Evading the Bankruptcy Code "Safe Harbor" Provisions — Are State Fraudulent Transfer Laws Preempted?

*By Gerard DiConza and Bryant Churbuck**

INTRODUCTION

This article reviews the divergent caselaw that addresses whether the "safe harbor" provisions of section 546 of Title 11 of the United States Code (the "Bankruptcy Code") bar creditors from asserting state law fraudulent transfer actions, or whether those provisions only preclude a bankruptcy trustee from maintaining such actions. It concludes that the line of cases holding that the section 546 safe harbors do not preempt the assertion of such state law claims by creditors represents the better view.

Section 546 provides a "safe harbor" from avoidance claims for transferees who receive transfers in connection with certain financial securities transactions,[1] repo transactions,[2] swaps,[3] and other transfers made through financial institutions. The Section 546 safe-harbor provisions exempt from avoidance those transfers or payments made in settlement of a securities transaction, repo agreements or swap transactions unless "actual" fraudulent intent is proven — meaning that the plaintiff must prove that the transferor actually intended to hinder or delay creditors' collection or intended to defraud them within the meaning of section 548(a)(1)(A).[4]

Courts have broadly construed the safe harbor provisions and have concluded they cover a broad range of securities transactions.[5] The safe harbor defenses arise most often in fraudulent transfer actions against recipients of transfers made in connection with leveraged buyouts ("LBOs").[6] Typically, LBO share redemptions are accomplished through borrowed funds secured by the target company's assets and payments are made to the former, selling shareholders through financial intermediaries.[7] LBO transferees have invoked section 546(e)'s safe harbor as a defense to trustee avoidance actions, and several courts have held that transfers received in connection with LBOs fall within section 546(e)'s broad definition of "settlement payments."[8]

Under a plain reading, the section 546 safe harbor provisions could be

---

*Gerard DiConza (gdiconza@dtklawgroup.com) is a partner and Bryant Churbuck (bchurbuck@dtklawgroup.com) is a law clerk at DiConza Traurig Kadish LLP, a law firm specializing in commercial bankruptcy, insolvency and reorganization law, in New York. The authors would like to thank Professor Richard Lieb, Editor-in-Chief of the Norton Journal of Bankruptcy Law and Practice, for his assistance, consideration and support in writing this article.

read to apply only to avoidance actions brought by a "trustee",[9] not individual creditors. Accordingly, to evade the far-reaching and ever-expanding scope of the safe harbor defenses, creative bankruptcy estate fiduciaries have abandoned or assigned their avoidance claims to creditors or trusts established for the benefit of creditors so those creditors can assert the claims under applicable state law.[10] Recently, a conflict has emerged over whether the section 546 safe harbors apply and preempt state-law based fraudulent transfer and related actions brought by or on behalf of a debtor's creditors. Notwithstanding the use of the word "trustee", the Second Circuit in the Tribune Company Chapter 11 cases ("*Tribune*") held that the Bankruptcy Code safe harbor provisions constitute a defense to state fraudulent transfer claims brought by creditors, not merely to those brought by a bankruptcy "trustee".[11] According to the Second Circuit's Tribune decision, the creditors' state law avoidance claims are preempted by an act of Congress and, accordingly, are trumped under the Supremacy Clause.[12] Consequently, under that decision, creditors, like a trustee, are barred by section 546(e) from asserting a state law constructive fraudulent transfer claim that meets the criteria of that provision.

Recently, in *PAH Litig. Trust v. Water St. Healthcare Partners L.P.* (*In re Physiotherapy Holdings, Inc.*) ("**Physiotherapy**"),[13] the Bankruptcy Court in Delaware rejected *Tribune*, holding that section 546(e) did not preempt the state law fraudulent transfer claims brought by creditors.

This article will discuss the differences between the approaches taken by the *Tribune* and *Physiotherapy* courts and attempt to reconcile how they reached their opposite results. While the safe harbor preemption issue is not currently before the Supreme Court,[14] the interpretation of section 546(e) will be addressed in the upcoming term.[15] The Court has been asked to decide whether the section 546(e) safe harbor defense applies when the transfer is made through a financial intermediary who exercises no control over the transferred proceeds and is thus a mere conduit through which the funds pass. In *FTI Consulting Inc, v. Merit Mgmt. Grp., LP*, the Seventh Circuit found that section 546(e)'s safe harbor was inapplicable, and concluded that the debtor's former shareholders where not protected from avoidance claims because the transfers were made through financial institutions acting as mere conduits.[16] This is the minority view and the Supreme Court has granted *certiorari* to consider that issue in *Merit*.[17]

Although the preemption issue addressed in *Tribune* and *Physiotherapy* is not yet before the Supreme Court, the Court's decision in *Merit* could shape the future application of the safe harbor provisions and whether they preempt state fraudulent transfer laws. While the *Physiotherapy* decision relied in part on the plain meaning of section 546(e), it also examined the legislative history to reach its conclusion that the safe harbor provision did not apply to protect transfers made in connection with a private company LBO. A plain meaning application of section 546(e) by the Supreme Court could bolster the view that the section 546 safe harbors apply only to actions commenced by a trustee and do not preempt state law fraudulent transfer claims brought by creditors or other creditor representatives.

