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How will Section 546(e) apply to public securities transactions in wake of *Merit Management*?

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Introduction

The Supreme Court's decision in *Merit Management* construes Section 546(e) of the Bankruptcy Code (11 USC § 546(e)) more narrowly than most lower courts have done before.(1) Often referred to as the securities 'safe harbour', this provision prevents a bankruptcy trustee from unwinding settlement payments or other transfers made in connection with securities contracts if the payments or transfers were "made by or to (or for the benefit of)" certain kinds of market participant, including any stockbroker or financial institution.(2)

Merit Management arose out of the debt-financed buyout or leveraged buyout (LBO) of a private company.

Most LBOs involve such private transactions, but it is worth considering what implications *Merit Management* may hold for rarer cases involving massive LBOs of public shareholders, such as *Tribune* and *Lyondell*.(3) Two justices of the Supreme Court recently issued an extraordinary statement suggesting that, in light of *Merit Management*, the Court of Appeals for the Second Circuit should revisit its decision in *Tribune*, and the lower court has announced that it will do so.(4) In a new round of briefs submitted to the appellate court, the creditor representatives seeking clawbacks have insisted that *Merit Management* requires *vacatur* of the judgment dismissing their claims pursuant to Section 546(e), while the *Tribune* shareholders contend that their LBO payments remain unassailably ensconced in the safe harbour.

Bankruptcy lends considerable force to fraudulent conveyance attacks on failed LBOs. In an LBO, a company takes on large debts and encumbrances; the proceeds go to cash out old shareholders so that new investors can acquire control while putting up only a minimal amount of fresh equity capital. Arguably, the company itself receives little if any benefit for its pains. Moreover, in the buyout, old equity jumps the priorities queue, leaving existing creditors behind – the very opposite of the structural priority of debt over equity on which the Bankruptcy Code is built.(5)

Discussion

Securities safe harbour depends on attributes of the targeted transfer, not those of related transactions

Several provisions of the Bankruptcy Code create powers for the bankruptcy trustee to set aside or avoid transactions of various kinds, which a debtor may have carried out before resorting to bankruptcy. Of course, these powers are not absolute, and an important limitation is imposed by Section 546(e). This statute provides that, "notwithstanding" the authorising provisions, "the trustee may not avoid" a transfer that has certain specified attributes (11 USC § 546(e)). Although written in complicated and technical fashion, Section 546(e) essentially prohibits the trustee from avoiding:

- "a transfer that is a... settlement payment... made by or to (or for the benefit of) a... stockbroker, financial institution... or securities clearing agency"; or
- "a transfer made by or to (or for the benefit of) a... stockbroker, financial institution... or securities clearing agency, in connection with a securities contract" (*id*).

This carve-out from the avoidance powers is itself subject to a proviso, which leaves intact the trustee's power under Section 548 of the Bankruptcy Code to avoid a transfer actually calculated to hinder, delay or defraud creditors (11 USC § 548(a)(1)(A)). However, transactions that come within the safe harbour are shielded from avoidance by the trustee on any theory of constructively fraudulent transfer or, apparently, on any theory of actually fraudulent transfer that is founded on state law rather than on Section 548.(6)

The parties in *Merit Management* debated whether the LBO payments received by shareholders were safe-harboured under Section 546(e) because of the participation of certain banks as intermediaries, even though these institutions never had a financial stake in the matter and the trustee was not pursuing the banks. The Supreme Court framed the question in somewhat more general terms as:

> *"how the safe harbor operates in the context of a transfer that was executed via one or more transactions, e.g., a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer include A → B → C→ D."*(7)

The court held that, in applying Section 546(e), courts should look only to "the transfer that the trustee seeks to avoid (*i.e.*, A → D) to determine whether that transfer meets the safe-harbor criteria", not to the "component parts" of "the overarching transfer".(8)

In other words, if the A to D transfer cannot enter the safe harbour under its own steam, it will not be towed in by virtue a financial institution's participation in the A to B or B to C transactions.

