UNDERSTANDING THE SCOPE OF THE § 546(e) SECURITIES SAFE HARBOR THROUGH THE CONCEPT OF THE "TRANSFER" SOUGHT TO BE AVOIDED

Ralph Brubaker
Carl L. Vacketta Professor of Law
University of Illinois College of Law

Bankruptcy Code § 546(e) contains a safe harbor that prevents avoidance of a securities settlement payment. To date, pleas for sane limits on the scope of the § 546(e) safe harbor have focused upon what kinds of transactions should be considered a "settlement payment." That language, however, is *not* the primary means by which § 546(e) both reveals its manifest object and correspondingly limits its reach thereto. Section 546(e) rationally constrains its scope via the statutory specification (the meaning of which the Supreme Court will consider in the pending case of *Merit Management Group v. FTI Consulting*) that the safe harbor only applies (because it need only apply) if the "*transfer*" sought to be avoided was allegedly "*made by or to (or for the benefit of)*" a protected securities market intermediary, such as a stockbroker or a financial institution.

Ascertaining the meaning and function of that determinative scope language requires an understanding of (1) the concept of a "transfer" as the fundamental analytical transaction unit throughout the Code's avoidance provisions, and (2) the relationship between that avoidable "transfer" concept and the inextricably interrelated concepts of who that "transfer" is "made by or to (or for the benefit of)." By its express terms, § 546(e) only shields a challenged "transfer" from avoidance if (1) that transfer was "made by" a debtor-transferor who was a qualifying intermediary, "or" (2) a party with potential liability—because the challenged transfer allegedly was made "to or for the benefit of" that party—was a protected intermediary.

UNDERSTANDING THE SCOPE OF THE § 546(e) SECURITIES SAFE HARBOR THROUGH THE CONCEPT OF THE "TRANSFER" SOUGHT TO BE AVOIDED

Ralph Brubaker[*]

I. The "Transfer" at Issue in *FTI Consulting*

II. A "Transfer" as the Fundamental Transactional Unit in the Code's Avoidance Provisions

A. *An Avoidable "Transfer" Made "by" the Debtor*

B. *An Avoidable "Transfer" Made "to" a "Transferee"*

C. *An Avoidable "Transfer" Made "for the Benefit of" a Non-Transferee*

III. The "Transfer" Sought to Be Avoided as the Transactional Unit in the § 546(e) Securities Safe Harbor

IV. Legislative History Regarding the "Transfer" Sought to Be Avoided as the Transactional Unit in the § 546(e) Safe Harbor

A. *The* Seligson *Case and the Predecessor Safe Harbor Provision: A Challenged "Transfer" Made "to" a Protected Intermediary as "Transferee"*

B. *The Predecessor Safe Harbor: A Challenged "Transfer" Made "by" the Debtor*

C. *The 1982 Enactment of § 546(e): A "Transfer" Made "by or to" a Qualifying Intermediary*

D. *The 2006 Amendment: Protecting Qualifying Intermediaries from "for the Benefit of" Liability*

V. LBOs and the § 546(e) Securities Safe Harbor

A. Kaiser Steel *and the "Mere Conduit" Controversy*

B. *Collapsing the Transaction Structure of an LBO as Against Selling Shareholders*

C. *Collapsing Doctrine and a "Transfer" as the Fundamental Transactional Unit*

VI. Conclusion

---

[*]Carl L. Vacketta Professor of Law, University of Illinois College of Law.

Bankruptcy Law Letter

JULY 2017 | VOLUME 37 | ISSUE 7

Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided

By Ralph Brubaker

Bankruptcy Code § 546(e) contains a safe harbor that prevents avoidance of a securities "settlement payment" or a transfer in connection with a "securities contract," unless the transfer at issue was an actual-intent fraudulent transfer. That safe-harbor provision was originally enacted in 1982 at the instance of the SEC, to protect the securities settlement and clearing process from what has come to be known (after the 2008 financial crisis) as dreaded "systemic risk." Nearly all observers agree, though, that the § 546(e) securities safe harbor is being applied by many courts in a manner that protects transactions that pose no threat whatsoever to the absolute integrity of that securities settlement and clearance process, much less any systemic risk.[1] Indeed, in many courts protected transactions need not have any connection whatsoever to the securities settlement system[2] and do not even need to involve a purchase or sale of securities.[3]

As a result, § 546(e) is now itself a tool for considerable mischief. Immunizing any kind of a payment (or other transfer) by a debtor to its shareholders (or other securities holders) from all risk of attack in a subsequent bankruptcy (except actual-intent fraudulent transfer liability) is a simple matter of "laundering" the payment through a financial institution acting as an escrow or disbursing agent.[4] And in the Third Circuit, not even that indirection is necessary, as any wire transfer (or even a payment by check) will do the trick.[5] Moreover, under prevailing interpretations of § 546(e), even conventional loans could easily be structured in a manner that would give any and all payments on that debt a similar kind of avoidance inoculation.[6]

To date, the litigation and commentary that has pleaded for

IN THIS ISSUE:

THOMSON REUTERS®

Mat #41942956

sane limits on the scope of the § 546(e) securities safe harbor has focused upon what kinds of transactions should or should not be considered a "settlement payment" within the meaning of the Bankruptcy Code—a topic thoughtfully explored by Professor Frost and Professor Kull in previous issues of *Bankruptcy Law Letter*.[7] The breadth that the courts of appeals have ascribed to that term is, indeed, startling, which raises legitimate questions regarding the soundness of the interpretative moves by which they have reached such outrageous results, e.g., concluding that fraudulent payments involving no actual securities transactions at all are nonetheless protected securities "settlement payments."[8]

All in all, though, the fixation on resolving the intractable vagueness of the term "settlement payment" has been most unfortunate, because that language is *not* the primary means by which § 546(e), by its terms, both reveals its manifest object and correspondingly limits its reach to that object. Indeed, the 2006 amendment to § 546(e) that supplemented the protection of "settlement payments," with a similar protection for an even more comprehensive category of "securities contract" transfers, largely moots the "settlement payment" controversy.[9]

The language by which the § 546(e) securities safe harbor rationally constrains its scope (for both "settlement payments" and "securities contract" transfers) is the statutory specification that the safe harbor only applies (because it need only apply) if the *"transfer"* sought to be avoided was *"made by or to (or for the benefit of)"* a protected securities market intermediary, such as a stockbroker, a securities clearing agency, or a financial institution. The meaning and function of that italicized language, in the context of the Code's avoidance provisions and the role of the securities safe harbor as an inseparable component of those avoidance provisions, has been badly misunderstood and (consequently) misconstrued by most courts. The notable exceptions are Judge Queenan's *In re Healthco International* decision,[10] which the Eleventh Circuit followed in its *Munford* decision,[11] both decided in 1996.

Other courts (including the Second,[12] Third,[13] Sixth,[14] and Eighth[15] Circuits), considering the text of § 546(e) in isolation, have summarily dismissed *Munford* and *Healthco* with an absurdly facile invocation of "plain" meaning, but without even engaging the operative statutory language nor (apparently, in many cases, comprehending or even trying to comprehend)

BANKRUPTCY LAW LETTER (USPS 674-930) (ISSN 0744-7871) is issued monthly, 12 times per year; published by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Periodicals postage paid at St. Paul, MN, and additional mailing

Subscription Price: For subscription information call (800) 221-9428, or write West, Credit Order Processing, 620 Opperman Drive, P.O. Box 64833, St. Paul, MN 55164-9754.

POSTMASTER: Send address changes to: *Bankruptcy Law Letter,* 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

the meaning *Munford* and *Healthco* actually attributed to the statutory text. Then, last summer, the Seventh Circuit agreed with *Healthco* and *Munford* in the case of *FTI Consulting, Inc. v. Merit Management Group,*[16] and the Supreme Court recently granted certiorari in *FTI Consulting* to resolve the circuit split.

The essence of the holdings in *Healthco, Munford*, and *FTI Consulting* is that the applicability of the § 546(e) securities safe harbor cannot be determined in the abstract, but rather, can only be determined by reference to the "transfer" sought to be avoided. As specified by the language of § 546(e) itself, the § 546(e) safe harbor prevents avoidance of the "transfer" at issue *only if* the "transfer" sought to be avoided is one "made by or to (or for the benefit of)" a protected securities market intermediary.

Not coincidentally, *only* when that is true does the avoidance action implicate the systemic risk concerns that motivated enactment of the securities safe harbor. And conversely, in nearly all of the cases in which the application of § 546(e) is most controversial (e.g., avoidance of LBO distributions to the debtor's shareholders), the "transfer" sought to be avoided is *not* one "made by or to (of for the benefit of)" a protected securities market intermediary. Thus, when the avoidance action is premised upon the theory (the validity of which must stand or fall on its own merits) that the "transfer" sought to be avoided was made "by" the debtor (who was not a qualifying securities market intermediary) "to" a shareholder (who, likewise, was not a protected securities market intermediary)—as in, e.g., a fraudulent transfer action whose viability depends upon "collapsing" (in the step-transaction doctrine sense) the transaction structure of an LBO—the § 546(e) securities safe harbor is entirely inapplicable and has no role whatsoever to play.

That very natural reading of the textual scope and applicability of the § 546(e) securities safe harbor—as limited to the "transfer" sought to be avoided— is quite compelling, but (oddly) it has not been fully vetted (or, for the most part, even understood) by the courts or commentators. This issue of *Bankruptcy Law Letter*, therefore, will explore the surprisingly elusive, yet critical meaning of the "transfer" protected from avoidance by § 546(e), in anticipation of the Supreme Court's consideration of that issue in *FTI Consulting*.

The "Transfer" at Issue in *FTI Consulting*

The "transfer" at issue in *FTI Consulting* is the purchase price paid by the Chapter 11 debtor (Valley View Downs) to a selling shareholder (Merit Management Group) in a corporate acquisition transaction.[17]

Before their bankruptcy filing in 2009, Valley View and its affiliated debtors were engaged in horse racing, off-track betting, and casino businesses. Their bankruptcy filing was precipitated by their efforts to develop a racing and casino facility (known as a "racino") in Pennsylvania. To do so, Valley View needed to procure, from the Pennsylvania State Harness Racing Commission (PSHRC), the last available harness racing license in the State of Pennsylvania. Bedford Downs Management Corporation, though, also submitted an application for that harness racing license, and thus, Valley View and Bedford were in a head-to-head competition for the license.

The PSHRC initially denied both Valley View's and Bedford's applications, which triggered appeals by both Valley View and Bedford that went all the way to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court affirmed the PSHRC's decisions, but afforded both Valley View and Bedford an opportunity to cure any deficiencies in their original proposals and reapply.

After the Pennsylvania Supreme Court's decision, Valley View proposed to acquire Bedford as a means of facilitating approval of its application for the last available harness racing license. Valley View and Bedford ultimately entered into an agreement under which Bedford agreed to withdraw its application, and then if Valley View was awarded the license, Valley View would acquire Bedford for $55 million. Pursuant to that agreement, Valley View submitted a new application and proposal, the PSHRC ultimately awarded the license to Valley View, and Valley View purchased Bedford by paying $55 million to Bedford's shareholders (which Valley View borrowed under a syndicated bank loan), including approximately $16.5 million to Merit Management (which owned approximately 30% of Bedford's stock).

To finance the proposed racino facility, including Valley View's acquisition of Bedford, Valley View borrowed money under a syndicated credit facility arranged by Credit Suisse. In order to develop the proposed racino, Valley View also needed (in addition to the harness racing license awarded by the PSHRC) a gaming license from the Pennsylvania Gaming Control Board. Valley View, however, was never awarded the necessary gaming license and, thus, was unable to repay the debt it incurred in connection with the racino project, which precipitated the Chapter 11 filing by Valley View and its affiliated debtors.