I. PREEMPTION PRINCIPLES UNDER THE SUPREMACY CLAUSE

Under the Constitution, the laws of the United States, and any treaties entered into by the President and Congress, are the "supreme law of the land," notwithstanding the laws of any state.[18] However, the mere fact that Congress decides to legislate in an area traditionally left to states does not mean that Congress intended to preempt state law.[19] Instead, it is presumed that Congress did not preempt state law unless there is a "clear and manifest purpose of Congress."[20] The purpose of Congress is "the ultimate touchstone" in determining whether preemption applies, and the scope of Congress' intent "primarily is discerned from the language of the preemption statute and the 'statutory framework' surrounding it."[21]

The Constitution also expressly gives Congress the authority to enact a uniform system of bankruptcy laws.[22] When Congress chooses to enact rules regarding bankruptcies, "it may embrace . . . whatever may be deemed important to a complete and effective bankruptcy system."[23] Under the current bankruptcy system, Congress has given the courts "broad latitude to affect both contract and property rights."[24] Despite this constitutional and statutory authority, the presumption against preemption of state law still applies unless there is a clear indication that Congress intended federal law to preempt state law.[25]

Congress' intent to preempt state law can take several different forms. Congress can expressly declare it.[26] Congress can also impliedly preempt state law in two ways: First, under the "field" preemption branch, Congress can create a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it" or touch "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[27] Second, under the "obstacle" branch, state law will be preempted where there is an actual conflict between state and federal law, or "where it is impossible for a private party to comply with both state and federal requirements."[28]

II. CONFLICT DEVELOPS IN THE SOUTHERN DISTRICT OF NEW YORK

Prior to the Second Circuit's ruling in *Tribune*, a conflict developed in interpreting the section 546 safe harbors in the Southern District of New York. First, in *Whyte v. Barclays Bank PLC* ("*Whyte*"),[29] the District Court held that state law constructive fraudulent transfer claims to avoid transfers relating to swaps are preempted by section 546(g).[30] Second, the Bankruptcy Court in the *Lyondell Chemical Company* Chapter 11 cases ("*Lyondell*") rejected *Whyte* and held that state law constructive fraudulent transfers claims to avoid transfers relating to a leveraged buyout are not preempted by section 546(e).[31] While the section 546 subsections at issue were not the same, both subsections are similarly worded and the courts relied on substantially the same sources, including legislative history, in their interpretation.

a. *Whyte* Holds That State Law Claims Are Preempted by Safe Harbor Provisions in the Bankruptcy Code

In *Whyte*, the trustee of a trust created pursuant to a confirmed Chapter 11 plan brought state and federal avoidance actions, which had been assigned to the trust, against Barclays Bank.[32] Barclays had been involved in facilitating various swap agreements with the debtor's New York Mercantile Exchanges ("NYMEX") portfolio.[33] At one point, the debtor's portfolio "embraced 20% of the nation's crude oil inventory."[34] The trust's trustee sued as the holder of the assigned causes of action, relying on power conferred under state law, not any federally granted bankruptcy powers.[35]

Barclays sought dismissal based on the section 546(g) safe harbor. The trust argued that section 546(g) should not apply to creditors or the trust,[36] noting that despite section 544 of the Bankruptcy Code (which gives a bankruptcy trustee the right and power to avoid transfers that could have been avoided by the debtor's creditors under applicable non-bankruptcy law),[37] avoidance actions available in bankruptcy belong to a debtor's creditors,[38] and the express language of section 546(g) imposed constraints to bring constructive fraudulent conveyance actions only on estate representatives.

The court rejected this argument as it would render section 546(g) "a nullity"[39] and concluded that such an "absurd result" was prevented because the trust's claims were preempted under the conflict branch of preemption analysis.[40] The "obvious purpose" of the statute, confirmed by the legislative history of section 546(g), was to "protect securities markets from the disruptive effects that unwinding such transactions would inevitably create."[41] By enacting the safe harbor provisions of section 546, Congress sought to "minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries."[42]

The court went on to state that accepting the trust's argument would "totally undercut" the purpose of section 546(g).[43] If prohibited causes of actions could be held, rather than asserted, and later assigned, it would "make a mockery of Congress' purpose of minimizing volatility in swap markets," and potentially "increase[] the risk of uncertain, unpredictable, and therefore destabilizing market volatility."[44] Accordingly, the court ruled that the state law claims were preempted and dismissed the case.[45]

b. *Lyondell* Declines to Follow *Whyte*

In *Lyondell*, the court was presented with similar issues regarding section 546(e). Like the trust in *Whyte*, the *Lyondell* trust was created pursuant to a confirmed Chapter 11 plan, which provided for the assignment of state law claims to avoid transfers made as part of a LBO.[46] In total, the trust sought to avoid $12.5 billion in transfers.[47] The former stockholders asserted several defenses to the trust's claims, including that section 546(e) provided a substantive defense to the claims and preempted the trust's state law claims.[48]

The court rejected the shareholders' argument, holding that sections 544 and 548, and thus section 546(e), did not apply to the claims because those claims were not asserted under sections 544 or 548.[49] The court relied on the

Bankruptcy Court decision in the Tribune Company cases for the proposition that section 546(e) only applies to "trustees" and not individual creditors.[50] The court also quickly disposed of any express or field preemption arguments.[51]

Although the *Lyondell* court relied in part on the plain language of the statute, its conflict preemption analysis also analyzed section 546(e)'s legislative history, and the court noted several instances supporting its view that Congress had not intended to preempt state law. For example, Congress was asked by the Commodities Futures Trading Commission and Commodity Exchange, Inc. to amend section 546(e) to expressly preempt state law fraudulent transfer claims, but never did.[52] Furthermore, Congress had not preempted state constructive fraudulent conveyance claims filed before bankruptcy, even though those claims could feasibly be just as harmful to the securities markets.[53] When there were claims that Congress wanted to prevent, such as avoidance actions to recover charitable contributions, Congress acted to expressly preempt state law.[54]

