By Asher Hawkins

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

Editor's Note: *ABI conducted its Sixth Annual Bankruptcy Law Student Writing Competition during the first semester of 2014. Law students from more than 20 schools submitted papers, which focused on issues such as bankruptcy sales, plan confirmation and other topics that involve jurisdiction, litigation or evidence in the bankruptcy courts. All papers were judged by a panel of bankruptcy experts on style, substance and relevance.* ***Asher Hawkins*** *of New York Law School won first place in the competition. As the winner, he received a $2,000 cash prize (sponsored by Invotex), a one-year ABI membership and publication of the paper in the* Journal. *For more on this topic, see the feature article on p. 14.*

Asher Hawkins is an evening student at New York Law School, with an expected graduation date of May 2014.

Ever since Jan. 14, 2014, when Bankruptcy Judge **Robert E. Gerber** of the Southern District of New York issued his decision in *Weisfelner v. Fund 1 (In re Lyondell Chemical Co.)*,[1] bankruptcy practitioners have commented extensively[2] about the emerging judicial split over whether the securities-related "safe harbors" of § 546 of the Bankruptcy Code[3] protect shareholders against state law constructive fraudulent conveyance (SLCFC)[4] actions filed by unsecured creditors outside of bankruptcy following an unsuccessful leveraged buyout (LBO). All eyes are now on the U.S. Court of Appeals for the Second Circuit, which is expected to consider appeals in the two seemingly conflicting decisions — *In re Tribune Co. Fraudulent Conveyance Litigation*[5] and *Whyte v. Barclays Bank PLC*[6] — that first illuminated this split over the extent of the § 546 safe harbors' scope.[7]

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

The opaqueness of the legislative history underlying § 546's securities-related safe harbors makes a pre-emption analysis of these statutory provisions less than straightforward.[15] Bankruptcy practitioners and market participants hopeful for a definitive resolution by the courts should therefore brace themselves for split-prompted appellate rulings that favor fact-focused application of uncontroversial interpretations as to the ordinary meaning of the Code, and that sidestep pre-emption analyses concerning § 546's safe harbors on the ground that responsibility for final resolution of the creditor-vs.-shareholder conflict underlying the split properly rests with Congress.[16]

An appellate court is likely to conclude that § 546's safe harbors bar creditors' mid-bankruptcy SLCFC claims in cases involving facts that are simi-

1 503 B.R. 348, 2014 Bankr. LEXIS 159, (Bankr. S.D.N.Y. Jan. 14, 2014) (Gerber, J.).

2 *See, e.g.*, Brian Trust, Joel Moss and Joaquin M. C. de Baca, "Southern District of New York Deepens Internal Split Over Loophole in Bankruptcy Safe Harbor for Capital Markets Transactions," Mayer Brown (Jan. 24, 2014), *available at* www.mayerbrown.com/files/Publication/2b59f899-3c86-44c2-a72e-767a0314dfe4/Presentation/PublicationAttachment/499318c1-1f12-49d9-a265-81c236204403/UPDATE-Lyondell-Bankruptcy-Court_Safe-Harbor_0114.pdf.

3 11 U.S.C. § 546 (2012).

4 Constructive fraudulent conveyance claims are more useful to creditors in this context because of the difficulty in proving intentional fraudulent conveyance; state law claims are generally more useful because they tend to have longer reach-back periods. *See* Jeffrey A. Liesemer, "Safe Harbour Neither Bars Nor Preempts State Law Fraudulent-Transfer Claims," *Insolvency & Restructuring* (Int'l Law Office), Feb. 21, 2014, *available at* www.capdale.com/files/10509_Safe%20Harbour%20Neither%20Bars%20Nor%20Pre-empts%20State%20Law%20Fraudulent%20Transfer%20Claims.pdf.

5 499 B.R. 310 (S.D.N.Y. 2013) (Sullivan, J.).

6 494 B.R. 196 (S.D.N.Y. 2013) (Rakoff, J.).

7 Kevin Walsh and Joe Dunn, "*Lyondell*: Is the Safe Harbor Closed to Former Shareholders of LBOs?," *Bankr., Restructuring & Com. L.* (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC), Feb. 10, 2014, *available at* www.mintz.com/newsletter/2014/Advisories/3683-0214-NAT-BRC/ (noting that *Tribune* and *Barclays* "are pending on appeal and will be heard in tandem").

