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Litigation Trustees Not Allowed to Wear Their "Non-Bankruptcy Hats" to Avoid Swap Transactions as Fraudulent Conveyances

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Introduction

The Bankruptcy Code provides bankruptcy trustees with avoidance powers that allow the trustees to undo certain pre- and post-petition actions. The purpose of this power to allow the recovering property or interests transferred by the debtor in order to maximize the value of the bankruptcy estate for the benefit of the creditor and to provide more equitable distribution to creditors. Among these avoidance powers is the power to avoid fraudulent transfers/conveyances.[1] In particular, the bankruptcy trustee may avoid a transfer (1) as an actually fraudulent transfer if it was made with the actual intent to hinder, delay, or defraud the debtor's creditors; or (2) as a constructively fraudulent transfer if it was made for less than reasonably equivalent value when the debtor (a) was insolvent at the time of the transfer or rendered insolvent by the transfer, (b) was engaged in a business for which the debtor had unreasonably small capital, or (c) intended to incur debts beyond its capacity to pay.[2]

However, these avoidance powers are subject to various limitations under the Bankruptcy Code. For example, section 546(g) of the Bankruptcy Code includes a safe-harbor provision that

[1] *See generally* 11 U.S.C. § 546 (2012)
[2] *See id*. §548.

prohibits a bankruptcy trustee using most of his avoidance powers to avoid a transfer that was made under or in connection with a swap agreement.[3] To determine the scope and purpose of the safe harbor provision, courts have examined the legislative history of section 546(g) and recently determined the scope of the safe-harbor provision with respect to the bankruptcy trustee.

Through the analysis of Congress' legislative history, courts have found that the scope of section 546(g)'s safe-harbor provision is to promote stability in financial markets. As a result, the bankruptcy trustee generally cannot avoid a transaction made under or in connection with a swap agreement. Recently, bankruptcy trustees tried to circumvent this prohibition by arguing that section 546(g) only applies to bankruptcy trustees representing the estate and not to creditor representatives. This issue was litigated in *Whyte v. Barclays Bank PLC*,[4] ("*Barclays*"), where the litigation trustee sought to avoid the novation of SemGroup's NYMEX portfolio on the ground that the transaction with Barclays was a fraudulent conveyance, asserting his claim not being brought under the Bankruptcy Code, but was rather being brought as claim under by New York's Debtor-Creditor Law that had been assigned to the trustee by the individual creditors under the confirmed chapter 11 plan.[5] As such, the plan was designed to circumvent the safe-harbor provision section 546(g) of the Bankruptcy Code; however, the court found this to be impermissible under the principles of federal preemption because such a finding would declare section 546(g) a nullity.[6] However, in light of the *Barclays* decision, other recent decisions interpreting section 546(e) have come to a seemingly opposite conclusion.

As a result, this Article seeks to discuss the impact of the *Barclays* decision on the interpretation of section 546(g) of the Bankruptcy Code in light of the conflicting decisions

[3] *See id*. §546(g).
[4] 494 B.R. 196 (S.D.N.Y. 2013).
[5] *See id.* at 198.
[6] *See id*. at 199.

interpreting section 546(e). Part A will briefly mention the language of section 546(g), its limitations on power of bankruptcy trustees to avoid actually fraudulent transactions and Congress's purpose in enacting section 546(g). Part B will discuss the *Barclays* decision with respect to the scope of section 546(g). Part C will discuss how bankruptcy courts have decided not to follow the *Barclays* decision when interpreting section 546(e) of the Bankruptcy Code and how other recent court decisions have distinguished the *Barclays* decision and the impact this could have on the way future courts will interpret section 546(g). Finally, Part D will conclude with a summary of the implications and significance of the *Barclays* decision in light of the recent court decisions interpreting section 546(e) of the Bankruptcy Code.

Part A. Section 546(g)'s Safe-Harbor Provision for Swap Agreements

Section 546 of the Bankruptcy Code and other bankruptcy law statutes; limit the power of bankruptcy trustees to avoid a swap transaction as a constructively fraudulent transfer/conveyance or preference.[7] Specifically, section 546(g) provides that "trustee[s] may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case . . . ." [8] Importantly, notwithstanding its prohibition against most avoidance actions, including actual fraudulent transfer/conveyance claims brought under section 544, section 546(g) does not protect actual fraudulent transfers brought under section 548.[9]

Congress enacted section 546(g)'s safe-harbor provision in order to limit the disruption