The Supreme Court rested *Merit Management* on the 'plain meaning' of the statute, largely eschewing any inquiry into extrinsic evidence of legislative intent.(9) This is somewhat ironic, given that many lower courts arrived at the opposite conclusion by following what they thought was the plain meaning.

Thinking through avoidance claims against public investors

The safe harbour delineated in Section 546(e) traces its origins to a statute that focused narrowly on protecting public exchanges and clearinghouses from the disruptive potential of bankruptcy-related clawbacks and was then expanded by stages to its current dimensions.(10) In a sense, therefore, concern for public markets lies at the core of Section 546(e), so that if the safe harbour shields LBO payments in a private transaction, it may seem natural to suppose that it must surely do so in a public one. However, the current statute is technical, dense and replete with defined terms, so there is no substitute for parsing it out point by point when considering its influence in any given situation – especially if plain meaning is the touchstone.

Hypothetical case to frame analysis

To anticipate how Section 546(e) may play out in litigation surrounding public LBOs, it is worth positing a hypothetical adversary proceeding within a bankruptcy case. The proceeding pertains to a once-prosperous company that was acquired by the management group in league with a Wall Street entrepreneur through a buyout of public shareholders. To fund the buyout, the company's cash was largely depleted and its assets fully encumbered with secured debt to fund the buyout. After the LBO, the company soon encountered rough waters in its product markets, foundered and then filed for bankruptcy within two years of the buyout. Its insolvency at the time of bankruptcy is beyond dispute.

To hone in on Section 546(e) issues, this discussion will not consider debates over whether the insolvency resulted from the LBO or was caused by a later downturn in business conditions are not considered here. Also beyond the scope are potential claims against the buyout group and the secured lenders that financed their acquisition.

The named defendants in this hypothetical case are former public shareholders which were cashed out in the LBO. The defendants include not only thousands of individual investors, but also so-called 'Wall Street investors' – that is, large stockbrokerage businesses, money-centre banks and registered investment companies. Importantly, however, no firm that acted solely as a financial intermediary or agent for customers had been sued. Each of the Wall Street investors named as defendants held equity interests in the debtor for its own account and cashed in those interests as part of the LBO.

All defendants have answered the complaint, denying that they participated in any avoidable transfer and invoking the protection of Section 546(e). They have also moved for judgment on the pleadings, citing *Merit Management*. What key issues are thereby raised, and what arguments will likely be made?

Wall Street investors and safe harbour

The Wall Street investors (ie, stockbrokers, banks and registered investment companies) would stand squarely on the plain language of Section 546(e). The predominant view holds that a transfer of cash to a shareholder in exchange for its equity interest as part of an LBO is both a 'settlement payment' and 'a transfer in connection with a securities contract' within the meaning of Section 546(e),(11) although courts have not spoken with one voice on these issues.(12) By its further terms, the safe harbour applies to any such LBO payment that was "made by or to... a stockbroker, [or] financial institution" (11 USC § 546(e)).

The statutory protection for securities-related transfers by, to or for the benefit of stockbrokers is explicit, while equivalent protection for banks and registered investment companies inheres in Section 546(e)'s use of the term 'financial institution'. The generally applicable definitional section of the Bankruptcy Code defines those words to include, among other things, any "commercial or savings bank, industrial savings bank... [or] trust company" and also "in connection with a securities contract... an investment company registered under the Investment Company Act of 1940" (*Id*, § 101 (22) (A), (B)).

The trustee may contend that, in the context of Section 546(e), the words 'stockbroker' and 'financial institution' should be understood as referring only to entities that acted as agents or intermediaries for customers in the transactions under scrutiny, not ones that participated as principals. This would arguably link the safe harbour more closely to Congress's expressed goal of protecting the stability of trading markets.

Technical support for the argument might be teased out of the Bankruptcy Code's generally applicable definition of 'stockbroker'. It confines this term to a "person... with respect to which there is a customer" (11 USC § 101(53A)(A)), which may imply that a firm is a stockbroker when it buys and sells securities on behalf of a clientele, but not when it trades for its own interest (as in our hypothetical case). That said, the definition of 'financial institution' cuts the other way. It specifically refers not only to banks that participate in a given securities transaction on their own behalf, but also to ones that do so on behalf of customers (11 USC § 101(22)(A)).