During Valley View's Chapter 11 proceedings, Valley View's estate sold (i) the site for the proposed Pennsylvania racino (which Valley View had purchased for $20 million) and (ii) Valley View's rights in the harness racing license (purchased for $55 million), at auction, to the highest bidder, for $5.6 million. Valley View's confirmed plan of reorganization established a litigation trust to pursue avoidance actions, and FTI Consulting (as trustee of that litigation trust) filed an avoidance action against Merit Management in federal district court in the Northern District of Illinois. That action sought to avoid and recover Valley View's transfer of $16.5 million to Merit Management as a constructively fraudulent transfer under Bankruptcy Code § 548(a)(1)(B) and the Pennsylvania Uniform Fraudulent Transfer Act (via Bankruptcy Code § 544(b)(1)). Merit Management sought judgment on the pleadings in that avoidance action based upon the securities safe harbor of § 546(e).

Merit Management acknowledged that the "transfers" at issue in the avoidance action (that the trustee seeks to avoid and recover) are "transfers Valley View Downs made to Merit Management in the amount of $16,503,850."[18] Nonetheless, Merit Management pointed out that "Valley View made the Transfers *through*" two financial intermediaries, "Credit Suisse and Citizens Bank of Pennsylvania ("Citizens Bank")."[19]

In particular, Citizens Bank acted as the designated escrow agent for purposes of Valley View's purchase of Bedford stock, with (1) (a) Valley View paying the $55 million aggregate purchase price to Citizens Bank and (b) Bedford shareholders depositing their stock shares with Citizens Bank, and (2) Citizens Bank then distributing (a) the stock shares to Valley View and (b) the appropriate share of the $55 million purchase price to each individual Bedford shareholder. In addition, Valley View drew on its Credit Suisse syndicated credit facility to pay the $55 million purchase price. Therefore, the precise mechanics of the $16.5 million "transfer" made by Valley View to Merit Management, in exchange for Merit Management's Bedford stock, was that Credit Suisse wired the funds to Citizens Bank, who wired the funds to Merit Management.

The district court held that the involvement of the two "financial institutions" (qualifying securities intermediaries under § 546(e)) in the challenged "transfer" by Valley View to Merit Management, in purchase of Merit Management's Bedford stock, was sufficient to invoke the § 546(e) securities safe harbor and, therefore, dismissed the trustee's constructive fraudulent transfer claims against Merit Management. The Seventh Circuit, though, reversed, holding that the § 546(e) securities safe harbor, by its terms, is entirely inapplicable to the trustee's claims because the "transfer" sought to be avoided as constructively fraudulent was a $16.5 million *"transfer* made *by"* Valley View *"to"* Merit Management, neither of whom were qualifying securities intermediaries under § 546(e).

The trustee in *FTI Consulting* conceded that if the "transfer" at issue in the avoidance action had been "made by or to (or for the benefit of)" Credit Suisse or Citizens Bank (each a "financial institution" within the meaning of Code §§ 546(e) & 101(22)(A)), then that "transfer" would qualify as either a "settlement payment" or a "securities contract" transfer (as those two terms have been construed by the courts of appeals) and, thus, fully protected from avoidance by the § 546(e) securities safe harbor. The *only* issue in *FTI Consulting*, therefore, is whether the "transfer" sought to be avoided as constructively fraudulent by the trustee was "made by or to (or for the benefit of)" Credit Suisse or Citizens Bank, as those operative terms are used in Code § 546(e). Resolving that issue requires an understanding of (1) the concept of a "transfer" as the fundamental transactional unit in the Bankruptcy Code's avoiding-power provisions and (2) the relationship between that avoidable "transfer" concept and the inextricably interrelated concepts of who that "transfer" is "made by or to (or for the benefit of)."

A "Transfer" as the Fundamental Transactional Unit in the Code's Avoidance Provisions

The Code's various avoiding-power provisions authorize a bankruptcy trustee (or DIP) to "avoid any *transfer* of an interest of the debtor in property" meeting the criteria specified in the particular avoidance provision.[20] The Code "defines the word 'transfer' as broadly as possible"[21] in § 101(54)(D) to mean "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property." That definition, however, does *not* specify the transactional unit that comprises the "transfer" that the trustee (or DIP) can "avoid" (or not, depending upon whether that "transfer" meets the avoidability criteria at issue),[22] particularly when that "transfer" is effectuated via multiple steps involving multiple entities.[23] Nevertheless, the structure of the Code's avoiding-power provisions makes clear that, for analytical purposes, a "transfer" made "by" the debtor "to" a "transferee" is the fundamental and pervasive transactional unit. Thus, the statutorily specified criteria regarding avoidability (or not, as in the case of the § 546(e) securities safe harbor) are applied to that "transfer."

An Avoidable "Transfer" Made "by" the Debtor

The Code's principal avoiding powers state that the "transfer" that can be avoided is a transfer *"of an interest of the debtor in property."*[24] The courts, including the Supreme Court, readily recognize this statutory language as simply a more elaborate (and, consistent with the Code's broad definition of "transfer," a more comprehensive) way of stating, as the Supreme Court put it in *Union Bank v. Wolas*, for example, that "Section 547(b) [the preferential transfer provision] of the Bankruptcy Code authorizes a trustee to avoid certain property transfers *made by a debtor* within 90 days before bankruptcy."[25] Likewise, Justice Scalia stated in *BFP v. Resolution Trust Corp.* that "[t]he constructive fraud provision at issue [now Code § 548(a)(1)(B)] applies to transfers *by* insolvent *debtors*."[26] And a quick WESTLAW search will produce dozens of courts of appeals decisions (and hundreds of lower court decisions) with similar characterizations of the meaning of the operative statutory language.

That the Code's avoidance provisions operate upon transfers *made by a debtor* is also explicitly acknowledged in the statutory criteria for avoidance of a transfer. For example, actual-intent fraudulent transfers are avoidable "if *the debtor*, voluntarily or involuntarily, *made such transfer* . . . with actual intent to hinder, delay, or defraud."[27] In another constructive fraud provision (not the one at issue in *BFP*), the statute declares the transfer avoidable "if *the debtor*, voluntarily or involuntarily, *made such transfer* to or for the benefit of an insider."[28] And in the state-law avoidance power most commonly invoked via Code § 544(b)—states' enactment of the Uniform Fraudulent Transfer Act (UFTA) (the state-law avoidance power at issue in *FTI Consulting*) or the 2014 Uniform Voidable Transactions Act (UVTA)—the avoidance power expressly applies only to "[a] transfer made . . . by a debtor."[29] Indeed, the same was true under the explicit statutory language of the predecessor avoiding-power provisions of the Bankruptcy Act of 1898.[30]

The avoiding-power provisions for which the § 546(e) safe harbor provides an exemption[31] only "authorize[] a trustee to avoid certain property *transfers made by a debtor*."[32] Thus, in *FTI Consulting*, defendant Merit Management fully acknowledged that the "transfers" at issue in the avoidance action (that the trustee seeks to avoid and recover) are "transfers Valley View Downs [*the debtor*] *made* to Merit Management in the amount of $16,503,850."[33] And that is true, even though the funds comprising that transfer may have originated with Valley View's lender, Credit Suisse, and may have been wired directly to the escrow agent, Citizens Bank, for distribution to Merit Management. The broad definition of "transfer" in Bankruptcy Code § 101(54), and in states' enactment of the UFTA and UVTA,[34] includes a "direct or indirect" disposition of a debtor's property. Because Valley View was borrowing the $16.5 million from Credit Suisse under the Credit Suisse syndicated loan facility, Valley View's *indirect* "transfer" of those funds (via Credit Suisse) would be "a transfer made by a debtor," Valley View, under both the Bankruptcy Code and the Pennsylvania fraudulent transfer statute.

An Avoidable "Transfer" Made "to" a "Transferee"

That the Code's avoiding-power provisions, by their terms, authorize avoidance of various "transfers" made "by" a debtor (as transferor) is straightforward and uncontroversial. The correlative concept embedded both in the analytical structure of the avoiding-power provisions and in the concept of a "transfer" as the fundamental transactional unit is, of course, that the avoidable "transfer" is one made "to" a "transferee." "A transfer that may be avoided under the Bankruptcy Code takes place from the debtor *to* some entity . . . a transferee."[35]

Identifying that "transferee" and the attendant circumstances surrounding the "transfer" made "by" the debtor "to" that "transferee" is critical in determining whether that "transfer" is avoidable (or not) under the Code's various avoiding-power provisions. For example, "§ 547 allows a trustee to avoid a preferential *transfer* of assets *by* a debtor-transferor *to* a *creditor-transferee* if certain conditions are met."[36] And various § 547(c) preference defenses (to avoidance of the "transfer" at issue), such as the ordinary course of business defense of § 547(c)(2),[37] also turn on identifying the "transferee" of that challenged "transfer." The same is true of the § 548(c) good-faith for-value defense for the "transferee" of a fraudulent "transfer."[38] Thus, as the legislative history explains, "liability is not imposed on a *transferee* to the extent that a *transferee* is protected under a provision such as section 548(c)."[39]

If a transfer is avoided, though, Code

§ 550(a)(1) provides that "the trustee may recover . . . the property transferred, or, if the court so orders, the value of such property, from the initial *transferee* of such *transfer*." Identifying the "transferee" of a challenged "transfer," therefore, is critical to determining both (1) whether the "transfer" is avoidable, and if it is, (2) from whom the trustee (or DIP) can recover. And it is this aspect of a "transfer," as the pervasive, fundamental transactional unit in avoidance analysis, that can be difficult to apply to a multi-step transaction. "Assets routinely pass through various entities' hands en route to their ultimate destination, and determining when an entity is a transferee is tricky."[40] "The hard cases are ones where nominally the initial transfer from the debtor goes to a third party before passing to the defendant transferee, but it is debatable whether that third party intermediary had sufficient independent dominion and control over the property transferred to count as a 'transferee' for purposes of avoidance."[41]

Justice Cardozo addressed that very issue in 1930, sitting as Chief Judge of the New York Court of Appeals, in a preference suit under the Bankruptcy Act of 1898, *Carson v. Federal Reserve Bank of New York.*[42] Cardozo's opinion in that case held that the transferee "subject to a duty to make restitution of a preference," "within the meaning of the statute, is the one who is preferred, and the one who is preferred is not the mere custodian or intermediary, but the creditor . . . who receives by virtue of the preference an excessive share of the estate."[43] That is the case because "[t]he statute does not intend, of course, that the form of the transaction shall be permitted to obscure realities."[44] Rather, "the statute must be read in conformity with common-law analogies[45] to exempt an agent or custodian from the duty to account for property or money, the subject of a preferen[tial transfer], if before the coming of bankruptcy he has settled with his principal."[46] "[T]o be charged with liability" as a transferee, he "must have been more than a mere . . . conduit between the bankrupt and the creditor."[47]

Cases under the Bankruptcy Code, likewise, have looked through the form and mechanics by which a "transfer" is effectuated in discerning who is the "transferee." The seminal decision under the Code is Judge Easterbrook's opinion in *Bonded Financial Services v. European American Bank*, in which he echoed Cardozo: "When A gives a check to B as agent for C, then C is the 'initial transferee'; the agent may be disregarded."[48] Indeed, as was also the case under the Bankruptcy Act of 1898, "the Bankruptcy Code does not define 'transferee,' " and " '[t]ransferee' is not a self-defining term; it must mean something different from 'possessor' or 'holder' or 'agent,' " because "[t]o treat 'transferee' as anyone who touches the money" would produce "absurd results."[49]

There is essentially *no* disagreement in the case law "that the term 'transferee' must mean something different from anyone who simply touches the avoided transfer."[50] "The statutory term is 'transferee'—not 'recipient,' "[51] and "those who act as mere 'financial intermediaries,' 'conduits,' or 'couriers' are not [considered] transferees."[52] "[I]f couriers and other mere conduits were deemed . . . 'transferees,' " then "every courier, every bank and every escrow agent [would] be subjected to a great and unimaginable liability."[53] Thus, consistent with Cardozo's *Carson* opinion, all courts agree "that a party cannot be [a] transferee if he is a 'mere conduit.' "[54] Importantly, though, the courts have "articulat[ed] different standards for determining whether a recipient of property was a transferee or a mere conduit,"[55] and "application and articulation of the ['mere conduit' concept] has been neither consistent nor predictable."[56] As we will see, that indeterminacy is precisely the reason for enactment of the § 546(e) securities safe harbor.

