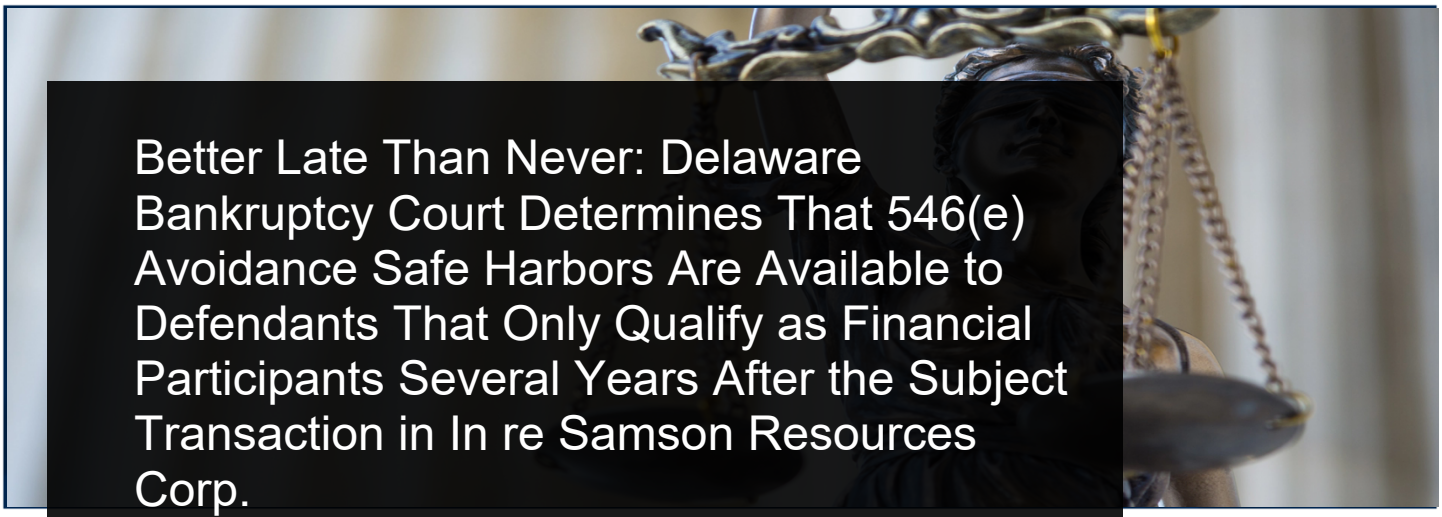
BRACEWELL



Better Late Than Never: Delaware Bankruptcy Court Determines That 546(e) Avoidance Safe Harbors Are Available to Defendants That Only Qualify as Financial Participants Several Years After the Subject Transaction in In re Samson Resources Corp.

Update

August 08, 2022 | 5 minute read

Following an August 4, 2022 memorandum opinion from Judge Brendan L. Shannon of the United States Bankruptcy Court for the District of Delaware, a party to a safe harbored contract can qualify as a "financial participant" under section 546(e) of the Bankruptcy Code even where the party was not a financial participant at the time of the transaction. The decision is significant because an expansive reading of financial participant could help financial participants shield certain prepetition transfers from avoidance actions that may otherwise be avoidable under the Bankruptcy Code.[1]

As background, in 2011 the controlling shareholders of Samson Investment Company ("SIC") executed a leveraged buyout via three transactions:

- SIC transferred $2.75 billion in cash to the selling shareholders in partial redemption of their shares in SIC (the "Redemption Transaction");
- Debtor Samson Resources Corporation ("SRC") transferred $3.5 billion in cash to the selling shareholders in consideration of their simultaneous transfer of their remaining shares in SIC; and
- SIC divested significant assets through a series of transactions whereby three of SIC's subsidiaries acquired certain of the divested assets; non-debtor Samson Energy then acquired ownership of those three entities and other divested assets in exchange for the selling shareholders' discharge of certain subordinated notes payable to them by SIC.

Amid a cyclical downturn in the oil and gas market, SRC and certain affiliates (together, the "Debtors") filed for chapter 11 bankruptcy protection on September 17, 2015 with the goal of reducing their first-lien debt, canceling their outstanding second-lien debt, unsecured debt, preferred equity and equity

Related People

William A. "Trey" Wood III
Partner
HOUSTON
+1.713.221.1166
trey.wood@bracewell.com

Mark E. Dendinger
Partner
NEW YORK
+1.212.508.6141
mark.dendinger@bracewell.com

Jonathan Lozano
Counsel
AUSTIN
+1.512.494.3689
jonathan.lozano@bracewell.com

Related Industries

Finance

Related Practices

Financial Restructuring

interests. Pursuant to the Debtors' plan of reorganization, which was confirmed on February 13, 2017, the Debtors formed a liquidating trust to pursue recoveries for over $2.4 billion of general unsecured claims against the Debtors.