The inference to be drawn from the purpose of the statute is not clear-cut. Trading by large firms as principals may be just as important to the efficient functioning of the markets as the activities of financial intermediaries. In any event the 'plain meaning' approach to statutory interpretation, which held sway in *Merit Management* and dominates the Supreme Court's recent jurisprudence concerning the Bankruptcy Code, discourages courts from purporting to discern nuances of congressional policy that are not evident in the language of the statute itself.

It will be no easy task for the trustee to overcome a straightforward argument that Section 546(e) brings LBO payments to stockbrokers, banks and registered investment companies within the safe harbour – even when these entities participated in the buyout not on behalf of customers, but for themselves.

Retail investors as deemed financial institutions

Next, consider the LBO payees – so-called 'retail investors', for lack of a better term. This category encompasses individuals, trusts and other entities that are not stockbrokers, banks or registered investment companies. But all of them received their LBO payments through a stockbroker or bank.

Retail investors might contend that their receipt of LBO proceeds fits neatly within the safe harbour because, in the words of Section 546(e), they received a "settlement payment" or "a transfer... in connection with a securities contract" and the payment or transfer was "made by... [a] stockbroker" or a "financial institution" (11 USC § 546(e)). If faced with this contention, the trustee would answer that these intermediaries and their remittances of LBO proceeds to retail investors are all beside the point: under *Merit Management*, the debtor to retail investor transfer is not insulated merely because Section 546(e) would protect the stockbroker/financial institution to retail investor payment if the trustee were trying to set it aside.

But retail investors that invested through a trust company or the trust department of a bank would have another theory varying the theme: for the purposes of Section 546(e), they would argue that they are themselves financial institutions. Odd though it may seem, when an entity that qualifies as a financial institution under the Bankruptcy Code "is acting as agent or custodian for a customer... in connection with a securities contract", that customer is also considered a financial institution (11 USC § 101(22)(A)). In *Merit Management* the Supreme Court pointed to this aspect of the definition without commenting on what implications it may have for the safe harbour.(13) Unsurprisingly, *Tribune* shareholders have tried to make the most of it in their recent brief to the Second Circuit concerning the impact of *Merit Management*.(14)

To deflect this theory, the trustee might urge that the term 'financial institution' as used in Section 546(e) carries a different meaning than that which the Bankruptcy Code assigns to it for general purposes. This argument would run counter to a "natural presumption" that words that appear in more than one place in a statute mean the same thing in each instance. Yet, "the presumption is not rigid and readily yields whenever... the connection in which the words are used" reasonably indicates "that they were employed in different parts of the act with different intent".(15)

Support for the trustee's 'same word, different meanings' argument might be gleaned by reading Section 546(e) as a whole in the light of other related provisions. Consider the Bankruptcy Code's definition of 'stockbroker', a term used alongside 'financial institution' in Section 546(e). The code does not deem a retail investor to be a stockbroker when the investor happens to transact through a stockbroker (11 USC § 101(53A)(A)). Can Section 546(e) really be meant to protect a transaction that the investor carries out through a bank but not one that he or she executes through a stockbroker?

To a degree, the 'same word, different meanings' argument might also glean support from *Merit Management* itself. That ruling teaches that the Section 546(e) analysis turns on the attributes of the particular transaction that the trustee has identified for avoidance, and that the targeted transaction cannot derive protection from a financial institution's involvement in related transfers that are being left undisturbed. Given that the trustee in the hypothetical case did not attack the bank-to-retail investor transaction, but only the debtor-to-retail investor payment, would it run counter to *Merit Management* to treat the retail investor as a deemed financial institution, and thereby insulate the overarching transfer based on a bank's intermediation in a mere component part?

