of the rights of such investors; when . . . trust indentures (A) generally provide that the trustee shall be under no duty to take any such action, even in the event of default, unless it receives notice of default, demand for action, and indemnity, from the holders of substantial percentages of the securities outstanding thereunder, and (B) generally relieve the trustee from liability even for its own negligent action or failure to act;
> (3) when the trustee does not have resources commensurate with its responsibilities, or has any relationship to or connection with the obligor or any underwriter of any securities of the obligor, or holds, beneficially or otherwise, any interest in the obligor or any such underwriter, which relationship, connection, or interest involves a material conflict with the interests of such investors;
> (4) when the obligor is not obligated to furnish to the trustee under the indenture and to such investors adequate current information as to its financial condition, and as to the performance of its obligations with respect to the securities outstanding under such indenture; or when the communication of such information to such investors is impeded by the fact that information as to the names and addresses of such investors generally is not available to the trustee and to such investors;
> (5) when the indenture contains provisions which are misleading or deceptive, or when full and fair disclosure is not made to prospective investors of the effect of the important indenture provisions; or
> (6) when . . . investors are unable to participate in the preparation [of the trust indenture], and, by reason of their lack of understanding of the situation, such investors would in any event be unable to procure the correction of the defects enumerated in this subsection.

Id. § 77bbb(a).

[35] Under the original version of the TIA, the SEC was required to manually review each qualified indenture for compliance with the TIA's mandatory provisions. Due to the impracticability of this approach, the Trust Indenture Reform Act of 1990, Pub. L. No. 101-550, 104 Stat. 2721 (1990), instead automatically deemed the TIA provisions to be incorporated into all qualified indentures notwithstanding any contradictory or otherwise nonconforming provisions therein. *See* Michael Vincent Campbell, *Implications Of The Trust Indenture Reform Act Of 1990: Breathing New Life Into The Trust Indenture Act Of 1939*, 11 ANN. REV. BANKING L. 181, 223–24 (1992) (discussing the changes to "automatic application of mandatory provisions . . . .").

disastrous one . . . ."[36] This was attributed to "conflicts of interest on the part of the trustees who in these situations have often times occupied not only a dual- but a several-sided relationship to the issues secured by the indentures under which they were trustees."[37] As a result, Warren O. Douglas was tapped to investigate the use and abuse of trust indentures and propose legislation addressing these issues—legislation that would ultimately become the TIA.[38] No doubt such conflicts of interest were a major motivating concern of the proposal and adoption of the TIA.[39] They were not, however, the only one.

Section 316(b) of the TIA provides that:

> [N]otwithstanding any other provision [of the indenture to be qualified,] the right of any holder of any indenture security *to receive payment of the principal [of] and interest on such indenture security*, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, *shall not be impaired or affected without the consent of such holder*, except as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a), and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.[40]

---

[36] Chas. H. Kinnane, *Some Aspects of the Trust Indenture Act of 1939 Duties and Responsibilities of Indenture Trustees*, 18 CHI.-KENT L. REV. 406, 406 (1940).

[37] *Id.*

[38] *See* Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., 111 F. Supp. 3d 542, 547–48 (S.D.N.Y. 2015) ("The impetus for the [TIA] was provided by a 1936 report of the [SEC] . . . referenced repeatedly throughout the house and Senate deliberations. The primary author of the 1936 SEC Report was William O. Douglas, who would subsequently become a commissioner and then Chairman of the SEC before being appointed an Associate Justice of the United States Supreme Court.") (citations omitted). For an in-depth discussion of Douglas's role in corporate reform at the SEC, see *William Douglas and the Rise of the Securities and Exchange Commission* in DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001).

[39] *See* 15 U.S.C. § 77bbb(a)(3) ("[W]hen the trustee . . . has *any relationship to or connection with* the obligor or any underwriter of any securities of the obligor, or holds, beneficially or otherwise, any interest in the obligor or any such underwriter, which relationship, connection, or interest involves a material conflict with the interests of such investors . . . .") (emphasis added); *see also* Kinnane, *supra* note 36, at 409–11 (describing the "far-reaching prohibitions" on certain types of conflicts of interest in the TIA); *see generally* Howard M. Friedman, *Updating the Trust Indenture Act*, 7 U. MICH. J. L. REFORM 329, 332–44 (1974) (describing and analyzing the various types of conflicts that the TIA attempts to address in-depth and assessing their alleged efficacy); *see also* Lev, *supra* note 31, at 96 ("[O]ne of the main purposes of the TIA was to eliminate any possible conflict of interest, so that a disinterested trustee will perform its duty to bondholders in the best possible way.").

[40] Trust Indenture Act of 1939, Pub. L. No. 76-253, § 316(b), 53 Stat. 1149, 1173 (1939) (codified as 15 U.S.C. § 77ppp(b)) (emphasis added). Section 316(b) was recently amended to provide additional language

The italicized portions of section 316(b) are the provisions of the TIA specifically relevant to the question this article addresses—a holder of an unexempted[41] security under a TIA-qualified indenture cannot be made to accept any change in terms[42] that would result in an "impairment" of the right to receive payment on their securities without their consent (excluding, of course, through a title 11 bankruptcy process).[43]

The basic rationale behind section 316(b) was twofold. First, section 316(b) was intended to protect minority rights against the tyranny of a majority of bondholders, who could force the helpless minority to accept terms that they never would have agreed to upon the purchase of the security.[44] The second purpose was "to assure the

---

clarifying "that the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security shall not be deemed to be impaired or affected by any change occurring by the application of section 104 of the Adjustable Interest Rate (LIBOR) Act to any indenture security." 15 U.S.C. § 77ppp(b).

41 *See* 15 U.S.C. § 77ddd ("Exempted securities and transactions.").

42 Section 316(a) does provide that an indenture "*may* contain provisions authorizing the holders of not less than 75 per centum in principal . . . to consent on behalf of the holders of all such indenture securities to the postponement of any interest payment for a period not exceeding three years from its due date." 11 U.S.C. § 77ppp(a)(2) (emphasis added). *See* Cont'l Bank & Tr. Co. of N.Y. v. First Nat. Petroleum Tr., 67 F. Supp. 859, 871 (D.R.I. 1946) (holding indenture provision that allowed postponement of interest payment by mere majority vote to be in contravention of both §§ 316(a) and 316(b)). The only other exception to § 316(b)'s prohibition is its language that an indenture may limit or deny "the right of any holder . . . to institute any . . . suit, if and to the extent that the . . . prosecution thereof or the entry of judgment therein would . . . result in the surrender, impairment, waiver, or loss of the lien of such indenture . . . ." 15 U.S.C. § 77ppp(b). This latter exception was an addition to the original text of the bill in order to address certain state "election of remedies" laws, wherein an action to collect on a secured debt, without a concurrent action to foreclose on the security of the debt, would be treated as a waiver of the security. In the indenture context, then, a suit by a single bondholder to collect on its debt (as otherwise guaranteed by § 316(b)) could result in the involuntary waiver of the security for all of the other bondholders' debt—an obviously unappealing outcome. *See* George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 AM. BANKR. INST. L. REV. 431, 435–36 (2006) (describing the history and purpose of the election of remedies exception).