On September 15, 2017, the trustee for the liquidating trust (the "Trustee") filed an adversary complaint against the selling shareholders and the Samson entities involved in the leveraged buyout transactions (together, the "Defendants"), seeking to avoid the transactions as fraudulent transfers under the Bankruptcy Code.[2] In response, the Defendants argued, among other things, that the avoidance actions pertaining to the Redemption Transaction were barred by the safe harbor provided in section 546(e) of the Bankruptcy Code, which provides:[3]

Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, 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(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

The Court heard oral argument on May 19, 2022 and entered the memorandum opinion on August 4, 2022.

The Trustee made two primary arguments. First, the Trustee argued that a plain reading of section 546(e) leads to the conclusion that a transfer cannot be a "transfer made by a financial participant" unless the transferor is a financial participant *at the time of the transfer*. Second, the Trustee bolstered this argument by referencing other decisions interpreting other sections of the Bankruptcy Code, such as section 548(a)(1)(B)(ii)(IV), which has been interpreted to require that an entity must be an "insider" at the time of the subject transfer to be avoided as fraudulent.[4]

In contrast, the Defendants argued that the language of section 546(e) of the Bankruptcy Code requires consideration of the definition of "financial participant" in section 101(22A) of the Bankruptcy Code, which provides that an entity's satisfaction of the criteria to be a financial participant can be measured on any of three dates: (a) the time the entity enters into a securities contract, (b) the petition date, or (c) any day during the 15-month period preceding the petition date.[5] As such, the Defendants argued that, even though the transfer in question was made almost four years before the petition date, (a) SIC held sufficient transactions to qualify as a financial participant both on the petition date, as well as a date within 15 months preceding the petition date, both of

which were relevant to the dates in the Bankruptcy Code's definition of "financial participant" and (b) the transfers in the Redemption Transaction were made "in connection with a securities contract," therefore section 546(e) shielded those transfers from avoidance. The Defendants further argued that the Trustee's argument was inapposite because the relevant definitions in the sections of the Bankruptcy Code cited by the Trustee were silent as to when the time of a transaction should be measured.

Finding the Defendants' reading more persuasive, the Court noted that the Defendants' expert declarations (using methodologies from both the Defendants' and the Trustee's experts) showed that SIC had gross mark-to-market positions in commodity swaps and commodity options with a value in excess of $100 million on the petition date and as of August 31, 2015 (within the 15 months prior), thus rendering SIC a financial participant within the meaning of section 101(22A) and in satisfaction of section 546(e) of the Bankruptcy Code. Accordingly, the Court granted the Defendants' motion for summary judgment with respect to the Redemption Transaction.

Following the Court's opinion, parties evaluating the avoidability of sizable prepetition transfers have another potential defense in their toolbox (in addition to traditional arguments surrounding the transferor's solvency or the receipt of reasonably equivalent value). A party cannot avail itself of the protections in section 546(e) of the Bankruptcy Code if it never satisfies the definition of "financial participant." However, parties do not have to qualify as financial participants at the time of the transfer. Parties that fall in and out of the relevant thresholds for qualification as a financial participant can take some comfort that failing to qualify at the time of transfer may not leave the transfer subject to avoidance if the parties can attain financial participant status either on the petition date or the 15 months prior.

---

1. The Court's memorandum opinion additionally grants in part and denies in part various other summary judgment motions filed by other defendants related to whether such defendants (a) were released pursuant to the plan, (b) direct or indirect transferees of avoidable transfers, or (c) named as defendants solely in their capacity as trustees of other defendant trusts that were released. This article focuses only on the Court's analysis and opinion regarding the safe harbor summary judgment motion.

2. *Kravitz v. Samson Energy Co., LLC*, Adv. Case No. 17-51524 (BLS) (Bankr. D. Del. Sept. 15, 2017).

3. Prior to the Court's instant memorandum opinion, the Court issued an opinion on December 23, 2020 providing that the plain text of section 546(e) did not per se exclude SIC from being considered a financial participant, but that the Trustee should be permitted to complete discovery to demonstrate whether SIC had the requisite agreements or transactions to meet the definition of a financial participant under section 101(22A) of the Bankruptcy Code.[3] The

Defendants subsequently narrowed the scope of their summary judgment to focus solely on SIC's status as a financial participant in connection with the Redemption Transaction.

4. The Trustee similarly analogized the timing issue before the Court to the determination of whether a communication to an attorney is privileged—i.e., a communication cannot retroactively qualify as privileged if spoken to someone who only later becomes an attorney.

5. Section 101(22A)(A) defines a "financial participant" as "an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition."