

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, 549, or 724(a) 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, 549, and 724(a) 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 commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or

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

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2618; Pub. L. 97-222, §17, July 27, 1982, 96 Stat. 240; Pub. L. 98-353, title III, §487, July 10, 1984, 98 Stat. 383; Pub. L. 111-16, §2(9), May 7, 2009, 123 Stat. 1607.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 764 of the House amendment is derived from the House bill.

SENATE REPORT NO. 95-989

Section 764 permits the trustee to void any transfer of property that, except for such transfer, would have been customer property, to the extent permitted under section 544, 545, 547, 548, 549, or 724(a).

HOUSE REPORT NO. 95-595

Section 764 indicates the extent to which the avoiding powers may be used by the trustee under subchapter IV of chapter 7. If property recovered would have been customer property if never transferred, then subsection (a) indicates that it will be so treated when recovered.

Subsection (b) prohibits avoiding any transaction that occurs before or within five days after the petition if the transaction is approved by the Commission and concerns an open contractual commitment. This enables the Commission to exercise its discretion to protect the integrity of the market by insuring that transactions cleared with other brokers will not be undone on a preference or a fraudulent transfer theory.

Subsection (c) insulates variation margin payments and other deposits from the avoiding powers except to the extent of actual fraud under section 548(a)(1). This facilitates prepetition transfers and protects the ordinary course of business in the market.

AMENDMENTS

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

1984—Subsec. (a). Pub. L. 98-353 substituted “any transfer by the debtor” for “any transfer”.

1982—Subsec. (a). Pub. L. 97-222, §17(a), substituted “but” for “except”, inserted “such property” after “trustee, and”, and substituted “shall be” for “is” wherever appearing.

Subsec. (b). Pub. L. 97-222, §17(b), substituted “order for relief” for “date of the filing of the petition”.

Subsec. (c). Pub. L. 97-222, §17(c), struck out subsec. (c) which provided that the trustee could not avoid a transfer that was a margin payment to or deposit with a commodity broker or forward contract merchant or was a settlement payment made by a clearing organization and that occurred before the commencement of the case.

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.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

§ 765. Customer instructions

(a) The notice required by section 342 of this title to customers shall instruct each customer—

(1) to file a proof of such customer's claim promptly, and to specify in such claim any specifically identifiable security, property, or commodity contract; and

(2) to instruct the trustee of such customer's desired disposition, including transfer under section 766 of this title or liquidation, of any commodity contract specifically identified to such customer.

(b) The trustee shall comply, to the extent practicable, with any instruction received from a customer regarding such customer's desired disposition of any commodity contract specifically identified to such customer. If the trustee has transferred, under section 766 of this title, such a commodity contract, the trustee shall transmit any such instruction to the commodity broker to whom such commodity contract was so transferred.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2619; Pub. L. 97-222, §18, July 27, 1982, 96 Stat. 240; Pub. L. 98-353, title III, §488, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

For Historical and Revision Notes for this section, see Historical and Revision Notes set out under section 766 of this title.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98-353 substituted “notice required by” for “notice under”.

1982—Subsec. (b). Pub. L. 97-222 substituted “commodity contract” for “commitment”.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

§ 766. Treatment of customer property

(a) The trustee shall answer all margin calls with respect to a specifically identifiable commodity contract of a customer until such time as the trustee returns or transfers such commodity contract, but the trustee may not make a margin payment that has the effect of a distribution to such customer of more than that to which such customer is entitled under subsection (h) or (i) of this section.