As applied to the "transfer" at issue in *FTI Consulting*, though, there is apparently *no* controversy whatsoever regarding appropriate application of the "mere conduit" principle. The trustee sued Merit Management as "initial transferee" of Valley View's "transfer" of the $16.5 million purchase price for Merit Management's Bedford stock, and Merit Management did not contend otherwise. Thus, Merit Management apparently concedes that the involvement of Credit Suisse and Citizens Bank in the "transfer" of $16.5 million "by" Valley View "to" Merit Management was as "mere conduits" and *not* as transferors *nor* transferees.[57]

An Avoidable "Transfer" Made "for the Benefit of" a Non-Transferee

There is one other "transfer" concept that is critical to determining both (1) whether a "transfer" is avoidable, and if it is, (2) from whom the trustee (or DIP) can recover, and that is the concept of, as Code § 550(a)(1) formulates it, an "entity for whose benefit such transfer was made." That concept is a familiar one to the law of avoidable transfers, as it has long been (and still is) embedded in the statutory criteria for avoidance of a preferential transfer. Thus, Code § 547(b)(1) provides that a "transfer" by a debtor can be an avoidable preferential transfer if it was made "to *or for the benefit of* a creditor."[58] The Code's fraudulent transfer provision repeatedly invokes that concept in referring to an avoidable "transfer to *or for the benefit of* an insider."[59] And likewise, Code § 550(a)(1) provides that if a "transfer" is avoided under *any* of the Code's avoidance provisions, the trustee (or DIP) "may recover . . . the property transferred, or, if the court so orders, the value of such transfer from the initial transferee of such transfer *or* the entity *for whose benefit* such transfer was *made*."[60]

In the *Carson* case, Justice Cardozo also explained the meaning of similar "for the benefit of" language in the predecessor preference provision of the 1898 Act:

> "To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another [the transferee] for his benefit." National Bank of Newport v. National Herkimer County Bank, 225 U.S. 178, 184, 32 S. Ct. 633 [1912]. This will happen, for example, if bankrupts make a transfer of their assets to a creditor of their own creditor, who is thus preferred to the same extent as if the transfer had been made to him directly.[61]

And the Fourth Circuit also explained the "for the benefit of" concept (quoting *Bonded Financial*) more recently as follows:

> The traditional examples of the "entity for whose benefit such transfer was made" are a debtor of the transferee or the guarantor of a debt owed by the bankrupt party to the transferee. In both cases, the *transfer* of an asset from the bankrupt party *to the transferee* extinguishes the liability of "the entity for whose benefit such transfer was made." Thus, we have described that entity as " 'someone who receives the benefit but not the money.' "[62]

"[T]he categories 'transferee' and 'entity for whose benefit such transfer was made' are mutually exclusive."[63] Thus, the longstanding, well-known statutory "for the benefit of" concept of avoiding-power law is *not* directly implicated by the "transfer" at issue in *FTI Consulting* (since everyone apparently concedes that defendant Merit Management was the initial "transferee" of the challenged $16.5 million "transfer" made "by" debtor Valley View "to" Merit Management[64]). That statutory "for the benefit of" concept is extremely important, though, to understanding the meaning and import of the determinative "transfer made by or to (or for the benefit of)" statutory language of § 546(e) at issue in *FTI Consulting*.

The "Transfer" Sought to Be Avoided as the Transactional Unit in the § 546(e) Securities Safe Harbor

With that background in the meaning and function of the "transfer" concept as the fundamental transactional unit in the Code's avoiding-power provisions, we can now consider the meaning of the language of Code § 546(e), and how that statutory language rationally limits the scope and applicability of the securities safe harbor, by using that same pervasive "transfer" concept.

Code § 546(e) (emphasis added), in relevant part, provides as follows:

> (e) Notwithstanding sections 544 [strong-arm and state-law avoidance powers], 545 [avoidance of statutory liens], 547 [preferential transfers], 548(a)(1)(B), and 548(b) [constructively fraudulent transfers] 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* commodity broker, forward contract merchant, stockbroker, *financial institution*, financial participant, or securities clearing agency, *or* that is *a transfer 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(7) . . . that is made before the commencement of the case, except under section 548(a)(1)(A) [actual-intent fraudulent transfers] of this title.

As is apparent on the face of the statute, then, in its *safe harbor precluding avoidance* of particular "transfers," § 546(e) employs the same language and corresponding analytical structure as the referenced Code provisions *authorizing avoidance* of "transfers." The transactional unit shielded from avoidance by § 546(e) is the same as the transactional unit on which the Code's avoiding powers operate: a "transfer." Consistent with the uniform meaning of that statutory term throughout the Code's avoiding-power provisions, therefore,[65] the most natural reading of the determinative statutory language, in the context of the entirety of the Code's avoiding-power provisions (including those avoiding powers expressly cross-referenced in § 546(e) itself),[66] is clear: (1) if the challenged "transfer" (a) was made "by" a debtor who is a specified securities intermediary, "or" (b) was made "to" a "transferee" ("or for the benefit of"[67] a non-transferee) who is a protected securities intermediary, and (2) that "transfer" is a settlement payment or is made in connection with a securities contract, then § 546(e) provides a complete defense to avoidance of that challenged "transfer."

In *FTI Consulting*, though, defendant Merit Management apparently concedes that the trustee is "seeking avoidance and recovery" of a "transfer" made "by" debtor Valley View "to" defendant Merit Management as "initial transferee,"[68] neither of whom were qualifying securities intermediaries.[69] In other words, for purposes of analysis of the "transfer" that is avoidable (or not) in *FTI Consulting*, because Credit Suisse and Citizens Bank admittedly were "mere conduits," they "may be disregarded."[70] The § 546(e) securities safe harbor, therefore, has *no* applicability whatsoever to the "transfer" sought to be avoided in *FTI Consulting*.

Moreover, that the applicability of § 546(e) can *only* be determined by reference to the actual "transfer" at issue in a particular case—i.e., the "transfer" sought to be avoided by the trustee (or DIP)—is clearly revealed by the fact that § 546(e) is a *safe harbor exemption* from the trustee's (or DIP's) avoiding powers, introduced by a dependent "notwithstanding" clause explicitly cross-referencing those statutory avoiding powers. "A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers."[71] As Justice Scalia explained in his opinion (for a unanimous Court) in the *Rad-*

LAX case, this interpretive canon is a more particularized permutatation of the general-specific canon: "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one."[72] Accordingly, the § 546(e) safe harbor excepts from avoidance particular "transfers" that the trustee (or DIP) might otherwise challenge under the avoiding-power provisions referenced in its "notwithstanding" clause.

It is, of course, possible (even if not plausible) that the terms "transfer" or "made by or to (or for the benefit of)" in § 546(e) might have a meaning that departs from the consistent meaning of those words as used throughout the Code's avoiding-power provisions (for which § 546(e) provides an exception). And in the end, that is upshot (albeit unarticulated and entirely unwitting[73]) and the most that can be said in support of the truncated, conclusory, acontextual "plain"-meaning analysis of the Second, Third, Sixth, and Eighth Circuits. Common sense, though, (as reflected in the formal canons of statutory construction) strongly suggests otherwise.

There is no good reason to think that "transfer" as used in the § 546(e) safe harbor should be construed (in the abstract) to be referring to something other than the actual "transfer" sought to be avoided by the trustee (or DIP) under one of the statutory avoiding powers explicitly referenced in § 546(e).[74] Indeed, so construed, the safe harbor functions in a thoroughly nonsensical fashion (i.e., a safe harbor exemption invoked to shield from avoidance a "transfer" that is *not* being challenged?!). That perverse incongruity is apparent in the inconsistent descriptions of the "transfer" being protected from avoidance by courts that construe the scope of § 546(e) in isolation and without reference to the Code's avoidance provisions, in their entirety.

For example, in its *Quebecor World* opinion, the Second Circuit acknowledged that the "transfer" at issue (which the creditors' committee "sought to avoid and recover") was "certain payments *made <u>by</u> debtor* Quebecor World (USA) Inc. ("QWUSA") *<u>to</u>* the appellee noteholders" who were "*not* financial institutions."[75] Nonetheless, the court simultaneously, and solely for purposes of its construction of § 546(e), stated (without acknowledging or apparently even recognizing the self-contradiction) that "this was a *transfer made <u>to</u>* a financial institution," CIBC Mellon, the disbursing agent for the noteholders.[76] As the court's prior (inconsistent) description of the "transfer" at issue indicated, though, the committee was *not* seeking to avoid any transfer "to" CIBC Mellon (and thus subject CIBC Mellon to avoidance liability) because the Committee took the position (which no one apparently contested) that "CIBC Mellon was merely a conduit."[77] Other courts proclaiming a similarly preposterous "plain"-meaning interpretation of § 546(e) exhibit the same bemused vacillation regarding the "transfer" at issue.[78]

By its inconsistent and contradictory assumptions regarding the "transfer" at issue, then, the Second Circuit applied § 546(e) avowedly to shield from avoidance a "transfer" ("to" CIBC Mellon) that was *not* being challenged and that *no one* alleged had even been made. As one court aptly noted, "true conduits" like CIBC Mellon "may not be subject to avoidance recovery at all, thus rendering a § 546(e) exception unnecessary."[79] And, of course, the end result of the Second Circuit's confusion as to the "transfer" at issue is pernicious because it obliquely extends the safe harbor of § 546(e) to a "transfer" (*not* made "to" a financial institution) that the statute, by its explicit terms, does *not* protect.

The meaning and function of the term

"transfer" in § 546(e), in context, obviously is to shield from avoidance an actual "transfer" that the estate representative seeks to avoid under one of the avoiding powers explicitly referenced in § 546(e). Consequently, the associated phrase "made by or to (or for the benefit of)" should also carry the "transfer"-correlative meanings that those terms carry in the Code's avoiding-power provisions.[80] The Code's avoiding powers authorize avoidance of a "transfer" made "by" a debtor "to" a "transferee" if specified conditions regarding that transfer are met. If that transfer is avoided, the transferee "to" whom the transfer was made has liability, and if that transfer was made "for the benefit of" a non-transferee, that benefitted entity is also liable. By its express terms, therefore, Code § 546(e) only shields a challenged "transfer" from avoidance (1) if that transfer was "made by" a debtor-transferor who was a qualifying securities intermediary, or (2) a party with potential liability—because the challenged transfer allegedly was made "to or for the benefit of" that party—was a protected securities intermediary.

That this is the scope of the § 546(e) safe harbor, as revealed by an attentive, holistic reading of the statutory text, is fully consistent with (and thus confirmed by) the legislative record surrounding the enactment of (and amendments to) that provision.

Legislative History Regarding the "Transfer" Sought to Be Avoided as the Transactional Unit in the § 546(e) Safe Harbor

The Seligson *Case and the Predecessor Safe Harbor Provision: A Challenged "Transfer" Made "to" a Protected Intermediary as "Transferee"*

The predecessor provision to what is now Code § 546(e) was enacted in 1978 as § 764(c) of the new Bankruptcy Code, and as many courts have recognized, that safe harbor provision "was a response to the [1975] decision in *Seligson v. New York Produce Exchange*."[81] In that case, the trustee for a bankrupt commodities brokerage firm sought to avoid, as fraudulent transfers, margin payments that the debtor firm had made to the clearing association for the commodities exchange on which the debtor firm executed commodities trades. Whether the margin payments were avoidable turned on "whether the defendant sought to be held liable [the clearing association] is indeed a *transferee* of the fraudulent transfer,"[82] and "[t]he Association's sole contention in this regard is that it was a mere 'conduit' for the transmittal of margins."[83]

The *Seligson* court, though, held that there were genuine issues of material fact as to whether the challenged margin payments were made "to" the clearing association as "transferee" thereof or, alternatively, whether the clearing association was a "mere conduit" who "may be disregarded"[84] and who, thus, had no avoidance liability. The court, therefore, refused to grant the clearing association summary judgment and, thus, permitted the trustee's suit against the clearing association (alleging that the margin payments were made "to" the clearing association as "transferee") to go forward for trial on the merits.