Finally, the *Lyondell* court refused to regard *Whyte* as persuasive authority, stating that decision was readily distinguishable factually.[55] Unlike *Whyte*, where the confirmed Chapter 11 plan assigned the estates' claims to a single trustee serving in the capacity of bankruptcy trustee and representative of outside creditors, the Lyondell claims were pursued by a "Creditor Trust" asserting claims that were abandoned by the bankruptcy estates.[56] The *Lyondell* court also criticized the *Whyte* court's preemption analysis, as *Whyte* failed to properly apply Supreme Court and Second Circuit precedent, and took issue with *Whyte*'s conclusion that avoiding the transfers would lead to market disruptions.[57] Accordingly, the *Lyondell* court refused to grant the stockholders' motion to dismiss the state law constructive fraudulent transfer claims on preemption grounds.[58]

III. SECOND CIRCUIT RESOLUTION OF THE CONFLICT

In *Tribune*, certain retiree and noteholder creditors of the debtor brought state law fraudulent transfer claims against Tribune's former shareholders, officers, directors, financial advisors, and new owner Sam Zell as entities that benefitted from Tribune's leveraged buyout in 2007.[59] Before filing the fraudulent transfer action, the creditors moved for, and were granted, relief from the automatic stay to commence the action.[60]

The *Tribune* creditors made several arguments in support of their claims. First, they argued that based on the plain meaning of the statute, only the trustee, rather than creditors, were precluded from asserting constructive fraudulent conveyance claims under section 546(e).[61] The court summarized the creditors argument, stating that they believed constructive fraudulent transfer claims only temporarily belong to the trustee, and that after the statute of limitations lapsed those claims reverted to the creditors, or were only stayed while the trustee had the option of pursuing those claims.[62] The court rejected the creditors' arguments, concluding they had "no support in the language of the Code."[63] Statutes of limitation were "intended to limit the assertion of stale claims and to provide peace to possible defendants," not to "change the identity of the authorized plaintiffs."[64] Even if this was not the case, barring the trustee from asserting certain claims only for creditors to later assert those very same claims would be a hindrance to the performance of a trustee's duties and would encourage piecemeal litigation among creditors.[65]

The court then took a broader look at the Bankruptcy Code, and section 546(e)'s place in it. The creditors based parts of their argument on the language and structure of the automatic stay, but the stay only applied to actions against the debtor.[66] The court also stated that it was "equally important" that there was nothing in section 544 to suggest that state law constructive fraudulent transfer claims reverted to creditors after the two-year statute of limitations.[67] The creditors' argument also went against the very purpose of section 544, which the court stated was "intended to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among the creditors."[68] The creditors' argument was essentially that "their claims are on hold until the trustees *et al.* decide whether to bring an action they are powerless to bring or to pass on to creditors a power they do not have," which would be a "glaring anomaly" in the context of the rest of the Bankruptcy Code.[69]

The Second Circuit agreed with the defendant shareholders' preemption argument, holding that fraudulent conveyance claims, whether state or federal, threatened the stability of the nation's securities markets and that Congress acted to preclude that result.[70] Section 546(e) was enacted to "protect from avoidance proceedings payments by and to financial intermediaries in the settlement of securities transactions or the execution of securities contracts."[71] With these safe harbors and preemptions in place, Congress provided certainty and finality to transactions and individual stakes in firms, which in turn provided market stability.[72] To allow state law fraudulent transfer claims would "seriously undermine . . . markets in which certainty, speed, finality, and stability are necessary to attract capital."[73] The court stated that permitting creditors to assert state law claims that a trustee could not assert would be "a policy in a fruitless search of a logical rationale."[74]

According to the Second Circuit, the language of section 546(e) is ambiguous on whether it applies solely to "trustees" or also to creditors and whether it applies to state constructive fraudulent transfer claims, requiring it to review and analyze the legislative history.[75] After reviewing the legislative history, the Second Circuit determined that the purpose of section 546(e) was to promote finality and certainty for individual investors in securities transactions, and the only exception to this policy was cases of intentional fraud.[76] The threats to individual investors, without the safe harbor provisions of the Bankruptcy Code, would be numerous: unwinding the types of securities contracts at issue would create "substantial deterrents . . . to investing in securities" that would be "akin to the effect of eliminating the limited liability of investors for the debts of a corporation . . ."; individual investors with diversified portfolios that required minimal monitoring would be punished for their investments, by either increased monitoring costs or avoidance liability, because of the possibility that the firms they invested in might be "subject to mergers, stock buy-backs, or tender offers . . ."; and individual investors would be forced to expend capital defending "even very weak lawsuits involving millions of dollars," which would act as another deterrent to investing.[77] Accepting the creditors' arguments would substantially undermine Congress goal in preventing these outcomes. Accordingly, the court held that "Congress intended to protect from constructive fraudulent conveyance avoidance proceedings transfers by a debtor in bankruptcy that fall within [section] 546(e)'s terms."[78] Essentially, the claims were a *per se* threat to market stability and needed to be preempted to be consistent with Congressional intent.

IV. *PHYSIOTHERAPY* COURT EXPRESSLY DECLINES TO FOLLOW *TRIBUNE*

The Delaware Bankruptcy Court employed a different approach in deciding whether section 546(e) preempted state law fraudulent transfer laws. In *Physiotherapy*, the debtor was a provider of healthcare services at 650 locations in 33 different states.[79] After a 2007 merger, the debtor's finances deteriorated significantly,[80] and by 2009, the debtor's controlling shareholders decided to sell.[81] To improve the debtor's perceived financial health, the shareholders changed the debtor's revenue recognition methods, resulting in a significant revenue overstatement.[82] These overstatements led to shares of the company being "grossly overvalued" at the time it was sold pursuant to a leverage buyout in 2009. Eventually the debtor defaulted on its debt and filed a Chapter 11 case.[83]

