Navigating § 546's Safe Harbors in the Wake of *Lyondell, Tribune* and *Barclays*

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Ever since Jan. 14, 2014, when **Judge Robert E. Gerber** of the U.S. Bankruptcy Court for the Southern District of New York issued his decision in *Weisfelner v. Fund 1 (In re Lyondell Chemical Company)*,[1] bankruptcy practitioners have commented extensively[2] about the emerging judicial split over whether the securities-related "safe harbors" of § 546 of the Bankruptcy Code[3] protect shareholders against state-law constructive fraudulent conveyance (SLCFC)[4] actions filed by unsecured creditors outside of bankruptcy following an unsuccessful leveraged buyout (LBO). All eyes are now on the U.S. Court of Appeals for the Second Circuit, which is expected to consider in the coming months appeals in the two seemingly conflicting decisions—*In re*

[1] *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 2014 Bankr. LEXIS 159, (Bankr. S.D.N.Y. Jan. 14, 2014) (Gerber, J.).
[2] *See, e.g.*, **Brian Trust**, **Joel Moss** & Joaquin M. C de Baca, *Southern District of New York Deepens Internal Split Over Loophole in Bankruptcy Safe Harbor for Capital Markets Transactions*, MAYERBROWN.COM, (Jan. 24, 2014), http://www.mayerbrown.com/files/Publication/2b59f899-3c86-44c2-a72e-767a0314dfe4/Presentation/PublicationAttachment/499318c1-1f12-49d9-a265-81c236204403/UPDATE-Lyondell-Bankruptcy-Court_Safe-Harbor_0114.pdf.
[3] 11 U.S.C. § 546 (2012).
[4] Constructive fraudulent conveyance claims are preferred in this context because of the difficulty in proving intentional fraudulent conveyance; state-law claims are generally preferred because of their longer reach-back periods. *See* **Jeffrey A. Liesemer**, *Safe harbour neither bars nor pre-empts state law fraudulent transfer claims*, INSOLVENCY & RESTRUCTURING (Int'l Law Office), Feb. 21, 2014, *available at* http://www.capdale.com/files/10509_Safe%20Harbour%20Neither%20Bars%20Nor%20Pre-empts%20State%20Law%20Fraudulent%20Transfer%20Claims.pdf.

Tribune Co. Fraudulent Conveyance Litigation[5] and *Whyte v. Barclays Bank PLC*[6]—that first illuminated this split over the extent of the § 546 safe harbors' scope.[7]

In *Barclays*, issued in June 2013, Judge Jed S. Rakoff of the U.S. District Court for the Southern District concluded that § 546(g)[8]—the safe harbor for swap agreements—preempts creditors' avoidance-seeking state-law claims.[9] Roughly three months later, in *Tribune*, Judge Rakoff's Southern District colleague Judge Richard J. Sullivan rejected the argument that § 546(e), covering settlement payments, entirely preempts creditors' SLCFC claims against cashed-out shareholders in the wake of an unsuccessful LBO.[10] Judge Gerber endorsed Judge Sullivan's reasoning in *Lyondell*, which also involved invocation of § 546(e) in defense against creditors' post-LBO, SLCFC claw-back actions.[11] *Barclays*, *Tribune* and *Lyondell* all featured analyses of whether § 546 preempts SLCFC actions filed by creditors who believe their rights have been subordinated as a result of pre-bankruptcy securities transactions.[12] A key factual distinction between the three cases is that in *Tribune*, the creditors initiated their SLCFC claims after the statute-of-limitations window set forth in § 546(a)[13] had closed.[14]

The opaqueness of the legislative history underlying § 546's securities-related safe harbors makes preemption analysis of these statutory provisions less than straightforward.[15]