8 11. U.S.C. § 546(g) (2012).

9 *Barclays*, 494 B.R. at 199-201.

10 *In re Tribune*, 499 B.R. at 314-19.

11 *In re Lyondell*, 503 B.R. at 353-55.

12 *See generally* 494 B.R. at 199-201; 499 B.R. at 314-20; 503 B.R. at 359-78.

13 11 U.S.C. § 546(a) (2012).

14 *Compare* 503 B.R. 348 and 494 B.R. 196, *with* 499 B.R. 310.

15 *See generally* Liesemer, *supra* n.4 (discussing complexities of pre-emption issues involved in *Lyondell* and *Tribune*).

16 The Second Circuit has thus far refrained from weighing in on the pre-emptive scope of § 546(e)'s safe harbor. *See In re Lyondell*, 503 B.R. at 371, n.109 (citing *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V. (In re Enron Creditors Recovery Corp.)*, 651 F.3d 329 (2d Cir. 2011); *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94 (2d Cir. 2013)).

lar to those of *Barclays* and *Lyondell*, but it is equally likely to rule that when, as in *Tribune*, the trustee is time-barred under § 546(a) from exercising § 544(b)[17] power, the Code does not prevent creditors from commencing SLCFC suits outside of bankruptcy.

The final section of this article discusses litigation strategies that should be considered by any market participant connected to a chapter 11 case that is immediately preceded by a significant securities transaction. Generally speaking, creditors granted permission to sue those who apparently benefited from such a transaction should be willing to press legal claims that are not necessarily based on traditional fraudulent conveyance law, while cashed-out shareholders (and others who anticipate being sued by creditors in an avoidance-style action) should follow bankruptcy proceedings closely — and possibly attempt to intervene at the plan-confirmation stage.

Disgruntled Creditors Take Action

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

Tribune involves the mid-2007 LBO in which $8.2 billion was paid to shareholders of the eponymous media company[24] that ultimately filed for bankruptcy. After the estate failed to lodge SLCFC claims pursuant to its § 544(b) power within the window set forth in § 546(a), the Delaware bankruptcy court overseeing the case conditionally lifted the stay in a manner that paved the way for certain individual unsecured creditors to pursue SLCFC remedies outside of bankruptcy.[25] Starting in mid-2011, 44 suits against 1,700-plus cashed-out shareholders were filed in 21 states.[26] In rejecting the argument that § 546(e) pre-empts these claims, Judge Sullivan stressed that both § 546(e) and the legislative history thereof address only the "trustee,"[27] and that Congress apparently has chosen not to include a pre-emption clause in § 546(e) even as it has seen fit to include such a clause elsewhere in the Code.[28] He distinguished *Barclays* by noting that in *Tribune*, the creditors prosecuting SLCFC claims were "in no way identical with the ... trustee."[29] *Tribune* was not, however, entirely pro-creditor; Judge Sullivan concluded that the existence of intentional fraudulent-conveyance claims being pursued by the creditors' committee via the trustee's powers "deprives" individual creditors of the ability to commence effectively "co-extensive" SLCFC claims.[30]

In *Lyondell*, the unsecured creditors' SLCFC claims[31] targeted approximately half of the $12.5 billion that was paid to shareholders of a chemical company that filed for chapter 11 relief in January 2009, 13 months post-LBO.[32] Judge Gerber confirmed a reorganization plan that created a litigation trust through which would be pursued, for the benefit of the creditors, claims that the estate could have prosecuted under § 544(b) but that were "deemed to [have been] abandoned" by the estate under § 554.[33] Citing approvingly to *Tribune*[34] and rejecting the pre-emption analysis of *Barclays*,[35] Judge Gerber ruled that "there [was] no statutory text making section 546(e) applicable to claims brought on behalf of individual creditors"[36] and reasoned that Congress had clearly chosen not to place the goal of ensuring market stability ahead of "the historical priority of creditors over stockholders."[37]

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

Since at least the mid-19th century, U.S. bankruptcy law has permitted trustees to press state law fraudulent-conveyance claims for the benefit of creditors, a power currently codified at § 544(b).[38] The notion that creditors are, at least at the outset of a bankruptcy case, barred from directly pursuing state law remedies on an individual basis as a result of the trustee's power to act on their behalf is not a controversial one.[39] The question then becomes whether — and, if so, to

