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2018 New York City Bankruptcy Conference

Avoidance Actions Update

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2018

AMERICAN BANKRUPTCY INSTITUTE
NEW YORK CITY CONFERENCE
MAY 24, 2018

AVOIDANCE ACTIONS UPDATE

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PHYSIOTHERAPY: RECENT DECISION OF INTEREST ON THE AMOUNT RECOVERABLE FOR FRAUDULENT TRANSFER AVOIDANCE LIABILITY

By Hon. Melanie L. Cyganowski (Ret.), former Chief Judge, U.S. Bankruptcy Court, EDNY, & current Chair, Bankruptcy Practice, Otterbourg P.C., Jennifer S. Feeney, Esq., Counsel, and Robert C. Yan, Esq.,Associate, Otterbourg P.C.[1]

To the extent liability for an avoidable transfer arises under Sections 544, 545, 547, 548, 549, 553(b), or 724(a) of the Bankruptcy Code, Section 550 of the Bankruptcy Code sets forth the statutory parameters for the trustee's or the debtor in possession's ability to recover (for the benefit of the estate) the property transferred or the value of such property. A question has arisen in connection with the application of Section 550 and the potential limits and magnitude of recovery. Specifically, are recoveries limited under Section 550? A bankruptcy court from the District of Delaware recently addressed this question.

In *Pah Litigation Trust v. Water Street Healthcare Partners, LP (In re Physiotherapy Holdings, Inc.)*, Adv. Pro. No. 15-51238, 2017 WL 5054308 (Bankr. D. Del. Nov. 1, 2017), the Bankruptcy Court (Judge Gross presiding) was asked to determine an issue of potential damages on a finding of liability for a fraudulent transfer under the Bankruptcy Code. The PAH Litigation Trust (the "Litigation Trust") argued that it was entitled to receive the full amount of damages, whereas, the Defendants argued that recovery was limited to the amount necessary to satisfy unsecured claims. In Defendants' view, Plaintiff was seeking a windfall, but the Bankruptcy Court respectfully differed.

The key legal question confronting the Bankruptcy Court was whether 11 U.S.C. § 550 limited the amount of recovery. For purposes of its decision, the Bankruptcy Court assumed, without deciding, that the Litigation Trust was successful on its fraudulent transfer claim of $248.6 million against the Defendants.

Ultimately, the Bankruptcy Court ruled that recoveries under Section 550 are not capped at the amount of a creditor's claims. According to the Bankruptcy Court, a contrary decision "would mean that if Defendants are in fact liable for the fraudulent transfer, they would keep most if not all of the transferred money." *Physiotherapy Holdings*, 2017 WL 5054308, at *7. Claims asserted under state fraudulent transfer law, however, may be capped at the amount required to satisfy creditors' claims.

Background

In 2012, Court Square Capital Partners II, LP ("Court Square") acquired Physiotherapy Holdings, Inc. and affiliates (collectively, "Physiotherapy") by way of a leveraged buyout transaction (the "LBO") that resulted in Physiotherapy emerging as the surviving entity. The LBO was financed by, among other things, a $100 million term loan and $210 million in senior unsecured notes (the "Senior Notes"). Water Street Healthcare Partners, LP, Wind Point Partners IV, LP, and their related entities (collectively, the "Defendants"), received $248.6 million from the LBO transaction.

In 2013, Physiotherapy voluntarily filed for chapter 11 relief. A plan of reorganization was confirmed that reduced existing debt and established a Litigation Trust. Under the plan, in exchange for releases, holders (the "Noteholders") of the Senior Note claims totaling $210 million received new common

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stock in the reorganized debtor and 50% of any recoveries obtained by the Litigation Trust. Under the plan, the remaining 50% of Litigation Trust recoveries went to Court Square.

In 2015, the Litigation Trust commenced an adversary proceeding against the Defendants, asserting fraudulent transfer claims and the recovery of the $248.6 million. In 2016, Physiotherapy was sold (the "Sale"), resulting in the Noteholders receiving approximately $282 million because of their equity interest in Physiotherapy.

Analysis: The Parties' Respective Positions

The Litigation Trust argued that it was entitled to recover the full amount of the fraudulent transfers notwithstanding the Sale and receipt by the Noteholders of approximately $282 million. In support of its position, the Litigation Trust relied on the language of § 548 to "avoid" a fraudulent transfer and Section 550 to recover the property "transferred" or the "value" of the property transferred (which was the $248.6 million that the Defendants received). The Litigation Trust also contended that under operative case law Section 550 does not cap the amount of damages recoverable, and that so long as the recovery provides some benefit to the estate, then the amount recoverable is not limited by statute.

By its terms, Section 550 provides, in part, that "to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of [the Bankruptcy Code], the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property" from the initial transferee or the entity for whose benefit the transfer was made or any immediate or mediate transferee of the initial transferee. 11 U.S.C. § 550(a).

Defendants' position was moored in Section 550's purported intent. They argued that the fraudulent transfer laws are intended to be remedial, not punitive, and that Section 550 requires that any recoveries are for the benefit of the estate, i.e., a benefit to the debtor's creditors. Accordingly, in Defendants' view any recovery may not be greater than the value of unpaid creditor claims and only awarded to address the creditor's alleged harm. Further, Defendants asserted that Section 550 provides for a partial avoidance because creditors are entitled to recover only what is necessary to satisfy the claim. The Defendants argued that allowing a recovery in excess of unpaid claims equals a windfall.

Analysis: The Bankruptcy Court's Decision

The Bankruptcy Court ruled that Section 550 does not cap recoveries, and that to rule otherwise "would mean that if Defendants are in fact liable for the fraudulent transfer, they would keep most if not all of the transferred money." *Physiotherapy Holdings*, 2017 WL 5054308, at *7. The Bankruptcy Court added that "it cannot countenance such an inequitable result if liability exists." *Id.*

In reaching its decision, the Bankruptcy Court reviewed a number of decisions on the issue from other jurisdictions, as the Third Circuit had yet to address the issue. *See e.g., In re JTS Corp.*, 617 F.3d 1102 (9th Cir. 2010); *Stalnaker v. DLC, Ltd.*, 376 F.3d 819 (8th Cir. 2004); *In re Leonard*, 125 F.3d 543 (7th Cir. 1997); *Clinton v. Acequia, Inc. (In re Acequia, Inc.)*, 34 F.3d 800 (9th Cir. 1994); *MC Asset Recover, LLC v. Southern Co.*, No. 06-cv-0417, 2006 WL 5112612 (N.D. Ga. Dec. 11, 2006); *In re Tronox*, 464 B.R. 606 (Bankr. S.D.N.Y. 2012).

The Bankruptcy Court also found support in the Supreme Court's decision in *Moore v. Bay*, 282 U.S. 4 (1931), which held that "a bankruptcy trustee could avoid a fraudulent transfer in its entirety, for the

benefit of the estate, and that recovery was not limited to the amount of the unsatisfied creditor's claim." *Physiotherapy Holdings*, 2017 WL 5054308, at *8; *see DLC*, 295 B.R. 593, 606 (B.A.P. 8th Cir. 2003) (finding *Moore* is codified by § 550). The Bankruptcy Court rejected Defendants' contention that "benefit of the estate" means "benefit of creditors" because the meaning of "estate" is far more than the interest of creditors. As the Bankruptcy Court framed the issue, "A trustee may thus avoid a transfer beyond the extent necessary to satisfy a creditor's claim. The Trustee may avoid the entire transfer for the 'benefit of the estate.'" *Physiotherapy Holdings*, 2017 WL 5054308, at *8 (quoting *MC Asset Recovery*, 2006 WL 5112612, at *4).

The Bankruptcy Court did not adopt Defendants' assumption that the Noteholders would necessarily receive a windfall from the recovery of the fraudulent transfers if the Litigation Trustee was successful on its claims. The fact that subsequent to confirmation of the plan, the Noteholders received $282 million from the Sale on account of the equity received under the terms of the Plan, does not affect how the Noteholders claims are calculated. The Bankruptcy Court found that the equity interest that the Noteholders received under the plan satisfied 40.3% of the Senior Note claims. Based upon that determination, the Bankruptcy Court concluded that the satisfaction of those claims would occur only if the Litigation Trust recovered approximately $250.8 million. The $250.8 million sum was calculated applying a 40.3% equity interest in the original claim of $210 million which resulted in the equity valued at $84.63 million and a deficit of $125.37 million.

The final point addressed by the Bankruptcy Court was the amount of recovery under the Pennsylvania Uniform Fraudulent Transfer Account ("PUFTA"), which the Litigation Trust relied upon as its statutory predicate for asserting its constructive fraudulent claims against the Defendants. Here, the parties agreed that under PUFTA, recovery was limited to the lesser of "the value of the asset transferred … or the amount necessary to satisfy the creditor's claim." *Physiotherapy Holdings*, 2017 WL 5054308, at *8 (quoting 12 Pa. Cons. Stat. § 5108(b)) Accordingly, even under PUFTA, based upon the above calculations, the Litigation Trust would need to recover twice the amount of $125.37 million because the Noteholders only had a 50% interest in any recovery by the Litigation Trust. As of the time of the Bankruptcy Court's decision, the Litigation Trust had already recovered $22.05 million, leaving $228.7 million as a final recovery.

<u>Thoughts</u>

1. Who benefits from fraudulent transfer recoveries?

According to *Physiotherapy*, under § 550, recoveries are for the benefit of the "estate" and not confined to any particular creditor. As a result, recoveries are not limited to the amount necessary to satisfy creditors' claims under § 550.

2. How are a creditor's damages calculated? Do recoveries under a plan reduce the amount recoverable in a subsequent avoidance action? If so, how?

According to *Physiotherapy*, while a creditor cannot receive more than its claim, plan treatment (and subsequent increases in the value of non-cash distributions) does not affect how a creditor's claim is calculated.

3. Is there a cap on damages recoverable in a fraudulent transfer action when a portion of the amount recovered may be used to pay other parties in interest? Equity holders?

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According to *Physiotherapy*, recoveries under § 550 are not capped so long as the recovery is for the benefit of the estate. However, a cap may be applicable if a claim that is asserted under applicable state law restricts the amount recoverable to the amount necessary to make *the creditors whole*. A party asserting a fraudulent transfer claim should be mindful of whether asserting such a claim under state law fraudulent transfer statutes or under federal law, as the cap issue may come into play (i.e., if the amount of the transfer sought to be avoided exceeds the amount necessary to pay the claims of all creditors, damages may be limited to the amount necessary to pay creditor claims under state law fraudulent transfer statutes).

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ABI NY Conference
May 2018
Avoidance Actions Update –
Extraterritoriality and Avoidance Actions
By Barbra R. Parlin, Holland & Knight LLP[2]

I. Presumption against Extraterritoriality:

A. "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. This principle represents a cannon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress' power to legislate. . . . [U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions. . .When a statute gives no clear indication of extraterritorial application, it has none." *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247, 254 (2010) (internal citations omitted).

B. *Morrison* involved a claim under section 10(b) of the Securities Exchange Act of 1934 ("'34 Act") and Rule 10b-5 promulgated thereunder. The securities at issue were not bought or sold in the US, nor were they listed on a U.S. exchange, although some of the fraud at issue in that case involved a subsidiary of the issuer in the U.S. Before *Morrison,* Second Circuit case law had permitted application of section 10(b) to securities listed in foreign markets when the conduct at issue had an effect on U.S. markets or investors (the "Effects Test") or the wrongful conduct occurred in the United States ("Conduct Test"). Other circuits applied versions of these tests.

C. In *Morrison*, the Supreme Court affirmed the lower courts' dismissal of the case, but in so doing it rejected the unpredictable and inconsistent application of section 10(b) resulting from application of the Effects and Conduct Tests. The *Morrison* majority opinion criticized lower court decisions that substituted "judicial-speculation-made-law – divining what Congress would have wanted if it had thought of the situation before the court" as demonstrating the need for the presumption against extraterritoriality. "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. at 261. With respect to the specific law at issue, the Court found that U.S. securities law applies to purchases or sales of securities listed on domestic U.S. exchanges or that take place within the United States. Purchases or sales of securities that are listed on exchanges outside the United States and which take place outside the United States are not subject to claims under section 10(b) of the '34 Act or Rule 10b-5 promulgated thereunder.

D. Notwithstanding *Morrison*, lower courts still reach different conclusions when applying the presumption in a particular case depending on the facts of the case.

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II. Avoidance Actions and Presumption Against Extraterritoriality

A. Before *Morrison*, there was a split of authority as to the extraterritorial application of U.S. avoidance law.

1. Some courts simply applied the presumption against extraterritoriality, but some courts also considered the "effects" of the conduct at issue in the U.S. in order to find an exception to the presumption. *Compare In re Midland Euro Exchange Inc.,* 347 B.R. 708, 715-720 (Bankr. C.D. CA 2006) (applying tests, but finding that trustee could not avoid transfer that occurred outside the United States pursuant to section 548); I*n re Maxwell Communications Corp. plc*., 186 B.R. 807, 816 (S.D.N.Y. 1995) (applying presumption, finding that Congress did not intend for section 548 to apply to extraterritorial transfers).

2. The *Maxwell* court held that "if the legislative purpose is not unmistakably clear, any ambiguity in the statute must be resolved in favor of refusing to apply the law to events occurring outside the United States." *Id*. at 818. It also found that the mere fact that the term "property of the estate" is used in both section 541 of the Bankruptcy Code, which does apply extraterritorially, and in section 547 does not mean that Congress intended for the Bankruptcy Code's avoidance provisions (Sections 547 and 548) to be applied extraterritorially. To support this argument, the Court relied on *FDIC v. Hirsch (In re Colonial Realty Co.),* 980 F.2d 125, 131 (2d Cir. 1992), which held that fraudulently transferred property does not become property of the estate until the transfer is avoided and recovered.

3. By contrast, the Fourth Circuit read section 548 as manifesting Congressional intent to apply that section extraterritorially in all cases. It based this reading on the fact that section 541 defines property of the estate to include all legal or equitable interests of the debtor in property wherever located, while section 548 permits the avoidance of transfers of interests of the debtor in property. Since a trustee is permitted to avoid a transfer concerning anything that would otherwise have been property of the estate but for such transfer, and that the estate includes all of the debtor's property wherever it is located, the *French* Court determined that Congress likewise intended that the avoidance powers of section 548 (and 547) were intended to reach transfers outside the United States. *In re French*, 440 F.3d 145,151-152 (4th Cir. 2006).