43 *See* SKEEL, *supra* note 38, at 121–22 (describing failed efforts by banking institutions to circumvent reorganization reform by allowing voluntary adjustment to payment terms in indentures by majority vote and observing that "[o]nly in bankruptcy could public bondholders be bound by a majority vote; and there the independent [bankruptcy] trustee, . . . would be calling the shots."). *See also* Upic & Co. v. Kinder-Care Learning Cntrs., 793 F. Supp. 448, 453 (S.D.N.Y. 1992) ("Section 316(b) tends to force recapitalizations into bankruptcy court by frustrating a distressed firm's efforts to successfully complete a consensual workout."). *See also* Shuster, *supra* note 42, at 437–40 (discussing the implicit "bankruptcy exception" to section 316(b)). An obvious consequence of this voting prohibition in out-of-court restructurings is that an individual bondholder may have no incentive to assent to a voluntary impairment, which in turn spoils the opportunity for those bondholders who would assent. *Upic*, 793 F. Supp. at 453 ("By guaranteeing a bondholder's right to receive payment of the principal of or interest on the security, Section 316(b) creates a disincentive for bondholders to exchange their bonds for stock or for bonds with different terms."). For a thoughtful examination of the "holdout problem" of consensual indenture restructurings effected by section 316(b) and how they may be resolved through bankruptcy (and how, arguably, the reason for such requirement was later itself outmoded by new developments in the financial industry and the adoption of the Bankruptcy Code), see generally Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L. J. 232 (1987) [hereinafter *Voting Prohibition*].

44 *See* Shuster, *supra* note 42, at 433 ("[S]ection 316(b) protects the rights of each individual bondholders under an indenture as against other bondholders under that indenture. It is a "countermajoritarian" protection designed to preserve the rights of the one against the desires of the many—if the TIA is the bondholder's Constitution, then section 316(b) is their Bill of Rights.") (footnote omitted). These concerns, like those

negotiability of the debentures by making certain that the promise to pay contained therein was unconditional."[45] The intention was that the "unconditional" promise to pay could only be altered under the watchful eye of judicial supervision through the bankruptcy process.[46] Even then, however, the nonconsensual modification of such terms could only be afforded through meeting the strict requirements of section 1129(b)'s "cramdown" provisions of plan confirmation—itself no small feat.[47] The reason for this high standard for modification goes to the very nature of the securities themselves. If the terms of the bonds could be changed after they had been issued by mere majority vote, then that would effectively render them non-negotiable.[48] And of course if the bonds were non-negotiable, then they could not be sold by one party to another on the market.[49]

---

regarding conflicts of interest, stemmed largely from the perception that institutional actors were running roughshod over individual investors. *See id.* at 438 ("The SEC's rationale . . . was . . . to protect the 'mom and pop' investor from the institutions and insiders.").

[45] *In re* Envirodyne Indus., 174 B.R. 986, 993 (Bankr. N.D. Ill. 1994) (citing Cruden v. Bank of N.Y., 957 F.2d 961, 968 (2d Cir. 1992)). *See also* Roe, *Voting Prohibition*, *supra* note 43, at 256–58 (discussing how "majority [action] clauses seemed to fail tests of negotiability" and how historic precedent before the adoption of the Uniform Commercial Code treated bonds and indentures as each conveying separate rights to a bondholder, rather than rights under a bond subject to an indenture, in order to preserve the negotiability of the bonds). An additional reason given for the TIA in general was "to re-establish the public confidence in the money market and the securities market" in the wake of the great depression. Lev, *supra* note 31, at 53. Both reasons could be understood as furthering the goal of providing stability to the bond market in general.

[46] *See* Roe, *Voting Prohibition*, *supra* note 43, at 251 ("The SEC wanted trust indenture legislation that would bring contractual recapitalizations under the jurisdiction of the federal bankruptcy court."); Shuster, *supra* note 42, at 437–38 ("The perceived problem was that, absent section 316(b), a debt issuer would be able to agree with a majority of its bondholders that all bond debt will be reduced. Such an out-of-court agreement would allow the issuer to circumvent or 'contract-around' the provisions of the U.S. Bankruptcy Code, which would apply different, statutory requirements for debt reduction."). As Roe notes, the Code's cramdown provisions in section 1129(b) have, to some extent, frustrated the purpose of protecting bondholders from majority action. *See* Roe, *Voting Prohibition*, *supra* note 43, at 255 ("The judge determines whether the plan compromises the creditors' claim only if the creditor class votes against the plan. Since the principal impetus behind the Trust Indenture Act's prohibition was to require judicial scrutiny in bankruptcy of a recapitalization plan, the prohibition's raison d'etre is now gone.") (footnotes omitted). While not the subject of this article, it should be noted that the Bankruptcy Code still provides judicial supervision of workout proceedings in other meaningful ways that seem to further the TIA's mission statement, and that Professor Roe's commentary came less than a decade after the initial adoption of the Bankruptcy Code. *See* Shuster, *supra* note 42, at 440 ("[C]hapter 11 offers and requires more than just a reduced creditor voting percentage. It is a statute that carefully balances the rights of the individual against the rights of the group. . . . Within this scheme, there is an advanced degree of comfort that the individual bondholder's rights will not be prejudiced. And, unlike an out-of-court restructuring, there is a judge waiting to hear the equitable concerns that an individual bondholder might raise.").

[47] *See* Shuster, *supra* note 42, at 439 n.30.

[48] *See* Enoch v. Brandon, 164 N.E. 45, 46–47 (N.Y. 1928) (examining bonds under the then-current Negotiable Instruments Law (since superseded by the Uniform Commercial Code), and noting that a bond "[m]ust contain an unconditional promise to pay a fixed sum on demand, or at a fixed or determinable future time, to order or to bearer. Only if it fulfills these requirements is it negotiable").

[49] *See Negotiable*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("(Of a written instrument under modern law) capable of being transferred by transfer of possession, or by indorsement and transfer of possession, to a person who thereby becomes the holder."); *see also* U.C.C. § 3-104 (AM. L. INST. & UNIF. L. COMM'N 2021) (defining "negotiable instrument" to mean "an unconditional promise to pay a fixed amount of money . . . *payable to bearer or to order* . . . on demand or at a definite time . . . .") (emphasis added).

Section 316(b) was undoubtedly intended to protect the marketability of bonds issued under trust indentures. Some cases have gone even further, suggesting that section 316(b) in fact extends not only to the bare legal rights to payment of principal and interest, but to any related indenture provisions that could affect the practical ability to realize on those payments.[50] Generally, these cases involve situations where a proposed restructuring would leave the actual payment provisions of an indenture unaltered, but use a majority voting provision to strip beneficial rights, covenants, and other important payment protections, such as guaranties.[51] While these cases were later repudiated by the United States Court of Appeals for the Second Circuit,[52] it nonetheless remains clear that the sweeping provisions of the TIA were meant to address system-wide sources of instability in the securities markets.

