Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

JANUARY 2025

EDITOR'S NOTE: EVERYTHING IS BRIGHT
Victoria Prussen Spears

YELLOW IS SEEING RED: BANKRUPTCY COURT INVOKES *LOPER BRIGHT* IN UPHOLDING PBGC REGULATIONS
Dominic DeMatties and Katherine B. Kohn

"RECAPPING" AND RECONCILING *MERIT MANAGEMENT* AND *NINE WEST*, THE SECOND CIRCUIT HOLDS THAT BOSTON GENERATING'S 2006 "RECAPITALIZATION" WAS SAFE-HARBORED
Gregory M. Petrick, Ivan Loncar, Ingrid Bagby, Kathryn M. Borgeson, Casey John Servais, Eric G. Waxman, and Andrew M. Greenberg

INSOLVENCY CHALLENGE RIGHTS
Tina Hoffmann, Nicola Hughes, Amy Jacks, Hervé Kensicher, Malte Richter, Inga Rupp, Devi Shah, Stefanie Skoruppa, Patrick Teboul, Marco Wilhelm, and Alexandra Wood

A PRIMER ON THE ADGM RESTRUCTURING REGIME
Polina Lyadnova and Misthura Otubu

UPDATES TO ITALY'S INSOLVENCY CODE
Roberto Bonsignore, Giuseppe Scassellati-Sforzolini, Francesco Iodice, and Sara Maria Crupi

LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 21 NUMBER 1 January 2025

Editor's Note: Everything Is Bright
Victoria Prussen Spears 1

Yellow Is Seeing Red: Bankruptcy Court Invokes *Loper Bright* in Upholding PBGC Regulations
Dominic DeMatties and Katherine B. Kohn 4

"Recapping" and Reconciling *Merit Management* and *Nine West*, the Second Circuit Holds That Boston Generating's 2006 "Recapitalization" Was Safe-Harbored
Gregory M. Petrick, Ivan Loncar, Ingrid Bagby, Kathryn M. Borgeson, Casey John Servais, Eric G. Waxman, and Andrew M. Greenberg 9

Insolvency Challenge Rights
Tina Hoffmann, Nicola Hughes, Amy Jacks, Hervé Kensicher, Malte Richter, Inga Rupp, Devi Shah, Stefanie Skoruppa, Patrick Teboul, Marco Wilhelm, and Alexandra Wood 15

A Primer on the ADGM Restructuring Regime
Polina Lyadnova and Misthura Otubu 31

Updates to Italy's Insolvency Code
Roberto Bonsignore, Giuseppe Scassellati-Sforzolini, Francesco Iodice, and Sara Maria Crupi 40

LexisNexis

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:
Ryan D. Kearns, J.D., at 513.257.9021
Email: .... ryan.kearns@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . (518) 487-3385
Fax Number . . . . (800) 828-8341
Customer Service Website . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)
ISBN: 978-0-7698-7988-8 (eBook)
ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2025)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2025 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

(2025–Pub.4789)

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF
Steven A. Meyerowitz
President, Meyerowitz Communications Inc.

EDITOR
Victoria Prussen Spears
Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS
Scott L. Baena
Bilzin Sumberg Baena Price & Axelrod LLP

Kathryn M. Borgeson
Cadwalader, Wickersham & Taft LLP

Andrew P. Brozman
Clifford Chance US LLP

Michael L. Cook
Schulte Roth & Zabel LLP

Mark G. Douglas
Jones Day

Mark J. Friedman
DLA Piper

Stuart I. Gordon
Rivkin Radler LLP

Patrick E. Mears
Barnes & Thornburg LLP

Pratt's Journal of Bankruptcy Law is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2025 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

"Recapping" and Reconciling *Merit Management* and *Nine West*, the Second Circuit Holds That Boston Generating's 2006 "Recapitalization" Was Safe-Harbored

By Gregory M. Petrick, Ivan Loncar, Ingrid Bagby, Kathryn M. Borgeson, Casey John Servais, Eric G. Waxman, and Andrew M. Greenberg*