Uncertainty regarding the application of the "mere conduit" concept and the consequent prospect for avoidance liability as a "transferee" of margin payments, then, is what prompted enactment of the initial avoidance safe harbor. That statutory safe harbor provided that "the trustee may *not* avoid a *transfer* that is a margin payment *to* . . . a commodity broker or forward contract merchant."[85]

This provision, therefore, automatically gave to commodity brokers and forward contract merchants, as regards commodity margin payments they received, the same protection available to "mere conduits" (i.e., no avoidance liability), but *without* the uncertainty, expense, and prospective liability associated with litigating "mere conduit" status (as illustrated by the *Seligson* case). Thus, even if the trustee alleged that a commodity margin payment that a commodity broker or forward contract merchant received was an avoidable "transfer" made "to" that protected entity as "transferee" (as alleged in *Seligson*), the new safe harbor protected those entities from any avoidance liability.

That the initial safe harbor was designed to essentially give commodity brokers and forward contract merchants automatic "mere conduit" protection against any avoidance liability for receipt of a commodity margin payment, is confirmed by the rationale proffered for this avoidance safe harbor in the Senate Report: "It would be unfair to permit recovery from an innocent commodity broker since such brokers are, for the most part, simply conduits for margin payments."[86] As explained contemporaneously by special counsel at the CFTC's Division of Trading and Markets:

> The *Seligson* case is troublesome because it could lead to a recovery of substantial margin payments, which could in turn impair the financial stability of [a commodity broker or forward contract merchant (FCM)] from which the payments are recovered. To a large extent, [these intermediaries] are simply conduits for the margin payments they receive; much of the amount recovered by a trustee would have to be paid out of [the intermediary's] capital, and the financial problems thereby created could have a domino-type effect on other firms.[87]

The concern *Seligson* created and that was addressed by the original safe harbor was the prospect of avoidance liability as a "transferee" for the specified market intermediaries. And in creating its safe harbor from liability for those intermediaries, by its terms, the statute utilized the pervasive "transfer" concept as the analytical transaction unit for determining the avoidability (or not) of commodity margin payments—preventing avoidance if the "transfer" at issue was a commodity margin payment that the trustee alleged was made "to" a commodity broker or forward contract merchant as "transferee." And, of course, if the trustee conceded that the commodity margin payment was *not* made "to" a protected commodity broker or forward contract merchant as "transferee" (because the commodity broker or forward contract merchant was a "mere conduit"—the defendant's argument in *Seligson*), then the safe harbor obviously would have no application whatsoever, because "true conduits . . . may not be subject to avoidance recovery at all, thus rendering a [safe harbor] exception unnecessary."[88]

The Predecessor Safe Harbor: A Challenged "Transfer" Made "by" the Debtor

The original safe harbor also contained statutory confirmation that the "transfer" sought to be avoided under the Code's avoiding powers (and, thus, protected from avoidance by the safe harbor) is *always* a transfer allegedly *made "by" the debtor*.

Code § 103 governs the applicability of various chapters and subchapters of the Bankruptcy Code to the various kinds of bankruptcy cases (i.e., Chapter 7, 9, 11, 12, 13, and 15 cases) maintained pursuant to the Code. As originally enacted in 1978, Code § 103(d) provided as follows: "Subchapter IV of chapter 7 of this title [entitled Commodity Broker Liquidation] applies only in a case under such chapter concerning a commodity broker [as debtor] *except with respect to section 746(c)* [sic[89]] which applies to margin payments *made by any debtor* to a commodity broker or forward contract merchant."[90] That "except" clause was necessary for the safe harbor to have full effect in protecting the specified market intermediaries from any and all avoidance liability for commodity margin payments they received.

Again, as the Supreme Court has recognized, the Code's avoidance provisions "authorize[] a trustee to avoid certain property *transfers* *made by a debtor*."[91] If the § 764(c) safe harbor were only applicable in commodity broker liquidation cases, therefore, the safe harbor would only shield from avoidance commodity margin payments made "by" commodity brokers (who subsequently file bankruptcy). A major category of potential avoidance liability that the safe harbor sought to eliminate, though, was cases "where the bankrupt is a customer of an FCM" or commodity broker who received the customer's prebankruptcy commodity margin payments.[92] To protect these transfers "made *by* a debtor" who was *not* a commodity broker, therefore, the safe harbor had to apply generally to commodity "margin payments *made by any debtor* to a commodity broker or forward contract merchant.[93]

That particular statutory provision was rendered unnecessary by the 1982 amendment that moved the safe harbor into the Chapter 5 provisions of general applicability to all bankruptcy cases.[94] Its lasting relevance though, is in its clear confirmation that the avoidance safe harbor, from its very inception, operated upon the same pervasive transactional unit as do all of the Code's avoidance provisions: a "transfer" made "by" a debtor as transferor "to" a "transferee."

The 1982 Enactment of § 546(e): A "Transfer" Made "by or to" a Qualifying Intermediary

In 1982, with the urging and support of the SEC, Congress expanded the avoidance safe harbor beyond the commodities markets, to also protect specified securities intermediaries from avoidance liability for any "margin payment" or "settlement payment" they received, in a newly enacted § 546(d) (now § 546(e)) that replaced the former § 764(c).[95] This expanded safe harbor also broadened the scope of these non-avoidable "transfers" to include not only those allegedly made "to" a protected commodities or securities intermediary as "transferee," but also any such "transfer" allegedly made "by" a specified intermediary who has filed bankruptcy.[96]

With respect to that latter expansion of the safe harbor, a trustee's allegation that any and all margin payments and settlement payments passing through the hands of a bankrupt commodity or securities firm were "transfers" made "by" the debtor firm, and thus potentially avoidable, was perceived to hold the potential for unacceptable "systemic risk" that the expanded safe harbor would eliminate. As explained in the House Report, that additional protection was "necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market."[97] "The Bankruptcy Code now expressly provides certain protections to the commodities market to protect against such a 'ripple effect.' . . . [F]or example, [Code § 764(c)] prevents a trustee in bankruptcy from avoiding or setting aside . . . margin payments made *to* a commodity broker."[98] The 1982 amendments "*broaden* the commodities market protections" to also protect payments made *by* a broker "and expressly extend similar protections to the securities market."[99]

Of course, as many have pointed out, no such "ripple effect" systemic risk is implicated when *neither* the debtor (whose trustee is seeking to avoid and recover the "transfer" at issue made "by" the debtor) *nor* the defendant (from whom recovery is sought as alleged transferee "to" whom the "transfer" was made) is a protected market intermediary. Not coincidentally, then, the statutory language Congress chose in codifying the safe harbor, by restricting its effect to a "transfer" allegedly "made by or to" a qualifying market intermediary, makes the safe harbor *entirely inapplicable* to such a "transfer."

The 2006 Amendment: Protecting Qualifying Intermediaries from "for the Benefit of" Liability

In the 2006 amendment to the § 546(e) safe harbor, in order to further protect a qualifying intermediary from potential avoidance liability in connection with a margin payment, settlement payment or securities contract transfer, the "transfer" made "by or to" scope provision was amended to also include the familiar concept of "for the benefit of" avoidance liability.[100] Indeed, it is entirely within the realm of realistic possibility that even a "mere conduit" (who can have *no* liability for a transfer "to" the conduit as "transferee") nonetheless may have contingent guaranty liability in connection with the transfer (e.g., by virtue of the system of guaranties involved in the securities settlement and clearing process[101]), such that the conduit *could* have "for the benefit of" liability exposure in connection with the challenged "transfer."[102] In protecting qualifying intermediaries from such beneficiary liability, Congress employed "transfer" made "to or for the benefit of" language that replicated statutory text in the Code's existing avoidance provisions[103] and even an existing avoidance safe harbor.[104]

Considering the Code's avoidance provisions as a whole, then, one can readily recognize this "for the benefit of" language (added to § 546(e) in 2006) for what it is: an obvious reference to the firmly established concept of "for the benefit of" avoidance liability. Moreover, use of that "transfer" liability language also reinforces reading the "by or to" language as transferor and transferee references, in accordance with the *noscitur a sociis* ("it is known by its associates") canon of statutory construction.[105]

Considering the meaning of the "transfer made by or to (or for the benefit of)" language of § 546(e) in the abstract, without reference (indeed, contrary) to the settled, accepted meaning of those terms as used throughout the Code's avoidance provisions (per the Second, Third, Sixth, and Eighth Circuits), one must resort to rank (and implausible) speculation to explain the meaning and purpose of the 2006 amendment. For example, the Second Circuit, while acknowledging that there is nothing in the legislative history even remotely supporting its facile surmise, nonetheless mused that because "[t]he phrase 'or for the benefit of' was added by the 2006 amendments to section 546(e)," "*after* the circuit split arose, it is arguable that Congress intended to resolve the split with the 2006 Amendments" by statutorily overruling *Munford*.[106] That attribution of such a novel, highly idiosyncratic meaning to the "for the benefit of" language, tellingly reveals how badly those courts have misread (indeed, distorted) *Munford* and (by extension) the statutory text of § 546(e).

Courts that dismiss *Munford* invariably do so with the assertion that "*Munford* seems to have read into section 546(e) the requirement that the [qualifying intermediary] obtain a 'beneficial interest' in the funds they handle for the section to be applicable. This requirement is not explicit in section 546,"[107] which "does not expressly require that the financial institution obtain a beneficial interest in the funds."[108] *Munford*, however, did *not* read a non-textual "beneficial interest" requirement into § 546(e). *Munford* was clearly interpreting the "transfer" made "by or to" scope language of § 546(e), and the court interpreted the meaning of that statutory text in accordance with the *uniform view* of *all* courts that a "mere conduit" is *neither* a transferor *nor* transferee of a challenged "transfer":

> Here, the [challenged] transfers/payments were made *by* [debtor] Munford *to* shareholders. None of the entities listed in sections 546(e) . . . made or received a transfer/payment. Thus, section 546(e) is not applicable.
>
> True, a section 546(e) financial institution was presumptively involved in this transaction. But the bank here was nothing more than an intermediary or conduit.[109]

The *Munford* court stated that "the bank never acquired a beneficial interest in . . . the funds"[110] simply as a concise and intuitive locution of the debtor's allegation (which the defendants apparently did not contest) that the bank was a mere conduit. Thus, the "transfer" sought to be avoided by the debtor (*and* sought to be shielded from avoidance under § 546(e) by the defendants) was neither "made *by*" nor "*to*" the bank as either transferor or transferee, because such a conduit "may be disregarded."[111]

Significantly, the so-called "requirement" of a "beneficial interest" that courts have incorrectly attributed to *Munford* is *not* the test used by most courts (or even the Eleventh Circuit) to determine whether an intermediary is a mere conduit. Rather, the dominant tests are the "dominion" test and the "control" test.[112] Hence, if the purpose of the 2006 amendment to § 546(e) were, in actuality, to legislatively overrule *Munford*, Congress undoubtedly would *not* have used the "for the benefit of" language to effectively achieve that object. Moreover, it likely would have made some mention of that objective in the House Report explaining the amendment. The only explanation offered, however, was that "[t]his amendment conforms the language of Sections 546(e) and 546(f) to the language in 546(g), regarding the protection of transfers in connection with swap agreements."[113]

The only plausible explanation for the 2006 amendment to § 546(e) is that it protects qualifying intermediaries from "for the benefit of" avoidance liability in connection with a challenged "transfer" that is a margin payment, settlement payment or securities contract transfer, consistent with the accepted meaning of such "for the benefit of" language throughout the Code's avoidance provisions. Courts' resistance (or obliviousness) to the obvious meaning and implications of that 2006 amendment is a revealing indication of how bizarre, careless, and utterly wrong-headed is their simplistic interpretation of the determinative "transfer made by or to (or for the benefit of)" scope language of § 546(e).