Notably, Congress wrote the definition of 'financial institution' into the Bankruptcy Code as part of the same set of amendments by which it added that term to Section 546(e), and gave no evident signal in the text that the term carries a narrower meaning for the safe harbour.(16) The resulting provision may not be a model of pristine logic or internal consistency, but courts may hesitate to reject its plain meaning as flat-out absurd in the context of what has been a series of amendments expanding the safe harbour for securities transactions.

Initial transferees, mediate or immediate transferees and mere conduits

In *Merit Management* the Supreme Court assumed without discussion that the trustee had properly identified the avoidable transaction as A to D – that is, the cash-for-equity interest exchange as between the debtor and the old public shareholders – without regard to the lender, the escrow agent, and the A to B to C to D steps in between. The court did not discuss why (or whether) the trustee was entitled to approach the matter in that way. It seems that the parties did not quarrel about the characterisation. Be that as it may, the hypothetical case above presents a variation in the scenario and thus a related but different question: when it comes to an LBO carried out across public markets, is it proper to ignore links in the chain of investment and distribution when analysing avoidance claims levelled against those that cashed in their equity interests?

The Supreme Court stressed that *Merit Management* does not allow the trustee "to define the transfer that it seeks to avoid in any way it chooses"; rather, it leaves any defendant "free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer".(17) In the hypothetical case, retail investors might challenge the trustee's fundamental allegation that they received property of the debtor in a transfer that would be avoidable but for Section 546(e).

The Bankruptcy Code defines the term 'transfer' as including "each mode, direct *or indirect*... of disposing of or parting with" property or an interest in property (11 USC § 101(54)(D), emphasis added). However, in the context of avoidance remedies, the Bankruptcy Code recognises a difference between the 'initial transferee' and a person to whom the proceeds flowed in a subsequent transaction; it refers to the latter as a 'mediate or immediate transferee' (*Id* § 550(a)).

On successfully avoiding a transfer, the trustee may recover the transferred property or its value from the "initial transferee... or the entity for whose benefit such transfer was made" (11 USC § 550(a)(1)). But the trustee may not recover from a mediate or immediate transferee if that person "takes for value... in good faith, and without knowledge of the voidability of the transfer avoided" (*Id* at (b)(1)). Further, if a mediate or immediate transferee meets the 'value/good faith/knowledge' test, no recovery may be had against a person to whom that transferee in turn passed along the proceeds, as long as that subsequent taker acted in good faith (even if it gave no value in exchange) (*Id* at (b)(2)). As shorthand, these can be called the 'good-faith limitations' on recoveries for avoided transfers. Importantly, these limitations do not apply to initial transferees.

Arguably, it would be inconsistent with this remedial scheme to permit the trustee to treat as a single unit the entire series of transfers and retransfers by which the LBO payments finally came into the hands of public investors. Such a re-characterisation would circumvent the good-faith limitations on recoveries by casting those investors as 'initial transferees' or as 'entities for whose benefit the avoided transfer was made', even though they stood at several transactional removes from the debtor.(18)

The implications are potentially significant. If the public investors that cashed out in an LBO were not the initial transferees, then presumably entities somewhere further up the chain played that role. If the initial transferees were stockbrokers or financial institutions, they will plausibly assert that their transactions in the LBO are safe-harboured by Section 546(e). The question that will arise is this: if the initial transfer finds shelter in the safe harbour, may the trustee recover anything at all from entities further down the chain of payments? The Bankruptcy Code suggests not, since it entitles the trustee to recover only "to the extent that a transfer is avoided" (11 USC § 550(a)).

Faced with this prospect, the trustee will probably respond that only the ultimate recipients were actual transferees – all intermediaries were 'mere conduits'. That non-statutory term has considerable currency in case law. Many courts regard as a 'transferee' only an entity that has received property of the debtor on terms that allowed it to exercise dominion or control over the property or to use the property for its own purposes.(19) As one notable decision has it, a "bank [that] never acquired a beneficial interest in the funds... was not a 'transferee' in the LBO transaction", which matters because "a trustee may only avoid a transfer to a 'transferee'".(20) This is essentially the idea that the parties to *Merit Management* debated, but the Supreme Court decided the case in different terms. Its decision has thus left the 'transferee' or 'mere conduit' issue to be hashed out in future cases when defendants challenge whether trustees "have failed to properly identify an avoidable transfer under the Code". Under *Merit Management* that question must be answered before the Section 546(e) safe harbour becomes relevant at all.(21)