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[5] 499 B.R. 310 (S.D.N.Y. 2013) (Sullivan, J.).
[6] 494 B.R. 196 (S.D.N.Y. 2013) (Rakoff, J.).
[7] **Kevin Walsh** & **Joe Dunn**, Lyondell*: Is the Safe Harbor Closed to Former Shareholders of LBOs?*, BANKR., RESTRUCTURING & COM. L. (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.), Feb. 10, 2014, *available at* http://www.mintz.com/newsletter/2014/Advisories/3683-0214-NAT-BRC/ (noting that *Tribune* and *Barclays* "are pending on appeal and will be heard in tandem").
[8] 11. U.S.C. § 546(g) (2012).
[9] *Barclays*, 494 B.R. at 199–201.
[10] *In re Tribune*, 499 B.R. at 314–19.
[11] *In re Lyondell*, 2014 Bankr. LEXIS 159, at *4-7.
[12] *See generally* 494 B.R. at 199–201; 499 B.R. at 314–20; 2014 Bankr. LEXIS 159, at *21–62.
[13] 11 U.S.C. § 546(a) (2012).
[14] *Compare* 2014 Bankr. LEXIS 159, *and* 494 B.R. 196, *with* 499 B.R. 310.
[15] *See generally* Liesemer, *supra* note 4 (discussing the complexities of the preemption issues involved in *Lyondell* and *Tribune*).

Bankruptcy practitioners and market participants hopeful for a definitive resolution by the courts should therefore brace themselves for split-prompted appellate rulings that favor fact-focused application of uncontroversial interpretations as to the ordinary meaning of the Code, and that sidestep preemption analyses concerning § 546's safe harbors on the ground that responsibility for final resolution of the creditor-versus-shareholder conflict underlying the split properly rests with Congress.[16]

For reasons explained in detail below, the author suggests that an appellate court is likely to conclude that § 546's safe harbors bar creditors' mid-bankruptcy SLCFC claims in cases involving facts similar to those of *Barclays* and *Lyondell*, but is equally likely to rule that when, as in *Tribune*, the trustee is time-barred under § 546(a) from exercising § 544(b)[17] power, the Code does not prevent creditors from commencing SLCFC suits outside of bankruptcy. The final section of this article discusses litigation strategies that should be considered by any market participant connected to a chapter 11 bankruptcy immediately preceded by a significant securities transaction. Generally speaking, creditors granted permission to sue those who apparently benefited from such a transaction should be willing to press legal claims not necessarily based on traditional fraudulent conveyance law, while cashed-out shareholders (and others who anticipate being sued by creditors in an avoidance-style action) should follow bankruptcy proceedings closely—and, possibly, attempt to intervene at the plan-confirmation stage.

[16] The Second Circuit has thus far refrained from weighing in on the preemptive scope of § 546's safe harbor. *See In re Lyondell*, 2014 Bankr. LEXIS 159, at *56 n.109 (citing *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V. (In re Enron Creditors Recovery Corp.)*, 651 F.3d 329 (2d Cir. 2011); *Official Comm. of Unsecured Creditors v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94 (2d Cir. 2013)).
[17] 11 U.S.C. § 544(b) (2012).

***Barclays, Tribune* and *Lyondell*: Disgruntled Creditors Take Action**

Barclays stems from a June 2008 agreement between Barclays and the energy transport company SemGroup pursuant to which the bank paid $143 million to acquire a SemGroup portfolio of commodities derivatives.[18] SemGroup filed for chapter 11 bankruptcy several weeks later; the portfolio went on to become profitable.[19] The resulting reorganization plan, confirmed by the Delaware-based bankruptcy court overseeing the case, provided for establishment of a litigation trust to which creditors could transfer avoidance claims targeting pre-bankruptcy transactions, with the trust prosecuting such claims on the creditors' behalves.[20] The bankruptcy trustee in the case also served as trustee of the litigation trust.[21] Judge Rakoff concluded that § 546(g) "impliedly preempts the Trustee's attempt to resuscitate fraudulent avoidance claims . . . she would [otherwise] be expressly prohibited by section 546(g) from asserting . . . ."[22] Surveying the legislative history of § 546's safe harbors, he noted that Congress's creation of § 546(e) and, subsequently, of § 546(g), reflected an overall aim of providing stability in the securities marketplace.[23]