LBOs and the § 546(e) Securities Safe Harbor

The context in which courts' overly broad interpretation of the scope of § 546(e) has generated perhaps the most litigation (and controversy) has been fraudulent transfer challenges to leveraged buyout transactions (LBOs). "A leveraged buyout can take a myriad of different forms."[114] This gist of these transactions, though, tends to follow a similar pattern:

> For example, an acquirer may form a wholly owned subsidiary to buy the stock of the debtor (D) from D's pre-acquisition shareholders. The acquirer finances the acquisition by borrowing a significant portion of the purchase price, liability which it causes D to assume after closing, secured by D's assets. The (borrowed) purchase price is then remitted to D's pre-acquisition shareholders. This has the effect of giving D's selling shareholders the benefit of using D's assets to gain priority over D's pre-bankruptcy unsecured creditors, who will be junior in right to LBO lenders with liens encumbering D's assets.[115]

"[I]f the deal sours and [D] descends into bankruptcy, . . . [s]ince [D]'s shareholders receive money while [D]'s [unsecured] creditors lose their claim to [D]'s remaining assets, unsuccessful leveraged buyouts often lead to fraudulent conveyance litigation alleging" that D's assets were transferred "without receiving fair value in return," a constructively fraudulent transfer.[116] Such constructive fraud suits can be filed "against all parties to the transaction, including [the] selling shareholders,"[117] and it is with respect to the avoidance claims against the selling shareholders that applicability and scope of the § 546(e) securities safe harbor is implicated.[118]

The first court of appeals decision to address the § 546(e) safe harbor as applied to an LBO, the Tenth Circuit's *Kaiser Steel* case[119]—a virtual replay of the *Seligson* litigation that inspired enactment of the safe harbor[120]—perfectly illustrates the proper scope and applicability of the securities safe harbor. Subsequent cases, however (with the notable exceptions of *Healthco*, *Munford*, and now *FTI Consulting*), have unmoored the operation of the safe harbor from the statutory text confining its purview to a "transfer" allegedly "made by or to" a protected securities intermediary.

Kaiser Steel *and the "Mere Conduit" Controversy*

At issue in *Kaiser* were the LBO payments made to selling shareholders, and in its complaint, Kaiser named "as defendants over 150 brokerage houses."[121] Broker-defendants sought to be held liable "for funds received by them in payment for Kaiser shares held by the broker in street name for its customer" moved for summary judgment.[122] Those broker-defendants made two arguments. First, as in *Seligson,* each argued that "it should be found to be a 'mere conduit' and not subject to liability as an initial transferee."[123] Second, and alternatively, "[t]hey argue[d] the applicability of [Code] § 546(e) which limits the trustee's ability to recover either a margin or settlement payment from a broker."[124]

On the mere conduit issue, the bankruptcy court (after an extended discussion of the doctrine) ultimately concluded that the brokers "may be held liable as initial transferees for funds received by them in payment for Kaiser shares held by the broker in street name for its customer."[125] On appeal, though, the district court reversed, holding "that the undisputed facts in this case indicate that [the appealing broker] was nothing more than a mere conduit."[126] On further appeal to the Tenth Circuit, that court refused to address the "mere conduit" issue, instead affirming the district court on the ground that "even if [the appealing broker] can be considered an initial transferee, [it] is . . . nevertheless protected [from avoidance liability] by [Code] § 546(e), which exempts 'settlement payments' made *to* brokers from recovery as a [constructively] fraudulent conveyance."[127]

Indeed, allowing such a protected securities intermediary to escape avoidance liability (as an alleged "transferee" of a settlement payment made "to" that protected securities intermediary) *without* having to litigate the "mere conduit" issue, is precisely the reason the securities safe harbor was enacted, as demonstrated by the *Seligson* case. When the claim at issue, though, is that the challenged "transfer" was *not* made "to" a protected securities intermediary as "transferee," because the intermediary was a mere conduit who "may not be subject to an avoidance recovery at all," then "a § 546(e) exception is unnecessary."[128]

And that is the more typical claim made in LBO litigation against selling shareholders—that the avoidable "transfers" are the payments "made *by*" the debtor as transferor "*to*" the selling shareholders as "transferees." That this is the "transfer" sought to be avoided (*and* sought to be shielded from avoidance under § 546(e), if applicable) in LBO litigation against selling shareholders is made clear by the doctrine of "collapsing" the transaction structure of an LBO.

Collapsing the Transaction Structure of an LBO as Against Selling Shareholders

As Professor Frost noted in a previous issue of *Bankruptcy Law Letter*, "[o]ften leveraged buyouts are structured in such a way that the strict application of the fraudulent transaction laws cannot reach the transfers made."[129] For example, in the stylized LBO of debtor "D" set forth above, note that the nominal structure of the LBO is one in which *the acquirer* paid the selling shareholders for their D stock, *not* debtor D. It might seem, therefore, that the selling shareholders have no avoidance liability exposure at all, because "the constructive fraud provision [only] applies to transfers *by* an insolvent *debtor*,"[130] and as structured, a selling shareholder could not be considered the "transferee" of any transfer made "by" debtor D as transferor "to" the selling shareholder. The precise transaction structure the parties employ to effectuate an LBO is not determinative, though, because the courts have developed a doctrine analogous to the step-transaction doctrine of tax law,[131] known as "collapsing" the transaction structure.

" '[C]ollapsing' enables courts to ignore the formal (and often artificial) structure of a transaction or series of transactions."[132] "Courts have 'collapsed' a series of transactions into one transaction when it appears that despite the formal structure and the labels attached, the segments, in reality, comprise a single integrated scheme,"[133] and "[i]t is well established that multilateral transactions may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction for analysis under the" fraudulent transfer statutes.[134] Indeed, "the concept of 'collapsing' a series of transactions and treating them as a single integrated transaction has been applied primarily when analyzing a transfer alleged to be fraudulent in the context of a failed leveraged buy-out."[135] As Professor Markell has noted in this journal, "[p]articularly in the leveraged buyout area, courts have not hesitated to collapse transactions in order to evaluate the substance of a transaction."[136]

In our representative LBO of debtor D, then, a viable fraudulent transfer action against the selling shareholders would be dependent upon collapsing the transaction structure of the LBO as against those selling shareholders. Collapsing would recharacterize the transactions as D borrowing money and selling stock to the acquirer and then using the loan and stock-sale proceeds to repurchase the selling shareholders' stock,[137] such that selling shareholders "are direct transferees of [debtor D]'s property"[138] and thus "liable as . . . transferee[s] in the alleged fraudulent conveyance."[139]

Collapsing Doctrine and a "Transfer" as the Fundamental Transactional Unit

At this point, the astute reader may have already recognized the connection between "collapsing" a series of related transactions and the "mere conduit" doctrine. Whether transactions "should be collapsed and whether a party is a 'mere conduit' are different issues involving different analyses."[140] Nonetheless, they are both directed at the same object: properly conceptualizing the transactional unit for purposes of analyzing the avoidability (or not) of a "transfer" allegedly made "by" the debtor-transferor "to" a "transferee." As Professor Frost perceptively noted, "mere conduit" doctrine "in a sense collapse[s] two [or more] transactions into one,"[141] and a few courts have noted the converse in connection with "collapsing" doctrine—disregarded intermediaries in collapsed transactions are essentially treated as if they were "mere conduits."[142]

"In deciding whether to collapse the transaction and impose liability on particular defendants, the courts have looked frequently to the knowledge of the defendants of the structure of the entire transaction."[143] For example, in the seminal *Wieboldt* decision, the court collapsed the LBO transaction structure as against controlling and insider shareholders who were aware of or participated in the structuring of the LBO. The court refused, however, to collapse the transaction structure as against public shareholders who merely tendered their shares in response to a public tender offer for the debtor's stock.[144] Public shareholders' protection against avoidance liability in connection with an LBO, therefore, is attributable to the courts' general unwillingness to collapse LBO transaction structure in order to impose avoidance liability upon them.[145]

If, however, the LBO transaction structure *is* collapsed as against a selling shareholder (or a collapsing theory is sufficiently alleged for purposes of a motion to dismiss or a summary judgment motion[146]), then the "transfer" at issue was allegedly "made *by*" the debtor as transferor "*to*" the defendant selling shareholder as "transferee." If *neither* the debtor *nor* the selling shareholder is a qualifying § 546(e) intermediary, and thus the "transfer" at issue was *not* "made by or to" a qualifying securities intermediary, then the § 546(e) securities safe harbor, by its express terms, does *not* apply to shield that "transfer" from avoidance. As Judge Gross correctly noted, therefore, "as a general rule, section 546(e) does *not* apply to 'collapsed' transactions,"[147] because generally neither the debtor-transferor nor the shareholder-transferee in such cases is a protected securities intermediary.

Conclusion

The fundamental analytical transaction unit throughout the Code's avoiding-power provisions is the "transfer" sought to be avoided, and the same is true of the § 546(e) securities safe harbor. Thus, that safe harbor is applicable only if (1) the "transfer" at issue (a) was "made by" a debtor-transferor who was a qualifying securities intermediary, "or" (b) was made "to" a "transferee" ("or for the benefit of" a non-transferee) who was a protected securities intermediary, and (2) that "transfer" was a settlement payment or was made in connection with a securities contract.

ENDNOTES:

[1]For example, a recent article *defending* the Bankruptcy Code's various securities and derivatives safe harbors noted, without any counter-argument at all, Professor Mooney's eminently sensible, representative position that the § 546(e) "settlement-payment avoidance protection should not apply to rescue a beneficial investor that has been paid by its issuer from the issuer risk that it necessarily assumed" by investing in the security at issue. Mark D. Sherrill, In Defense of the Bankruptcy Code's Safe Harbors, 70 Bus. Law. 1007, 1023 (2015) (quoting Charles W. Mooney, The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When Is Safe *Too* Safe?, 49 Tex. Int'l L. J. 243, 262 (2014)).

[2]See, e.g., In re Plassein Intern. Corp., 590 F.3d 252, 255, 52 Bankr. Ct. Dec. (CRR) 145, Bankr. L. Rep. (CCH) P 81653 (3d Cir. 2009) (in making payments at issue to shareholders, "the parties did not make use of the 'settlement system'—the system of intermediaries and guarantees usually employed in securities transactions").

[3]See 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); Christopher W. Frost, The Continued Expansion of Section 546(e): Has the Safe Harbor Swallowed the Rule?, 31 Bankr. L. Letter No. 10, at 1 (Oct. 2011).

[4]Judge Gregg, among others, pointed this out in In re Quality Stores, Inc., 355 B.R. 629, 635 n.5, 47 Bankr. Ct. Dec. (CRR) 98 (Bankr. W.D. Mich. 2006), aff'd sub nom., QSI Holdings, Inc. v. Alford, 382 B.R. 731 (W.D. Mich. 2007), judgment aff'd, 571 F.3d 545, 51 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 81528 (6th Cir. 2009). See also Jewel Recovery, L.P. v. Gordon, 196 B.R. 348, 353 (N.D. Tex. 1996). On the practical reality of parties " 'structur[ing]' their way out of liability under avoiding power statutes" by virtue of prevailing interpretations of § 546(e), see Jonathan M. Landers & Sandra A. Riemer, A New Look at Fraudulent Transfer Liability in High Risk Transactions, Bus. L. Today, Dec. 2016, at 1, 3. See also Joel D. Applebaum, et al., The Ins and Outs of LBOs, American Bankruptcy Institute 20th Annual Central States Bankruptcy Workshop, 061313 ABI-CLE 197 (June 13, 2013) (containing a section entitled "Drafting LBO Documents to Claim the 'Safe Harbor' of Section 546(e) of the Bankruptcy Code" and advising use of a qualifying financial institution as an "exchange agent" for LBO payments to shareholders).