III. Application of Section 546(e) to Payments in Connection with Indentures

A. Indentures as "Securities Contracts" under Section 741

Section 546(e) provides a safe harbor for payments made "in connection with a securities contract, as defined in section 741(7) . . . ."[53] Section 741(7)(A), in turn defines "securities contract" as:

> (i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein

---

[50] *See, e.g.*, Federated Strategic Income Fund v. Mechala Grp. Jamaica, No. 99 CIV 10517, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999) ("A holder who chooses to sue for payment at the date of maturity will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantors."). "It is beyond peradventure that when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt, that such action does not constitute an 'impairment' or 'affect' the right to sue for payment." *Id.*; Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., 111 F. Supp. 3d 542, 557 (S.D.N.Y. 2015); MeehanCombs Glob. Credit Opportunities Funds v. Caesars Ent. Corp., 80 F. Supp. 3d 507, 513, 516 (S.D.N.Y. 2015) (refusing to grant motion to dismiss because plaintiff-noteholders may be able to assert a claim under section 316(b) for stripping of guaranties despite "legal claim for payment" not being altered); BOKF, N.A. v. Caesars Ent. Corp., 144 F. Supp. 3d 459, 477 (S.D.N.Y. 2015) (same on motion for summary judgment). The reasoning in this line of cases rested upon an expansive reading of section 316(b) that purportedly effected the purpose of the TIA by preventing practical, rather than just literal, alterations to a nonconsenting bondholders' right to collect payment. *See* Mark J. Roe, *The Trust Indenture Act of 1939 in Congress and the Courts in 2016: Bringing the SEC to the Table*, 129 HARV. L. REV. F. 360, 369–71 (2016) (discussing the courts' rationale employed in the preceding three cases) [hereinafter *Bringing SEC to the Table*].

[51] These types of "coercive" transactions, where a mere majority of bondholders attempt to impose their will on a nonconsenting minority by removing everything from the indenture *except* provisions relating to payment of principal and interest, and effectively leaving the securities worthless, are not unheard of. *See* Roe, *Voting Prohibition*, *supra* note 42, at 247–48 (discussing majority votes to "dilute" indentures by stripping protective covenants in the face of nonconsenting minorities as a practical workaround to section 316(b)).

[52] *See* Marblegate Asset Mgmt. v. Educ. Mgmt. Fin., 846 F.3d 1, 1 (2d Cir. 2017).

[53] 11 U.S.C. § 546(e) (2018).

or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any [of the foregoing], and including any repurchase or reverse repurchase transaction on any [of the foregoing] . . . ;
(ii) any option entered into on a national securities exchange relating to foreign currencies;
(iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loan or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any [of the foregoing] . . . (whether or not such settlements is in connection with any agreement or transaction referred to in clauses (i) through (xi));
(iv) any margin loan;
(v) any extension of credit for the clearance or settlement of securities transactions;
(vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction;
(vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;
(viii) any combination of the agreements or transactions referred to in this subparagraph;
(ix) any option to enter into any agreement or transaction referred to in this subparagraph;
(x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities transaction under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or
(xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with

> any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 . . . .[54]

Upon closer examination, this definition is as broad as it is lengthy.[55] Not only are several specific examples of contracts enumerated that explicitly constitute "securities contracts," but the definition also includes any contracts "similar to" any of the enumerated examples,[56] any master agreement that covers any other agreement that qualifies as a securities contract,[57] and any security agreements (including guarantees) that are "related to" any securities contract.[58]

As explored in Section I, section 546(e) was steadily expanded over the course of its existence,[59] and the same has been true of the definition of "securities contract," which has expanded along with section 546(e). The initial Bankruptcy Code, as enacted in 1978, contained no definition of "securities contract" at all.[60] The definition was added in 1982, simply defining it as a "contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, or the guarantee of any settlement of cash or securities by or to a securities clearing agency . . . ."[61]

---

[54] *Id.* § 741(7)(A). The definition excludes "any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan[.]" *Id.* § 741(7)(B).

[55] This definition has been observed to be "very broad in its application and encompass[] virtually ***any contract for the purchase or sale of securities***, any extension of credit for the clearance or settlement of securities transactions, and a wide array of related contracts, including security agreements and guarantee agreements." Oscar Garza, Douglas Levin & Matthew Bouslog, *The Current State of Play: the Bankruptcy Code "Safe Harbor" after* Merit Management, 30 NORTON J. BANKR. L. & PRAC. 212, 217 (2021) (emphasis in original) (emphasis added) (quoting *In re* Lehman Bros. Holdings, Inc., 469 B.R. 415, 438 (Bankr. S.D.N.Y. 2012)); *see also* Charles W. Mooney, Jr., *The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When Is Safe* Too *Safe?*, 49 TEX. INT'L L. J. 245, 267 (2014) ("Given the breadth of the second clause of Section 546(e) and the definition of "securities contract," is there work left for the settlement payment clause? Stated otherwise, can there be a settlement payment to a stockbroker, financial institution, financial participant, or securities clearing agency that is not also a transfer to such an entity in connection with a securities contract . . . ? I seriously doubt it."); *see also* Picard v. Ida Fishman Revocable Tr. (*In re* Bernard L. Madoff Inv. Sec.), 773 F.3d 411, 417–18 (2d Cir. 2014) ("Section 741(7) of the Bankruptcy Code, to which § 546(e) refers, defines "securities contract" with extraordinary breadth . . . . Thus, the term "securities contract" expansively includes contracts for the purchase or sale of securities, as well as any agreements that are *similar* or *related* to contracts for the purchase or sale of securities. This concept is broadened even farther because § 546(e) also protects a transfer that is 'in connection' with a securities contract.") (emphasis in original) (citations omitted).

[56] 11 U.S.C. § 741(7)(A)(vii).

[57] *See id.* § 741(7)(A)(viii).

[58] *Id.* § 741(7)(A)(ix).

[59] *See* Jaffe, *supra* note 27, at 28 ("Since the enactment of the Code in 1979, Congress has amended § 546(e) . . . to extend the safe harbor protections to a broader range of financial markets and security or commodity transactions . . . .").

[60] *See* Wilbur F. Foster, Jr., *Bankruptcy for Bankers: Court's Flexible Interpretation of "Securities Contract" May Aid Banks*, 113 BANKING L. J. 1027, 1029 (1996).

[61] Act of July 27, 1982, Pub. L. No. 97-222, § 8(7), 96 Stat. 235, 237 (1982). Note the "by or to" language, which parallels the language that was inserted into section 546(e) through this same amendment.

The 1984 amendments modestly expanded the definition to include contracts "for the purchase or sale of a . . . certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof)," as well as options related to foreign currencies.[62] The 2005 BAPCPA amendments drastically expanded both the text and breadth of the section, bringing it substantially into its current state.[63] The current language was put in place through the Financial Netting Improvements Act of 2006, which added "any extension of credit for the clearance or settlement of securities transactions" and "any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction" to the definition, along with a few other more minor additions and alterations.[64] Thus, just as with section 546(e), the definition of "securities contract" has steadily expanded each time that it has been amended.

Given how broad the definition is, perhaps it is not surprising that the caselaw does not abound with examples of what does and does not constitute a "securities contract;" the plain text of the language seems so inclusive, and its exceptions so clear (e.g., "does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan")[65], that the issue may simply not be actually litigated most of the time. Cases addressing whether indentures qualify as "securities contracts" are even fewer and farther between. Those cases where the issue does arise invariably give the topic little, if any, direct consideration. Furthermore, of that small contingent, there is also no consensus on whether indentures are in fact "securities contracts" under section 741(7) for purposes of section 546(e).