B. Since *Morrison*, courts remain split on the question of whether Congress intended for the Bankruptcy Code's avoidance provisions to apply extraterritorially:

1. Under *Morrison*, court must first consider whether the presumption against extraterritoriality has been rebutted by determining if Congress intended for the statute at issue to apply extraterritorially. If the court determines that the statute applies extraterritorially, then the inquiry is complete. If the court determines that the statute is not supposed to apply extraterritorially, then the court must then consider whether the application of the statute to the litigation at issue would be extraterritorial. *In re Arcapita B.S.C.(c),* 575 B.R. 229, 243 (Bankr. S.D.N.Y. 2017).

2. In *Picard v. Bureau of Labor Ins. (In re BLMIS),* 480 B.R. 501 (Bankr. S.D.N.Y. 2012), the Madoff trustee sought to avoid a transfer made to an investor in Fairfield Sentry, which in turn had invested that investor's money in BLMIS, i.e., a subsequent transferee. The

Bankruptcy Court for the Southern District of New York, Lifland J, held that in determining whether a transfer is extraterritorial, the court must focus on where the transfer from the debtor originated. Since the transfer from BLMIS at issue in that case originated in New York, it was not extraterritorial at all, so the trustee could assert a claim against a subsequent transferee pursuant to section 550, even though that person had received its transfer in Taiwan from Fairfield Sentry, a Cayman transferor. That being said, the Bankruptcy Court also held that, in any case, Congress had manifested its intent for section 550 to apply extraterritorially.

3. Two years later, in *Sec. Investor Protection Corp. v. BLMIS (In re BLMIS),* 513 B.R. 222 (S.D.N.Y. 2014) (the "ET Decision"), the District Court for the Southern District of New York, reached a conclusion opposite Judge Lifland's earlier decision. In a ruling applicable to a group of adversary proceedings that had been withdrawn from the bankruptcy court, the Court held that in determining whether a transfer is extraterritorial, the focus should be on the transfer at issue, in that case the *subsequent* transfer to the defendant, and not on the initial transfer from the debtor. The Court rejected Judge Lifland's earlier finding that section 550(a) was intended to be applied extraterritorially. Instead, it held that section 550(a)(2), which provides for the recovery of avoided transfers from subsequent transferees, does *not* apply extraterritorially. The Court further found that international comity considerations warranted dismissal of adversary proceedings seeking to avoid subsequent transfers between two foreign parties that occurred outside the U.S.

4. The ET Decision did not dismiss any adversary proceedings, but rather remanded the cases to the Bankruptcy Court for further proceedings. Thereafter, subsequent transferees whose cases were involved in the ET Decision as well as many similarly situated defendants moved to dismiss on the grounds set forth in that opinion, while the trustee sought leave to amend the complaints to add facts showing U.S. connections. The Bankruptcy Court,: (i) dismissed on international comity grounds the complaints/claims seeking to avoid subsequent transfers made by two offshore funds that had themselves commenced insolvency proceedings in foreign jurisdictions, without reaching the issue of extraterritoriality; (ii) dismissed on extraterritoriality grounds complaints to avoid subsequent transfers that were made by foreign entities using foreign bank accounts; (iii) denied the Trustee leave to amend because it found the additional allegations proffered unavailing; and (iv) otherwise resolved the motions depending on whether the facts pleaded were sufficient to tie the transfers at issue to the U.S. *See Sec. Investor Protection Corp. v. BLMIS (In re BLMIS),* 2016 WL 6900689, *1 (Bankr. S.D.N.Y. Nov. 22, 2016).

5. The Bankruptcy Court further held that in determining whether the presumption against extraterritoriality has been rebutted in a particular subsequent transfer case, the locations of the bank accounts from which the transfer was made and received and the location or residence of the transferor and the transferee are the only relevant factors to be considered. Notably, the Bankruptcy Court held that the use of a correspondent bank account in the U.S., by itself, was not a sufficient basis to rebut the presumption against extraterritoriality. So, if the transfer is by from a U.S. account to either a U.S. or a foreign account (excluding correspondent accounts), then this fact rebuts the presumption against extraterritoriality. Conversely, a transfer by U.S. residents or foreigners that occurs wholly outside the U.S. does not rebut the presumption and will not be subject to avoidance under U.S. law. *Id*., 2016 WL 6900689, *25.

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6. In *In re Lyondell Chemical Co.*, 543 B.R. 127, 151-155 (Bankr. S.D.N.Y. 2016), the Bankruptcy Court for the Southern District of New York generally adopted the Fourth Circuit's reasoning in *French*, finding that Congress intended the Bankruptcy Code's avoidance provisions to apply extraterritorially in all cases. Among other things, the *Lyondell* court reasoned that the avoidance provisions (including section 548) must have been intended to apply extraterritorially to give effect to section 541(a)(3) of the Bankruptcy Code, which makes any interest in property that a trustee recovers pursuant to section 550 property of the estate. The court reasoned that "[i]t would be inconsistent (such that Congress could not have intended) that property located anywhere in the world could be property of the estate once recovered under section 550, but that a trustee could not avoid the fraudulent transfer and recover that property if the center of gravity of the fraudulent transfer were outside of the United States." *Id*. at 154-155. The *Lyondell* court distinguished the holding of *Colonial Realty,* that fraudulently transferred property does not become property of the estate until the transfer is avoided and recovered, on the ground that this was simply a matter of timing and did not indicate Congressional intent not to permit fraudulent transferred property to be recovered on an extraterritorial basis. The Bankruptcy Court for the District of Delaware reached a similar conclusion in *In re FAH Liquidating Corp*., 572 B.R. 117, 125-126 (Bankr. D. Del. 2017) (adopting *Lyondell's* reasoning and holding that avoidance provisions apply extraterritorially).

7. By contrast, other courts, including courts in the Southern District of New York, have rejected the *French/Lyondell* approach and held that the Bankruptcy Code's avoidance provisions do not apply extraterritorially. *See, e.g., In re Sherwood Investments Overseas Ltd.,* 2016 WL 5719450 (M.D. Fl. Sept. 30, 2016); *In re Ampal –American Israel Corp*., 562 B.R. 601, 612-614 (Bankr. S.D.N.Y. 2017) (applying presumption, finding that Congress did not intend for section 547 to apply extraterritorially, and rejecting reasoning of Judge Lifland in BLMIS, *Lyondell* and *French* on this issue); *In re CIL Limited*, ___ B.R. ___, 2018 WL 329893, *24-29 (Bankr. S.D.N.Y. Jan. 5, 2018) (analyzing law, finding that avoidance statutes do not apply extraterritorially).

8. Notably, the *Ampal* court agreed with Judge Lifland (and rejected the District Court's contrary view) that in determining whether a particular case involves the extraterritorial application of section 547, the focus should be on the initial transfer, as this is the transfer that the trustee must avoid in order to impose liability on any party under section 550. *See Ampal*, 562 B.R. at 613.

9. In *Arcapita Bank*, 575 B.R. at 244-249, the Bankruptcy Court held that a transfer that was sent to and from correspondent bank accounts held by the debtor and the defendant in New York sufficiently "touched and concerned" the United States so as not to involve an extraterritorial application of section 547. The court distinguished the transfers at issue, which were initial transfers to defendants received in New York, from those at issue in the District Court decision in *Madoff*, which involved subsequent transfers by foreign entities to foreign entities that happened via a correspondent bank account in New York, and were a step removed from the initial transfer.

10. By contrast, the *CIL* court found that the transfer at issue in that case (the issuance of shares) did not sufficiently "touch and concern" the Unites States to be deemed a domestic

transfer. Although the complaint alleged that the transfer was orchestrated from New York and that the debtor had retained advisors in NY who were involved in negotiating and documenting the transaction from there, this was not a sufficient nexus to the United States given that the transfer was entirely by and among foreign entities, the transfer took place entirely outside the U.S., the transfer was subject to UK law and any alleged harm was exclusively to foreign creditors. As such, the *CIL* Court found that the conduct was entirely outside the United States and could not be the subject of a U.S. avoidance action under the Bankruptcy Code. *CIL*, 2018 WL 329893 at *29-31.

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Preemption and Section 546(e)

Michael Luskin
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The Second Circuit's opinion in Tribune lays out the arguments *pro* and *con* whether Section 546(e) of the Bankruptcy Code preempts creditors' constructive fraudulent conveyance claims under state law, where the payments to selling shareholders were made through financial institutions of the kind specified in the safe harbor provisions of 546(e). The Court said yes, it does. The procedural history and basis for the holding are set out in the outline that follows. While Tribune settled the preemption issue in the Second Circuit (see, e.g., the later disposition of the Lyondell case), courts elsewhere have not all been persuaded. See, e.g., the Delaware Bankruptcy Court's decision in Physiotherapy, which followed the New York Bankruptcy Court's decision in Lyondell.

For discussion now is whether preemption really matters any longer in light of the Supreme Court's decision in Merit v. FTI. Merit did not discuss preemption – it held that a proper reading of Section 546(e) allows the trustee to challenge the transfer of funds from the debtor to the selling shareholders without regard to the intermediate transfers through the banks involved in the transaction – that is, the entities presumably entitled to avail themselves of 546(e)'s safe harbor. As a result, trustees can now bring both constructive and actual fraudulent conveyance claims against selling shareholders (at least those that are not financial institutions) under both state and federal (bankruptcy) law free of the 546(e) hurdle.

Questions and comments about this appear at the end of the outline.

I. Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d Cir. 2016)

A. Transfers under attack by the litigation trustee were payments to selling shareholders through financial intermediaries (banks) in connection with a failed leveraged buyout.

B. During the bankruptcy proceedings, the UCC brought actual fraudulent conveyance claims under Bankruptcy Code Section 548 against various participants in and beneficiaries of the leveraged buyout.

C. Two groups of creditors – the Retirees and the Noteholders – brought their own constructive fraudulent conveyance actions under state law in various state and federal courts.

1. The Retirees and Noteholders first sought an order from the Bankruptcy Court (a) holding that once the two-year statute of limitations under Bankruptcy Code Section 546(a) expired, they were free to bring their state law claims; and (b) lifting the automatic stay to permit them to file their complaints.

2. The Bankruptcy Court lifted the stay but expressly refrained from determining whether the individual creditors had standing to bring the claims or whether their claims were preempted by Section 546(e) of the Bankruptcy Code.

3. Under the Tribune plan, the Retirees and Noteholders were allowed to pursue their state law constructive fraud claims, and the Litigation Trust was established to pursue

the actual fraud claims. All claims were eventually consolidated and transferred to the Southern District of New York in a single Multidistrict Litigation proceeding.

D. The defendants (Tribune's selling shareholders) moved to dismiss and the District Court granted the motion, holding that the automatic stay deprived the plaintiffs of standing for so long as the Litigation Trustee was seeking to avoid the same transfers (*i.e.*, the payments to the selling shareholders).

E. But, the District Court rejected the shareholders' argument that Section 546(e) preempts a trustee from exercising its avoidance powers under Section 544 to avoid transfers to the financial intermediaries specified in Section 546(e). The District Court held: (1) Section 546(e) applies only to a trustee; and (2) Congress declined to extend Section 546(e) to state law fraudulent conveyance claims brought by creditors.

F. The Court of Appeals held:

1. Plaintiffs' claims were not barred by Section 362's automatic stay, since plaintiffs had sought and obtained appropriate orders from the Bankruptcy Court granting them relief from the stay to file and coordinate their actions.

2. Plaintiffs' claims are preempted by Section 546(e).

   a. Federal law prevails when it conflicts with state law. Constitution, Article VI, Clause 2; Arizona v. U.S., 132 S.Ct. 2492, 2500 (2012).

   b. The Court of Appeals rejected the plain language argument that Section 546(e) refers only to actions by a trustee not by a creditor: Where there are multiple reasonable interpretations of a statutory scheme "a preemptive effect may be inferred where it is not expressly provided."

   c. Implied preemption occurs "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

   d. The Court recognized the presumption against implied preemption – it "weighs most heavily where the particular regulatory area is traditionally the domain of state law" – and recognized that "preemption is always a matter of congressional intent, even where that intent must be inferred."

   e. The Court held that "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights" and that the state law claims were preempted upon filing. They were also stayed by federal law, and if they "reverted" to the creditors when the stay was lifted or the case is concluded, that would also be by federal law. A trustee's claims under Section 544 arise under federal law and have their own substantive elements, measure of damages, statute of limitations, and rules for distribution; and once resolved, bar further action by creditors – creditors are bound by the outcome of the

trustee's action. Section 546(e) also relates to securities markets, which are themselves subject to heavy federal regulation.

f. The Court concluded that there is "No measurable concern about federal intrusion into traditional state domains." The Court said it was then free to infer congressional intent from the Code.

g. The Court did not focus on Section 546(e)'s use of the word "trustee." It said plaintiffs' theory rests on (i) the "reversion" of the constructive fraudulent conveyance claims to creditors once the two-year statute of limitations expires and the trustee has failed to bring an action; and (ii) the claims were stayed by Section 362(a) but not extinguished, and could be asserted once the stay was lifted.

h. It also found "ambiguities, anomalies, and conflicts" in and among the various relevant Bankruptcy Code sections.

   (A) Code is silent on "reversion" of claims to creditors under these circumstances.

   (B) It's anomalous to allow trustees to prevail on intentional fraud claims and to recover the transfer (or its value) while at the same time allowing creditors later on to attack the same transaction on constructive fraud grounds and then recover the same transfer or value. This would guarantee piecemeal litigation.

   (C) The Court rejected the notion that this is the result of a balance struck by Congress between streamlining bankruptcy proceedings and providing for certainty for securities transactions. There is no supporting legislative history.

   (D) The Court cites numerous cases that it believes establish that it is not clear that creditors' state law claims all fall within the scope of Section 544(b)(1). And, even if they do and then "revert" to creditors (after the statute of limitations expires or the case is concluded), it is not clear that they revert in unaltered form.

   (E) This lack of clarity and certainty could well lead to the conclusion that creditors' rights are cut off upon the bankruptcy filing – except for their right, collectively, to share in any distribution on account of the trustee's avoidance actions.