[5]See Plassein, 590 F.3d at 255 (applying § 546(e) to an ordinary wire transfer from debtor's bank "to the shareholders' private accounts at their various banks"), aff'g In re Plassein Intern. Corp., 366 B.R. 318, 323, 48 Bankr. Ct. Dec. (CRR) 62, 28 A.L.R. Fed. 2d 829 (Bankr.

D. Del. 2007) ("federal regulations require that a wire transfer must be performed by a bank; thus, a wire transfer must be made through a financial institution" of the sort referenced in § 546(e)).

[6]See Mooney, 49 Tex. Int'l L. J. at 265-66. See also Enron, 651 F.3d at 345-47 (Koetl, D.J., dissenting); Frost, 31 Bankr. L. Letter No. 10, at 4-5.

[7]See Christopher W. Frost, Settlement Payments and the Safe Harbor of Section 546(e), 28 Bankr. L. Letter No. 5, at 1 (May 2008); Frost, 31 Bankr. L. Letter No. 10; Andrew Kull, Common-Law Restitution and the Madoff Liquidation, 31 Bankr. L. Letter No. 12, at 2, 9, 12-13 (Dec. 2011).

[8]See In re Bernard L. Madoff Inv. Securities LLC, 773 F.3d 411, 60 Bankr. Ct. Dec. (CRR) 106, 72 Collier Bankr. Cas. 2d (MB) 1295, Bankr. L. Rep. (CCH) P 82737 (2d Cir. 2014), cert. denied, 135 S. Ct. 2858, 192 L. Ed. 2d 910 (2015) and cert. denied, 135 S. Ct. 2859, 192 L. Ed. 2d 910 (2015). See generally Andrew Kull, Common-Law Restitution and the Madoff Liquidation, 92 B.U. L. Rev. 939, 956-58, 962-65 (2012); Samuel P. Rothschild, Note, Bad Guys in Bankruptcy: Excluding Ponzi Schemes From the Stockbroker Safe Harbor, 112 Colum. L. Rev. 1376 (2012).

[9]See Mooney, 49 Tex. Int'l L.J. at 265.

[10]In re Healthco Intern., Inc., 195 B.R. 971, 981-83, 35 Collier Bankr. Cas. 2d (MB) 1345 (Bankr. D. Mass. 1996).

[11]Matter of Munford, Inc., 98 F.3d 604, 609-10, 36 Collier Bankr. Cas. 2d (MB) 1673 (11th Cir. 1996).

[12]Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 338-39, 55 Bankr. Ct. Dec. (CRR) 12, 65 Collier Bankr. Cas. 2d (MB) 1833 (2d Cir. 2011); In re Quebecor World (USA) Inc., 719 F.3d 94, 98, 99-100, 58 Bankr. Ct. Dec. (CRR) 12, 69 Collier Bankr. Cas. 2d (MB) 1253, Bankr. L. Rep. (CCH) P 82505 (2d Cir. 2013).

[13]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); In re Plassein Intern. Corp., 590 F.3d 252, 257-58, 52 Bankr. Ct. Dec. (CRR) 145, Bankr. L. Rep. (CCH) P 81653 (3d Cir. 2009).

[14]In re QSI Holdings, Inc., 571 F.3d 545, 550-51, 51 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 81528 (6th Cir. 2009).

[15]Contemporary Industries Corp. v. Frost, 564 F.3d 981, 986-87, 51 Bankr. Ct. Dec. (CRR) 157, Bankr. L. Rep. (CCH) P 81473 (8th Cir. 2009).

[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).

[17]The facts set forth herein are taken from the complaint filed in the adversary proceeding in Valley View's bankruptcy case, the courts' published opinions in that case, and the parties' briefing before the Seventh Circuit.

[18]Brief of Defendant-Appellee at 5, FTI Consulting, Inc. v. Merit Mgmt. Grp., 830 F.3d 690 (7th Cir. 2016) (No. 15-3388), 2016 WL 614281, at *5.

[19]FTI Consulting, Inc. v. Merit Management Group, LP., 541 B.R. 850, 852, Bankr. L. Rep. (CCH) P 82875 (N.D. Ill. 2015), rev'd, 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) (emphasis added). See also Brief of Defendant-Appellee at 12, FTI Consulting, Inc. v. Merit Mgmt. Grp., 830 F.3d 690 (7th Cir. 2016) (No. 15-3388), 2016 WL 614281, at *12 ("Here, Valley View Downs paid Merit Management, through two financial institutions").

[20]11 U.S.C.A. §§ 544(b)(1) (emphasis added) (giving trustee or DIP powers of individual creditors to avoid transfers under state law, e.g., using state fraudulent transfer statutes), 547(b) (emphasis added) (preferential transfers), 548(a)(1) (emphasis added) (fraudulent transfers). Some of the other avoiding powers alter the operative language slightly, but nonetheless still operate to avoid a "transfer" of property. See, e.g., 11 U.S.C.A. §§ 544(a) (so-called strong-arm power to "avoid any *transfer* of property of the debtor" (emphasis added)); 549(a)(1) (power to "avoid a *transfer* of property of the [bankruptcy] estate that occurs after the commencement of the case" (emphasis added)). The power to avoid statutory liens is phrased in terms of "avoid[ing] the *fixing* of a statutory lien on property of the debtor." 11 U.S.C.A. § 545 (emphasis added). A "lien," though, is defined in Code § 101(37) as "a charge against or interest in property," and a "transfer" is defined in § 101(54)(A) to include "the creation of a lien." The "fixing" of a statu-

tory lien, therefore, is synonymous with "transfer" of a property interest. Indeed, the predecessor bankruptcy statute, the Bankruptcy Act of 1898, explicitly included "fixing a lien upon property or upon an interest therein" within the statute's definition of a "transfer." Bankruptcy Act of 1898 § 1(30), reprinted in 1 Collier on Bankruptcy 44.2 (James Wm. Moore et al. eds., 14th ed. 1974). Thus, Bankruptcy Code § 550(a) and § 551 both refer to a "*transfer* [that] is avoided under section . . . 545." 11 U.S.C.A. §§ 550(a), 551 (emphasis added).

[21]In re Harwell, 628 F.3d 1312, 1317 n.6, 54 Bankr. Ct. Dec. (CRR) 12, 64 Collier Bankr. Cas. 2d (MB) 1820, Bankr. L. Rep. (CCH) P 81909 (11th Cir. 2010).

[22]Cf. Andrea Coles-Bjerre, Bankruptcy Theory and the Acceptance of Ambiguity, 80 Am. Bankr. L.J. 327, 337 (2006). Professor Coles-Bjerre's article explores the intractable ambiguity (or vagueness) regarding whether the fundamental transactional unit of an avoidable "transfer" is divisible for various purposes. Her basic point, though, regarding the intrinsic ambiguity (or vagueness) in determining the "transfer" that is avoidable (from a "whole" versus "part" perspective) also applies to defining the contours of the whole or entire "transfer" itself.

[23]Thus, the courts uniformly recognize that the "Bankruptcy Code does not define [who should be considered the] 'transferee' " of such a "transfer." Harwell, 628 F.3d at 1317. See infra notes 48-56 and accompanying text. And the same is true with respect to the transferor of a "transfer"; i.e.: "by" whom was the transfer "made"? See infra note 57.

[24]See supra note 20 and accompanying text.

[25]Union Bank v. Wolas, 502 U.S. 151, 152, 112 S. Ct. 527, 528, 116 L. Ed. 2d 514, 22 Bankr. Ct. Dec. (CRR) 574, 25 Collier Bankr. Cas. 2d (MB) 1011, Bankr. L. Rep. (CCH) P 74296A (1991) (emphasis added).

[26]BFP v. Resolution Trust Corp., 511 U.S. 531, 535, 114 S. Ct. 1757, 1760, 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) (emphasis added). See also id. at 533 (with respect to that same constructive fraud provision, discussing "the Bankruptcy Code's requirement that *transfers* of property *by* insolvent *debtors* within one year prior to filing of a bankruptcy petition be in exchange for a 'reasonably equivalent value' " (emphasis added)).

[27]11 U.S.C.A. § 548(a)(1)(A) (emphasis added).

[28]11 U.S.C.A. § 548(a)(1)(B)(ii)(IV) (emphasis added).

[29]UFCA §§ 4(a), 5(a), 7A, pt. II U.L.A. 58, 129 (2006); UVTA §§ 4(a), 5(a), 7A, pt. II U.L.A. 20, 29 (Supp. 2017).

[30]See 1898 Act § 60a(1), reprinted in 3, pt. 2 Collier (14th ed.) at 731 (predecessor to Code § 547 preference provision, stating that "[a] preference is a transfer, as defined in this Act, . . . made by [the] debtor" meeting specified criteria); 1898 Act § 67d(2)-(3), reprinted in 4 Collier (14th ed.) at 5-6 (predecessor to Code § 548 fraudulent transfer provision, applicable to "[e]very transfer made . . . by a debtor" meeting specified criteria); 1898 Act § 70e(1), reprinted in 4A Collier (14th ed.) at 5 (predecessor to Code § 544(b)(1), applicable to "[a] transfer made . . . by a debtor" voidable "under any Federal or State law applicable thereto"). The 1898 Act defined "transfer" broadly, in a fashion similar to the Code definition, as "every . . . different mode, direct or indirect, of disposing of or of parting with property or with an interest therein." 1898 Act § 1(30), reprinted in 1 Collier (14th ed.) at 44.2.

[31]Namely, Code "sections 544 [strong-arm and state-law avoidance powers], 545 [avoidable statutory liens], 547 [preferential transfers], 548(a)(1)(B), and 548(b) [constructively fraudulent transfers]." 11 U.S.C.A. § 546(e).

[32]Union Bank v. Wolas, 502 U.S. at 152.

[33]Brief of Defendant-Appellee at 5, FTI Consulting, Inc. v. Merit Mgmt. Grp., 830 F.3d 690 (7th Cir. 2016) (No. 15-3388), 2016 WL 614281, at *5 (emphasis added).

[34]Both the UFTA and UVTA define "transfer" in a fashion nearly identical to that of the Bankruptcy Code, to mean "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." UFTA § 1(12), 7A, pt. II U.L.A. 15 (2006); UVTA § 1(16), 7A, pt. II U.L.A. 12 (Supp. 2017).

[35]Rupp v. Markgraf, 95 F.3d 936, 942, 29 Bankr. Ct. Dec. (CRR) 834, 36 Collier Bankr. Cas. 2d (MB) 1312 (10th Cir. 1996) (emphasis added).

[36]In re Ogden, 314 F.3d 1190, 1196, 40 Bankr. Ct. Dec. (CRR) 208, Bankr. L. Rep. (CCH) P 78794 (10th Cir. 2002) (emphasis added). See 11 U.S.C.A. § 547(b)(1) (authoriz-

ing avoidance of a preferential transfer "to a . . . creditor").

[37]"The trustee may not avoid under this section a transfer . . . (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) according to ordinary business terms." 11 U.S.C.A. § 547(c)(2).

[38]Providing a defense to "a transferee . . . of such a [fraudulent] transfer . . . that takes for value and in good faith . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer." 11 U.S.C.A. § 548(c).

[39]124 Cong. Rec. 34,000 (1978) (emphasis added) (statement of Sen. DeConcini); 124 Cong. Rec. 32,400 (1978) (emphasis added) (statement of Rep. Edwards). The floor statements of the foregoing floor managers of the 1978 legislation are "persuasive evidence of congressional intent," generally regarded as the equivalent of a conference report. Begier v. I.R.S., 1990-2 C.B. 265, 496 U.S. 53, 64 n.5, 110 S. Ct. 2258, 110 L. Ed. 2d 46, 20 Bankr. Ct. Dec. (CRR) 940, 22 Collier Bankr. Cas. 2d (MB) 1080, Bankr. L. Rep. (CCH) P 73403, 90-1 U.S. Tax Cas. (CCH) P 50294, 65 A.F.T.R.2d 90-1095 (1990).

[40]Christopher W. Frost, Initial Transferee or Mere Conduit: The Seventh Circuit Takes a Stab at a Slippery Concept, 31 Bankr. L. Letter No. 2, at 1 (Feb. 2011).

