WILMERHALE H

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

2010-06-24

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 postbankruptcy 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.

Authors



Philip D. Anker

PARTNER

Co-Chair, Bankruptcy and Financial Restructuring Practice Group

philip.anker@wilmerhale.com+1 212 230 8890



Jeannette K. Boot

jeannette.boot@wilmerhale.com

+1 212 295 6507

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 2100 Pennsylvania Avenue, NW, Washington, DC 20037, +1 202 663 6000. Our United Kingdom office is operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at www.sra.org.uk/solicitors/code-of-conduct.page. A list of partners and their professional qualifications is available for inspection at our UK office. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does only end to avoice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2004-2024 Wilmer Cutler Pickering Hale and Dorr LLP