   (F) Finally, the Court found that plaintiffs' claims conflict with Section 546(e); and in particular, with the need for certainty and finality in securities transactions. It found this need to be paramount and Section 546(e)'s reach to be broad – it "protects transactions rather than firms," and Congress intended to protect these transactions (including leveraged buyouts) from attack as constructive fraudulent conveyances.

G. Certiorari Petition Pending

1. Plaintiffs filed a petition for certiorari with the Supreme Court on September 9, 2016. The first question presented is "Whether the Second Circuit correctly held – contrary to several other courts of appeals – that the presumption against federal preemption of state law does not apply in the bankruptcy context."

2. Plaintiffs put forward these reasons for granting certiorari:

   a. To reverse the Second Circuit's rulings that the "presumption against preemption" does not apply in the bankruptcy context; and that bankruptcy is a "wholesale preemption of state creditors' rights laws."

   b. To resolve the split among circuits over the role financial institutions must play in a challenged transfer in order to fall within the 546(e) safe harbor.

   c. To define the role courts play in altering – or not – the balance between competing policies struck by the statute. The start must be the language of the statute not the underlying policy reasons for the statute, and it is not for courts to rebalance competing policies.

   d. Other courts disagree with the Second Circuit's decision:

      (i) Before Tribune: Lyondell Chem. Co., 503 B.R. 348 (Bankr.S.D.N.Y.2014) (no implied preemption; the Court later reversed itself after Tribune came down).

      (ii) After Tribune: Physiotherapy Holdings, 2016 WL 3611831 (Bankr.D.Del.2016) (following Lyondell, on very different facts).

   e. The Second Circuit's decision conflicts with the Supreme Court's prior cases that require close attention first to the text of the statute, not with what it perceives as Congress's "primary purpose":

      (i) Law v. Siegel, 134 S.Ct. 1188 (2014) (rejecting homestead exemption as producing inequitable results and deferring to the policy balance set by Congress);

      (ii) RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065 (2012) (construing Code provision to allow credit bidding by lienholders and declining to choose among policy agreements);

      (iii) Hall v. United States, 132 S.Ct. 1882 (2012) (construing tax liability "incurred by the state" under Code Section 503 and rejecting argument that its construction conflicted with Congressional intent to provide debtors with tax relief).

3. The defendants of course disagree. They say:

a. The Court of Appeals correctly applied preemption doctrines and statutory interpretation rules.

b. Preemption can be implied from the strong federal presence in creditors' rights (*i.e.*, through the Bankruptcy Code).

c. Section 546(e) strikes a balance between two important federal concerns: bankruptcy and securities regulation, and there is no long history of state regulation of fraudulent conveyance claims in national securities markets involving debtors in bankruptcy cases.

d. And, since "the trustee" is the representative of creditors in a bankruptcy case, the use of the word "trustee" in 546(e) is not the strong "textual cue" that the petitioners say it is.

e. Finally, there is no statutory support for the "reversion" of claims to creditors (except upon dismissal of the case) or for the reversion of claims unaffected by what happens to them while subject to bankruptcy administration; the claims are part and parcel of the trustee's job to collect and distribute assets and value to all creditors.

4. Petitioners recently filed a supplemental brief with the Supreme Court arguing that In Re Northington, 876 F.3d 1302 (11th Cir. Dec. 11, 2017), "deepens the Circuit split" on the question of whether the presumption against preemption applies in the bankruptcy context.

(A) Northington involved the relationship between Section 541(a) of the Bankruptcy Code (broadly defining property of the estate) and Georgia's "pawn" statute (providing for the forfeiture of pawned property to the pawnbroker if the pawned property is not redeemed within a statutorily prescribed grace period) and presented the question of whether the pawnbroker's claim to pawned property (the debtor's car) in the debtor's chapter 13 case (filed before the redemption period ran) was a "mere claim" or was a claim for the car itself.

(B) The Court of Appeals held that the car was part of the estate when the case was filed, but that Georgia's pawn statute continued to apply and once the applicable grace period (as extended by Section 108) expired, the car "dropped out" of the estate. The Court noted that federal law says what property is in the estate, but that state law defines the debtor's rights in that property. It acknowledged Congress's power to supersede state property law in bankruptcy cases, and noted that the question was whether Congress exercised it here. The Court also noted that absent clear statutory directive to the contrary, courts interpreting the Bankruptcy Code must assume the validity of state law (*i.e.*, Georgia's pawn statute), and that if the Court were to read the Bankruptcy Code to displace state law, the federal purpose to do so must be "clear and manifest."

(C) Finally, the Court noted the possibility of preemption by implication, but only when the implication is unambiguous. Finding no such unambiguous implication here, the Court said that Georgia's pawn statute continued to apply, and the debtor's right to the car ended.

(D) Petitioners laud the 11th Circuit's analysis, saying it properly looked for clear evidence of intent to preempt in light of the presumption against preemption, and contrasted this with its view of what the Second Circuit did in Tribune – *i.e.*, it failed to consider the presumption against preemption.

(E) The respondents, of course, take a different view in their Supplemental Brief. They believe the Second Circuit did consider presumption but just came to a different conclusion based on the greater state regulation of pawned property (in Northington) than fraudulent conveyances and securities markets (in Tribune). The respondents also say the Code's "text, structure and purpose make unmistakably clear that Congress did not intend to permit creditors to 'end run' Section 546(e)…."

The certiorari petition is to be considered at the Court's March 23 conference and is likely to have been acted on before the ABI NYC Conference date (May 24). Keep track here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-317.html

II. Comments and Questions

A. Should the Supreme Court grant certiorari in Tribune?

B. Will the Supreme Court follow the approach just taken in Merit and read Section 546(e) literally – "trustee" means "trustee" and only actions by a trustee are barred?

C. Does any of this matter, since Merit makes clear that the trustee may skip over the intermediate bank-to-bank (financial institution) transfers and go after the ones that really matter: constructively fraudulent transfers from debtor to selling shareholders? The Tribune trustee will no doubt seek to amend his complaint to include them. Of what relevance would preemption be?

D. Or would it continue to be relevant? What about the trustee's legitimate need to reach peace with selling shareholders in order to confirm a reorganization plan (as opposed to a liquidating plan)? Shouldn't control of all claims, including state law claims not barred by Section 546(e) or the two-year statute of limitations, be controlled by a single entity – the trustee? Can't the trustee sue on and settle all of them?

E. And what about this "reversion" argument? The statute is silent on what goes back to creditors at the expiration of the statute of limitations or the end of the case.

F. What if the trustee abandons or assigns all his leveraged buyout fraudulent conveyance claims to creditors? Couldn't creditors then sue everyone, including the financial institutions who were transferees?

5210442.1

ABI NY Conference
May 2018
Avoidance Actions Update –
Proposed Adoption of Uniform Voidable Transactions Act ("UVTA") in New York
By Jonathan L. Flaxer, Golenbock Eiseman Assor Bell & Peskoe LLP

STATUS:

- The UVTA passed the New York State Assembly in February 6, 2018. The Senate referred its version of the UVTA to the Judiciary Committee on January 3, 2018.

- The UTVA had been enacted in the following States: AL, AR, CA, GA, ID, IN, IA, KY, MI, MN, NM, NC, ND, PA, UT, VT, WA.

- In addition to NY, it is currently pending in the following States: FL, NJ, RI, SC, WV.

SUMMARY OF MOST SIGNIFICANT CHANGES FROM CURRENT LAW:

- Choice of Law: Governed by law of jurisdiction where debtor located when transfer made. For individuals: place of residence. For entities: place of business or, if multiple locations, Chief Executive Office.

- Nomenclature: Eliminates "fraudulent" in favor of "voidable".

- Definition of Insolvency: Fair valuation of assets *and* liabilities. Presumed insolvent if fail to pay debts as come due, but debts subject to *bona fide* dispute disregarded. Special definition for partnerships eliminated.

- Constructively Voidable: Must show one of variants of insolvency plus lack of reasonably equivalent value, but lack of good faith no longer an element of affirmative claim.

- Burden: Standard for all sections is "preponderance of the evidence." Plaintiff has burden on (i) value of asset transferred and (ii) that defendant was the initial transferee, person for whose benefit transfer made, or was immediate or mediate transferee. Defendant has burden on reasonably equivalent value and, if defendant is subsequent transferee, good faith and taking for value.

- Insider Presumption: Transfer to insider for antecedent debt while debtor is insolvent and insider had reasonable cause to know of insolvency, is voidable.

5210442.1

STATE OF NEW YORK

1853--A

2017-2018 Regular Sessions

IN ASSEMBLY

January 13, 2017

Introduced by M. of A. WEINSTEIN -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the debtor and creditor law, the civil practice law and rules, the estates, powers and trusts law and the workers' compensation law, in relation to enacting the "uniform voidable transactions act"; and to repeal certain provisions of the debtor and creditor law relating to fraudulent conveyances

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Short title. This act shall be known and may be cited as the "uniform voidable transactions act".

S 2. Article 10 of the debtor and creditor law is REPEALED and a new article 10 is added to read as follows:

ARTICLE 10

UNIFORM VOIDABLE TRANSACTIONS ACT

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

S 270. DEFINITIONS. AS USED IN THIS ARTICLE:

(A) "AFFILIATE" MEANS:

(1) A PERSON THAT DIRECTLY OR INDIRECTLY OWNS, CONTROLS OR HOLDS WITH POWER TO VOTE, TWENTY PERCENT OR MORE OF THE OUTSTANDING VOTING SECURITIES OF THE DEBTOR, OTHER THAN A PERSON THAT HOLDS THE SECURITIES:

(I) AS A FIDUCIARY OR AGENT WITHOUT SOLE DISCRETIONARY POWER TO VOTE

THE SECURITIES; OR
(II) SOLELY TO SECURE A DEBT, IF THE PERSON HAS NOT IN FACT EXERCISED THE POWER TO VOTE;
(2) A CORPORATION TWENTY PERCENT OR MORE OF WHOSE OUTSTANDING VOTING SECURITIES ARE DIRECTLY OR INDIRECTLY OWNED, CONTROLLED OR HELD WITH POWER TO VOTE, BY THE DEBTOR OR A PERSON THAT DIRECTLY OR INDIRECTLY OWNS, CONTROLS OR HOLDS, WITH POWER TO VOTE, TWENTY PERCENT OR MORE OF THE OUTSTANDING VOTING SECURITIES OF THE DEBTOR, OTHER THAN A PERSON THAT HOLDS THE SECURITIES:
(I) AS A FIDUCIARY OR AGENT WITHOUT SOLE DISCRETIONARY POWER TO VOTE THE SECURITIES; OR
(II) SOLELY TO SECURE A DEBT, IF THE PERSON HAS NOT IN FACT EXERCISED THE POWER TO VOTE;
(3) A PERSON WHOSE BUSINESS IS OPERATED BY THE DEBTOR UNDER A LEASE OR OTHER AGREEMENT, OR A PERSON SUBSTANTIALLY ALL OF WHOSE ASSETS ARE CONTROLLED BY THE DEBTOR; OR
(4) A PERSON THAT OPERATES THE DEBTOR'S BUSINESS UNDER A LEASE OR OTHER AGREEMENT OR CONTROLS SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS.
(B) "ASSET" MEANS PROPERTY OF A DEBTOR, BUT THE TERM DOES NOT INCLUDE:
(1) PROPERTY TO THE EXTENT IT IS ENCUMBERED BY A VALID LIEN;
(2) PROPERTY TO THE EXTENT IT IS GENERALLY EXEMPT UNDER NON-BANKRUPTCY LAW; OR
(3) AN INTEREST IN PROPERTY HELD IN TENANCY BY THE ENTIRETY TO THE EXTENT IT IS NOT SUBJECT TO PROCESS BY A CREDITOR HOLDING A CLAIM AGAINST ONLY ONE TENANT.
(C) "CLAIM", EXCEPT AS USED IN "CLAIM FOR RELIEF", MEANS A RIGHT TO PAYMENT, WHETHER OR NOT THE RIGHT IS REDUCED TO JUDGMENT, LIQUIDATED, UNLIQUIDATED, FIXED, CONTINGENT, MATURED, UNMATURED, DISPUTED, UNDISPUTED, LEGAL, EQUITABLE, SECURED OR UNSECURED.
(D) "CREDITOR" MEANS A PERSON THAT HAS A CLAIM.
(E) "DEBT" MEANS LIABILITY ON A CLAIM.
(F) "DEBTOR" MEANS A PERSON THAT IS LIABLE ON A CLAIM.
(G) "ELECTRONIC" MEANS RELATING TO TECHNOLOGY HAVING ELECTRICAL, DIGITAL, MAGNETIC, WIRELESS, OPTICAL, ELECTROMAGNETIC OR SIMILAR CAPABILITIES.
(H) "INSIDER" INCLUDES:
(1) IF THE DEBTOR IS AN INDIVIDUAL:
(I) A RELATIVE OF THE DEBTOR OR OF A GENERAL PARTNER OF THE DEBTOR;
(II) A PARTNERSHIP IN WHICH THE DEBTOR IS A GENERAL PARTNER;
(III) A GENERAL PARTNER IN A PARTNERSHIP DESCRIBED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH; OR
(IV) A CORPORATION OF WHICH THE DEBTOR IS A DIRECTOR, OFFICER, OR PERSON IN CONTROL;
(2) IF THE DEBTOR IS A CORPORATION:
(I) A DIRECTOR OF THE DEBTOR;
(II) AN OFFICER OF THE DEBTOR;
(III) A PERSON IN CONTROL OF THE DEBTOR;