Tribune involves the mid-2007 LBO in which $8.2 billion was paid to shareholders of the eponymous media company.[24] The company ultimately filed for bankruptcy; after the estate failed to lodge SLCFC claims pursuant to its § 544(b) power within the window set forth in § 546(a), the Delaware-based bankruptcy court overseeing the case conditionally lifted the stay in a manner that paved the way for certain individual unsecured creditors to pursue SLCFC

[18] *Barclays*, 494 B.R. at 198.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 199.
[22] *Id.*
[23] *Id.* at 201 (citing *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V. (In re Enron Creditors Recovery Corp.)*, 651 F.3d 329, 338–39 (2d Cir. 2011)).
[24] *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 313 (S.D.N.Y. 2013).

remedies outside of bankruptcy.[25] Starting in mid-2011, forty-four suits against 1700-plus cashed-out shareholders were filed in twenty-one states.[26] In rejecting the argument that § 546(e) preempts these claims, Judge Sullivan stressed that both § 546(e) and the legislative history thereof address only the "trustee,"[27] and that Congress apparently has chosen not to include a preemption clause in § 546(e) even as it has seen fit to include such a clause elsewhere in the Code.[28] He distinguished *Barclays* by noting that in *Tribune*, the creditors prosecuting SLCFC claims were "in no way identical with the bankruptcy trustee."[29] *Tribune* was not, however, entirely pro-creditor: Judge Sullivan concluded that the existence of intentional fraudulent conveyance claims being pursued by the creditors' committee via the trustee's powers "deprives" individual creditors of the ability to commence effectively "coextensive" SLCFC claims.[30]

In *Lyondell*, the unsecured creditors' SLCFC claims[31] target approximately half of the $12.5 billion paid to shareholders of a chemical company that filed for chapter 11 relief in January 2009, thirteen months post-LBO.[32] Judge Gerber confirmed a reorganization plan that created a litigation trust through which would be pursued, for the benefit of the creditors, claims the estate could have prosecuted under § 544(b) but that, pursuant to the plan, were "deemed to

[25] *Id.* at 314.
[26] Liesemer, *supra* note 4 (citing Memorandum of Law in Support of Defendants' Joint Phase One Motion to Dismiss the Individual Creditor Actions with Prejudice Pursuant to Federal Rule of Civil Procedure 12(b)(6) at 4-5, *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11-md-2296 (S.D.N.Y. Nov. 6 2012), Doc. 1671. The individual creditor actions were "sufficiently voluminous" to warrant consolidation by the Judicial Panel on Multidistrict Litigation, which transferred the matter to Judge Sullivan. 499 B.R. at 314.
[27] *Id.* at 316.
[28] *Id.* at 317 (citing 11 U.S.C. § 544(b)(2) (2012)).
[29] *Id.* at 319–20.
[30] *Id.* at 323.
[31] The *Lyondell* creditors' state-action complaint alleges only violations of N.Y. DEBT. & CRED. Law. *See* Complaint at 100–01, *Weisfelner v. Fund 279*, No.653617/2012 (Sup. Ct. N.Y. Cnty. Oct. 16, 2012).
[32] *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 2014 Bankr. LEXIS 159, at *1–4 (Bankr. S.D.N.Y. Jan. 14, 2014).

[have been] abandoned" by the estate under § 554.[33] Citing approvingly to *Tribune*[34] and rejecting the preemption analysis of *Barclays*,[35] Judge Gerber ruled that "there is no statutory text making section 546(e) applicable to claims brought on behalf of individual creditors"[36] and reasoned that Congress clearly has chosen not to place the goal of ensuring market stability ahead of "the historical priority of creditors over stockholders."[37]

Conflicting Theories as to Where the Estate's Powers End and the Creditors' Begin

