

## TOUSA Appeal: 11th Circuit Reinstates Bankruptcy Court's Fraudulent Transfer Opinion as Against All Defendants

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TOUSA involved one of the largest fraudulent transfer litigations in bankruptcy history. The Bankruptcy Court agreed with the Unsecured Creditors' Committee that both the so-called "New Lenders" and the "Transeastern Lenders" received fraudulent transfers as part of a July 31, 2007 financing transaction. The District Court reversed in a scathing opinion, but today the 11th Circuit Court of Appeals has reversed the District Court and reinstated the Bankruptcy Court's opinion in its entirety. The opinion can be found [HERE](#). All that is left now is for the District Court to consider the issue of the remedies previously ordered by the Bankruptcy Court.

In a nutshell, TOUSA—a national homebuilder—incurred "rescue" first lien and second lien term debt in the aggregate amount of \$500 million in July 31, 2007. The loans from the New Lenders were guaranteed by TOUSA's subsidiaries and secured by the subsidiaries' substantial assets. The proceeds of the loans were primarily used to repay approximately \$421 million in debt incurred by an affiliate—Transeastern—whose debt had been guaranteed by TOUSA. The Bankruptcy Court issued an opinion of more than 180 pages concluding that the guarantees and collateral from TOUSA's subsidiaries were not issued in exchange for "reasonably equivalent value" and, therefore, should be avoided as fraudulent transfers. The Bankruptcy Court also concluded that the fraudulent transfers were incurred "for the benefit of" the Transeastern Lenders, such that the \$421 million (plus additional damages) should be recovered from the Transeastern Lenders as "transferees" of the fraudulent transfer.

On appeal, the District Court reversed, concluding that the Bankruptcy Court's definition of "reasonably equivalent value" was too narrow and severely criticizing the Bankruptcy Court for essentially adopting verbatim the Committee's proposed findings and conclusions. The District Court also concluded that the Transeastern Lenders were insulated from fraudulent transfer liability. Our series of blogs on the District Court's opinion and the subsequent appeal to the 11th Circuit Court of Appeals can be found [here](#), [here](#), [here](#), [here](#) and [here](#).

In reversing, the 41-page 11th Circuit opinion focuses in particular on three items. First, that the Bankruptcy Court's findings of fact were supported by the record and should not be reversed because they were not "clearly erroneous." Second, even if all of the elements of "value" argued by the New Lenders were present, they did not add up to "reasonably equivalent value" in the aggregate. Third, the Transeastern Lenders received the bulk of the proceeds of the loans made by the New Lenders and, therefore, the New Lenders' loans were made "for the benefit of" of the Transeastern Lenders.

The one item that the 11th Circuit did not address was the remedies ordered by the Bankruptcy Court, which included both avoidance of the TOUSA subsidiaries' guarantees and related collateral grants and recovery of the \$421 million from the Transeastern Lenders. The remedies also included substantial other damages such as disgorgement of professional fees. The Transeastern Lenders had argued that the Bankruptcy Court improperly awarded a double remedy by ordering recovery both from the New Lenders and from the Transeastern Lenders. The 11th Circuit declined to address this, instead remanding the matter back to the Bankruptcy Court for consideration of the issue of remedies.

Pundits and bloggers (including [Basis Points](#)) have previously expressed the concern that, if the TOUSA opinion were to be upheld, it could damage the ability of distressed borrowers to obtain "rescue financing" and, instead, force them into Chapter 11. A second concern was that lenders in the position of the Transeastern Lenders might need to reconsider the finality of repayment of their debts by an affiliate guarantor. Given the 11th Circuit's decision today, those concerns will now be put to the test over the next several years.

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