After the Chapter 11 filing, the state law fraudulently transfer claims against the controlling shareholders were transferred to a litigation trust, which filed a fraudulent transfer action against the former shareholders to avoid the transfers received in the LBO.[84] The shareholders moved to dismiss on grounds that the section 546(e) safe harbor applied. The bankruptcy court noted the previous split in the Southern District of New York, and the Second Circuit's resolution of the conflict, but rejected the Second Circuit decision in *Tribune* and determined that *Lyondell* contained a better approach.[85]

The *Physiotherapy* court did acknowledge that the legislative history of the safe harbors established that Congress was concerned about the nation's securities markets.[86] The "one constant" revealed by the legislative history of section 546(e) and its amendments was that Congress believed "certain protections are necessary to prevent the insolvency of one commodity or securities firm from spreading to other firms and [possibly] threatening the collapse of the affected market."[87] Because broker-dealers and clearing houses are the ones that facilitate ordinary stock transfers, avoidance actions aimed at them "may negatively impact the U.S. economy as a whole."[88] The court concluded that the purpose of sections 546(e) and 546(g) was to protect against this systemic risk.[89]

However, the court criticized the Second Circuit's *Tribune* and Tenth

Circuit's *Kaiser Steel* decisions, observing that "these cases have placed too much emphasis on certain themes that do not appear to have played a critical role in the drafting of the safe harbors."[90] The 1990 report cited by the *Kaiser Steel* court in its decision also undermined any argument that the goal of section 546(e) was to promote finality for individual investors.[91] Moreover, other federal courts that considered the legislative history of section 546(e) concluded that its "sole purpose" was to protect securities markets from systemic risk.[92]

With the goals and scope of section 546(e) in mind, the court then analyzed whether the claims in the case could threaten the stability of the securities markets.[93] The court concluded that, based on the facts before it, the answer was clearly no.[94] Unlike the claims in *Whyte*, the plaintiffs were not seeking to avoid a "large portfolio of swap transactions.[95] Nor were the claims like those before the *Tribune* court, where the shares were publicly traded.[96] Instead, 90% of the debtor was formerly owned by two controlling shareholders, and the court stated[97] that it was "hard to envision a scenario where requiring [the controlling shareholders] to disgorge their payments would pose any sort of 'ripple effect' to the broader secondary market."[98] Because it was a private company LBO and there was no threat to the securities markets, the court in *Physiotherapy* held there was no preemption of the state law claims.[99]

The *Physiotherapy* court concluded that its ruling was bolstered by the plain language of section 546(e).[100] The court emphasized that the language of section 546(e) "only limits a *trustee's* ability to bring a fraudulent conveyance action. The statute is silent with regard to a creditor's ability to bring such a claim."[101] The court recognized that if Congress intends a Bankruptcy Code provision to apply to parties other than trustee, it expressly states such intention.[102] According to the court, the language of section 546(e) was "strong evidence" that Congress did not intend section 546(e) to preempt state-law avoidance claims.[103]

V. CURRENT STATE OF THE LAW AND POTENTIAL RESOLUTION BY THE SUPREME COURT?

The text of the Bankruptcy Code safe harbors expressly applies to fraudulent transfer claims brought by a "trustee". Based on a plain reading of these provisions, state fraudulent transfer claims brought by parties other than bankruptcy estate representatives should not be preempted by the safe harbors. While the Bankruptcy Code does not explicitly define the term "trustee", it does refer to a "trustee" as a "representative of the estate."[104] Thus, a "trustee" under the Bankruptcy Code is an estate representative, not an estate's creditors.[105] The Supreme Court has noted that Congress "could easily have used [a broader] formulation" than just "trustee" if it wanted to encompass others.[106]

While the plain language of the Bankruptcy safe harbors expressly applies to "trustee" fraudulent transfer actions, the Second Circuit and other courts have expanded the reach of these safe harbors to avoidance actions commenced under state law by non-bankruptcy estate representatives. Other courts have gone beyond the *Tribune* analysis and hold other types of state law claims are preempted.[107] It is uncertain whether the Supreme Court would adopt such a broad view of the wholesale preemption effect of the Bankruptcy Code on state debtor/creditor laws.[108]

While the broad application of the Bankruptcy safe harbors by *Tribune* is the majority rule, upholding *Tribune* and the broad application of section 546 preemption also risks application of the safe harbor provisions to fraudulent transfer claims brought by creditors, even in cases where no federal bankruptcy case was filed.[109] There should be limits to the ever-growing application of the safe harbors provisions.

The *Lyondell* and *Physiotherapy* decisions and their rationales are sound, consistent and comply with congressional intent. First, the outcomes in cases like *Whyte* would differ little under the *Physiotherapy* approach, as avoiding transactions on that scale would almost certainly have a profoundly negative effect on the securities market at issue, and that effect would be against Congress' intent in enacting section 546(e) and similar provisions.[110] Second, as noted in *Lyondell* and *Physiotherapy*, Congress chose to expressly preempt unwanted state law avoidance claims in other provisions of the Bankruptcy Code, yet failed to do so in section 546(e).[111] Congress knew how to explicitly preempt state law in the Bankruptcy Code; however, it chose not to do so in the context of the section 546 safe harbor provisions. Third, Congress has been asked to expressly preempt state law fraudulent transfer claims under section 546(e), but has never done so.[112] Finally, it respects the sovereignty and rights of states, particularly in fields where states have traditionally legislated.[113] While the Supreme Court has not decided the issue, its decision in the *Merit* case may shed light on whether the safe harbor defenses apply to fraudulent transfer claims brought by non-bankruptcy estate plaintiffs.[114]

NOTES:

[1]See 11 U.S.C.A. § 546(e) (safe harbor for margin and settlement payments made in connection with securities contracts). Section 546(e) states:

> Notwithstanding section 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761, or this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(4), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C.A. § 546(e). A "settlement payment" is defined in section 741(8) of the Bankruptcy Code as: "a preliminary settlement payment, a partial settlement payment, an interim settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade . . ." The definition is "frustratingly self-referential — essentially stating that a 'settlement payment' is a 'settlement payment'." In re MacMenamin's Grill Ltd., 450 B.R. 414, 418 (Bankr. S.D. N.Y. 2011).