Since at least the mid-nineteenth century, U.S. bankruptcy law has permitted bankruptcy trustees to press state-law fraudulent conveyance claims for the benefit of creditors, a power currently codified at § 544(b).[38] The notion that creditors are, at least at the outset of a bankruptcy case, barred from directly pursuing state-law remedies on an individual basis as a result of the trustee's power to act on their behalf is not a controversial one.[39] The question then becomes whether—and, if so, to what extent—someone *other than* the trustee may litigate such

[33] Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint at 11, *Weisfelner v. Morgan Stanley & Co.*, No. 09-10023 (Bankr. S.D.N.Y. Jan 11, 2011) Doc. 72 [hereinafter *Lyondell* Shareholders' Memo] (citing 11 U.S.C. § 554 (2013)). Prior to confirmation, the § 544 claims had been prosecuted by the creditors' committee. *Id.*

[34] 2014 Bankr. LEXIS 159, at *7.

[35] *Id.* at *63–78.

[36] *Id.* at *21.

[37] *Id.* at *51.

[38] *Id.* at *31 (citing 4A COLLIER ON BANKRUPTCY ¶ 70.03[1] (James William Moore & Robert Stephen Oglebay eds., 14th ed. 1978)).

[39] Judge Gerber made the following observation in *Lyondell*:

> [I]t is contrary to the important bankruptcy policy of equality of distribution if individual creditors suing to advance personal interests assert claims which, if otherwise actionable, may (and should) be asserted by the estate for the benefit of all. This principle was noted as recently as yesterday by the Second Circuit in a non-preemption case, Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC), No. 12-1645-bk(L), 740 F.3d 81, 2014 U.S. App. LEXIS 600, at *25, 2014 WL 103988, at *7 (2d Cir. Jan. 13, 2014) . . . . Thus, when the trustee or estate representative can act, individual creditors cannot. But when the trustee no longer can act, or chooses not to, individual creditors can, especially in cases where a reorganization plan, by express terms, conveys the estate's rights back to individual creditors.

In re Lyondell, 2014 Bankr. LEXIS 159, at *31 n.47 (citation as rendered in original, with secondary citation omitted).

claims before the bankruptcy process has fully concluded.[40] In the chapter 11 context, it is generally accepted that a bankruptcy court may bestow upon an official creditors' committee "derivative standing" to initiate an avoidance action,[41] with the key criterion for eligibility being whether the "trustee or debtor in possession unjustifiably fails or refuses to pursue a claim."[42]

The widespread acceptance of granting creditors' committees derivative standing in turn begs another question: Is the trustee's § 544(b) power property of the estate that can be transferred like any other piece of property, or is it a statutory right that might very well be temporary in duration but that during its existence may not be exercised by anyone other than the trustee except in limited circumstances? Bankruptcy practitioners have commented that federal courts are split on this question,[43] which has perhaps most noticeably come to the fore in cases in which a trustee (or a DIP) seeks to dispose of a claim mid-bankruptcy, typically by selling it to a creditor.[44]

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[40] For a thorough critique of the growth of litigation trusts which seems to have foreshadowed Judge Rakoff's apparent apprehension in *Barclays* about the propriety of a "two-hatted trustee," see Andrew J. Morris, *Clarifying the Authority of Litigation Trusts: Why Post-Confirmation Trustees Cannot Assert* Creditors' *Claims Against Third Parties*, 20 AM. BANKR. INST. L. REV. 589 (2012).

[41] *See* COLLIER ON BANKRUPTCY ¶ 1103.05[a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013) [hereinafter COLLIER] . Derivative litigation, best known today for its use by shareholders, originated in eighteenth century England, in the context of breach-of-duty actions against trustees of charitable organizations. *See* DEBORAH A. DEMOTT & DAVID F. CAVERS, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 1:3 (2013) (citing *The Charitable Corporation v. Sutton*, (1742) 26 Eng. Rep. 642 (Ch.); 2 Atk. 404).

[42] *See* COLLIER, *supra* note 41, at ¶ 1103.05[b].