1. Cases Against Treating Indentures as "Securities Contracts"

Of the handful of cases, arguably the most impactful one on the topic of indentures has been *In re Qimonda Richmond, LLC.*[66] *Qimonda* involved a chapter 11 debtor whose predecessor had borrowed more than $33,000,000 raised through conduit bonds issued by a governmental entity.[67] U.S. Bank was the indenture trustee, and the debt was collateralized through the issuance of a letter of credit by Citibank in favor of U.S. Bank (as indenture trustee).[68] The debtor directed U.S. Bank to redeem the bonds and deposited approximately $48,000,000 into its Citibank account

[62] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 482(7), 98 Stat. 333, 382–83 (1984).
[63] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 907(a)(2), 119 Stat. 23, 170, 173–74 (2005).
[64] Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, § 5(a)(3)(E), 120 Stat. 2692, 2697 (2006) (internal marked omitted).
[65] 11 U.S.C. § 741(7)(B) (2018).
[66] 467 B.R. 318, 323 (Bankr. D. Del. 2012).
[67] *Id.* at 320.
[68] *Id.*

for that purpose.[69] Citibank drew the funds and paid them to U.S. Bank, which then used them to redeem the bonds.[70] The debtor then filed for bankruptcy under chapter 11 shortly thereafter.[71] Through the chapter 11 process, a liquidating trust was set up and a liquidating trustee appointed.[72] The liquidating trustee then sought to recover the payments that the debtor had made to Citibank as preferential transfers, and Citibank countered that the payments were not avoidable by virtue of the section 546(e) safe harbor and moved to dismiss the avoidance action on those grounds.[73]

Citibank posited that the payments were made "'in connection with a securities contract'" because they were made in connection with the indenture and the bonds related to it.[74] The liquidating trustee countered that section 741(7) did not list bonds nor indentures among its definition of "securities contracts," and thus they must not qualify as such.[75] Judge Mary Walrath denied the motion to dismiss, noting that she was not convinced that the bonds and indenture were "securities contracts."[76] Because the matter was ultimately resolved consensually through mediation, the court did not issue a final judgment on the merits of the safe harbor issue.[77]

Qimonda was cited with approval in *In re MPM Silicones, LLC* in the context of a bench ruling on plan confirmation issued by Judge Robert Drain.[78] Although Judge Drain's ruling addressed Code section 555's carve-out for certain types of *ipso facto* clauses in securities contracts (rather than the section 546(e) safe harbor); both sections refer to the same definition provided by section 741(7).[79] Certain indenture trustees argued that they should be granted relief from the automatic stay in order to rescind acceleration of their notes and thereby preserve an applicable prepayment premium.[80] The trustees invoked the section 555 exception on *ipso facto* clauses to argue that such relief was permissible, as the indentures and their underlying notes constituted "securities contracts" as defined by section 741(7).[81]

---

[69] *Id.*

[70] *See id.*

[71] *Id.* at 321.

[72] *See id.*

[73] *See id.* at 321–22 ("The [liquidating trustee] seeks to avoid two allegedly preferential transfers to Citibank: the Deposit of more than $33 million into the Debtors' Citibank Account (creating a security interest in favor of Citibank on these funds) and the transfer of those funds from the Debtors' account to Citibank pursuant to the Debit.").

[74] *Id.* at 323.

[75] *See id.*

[76] *Id.* ("Although it is settled law that bonds and indentures are *contracts*, the Court is not persuaded that the Bonds and Indenture are *securities contracts* within the definitions in the Bankruptcy Code. Therefore, the Court cannot conclude that the Deposit and Debit made in connection with the LC (even if the LC was a credit enhancement to the Bonds) were 'in connection with a securities contract' and protected by section 546(e).") (emphasis in original).

[77] *See In re* Qimonda Richmond, LLC, No. 11-50603 (Bankr. D. Del. Sept. 9, 2013), ECF No. 163; *see also In re* Qimonda Richmond, LLC, No. 11-50603 (Bankr. D. Del. Oct. 18, 2013), ECF No. 165.

[78] No. 14-22503, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014).

[79] *See id.* at *20. *See also* 11 U.S.C. §§ 546(e), 555, 741(7).

[80] *See In re* MPM Silicones, 2014 WL 4436335, at *19.

[81] *Id.* at *20.

Judge Drain stated that he had "serious doubts that the indenture itself is a securities contract as defined in section 741(7)(A) of the Bankruptcy Code, at least with respect to this issue."[82] Citing to *Qimonda*, he stated that a "securities contract" is, "[g]enerally speaking . . . a contract for the purchase, sale or loan of a security."[83] He continued that "[c]learly, the indentures themselves are not contracts for the purchase, sale or loan of a security; they instead set forth the terms under which the underlying notes will be governed and the role of the trustees in connection therewith."[84] Judge Drain therefore declined to treat the indentures as "securities contracts" for purposes of allowing the trustees to rescind their indentures' accelerations under the narrow circumstances presented.[85]

2. Cases in Favor of Treating Indentures as "Securities Contracts"

As far as these authors are aware, only two cases have even arguably answered the question of whether indentures are "securities contracts" in the affirmative, and they did so only impliedly. In *In re SunEdison, Inc.*,[86] Judge Bernstein was confronted with the following facts. The debtor had formed a litigation trust pursuant to its confirmed plan of confirmation; and the litigation trust was the successor-in-interest to certain of the debtor's causes of action, including avoidance actions.[87] Among these causes of action were claims arising from a certain pre-petition purchase and sale agreement for certain securities between a debtor-seller and a third party

---

[82] *Id.* at *21.

[83] *Id.*

[84] *Id.* (citing *In re* Qimonda Richmond LLC, 467 B.R. 318, 323 (Bankr. D. Del. 2012)). The trustees also argued that the indentures were "securities contracts" under the provisions of section 741(7)(A)(x), which pertains to "master agreements" and makes them securities contracts insofar as they pertain to underlying documents which are securities contracts. *Id.* Judge Drain also did dismiss this argument on the basis that section 741(7)(A)(x) makes such master agreements "securities contracts" only "with respect to each agreement or transaction under such master agreement that is referred to in clause (i) [i.e., a contract for the purchase, sale or loan of a security]." *Id.* (alterations in original) (internal marks omitted). Judge Drain thus reasoned that the relevant transaction—the attempt to rescind an acceleration—"does not itself pertain to the purchase, sale or loan of the notes . . . ." *Id.* It is worth noting that section 741(7)(A)(x) has not been amended since the time that Judge Drain issued his bench ruling, and that section 741(7)(A)(x) currently reads "with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix) . . . ." 11 U.S.C. § 741(7)(A)(x) (2018). Thus, it seems that a master agreement that relates to *any* of the listed provisions of section 741(7)(A), not just the "purchase, sale, or loan" of a security, is also to be treated as a security agreement to the same extent.

[85] *See In re* MPM Silicones, 2014 WL 4436335, at *21. Notably, however, Judge Drain also stated his belief that section 555's provisions for terminating, cancelling or liquidating a "securities contract" would not apply to the situation that the trustees were attempting to invoke it for in any event, i.e., the *decelerating* of an indenture that had already accelerated. The definition of "securities contract" was arguably irrelevant, as the relief that the trustees were seeking would not be available under section 555 *regardless* of whether the indentures constituted securities contracts or not. *See id.* at *22. Consequently, Judge Drain's holding with respect to "securities contracts" must be taken in context of the relief that the trustees were seeking.