In an appeal from the Boston Generating *bankruptcy case, the U.S. Court of Appeals for the Second Circuit resolved tension between two of the most important cases interpreting the Bankruptcy Code's "safe harbor" provisions in favor of the U.S. Supreme Court's precedent in* Merit Management. *The authors of this article explain the decision and its implications.*

Until recently, two of the most important cases interpreting the Bankruptcy Code's "safe harbor" provisions appeared to be in potential tension. First, in the U.S. Supreme Court's 2018 *Merit Management* decision,[1] the Court held that in applying the safe harbor provisions to a complex, multi-step financial transaction, courts should analyze the "overarching" transaction, not its individual components. Meanwhile, in the U.S. Court of Appeals for the Second Circuit's 2023 *Nine West* decision,[2] the Second Circuit held that in determining which entities qualify as protected "financial institutions," courts should take a "transfer-by-transfer" approach by analyzing each transfer under a contract individually, even where multiple transfers are governed by the same contract. Does *Nine West*'s "transfer-by-transfer" approach therefore suggest that, where a larger financial transaction consists of multiple smaller sub-transactions, a court must analyze each of the component sub-transactions separately, or does *Merit Management*'s principle that courts should look at the larger, overarching transaction still apply?

In an appeal from the *Boston Generating* bankruptcy case, the Second Circuit resolved this potential tension in favor of the Supreme Court's precedent in *Merit Management*, holding that "*even under Nine West's transfer-by-transfer approach, we look to the [overarching] end-to-end transaction to determine whether*

* The authors, attorneys at Cadwalader, Wickersham & Taft LLP, may be contacted at gregory.petrick@cwt.com, ivan.loncar@cwt.com, ingrid.bagby@cwt.com, kathryn.borgeson@cwt.com, casey.servais@cwt.com, eric.waxman@cwt.com, and andrew.greenberg@cwt.com, respectively.

[1] Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 583 U.S. 366 (2018).

[2] In re Nine West LBO Sec. Litig., 87 F.4th 130 (2d Cir. 2023).

the safe harbor applies."[3] In *Boston Generating*, a liquidating trustee challenged as fraudulent the debtor's transfer of cash to its corporate parent as one step in a larger "recapitalization" transaction that culminated in the repurchase of the parent's equity securities. Applying *Merit Management*'s instruction to look at the overarching transaction, the Second Circuit first concluded that the transfer of cash from the debtor to the parent constituted part of a larger, safe-harbored "transfer made in connection with a securities contract." Next, applying *Nine West*'s "transfer-by-transfer" approach to this single overarching transaction, the Second Circuit concluded that the relevant debtors were protected "financial institutions," because the "financial institution" definition includes a bank customer when a bank is acting as the customer's agent, and a bank was in fact acting as the debtors' agent with respect to the overarching securities transaction. Based on these twin analyses, the Second Circuit concluded that the entire recapitalization transaction was safe-harbored, and therefore immune from avoidance.

BACKGROUND

Boston Generating LLC and its parent, EBG Holdings LLC, owned and operated electric power generating facilities in the Boston area. In 2006, Boston Generating and EBG undertook a leveraged recapitalization transaction designed to repurchase EBG's existing equity securities by way of a tender offer. The recapitalization transaction had four main components or steps:

(i) Boston Generating borrowed funds from various banks pursuant to two different credit facilities;

(ii) Boston Generating transferred the loan proceeds to EBG;

(iii) EBG further transferred the loan proceeds to the bank acting as its "depository" with respect to the recapitalization transaction; and

(iv) The depository bank then used the loan proceeds to execute the repurchase of EBG's equity securities.