To deflect the 'initial transferee' label and define themselves as 'mediate or immediate transferees', public shareholders may point to the indirect holding system within which the vast bulk of public securities in the United States are held and traded. Under this system, the beneficial interests that retail investors exchange for cash in the LBO are not the equivalent of legal ownership of the debtor's securities. Rather, what each retail investor owns before cashing out is a security entitlement to a financial asset held for that investor's benefit in a securities account on the books of a securities intermediary.(22) The financial asset consists of a *pro rata* share in the intermediary's entire inventory of its own securities entitlements with respect to a similar financial asset on the books of the next intermediary up the chain. And so on through each intermediary or link until the chain reached one of the major banks and broker-dealers that are participants in the depository trust company (DTC).(23) The DTC is the clearing agency that, before the LBO, actually held (through a subsidiary) the debtor's securities on behalf of those participants, just as at all times it holds trillions of dollars in other securities.(24)

Everyone in the investment/distribution chain for securities issued by a particular company has a beneficial interest – in the form of a securities entitlement – with respect to those securities, and the public investor standing at the last link may be described as an ultimate beneficial owner. But security entitlements constitute a unique species of property or bundle of rights defined by applicable non-bankruptcy law – namely, Article 8 of the Uniform Commercial Code. Article 8 is constructed on the basis of fundamental principles that circumscribe the enforceability of securities entitlements within the bounds of the direct relationship between customer and intermediary. Thus, "an entitlement holder's own intermediary has the obligation to see to it that the entitlement holder receives all of the economic and corporate rights that comprise the financial asset".(25) By the same token, "the entitlement holder can look only to that intermediary for performance of the obligations"; (26) absent unusual circumstances, the holder has no recourse against others in the chain that assert "an adverse claim to the [same] financial asset".(27)

If a public investor could not enforce its securities entitlement against the debtor that issued the securities, but only against the investor's direct intermediary, under what principle would it be proper for the trustee to ignore all intermediaries to recover LBO payments from that investor? At this juncture, the 'mere conduit' issue tends to intersect with a broader idea known as the 'collapsing transactions' doctrine.(28)

Collapsing transactions doctrine

When the trustee in our hypothetical case depicts 'debtor to shareholder' payments as the overarching transfer that will be avoided if the safe harbour does not apply, the court will likely apply the collapsing transactions doctrine to determine whether intermediate transactions or component parts may properly be ignored. This doctrine aims to elevate substance over form. In a widely accepted formulation, the court may ignore the formal separateness of steps in a transactional series, and assess their legal consequences as though they constituted integral parts of a single whole, if:

- the multiple transactions would not have occurred on their own;
- those transactions were dependent or conditioned on one another; and
- all the parties involved knew of the multiple transactions.(29)

The LBO of a public company almost certainly meets the first two criteria of the test for collapsing transactions. The whole point of an LBO is to get public investors to give up their equity interests in the company in exchange for cash, and each intermediary in the indirect holding system has the legal obligation to pass along to customers the LBO proceeds that it received for their benefit. Still, if the few cases on point are a reliable guide, the trustee's effort to use this doctrine to recover LBO proceeds from retail investors faces a serious obstacle in the third criterion of that test, which focuses on the state of mind of the defendants from which the recovery is sought.

The court will assess the defendants' knowledge of transactions that formed part of the LBO and of the surrounding circumstances. Indeed, in litigation about private LBOs, judges who have collapsed and unwound transfers made to the insiders and controlling shareholders have sometimes refused to impose that treatment on shareholders that were not insiders and did not play a role in shaping the buyout.(30) In regard to a public LBO, a finding that insiders knew or should have known that the buyout would cheat creditors would not necessarily lead the court to collapse transactions among intermediaries so as to expose public investors to clawbacks.