[86] 620 B.R. 505 (Bankr. S.D.N.Y. 2020).

[87] *See id.* at 510–11. The structure of the actual arrangement was somewhat more complicated than presented here. Only the parts of the transaction relevant to this article's analysis are recited here, in as simplified a form as possible.

purchaser, where, essentially, the purchase price was to partially funded through an indenture and pledge agreement on the debtor's behalf.[88] In connection with the purchase and the indenture, a special purpose entity would also be formed.[89] The debtor would then transfer the ownership interests it was selling into the SPE, and the SPE in turn would transfer them to Wilmington Trust, N.A. as collateral agent, to be held as security for the notes issued by the SPE under the indenture.[90]

The transactions closed as contemplated, and the SPE issued $336,470,000 worth of notes pursuant to the indenture.[91] Wilmington Trust, as collateral agent, received the pledge of the SPE's ownership interests as security for the indenture.[92] The debtors later filed for bankruptcy, and the litigation trust brought an avoidance action seeking to clawback the initial transfer of the securities from the debtor entity to the SPE.[93] The defendants, including Wilmington Trust, moved to dismiss and argued that the transfer that the trust was seeking to avoid was covered by section 546(e)'s safe harbor.[94] In opposition, the litigation trust argued that the safe harbor could not apply because it was only seeking to avoid the initial transfer of the shares to the SPE, not the SPE's subsequent transfer of the shares to Wilmington Trust, and that furthermore the status of Wilmington Trust as a "financial institution" for purposes of section 546(e) was "a factual issue that cannot be decided on a motion to dismiss . . . ."[95]

Judge Bernstein began by looking to the Supreme Court's decision in *Merit Management*,[96] concluding that it only stood for the proposition that a defendant

---

[88] *See id.* at 508–09.

[89] *Id.* at 509.

[90] *See id.*

[91] *Id.*

[92] *Id.* at 509–10.

[93] *See id.* at 511.

[94] *Id.* Actually, the defendants raised three defenses: (i) the safe harbor; (ii) the debtor received reasonably equivalent value in exchange for the transfer; and (iii) there was no allegation that the debtor entity was actually insolvent at the time that the transfer was made. *Id.* For purposes of this article, we will only focus on the safe harbor defense.

[95] *Id.* Note the procedural posture here once again—a motion to dismiss—was viewed in exactly the same light that the question was considered in by Judge Walrath in *Qimonda*.

[96] 138 S. Ct. 883 (2018). *Merit* involved the opposite of the situation in *SunEdison*; namely, the transaction involved the transfer of stock to a bank as an intermediary escrow agent, which shares the bank subsequently disbursed to the debtor-purchaser and the cash to the defendant-sellers. *Id.* at 891–92. The trustee then attempted to avoid this transaction as constructively fraudulent on the theory that the debtor was insolvent at the time that it purchased the stock. *See id.* at 891. The defendant posited that the transaction was protected by the section 546(e) safe harbor, on the basis that it involved a sale of securities to a "financial institution" because the bank operated as an intermediary in the exchange. *See id.* at 891–92. The Supreme Court agreed with the trustee, holding that "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions." *Id.* at 893. In this case, the trustee's targeted transfer was the end-to-end transfer of the debtor's cash to the defendant in exchange for the defendant's stock. *See In re* SunEdison, Inc., 620 B.R. at 513. The court reasoned that this was a properly avoidable transfer within the trustee's avoidance powers notwithstanding the fact that the debtor, in actuality, transferred its cash to the bank, and the bank transferred the defendant's stock to the debtor. *In re* SunEdison, Inc., 620 B.R. at 514–15. For a more comprehensive treatment of *Merit* and its impact, see Garza et al., *supra* note 55.

could not use a financial participant as an intermediary in order to defeat an avoidance action of an overarching transfer—not that a debtor (or, in this case, litigation trust) could avoid an entire overarching transfer to a financial institution on the basis that there was an intermediate transfer prior to that.[97] Therefore, Judge Bernstein found that *Merit Management* did not foreclose application of the safe harbor, because the "transfer . . . to be avoided" could not be limited to the intermediary transfer from the debtor to SPE—that transfer would never have happened without, and thus could not be separate from, the overarching transfer of the debtor's shares from the SPE to Wilmington Trust.[98]

With the stage set, Judge Bernstein turned to the question at issue here: was the transaction made "in connection with" a securities contract as required under section 546(e)?[99] He answered the question in the affirmative, reasoning that both the first purchase and sale agreement (for the initial sale of the stock) and the second purchase and sale agreement (for the financing and transfer of the stock, which included the formation of the SPE and the entering into the indenture) were both "securities contracts," because they related to the sale of the debtor's securities to the purchaser, even though those securities were ultimately being held by Wilmington Trust pursuant to the indenture.[100] Because Wilmington Trust was unquestionably a "financial institution" within the meaning of section 101(22)(A), the transaction was thus properly safe-harbored under section 546(e), and the defendants' motion to dismiss was granted.[101]

It is true that *SunEdison* does not squarely hold or directly address the question of whether the indenture at issue constituted a "securities contract." Rather, Judge Bernstein explained that the two documents giving rise to the two transfers (i.e., the two purchase and sale agreements) contemplated the purchase of securities, and thus qualified as "securities contracts."[102] Notably though, the transfer of the shares to Wilmington Trust—the ultimate recipient of the shares, which resulted in their qualifying for the safe harbor—appears to have been accomplished pursuant to the Indenture, with the accompanying purchase and sale agreement merely making such a transfer a condition to closing.[103] Thus, it appears that the actual transfer at issue

---

[97] *See In re* SunEdison, Inc., 620 B.R. at 513–14 ("While *Merit* defined the relevant transfer as the overarching transfer that the trustee seeks to avoid, it does not follow that the trustee can escape the reach of the safe harbor by seeking to avoid an intermediate transfer between non-qualifying participants and sue the qualifying participants of the true overarching transfer as subsequent transferees.").

[98] *See id.* at 514–16. And, of course, the indenture was required to be entered into between the SPE and Wilmington as part of the integrated transaction. *See id.* at 517.

[99] *See id.* at 512, 515–16.

[100] *See id.* at 515–16.

[101] *Id.* at 516–17.

[102] *See id.* at 515.

[103] *See id.* at 509. To be clear, the securities were transferred to Wilmington through the Pledge Agreement, under which Wilmington was Collateral Agent. *Id.* However, the recitals to the Pledge Agreement make reference to the Indenture and are clear that the Pledge Agreement is itself only being entered into as a provision of the Indenture, under which Wilmington was both Indenture Trustee and Collateral Agent. *Id.* at 510. These documents, along with the Purchase and Sale Agreement, were filed on the docket as exhibits. *See* Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint, Exs. A

was the transfer effected pursuant to the indenture, and that transfer was protected under the safe harbor by virtue of a financial institution being the recipient of securities thereunder.

The upshot is that because the court focused on the status of the purchase and sale agreement as a "securities contract," it in effect collapsed the indenture and the sale agreement, either intentionally or otherwise. At the very least, *SunEdison* appears to support the proposition that a transfer being made through an indenture that is *connected* with a "securities contract" qualifies for safe harbor protection, even if the opinion did not expressly resolve whether an indenture itself could constitute a "securities contract."