[2]See 11 U.S.C.A. § 546(f) (providing safe harbor for repo participants).

[3]See 11 U.S.C.A. § 546(g) (providing safe harbor for swaps).

[4]See 11 U.S.C.A. § 548(a)(1)(A). Section 548(a)(1)(A) states:

> The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

11 U.S.C.A. § 548(a)(1)(A).

[5]See In re Resorts Intern., Inc., 181 F.3d 505, 515–16, 34 Bankr. Ct. Dec. (CRR) 736, Bankr. L. Rep. (CCH) P 77952 (3d Cir. 1999) ("The general thrust of [applicable case law] is that the term 'settlement payment' is a broad one that includes almost all securities transactions."); see also Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 55 Bankr. Ct. Dec. (CRR) 12, 65 Collier Bankr. Cas. 2d (MB) 1833 (2d Cir. 2011).

[6]See John H. Ginsberg et al, Befuddlement Betwixt Two Fulcrums: Calibrating the Scales of Justice to Ascertain Fraudulent Transfers in Leveraged Buyouts, 19 Am. Bankr. Inst. L. Rev. 71 (2011).

[7]In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98, 105 (2d Cir. 2016).

[8]See Resorts Int'l, 181 F.3d at 515–16. ("Including payments made during LBOs within the scope of the definition is consistent with the broad meaning these cases discern. A payment for shares during an LBO is obviously a common securities transaction, and we therefore hold that it is also a settlement payment for the purposes of section 546(e)."); In re Plassein Intern. Corp., 590 F.3d 252, 259, 52 Bankr. Ct. Dec. (CRR) 145, Bankr. L. Rep. (CCH) P 81653 (3d Cir. 2009) (holding section 546(e) safe harbor applies to private company LBO). But cf. In re MacMenamin's Grill Ltd., 450 B.R. 414, 425 (Bankr. S.D. N.Y. 2011) (concluding section 546(e) safe harbor does not apply to private company LBO); In re Norstan Apparel Shops, Inc., 367 B.R. 68, 76–77, 48 Bankr. Ct. Dec. (CRR) 9 (Bankr. E.D. N.Y. 2007) (same).

[9]Only the bankruptcy trustee is expressly prohibited from bringing certain causes of action under section 546's safe harbors. See, e.g., 11 U.S.C.A. § 546(g) ("Notwithstanding [other sections of the bankruptcy code], the *trustee* may not avoid a transfer made by or to a (or for the benefit of) repo participant or financial participant . . .") (emphasis added).

[10]See, e.g., Whyte v. Barclays Bank PLC, 494 B.R. 196, 58 Bankr. Ct. Dec. (CRR) 80, Bankr. L. Rep. (CCH) P 82496, 179 O.G.R. 503 (S.D. N.Y. 2013), aff'd, 644 Fed. Appx. 60 (2d Cir. 2016), cert. denied, 137 S. Ct. 2114, 198 L. Ed. 2d 220 (2017); See generally Deborah L. Thorne, Recovery of LBO Fraudulent Transfers: Can § 546(e) Be Circumvented, Mar. 2012 ABI Journal 28 (2012).

[11]Tribune, 818 F.3d at 124.

[12]Tribune, 818 F.3d at 124. In *Tribune*, the Second Circuit affirmed dismissal of the claims solely on preemption and the Court did not address other defenses including creditors' standing rights to bring such state law actions, or the issues of section 546(g) addressed in *Whyte*, which was heard in tandem with *Tribune*. *Whyte* was affirmed separately, but for the same reasons as *Tribune*. See Whyte v. Barclays Bank PLC, 644 Fed. Appx. 60 (2d Cir. 2016), cert. denied, 137 S. Ct. 2114, 198 L. Ed. 2d 220 (2017). The Supreme Court denied certiorari in Whyte on May 15, 2017. See Whyte v. Barclays Bank PLC, 137 S. Ct. 2114, 198 L. Ed. 2d 220 (2017).

[13]In re Physiotherapy Holdings, Inc., 62 Bankr. Ct. Dec. (CRR) 213, 2016 WL 3611831 (Bankr. D. Del. 2016).

[14]The creditors in Tribune filed a petition for a writ of *certiorari*, which is still pending

before the Supreme Court.

[15]FTI Consulting, Inc. v. Merit Management Group, LP, 830 F.3d 690, 62 Bankr. Ct. Dec. (CRR) 250, 75 Collier Bankr. Cas. 2d (MB) 1855, Bankr. L. Rep. (CCH) P 82972 (7th Cir. 2016), cert. granted, 137 S. Ct. 2092, 197 L. Ed. 2d 894 (2017).

[16]FTI Consulting, Inc. v. Merit Management Group, LP, 830 F.3d 690, 62 Bankr. Ct. Dec. (CRR) 250, 75 Collier Bankr. Cas. 2d (MB) 1855, Bankr. L. Rep. (CCH) P 82972 (7th Cir. 2016), cert. granted, 137 S. Ct. 2092, 197 L. Ed. 2d 894 (2017). In so deciding, the *Merit* court found agreement with the Eleventh Circuit in Matter of Munford, Inc., 98 F.3d 604, 610, 36 Collier Bankr. Cas. 2d (MB) 1673 (11th Cir. 1996) (holding safe harbor provisions did not apply to payments made through financial institutions involved as mere conduits).