[41]Charles Jordan Tabb, The Law of Bankruptcy § 6.1, at 464 (3d ed. 2014).

[42]Carson v. Federal Reserve Bank of New York, 254 N.Y. 218, 172 N.E. 475, 70 A.L.R. 435 (1930) (Cardozo, C.J.).

[43]Carson, 172 N.E. at 481-82.

[44]Carson, 172 N.E. at 482.

[45]Indeed, "[b]ankruptcy statutes have always been, by necessity, enacted against and informed by the background of our common law legal system." Ralph Brubaker, Considering the Common Law Origins and Nature of the Code's Avoidance Remedy, 27 Bankr. L. Letter No. 1, at 1, 7 (Jan. 2007). And, of course, "[a] statute will be construed to alter the common law only when that disposition is clear." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 318 (2012).

As Cardozo insightfully recognized, avoidance and recovery of a transfer invalidated by the Bankruptcy Code unmistakably implicates the common law of restitution and unjust enrichment and a transferee's "duty to make restitution of a preference." Carson, 172 N.E. at 481. "Avoidance as a remedy traces its roots to rescissionary principles of English equity jurisprudence 'which were not essentially different from those' of Roman law." Ralph Brubaker, Lien Avoidance "for the Benefit of the Estate": Textualism, Equitable Powers, and Code Common Law, 26 Bankr. L. Letter No. 1, at 1, 8 (Jan. 2006) (quoting 1 Henry Campbell Black, A Treatise on the Rescission of Contracts and Cancellation of Written Instruments § 2, at 5 (2d ed. 1929)). "Avoidance, then, is an equitable remedy grounded in general restitutionary principles of unjust enrichment." Id. See also Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. a, at 264 (2011) (explaining that "whenever the basis of the . . . claim is a transfer from the claimant to the defendant that the claimant seeks to undo," this is "a substantive right to avoidance of the transaction in question," alternatively described by "use of the word 'rescission' in describing the right to restitution"). Of course, a bankruptcy trustee (or DIP) seeks to avoid a transfer made by a debtor as representative of the debtor's bankruptcy estate.

[46]Carson, 172 N.E. at 482-83. In other words, a "mere conduit" has no restitution liability "if he has parted before bankruptcy with title and possession" of the property at issue. Id. at 482.

[47]Carson, 172 N.E. at 482.

[48]Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890, 893, 17 Bankr. Ct. Dec. (CRR) 299, 18 Collier Bankr. Cas. 2d (MB) 155 (7th Cir. 1988).

[49]Bonded Fin., 838 F.2d at 893-94.

[50]Jessica D. Gabel & Paul R. Hage, Who Is a 'Transferee' Under Section 550(a) of the Bankruptcy Code?: The Divide Over Dominion, Control, and Good Faith in Applying the Mere Conduit Defense, 21 Norton J. Bankr. L. & Prac. No. 1, at 47, 51 (Feb. 2012).

[51]In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 130 F.3d 52, 56, 31 Bankr. Ct. Dec. (CRR) 978, 38 Collier Bankr. Cas. 2d (MB) 1851, Bankr. L.

Rep. (CCH) P 77560 (2d Cir. 1997).

[52]Ogden, 314 F.3d at 1202.

[53]Finley Kumble, 130 F.3d at 57, 56.

[54]In re Southeast Hotel Properties Ltd. Partnership, 99 F.3d 151, 155, 29 Bankr. Ct. Dec. (CRR) 1202, 36 Collier Bankr. Cas. 2d (MB) 1649, Bankr. L. Rep. (CCH) P 77158 (4th Cir. 1996).

[55]Frost, 31 Bankr. L. Letter No. 2, at 4.

[56]Gabel & Hage, 21 J. Bankr. L. & Prac. No. 1 at 49.

[57]The "mere conduit" principle can also be implicated in determining whether the transfer at issue was made "by" the debtor as transferor, as required by the Code's avoiding-power provisions. See, e.g., In re Computrex, Inc., 403 F.3d 807, 810-11, 44 Bankr. Ct. Dec. (CRR) 155, Bankr. L. Rep. (CCH) P 80266, 2005 FED App. 0177P (6th Cir. 2005) (no preferential transfer by the debtor because debtor was "a mere disbursing agent"); In re Chase & Sanborn Corp., 813 F.2d 1177, 1178, Bankr. L. Rep. (CCH) P 71753 (11th Cir. 1987) (no fraudulent transfer by the debtor because "the debtor corporation was a mere conduit"). For an extended critique of some courts' test for a "mere conduit" in this context, see Ralph Brubaker, When Property Becomes a Promise Becomes a Preference, 25 Bankr. L. Letter No. 8, at 1 (Aug. 2005). See also In re LGI Energy Solutions, Inc., 460 B.R. 720, 55 Bankr. Ct. Dec. (CRR) 235, 66 Collier Bankr. Cas. 2d (MB) 1329 (B.A.P. 8th Cir. 2011) (declining to follow the *Computrex* decision). Thus, the indeterminacy that motivated enactment of § 546(e) in 1982 (see infra) also prevails in determining "by" whom a challenged "transfer" was "made." Indeed, in 1987 the *Chase & Sanborn* court remarked that "[n]o court, as far as we have discovered, previously has established a framework for determining when funds provided to a debtor by a third party become property of the debtor so that an allegedly fraudulent transfer of the funds . . . is subject to avoidance" as a transfer "made by" the debtor. Chase & Sanborn, 813 F.2d at 1180.

[58]11 U.S.C.A. § 547(b)(1) (emphasis added). The predecessor provision in the 1898 Act also provided that "a transfer . . . made by [the] debtor" could be avoided if made "to *or for the benefit of* a creditor" preferred thereby. 1898 Act § 60a(1) (emphasis added), reprinted in 3, pt. 2 Collier (14th ed.) at 731.

[59]11 U.S.C.A. § 548(a)(1) (emphasis added).

[60]11 U.S.C.A. § 550(a)(1) (emphasis added).

[61]Carson, 172 N.E. at 482.

[62]In re Meredith, 527 F.3d 372, 375, 50 Bankr. Ct. Dec. (CRR) 45, 59 Collier Bankr. Cas. 2d (MB) 1382, Bankr. L. Rep. (CCH) P 81252 (4th Cir. 2008) (emphasis added) (citations omitted) (quoting In re Columbia Data Products, Inc., 892 F.2d 26, 49, 19 Bankr. Ct. Dec. (CRR) 1799, Bankr. L. Rep. (CCH) P 73106 (4th Cir. 1989) (quoting Bonded Fin., 838 F.2d at 895)).

[63]Bonded Fin., 838 F.2d at 896.

[64]And neither Valley View nor Merit Management contends that the challenged "transfer" was made "for the benefit of" Credit Suisse or Citizens Bank.

[65]"A word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, Reading Law at 170.

[66]"Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, Reading Law at 167. "Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts." Id.

[67]The "to (or for the benefit of)" language of § 546(e), not coincidentally, replicates the "to or for the benefit of" language of § 547(b)(1) and the repeated use of that language throughout § 548(a)(1).

[68]See Brief of Defendant-Appellee at 5, FTI Consulting, Inc. v. Merit Mgmt. Grp., 830 F.3d 690 (7th Cir. 2016) (No. 15-3388), 2016 WL 614281, at *5 ("Trustee filed suit against Merit Management . . . seeking avoidance and recovery of transfers Valley View Downs made to Merit Management in the amount of $16,503,850.").

[69]And neither Valley View nor Merit Management contends that the challenged "transfer" was made "for the benefit of" Credit Suisse or Citizens Bank.

[70]Bonded Fin., 838 F.2d at 893.

[71]Scalia & Garner, Reading Law at 126.

[72]RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 132 S. Ct. 2065,

2071, 182 L. Ed. 2d 967, 56 Bankr. Ct. Dec. (CRR) 144, 67 Collier Bankr. Cas. 2d (MB) 483, Bankr. L. Rep. (CCH) P 82218 (2012).

[73]Those courts apparently did not even realize that their construction of the determinative language of § 546(e) is at odds with its accepted meaning throughout the rest of the Code's avoidance provisions. See infra notes 75-78 and accompanying text.

[74]"The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves (in the absence of duress)." Scalia & Garner, Reading Law at 180.

[75]Quebecor World, 719 F.3d at 96, 99 (emphasis added). See also In re Quebecor World (USA) Inc., 453 B.R. 201, 204, 212, 55 Bankr. Ct. Dec. (CRR) 60 (Bankr. S.D. N.Y. 2011) ("It is undisputed that these substantial payments were *made by [debtor]* QWUSA *to* the Noteholders . . . within the ninety day period" before bankruptcy, as required by Code § 547(b), which "provides that the trustee of a bankruptcy estate may recover . . . money or property *transferred by an insolvent debtor* in the ninety days preceding bankruptcy, where the *transfer* (1) was *made to* . . . a creditor." (emphasis added)), aff'd, 480 B.R. 468, Bankr. L. Rep. (CCH) P 82355 (S.D. N.Y. 2012), judgment aff'd, 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).

Although it is unclear, given the procedural posture of the case, some of the defendants in *Quebecor World* may have been financial institutions. If so, and if the challenged payments were "settlement payments" or transfers in connection with a "securities contract," which the Second Circuit held to be the case, then the debtor's alleged transfers "to" those defendants who were financial institutions would be shielded from avoidance under the terms of § 546(e).

[76]Quebecor World, 719 F.3d at 99 (emphasis added). The bankruptcy court made a similar (conclusory and self-contradictory) assertion: "In determining that *the transfer in question* [see supra note 75] qualifies for the [§ 546(e)] exemption, the Court must find that [it] has been *made to* a 'financial institution.' . . . [W]ithout question the Disputed Transfer was 'made . . . to . . . a . . . financial institution,' *i.e.*, CIBC Mellon as trustee for the Notes." Quebecor World, 453 B.R. at 212 (emphasis added).

[77]Quebecor World, 719 F.3d at 99.

[78]In *Resorts International*, the Third Circuit described the "transfer" sought to be avoided as debtor "Resorts' payment to [shareholder] Lowenschuss." 181 F.3d at 514 (stating that "section 548 would allow the trustee to avoid *the transfer*" if debtor "Resorts received less than a reasonably equivalent value to the $3,800,000 *it [debtor Resorts] paid*" as "the transfer to Lowenschuss" (emphasis added)). But for purposes of its application of the § 546(e) safe harbor, the court (incongruously) stated that the "transfer" at issue was "made by . . . a financial institution" because "Resorts wired [the] funds to Chase which Chase then forwarded to Merrill Lynch who paid Loweschuss," and Merrill Lynch and Chase were financial institutions. Id. at 515. See also QSI Holdings, 571 F.3d at 547, 551, 548 (acknowledging that "transfer" debtors "seek to avoid [is] payments [they] made *to* approximately 170 shareholders," but also stating (inconsistently) "that the transfer was made *to* a financial institution" because the debtors made those payments through HSBC Bank as "exchange agent" (emphasis added)).

[79]Zahn v. Yucaipa Capital Fund, 218 B.R. 656, 676-77 n.31 (D.R.I. 1998). One of the functions of the surplusage canon is to prevent "an interpretation [of a provision] that renders it pointless." Scalia & Garner, Reading Law at 176.

[80]"Associated words bear on one another's meaning (*noscitur a sociis*)." Scalia & Garner, Reading Law at 195.

[81]Kaiser Steel Corp. v. Charles Schwab & Co., Inc., 913 F.2d 846, 849 n.4, 20 Bankr. Ct. Dec. (CRR) 1650, 23 Collier Bankr. Cas. 2d (MB) 1403, Bankr. L. Rep. (CCH) P 73620 (10th Cir. 1990). See S. Rep. No. 95-989, at 106 (1978) (citing Seligson v. New York Produce Exchange, 394 F. Supp. 125 (S.D. N.Y. 1975)), reprinted in 1978 U.S.C.C.A.N. 5787, 5892.