Judge Drain would revisit the issue of section 546(e) in his last opinion prior to his retirement, *In re Tops Holding II Corp.*[104] In *Tops*, Judge Drain relied upon *Merit Management* to rule that a series of dividends issued following a stock purchase agreement funded largely by secured debt were not safe-harbored under section 546(e) because the dividends were "one-way" payments separable from the ostensibly safe-harbored portion of the transaction, i.e., the issuance of the notes.[105] To finance the dividends, the purchaser would take on further debt through the issuance of notes pursuant to indentures.[106] Judge Drain did note that "the Bankruptcy Code defines 'security' broadly, including various types of debt such as privately placed notes, and the issuance of such notes in return for the loan proceeds would generally fit within 11 U.S.C. § 741(7)(A)(i)'s broad (indeed circular) definition of a 'securities contract.'"[107]

Judge Drain nonetheless held that the dividends at issue were avoidable, notwithstanding the issuance of notes pursuant to the indentures, precisely because they were dividends.[108] In a long parenthetical, Judge Drain noted that the only question that should be considered is "whether [the debtor] was insolvent or rendered insolvent by the dividends—not whether the dividends are safe-harbored . . . ."[109] He went on to state that "*[t]he avoidance of these dividends and the loans that funded them would have* <u>*no*</u> *effect on the public securities markets, the ostensible purpose*

(Purchase and Sale Agreement), B (Indenture), and C (Pledge Agreement), *In re* SunEdison Inc., No. 18-01537 (Bankr. S.D.N.Y. Sept. 13, 2019), ECF No. 21.

[104] 646 B.R. 617 (Bankr. S.D.N.Y. 2022).

[105] *See id.* at 677–82.

[106] *See id.* at 679–80.

[107] *Id.* at 681 (footnote omitted).

[108] *Id.* at 680–82 ("What clearly is not a 'settlement payment' in respect of a securities contract for purposes of section 546(e), however, is a dividend, and because it is the 2009, 2012, and 2013 dividends that the Complaint seeks to avoid (transfers A→D), not the issuance of the private notes (transfers A→B), *Merit Mgmt.* requires that they not be safe-harbored under section 546(e).") (alterations in original). Judge Drain's holding required him to reconcile *In re Boston Generating LLC*, 617 B.R. 442 (Bankr. S.D.N.Y. 2020), another case where a dividend payment was held to be safe-harbored under section 546(e) post-*Merit Management*. *See id.* at 682–85. In that case, Judge Grossman held that a series of payments made in connection with a stock repurchase agreement funded secured debt were safe-harbored under section 546(e), including a dividend. *See In re* Bos. Generating LLC, 617 B.R. at 493–94. There were no notes or indentures at issue in *Boston Generating*.

[109] *In re* Tops Holding, 646 B.R. at 688.

for section 546(e)."[110] He closed by opining that "Congress should act to restrict *to public transactions* its current overly broad free pass in section 546(e) that has informed the playbook of private loan and equity participants to loot privately held companies to the detriment of their non-insider creditors with effective impunity."[111] Though the transaction at issue in *Tops* was ultimately held not to be safe-harbored, Judge Drain's comment with respect to the broad definition of "securities contract" and his observations on public transactions do suggest that the safe harbor extends as far even as payments in connection with indentures for privately-held notes, though he disagrees with such treatment.

B. The Parallel Purposes of Section 546(e) and the TIA

We have thus far examined the history and intent behind the section 546(e) safe harbor itself,[112] the TIA,[113] and the Code's definition of "securities contracts" that is incorporated into section 546(e).[114] We have looked at how the few courts to have considered the issue have ruled with respect to whether the safe harbor applies to transactions in connection with indentures.[115] With this framework established, we can now move to the final Part of this Article: the case for applying section 546(e) to indentures as "securities contracts."

We begin with the most obvious corollary: the documented and identifiable trend of increasing the scope of each of section 546(e) and the definition of "securities contracts" over time, and how the rationale behind this dovetails with the avowed purposes of the TIA. As explained above, the safe harbor has been widened at every opportunity, with legislative history confirming that Congress intended to steadily expand the number of transactions sheltered by the safe harbor so as to provide the maximum stability possible to fragile securities markets.[116] Accordingly, the type of transactions (and the types of participants therein) covered by the safe harbor has increased time and again.

Similarly, the definition of "securities contracts" in section 741 has been expanded to be more inclusive every time that it has been amended.[117] Thus, the type of contracts covered by the safe harbor has grown more and more inclusive with each amendment, right as the amount of transactions and participants have done the same.[118]

---

[110] *Id.* (alteration in original) (emphasis in original).

[111] *Id.* (emphasis in original).

[112] *See generally supra* Section I.

[113] *See generally supra* Section II.

[114] *See generally supra* Section III.

[115] *See generally supra* Section III.A.i, III.A.ii.

[116] *See generally supra* Section I; *see also* Merit Mgmt. Grp. v. FTI Consulting, Inc., 138 S. Ct. 883, 890 (2018) ("Congress amended the securities safe harbor exception over the years, each time expanding the categories of covered transfers or entities.").

[117] *See generally supra* Section III.a.

[118] *See* Picard v. Ida Fishman Revocable Tr. (*In re* Bernard L. Madoff Inv. Sec.), 773 F.3d 411, 417–18 (2d Cir. 2014) ("Section 741(7) of the Bankruptcy Code, to which § 546(e) refers, defines "securities contract"

Finally, while seldom amended,[119] the TIA was from inception conceived as being as broadly applicable as possible, for the specific purpose of providing predictability, transparency and stability in the bonds market.[120] By ensuring that certain standard provisions apply to indentures—the most important of which prohibited a security holder's right to payment of principal or interest from being modified nonconsensually outside of a confirmed plan of reorganization—the TIA gave markets certainty with respect to the value of the securities that they were trading.[121]

Thus, the aims of all three pieces of the picture are aligned. The TIA aims to ensure that indentures protect holder and preserve their securities and the rights and entitlements thereunder so that markets are not destabilized by an unpredictable restructuring after an investor has already purchased the security.[122] The safe harbor is meant to shield securities transactions from the claw back provisions of the Bankruptcy Code, because otherwise the securities markets may be destabilized by complex securities transactions being unwound, with ever-expanding collateral implications at every intervening step between the debtor and the ultimate transferee.[123] The extremely capacious definition of "securities contract" only serves to broaden the already-wide safe harbor in order to ensure that its aims are adequately effectuated.[124]

Several examples demonstrate where the safe harbor has been successfully invoked and consider the substance of the transaction. First consider *In re Lehman Brothers Holdings Inc.*,[125] which involved an $8.6 billion avoidance action brought by the debtor and creditors' committee against JPMorgan Chase.[126] JPMorgan and the debtor entered into a clearing agreement that allowed JPMorgan the option, *but not the obligation*, to make extensions of credit to the debtor from certain accounts

---

with extraordinary breadth. . . . Thus, the term "securities contract" expansively includes contracts for the purchase or sale of securities, as well as any agreements that are *similar* or *related* to contracts for the purchase or sale of securities. This concept is broadened even farther because § 546(e) also protects a transfer that is "in connection" with a securities contract.") (emphasis in original) (citations omitted).