17 11 U.S.C. § 544(b) (2012).
18 *Barclays*, 494 B.R. at 198.
19 *Id.*
20 *Id.*
21 *Id.* at 197 and 199.
22 *Id.* at 199.
23 *Id.* at 201 (citing *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V. (In re Enron Creditors Recovery Corp.)*, 651 F.3d 329, 338-39 (2d Cir. 2011)).
24 *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 313 (S.D.N.Y. 2013).
25 *Id.* at 313-14.
26 Liesemer, *supra* n.4 (citing Memorandum of Law in Support of Defendants' Joint Phase One Motion to Dismiss the Individual Creditor Actions with Prejudice Pursuant to Federal Rule of Civil Procedure 12(b)(6) at 4-5, *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11-md-2296 (S.D.N.Y. Nov. 6, 2012), Doc. 1671). The individual creditor actions were "sufficiently voluminous" to warrant consolidation by the Judicial Panel on Multidistrict Litigation, and the matter was then transferred to Judge Sullivan. 499 B.R. at 314.
27 *Id.* at 316.
28 *Id.* at 318 (citing 11 U.S.C. § 544(b)(2) (2012)).
29 *Id.* at 319.
30 *Id.* at 322-23.
31 The *Lyondell* creditors' state-action complaint alleged only violations of N.Y. Debt. and Cred. Law. *See* Complaint at 100-01, *Weisfelner v. Fund 279*, No. 653617/2012 (Sup. Ct. N.Y. Cnty. Oct. 16, 2012).
32 *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 353-54 (Bankr. S.D.N.Y. 2014).
33 Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint at 11, *Weisfelner v. Morgan Stanley & Co.*, No. 09-10023 (Bankr. S.D.N.Y. Jan 11, 2011), Doc. 72 [hereinafter, "*Lyondell* Shareholders' Memo"] (citing 11 U.S.C. § 554 (2013)). Prior to confirmation, the § 544 claims had been prosecuted by the creditors' committee. *Id.*
34 503 B.R. at 355.
35 *Id.* at 373-78.
36 *Id.* at 359.
37 *Id.* at 369.
38 *Id.* at 362-63 (citing, *inter alia*, 4A *Collier on Bankruptcy* ¶ 70.03[1] (James William Moore and Robert Stephen Oglebay eds., 14th ed., 1978)).
39 Judge Gerber made the following observation in *Lyondell*:

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

In re Lyondell, 503 B.R. at 363, n.47 (citation as rendered in original, with secondary citation omitted).

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

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

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

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

Broadly speaking, § 546 "limits certain rights and powers granted to the trustee elsewhere in the Bankruptcy Code."[46] Its securities-related safe harbors begin with "notwithstanding" clauses that specifically identify, among other Code provisions, § 544. The use of these "notwithstanding" clauses indicates that Congress intended for the restrictions set forth in § 546's safe harbors to be interpreted not in a vacuum, but within the context of the scope of the positive trustee powers that are identified in sections such as § 544, and for the latter to be interpreted in the context of the former.[47] Whether the trustee's § 544(b) power amounts to a statutory right to which others may be granted derivative standing, or to a piece of property belonging to the estate that can be transferred to whomsoever the trustee sees fit, the result is the same: The right or property in question is limited in scope by the linguistic interplay between § 544(b) and § 546(e)-(g).

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

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

An appellate court that is leery[50] of engaging in pre-emption analysis concerning § 546's safe harbors, but that finds potentially problematic the upshot of *Tribune*'s rhetoric, has two options. The first option is to outright reject the "auto-

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

41 *See Collier on Bankruptcy* ¶ 1103.05[a] (Alan N. Resnick and Henry J. Sommer eds., 16th ed., 2011). Derivative litigation, best known today for its use by shareholders, originated in 18th-century England in the context of breach-of-duty actions against trustees of charitable organizations. *See* Deborah A. DeMott and David F. Cavers, *Shareholder Derivative Actions: Law and Practice* § 1:3 (2013) (citing *The Charitable Corp. v. Sutton*, (1742) 26 Eng. Rep. 642 (Ch.); 2 Atk. 400)).

42 *See Collier*, *supra* n.41, at ¶ 1103.05[b].

