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Split Second Circuit Narrows Bankruptcy Code's Settlement Payment Safe Harbor

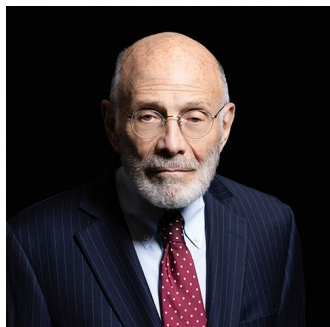
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In his latest article for *The Bankruptcy Strategist* titled, "Split Second Circuit Narrows Bankruptcy Code's Settlement Payment Safe Harbor," Schulte Roth & Zabel of counsel Michael L. Cook details the Second Circuit's split decision in *In re Nine West LBO Securities Litigation*.

Two streams of payments to shareholders in a leveraged buyout (LBO), totaling \$4 million (Certificate Transfers) and \$1.101 billion (DTC Transfers), made through a paying agent bank, were "safe harbored under [Bankruptcy Code §546(e)], but "Payroll Transfers," totaling \$78 million, made to the debtor's "directors, officers and employee shareholders through its payroll program ... [were] not so shielded," from fraudulent transfer claims, held the Second Circuit in a split decision. *In re Nine West LBO Securities Litigation*, 2023 WL 8180356, *4 (2d Cir. Nov. 27, 2023) (2-1). The majority opinion turned on "the scope of the term 'financial institution' as defined in [Code] §101(22)(A)" when applied to the paying agent bank and its customer, the debtor here. *Id.* In the majority's view, "the definition encompasses bank customers [i.e., the debtor] only in transactions with the bank acting as their agent" *Id.*

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