

tract, agreement, understanding, or operation of law, is—

- (1) part of the capital of the debtor; or
- (2) subordinated to the claims of any or all creditors.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 12, July 27, 1982, 96 Stat. 238.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 746(a) protects entities who deal in good faith with the debtor after the filing of the petition and before a trustee is appointed by deeming such entities to be customers. The principal application of this section will be in an involuntary case before the order for relief, because § 701(b) requires prompt appointment of an interim trustee after the order for relief.

Subsection (b) indicates that an entity who holds securities that are either part of the capital of the debtor or that are subordinated to the claims of any creditor of the debtor is not a customer with respect to those securities. This subsection will apply when the stockbroker has sold securities in itself to the customer or when the customer has otherwise placed such securities in an account with the stockbroker.

AMENDMENTS

1982—Pub. L. 97-222, § 12(c), substituted “claims” for “claim” in section catchline.

Subsec. (a). Pub. L. 97-222, § 12(a), substituted “enters into” for “effects, with respect to cash or a security,” struck out “with respect to such cash or security” wherever appearing, and substituted “the date of the filing of the petition” for “such date”, and “entered into” for “effected”.

Subsec. (b). Pub. L. 97-222, § 12(b), substituted “transferred to the debtor” for “has a claim for” in provisions preceding par. (1), and struck out “is” in par. (2).

§ 747. Subordination of certain customer claims

Except as provided in section 510 of this title, unless all other customer net equity claims have been paid in full, the trustee may not pay in full or pay in part, directly or indirectly, any net equity claim of a customer that was, on the date the transaction giving rise to such claim occurred—

- (1) an insider;
- (2) a beneficial owner of at least five percent of any class of equity securities of the debtor, other than—

(A) nonconvertible stock having fixed preferential dividend and liquidation rights; or

(B) interests of limited partners in a limited partnership;

(3) a limited partner with a participation of at least five percent in the net assets or net profits of the debtor; or

(4) an entity that, directly or indirectly, through agreement or otherwise, exercised or had the power to exercise control over the management or policies of the debtor.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 13, July 27, 1982, 96 Stat. 238.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 747 subordinates to other customer claims, all claims of a customer who is an insider, a five percent owner of the debtor, or otherwise in control of the debtor.

AMENDMENTS

1982—Pub. L. 97-222 substituted “the transaction giving rise to such claim occurred” for “such claim arose” in provisions preceding par. (1).

§ 748. Reduction of securities to money

As soon as practicable after the date of the order for relief, the trustee shall reduce to money, consistent with good market practice, all securities held as property of the estate, except for customer name securities delivered or reclaimed under section 751 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 748 requires the trustee to liquidate all securities, except for customer name securities, of the estate in a manner consistent with good market practice. The trustee should refrain from flooding a thin market with a large percentage of shares in any one issue. If the trustee holds restricted securities or securities in which trading has been suspended, then the trustee must arrange to liquidate such securities in accordance with the securities laws. A private placement may be the only exemption available with the customer of the debtor the best prospect for such a placement. The subsection does not permit such a customer to bid in his net equity as part of the purchase price; a contrary result would permit a customer to receive a greater percentage on his net equity claim than other customers.

§ 749. Voidable transfers

(a) Except as otherwise provided in this section, any transfer of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, or 549 of this title. For the purpose of such sections, the property so transferred shall be deemed to have been property of the debtor and, if such transfer was made to a customer or for a customer’s benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before seven days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or

(2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614; Pub. L. 97-222, § 14, July 27, 1982, 96 Stat. 238; Pub. L. 111-16, § 2(8), May 7, 2009, 123 Stat. 1607.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 749 indicates that if the trustee avoids a transfer, property recovered is customer property to any extent it would have been customer property but for the transfer. The section clarifies that a customer

who receives a transfer of property of the debtor is a creditor and that property in a customer's account is property of a creditor for purposes of the avoiding powers.

AMENDMENTS

2009—Subsec. (b). Pub. L. 111-16 substituted “seven days” for “five days” in introductory provisions.

1982—Pub. L. 97-222 substituted “(a) Except as otherwise provided in this section, any” for “Any”, and “but” for “except”, inserted “such property”, substituted “or 549” for “549, or 724(a)”, and added subsec. (b).