(IV) A PARTNERSHIP IN WHICH THE DEBTOR IS A GENERAL PARTNER;
(V) A GENERAL PARTNER IN A PARTNERSHIP DESCRIBED IN SUBPARAGRAPH (IV) OF THIS PARAGRAPH; OR
(VI) A RELATIVE OF A GENERAL PARTNER, DIRECTOR, OFFICER OR PERSON IN CONTROL OF THE DEBTOR;
(3) IF THE DEBTOR IS A PARTNERSHIP:
(I) A GENERAL PARTNER IN THE DEBTOR;
(II) A RELATIVE OF A GENERAL PARTNER IN, A GENERAL PARTNER OF OR A PERSON IN CONTROL OF THE DEBTOR;
(III) ANOTHER PARTNERSHIP IN WHICH THE DEBTOR IS A GENERAL PARTNER;
(IV) A GENERAL PARTNER IN A PARTNERSHIP DESCRIBED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH; OR
(V) A PERSON IN CONTROL OF THE DEBTOR;
(4) AN AFFILIATE, OR AN INSIDER OF AN AFFILIATE AS IF THE AFFILIATE WERE THE DEBTOR; AND
(5) A MANAGING AGENT OF THE DEBTOR.
(I) "LIEN" MEANS A CHARGE AGAINST OR AN INTEREST IN PROPERTY TO SECURE PAYMENT OF A DEBT OR PERFORMANCE OF AN OBLIGATION, AND INCLUDES A SECURITY INTEREST CREATED BY AGREEMENT, A JUDICIAL LIEN OBTAINED BY LEGAL OR EQUITABLE PROCESS OR PROCEEDINGS, A COMMON-LAW LIEN, OR A STATUTORY LIEN
(J) "ORGANIZATION" MEANS A PERSON OTHER THAN AN INDIVIDUAL.
(K) "PERSON" MEANS AN INDIVIDUAL, ESTATE, PARTNERSHIP, ASSOCIATION, TRUST, BUSINESS OR NONPROFIT ENTITY, PUBLIC CORPORATION, GOVERNMENT OR GOVERNMENTAL SUBDIVISION, AGENCY OR INSTRUMENTALITY, OR OTHER LEGAL OR COMMERCIAL ENTITY.
(L) "PROPERTY" MEANS ANYTHING THAT MAY BE THE SUBJECT OF OWNERSHIP.
(M) "RECORD" MEANS INFORMATION THAT IS INSCRIBED ON A TANGIBLE MEDIUM OR THAT IS STORED IN AN ELECTRONIC OR OTHER MEDIUM AND IS RETRIEVABLE IN PERCEIVABLE FORM.
(N) "RELATIVE" MEANS AN INDIVIDUAL RELATED BY CONSANGUINITY WITHIN THE THIRD DEGREE AS DETERMINED BY THE COMMON LAW, A SPOUSE OR AN INDIVIDUAL RELATED TO A SPOUSE WITHIN THE THIRD DEGREE AS SO DETERMINED, AND INCLUDES AN INDIVIDUAL IN AN ADOPTIVE RELATIONSHIP WITHIN THE THIRD DEGREE.
(0) "SIGN" MEANS, WITH PRESENT INTENT TO AUTHENTICATE OR ADOPT A RECORD:
(I) TO EXECUTE OR ADOPT A TANGIBLE SYMBOL; OR
(II) TO ATTACH TO OR LOGICALLY ASSOCIATE WITH THE RECORD AN ELECTRONIC SYMBOL, SOUND, OR PROCESS.
(P) "TRANSFER" MEANS EVERY MODE, DIRECT OR INDIRECT, ABSOLUTE OR CONDITIONAL, VOLUNTARY OR INVOLUNTARY, OF DISPOSING OF OR PARTING WITH AN ASSET OR AN INTEREST IN AN ASSET, AND INCLUDES PAYMENT OF MONEY, RELEASE, LEASE, LICENSE, AND CREATION OF A LIEN OR OTHER ENCUMBRANCE.
(Q) "VALID LIEN" MEANS A LIEN THAT IS EFFECTIVE AGAINST THE HOLDER OF A JUDICIAL LIEN SUBSEQUENTLY OBTAINED BY LEGAL OR EQUITABLE PROCESS OR PROCEEDINGS.
S 271. INSOLVENCY. (A) A DEBTOR IS INSOLVENT IF, AT A FAIR VALUATION, THE SUM OF THE DEBTOR'S DEBTS IS GREATER THAN THE SUM OF THE DEBTOR'S ASSETS.
(B) A DEBTOR THAT IS GENERALLY NOT PAYING THE DEBTOR'S DEBTS AS THEY BECOME DUE OTHER THAN AS A RESULT OF A BONA FIDE DISPUTE IS PRESUMED TO BE INSOLVENT. THE PRESUMPTION IMPOSES ON THE PARTY AGAINST WHICH THE PRESUMPTION IS DIRECTED THE BURDEN OF PROVING THAT THE NONEXISTENCE OF INSOLVENCY IS MORE PROBABLE THAN ITS EXISTENCE.

(C) ASSETS UNDER THIS SECTION DO NOT INCLUDE PROPERTY THAT HAS BEEN TRANSFERRED, CONCEALED OR REMOVED WITH INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS, OR THAT HAS BEEN TRANSFERRED IN A MANNER MAKING THE TRANSFER VOIDABLE UNDER THIS ARTICLE.

(D) DEBTS UNDER THIS SECTION DO NOT INCLUDE AN OBLIGATION TO THE EXTENT IT IS SECURED BY A VALID LIEN ON PROPERTY OF THE DEBTOR NOT INCLUDED AS AN ASSET.

S 272. VALUE. (A) VALUE IS GIVEN FOR A TRANSFER OR AN OBLIGATION IF, IN EXCHANGE FOR THE TRANSFER OR OBLIGATION, PROPERTY IS TRANSFERRED OR AN ANTECEDENT DEBT IS SECURED OR SATISFIED, BUT VALUE DOES NOT INCLUDE AN UNPERFORMED PROMISE MADE OTHERWISE THAN IN THE ORDINARY COURSE OF THE PROMISOR'S BUSINESS TO FURNISH SUPPORT TO THE DEBTOR OR ANOTHER PERSON.

(B) FOR THE PURPOSES OF PARAGRAPH TWO OF SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-THREE AND SECTION TWO HUNDRED SEVENTY-FOUR OF THIS ARTICLE, A PERSON GIVES A REASONABLY EQUIVALENT VALUE IF THE PERSON ACQUIRES AN INTEREST OF THE DEBTOR IN AN ASSET PURSUANT TO A REGULARLY CONDUCTED, NONCOLLUSIVE FORECLOSURE SALE OR EXECUTION OF A POWER OF SALE FOR THE ACQUISITION OR DISPOSITION OF THE INTEREST OF THE DEBTOR UPON DEFAULT UNDER A MORTGAGE, DEED OF TRUST, OR SECURITY AGREEMENT.

(C) A TRANSFER IS MADE FOR PRESENT VALUE IF THE EXCHANGE BETWEEN THE DEBTOR AND THE TRANSFEREE IS INTENDED BY THEM TO BE CONTEMPORANEOUS AND IS IN FACT SUBSTANTIALLY CONTEMPORANEOUS.

S 273. TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITOR. (A) A TRANSFER MADE OR OBLIGATION INCURRED BY A DEBTOR IS VOIDABLE AS TO A CREDITOR, WHETHER THE CREDITOR'S CLAIM AROSE BEFORE OR AFTER THE TRANSFER WAS MADE OR THE OBLIGATION WAS INCURRED, IF THE DEBTOR MADE THE TRANSFER OR INCURRED THE OBLIGATION:

(1) WITH ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD ANY CREDITOR OF THE DEBTOR; OR

(2) WITHOUT RECEIVING A REASONABLY EQUIVALENT VALUE IN EXCHANGE FOR THE TRANSFER OR OBLIGATION, AND THE DEBTOR:

(I) WAS ENGAGED OR WAS ABOUT TO ENGAGE IN A BUSINESS OR A TRANSACTION FOR WHICH THE REMAINING ASSETS OF THE DEBTOR WERE UNREASONABLY SMALL IN RELATION TO THE BUSINESS OR TRANSACTION; OR

(II) INTENDED TO INCUR, OR BELIEVED OR REASONABLY SHOULD HAVE BELIEVED THAT THE DEBTOR WOULD INCUR, DEBTS BEYOND THE DEBTOR'S ABILITY TO PAY AS THEY BECAME DUE.

(B) IN DETERMINING ACTUAL INTENT UNDER PARAGRAPH ONE OF SUBDIVISION (A) OF THIS SECTION, CONSIDERATION MAY BE GIVEN, AMONG OTHER FACTORS, TO WHETHER:

(1) THE TRANSFER OR OBLIGATION WAS TO AN INSIDER;

(2) THE DEBTOR RETAINED POSSESSION OR CONTROL OF THE PROPERTY TRANSFERRED AFTER THE TRANSFER;

(3) THE TRANSFER OR OBLIGATION WAS DISCLOSED OR CONCEALED;

(4) BEFORE THE TRANSFER WAS MADE OR OBLIGATION WAS INCURRED, THE DEBTOR HAD BEEN SUED OR THREATENED WITH SUIT;

(5) THE TRANSFER WAS OF SUBSTANTIALLY ALL THE DEBTOR'S ASSETS;

(6) THE DEBTOR ABSCONDED;

(7) THE DEBTOR REMOVED OR CONCEALED ASSETS;

(8) THE VALUE OF THE CONSIDERATION RECEIVED BY THE DEBTOR WAS REASONABLY EQUIVALENT TO THE VALUE OF THE ASSET TRANSFERRED OR THE AMOUNT OF THE OBLIGATION INCURRED;

(9) THE DEBTOR WAS INSOLVENT OR BECAME INSOLVENT SHORTLY AFTER THE TRANSFER WAS MADE OR THE OBLIGATION WAS INCURRED;

(10) THE TRANSFER OCCURRED SHORTLY BEFORE OR SHORTLY AFTER A SUBSTANTIAL DEBT WAS INCURRED; AND

(11) THE DEBTOR TRANSFERRED THE ESSENTIAL ASSETS OF THE BUSINESS TO A LIENOR THAT TRANSFERRED THE ASSETS TO AN INSIDER OF THE DEBTOR.

(C) A CREDITOR MAKING A CLAIM FOR RELIEF UNDER SUBDIVISION (A) OF THIS SECTION HAS THE BURDEN OF PROVING THE ELEMENTS OF THE CLAIM FOR RELIEF BY A PREPONDERANCE OF THE EVIDENCE.

S 274. TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITOR. (A) A TRANSFER MADE OR OBLIGATION INCURRED BY A DEBTOR IS VOIDABLE AS TO A CREDITOR WHOSE CLAIM AROSE BEFORE THE TRANSFER WAS MADE OR THE OBLIGATION WAS INCURRED IF THE DEBTOR MADE THE TRANSFER OR INCURRED THE OBLIGATION WITHOUT RECEIVING A REASONABLY EQUIVALENT VALUE IN EXCHANGE FOR THE TRANSFER OR OBLIGATION AND THE DEBTOR WAS INSOLVENT AT THAT TIME OR THE DEBTOR BECAME INSOLVENT AS A RESULT OF THE TRANSFER OR OBLIGATION.

(B) A TRANSFER MADE BY A DEBTOR IS VOIDABLE AS TO A CREDITOR WHOSE CLAIM AROSE BEFORE THE TRANSFER WAS MADE IF THE TRANSFER WAS MADE TO AN INSIDER FOR AN ANTECEDENT DEBT, THE DEBTOR WAS INSOLVENT AT THAT TIME, AND THE INSIDER HAD REASONABLE CAUSE TO BELIEVE THAT THE DEBTOR WAS INSOLVENT.

(C) SUBJECT TO SUBDIVISION (B) OF SECTION TWO HUNDRED SEVENTY-ONE OF THIS ARTICLE, A CREDITOR MAKING A CLAIM FOR RELIEF UNDER SUBDIVISION (A) OR (B) OF THIS SECTION HAS THE BURDEN OF PROVING THE ELEMENTS OF THE CLAIM FOR RELIEF BY A PREPONDERANCE OF THE EVIDENCE.

S 275. WHEN TRANSFER IS MADE OR OBLIGATION IS INCURRED. FOR THE PURPOSES OF THIS ARTICLE:

(A) A TRANSFER IS MADE:

(1) WITH RESPECT TO AN ASSET THAT IS REAL PROPERTY OTHER THAN A FIXTURE, BUT INCLUDING THE INTEREST OF A SELLER OR PURCHASER UNDER A CONTRACT FOR THE SALE OF THE ASSET, WHEN THE TRANSFER IS SO FAR PERFECTED THAT A GOOD-FAITH PURCHASER OF THE ASSET FROM THE DEBTOR AGAINST WHICH APPLICABLE LAW PERMITS THE TRANSFER TO BE PERFECTED CANNOT ACQUIRE AN INTEREST IN THE ASSET THAT IS SUPERIOR TO THE INTEREST OF THE TRANSFEREE; AND

(2) WITH RESPECT TO AN ASSET THAT IS NOT REAL PROPERTY OR THAT IS A FIXTURE, WHEN THE TRANSFER IS SO FAR PERFECTED THAT A CREDITOR ON A SIMPLE CONTRACT CANNOT ACQUIRE A JUDICIAL LIEN OTHERWISE THAN UNDER THIS ARTICLE THAT IS SUPERIOR TO THE INTEREST OF THE TRANSFEREE;

(B) IF APPLICABLE LAW PERMITS THE TRANSFER TO BE PERFECTED AS PROVIDED IN SUBDIVISION (A) OF THIS SECTION AND THE TRANSFER IS NOT SO PERFECTED BEFORE THE COMMENCEMENT OF AN ACTION FOR RELIEF UNDER THIS ARTICLE, THE TRANSFER IS DEEMED MADE IMMEDIATELY BEFORE THE COMMENCEMENT OF THE ACTION;

(C) IF APPLICABLE LAW DOES NOT PERMIT THE TRANSFER TO BE PERFECTED AS PROVIDED IN SUBDIVISION (A) OF THIS SECTION, THE TRANSFER IS MADE WHEN IT BECOMES EFFECTIVE BETWEEN THE DEBTOR AND THE TRANSFEREE;

(D) A TRANSFER IS NOT MADE UNTIL THE DEBTOR HAS ACQUIRED RIGHTS IN THE ASSET TRANSFERRED; AND

(E) AN OBLIGATION IS INCURRED:

(1) IF ORAL, WHEN IT BECOMES EFFECTIVE BETWEEN THE PARTIES; OR

(2) IF EVIDENCED BY A RECORD, WHEN THE RECORD SIGNED BY THE OBLIGOR IS DELIVERED TO OR FOR THE BENEFIT OF THE OBLIGEE.