[17]Cf. In re Quebecor World (USA) Inc., 719 F.3d 94, 58 Bankr. Ct. Dec. (CRR) 12, 69 Collier Bankr. Cas. 2d (MB) 1253, Bankr. L. Rep. (CCH) P 82505 (2d Cir. 2013) (finding safe harbor applicable where financial institution was trustee and actual exchange was between two private entities); Contemporary Industries Corp. v. Frost, 564 F.3d 981, 987, 51 Bankr. Ct. Dec. (CRR) 157, Bankr. L. Rep. (CCH) P 81473 (8th Cir. 2009) (finding § 546(e) not limited to public securities transactions, and exempting from avoidance Chapter 11 debtor's payments that were deposited in a national bank in exchange for shareholders' privately-held stock during leveraged buyout, as settlement payments made to financial institution); In re QSI Holdings, Inc., 571 F.3d 545, 551, 51 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 81528 (6th Cir. 2009) (finding HSBC's role in a leveraged buyout "sufficient to satisfy the requirement that the transfer was made to a financial institution" although it was only the exchange agent); In re Resorts Intern., Inc., 181 F.3d 505, 516, 34 Bankr. Ct. Dec. (CRR) 736, Bankr. L. Rep. (CCH) P 77952 (3d Cir. 1999) (noting that "the requirement that the 'commodity brokers, forward contract merchants, stockbrokers, financial institutions, and securities clearing agencies' obtain a 'beneficial interest' in the funds they handle . . . is not explicit in section 546"); In re Kaiser Steel Corp., 952 F.2d 1230, 1240, 26 Collier Bankr. Cas. 2d (MB) 443, Bankr. L. Rep. (CCH) P 74387 (10th Cir. 1991) (rejecting Kaiser's argument that "even if the payments were settlement payments, § 546(e) does not protect a settlement payment 'by' a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system and not to an equity security holder").

[18]U.S. Const. Art. VI., Cl. 2.

[19]See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947).

[20]Rice v. Santa Fe Elevator Corp., 331 U.S. at 230 (citing Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 47 S. Ct. 207, 71 L. Ed. 432 (1926)).

[21]See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86, 116 S. Ct. 2240, 135 L. Ed. 2d 700, Prod. Liab. Rep. (CCH) P 14634, 29 U.C.C. Rep. Serv. 2d 1077 (1996).

[22]U.S. Const. Art. I, § 8, Cl. 4.

[23]See U.S. v. Fox, 95 U.S. 670, 672, 24 L. Ed. 538, 1877 WL 18556 (1877).

[24]See In re Huntington Ltd., 654 F.2d 578, 590, 8 Bankr. Ct. Dec. (CRR) 218, Bankr. L. Rep. (CCH) P 68282 (9th Cir. 1981).

[25]See BFP v. Resolution Trust Corp., 511 U.S. 531, 540, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994) ("the Bankruptcy Code will be construed to adopt, rather than to displace, preexisting state law."); In re Federal-Mogul Global Inc., 684 F.3d 355, 365, 56 Bankr. Ct. Dec. (CRR) 112 (3d Cir. 2012) ("This 'strong presumption against inferring Congressional preemption' also 'applies in the bankruptcy context.' ") (citation omitted); see also Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 505, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep.

(CCH) P 70923, 16 Envtl. L. Rep. 20278 (1986) (Congress "did not intend for the Bankruptcy Code to pre-empt all state laws"); In re Berry Estates, Inc., 812 F.2d 67, Bankr. L. Rep. (CCH) P 71659 (2d Cir. 1987) ("Congress did not intend for bankruptcy laws to abrogate the State's police powers.").

[26]See Arizona v. U.S., 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351, 115 Fair Empl. Prac. Cas. (BNA) 353, 95 Empl. Prac. Dec. (CCH) P 44539 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption."). None of the cases addressing section 546 have held that express preemption applies.

[27]Rice, 331 U.S. at 230 (citing Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

[28]See English v. General Elec. Co., 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65, 5 I.E.R. Cas. (BNA) 609, 14 O.S.H. Cas. (BNA) 1609, 115 Lab. Cas. (CCH) P 56262, 113 Pub. Util. Rep. 4th (PUR) 97 (1990) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); Hines, 312 U.S. at 67.)

[29]Whyte v. Barclays Bank PLC, 494 B.R. 196, 58 Bankr. Ct. Dec. (CRR) 80, Bankr. L. Rep. (CCH) P 82496, 179 O.G.R. 503 (S.D. N.Y. 2013), aff'd, 644 Fed. Appx. 60 (2d Cir. 2016), cert. denied, 137 S. Ct. 2114, 198 L. Ed. 2d 220 (2017).

[30]Whyte, 494 B.R. at 201.

[31]In re Lyondell Chemical Company, 503 B.R. 348, 378 (Bankr. S.D. N.Y. 2014), as corrected, (Jan. 16, 2014).

[32]Whyte, 494 B.R. at 198.

[33]Whyte, 494 B.R. at 198.

[34]Whyte, 494 B.R. at 201.

[35]Whyte, 494 B.R. at 198–99.

[36]Whyte, 494 B.R. at 198–99.

[37]Section 544(b)(1) of the Bankruptcy Code permits the trustee to avoid transfers that could have been avoided by other creditors under state or federal law. See 11 U.S.C.A. § 544(b)(1); In re Palermo, 739 F.3d 99, 101–02, 58 Bankr. Ct. Dec. (CRR) 250 (2d Cir. 2014) ("The 'applicable law' in determining which obligations are voidable under Section 544(b)(1) is often state law.") (citing In re Adelphia Recovery Trust, 634 F.3d 678, 691, 54 Bankr. Ct. Dec. (CRR) 89 (2d Cir. 2011)); In re Marlar, 267 F.3d 749, 754, 38 Bankr. Ct. Dec. (CRR) 134, 46 Collier Bankr. Cas. 2d (MB) 1665, Bankr. L. Rep. (CCH) P 78523 (8th Cir. 2001) ("The plain language of § 544(b)(1) permits the trustee to avoid the transfer if any unsecured creditor has the right to do so under state law. Thus, the fact that the transfer is not voidable by [one creditor] does not bar the trustee from relying on the rights of other unsecured creditors.").