In the hypothetical case, 'Mom and Pop' investors will undoubtedly contend that they could not have known that the LBO would be constructively fraudulent. In the run-up to an LBO, a company typically predicts that the buyout will leave it in good financial health and poised to prosper in the future. Unless the company was already in evident financial distress going into the LBO, it will be very difficult to portray ordinary investors as having been placed on notice that a financial debacle was in store (although sophisticated institutional investors might be chargeable with the knowledge available to comparably expert observers).

The trustee might take the position that, under the Bankruptcy Code, a defendant's state of mind should not matter when a court decides whether to collapse transactions for avoidance purposes. After all, good-faith limitations on recoveries come into play only after a transfer has been avoided and, even then, only if a defendant claims not to be the initial transferee or intended beneficiary of the transfer, but just a mediate, immediate or still more remote transferee.

Or the trustee might contend that public investors' knowledge of certain objective facts should suffice for applying the collapsing transactions doctrine to them. The argument might go that even outside investors knew that the LBO would substitute debt for equity in the capital structure. They were therefore on inquiry notice as to the financial condition of the company, and – if its financial health was in doubt – were chargeable with knowledge that carrying out the LBO would undermine creditors' prospects for having their claims paid.(31)

Whether a transaction amounts to a constructively fraudulent transfer turns on certain economic realities:

- Did the debtor receive reasonably equivalent consideration for the property it gave up?
- Was it left insolvent, labouring under unmanageable debt or too thinly capitalised for its business?(32)

These defining elements have nothing to do with a transferee's state of mind. Why, then, should an equity holder's subjective knowledge make any difference when a court considers whether the series of transactions that took place in the course of an LBO should be combined analytically in order to determine whether that person received a constructively fraudulent transfer?

It is easy to see why courts might be reluctant for avoidance litigation to ensnare public investors in the aftermath of an LBO. Much more difficult to grasp, as far as creditors' rights and bankruptcy priorities are concerned, is how investors' state of mind can justify this reluctance. However, strictly logical or not, present law may prevent a trustee from recasting a public LBO involving layers of intermediaries (A to B to C to D) as a transfer from the debtor to equity holders which were not insiders (A to D) in order to allege that LBO payments were constructively fraudulent. Under *Merit Management* the trustee's complaint must target one or more specific transfers as voidable (and the allegation may be tested) before any question concerning the Section 546(e) safe harbour even enters into the case.

For further information on this topic please contact Trevor Swett at Caplin & Drysdale by telephone (+1 202 862 5000) or email (tswett@capdale.com). The Caplin & Drysdale website can be accessed at www.capdale.com.

Endnotes

(1) *Merit Mgmt Grp, LP v FTI Consulting, Inc*, 138 S Ct 883 (2018); for further details please see "Narrower harbours: Supreme Court limits Section 546(e) securities safe harbour".

(2) 11 USC § 546(e).

(3) *In re Tribune Co Fraudulent Conveyance Litig*, 818 F3d 98 (2d Cir 2016), cert docketed sub nom *Deutsche Bank Trust Co Americas v Robert McCormick Found*, 16-317 (US 2018); *Weisfelner v Fund 1* (*In re Lyondell Chem Co*), 554 BR 655 (Bankr SDNY 2016).

(4) *Deutsche Bank Trust Co Americas v Robert McCormick Found*, 138 S Ct 1162 (US 2018) (mem) (Statement of Kennedy and Thomas, JJ); Order, *In re Tribune Co Fraudulent Conveyance Litig*, Case 13-3992 (L) (2d Cir May 15 2018), ECF 386.

(5) See *Czyzewski v Jevic Holding Corp*, 137 S Ct 973, 983 (2017); see *Weisfelner v Fund 1* (*In re Lyondell Chem Co*), 503 BR 348, 369 (Bankr SDNY 2014).

(6) A constructively fraudulent transfer is one for which the debtor received less than reasonably equivalent consideration, at a time when (or with the result that) the debtor was insolvent, was inadequately capitalised or was intentionally incurring, or believed it would incur, debts beyond its ability to pay as they matured (11 USC § 548(a)(1)(B)).