S 276. REMEDIES OF CREDITOR. (A) IN AN ACTION FOR RELIEF AGAINST A TRANSFER OR OBLIGATION UNDER THIS ARTICLE, A CREDITOR, SUBJECT TO THE LIMITATIONS IN SECTION TWO HUNDRED SEVENTY-SEVEN OF THIS ARTICLE, MAY OBTAIN:

(1) AVOIDANCE OF THE TRANSFER OR OBLIGATION TO THE EXTENT NECESSARY TO SATISFY THE CREDITOR'S CLAIM;

(2) AN ATTACHMENT OR OTHER PROVISIONAL REMEDY AGAINST THE ASSET TRANSFERRED OR OTHER PROPERTY OF THE TRANSFEREE IF AVAILABLE UNDER APPLICABLE LAW; AND

(3) SUBJECT TO APPLICABLE PRINCIPLES OF EQUITY AND IN ACCORDANCE WITH APPLICABLE RULES OF CIVIL PROCEDURE:

(I) AN INJUNCTION AGAINST FURTHER DISPOSITION BY THE DEBTOR OR A TRANSFEREE, OR BOTH, OF THE ASSET TRANSFERRED OR OF OTHER PROPERTY;

(II) APPOINTMENT OF A RECEIVER TO TAKE CHARGE OF THE ASSET TRANSFERRED OR OF OTHER PROPERTY OF THE TRANSFEREE; OR

(III) ANY OTHER RELIEF THE CIRCUMSTANCES MAY REQUIRE.

(B) IF A CREDITOR HAS OBTAINED A JUDGMENT ON A CLAIM AGAINST THE DEBTOR, THE CREDITOR, IF THE COURT SO ORDERS, MAY LEVY EXECUTION ON THE ASSET TRANSFERRED OR ITS PROCEEDS.

S 276-A. ATTORNEY'S FEES IN ACTION OR SPECIAL PROCEEDING UNDER THIS ARTICLE TO AVOID A TRANSFER OR OBLIGATION. IN AN ACTION OR SPECIAL PROCEEDING UNDER THIS ARTICLE IN WHICH A JUDGMENT CREDITOR WHO HAS BEEN AWARDED BY COURT ORDER OR AGREEMENT OR HAS WAIVED ATTORNEY'S FEES AVAILABLE TO PREVAILING PARTIES BY THE TERMS OF THE STATUTE UNDER WHICH THE CREDITOR'S UNDERLYING CLAIM AROSE, OR REPRESENTATIVE ASSERTING THE RIGHTS OF SUCH JUDGMENT CREDITOR, RECOVERS JUDGMENT AVOIDING ANY TRANSFER OR OBLIGATION, THE JUSTICE OR SURROGATE PRESIDING AT THE TRIAL SHALL FIX THE REASONABLE ATTORNEY'S FEES OF THE CREDITOR, OR CREDITOR REPRESENTATIVE, INCURRED IN SUCH ACTION OR SPECIAL PROCEEDING UNDER THIS ARTICLE AS AN ADDITIONAL AMOUNT REQUIRED TO SATISFY THE CREDITOR'S CLAIM, AND THE CREDITOR, OR CREDITOR REPRESENTATIVE, SHALL HAVE JUDGMENT THEREFOR AGAINST THE DEBTOR AND, SUBJECT TO THE DEFENSES AND PROTECTIONS IN SECTION TWO HUNDRED SEVENTY-SEVEN OF THIS ARTICLE, AGAINST ANY TRANSFEREE (OR PERSON FOR WHOSE BENEFIT THE TRANSFER WAS MADE) AGAINST WHOM RELIEF IS ORDERED, IN ADDITION TO THE OTHER RELIEF GRANTED BY THE JUDGMENT. THE FEE SO FIXED SHALL BE WITHOUT REGARD, OR PREJUDICE, TO ANY AGREEMENT, EXPRESS OR IMPLIED, BETWEEN THE CREDITOR, OR THE CREDITOR REPRESENTATIVE, AND HIS OR HER ATTORNEY WITH RESPECT TO THE COMPENSATION OF SUCH ATTORNEY.

S 277. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEREE OR OBLIGEE. (A) A TRANSFER OR OBLIGATION IS NOT VOIDABLE UNDER PARAGRAPH ONE OF SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-THREE OF THIS ARTICLE AGAINST A PERSON THAT TOOK IN GOOD FAITH AND FOR A REASONABLY EQUIVALENT VALUE GIVEN THE DEBTOR OR AGAINST ANY SUBSEQUENT TRANSFEREE OR OBLIGEE.

(B) TO THE EXTENT A TRANSFER IS AVOIDABLE IN AN ACTION BY A CREDITOR UNDER PARAGRAPH ONE OF SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-SIX OF THIS ARTICLE THE FOLLOWING RULES APPLY:

(1) EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, THE CREDITOR MAY RECOVER JUDGMENT FOR THE VALUE OF THE ASSET TRANSFERRED, AS ADJUSTED UNDER SUBDIVISION (C) OF THIS SECTION, OR THE AMOUNT NECESSARY TO SATISFY THE CREDITOR'S CLAIM, WHICHEVER IS LESS. THE JUDGMENT MAY BE ENTERED AGAINST:

(I) THE FIRST TRANSFEREE OF THE ASSET OR THE PERSON FOR WHOSE BENEFIT THE TRANSFER WAS MADE; OR

(II) AN IMMEDIATE OR MEDIATE TRANSFEREE OF THE FIRST TRANSFEREE, OTHER THAN:

(A) A GOOD-FAITH TRANSFEREE THAT TOOK FOR VALUE; OR

(B) AN IMMEDIATE OR MEDIATE GOOD-FAITH TRANSFEREE OF A PERSON DESCRIBED IN CLAUSE (A) OF THIS SUBPARAGRAPH.

(2) RECOVERY PURSUANT TO PARAGRAPH ONE OF SUBDIVISION (A) OR SUBDIVISION (B) OF SECTION TWO HUNDRED SEVENTY-SIX OF THIS ARTICLE OF OR FROM THE ASSET TRANSFERRED OR ITS PROCEEDS, BY LEVY OR OTHERWISE, IS AVAIL-

ABLE ONLY AGAINST A PERSON DESCRIBED IN SUBPARAGRAPH (I) OR (II) OF PARAGRAPH ONE OF THIS SUBDIVISION.

(C) IF THE JUDGMENT UNDER SUBDIVISION (B) OF THIS SECTION IS BASED UPON THE VALUE OF THE ASSET TRANSFERRED, THE JUDGMENT MUST BE FOR AN AMOUNT EQUAL TO THE VALUE OF THE ASSET AT THE TIME OF THE TRANSFER, SUBJECT TO ADJUSTMENT AS THE EQUITIES MAY REQUIRE.

(D) NOTWITHSTANDING VOIDABILITY OF A TRANSFER OR AN OBLIGATION UNDER THIS ARTICLE, A GOOD-FAITH TRANSFEREE OR OBLIGEE IS ENTITLED, TO THE EXTENT OF THE VALUE GIVEN THE DEBTOR FOR THE TRANSFER OR OBLIGATION, TO:

(1) A LIEN ON OR A RIGHT TO RETAIN AN INTEREST IN THE ASSET TRANSFERRED;

(2) ENFORCEMENT OF AN OBLIGATION INCURRED; OR

(3) A REDUCTION IN THE AMOUNT OF THE LIABILITY ON THE JUDGMENT.

(E) A TRANSFER IS NOT VOIDABLE UNDER PARAGRAPH TWO OF SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-THREE OR SECTION TWO HUNDRED SEVENTY-FOUR OF THIS ARTICLE IF THE TRANSFER RESULTS FROM:

(1) TERMINATION OF A LEASE UPON DEFAULT BY THE DEBTOR WHEN THE TERMINATION IS PURSUANT TO THE LEASE AND APPLICABLE LAW; OR

(2) ENFORCEMENT OF A SECURITY INTEREST IN COMPLIANCE WITH ARTICLE NINE OF THE UNIFORM COMMERCIAL CODE, OTHER THAN ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION OF THE OBLIGATION IT SECURES.

(F) A TRANSFER IS NOT VOIDABLE UNDER SUBDIVISION (B) OF SECTION TWO HUNDRED SEVENTY-FOUR OF THIS ARTICLE:

(1) TO THE EXTENT THE INSIDER GAVE NEW VALUE TO OR FOR THE BENEFIT OF THE DEBTOR AFTER THE TRANSFER WAS MADE, EXCEPT TO THE EXTENT THE NEW VALUE WAS SECURED BY A VALID LIEN;

(2) IF MADE IN THE ORDINARY COURSE OF BUSINESS OR FINANCIAL AFFAIRS OF THE DEBTOR AND THE INSIDER; OR

(3) IF MADE PURSUANT TO A GOOD-FAITH EFFORT TO REHABILITATE THE DEBTOR AND THE TRANSFER SECURED PRESENT VALUE GIVEN FOR THAT PURPOSE AS WELL AS AN ANTECEDENT DEBT OF THE DEBTOR.

(G) THE FOLLOWING RULES DETERMINE THE BURDEN OF PROVING MATTERS REFERRED TO IN THIS SECTION:

(1) A PARTY THAT SEEKS TO INVOKE SUBDIVISION (A), (D), (E) OR (F) OF THIS SECTION HAS THE BURDEN OF PROVING THE APPLICABILITY OF THAT SUBDIVISION.

(2) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPHS THREE AND FOUR OF THIS SUBDIVISION, THE CREDITOR HAS THE BURDEN OF PROVING EACH APPLICABLE ELEMENT OF SUBDIVISION (B) OR (C) OF THIS SECTION.

(3) THE TRANSFEREE HAS THE BURDEN OF PROVING THE APPLICABILITY TO THE TRANSFEREE OF CLAUSE (A) OR (B) OF SUBPARAGRAPH (II) OF PARAGRAPH ONE OF SUBDIVISION (B) OF THIS SECTION.

(4) A PARTY THAT SEEKS ADJUSTMENT UNDER SUBDIVISION (C) OF THIS SECTION HAS THE BURDEN OF PROVING THE ADJUSTMENT.

(H) THE STANDARD OF PROOF REQUIRED TO ESTABLISH MATTERS REFERRED TO IN THIS SECTION IS PREPONDERANCE OF THE EVIDENCE.

S 278. EXTINGUISHMENT OF CLAIM FOR RELIEF. A CLAIM FOR RELIEF WITH RESPECT TO A TRANSFER OR OBLIGATION UNDER THIS ARTICLE IS EXTINGUISHED UNLESS ACTION IS BROUGHT:

(A) UNDER PARAGRAPH ONE OF SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-THREE OF THIS ARTICLE, NOT LATER THAN FOUR YEARS AFTER THE TRANSFER WAS MADE OR THE OBLIGATION WAS INCURRED OR, IF LATER, NOT LATER THAN ONE YEAR AFTER THE TRANSFER OR OBLIGATION WAS OR COULD REASONABLY HAVE BEEN DISCOVERED BY THE CLAIMANT;

(B) UNDER PARAGRAPH TWO OF SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-THREE OR SUBDIVISION (A) OF SECTION TWO HUNDRED SEVENTY-FOUR OF

THIS ARTICLE, NOT LATER THAN FOUR YEARS AFTER THE TRANSFER WAS MADE OR THE OBLIGATION WAS INCURRED; OR

(C) UNDER SUBDIVISION (B) OF SECTION TWO HUNDRED SEVENTY-FOUR OF THIS ARTICLE, NOT LATER THAN ONE YEAR AFTER THE TRANSFER WAS MADE.

S 279. GOVERNING LAW. (A) IN THIS SECTION, THE FOLLOWING RULES DETERMINE A DEBTOR'S LOCATION:

(1) A DEBTOR WHO IS AN INDIVIDUAL IS LOCATED AT THE INDIVIDUAL'S PRINCIPAL RESIDENCE.

(2) A DEBTOR THAT IS AN ORGANIZATION AND HAS ONLY ONE PLACE OF BUSINESS IS LOCATED AT ITS PLACE OF BUSINESS.

(3) A DEBTOR THAT IS AN ORGANIZATION AND HAS MORE THAN ONE PLACE OF BUSINESS IS LOCATED AT ITS CHIEF EXECUTIVE OFFICE.

(B) A CLAIM FOR RELIEF IN THE NATURE OF A CLAIM FOR RELIEF UNDER THIS ARTICLE IS GOVERNED BY THE LOCAL LAW OF THE JURISDICTION IN WHICH THE DEBTOR IS LOCATED WHEN THE TRANSFER IS MADE OR THE OBLIGATION IS INCURRED.

S 280. SUPPLEMENTARY PROVISIONS. UNLESS DISPLACED BY THE PROVISIONS OF THIS ARTICLE, THE PRINCIPLES OF LAW AND EQUITY, INCLUDING THE LAW MERCHANT AND THE LAW RELATING TO PRINCIPAL AND AGENT, ESTOPPEL, LACHES, FRAUD, MISREPRESENTATION, DURESS, COERCION, MISTAKE, INSOLVENCY, OR OTHER VALIDATING OR INVALIDATING CAUSE, SUPPLEMENT ITS PROVISIONS.

S 281. UNIFORMITY OF APPLICATION AND CONSTRUCTION. THIS ARTICLE SHALL BE APPLIED AND CONSTRUED TO EFFECTUATE ITS GENERAL PURPOSE TO MAKE UNIFORM THE LAW WITH RESPECT TO THE SUBJECT OF THIS ARTICLE AMONG STATES ENACTING IT.

S 281-A. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. THIS ARTICLE MODIFIES, LIMITS, OR SUPERSEDES THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, 15 U.S.C. SECTION 7001 ET SEQ., BUT DOES NOT MODIFY, LIMIT, OR SUPERSEDE SECTION 101(C) OF THAT ACT, 15 U.S.C. SECTION 7001(C), OR AUTHORIZE ELECTRONIC DELIVERY OF ANY OF THE NOTICES DESCRIBED IN SECTION 103(B) OF THAT ACT, 15 U.S.C. SECTION 7003(B).

S 3. Paragraph 5 of subdivision (c) of section 5205 of the civil practice law and rules, as amended by chapter 93 of the laws of 1995, is amended to read as follows:

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be [fraudulent conveyances] VOIDABLE TRANSACTIONS under article ten of the debtor and creditor law.