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-16 effective Dec. 1, 2009, see section 7 of Pub. L. 111-16, set out as a note under section 109 of this title.

§ 750. Distribution of securities

The trustee may not distribute a security except under section 751 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 750 forbids the trustee from distributing a security other than a customer name security. The term “distribution” refers to a distribution to customers in satisfaction of net equity claims and is not intended to preclude the trustee from liquidating securities under proposed 11 U.S.C. 748.

§ 751. Customer name securities

The trustee shall deliver any customer name security to or on behalf of the customer entitled to such security, unless such customer has a negative net equity. With the approval of the trustee, a customer may reclaim a customer name security after payment to the trustee, within such period as the trustee allows, of any claim of the debtor against such customer to the extent that such customer will not have a negative net equity after such payment.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 751 requires the trustee to deliver a customer name security to the customer entitled to such security unless the customer has a negative net equity. The customer's net equity will be negative when the amount owed by the customer to the stockbroker exceeds the liquidation value of the non-customer name securities in the customer's account. If the customer is a net debtor of the stockbroker, then the trustee may permit the customer to repay debts to the stockbroker so that the customer will no longer be in debt to the stockbroker. If the customer refuses to pay such amount, then the court may order the customer to endorse the security in order that the trustee may liquidate such property.

§ 752. Customer property

(a) The trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims and in priority to all other claims, except claims of the kind specified in section 507(a)(2) of this title that are attributable to the administration of such customer property.

(b)(1) The trustee shall distribute customer property in excess of that distributed under sub-

section (a) of this section in accordance with section 726 of this title.

(2) Except as provided in section 510 of this title, if a customer is not paid the full amount of such customer's allowed net equity claim from customer property, the unpaid portion of such claim is a claim entitled to distribution under section 726 of this title.

(c) Any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor, excluding property excluded under section 741(4)(B) of this title, shall be apportioned between the general estate and customer property in the same proportion as the general estate of the debtor and customer property were subject to such security interest.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614; Pub. L. 97-222, §15, July 27, 1982, 96 Stat. 238; Pub. L. 98-353, title III, §484, July 10, 1984, 98 Stat. 383; Pub. L. 109-8, title XV, §1502(a)(3), Apr. 20, 2005, 119 Stat. 216.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Section 752(a) requires the trustee to distribute customer property to customers based on the amount of their net equity claims. Customer property is to be distributed in priority to all claims except expenses of administration entitled to priority under §507(1). It is anticipated that the court will apportion such administrative claims on an equitable basis between the general estate and the customer property of the debtor.

Subsection (b)(1) indicates that in the event customer property exceeds customers net equity claims and administrative expenses, the excess pours over into the general estate. This event would occur if the value of securities increased dramatically after the order for relief but before liquidation by the trustee. Subsection (b)(2) indicates that the unpaid portion of a customer's net equity claim is entitled to share in the general estate as an unsecured claim unless subordinated by the court under proposed 11 U.S.C. 501. A net equity claim of a customer that is subordinated under section 747 is entitled to share in distribution under section 726(a)(2) unless subordinated under section 510 independently of the subordination under section 747.

Subsection (c) provides for apportionment between customer property and the general estate of any equity of the debtor in property remaining after a secured creditor liquidates a security interest. This might occur if a stockbroker hypothecates securities of his own and of his customers if the value of the hypothecated securities exceeds the debt owed to the secured party. The apportionment is to be made according to the ratio of customer property and general property of the debtor that comprised the collateral. The subsection refers to cash and securities of customers to include any customer property unlawfully converted by the stockbroker in the course of such a transaction. The apportionment is made subject to section 741(4)(B) to insure that property in a customer's account that is owed to the stockbroker will not be considered customer property. This recognizes the right of the stockbroker to withdraw money that has been erroneously placed in a customer's account or that is otherwise owing to the stockbroker.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-8 substituted “507(a)(2)” for “507(a)(1)”.

1984—Subsec. (a). Pub. L. 98-353, §484(a), substituted “customers' allowed” for “customers allowed”, “except claims of the kind” for “except claims”, and “such customer property” for “customer property”.