[82]Seligson, 394 F. Supp. at 127-28 (emphasis added). Avoidability as a constructively fraudulent transfer also turned on "whether the [debtor] transferor received 'fair consideration' for the transfer." Id. at 127. Congress also enacted a corresponding safe harbor for this "value" issue in 1978 in the original version of Code § 548(d)(2)(B). See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2600-01.

[83]Seligson, 394 F. Supp. at 135.

[84]Bonded Fin., 838 F.2d at 893.

[85]Pub. L. No. 95-598, 92 Stat. at 2619 (enacting 11 U.S.C.A. § 764(c)) (superseded in 1982 by 11 U.S.C.A. § 546(e)).

[86]S. Rep. No. 95-989, at 106, reprinted in 1978 U.S.C.C.A.N. at 5892.

[87]Frederick L. White, The Commodity-Related Provisions of the Bankruptcy Act of 1978, 34 Rec. Ass'n B. City N.Y. 262, 269 (1979). The Senate Report, likewise, identified an additional "basic objective" of the commodity broker subchapter "as the protection of commodity market stability." S. Rep. No. 95-989, at 7-8, reprinted in 1978 U.S.C.C.A.N. at 5793-94.

[88]Zahn, 218 B.R. at 676-77 n.31.

[89]"The original reference in section 103(d) to 'section 746(c)' was a typographical error; the reference should have been to 'section 764(c).' " H.R. Rep. No. 97-420, at 3 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 585.

[90]Pub. L. No. 95-598, 92 Stat. at 2555 (emphasis added) (enacting 11 U.S.C.A. § 103(d)) (amended in 1982, with the enactment of 11 U.S.C.A. § 546(e), to repeal the "except" clause).

[91]Union Bank v.Wolas, 502 U.S. at 152.

[92]White, 34 Rec. Ass'n B. City N.Y. at 275 n.13.

[93]Pub. L. No. 95-598, 92 Stat. at 2555 (emphasis added) (enacting 11 U.S.C.A. § 103(d)) (amended in 1982, with the enactment of 11 U.S.C.A. § 546(e), to repeal the "except" clause). See 124 Cong. Rec. 34,018 (1978) (statement of Sen. DeConcini and Sen. Mathias) ("the intent of section 764 . . . is to provide that margin payments . . . previously *made by a bankrupt* to a commodity broker [or] forward contract merchant . . . are nonavoidable transfers by the bankrupt's trustee" (emphasis added)).

[94]See Pub. L. No. 97-222, § 2, 96 Stat. 235, 235 (1982) (repealing the "except" clause of Code § 103(d)).

[95]Pub. L. No. 97-222, § 4, 96 Stat. at 236 (enacting Code § 546(d)); id. § 17(c), 96 Stat. at 240 (repealing Code § 764(c)).

[96]Pub. L. No. 97-222, § 4, 96 Stat. at 236 (enacting Code § 546(d)).

[97]H.R. Rep. No. 97-420, at 1, reprinted in 1982 U.S.C.C.A.N. at 583.

[98]Id. (emphasis added) (citation omitted).

[99]Id. at 2 (emphasis added), reprinted in 1982 U.S.C.C.A.N. at 583.

[100]Pub. L. No. 109-390, § 5(b)(1)(A), 120 Stat. 2692, 2697 (2006) (amending § 546(e)).

[101]The House Report accompanying enactment of what is now § 546(e) explained that the safe harbor was necessary "[b]ecause of the structure of the clearing systems in" the "commodities and securities markets [which] operate through a complex system of accounts and guarantees." H.R. Rep. No. 97-420, at 1, reprinted in 1982 U.S.C.C.A.N. at 583. For explanations of the securities settlement and clearing process, see Irina Fox, Settlement Payment Exception to Avoidance Powers in Bankruptcy, 84 Am. Bankr. L.J. 571, 583-86 (2010); Samir D. Parikh, Saving Fraudulent Transfer Law, 86 Am. Bankr. L.J. 305, 327-31 (2012); Neil M. Garfinkel, Note, No Way Out: Section 546(e) Is No Escape for the Public Shareholder of a Failed LBO, 1991 Colum. Bus. L. Rev. 51, 63-65.

[102]See generally Charles J. Tabb & Ralph Brubaker, Teacher's Manual for Bankruptcy Law: Principles, Policies, and Practice 504-06 (4th ed. 2015) (discussing such a case in a different context); Charles J. Tabb & Ralph Brubaker, Bankruptcy Law: Principles, Policies, and Practice 464-67 (4th ed. 2015); In re Railworks Corp., 2012 WL 6681894 (Bankr. D. Md. 2012), vacated, 2013 WL 3427897 (D. Md. 2013), decision rev'd, 760 F.3d 398, 59 Bankr. Ct. Dec. (CRR) 225, Bankr. L. Rep. (CCH) P 82670 (4th Cir. 2014).

[103]See 11 U.S.C.A. §§ 547(b)(1), 548(a)(1).

[104]See 11 U.S.C.A. § 926(b) (enacted in 1988).

[105]See Scalia & Garner, Reading Law at 195-98.

[106]Quebecor World, 719 F.3d at 99-100 n.3 (emphasis added).

[107]Lowenschuss, 181 F.3d at 516.

[108]Contemporary Indus., 564 F.3d at 987.

[109]Munford, 98 F.3d at 610 (emphasis in original).

[110]Munford, 98 F.3d at 610.

[111]Bonded Fin., 838 F.2d at 893.

[112]See generally Frost, 31 Bankr. L. Letter No. 2, at 4; Gabel & Hage, 21 J. Bankr. L. & Prac. No. 1 at 47.

[113]H.R. Rep. No. 109-648 (pt. I), at 8 (2006),

reprinted in 2006 U.S.C.C.A.N. 1585, 1593. See Parikh, 86 Am. Bankr. L.J. at 336 n.174. The Second Circuit, therefore, was incorrect when it stated, in the course of its speculative hypothesizing, that "the legislative history does not mention, let alone explain the reasoning behind, this change." Quebecor World, 719 F.3d at 100 n.3.

[114]Tabb, The Law of Bankruptcy, § 6.39, at 598.

[115]Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts, 2013 Wis. L. Rev. 1161, 1220. See generally Tabb & Brubaker, Teacher's Manual at 542-47; Tabb & Brubaker, Bankruptcy Law at 512-13.

[116]Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 980, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017).

[117]Lipson & Vandermeuse, 2013 Wis. L. Rev. at 1221.

[118]See Tabb & Brubaker, Teacher's Manual at 544.

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

[120]See In re Kaiser Steel Corp., 105 B.R. 639, 644-50, 21 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 73072 (Bankr. D. Colo. 1989), rev'd, 110 B.R. 514, 519-21 (D. Colo. 1990), judgment aff'd, 913 F.2d 846, 20 Bankr. Ct. Dec. (CRR) 1650, 23 Collier Bankr. Cas. 2d (MB) 1403, Bankr. L. Rep. (CCH) P 73620 (10th Cir. 1990).

[121]Kaiser Steel, 105 B.R. at 642.

[122]Kaiser Steel, 105 B.R. at 653.

[123]Kaiser Steel, 105 B.R. at 642.

[124]Kaiser Steel, 105 B.R. at 642.

[125]Kaiser Steel, 105 B.R. at 653.

[126]Kaiser Steel, 110 B.R. at 521.

[127]Kaiser Steel, 110 B.R. at 516 (emphasis added). See Kaiser Steel, 913 F.3d at 848.

[128]Zahn, 218 B.R. 676-77 n.31.

[129]Christopher W. Frost, Inter-Corporate Obligations, Reasonably Equivalent Value, and Beneficiary Liability: *In re TOUSA, Inc.*, 32 Bankr. L. Letter No. 9, at 1, 7 (Sept. 2012).

[130]BFP, 511 U.S. at 1760.

[131]"The step transaction doctrine is a judicially-created doctrine that has traditionally been applied in the tax context. Nevertheless, courts often apply the step transaction concept in other fields as well, including disputes involving issues of . . . fraudulent conveyances." In re Big V Holding Corp., 267 B.R. 71, 92 (Bankr. D. Del. 2001). See Tabb & Brubaker, Teacher's Manual at 545-47 & n.21; Michael J. Heyman, The Step-Transaction Defense: Collapsing Multi-Step Transactions to Defend Against Fraudulent Conveyance Allegations, 30 Cal. Bankr. J. 1 (2009); Peter Spero, Fraudulent Transfers, Prebankruptcy Planning and Exemptions § 1:5 (2017). The step-transaction "doctrine treats the 'steps' in a series of formally separate but related transactions involving the transfer of property as a single transaction, if all steps are substantially linked." Greene v. U.S., 13 F.3d 577, 583, 94-1 U.S. Tax Cas. (CCH) P 50022, 73 A.F.T.R.2d 94-746 (2d Cir. 1994). See Gregory v. Helvering, 1935-1 C.B. 193, 293 U.S. 465, 470, 55 S. Ct. 266, 79 L. Ed. 596, 35-1 U.S. Tax Cas. (CCH) P 9043, 14 A.F.T.R. (P-H) P 1191, 97 A.L.R. 1355 (1935) (refusing to "exalt artifice above reality").

[132]Appleaum, et al., 061313 ABI-CLE 197.

[133]In re Sunbeam Corp., 284 B.R. 355, 370, 40 Bankr. Ct. Dec. (CRR) 101 (Bankr. S.D. N.Y. 2002).

[134]HBE Leasing Corp. v. Frank, 48 F.3d 623, 635, 31 Fed. R. Serv. 3d 1422 (2d Cir. 1995). See also Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2d Cir. 1993) (quoting Pepper v. Litton, 308 U.S. 295, 305, 60 S. Ct. 238, 84 L. Ed. 281 (1939) ("substance will not give way to form" and "technical considerations will not prevent substantial justice from being done)).

[135]Sunbeam, 284 B.R. at 370.

[136]Bruce A. Markell, Substance Over Form in Fraudulent Transfer Law, 34 Bankr. L. Letter No. 2, at 2, 6 (Feb. 2014).

[137]See Tabb & Brubaker, Bankruptcy Law at 545-46.

[138]Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488, 503, 18 Bankr. Ct. Dec. (CRR) 1134, 20 Collier Bankr. Cas. 2d (MB) 776, Bankr. L. Rep. (CCH) P 72574A, Fed. Sec. L. Rep. (CCH) P 94872 (N.D. Ill. 1988), on reconsideration in part, 1989 WL 18112 (N.D. Ill. 1989).

[139]In re Mervyn's Holdings, LLC, 426 B.R. 488, 497-98 (Bankr. D. Del. 2010).

[140]In re Allou Distributors, Inc., 379 B.R. 5, 24, 49 Bankr. Ct. Dec. (CRR) 29 (Bankr. E.D. N.Y. 2007).

[141]Frost, 31 Bankr. L. Letter No. 2, at 5. "In the normal case, the payment of funds to the conduit and the payment of funds to the ultimate transferee—two separate transactions—are treated as a direct payment from the debtor to the ultimate transferee." Id.

[142]See In re TOUSA, Inc., 680 F.3d 1298, 1314-15, 56 Bankr. Ct. Dec. (CRR) 135, 67 Collier Bankr. Cas. 2d (MB) 1035, Bankr. L. Rep. (CCH) P 82276 (11th Cir. 2012); Wieboldt, 94 B.R. at 500, 503.

[143]In re Best Products Co., Inc., 168 B.R. 35, 56-57 (Bankr. S.D. N.Y. 1994). See also Lippi v. City Bank, 955 F.2d 599, 611-14 (9th Cir. 1992).

[144]See Wieboldt, 94 B.R. at 500-04.

[145]See Tabb & Brubaker, Teacher's Manual at 545.

[146]See Allou Distribs., 379 B.R. at 23 (court must consider "the 'collapsing' theory advanced by the Trustee" in order "to determine whether a fraudulent transfer claim has been pleaded or proved").

[147]Mervyn's Holdings, 426 B.R. at 500 (emphasis added).