S 4. Subdivision (g) of section 5519 of the civil practice law and rules, as added by chapter 184 of the laws of 1988, is amended to read as follows:

(g) Appeals in medical, dental or podiatric malpractice judgments. In an action for medical, dental or podiatric malpractice, if an appeal is taken from a judgment in excess of one million dollars and an undertaking in the amount of one million dollars or the limit of insurance coverage available to the appellant for the occurrence, whichever is greater, is given together with a joint undertaking by the appellant and any insurer of the appellant's professional liability that, during the period of such stay, the appellant will make no [fraudulent conveyance without fair consideration] VOIDABLE TRANSACTION as described in [section two hundred seventy-three-a] ARTICLE TEN of the debtor and creditor law, the court to which such an appeal is taken shall stay all proceedings to enforce the judgment pending such appeal if it finds that

there is a reasonable probability that the judgment may be reversed or determined excessive. In making a determination under this subdivision, the court shall not consider the availability of a stay pursuant to subdivision (a) or (b) of this section. Liability under such joint undertaking shall be limited to [fraudulent conveyances] VOIDABLE TRANSACTIONS made by the appellant subsequent to the execution of such undertaking and during the period of such stay, but nothing herein shall limit the liability of the appellant for [fraudulent conveyances] VOIDABLE TRANSACTIONS pursuant to article ten of the debtor and creditor law or any other law. An insurer that pays money to a beneficiary of such a joint undertaking shall thereupon be subrogated, to the extent of the amount to be paid, to the rights and interests of such beneficiary, as a judgment creditor, against the appellant on whose behalf the joint undertaking was executed.

S 5. Subparagraph 4 of paragraph (b) of section 7-3.1 of the estates, powers and trusts law, as amended by chapter 206 of the laws of 1998, is amended to read as follows:

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be [fraudulent conveyances] VOIDABLE TRANSACTIONS under article ten of the debtor and creditor law.

S 6. Paragraph 3 of subdivision 3-a of section 50 of the workers' compensation law, as amended by chapter 139 of the laws of 2008, is amended to read as follows:

(3) A member's participation in a group self-insurer shall not relieve it of its liability for compensation prescribed by this chapter except by the payment thereof by the group self-insurer or by itself. Each member shall be responsible, jointly and severally, for all liabilities of the group self-insurer provided for by this chapter occurring during its respective period of membership, and such liability shall attach to any recipient of a conveyance of assets made in violation of SUBDIVISION (A) OF section two hundred [seventy-three] SEVENTY-FOUR of the debtor and creditor law. As between the employee and the group self-insurer, notice to or knowledge of the occurrence of the injury on the part of the member shall be deemed notice or knowledge, as the case may be, on the part of the group self-insurer; jurisdiction of the member shall, for the purpose of this chapter, be jurisdiction of the group self-insurer and such group self-insurer shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the participating member for the payment of compensation under the provisions of this chapter. The insolvency or bankruptcy of a participating member shall not relieve the group self-insurer from the payment of compensation for injuries or death sustained by an employee during the time the member was a participant in such group self-insurer. Notice of termination of a participating member shall not be effective until at least ten days after notice of such termination, on a prescribed form, has been either filed in the office of the chair or sent by certified or registered letter, return receipt requested, and also served in like manner upon the member. In the event such termination is due to a member's failure to pay required contributions, such member's termination shall not be rescinded more than three times.

S 7. This act shall take effect one hundred twenty days after it shall have become a law, and shall apply to a transfer made or obligation incurred on or after such effective date, but shall not apply to a

transfer made or obligation incurred before such effective date, nor shall it apply to a right of action that has accrued before such effective date. For the purposes of this act, a transfer is made and an obligation is incurred at the time provided in section 275 of the debtor and creditor law, as added by section two of this act.

GoldinAssociates LLC

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This presentation has been prepared for a panel discussion during the 2018 ABI New York City Conference providing updates on avoidance actions. The author of this presentation, Marc S. Kirschner, is the Trustee of the Tribune Litigation Trust. This article is prepared based solely on information available to the public. Because litigation involving the Tribune Litigation Trust is pending and Mr. Kirschner is involved in other avoidance actions, Mr. Kirschner will not be commenting on any confidential matter or the future resolution of substantive legal issues, which will be discussed by other panelists. No statements in this presentation may be used in litigation involving the Tribune Litigation Trust.

Key Definitional Issues

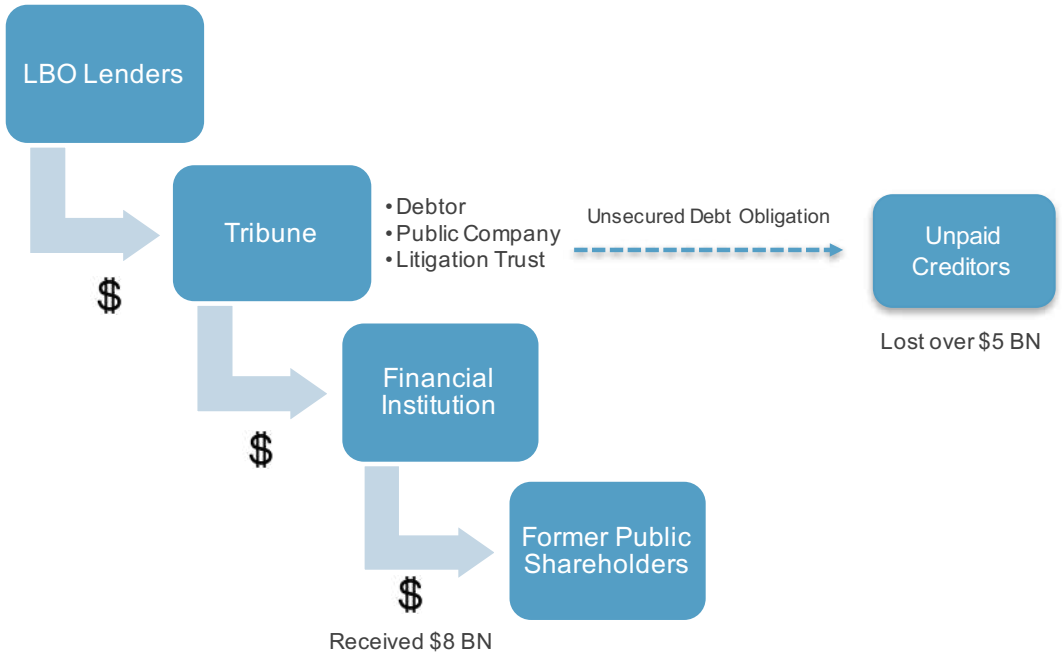
- Bankruptcy trustees have broad power to avoid certain types of transfers made by a debtor to ensure fundamental policies of maximizing the estate and equality of distributions
  - Intentional Fraudulent Transfer – "actual intent to hinder, delay or defraud" creditors. Bankruptcy Code section 548(a)(1)(A)
  - Constructive Fraudulent Transfer – Insolvent, unreasonably small amount of capital, no receipt of reasonably equivalent value. Section 548(a)(1)(B)
- Notwithstanding such broad power, a safe harbor under section 546(e) prevents a "trustee" from avoiding, among other things, a constructive but not intentional fraudulent "transfer" that is a "margin payment" or a "settlement payment" "made by or to (or for the benefit of)" qualifying entities such as a "commodity broker, forward contract or merchant, stockbroker, financial institution, financial participant or securities clearing agency", or that is a transfer made by or to (or for the benefit of) such entity, including a financial institution, "in connection with a securities contract."
- Conduit – An entity that lacks possession or control (i.e. an intermediary or pass through entity). In Re Finley, Kumble, Wagner, Heine, Underberg, Manley, Meyerson & Casey, 130 F. 3d 52, 57-59 (2d Cir. 1977)

Key Definitional Issues (Cont'd)

- Financial Institution – (A.) A Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as "agent or custodian" for a "customer"…"in connection with a securities contract…such customer". Section 101 (22)
  - (B.) in connection with a securities contract…an investment company registered under the Investment Company Act of 1940
- Financial Participant – (A.) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or
  - (B.) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991). Section 101 (22A)

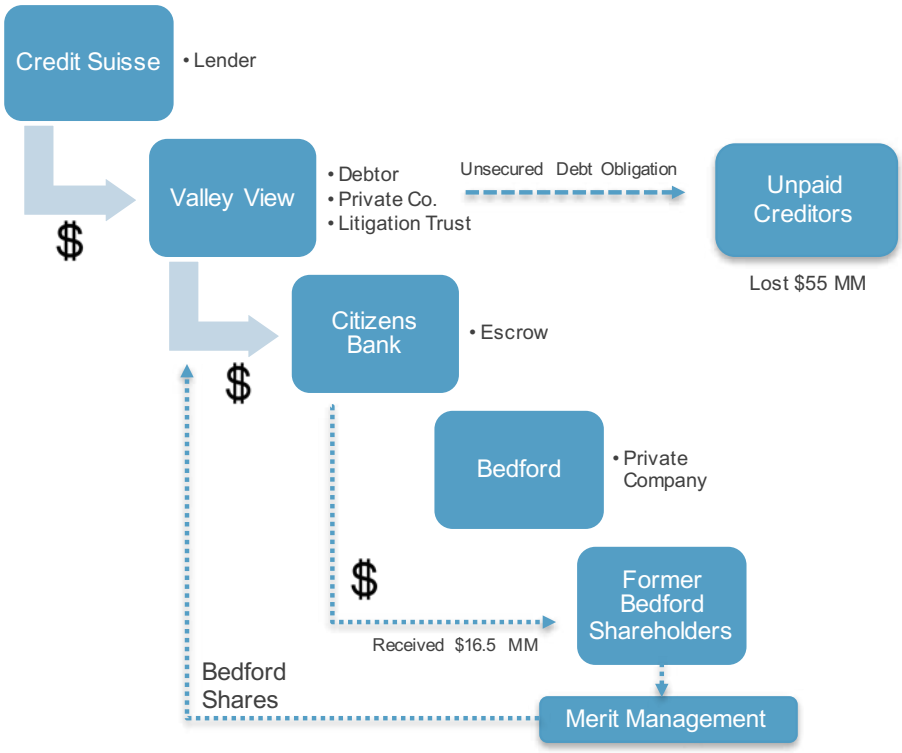
Tribune Trust Claw Back Litigation

- Trustee for Tribune Trust seeks to claw back money paid to public shareholders as intentional fraudulent transfer under section 548(a)(1)(A)
- Individual unpaid Tribune creditors sue to claw back money paid to public shareholders under a number of state law constructive fraudulent transfer statutes (referred to by defendants as an "end around" or "work around")



Merit Management Group, LP v. FTI Consulting, Inc.

- Trustee for Valley View seeks to claw back money paid to Merit Management for its Bedford shares as constructive fraudulent transfer under section 548(a)(1)(B)



Pre February 2018 Majority Circuit Court Law

- Payment made through a financial institution acting as an intermediary is protected by safe harbor
  - Pre February 2018, purpose to prevent disruption of the securities trading markets and protect integrity of the securities settlement and clearance process. In Re Quebecor World (USA) Inc., 719 F. 3d 94 (2d Cir. 2013)
  - Direct conflict between securities law and bankruptcy law
- Tribune state law constructive fraudulent transfer suits barred by second circuit because payment went through a financial institution acting as an intermediary, and court ruled that section 546(e) preempted state laws to the extent it would have allowed such claim to proceed. Petition for certiorari pending.
- Tribune Trust intentional fraudulent conveyance law suit dismissed by district court because of alleged failure to meet heightened intent standard on the part of the special committee of the board. To be appealed.
- Merit Management Group, LP v. FTI Consulting claw back actions barred at lower courts because payments went to or was made by a financial institution

U.S. Supreme Court Review of Merit Management

- Issue – is a payment made by wire transfer or check to a third party "made by or to (or for the benefit of) a financial institution"
  - If you mail a letter to a friend, was the letter mailed "by" you or "by" the post office "to" your friend?
- Seventh Circuit held safe harbor under section 546(e) does not protect from avoidance a transfer conducted through a conduit (an intermediary, e.g. the post office)
  - Contrary to five circuit courts of appeal, including second circuit which decided Tribune case
- U.S. Supreme Court argument on November 6, 2017
  - Very favorable comments by almost all of the justices
  - Since Merit received the money that otherwise would have gone to creditors, what difference does the intermediary make?
  - Look to the "transfer" the trustee seeks to avoid, not the mechanics
  - Trustee can only recover under section 550 from transferee who has control
  - Safe harbor only applies to "transfers" subject to avoidance in the first place
  - Why didn't the SEC or any financial institutions file an amicus brief (underscores financial entities are fully protected), and less concern about protecting securities trading markets

U.S. Supreme Court Ruling February 27, 2018

- Momentous change in the law of the land, now binding on all circuits. On February 27, 2018, the United States Supreme Court in a unanimous opinion held that section 546(e) does not protect fraudulent transfers in which financial institutions serve merely as a "conduit." 2018 WL 1054879, *7 (2018).
  - Supreme Court examined the text, statutory structure and legislative purpose (transfers "through" a covered entity "appear nowhere in the statute")
- Look only to "transfer" Trustee sought to avoid
  - A executes a transfer to D through intermediaries B and C
  - Held: look to "transfer" only from A to D, i.e., the real parties in interest
- Rejects defense that identity of a conduit is relevant, disregards intermediaries
- Rejects argument that purpose to preserve the integrity of securities contracts, and cast aside arguments that statute was designed to insulate from liability all shareholders who received payments in a leveraged buyout (no deviation from plain meaning of statute)
- Tribune trust seeks to add constructive fraud case now that law of the land changed
- Covers private and public companies, even though facts involved private company

U.S. Supreme Court Ruling February 27, 2018 (Cont'd)

- Open questions:
  - Because the parties did not raise the point, in fn. 2 the court stated it did not address the definitions of "Financial Institution" and "Customer"
  - Defendants who received proceeds beneficially may argue they are a protected entity under definitions of "Financial Institution" or "Financial Participant," or "Investment Company registered under the Investment Company Act" as used in section 546(e)
  - What is meaning of acting as "agent or custodian for a customer"
    - Bankruptcy Code does not define "agent"
    - "Custodian" is defined in section 101(11) as follows:
      - (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
      - (B) assignee under a general assignment for the benefit of the debtor's creditors; or
      - (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors
  - Potential focus on definition of a "settlement payment" and a "securities contract" under 546(e). Re fn. 5, these definitions were not at issue in Merit.