[38]Whyte, 499 B.R. at 199.

[39]Whyte, 499 B.R. at 199.

[40]Whyte, 499 B.R. at 199–200.

[41]Whyte, 499 B.R. at 200.

[42]Whyte, 499 B.R. at 200. (citing Kaiser Steel Corp. v. Charles Schwab & Co., Inc., 913 F.2d 846, 849, 20 Bankr. Ct. Dec. (CRR) 1650, 23 Collier Bankr. Cas. 2d (MB) 1403, Bankr. L. Rep. (CCH) P 73620 (10th Cir. 1990)).

[43]Whyte, 499 B.R. at 200.

[44]Whyte, 499 B.R. 201 (citing *Enron*, 651 F.3d at 338–39).

[45]Whyte, 499 B.R. 201.

[46]Lyondell, 503 B.R. at 355–56.

[47]Lyondell, 503 B.R. at 355.

[48]Lyondell, 503 B.R. at 357–58.

[49]Lyondell, 503 B.R. at 358–59.

[50]Lyondell, 503 B.R. at 358, n.17–18 (citing 11 U.S.C.A. § 546(e); In re Tribune Co. Fraudulent Conveyance Litigation, 499 B.R. 310, 315–16, 58 Bankr. Ct. Dec. (CRR) 134 (S.D. N.Y. 2013); Transcript of Decision of Feb. 17, 2013, Development Specialists, Inc. v. Kaplan (In re Irving Tanning Co.), No. 12-01024 (Bankr. D. Me. Feb. 17, 2013), ECF No. 43 (Kornreich, J.)).

[51]Lyondell, 503 B.R. at 359–63.

[52]Lyondell, 503 B.R. at 365, n.66 (citing Tribune I, 499 B.R. at 318).

[53]Lyondell, 503 B.R. at 365, n.66 (citing *Tribune* I, 499 B.R. at 318).

[54]Lyondell, 503 B.R. at 366 ("Congress then expressly preempted state fraudulent transfer laws that would permit individual creditors to recover with respect to such contributions so long as the contributions did not exceed the Congressionally prescribed amount.").

[55]Lyondell, 503 B.R. at 374–76.

[56]Lyondell, 503 B.R. at 375.

[57]Lyondell, 503 B.R. at 376–78.

[58]Although *Lyondell* was subsequently appealed, the court's holdings regarding the state law constructive fraudulent transfer claims was not at issue. See In re Lyondell Chemical Co., 554 B.R. 635 (S.D. N.Y. 2016) (reversing the *Lyondell* court's holding on the intentional fraudulent transfer claims).

[59]Tribune, 818 F.3d at 106.

[60]Tribune, 818 F.3d at 107. The creditors initially brought their claims in various federal and state courts after obtaining stay relief. Tribune, 818 F.3d at 106. Their claims were later consolidated in a federal court action brought by the trustee of the Litigation Trust created pursuant to the confirmed Chapter 11 plan. In re: Tribune Co. Fraudulent Conveyance Litigation, 831 F. Supp. 2d 1371 (U.S.J.P.M.L. 2011).

[61]Tribune, 818 F.3d at 113.

[62]Tribune, 818 F.3d at 113–14. Section 546(a)(1) of the Bankruptcy Code provides that a fraudulent transfer action may be not be commenced later than two years after the commencement of a bankruptcy case. 11 U.S.C.A. § 546(a)(1).

[63]Tribune, 818 F.3d at 114.

[64]Tribune, 818 F.3d at 114.

[65]Tribune, 818 F.3d at 114.

[66]Tribune, 818 F.3d at 114 (citing 11 U.S.C.A. § 362).

[67]Tribune, 818 F.3d at 114.

[68]Tribune, 818 F.3d at 115.

[69]Tribune, 818 F.3d at 115.

[70]Tribune, 818 F.3d at 122–23.

[71]Tribune, 818 F.3d at 119.

[72]Tribune, 818 F.3d at 119.

[73]Tribune, 818 F.3d at 119.

[74]Tribune, 818 F.3d at 119.

[75]Tribune, 818 F.3d at 116–18. The Second Circuit concluded that "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditor's rights" and there are no "concern[s] about federal intrusion into traditional state domains" that need to be considered. Tribune, 818 F.3d at 111–112.

[76]Tribune, 818 F.3d at 120–21 (citing In re Kaiser Steel Corp., 952 F.2d 1230, 1240 n.10, 26 Collier Bankr. Cas. 2d (MB) 443, Bankr. L. Rep. (CCH) P 74387 (10th Cir. 1991)). In *Kaiser Steel*, the Tenth Circuit held that payments made to shareholders in a leveraged buyout were "settlement payments" within the meaning of section 546(e). Kaiser Steel, 952 F.2d at 1237–40.

[77]Tribune, 818 F.3d at 122.

[78]Tribune, 818 F.3d at 123.

[79]Physiotherapy, 2016 WL 3611831, at *2.

[80]Physiotherapy, 2016 WL 3611831, at *2 ("[T]here were delays in implementing a new single accounting system to replace the various legacy systems; there were problems keeping up with cash collections; and there were almost no internal financial reporting controls.").

[81]Physiotherapy, 2016 WL 3611831, at *2.

[82]Physiotherapy, 2016 WL 3611831, at *3-4.