[43] *See* Arthur J. Steinberg & Christopher G. Boies, *Reversion to Creditors of State Law Fraudulent Transfer Claims*, N.Y. L.J., Aug. 22, 2011, at 3 (comparing *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000) (fraudulent transfer action not possession of DIP), with *In re Zwirn*, 362 B.R. 536 (Bankr. S.D. Fla. 2007), and *Nat'l Tax Credit Partners L.P. v. Havlik*, 20 F.3d 705 (7th Cir. 1994) (right to pursue fraudulent transfer action is property of the estate)).

[44] George R. Howard, *Bankruptcy Trustee May Sell State-Law Avoidance Claims*, JONES DAY BUS. RESTRUCTURING REV. (Jones Day) Nov./Dec. 2010, *available at* http://www.jonesday.com/bankruptcy-trustee-may-sell-state-law-avoidance-claims-ibusiness-restructuring-reviewi-12-01-2010/ (comparing *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010), and *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C. Inc.)*, 177 F.3d 774 (9th Cir. 1999) (trustee or DIP may sell state-law fraudulent transfer action to creditor post-petition), with *In re Cybergenics*, 226 F.3d 237 (such a claim is not property of the estate and cannot be sold)).

Considered together, the principles discussed thus far in this section stand for the proposition that so long as the trustee technically enjoys § 544(b) power, anyone other than the trustee who wishes to prosecute an avoidance action outside of bankruptcy must do so either as a substitute of the trustee, or as recipient of a property-like cause of action that has been transferred to the litigant by the trustee. What, then, if the trustee technically *does not* enjoy § 544(b) power—because of, for example, the expiration of the § 546(a) window? Judge Sullivan, citing two cases by Illinois-based bankruptcy judges in cases involving § 544(a), endorsed the theory that when the trustee is time-barred from exercising § 544(b) power, SLCFC claims "automatically revert" to the unsecured creditors whose existence originally gave rise to the trustee's § 544(b) power.[45]

Reading § 546's Safe Harbors in the Context of § 544(b), and Vice Versa

Broadly speaking, § 546 "limits certain rights and powers granted to the trustee elsewhere in the Bankruptcy Code."[46] Section 546's securities-related safe harbors begin with "notwithstanding" clauses that specifically identify, among other provisions of the Code, § 544. The use of these "notwithstanding" clauses indicates that Congress intended for the restrictions set forth in § 546's safe harbors to be interpreted not in a vacuum but in the context of the scope of the positive trustee powers identified in sections such as § 544, and for the latter to be interpreted in the context of the former.[47] Whether the trustee's § 544(b) power amounts to a

[45] *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 321 (S.D.N.Y. 2013) (citing *Barber v. Westbay (In re Integrated Agri Inc.)*, 313 B.R. 419 (Bankr. C.D. Ill. 2004); *Klingman v. Levinson*, 158 B.R. 109 (N.D. Ill. 1993)). Judge Sullivan further held that Second Circuit precedent supports the conclusion that SLCFC claims are not property of the estate. *See In re Tribune*, 499 B.R. at 321–22 (citing *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992)). One practitioner has argued in commentary that "[i]n citing to *Colonial Realty* for that proposition, [Judge Sullivan] may have climbed onto a slender branch because the Second Circuit in that case was not referring to a cause of action" but to fraudulently transferred property pre-avoidance. Liesemer, *supra* note 4.

[46] COLLIER, *supra* note 41, at ¶ 546.01.

[47] *See* 1A SUTHERLAND STATUTORY CONSTRUCTION § 20:22 (7th ed.) (2013) (citing *Wright v. Professional Services Industries Inc.*, 956 P.2d 230 (Or. Ct. App. 1998)) ("'Notwithstanding' clause in statute, by its nature, acts as an

statutory right to which others may be granted derivative standing, or to a piece of property belonging to the estate that can be transferred to whomsoever the trustee sees fit, the result is the same: the right or property in question is limited in scope by the linguistic interplay between § 544(b) and § 546(e).