Merit Fallout

- No longer can a transaction be cleansed by a conduit
- Not dependent on identity of the actor exercising the avoidance power, thereby indicating decision to be applied broadly
- Potential for increased recoveries for creditors
- More circumscribed defenses
- Tribune Trust proposed amendment to add a constructive fraudulent conveyance claim
- Sampson Resources amendment of Motion to Dismiss to delete section 546(e) defense
- Numerous law firm and academic commentaries

Appendix I

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3/8/18

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March 8, 2018

Although Defendants already had an opportunity to respond to the Trustee's request for leave to file an amended complaint in July 2017, the Court will allow any Defendant who wishes to respond to this letter to do so no later than March 13, 2018.

SO ORDERED
Dated: 3/8/18 RICHARD J. SULLIVAN
U.S.D.J.

VIA ECF AND E-MAIL

The Honorable Richard J. Sullivan
United States District Court Judge
Southern District of New York
40 Foley Square, Room 2104
New York, NY 10007

Re: *In re Tribune Co. Fraudulent Conveyance Litigation*, 11-MD-2296; *Kirschner v. FitzSimons, et al.*, No. 12-CV-2652 ("*FitzSimons*")

Dear Judge Sullivan:

We represent the Tribune Litigation Trustee, Marc S. Kirschner (the "Trustee"). In light of the Supreme Court's unanimous decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, No. 16-784, 2018 WL 1054879 (U.S. Feb. 27, 2018) (copy attached as Exhibit "A"), we write to renew the Trustee's July 18, 2017 request (No. 11-md-02296 ECF No. 6994) for leave to file a motion to amend the Complaint in the *FitzSimons* action in order to assert a constructive fraudulent conveyance claim under 11 U.S.C. § 548(a)(1)(B) against the vast preponderance of the shareholder defendants named in Count One of the Complaint (the "Shareholder Defendants"). A blacklined copy of the proposed amended complaint (changed pages only, with certain confidential information redacted) is attached hereto as Exhibit "B."[1]

As the Trustee explained in the July 18 request, if the Supreme Court affirmed the Seventh Circuit in *FTI Consulting*, prevailing law in the Second Circuit would change such that the Trustee would no longer be barred from asserting a constructive fraudulent transfer claim against the Shareholder Defendants under 11 U.S.C. § 548, and such claim would relate back under Fed.

[1] If the Trustee is permitted to file the amended complaint, a new schedule attached thereto will identify those Shareholder Defendants that are omitted from the constructive fraudulent transfer claim (count I-B). The Shareholder Defendants that will be omitted from count I-B are Shareholder Defendants that benefitted from the challenged transfers and can be identified without the benefit of discovery as a "Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity," as *FTI Consulting* does not alter such Shareholder Defendants' entitlement to a § 546(e) defense in their individual capacity. *See* 11 U.S.C. § 546(e); 11 U.S.C. § 101(22) (defining "financial institution"). If and when the amendment is allowed, any other Shareholder Defendant claiming an entitlement to a § 546(e) defense to count I-B may raise it in their answer (or whatever other manner the Court may allow), as they would with any other affirmative defense.

R. Civ. P. 15 for statute of limitations purposes.[2] Six detailed responses were submitted in opposition to the Trustee's July Request.[3] With the Court's permission, the Trustee responded to the arguments set forth in these responses by letter dated August 4, 2017. No. 11-md-02296 ECF No. 7008.

On August 24, 2017, the Court denied the Trustee's July 18 request "without prejudice to renewal in the event of an intervening change in the governing law of this Circuit." No. 11-md-02296 ECF No. 7019, at 3. The Court stated: "If, and when, the Supreme Court affirms the Seventh Circuit in *FTI Consulting*, the Trustee would have a strong argument in support of amending his complaint to include the constructive fraudulent conveyance claim." *Id.*

The Supreme Court has now unanimously affirmed the Seventh Circuit's decision in *FTI Consulting*. The Supreme Court held that "[t]he language of §546(e), the specific context in which that language is used, and the broader statutory structure all support the conclusion that the relevant transfer for purposes of the §546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions." 2018 WL 1054879 at *8. As such, the fact that one or more financial institutions acted as conduits in connection with the Tribune LBO no longer precludes the Trustee from seeking to avoid the transfers between Tribune and the Shareholder Defendants.[4]

---

[2] *See, e.g.*, *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993) ("When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review").

[3] *See* No. 11-md-02296 ECF Nos. 7000 (Blackport Capital Fund Ltd.), 7003 (Exhibit A Shareholder Defendants' Executive Committee), 7004 (EGI-TRB, L.L.C., Equity Group Investments, L.L.C., Sam Investment Trust, Samuel Zell), 7005 (JPMorgan Defendants), and 7011 (Rogers Worthington), and No. 12-cv-02652 ECF No. 5345 (Citigroup Global Markets Inc.). The Court ordered any Defendant that wished to respond to the Trustee's July 18 request to do so by July 28, 2017. No. 11-md-02296 ECF No. 6993.

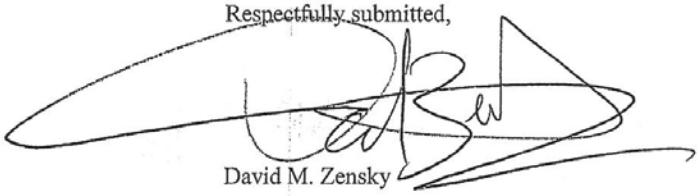
[4] It is worth noting that the Supreme Court was unquestionably aware that an affirmance of *FTI Consulting* would likely result in, *inter alia*, the assertion of a constructive fraudulent conveyance claim against the Shareholder Defendants in the *FitzSimons* case, as the petitioner in *FTI Consulting*, and several *amici*, including certain of the Shareholder Defendants, argued in both briefing and at oral argument that the specter of such a claim by the Trustee in this case weighed against the Seventh Circuit's view of § 546(e). *See* Br. of Pet'r at 33, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, No. 16-784 (U.S. July 13, 2017) (citing *Tribune* for the proposition that the safe harbor should protect the entire transaction, instead of particular participants); *id.* at 40 (citing *Tribune* as an example of "long-tailed potential liability"); Reply Brief of Pet'r at 17 (Feb. 3, 2017) (addressing *Tribune* decision); Brief of Various Former Tribune and Lyondell Shareholders as *Amici Curiae* at 2 (July 20, 2017) (noting Trustee's July 18 request to amend the complaint to assert constructive fraudulent conveyance claims against certain defendants and that the "outcome [in *Merit Mgmt.*] could thus materially affect *amici*"); Brief of Nat'l Ass'n of Bankruptcy Trustees as *Amici Curiae* at 13, 18 (Sept. 18, 2017) (discussing *Tribune* as an example of why the safe harbor cannot be as broad as Petitioner argued).

Akin Gump
STRAUSS HAUER & FELD LLP

The Trustee thus renews his request for leave to file a motion to amend the Complaint, or, alternatively, requests leave to file the amended complaint, for the reasons set forth herein, and in his July 18 request and August 4 letter.[5]

We are available at the Court's convenience should Your Honor wish to discuss this matter further.

Respectfully submitted,



David M. Zensky

cc: Joshua Y. Sturm, Esq., Ropes & Gray LLP (via e-mail)
All counsel of record (via ECF)
All *pro se* Trust Defendants (via first-class mail or e-mail)

[5] As noted in his July 18 request and August 4, 2017 letter, the Trustee would also amend Schedule A to the existing complaint to eliminate the hundreds of defendants who have settled or otherwise been voluntarily dismissed, and update the remainder of the list as needed to correct any mistakes in defendant names or transfer amounts. The amendment would also make certain changes required by the Trustee's partial settlement with Morgan Stanley defendants on June 3, 2016 (No. 11-md-02296 ECF No. 6865).

Appendix II

HARVARD LAW SCHOOL | Bankruptcy Roundtable

6 MAR 2018

Merit Management v. FTI: Law Firm Perspectives

by Editor | posted in: Avoidance, Financial Firms and Safe Harbors, fraudulent transfer, Statutory Interpretation, Supreme Court |

On February 27, the Supreme Court decided Merit Management Group, LP v. FTI Consulting, Inc., holding unanimously that the § 546(e) safe harbor does not protect allegedly fraudulent transfers "in which financial institutions served as mere conduits." The Court's decision resolves a circuit split on the reach of § 546(e). In reaching its conclusion, the Court focused on the "end-to-end transfer" that the trustee seeks to avoid, rather than any "component parts of the overarching transfer." In FTI, because the overarching transfer was made between two parties not otherwise shielded by the safe harbor, the transfer will now fall outside the safe harbor.

As many law firms recognize, this decision will have wide-ranging implications on the finality of securities transactions effected through financial institutions, especially leveraged buyouts. Mayer Brown notes that as the decision enhances a trustee's ability to recover fraudulent transfers, it also increases the bankruptcy estate's leverage against recipients of pre-petition transfers. Cleary observes that "debtors or trustees may strategically frame avoidance actions in order to limit the scope of the safe

harbor." Mayer Brown concludes that the decision may also expose investors, investment funds and similar entities to fraudulent transfer litigation risks.

The bottom line, as Davis Polk notes, is that the § 546(e) safe harbor is no longer a blanket safe harbor for the recipients of transactions that pass through financial institutions. But the safe harbor will still shield financial institutions operating as escrow agents or clearinghouses, as the Court expressly stated that a financial institution under § 546(e) is protected whether the institution acts as a principal or as an intermediary.

Firms have noted that the decision also left open some ambiguities. First, Schulte Roth & Zabel writes that the Court leaves open possible arguments that any "customer" of a "financial institution" is also itself a "financial institution" under § 546(e). Second, Mayer Brown points out that the Court did not address whether the transaction at issue actually qualified as a transfer that is a "settlement payment" or made in connection with a "securities contract" under § 546(e). These ambiguities will draw the attention of defendants in future fraudulent transfer litigation.

Finally, Weil notes that the decision raises the question of how the preemption of state-law creditor remedies under § 546(e) will be applied in light of the Supreme Court's now-narrow construction of the safe harbor.

By Jianjian Ye, Harvard Law School, J.D. 2018.

The roundtable has posted on FTI before. Some of those posts are: an analysis of the FTI oral argument, the Amici Curiae Brief of Bankruptcy Law Professors, an article by Ralph Brubaker on the meaning of § 546(e), and a roundup of law firm perspectives on the Seventh Circuit's decision in *FTI Consulting, Inc. v. Merit Management Group, LP*, 830 F.3d 690 (7th Cir. 2016).

546(e), Avoidance, Cleary Gottlieb, Davis Polk, fraudulent conveyance, FTI, FTI Consulting v Merit Management Group, leveraged buyouts, Mayer Brown, Safe Harbors, Schulte Roth & Zabel, Section 546(e), Settlement Payment, Supreme Court, Weil Gotshal

Appendix III

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: SAMSON RESOURCES CORPORATION, *et al.*, Debtor.	Chapter 11 Case No. 15-11934 (BLS) (Jointly Administered)
PETER KRAVITZ, as Settlement Trustee of and on behalf of the SAMSON SETTLEMENT TRUST, Plaintiff, v. SAMSON ENERGY COMPANY, LLC, *et al.* Defendants	Adv. Pro. No. 17-51524 (BLS)

NOTICE OF WITHDRAWAL OF CERTAIN PORTIONS OF SAMSON DEFENDANTS' MOTION TO DISMISS

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The Samson Defendants[1], by and through their undersigned counsel, hereby provide notice that, in light of the Supreme Court's recent ruling in *Merit Management Group, LP v. FTI Consulting, Inc.*, --- S. Ct. ----, 2018 WL 1054879 (Feb. 27, 2018), they withdraw argument IV.C ("Counts I and II Are Barred by Section 546(e) of the Bankruptcy Code") from their Motion to Dismiss [Docket No. 20]. Argument IV.C is found at pages 26-34 of the Memorandum in Support of Samson Defendants' Motion to Dismiss [Docket No. 21].

The Samson Defendants reserve the right to raise any other defenses and arguments, including those based on section 546(e) of the Bankruptcy Code, that remain valid following *Merit Management*.

March 12, 2018

Respectfully submitted,

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[1] The Samson Defendants are Samson Energy Company, LLC; Samson Exploration, LLC; Samson Offshore, LLC; SFT (Delaware) Management, LLC; ST 2008 (Delaware) Management, LLC; Charles and Lynn Schusterman Family Foundation; Stacy Family Trust; Stacy Family Delaware Trust; Schusterman 2008 Delaware Trust; Stacy Schusterman, in her alleged capacity as trustee of the Stacy Family Trust, the Stacy Family Delaware Trust and the Schusterman 2008 Delaware Trust; Lynn Schusterman, in her alleged capacity as trustee of the Stacy Family Trust and the Stacy Family Delaware Trust; C. Philip Tholen, in his alleged capacity as co-trustee of the Schusterman 2008 Delaware Trust; and Wilmington Savings Fund Society, FSB, in its alleged capacity as trustee of the Stacy Family Trust and/or Stacy Family Delaware Trust and the Schusterman 2008 Delaware Trust.

In *Moody,* the Third Circuit observed that challenges to LBOs tend to be based upon constructive, not intentional, fraud. 971 F.2d at 1064. This is particularly true where the "LBO" in question was at arms'-length and involved over $4 billion of fresh equity—allegations that destroy any suggestion of fraudulent intent. *See Tribune,* 2017 WL 82391, at *14 (arms'-length, public LBO is the type of "highly complex transaction" that does not support an inference of fraudulent intent); *Lehman Bros.*, 541 B.R. at 576 (transaction was "'significantly different from the family relationships—a husband conveying property to his wife, for example, or a mother conveying property to her son—one typically sees in fraudulent conveyance cases'") (quoting *Lippe v. Bairnco Corp.,* 249 F. Supp. 2d 357, 382 (S.D.N.Y. 2003); *MFS/Sun Life Tr.-High Yield Series v. Van Dusen Airport Servs. Co.,* 910 F. Supp. 913, 935 (S.D.N.Y. 1995) (fact that LBO was an "arm's-length transaction by sophisticated businesspeople" weighed against finding of actual fraudulent intent).