In 2010, almost four years after the recapitalization, Boston Generating and EBG filed for bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of New York. Their Chapter 11 plan was confirmed in 2011. A liquidating trustee appointed under the plan then brought an action seeking to avoid Boston Generating's transfer of the loan proceeds to EBG as a fraudulent transfer under the New York Debtor and Creditor Law. The

[3] Holliday v. Credit Suisse Sec. (USA) LLC (In re Boston Generating, LLC), 21-2543-br (2d Cir. Sept. 19, 2024) (emphasis added).

defendants in the fraudulent transfer action asserted, as an affirmative defense, that all steps in the recapitalization transaction were protected from avoidance by Section 546(e) of the Bankruptcy Code, a "safe harbor" provision that immunizes from avoidance a "transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract[.]"[4] The bankruptcy court held that the 546(e) safe harbor applied, and dismissed the fraudulent transfer action on that basis. The liquidating trustee appealed to the U.S. District Court for the Southern District of New York, which affirmed the bankruptcy court's ruling. The trustee then appealed to the Second Circuit, which agreed with both the bankruptcy court and the district court that the 546(e) safe harbor applied.

ANALYSIS

In its appeal to the Second Circuit, the liquidating trustee made two main arguments for why the Section 546(e) safe harbor did not apply to Boston Generating's transfer of cash to its parent, EBG. First, the trustee argued that an "upstream" dividend of cash from a subsidiary to its parent does not qualify as "a transfer made in connection with a securities contract," because such a dividend does not, in itself, involve a purchase or sale of securities. Second, the trustee argued that Boston Generating and EBG did not qualify as protected "financial institutions." The Second Circuit rejected both arguments.

Applying *Merit*: A Cash Dividend Can Be Safe-Harbored Where It Constitutes A "Component" of an Overarching Securities Transaction

In rejecting the trustee's argument that Boston Generating's transfer of cash to its parent did not constitute a "transfer made in connection with a securities contract," the Second Circuit applied the Supreme Court's 2018 decision in *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*[5] *Merit Management*, like *Boston Generating*, involved a multi-step financial transaction, and the question posed was whether courts, in applying the safe harbors, "should look to the [overarching] transfer that the trustee seeks to avoid to determine whether the transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer?" The Supreme Court answered this question by holding that the Section 546(e) safe harbor "applies to the *overarching* transfer that the trustee seeks to avoid, not any component part of that transfer."

---

[4] 11 U.S.C. § 546(e).

[5] 583 U.S. 366 (2018).

Applying *Merit's* instruction to analyze the "overarching" transfer rather than its individual components, the Second Circuit concluded that the cash transfer from Boston Generating to its parent was safe-harbored as part of the "overarching" recapitalization transaction aimed at repurchasing the parent's securities. As support for its conclusion that the cash transfer was merely a component of the larger "overarching" securities transaction, the Second Circuit noted that the credit facility agreements under which Boston Generating borrowed the cash that it later transferred to its parent expressly contemplated that the purpose of the loans was to fund the larger recapitalization transaction, and acknowledged that Boston Generating would transfer the loan proceeds to EBG for that purpose. All parties, including the lenders, therefore understood that the loans taken out by Boston Generating constituted a step in the larger recapitalization transaction.

The Second Circuit also rejected an argument by the trustee that Boston Generating's cash transfer to EBG was not made "in connection" with a securities contract because Boston Generating was allegedly not a party to the actual tender offer agreement pursuant to which EBG's equity securities were ultimately repurchased. First, the Second Circuit refuted this contention by the trustee as a factual matter, noting that Boston Generating was in fact a party to the tender offer agreement in its capacity as one of EBG's subsidiaries (which were identified in the tender offer as parties to the agreement). Second, in any event, the Second Circuit noted that under its own precedent, an entity does not need to be an actual party to a "securities contract" in order for a transfer by that entity to be safe-harbored, because Section 546(e) only requires a transfer to be made "in connection with" a securities contract, not by a party to that contract.[6]

Applying *Nine West*: Bank Customers Qualify as Protected "Financial Institutions" Where A Bank is Acting as Their "Agent" With Respect to The Overarching Securities Transaction

In rejecting the trustee's argument that Boston Generating and EBG did not qualify as protected "financial institutions," the Second Circuit relied on its own 2023 decision in *In re Nine West LBO Sec. Litig.*[7] *Nine West* interpreted the Bankruptcy Code's definition of "financial institution," which includes a "customer" of a bank "when" the bank "is acting as agent" for the customer "in

[6] See In re Bernard L. Madoff Inv. Sec. LLC, 773 F.3d 411, 421-22 (2d Cir. 2014).