The facts underlying *Lyondell* indicate that the creditors and Judge Gerber regarded the trustee's § 544(b) power as an piece of property belonging to the estate—pursuant to the plan, the estate's § 544(b) right to pursue SLCFC claims was deemed abandoned by the estate,[48] and Judge Gerber noted in his decision that "when the trustee no longer can act, or chooses not to, individual creditors can, especially in cases where a reorganization plan, by express terms, *conveys* the estate's rights back to individual creditors."[49] The author suggests that application of a plain-meaning interpretation of chapter 5's relevant sections to this chain of events yields the conclusion that what the unsecured creditors in *Lyondell* actually received were not state-law claims that could be prosecuted in any manner the creditors saw fit, but rather limited choses in action that could not be used to effectuate the unwinding of a stock sale (or otherwise violate any of the restrictions set forth in § 546).

Tribune's facts present a more difficult statutory analysis conundrum. Because the trustee's § 544(b) power to pursue SLCFC claims was abrogated by expiration of the § 546(a) timeframe, there was no statutory right from which the SLCFC-based power-to-sue granted to the unsecured creditors derived, nor any extant property (in the form of a viable SLCFC claim) that could be conveyed from trustee to creditors.

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exception to the other laws to which it refers."); 3A SUTHERLAND STATUTORY CONSTRUCTION § 73:11 (7th ed.) (2013) (citing *King v. Sununu*, 490 A.2d 796 (N.H. 1985)) ("The plain meaning of the word 'notwithstanding' is 'without prevention or obstruction from or by,' or 'in spite of,' according to the dictionary.").

[48] The shareholders in *Lyondell* decried this maneuver. *See Lyondell* Shareholders' Memo, *supra* note 33, at 34.

[49] *See supra* note 39 (emphasis added).

An appellate court that is leery[50] of engaging in preemption analysis concerning § 546's safe harbors, but that finds potentially problematic the upshot of *Tribune*'s rhetoric, has two options. First: outright rejection "automatic reversion" theory. As one commentary has reasoned, the Code does not provide for such a mechanism, and there is no excuse for a diligent creditor's failure to force the trustee to press a certain type of legal claim if it appears the trustee will not do so before the § 546(a) window closes.[51] The second option is to affirm Judge Sullivan's holding, but with an emphasis on—and possible expansion upon—Judge Sullivan's "collusion-limiting" approach. As noted above, Judge Sullivan rejected the assertion that creditors could individually pursue SLCFC actions while the committee pressed (ostensibly more difficult to prove) claims of intentional fraudulent conveyance.[52] The effect of Judge Sullivan's anti-collusion approach is to prevent creditors and trustees from divvying up a trustee's § 544(b) rights bundle in such a way that a creditor can wield the trustee's most viable avoidance-oriented cause of action in a manner that the trustee could not. This approach could be furthered improved by the creation of some form of "diligent creditor" test that would appease reversion critics' concerns of wink-and-nod conspiracies in which trustees sit on their § 544(b) powers until the § 546(a) window closes and creditors come away with a valid basis for a request to lift the stay.

[50] Both *Tribune* and *Lyondell* cited § 544(b)(2)—deeming preempted any claim seeking to avoid a charitable contribution—in support of the argument that Congress knows how to mandate preemption. *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 318–19 (S.D.N.Y. 2013); *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 2014 Bankr. LEXIS 159, at *51 (Bankr. S.D.N.Y. Jan. 14, 2014). This reasoning downplays the fact that § 544(b)(2) contains the Code's *only* usage of any derivation of the word "preempt," despite judicial interpretation of other sections of the Code as having preemptive effect. In addition, at least one commentator has criticized "Congress's zeal to [use the Code to] protect the rights of American tithe-givers in their religious practice." *See* Lawrence Reicher, *Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(A)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV J. 159, 162 (2008).
[51] *See* Steinberg & Boies, *supra* note 43.
[52] *See supra* note 30 and accompanying text.