In sum, Counts II and IV of the Complaint are not well-pleaded, do not allege necessary facts, and posit an implausible theory. They should be dismissed.

C. Counts I and II Are Barred by Section 546(e) of the Bankruptcy Code.

In Counts I and II, Plaintiff seeks to avoid and recover transfers of approximately $6.316 billion in cash (the "Cash Transfers") made to the Selling Shareholders in exchange for the redemption and purchase of their Samson Investment shares. Compl. ¶¶ 44, 54, 110, 125, 171. The Cash Transfers, however, were transfers by JPMorgan, a financial institution. As of the date of the Sale, Samson Investment maintained an account at JPMorgan. Rabinowitz Decl. ¶ 7. On that date, in accordance with the Purchase Agreement and pursuant to the instruction of SRC, (i) Samson Investment entered into a bridge loan agreement with JPMorgan under which JPMorgan loaned Samson Investment $2.25 billion by transferring that amount into the previously-referenced account, (ii) Samson Investment entered into a revolving credit agreement with

JPMorgan under which JPMorgan loaned Samson Investment $1.345 billion by transferring that amount into Samson Investment's account at JPMorgan, and (iii) JPMorgan then transferred $2.75 billion, which included a portion of the funds borrowed under the bridge agreement and revolving credit agreement, from Samson Investment's account, via intra-bank transfers, to the Selling Shareholders' accounts at JPMorgan. *Id.* & Ex. B. SRC likewise maintained an account at JPMorgan. Rabinowitz Decl. ¶ 11. As of the date of the Sale, JPMorgan transferred $3,566,361,770 in cash that had been raised by the KKR Group and SRC's other investors from SRC's account, via intra-bank transfers, to the Selling Shareholders' accounts at JPMorgan. *Id.* & Ex. B. Because the Complaint seeks relief only under section 544(b) of the Bankruptcy Code, these transfers are entirely shielded by section 546(e), as it is interpreted by binding Third Circuit precedent.[21]

Bankruptcy Code Section 546(e) provides, in relevant part:

> Notwithstanding [section] 544 . . . of this title, the trustee may not avoid a transfer that is a . . . settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a . . . financial institution . . . , or that is a transfer made by or to (or for the benefit of) a . . . financial institution, . . . in connection with a securities contract, as defined in section 741(7) . . . .

11 U.S.C. § 546(e).

[21]Although the scope of section 546(e) is currently before the Supreme Court, *see Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 137 S. Ct. 2092 (2017), the Supreme Court has not yet ruled. Pending a ruling, this Court must follow binding Third Circuit precedent, discussed below. *See, e.g.*, *In re Rue21, Inc.*, 575 B.R. 314, 330 (Bankr. W.D. Pa. 2017) ("[T]he precedential decision of the Third Circuit in *Resorts International* is binding on this Court. It will remain so unless and until the Supreme Court overturns it. The law in this matter is not ambiguous. [¶] [T]his Court must apply the law as it exists today. It will not speculate on the outcome of future rulings, nor is it required to do so."). The Court and the Samson Defendants should not be burdened by further litigation on Counts I and II where binding precedent mandates their dismissal. The Samson Defendants do not concede that they lack a section 546(e) defense even if the Supreme Court rules that the section 546(e) safe harbor does not apply just because a financial institution acts as a conduit. By way of example only, they reserve the right to show that an entity within one or more of the protected categories set forth in section 546(e) had a beneficial interest in the transaction and was more than a mere conduit.

Counts I and II are barred by two independent grounds under section 546(e). *First*, the Cash Transfers to the Selling Shareholders plainly qualify as "settlement payments" made "by or to" a "financial institution." *Second*, the Cash Transfers were made by a financial institution "in connection with" the Purchase Agreement, which is unquestionably a "securities contract." Counts I and II must therefore be dismissed.

1. The Cash Transfers Were Settlement Payments Made by a Financial Institution.

Under the settlement payment prong of section 546(e), a protected transfer must be (1) a "settlement payment" and (2) "made by or to . . . [a] financial institution." 11 U.S.C. § 546(e). The Bankruptcy Code defines "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). The Third Circuit has recognized the broad definition afforded to this term and has interpreted "settlement payment" to include "the transfer of cash or securities made to complete a securities transaction." *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515 (3d Cir. 1999); *In re Plassein Int'l Corp.*, 590 F.3d 252, 258 (3d Cir. 2009). While the term "settlement payment" indisputably encompasses transfers for the purchase and sale of securities, it also encompasses payments made to redeem securities. *See Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 749 (7th Cir. 2013) ("'[S]ettlement payment' means what it ordinarily does in the securities business; the financial settling-up after a trade . . . Here the investors told the Funds to redeem some of their shares; the swap of money for shares was a settlement payment."); *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 339 (2d Cir. 2011) ("The payments at issue were made to redeem commercial paper, which the Bankruptcy Code defines as a security. They thus constitute the 'transfer of cash . . . made to complete [a] securities transaction' and are

settlement payments within the meaning of § 741(8)."); *Official Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge Co.)*, 344 B.R. 340, 366 (W.D. Pa. 2006) ("Under a literal application of § 546(e) . . . the redemption payments constituted 'settlement payments.'").

As noted above, characterizing the Sale as an "LBO" ignores the $4 billion equity infusion by SRC. Even if the Sale were an "LBO," a transfer made for shares of stock as part of it would be afforded the same protection under section 546(e) as any other type of settlement payment. *See Resorts*, 181 F.3d at 516 ("A payment for shares during an LBO is obviously a common securities transaction, and . . . therefore . . . it is also a settlement payment for purposes of 546(e)."). The section 546(e) safe harbor is also available regardless of whether a transfer involves public or privately-traded securities. *See Plassein*, 590 F.3d at 258 ("The value of the privately held securities at issue is substantial and there is no reason to think that unwinding that settlement would have any less of an impact on financial markets than publicly traded securities.") (citing *In re QSI Holdings, Inc.*, 571 F.3d 545, 549-50 (6th Cir. 2009)).

Pursuant to the Purchase Agreement, the Selling Shareholders received the Cash Transfers in exchange for the redemption and sale of their Samson Investment shares. Compl. ¶ 43; Purchase Agreement §§ 2.1, 2.2. Accordingly, the Cash Transfers to the Selling Shareholders in payment for their shares constituted settlement payments that meet the first element for the settlement payment prong under section 546(e).

The second element of the settlement payment prong—that the settlement payment be "by or to (or for the benefit of)" a financial institution—has also been interpreted broadly by the courts. The term "financial institution" includes "an entity that is a commercial or savings bank." 11 U.S.C. § 101(22)(A). Thus, to qualify as a payment made "by or to . . . [a] financial institution" within the meaning of section 546(e) of the Bankruptcy Code, a payment need only

to pass from, to, or through a commercial or savings bank. *See Plassein*, 590 F.3d at 258 (section 546(e) applies where a bank transferred the funds in connection with an LBO and therefore "financial institutions were implicated in the transfers"). "So long as a financial institution is involved, the payment is an unavoidable 'settlement payment.'" *In re Hechinger Inv. Co. of Del.*, 274 B.R. 71, 87 (D. Del. 2002). Section 546(e) does not require financial institutions to "obtain a 'beneficial interest' in the funds they handle for the section to be applicable"; even where they act merely as an intermediary or conduit in facilitating the settlement payment this requirement is satisfied. *Resorts*, 181 F.3d at 516.

The Cash Transfers were made by a financial institution. The parties to the Purchase Agreement used JPMorgan—a paradigm "commercial or savings bank"—to effect the delivery of the Cash Transfers to the Selling Shareholders.[22] *See, e.g.*, *Lehman Bros. Holdings, Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings, Inc.)*, 469 B.R. 415, 437 (Bankr. S.D.N.Y. 2012) ("JPMC [*i.e.*, JPMorgan] unquestionably fits the Bankruptcy Code's definition of 'financial institution'"); Rabinowitz Decl., ¶¶ 7, 11 & Ex. B. Accordingly, the Cash Transfers were transferred by a "financial institution" to the Selling Shareholders and the second element of the settlement payment prong under section 546(e) is also met.

[22]JPMorgan is unquestionably a "commercial or savings bank" within the definition of "financial institution." *See, e.g.*, National Information Center, A Repository of Financial Data and Institution Characteristics Collected by the Federal Reserve System, https://www.ffiec.gov/nicpubweb/nicweb/InstitutionProfile.aspx?parID_Rssd=852218&parDT_END=20051230 (last visited Jan. 11, 2018). The Court may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Federal Rule of Evidence 201(b)(2); *see also Bolles v. One West Bank*, 2014 WL 888517, at *3 (M.D. Pa. Mar. 6, 2014) (taking judicial notice of bank charter information on FDIC website in deciding motion for judgment on the pleadings); *Enron Corp. v. Int'l Fin. Corp. (In re Enron Corp.)*, 341 B.R. 451, 458 (Bankr. S.D.N.Y. 2006) (taking judicial notice of status as financial institution for purposes of section 546(e) where such status "may be ascertained from the records of various public or quasi-public bodies").

Because the Cash Transfers to the Selling Shareholders were "settlement payments" made via JPMorgan in exchange for shares of Samson Investment stock, the Cash Transfers are protected from avoidance pursuant to the settlement payment prong of section 546(e).

2. The Cash Transfers Were Made by a Financial Institution in Connection with a Securities Contract.

Transfers "made by or to . . . [a] financial institution . . . in connection with a securities contract" are also safe-harbored by section 546(e). 11 U.S.C. § 546(e).

The Bankruptcy Code expansively defines "securities contract" to include "a contract for the purchase, sale, or loan of a security." 11 U.S.C. § 741(7)(A)(i). Common stock in a corporation such as Samson Investment is a paradigmatic security. *Id.* § 101(49)(A)(ii) ("The term 'security' includes stock."). The courts, in turn, have broadly interpreted the term "securities contract." *See, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 418 (2d Cir. 2014) ("[T]he term 'securities contract' expansively includes contracts for the purchase or sale of securities, as well as any agreements that are *similar* or *related* to contracts for the purchase or sale of securities.") (emphasis in original). Thus, where a transfer is made by or to a financial institution "in an amount and manner prescribed by" an agreement for the purchase or sale of securities, the transfer is insulated from avoidance under section 546(e). *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98 (2d Cir. 2013) (transfer made to purchase notes pursuant to a note purchase agreement were not subject to avoidance because such transfer "fits squarely within the plain wording of the securities contract exemption"); *In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. 69, 84 (Bankr. D. Del. 2008) (repurchase agreements providing for the sale and repurchase of notes qualify as "securities contracts" under section 741).

The Complaint plainly alleges that the Cash Transfers were made to the Selling Shareholders "in connection with a securities contract"—namely, the Purchase Agreement.

The "[Purchase Agreement] called for the implementation of the transactions through both (1) a stock redemption, in which [Samson Investment] would redeem its own stock owned by the Selling Shareholders; and (2) a stock sale, in which the Selling Shareholders would sell the remaining stock in [Samson Investment] to SRC, a newly formed corporation formed by the Sponsors to own [Samson Investment]." Compl. ¶ 43; *see also* Purchase Agreement §§ 2.1, 2.2. The Purchase Agreement is therefore a securities contract within the meaning of Bankruptcy Code section 741(7)(A)(i).

The remaining element of the securities contract prong was addressed above. The Cash Transfers were made by and through JPMorgan, a "financial institution." 11 U.S.C. § 101(22)(A). Accordingly, both elements of the test are met and the Cash Transfers are likewise protected from avoidance under the securities contract prong under section 546(e).

3. Count II, for Intentional Fraudulent Transfer Under Section 544(b) of the Bankruptcy Code, Is Equally Barred by Section 546(e).

The section 546(e) safe harbor is an absolute bar against all fraudulent transfer claims brought pursuant to section 544(b)—including those asserting an actual intent to hinder, delay, or defraud creditors. The statute is clear and unambiguous on this point. Congress knew how to except categories of fraudulent transfer claims from the safe harbor, and did do so with respect to actual intent fraudulent transfer claims under section 548(a)(1)(A). 11 U.S.C. § 546(e); *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). There is no exception for state-law actual-intent fraudulent transfer claims brought pursuant to section 544(b) and, accordingly, section 546(e) bars the pursuit of such claims. *See SIPC v. Madoff*, 476 B.R. 715, 722 (S.D.N.Y. 2012) ("The Trustee offers no explanation for why Congress, if it had

in fact wanted to enact the general fraud exception the Trustee advocates, did not express that intention in the statute, when it did express its desire to exempt § 548(a)(1)(A)."), *aff'd sub nom In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411 (2d Cir. 2014); *In re U.S. Mortg. Corp.*, 491 B.R. 642, 675-76 (Bankr. D.N.J. 2013) (all claims under section 544(b) were barred under the plain language of section 546(e), including state-law actual-intent fraudulent transfer claims); *Nat'l Forge*, 344 B.R. at 370 ("[I]f Congress had intended to exempt from § 546(e)'s protection allegations of actual fraud under state law fraudulent transfer theories, it could have easily done so.").

The Complaint asserts no claims under section 548 of the Bankruptcy Code. Count II purports to allege only an actual-intent claim under section 544(b) and "applicable state law including the Uniform Fraudulent Transfer Act as enacted in Delaware, Nevada, and/or Oklahoma." Compl. ¶ 132. Because section 546(e) applies here and provides no exception for actual intent fraudulent transfer claims under section 544(b), Count II must be dismissed.

D. Count V Should Be Dismissed in Part.

Count V must be dismissed to the extent it seeks to recover (from initial or subsequent transferees) property or its value where the underlying transfer is not avoidable. Section 550(a) provides that a transfer is subject to recovery only "to the extent that a transfer is avoided under section 544 . . . of this title." 11 U.S.C. § 550(a). Thus, where a transfer cannot be avoided because the correlative claim for relief has been dismissed based on Rules 8 and 9(b) or by operation of section 546(e), the trustee cannot maintain a claim for recovery of the transferred property against any initial or subsequent transferees. *See In re H & S Transp. Co.*, 939 F.2d 355, 359 (6th Cir. 1991) ("Section 550(a) provides that the trustee may recover from the initial transferee or any immediate or mediate transferee 'to the extent that a transfer is avoided . . . .' Thus, according to the literal language of the statute there must be an avoidable transfer before