119 *See* Lev, *supra* note 31, at 57–60 (describing how the "first comprehensive revision of the TIA became effective as of November 15, 1990[,]" approximately fifty-one years after its first adoption).

120 *See generally supra* Part II; *see also* Shuster, *supra* note 42, at 432 (explaining how the TIA's anti-modification provision section 316 applies to all qualified indentures regardless of whether the contract actually incorporates them or not). It bears noting that not all indentures are "qualified" under the TIA, but nonetheless language mirroring the TIA's protection of core or "sacred" rights is effectively ubiquitous even in non-qualified indentures. We have assumed for all hypothetical purposes throughout that an indenture is TIA-qualified because the TIA codifies the relevant terms, but from a practical perspective, there is no difference in application between a qualified and non-qualified indenture.

121 *See* Campbell, *supra* note 35, at 182.

122 *See* H.R. REP. NO. 97-420, at 1 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 583, 583 ("Because of the structure of the clearing systems . . . and the sometimes volatile nature of the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.").

123 *See In re* Enron Creditors Recovery Corp., 422 B.R. 423, 439 (Bankr. S.D.N.Y. 2009).

124 *See* Picard v. Ida Fishman Revocable Tr. (*In re* Bernard L. Madoff Inv. Sec.), 773 F.3d 411, 417–18 (2d Cir. 2014).

125 469 B.R. 415 (Bankr. S.D.N.Y. 2012).

126 *Id.* at 419.

prior to final payment in connection with securities transactions.[127] In return, JPMorgan obtained a lien on all of the debtor's accounts with it, which constituted essentially all of the debtor's cash and securities.[128] This clearance agreement was amended twice, both times adding obligors (both in terms of borrowers and guarantors) and new collateral in the form of these obligors' assets.[129] These transfers (in the form of the granting of liens and other collateral to JPMorgan) were the ones that the debtor and committee sought to avoid.[130] JPMorgan moved to dismiss on the basis of the section 546(e) safe harbor.[131]

The court agreed with JPMorgan and dismissed the claims.[132] In doing so, the court noted that it was of no moment that the clearance agreement apparently itself did not produce any direct obligations, as the definition of "securities contracts" "is very broad . . . and encompasses virtually any contract for the purchase or sale of securities, any extension of credit for the clearance or settlement of securities transactions, and a wide array of related contracts, including security agreements and guarantee agreements."[133] It described the clearance agreement as a "master contract" under section 741(7), as it operated to govern other agreements concerning the purchase, sale, or extension of credit in connection with the purchase or sale of securities.[134] By virtue of their relationship to the clearance agreement, the court also found that all of the ancillary security agreements and guarantees constituted "securities contracts" as well, as they were "credit enhancements" in connection with the purchase or sale of securities.[135] And the court specifically held that the granting of liens in connection with the amendments constituted "transfers" that were made in "connection with" the clearance agreement because they secured indebtedness that could arise in connection with a securities contract.[136]

Consider now this scenario: the clearance agreement described above was (hypothetically) replaced with an indenture for the issuance of securities that are then

---

127 *Id.* at 424–25.

128 *Id.*

129 *Id.* at 425–26, 428–29.

130 *See id.* at 435.

131 *Id.* at 431.

132 *See id.* at 451.

133 *Id.* at 438. The court found that the clearance agreement was an agreement for an "'extension of credit for the clearance or settlement of securities transactions'" on the basis that it provided that JPMorgan "'may, solely at [its] discretion . . . advance funds to [debtor] prior to final payment.'" *Id.*

134 *See id.* (internal marks omitted).

135 *See id.* at 438–39. The court noted that it was immaterial that the agreements did not specifically reference their interrelatedness with respect to invoking the safe harbor, because "[t]here is no required language to connect agreements so that they will be deemed related . . . ." *Id.* at 439. In explaining why the amount of actual exposure relative to the application of the debtor's collateral was immaterial to the analysis, the court went on to state that "[t]he 'in connection with' requirement of section 546(e) does not contain any temporal or existential requirement that a transfer must be 'in connection with' then-outstanding legal exposure." *Id.* at 442. The court concluded that "[t]he formulation is quite simple: a transfer is safe-harbored if it is 'in connection with' a securities contract. And the words 'in connection with' are to be interpreted liberally." *Id.* at 442.

136 *See id.* at 440 ("The liens granted under the [second amendment], therefore, are 'transfers' pursuant to safe-harbored 'securities contracts.'").

sold on an open market. The indenture (or documents ancillary to it) provides for a lien upon the securities for the satisfaction of their payment. What, exactly, under the above analysis changes? Even if one were to hypothetically accept that the contract at issue—that is, the indenture—doesn't create any obligations of its own (which would be highly unusual), the issuer certainly has obligations in the form of paying off the securities, be them notes or bonds. The issuer receives the initial purchase price from the sale of the securities, so there is a contract in connection with the purchase and sale of securities. If it is not the indenture itself, then the indenture at least could be considered to be a "master agreement" insofar as it governs the ultimate payment of the securities and the procedures related thereto. And if a granting of a lien on collateral in connection with a securities agreement constitutes a "transfer" for purposes of the safe harbor, then any indenture trustee holding a lien on collateral in connection with securities issued under the indenture holds a safe-harbored transfer as well. There is no apparent practical or principled basis for drawing the distinction between the forms of agreement, as it is indisputable that securities issued under indentures are still securities, no different than any other.

Next let us consider *In re Greektown Holdings, LLC*[137] and *In re Tribune Company Fraudulent Conveyance Litigation*.[138] *Greektown* involved a note purchase agreement that governed the use of proceeds of notes issued by an eventual debtor.[139] The notes were purchased by Merrill Lynch, the debtor filed for bankruptcy, and then sought to recover some payments made in connection with the note purchase agreement.[140] The defendants alleged that the transfers were protected by the safe harbor, and the court agreed, observing that the notes constituted "securities" despite the fact that they were privately-held.[141] Because the note purchase agreement provided for the purchase of such securities, it constituted a "securities contract" for purposes of section 546(e).[142]

In *Tribune*, the Second Circuit was confronted with the question of whether a leveraged buyout of a debtor company's shares, including payments for share redemptions, constituted payments "in connection with a securities contract" for purposes of section 546(e).[143] The debtor borrowed over $11 billion secured by its own assets (as is typical in a leveraged buyout) in order to make share redemption

---

137 No. 08-53104, 2015 WL 8229658 (Bankr. E.D. Mich. Nov. 24, 2015), *vacated and remanded*, 765 F. App'x 132 (6th Cir. 2019). *Greektown* was overruled following the Supreme Court's decision in *Merit Management*. However, its discussion of "securities contracts" remains pertinent, even if the ultimate holding was overruled because of *Merit*'s foreclosing of the conduit theory.

138 946 F.3d 66 (2d Cir. 2019).

139 *See In re* Greektown Holdings, LLC, 2015 WL 8229658, at *1–2.

140 *See id.* at *1–3.

141 *See id.* at *5 ("In other cases, parties have argued that privately and/or closely-held securities do not present the same systemic risk to the securities market and, for legislative intent or policy reasons, they should not be granted safe harbor under § 546(e). This Court feels it inappropriate to go beyond the plain and unambiguous language of the statute . . . .").