Charting a Course Through the Current Safe Harbor Seascape

Since *Lyondell* was issued, bankruptcy practitioners have advised creditors involved in the creation of reorganization plans to attempt to protect themselves against the final results in *Barclays* and *Tribune* by pushing for a plan that, respectively, provides for establishment of a discrete litigation trust for state-law claims, and prevents the trustee (or other estate representative) from litigating avoidance-minded actions at the same time as individual creditors are pursuing SLCFC claims.[53] These are of course valid suggestions, but the author believes that both creditors and those who presumably benefited from a significant pre-petition securities transaction should consider additional litigation strategies.

For creditors who are in some fashion pursuing avoidance outside of bankruptcy, it might be worthwhile to look beyond the confines of traditional fraudulent conveyance law. Courts interpret § 544(b)(1)'s "applicable law" proviso on a case-by-case basis.[54] Federal courts have in the past indicated that seemingly avoidance-minded causes of action such as unjust enrichment[55] and veil-piercing[56] are akin to fraudulent conveyance claims for the purpose of § 544(b). However, the Second Circuit recently has, in the context of bankruptcy cases stemming from Bernard Madoff's Ponzi scheme, discussed at length what types of state-law causes of action are or are not properly within the trustee's bailiwick.[57] While these cases did not involve analysis of

[53] *See, e.g.*, **Robert Winter** & **Luc Despins**, *Storm Warning for Section 546 'Safe Harbor'*, LAW360 (Feb. 4, 2014, 2:10 PM), http://www.law360.com/articles/506206/storm-warning-for-section-546-safe-harbor.
[54] COLLIER, *supra* note 41, at ¶ 544.06 n.1. (citing *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, No. 11-10070, 2012 U.S. App. LEXIS 5773 (5th Cir. Mar. 20, 2012) (holding that the Federal Debt Collection Procedures Act is not covered by the term "applicable law")).
[55] *See Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del. Inc.)*, 274 B.R. 71, 96 (D. Del. 2002). Steinberg & Boies, *supra* note 43, and Liesemer, *supra* note 4, address this decision's analysis of the interplay between unjust enrichment claims and § 546(e).
[56] *See* Howard, *supra* note 44 (citing *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010)).
[57] *See Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC)*, 740 F.3d 81, 88–94 (2d Cir. 2014); *Picard v. JPMorgan Chase Bank & Co. (In re Bernard L. Madoff Inv. Secs. LLC)*, 721 F.3d 54, 62–65 (2d Cir. 2013).

§ 544(b)(1)'s "applicable law" language, they might provide some basis for a creditor to argue that, based on the underlying facts, a claim of, say, tortious interference with contract is properly pursued by the creditor individually and not by the trustee.

For cashed-out shareholders (and other participants in significant pre-bankruptcy securities transactions), the key holdings of *Tribune* and *Lyondell* pose a substantial threat because they enable creditors to leverage their home-field advantage during plan formulation. The obvious solution would be for cashed-out shareholders and the like to somehow insert themselves into the plan-confirmation process. Under § 1128(b),[58] any "party in interest" may object to confirmation of a reorganization plan, and § 1109's list of who qualifies as a party in interest is nonexclusive.[59] While standing will typically be denied to those with "only tenuous ties[] to the reorganization,"[60] shareholders of a debtor corporation are automatically granted "party in interest" status under § 1109 and thus enjoy standing under § 1128(b) to object to confirmation of a reorganization plan. Ostensibly, a shareholder who does not fully cash out during an LBO, or who somehow reacquires shares as bankruptcy looms, would at least be in a position to participate in the plan-confirmation process and possibly prevent the plan from containing exceedingly pro-creditor terms.

Conclusion

Barclays, *Tribune* and *Lyondell* exposed deep-rooted differences of opinion among the judiciary as to the nature of a trustee's power in the chapter 11 context. Market participants should prepare themselves now for an unfolding period of uncertainty of indeterminate length.

[58] 11 U.S.C. § 1128(b) (2012).
[59] 11 U.S.C. § 1109 (2012).
[60] COLLIER, *supra* note 41, at ¶ 1129.05[1][c] n.15