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## Outer Bounds of Safe Harbors: Lehman-Swedbank Decision Limits Setoff Rights Under Swap Agreements

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Parties to swap agreements enjoy the protections of "safe harbors" under Sections 560 and 561 of the Bankruptcy Code, which generally permit the setoff of swap obligations even after a counterparty has entered bankruptcy, and even where the setoff of non-swap obligations would be prohibited by the Bankruptcy Code's automatic stay.

However, a recent decision in the Lehman bankruptcy, involving the setoff rights of a foreign bank, limits the right of setoff under the swap agreement safe harbors by enforcing a timing requirement for setoff found in Bankruptcy Code Section 553(a). Under this decision, a swap participant may continue to net its pre-bankruptcy swap claims against pre-bankruptcy collateral of a counterparty in bankruptcy, but a swap counterparty may not net such claims against post-bankruptcy collateral of the debtor in bankruptcy.

This decision, which the bank has appealed, is notable because of its effect on the bank—prohibiting it from applying millions of dollars in post-bankruptcy deposits by Lehman against Lehman's pre-bankruptcy swap obligations. It is also notable because it establishes an outer boundary on the swap agreement safe harbors, which might otherwise, taken literally, seem to

be virtually boundless in scope.

Read the full text of this alert: [Outer Bounds of Safe Harbors: \*Lehman-Swedbank\* Decision Limits Setoff Rights Under Swap Agreements.](#)

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