[83]Physiotherapy, 2016 WL 3611831, at *4.

[84]Physiotherapy, 2016 WL 3611831, at *4.

[85]Physiotherapy, 2016 WL 3611831, at *5-7.

[86]Physiotherapy, 2016 WL 3611831, at *7.

[87]Physiotherapy, 2016 WL 3611831, at *8 (citing H.R. Rep. No. 97-420 (1982)) (alteration in original).

[88]Physiotherapy, 2016 WL 3611831, at *8.

[89]Physiotherapy, 2016 WL 3611831, at *8.

[90]Physiotherapy, 2016 WL 3611831, at *8.

[91]Physiotherapy, 2016 WL 3611831, at *8 (quoting H.R. Rep. 101-484 (1990) ("The purpose of H.R. 4612 is to ensure that the swap and forward contract financial are not destabilized by uncertainties regarding the treatment of their financial instruments under the bankruptcy code.").

[92]Physiotherapy, 2016 WL 3611831, at *9 (citations omitted).

[93]Physiotherapy, 2016 WL 3611831, at *9 (citations omitted).

[94]Physiotherapy, 2016 WL 3611831, at *9 ("The issue therefore is straightforward: would allowing the Litigation Trust to pursue its state fraudulent transfer claims have a destabilizing effect on the financial markets Congress sought to protect? The Court believes the answer is clearly no.")

[95]Physiotherapy, 2016 WL 3611831, at *9.

[96]Physiotherapy, 2016 WL 3611831, at *9.

[97]Physiotherapy, 2016 WL 3611831, at *9 (citing Lyondell, 503 B.R. at 373 ("where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, [they] can give the money back to injured creditors with no damage to anyone but themselves"); In re MacMenamin's Grill Ltd., 450 B.R. 414, 419 (Bankr. S.D. N.Y. 2011) ("These decisions note that granting a safe harbor to a constructively fraudulent private stock sale has little if anything to do with Congress' stated purpose in enacting section 546(e): reducing systemic risk to the financial markets.").

[98]Although the *Physiotherapy* court relied on this factor, Third Circuit precedent makes

clear that the distinction between public and non-public companies is irrelevant in interpreting the Bankruptcy Code safe harbors. See Brandt, 590 F.3d at 258–59 (3d Cir. 2009).

[99]The *Physiotherapy* decision, although interlocutory, has been appealed and the defendants have requested a direct appeal to the Third Circuit. No decision has been rendered on whether the appeal will be heard and if so, by the Delaware District Court or Third Circuit.

[100]Physiotherapy, 2016 WL 3611831, at *9.

[101]Physiotherapy, 2016 WL 3611831, at *9 (emphasis in original).

[102]Physiotherapy, 2016 WL 3611831, at *9 (citing to 11 U.S.C.A. § 1109(b)).

[103]Physiotherapy, 2016 WL 3611831, at *9 (citing Wyeth v. Levine, 555 U.S. 555, 574–75, 129 S. Ct. 1187, 173 L. Ed. 2d 51, Prod. Liab. Rep. (CCH) P 18176 (2009)).

[104]See 11 U.S.C.A. § 323(a).

[105]Several Bankruptcy Code sections explicitly apply to "a creditor," or "a party in interest," showing that Congress also knows how to write statutes to apply to creditors when it wants to. See, e.g., 11 U.S.C.A. §§ 101(10), 1109(b).

[106]See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 7, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000) (only a "trustee" may pursue claims under section 506(c) of the Bankruptcy Code).

[107]See In re Hechinger Investment Co. of Delaware, 274 B.R. 71, 96–98 (D. Del. 2002) (holding unjust enrichments claims were preempted under section 546(e) because the claims essentially sought the same relief as a constructive fraudulent transfer claim); see also In re U.S. Mortg. Corp., 491 B.R. 642, 676 (Bankr. D. N.J. 2013) ("Thus, state law claims for damages that are merely 're-labeled' avoidance actions are preempted by the Code so as not to render § 546(e) 'useless.' ")

[108]See, e.g., BFP v. Resolution Trust Corp., 511 U.S. 531, 544–45, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994) ("Bankruptcy Code will be construed to adopt, rather than to displace, preexisting state law.") Several Bankruptcy Code sections other than section 546(e) explicitly preempt state law, showing that Congress knows how to write statutes to bar state-law claims when it so intends. See, e.g., 11 U.S.C.A. §§ 341(c), 541(c)(1), 1123(a), 366(c)(4), 704(c)(2)(B), 1123(a), 1142(a), 1302(d)(2)(B).

[109]See Ashmore for Wilson v. Dodds, 2017 WL 2868564 at *8 (D.S.C. 2017) (defendant in state fraudulent transfer suit sought dismissal arguing section 546(e) applied even though debtor had not filed for bankruptcy protection). Moreover, instead of transferring the fraudulent transfer claims to a trust under a plan, a debtor's case could be dismissed in which case the causes of action would vest in the creditors who had the right to commence such actions prior to the bankruptcy filing. See 11 U.S.C.A. § 349(b)(3) (if a case is dismissed, property of the debtor's estate is revested "in the entity in which such property was vested immediately before" the filing of the case).

[110]See Whyte, 494 B.R. at 201 ("Yet, on Whyte's interpretation of the statute, there need only be a two-year hiatus before the Trustee, wearing her non-bankruptcy hat, can bring actions that would totally imperil the stability of this large corpus of swap positions.")

[111]Physiotherapy, 2016 WL 3611831, at *9 (citing 11 U.S.C.A. § 544(b)(2)).

[112]Lyondell, 503 B.R. at 365, n.66 (citing Tribune I, 499 B.R. at 318).

[113]Lyondell, 503 B.R. at 360–61.

[114]See footnotes 15–17 supra.