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

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

45 *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 321 (S.D.N.Y. 2013) (citing *Barber v. Westbay (In re Integrated Agri Inc.)*, 313 B.R. 419, 427-28 (Bankr. C.D. Ill. 2004); *Klingman v. Levinson*, 158 B.R. 109, 113 (N.D. Ill. 1993)). Judge Sullivan further held that Second Circuit precedent supported the conclusion that SLCFC claims are not property of the estate. *See In re Tribune*, 499 B.R. at 321-22 (citing *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992)). One practitioner has argued that "[i]n citing *Colonial Realty* for that proposition, [Judge Sullivan] may have climbed onto a slender branch because the Second Circuit in that case was not referring to causes of action" but to fraudulently transferred property pre-avoidance. Liesemer, *supra* n.4.

46 *Collier*, *supra* n.41, at ¶ 546.01.

47 *See* 1A *Sutherland Statutory Construction* § 20:22 (7th ed. (2013) (citing *Wright v. Prof'l Servs. Indus. Inc.*, 956 P.2d 230, 231 (Ore. Ct. App. 1998)) ("A notwithstanding clause [in a statute], by its nature, acts as an exception to the other laws to which it refers."); 3A *Sutherland Statutory Construction* § 73:11 (7th ed. 2013) (citing *King v. Sununu*, 490 A.2d 796 (N.H. 1985)) (according to the dictionary, "[t]he plain meaning of ... 'notwithstanding' is 'without prevention or obstruction from or by,' or 'in spite of'").

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

49 *See supra* n.39 (emphasis added).

matic reversion" theory. As one pair of commentators has reasoned, the Code does not provide for such a mechanism, and there is no excuse for a diligent creditor's failure to force the trustee to press a certain type of legal claim if it appears that the trustee will not do so before the § 546(a) window expires.[51] The second option is to affirm Judge Sullivan's holding, but with an emphasis on — and possible expansion upon — Judge Sullivan's "collusion-limiting" approach. Judge Sullivan rejected the assertion that creditors could individually pursue SLCFC actions while the committee pressed (ostensibly more difficult to prove) claims of intentional fraudulent conveyance.[52]

The effect of Judge Sullivan's anti-collusion approach is to prevent creditors and trustees from divvying up a trustee's § 544(b) rights bundle in such a way that a creditor can wield the trustee's most viable avoidance-oriented cause of action in a manner that the trustee could not. Judge Sullivan's approach could be further improved by the creation of some form of "diligent creditor" test that would appease reversion critics' concerns of wink-and-nod conspiracies in which trustees sit on their § 544(b) powers until the § 546(a) window closes and creditors come away with a valid basis for a request to lift the stay.

Charting a Course Through the Current Safe Harbor Seascape

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

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

While these cases did not involve analyses of § 544(b)(1)'s "applicable law" language, they stand for the general principle that an action alleging that a third party's unlawful conduct directly harmed creditors must be pursued by creditors individually, but that an action alleging that a third party's conduct unlawfully reduced the value of an entity prebankruptcy, to the detriment of creditors generally, must be pursued by the trustee.[58] The Second Circuit's recent Madoff-related rulings might thus provide some basis for a creditor to argue that based on the facts underlying a particular failed LBO, a claim of, for example, tortious interference with contract is properly pursued by the creditor individually and not by the trustee.[59]

For cashed-out shareholders (and other participants in significant prebankruptcy securities transactions), the key holdings of *Tribune* and *Lyondell* pose a substantial threat because they enable creditors to leverage their home-field advantage during plan formulation. The obvious solution would be for cashed-out shareholders and the like to somehow insert themselves into the plan-confirmation process. Under § 1128(b),[60] any "party in interest" might object to confirmation of a reorganization plan, and § 1109(b)'s list of who qualifies as a party in interest is nonexclusive.[61] While standing will typically be denied to those with "only tenuous ties ... to the reorganization,"[62] courts have granted standing to object to third parties that can show imminent financial harm if a plan is confirmed as originally proposed.[63]

Conclusion

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

50 Both *Tribune* and *Lyondell* cited § 544(b)(2) — deeming pre-empted any claim seeking to avoid a charitable contribution — in support of the argument that Congress knows how to mandate pre-emption. *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 318-19 (S.D.N.Y. 2013); *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 369 (Bankr. S.D.N.Y. 2014). This reasoning downplays the fact that § 544(b)(2) contains the Code's only usage of any derivation of the word "pre-empt," despite judicial interpretation of other Code sections as having pre-emptive effect. At least one commentator has criticized "Congress's zeal to [use the Code to] protect the rights of American tithe-givers in their religious practice." *See* Lawrence A. Reicher, "Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(A)(2) of the Bankruptcy Code," 24 *Emory Bankr. Dev. J.* 159, 162 (2008).