[7] 87 F.4th 130 (2d Cir. 2023).

connection with a securities contract."[8] *Nine West* involved a securities contract under which the debtor hired a bank to facilitate the redemption of several different types of the debtor's stock. Notwithstanding that several different securities transactions were governed by the same securities contract, the Second Circuit held in *Nine West* that the debtor there qualified as a "financial institution" *only* with respect to the specific securities transactions with respect to which the bank had acted as the debtor's agent, *not* all transactions under the securities contract. *Nine West* therefore adopted what it called a "transfer-by-transfer" rather than "contract-by-contract" approach to the "customer" prong of the "financial institution" definition, meaning that even where multiple different transactions are governed by the same securities contract, it is still necessary to look at each individual transaction to determine whether a bank is acting as an agent with respect to that specific transaction.

Applying *Nine West*, the Second Circuit held that Boston Generating and EBG qualified as "financial institutions" with respect to the overarching recapitalization transaction, even under the transfer-by-transfer approach. In doing so, the Second Circuit rejected the trustee's effort to analyze each component of the recapitalization as a separate "transfer," instead looking at the entire recapitalization as a single "overarching" transaction, as required by *Merit*. The Second Circuit stated that "even under *Nine West*'s transfer-by-transfer approach, we look to the end-to-end transaction to determine whether the safe harbor applies."

Although the Boston Generating recapitalization entailed only a single "overarching" transaction, not the multiple transactions at issue in *Nine West*, the Second Circuit still had to determine whether the depository bank had acted as an "agent" with respect to that transaction. To assess the depository's status as an "agent," the Second Circuit relied on language in *Nine West* holding that a sufficient agency relationship exists where a bank "made payments to, and received information from" a debtor's shareholders during the relevant securities transactions.

These features of an agency relationship were present in Boston Generating's case, because the depository bank received the required documentation from equity holders who sought to tender their equity securities, and made payments to the tendering equity holders on behalf of Boston Generating and EBG. Furthermore, Boston Generating and EBG maintained "control" over the transactions performed by the depository bank in connection with the tender offer, because the tendered units were deemed "accepted" for payment and

[8] See 11 U.S.C. § 101(22)(A).

purchase only if Boston Generating and EBG gave notice to the depository bank of their acceptance. The fact that Boston Generating and EBG had the ability to "control" the depository bank's actions with respect to the tender offer served as further evidence that the depository bank was acting as their agent.

TAKEAWAYS

In *Merit Management*, the Supreme Court cautioned that a trustee is not free to define the transfer it seeks to avoid in any way it chooses and stated that a defendant is free to argue that the trustee failed to properly identify the avoidable transfer. In *Boston Generating*, the liquidating trustee chose to disregard the overarching transaction and attacked a component transfer within that transaction. Heeding *Merit Management*, the Second Circuit rebuffed that attack.

In the process, the Second Circuit helped to resolve a potential tension between two important precedents interpreting the Bankruptcy Code's "safe harbor" provisions, and provided a valuable roadmap for participants in the financial markets seeking to analyze whether complex, multi-step securities transactions are likely to be safe-harbored.

In particular, at least in the Second Circuit, participants in the financial markets can now take comfort that cash dividends or other transfers that do not directly involve securities can nonetheless potentially qualify as safe-harbored "transfers made in connection with a securities contract," as long as such transfers clearly constitute interim steps in a larger, overarching securities transaction.

To maximize the likelihood that interim transfers not directly involving securities receive safe-harbored treatment, however, parties should document such interim transfers in a way that makes clear their relationship to the larger securities transaction.

In addition, non-bank entities can increase the likelihood that the "securities contract" safe harbor will apply by clearly employing a bank as their agent to effectuate all stages of complex securities transactions, because such entities' status as a "customer" of a bank "in connection with a securities contract" can confer on them the status of a "financial institution" protected by the safe harbor.