(7) *Merit Mgmt*, 138 S Ct at 888.

(8) *Id*.

(9) *Id* at 896-97.

(10) See *id* at 889-90.

(11) See *Official Comm of Unsec Creditors of Quebecor World (USA) Inc v Am United Life Ins Co*, (*In re Quebecor World (USA) Inc*), 719 F3d 94, 98 (2d Cir 2013); *QSI Holdings, Inc v Alford* (*In re QSI Holdings, Inc*), 571 F3d 545, 549-550 (6th Cir 2009); *Lowenschuss v Resorts Int'l, Inc* (*In re Resorts Int'l, Inc*), 181 F3d 505, 515-16 (3d Cir 1991); *Kaiser Steel Corp v Charles Schwab & Co*, 913 F2d 846, 849 (10th Cir 1990).

(12) See, for example, *Geltzer v Mooney* (*In re MacMenamin's Grill, Ltd*), 450 BR 414, 418-25 (Bankr SDNY 2011); *Raleigh ex rel Wieboldt Stores, Inc v Schottenstein*, 131 BR 655, 664-65 (ND Ill 1991).

(13) *Merit Mgmt*, 138 S Ct at 890 n2.

(14) Opposition of Defendants-Appellants-Cross-Appellants to Motion of Plaintiffs-Appellants-Cross-Appellees to Recall the Mandate at 19-21, *In re Tribune Co Fraudulent Conveyance Litig*, 13-3992 (L) (2d Cir April 20 2018), ECF 377.

(15) *Atlantic Cleaners & Dyers v United States*, 286 US 427, 433 (1932) (cited in *In re Enron Corp*, 306 BR 465, 473 n6 (Bankr SDNY 2004) (discussing 11 USC §§ 555 and 560)).

(16) Bankruptcy Amendments and Federal Judgeship Act 1984, Pub L 98-355 §§ 421(j)(4), 461(d), 98 Stat 333.

(17) *Merit Mgmt*, 138 S Ct at 894.

(18) See *Boyer v Crown Stock Distribution, Inc*, 587 F3d 787, 796 (7th Cir 2009).

(19) See 5 Collier on Bankruptcy ¶ 550.02[4][a] (Richard Levin & Henry J Sommer eds, 16th ed).

(20) *Munford v Valuation Research Corp* (*In re Munford, Inc*), 98 F3d 604, 610 (11th Cir 1996) (citations omitted).

(21) *Merit Mgmt*, 138 S Ct at 894.

(22) Unif Commercial Code §§ 8-501, -503, 2C ULA (West 2005).

(23) Unif Commercial Code, Forms § 8.1.44, 5 ULA (West 2001).

(24) Unif Commercial Code § 8-503 cmt 2 at 591, 2C ULA (West 2005).

(25) *Id* § 8-503 cmt 2.

(26) *Id*.

(27) *Id* § 8-115.

(28) See *Wieboldt Stores, Inc v Schottenstein*, 94 BR 488, 501-02 (ND Ill 1988) (discussing *United States v Tabor Court Realty*, 803 F2d 1288, 1302 (3d Cir 1986)).

(29) See, for example, *Mervyn's LLC v Lubert-Adler Grp IV, LLC* (*In re Mervyn's Holdings, LLC*), 426 BR 488, 497 (Bankr D Del 2010).

(30) *Kupetz v Wolf*, 845 F2d 842, 848 (9th Cir 1988); *Weiboldt Stores*, 94 BR 488 at 503.

(31) As the court observed in *HBE Leasing Corp v Frank*, 48 F3d 623 (2d Cir 1995), a case involving a private LBO:

> "*The transferee need not have actual knowledge of the scheme that renders the conveyance fraudulent. Constructive knowledge of fraudulent schemes will be attributed to transferees who were aware of circumstances that should have led them to inquire further into the circumstances of the transaction, but who failed to make such inquiry*." *Id* at 636 (citation omitted).

(32) See Endnote 6, above.