51 *See* Steinberg and Boies, *supra* n.43.

52 *See supra* n.30 and accompanying text.

53 *See, e.g.*, Robert Winter and Luc Despins, "Storm Warning for Section 546 'Safe Harbor,'" *Law360* (Feb. 4, 2014), *available at* www.law360.com/articles/506206/storm-warning-for-section-546-safe-harbor.

54 *Collier*, *supra* n.41, at ¶ 544.06 n.1 (citing *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, No. 11-10070, 2012 U.S. App. LEXIS 5773 (5th Cir. March 20, 2012) (holding that Federal Debt Collection Procedures Act is not covered by term "applicable law")).

55 *See Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del. Inc. v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co. of Del. Inc.)*, 274 B.R. 71, 96 (D. Del. 2002). Steinberg and Boies, *supra* n.43, and Liesemer, *supra* n.4, address this decision's analysis of the interplay between unjust enrichment claims and § 546(e).

56 *See* Howard, *supra* n.44 (citing *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 258-59 (5th Cir. 2010)).

57 *See Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81, 88-94 (2d Cir. 2014); *Picard v. JPMorgan Chase Bank & Co. (In re Bernard L. Madoff Inv. Sec. LLC)*, 721 F.3d 54, 62-65 (2d Cir. 2013). Although the bankruptcy stemming from the Madoff Ponzi scheme is a liquidation pursuant to the Securities Investor Protection Act, a SIPA trustee possesses the same powers as a title 11 trustee. *Marshall*, 740 F.3d at 88 n.8 (citing 15 U.S.C. § 78fff-1(a) (2012)); *JPMorgan Chase*, 721 F.3d at 58 (citing same).

58 *Compare JPMorgan Chase*, 721 F.3d 54 (trustee not permitted to sue financial institutions that allegedly aided and abetted Ponzi scheme by pocketing large fees for investment transactions despite clear signs of fraud), *with Marshall*, 740 F.3d 81 (customers of defrauding investment company, now subject of bankruptcy, barred from pursuing state law conspiracy claims against customer who had close ties to scheme's perpetrator and apparently withdrew gains prior to scheme's collapse).

59 Practitioners representing creditors in actions against shareholders should take note that in *Marshall*, the would-be state law claimants had filed complaints that "cited the factual allegations contained in the [t]rustee's complaint [against the same defendants] multiple times in support of their claims." 740 F.3d at 91. Identification of facts unique to a creditor/plaintiff's, and shareholder/defendant's, involvement in a failed LBO will buttress the argument that the creditor's claim should not be pursued by the trustee.

60 11 U.S.C. § 1128(b) (2012).

61 11 U.S.C. § 1109(b) (2012).

62 *Collier*, *supra* n.41, at ¶ 1129.05[1][c], n.15.

63 *See, e.g., In re Global Indus. Techs.*, 645 F.3d 201, 203-06 (3d Cir. 2011) (*en banc*) (granting standing to insurers of manufacturer forced into bankruptcy by asbestos-related liability to object to plan that would fund claims trust with insurers' money on grounds that "when a federal court gives its approval to a plan that allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard"). *But see* 645 F.3d at 216 (Nygaard, J., dissenting) (arguing, on behalf of four-judge minority, that to afford "standing to parties who have no injury, either actual or contingent ... has broad deleterious implications for the jurisprudence of Article III standing"); *cf.*, *W.R. Grace & Co. v. Garlock Sealing Techs. LLC*, 532 F. App'x. 264, 265-68 (3d Cir. 2013) (denying "party in interest" status, in context of plan confirmation in bankruptcy prompted by debtor's asbestos-related liability, to manufacturer that had used debtor's products and been named as co-defendant with debtor in thousands of prebankruptcy torts, but that had never sought contribution or setoff from the debtor prior to bankruptcy).