142 *See id.* at *16 ("Because the Court has previously concluded that the Senior Notes were 'securities,' the Note Purchase Agreement is thus a 'securities contract' because it is a contract for the purchase and sale of securities.").

143 *See In re* Tribune Co. Fraudulent Conveyance Litig., 946 F.3d at 71–72.

payments of its own stock.[144] The plaintiffs then sought to recover the amounts paid to the shareholders through this framework as fraudulent transfers.[145] The plaintiffs contended that the transfers made in connection with the redemption—rather than the purchase—of the shares did not qualify as payments in connection with a "securities contract," because they did not technically involve a purchase or sale.[146] The Second Circuit easily dismissed this argument, finding that "[t]he term 'redemption,' in the securities context, means 'repurchase.'"[147] Thus, all of the transactions at issue were protected by section 546(e).[148]

Let us once again consider what would happen in these same cases if the debt instrument were an indenture. In *Greektown*, one could in concept substitute the note purchase agreement there for an indenture; the securities were notes that were privately issued and sold to a designated buyer subject to the requirements of the note purchase agreement. An indenture serves this same role, albeit with the addition of a third-party trustee who operates to preserve the interests of the holders and is granted security interests to that end. For privately held notes, an indenture won't be qualified under the TIA, but the TIA's relevant terms prohibiting nonconsensual modification of core terms will, as a practical matter, likely still be incorporated. More to the point, indentures typically provide for a repurchase of securities by the debtor.[149] Would any of the analysis in *Greektown* have differed if the transaction at issue was a repurchase of securities through an indenture rather than the note purchase agreement? Unlikely. The underlying principle remains the same: an agreement providing for the purchase (or repurchase) of notes is a securities contract within the meaning of section 741(7), regardless of the title of the agreement.

The same goes for *Tribune*, perhaps to an even greater extent. Mandatory redemption provisions are a mainstay of indentures, serving an important purpose in cases of default and election of remedies. There is no apparent rationale for precluding the application of the section 546(e) safe harbor to a redemption payment made through an indenture. Indeed, under *Tribune*, such "redemptions" should constitute "purchases" within the context of section 546(e). Likewise, the bonds or notes at issue under an indenture would also facially constitute securities, especially in light of the plain language of section 101(49),[150] as remarked upon by the court in

---

[144] *Id.* at 72.

[145] Because this case was post-*Merit Management*, the fact that financial intermediaries had participated in the exchange did not render the transfer automatically protected by the safe harbor. *See id.* at 77. The court in fact found that the debtor itself was a "financial institution" in this scenario, on the basis that the definition of section 101(22) provides that a "financial institution" includes a customer of a financial institution, provided that the financial institution is acting as an agent or custodian for such customer. *See id.* at 77–78.

[146] *Id.* at 80.

[147] *Id.* (citation omitted).

[148] *See id.* at 97; *see also In re* Nine W. LBO Sec. Litig., 482 F. Supp. 3d 187, 198–99 (S.D.N.Y. 2020) (finding that *Tribune* definitively answered the question that "redemptions" in the securities contract were "payments" for purposes of section 546(e) and thus covered from avoidance actions).

[149] *See* 2 COLLIER ON BANKRUPTCY, ¶ 101.47, at 101-87–88 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

[150] "The term 'security' (A) includes – (i) note . . . (iv) bond; (v) debenture . . . ." 11 U.S.C. § 101(49) (2018).

Greektown.[151] There is no apparent rationale for denying such a purchase of securities the benefits of section 546(e) due only to the form of agreement that served as their issuing vehicle.

Moreover, there are straightforward definitional reasons for considering indentures "securities contracts" for purposes of the safe harbor. As stated, it is plain that both notes and bonds (likely the two most common negotiable instruments issued in connection with, and governed by, indentures) qualify as "securities," as they are explicitly listed as such under section 101(49).[152] As also outlined above, "securities contract" is defined extremely broadly—and "purchase and sale," which partially informs that definition, has likewise been construed very broadly.[153] Among the categories of agreements that explicitly constitute "securities contracts" are "any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph,"[154] "a master agreement that provides for . . . [a] transaction [referred to above], together with all supplements to any such master agreement,"[155] and "any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph . . . ."[156]

An indenture, which typically (i) includes provisions that either directly provide for the purchase or sale of securities or else has provisions similar to such agreements insofar as it can provide for the mandatory sale or redemption of such securities, (ii) provides for the governing terms with respect to securities, as recognized by the court in *MPM*,[157] and (iii) often provides for the creation of security interests in connection with the purchase or sale of securities, which were recognized as being covered by the safe harbor by the court *Lehman Brothers*[158] should therefore qualify as a "securities contract" on each count, and thus be afforded the protections of section 546(e). Indeed, both the plain text and the purpose of the statutes involved seems to compel such result.

CONCLUSION

In this Article, we have traced the legislative history of the section 546(e) safe harbor, including the definition of "securities contract" employed in section 546(e),

---

151 *See In re* Greektown Holdings, LLC, No. 08-53104, 2015 WL 8229658, at *5 (Bankr. E.D. Mich. Nov. 24, 2015), *vacated and remanded*, 765 F. App'x 132 (6th Cir. 2019).

152 *See* 11 U.S.C. § 101(49).

153 *See* Picard v. Ida Fishman Revocable Tr. (*In re* Bernard L. Madoff Inv. Sec.), 773 F.3d 411, 418 (2d Cir. 2014) ("While neither the Bankruptcy Code nor SIPA defines purchase or sale, the Securities Exchange Act of 1934—of which SIPA is a part—defines the terms to 'include *any* contract to buy, purchase, or otherwise acquire . . . [or] to sell or otherwise dispose of' a security.") (alteration in original) (emphasis in original). *See also supra* Section III.

154 11 U.S.C. § 741(7)(A)(vii).

155 *Id.* § 741(7)(A)(x).

156 *Id.* § 741(7)(A)(xi).

157 *See In re* MPM Silicones, LLC, No. 14-22503, 2014 WL 4436335, at *21 (Bankr. S.D.N.Y. Sept. 9, 2014) ("[T]he indentures . . . set forth the terms under which the underlying notes will be governed and the role of the trustees in connection therewith.") (citation omitted).

158 *See In re* Lehman Brothers Holdings Inc., 469 B.R. 415, 438 (Bankr. S.D.N.Y. 2012).

to demonstrate how the breadth of that section has been expanded each time that it has been amended. We have shown that these were an intentional act done in furtherance of the belief that providing protection for securities transactions was necessary in order to provide stability and foreseeability in securities markets. We have also revisited how the TIA, specifically through its section 316(b), was likewise intended to preserve rights and entitlements, provide stability and foreseeability in the bond market through preventing the nonconsensual modification of bondholders' rights to payment outside of a confirmed plan of reorganization, thereby aligning the purposes of the governing indenture law with the purposes of the safe harbor.

The sparse case law applying section 546(e)'s applicability to indentures has brought the question to the fore, but has not foreclosed the possibility that an indenture may qualify for the safe harbor. Indeed, such a result is consistent with not only the text and purpose of the safe harbor, the common provisions found in trust indentures, and the more developed body of caselaw applying the protections of section 546(e) based on the same provisions found in other types of agreements.