

Corporate & Financial Weekly Digest

December 16, 2011 by Daren R. Domina

Bankruptcy Court Determines that TBA Contracts Do Not Qualify as Customer Claims

Co-authored by Avi Badash

The United States Bankruptcy Court for the Southern District of New York issued a memorandum decision in the Lehman Brothers Inc. (LBI) liquidation proceeding confirming the LBI trustee's determination that certain claims relating to TBA contracts do not qualify as customer claims against LBI's estate.

The United States Bankruptcy Court for the Southern District of New York issued a memorandum decision in the Lehman Brothers Inc. (LBI) liquidation proceeding confirming the LBI trustee's determination that certain claims relating to TBA contracts do not qualify as customer claims against LBI's estate. TBAs are bilateral agreements to buy or sell at a future date "to-be-announced" agency mortgage-backed securities (Agency MBS). The court ruled that since participants in the market for Agency MBS who invested in these TBA contracts on a delivery-versus-payment basis or receipt-versus-payment basis did not transfer any securities or cash to LBI to hold on their behalf, the participants never formed the sort of custodial relationship with LBI that is essential to customer status under the Securities Investor Protection Act of 1970, as amended (SIPA). The court ruled that the participants' accounts with LBI were used to facilitate trading activity that, while closely related to the market for Agency MBS securities, did not involve the retention by the broker-dealer of customer property that is a necessary part of the definition of a customer claims. The court reasoned that despite the fact that the contractual rights associated with TBA securities have notional value and may be traded, hedged and marked to market just like securities, the trading activity never involved the delivery or entrustment of any property to LBI. The court further provided that, although not essential to confirming the trustee's determination, TBA contracts are not mentioned as an example of a security and do not fit within the definition of the term "security" under SIPA and are thus not securities for the purposes of SIPA.

In re: Lehman Brothers Inc., No. 08-01420 (Bankr. S.D.N.Y. Dec. 8, 2011)

To read the memorandum decision, click [here](#).

Katten Muchin Rosenman LLP
Charlotte Chicago Irving London Los Angeles New York Washington, DC