[7] *See* 11 U.S.C. § 546.
[8] *See* 10 Norton Bankr. L. & Prac. 3d 11 U.S.C. § 546; *see also* 11 U.S.C. § 546(g) (2012). ("Notwithstanding sections 544, 545, 547, 548 (a)(1)(B) and 548 (b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548 (a)(1)(A) of this title.").
[9] *See* 4 Norton Bankr. L. & Prac. 3d § 65:6 (section 546(g) does not cover or protect "actions made with actual intent to hinder, delay, or defraud other creditors.").

avoidance actions may cause on volatile financial markets.[10] In addition, courts interpreting the legislative history behind section 546(g) have noted, "bankruptcy law has long accorded special treatment to transactions involving financial markets, to minimize volatility. Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to ongoing securities and other financial transactions could face heavy losses unless the transactions are resolved promptly and with finality." [11] Section 546(g) has been applied to bankruptcy trustees. Recently,[12] however, in *Barclays*, the district court held that section 546(g) also prohibited a litigation trustee who was appointed under a debtor's chapter 11 plan from asserting a state-law fraudulent transfer claim, which had been assigned to the trustee by the creditors under the plan, in order to avoid certain swap transactions.

Part B. The *Barclays'* Decision.

The *Barclays* court held that "where creditors' claims are assigned along with Chapter 5 federal avoidance claims to a litigation trust organized pursuant to a Chapter 11 plan, section 546(g) 'safe harbor' impliedly preempts state-law fraudulent conveyance actions seeking to avoid 'swap transactions' as defined by the [Bankruptcy] Code."[13] This case supports the argument that section 546(g) limits litigation trustees' avoidance powers and focuses on the inability of those trustees to sue under state fraudulent transaction laws to circumvent section 546(g) limitation powers.

[10] *See id*.
[11] *See* H.R. REP. No. 101–484, 2, (1990) *reprinted in* 1990 U.S.C.C.A.N. 223 at 224 (hereinafter) H.R. REP. No. 101–484, 2, (1990).
[12] *See* Barclays Bank PLC, 494 B.R. at 199.
[13] *See id.*

I. Facts

In *Barclays*,[14] SemGroup, a large energy transport and storage company, filed for bankruptcy on July 22, 2008.[15] Prior to filing for bankruptcy, SemGroup entered into a novation (which is a type of swap agreement) with Barclays, by which, Barclays acquired SemGroup's portfolio of commodities derivatives traded on the New York Mercantile Exchange ("NYMEX").[16] Soon after the novation was completed, the portfolio became profitable.

On October 28, 2009, the United States Bankruptcy Court for the District of Delaware confirmed the debtor's chapter 11 plan, which created a Litigation Trust (the "Trust").[17] As a result of the terms of the agreement creating the Trust, contributing lenders, putatively assigned "any and all of their claims" to the Trust to be brought by the trustee. The trustee was empowered to prosecute and bring any claims or causes of actions transferred to it by virtue of the agreement. The trustee was also entitled to bring avoidance actions arising under chapter 5 of the Bankruptcy Code and state law causes of actions. As a result of the trustee's powers, the trustee tried to invoke her rights under state law as a "holder and assignee of all claims and causes of action against Barclays."[18] The litigation trustee sought to avoid the novation on the grounds that the transaction between SemGroup and Barclays was a fraudulent conveyance, as defined by New York's Debtor-Creditor Law ("NYDCL").[19] It is important to note, the trustee did not attempt to avoid the novation under section 544 of the Bankruptcy Code because section 546(g) explicitly prohibits a fraudulent transfer action under section 544. Thus, the plan was designed to empower the litigation trustee to circumvent section 546(g)'s safe-harbor provisions

[14] *See id.*
[15] *See id*. at 198.
[16] *See id*.
[17] *See id*.
[18] *See id*.
[19] *See id*.

by allowing him to asset the claim under state law. Although the court acknowledged that argument was clever, the court ultimately rejected it. [20]

II. The Court's Holding

The United States District Court for the Southern District of New York, dismissed the trustee's complaint and held that section 546(g) preempted the trustee's state-law fraudulent conveyance claims that were assigned to the Trust that had been organized pursuant to a confirmed chapter 11 plan.[21] The court conducted a three-step analysis in deciding this case.[22]

First, the court examined whether the principle of federal preemption preempted the fraudulent conveyance claims.[23] Under this principle, the court held that section 546(g) of the Bankruptcy Code impliedly preempted the trustee's state law fraudulent avoidance claims.[24] The court reached its holding by applying "[c]onflict preemption, a form of implied preemption, [which] occurs when it is "impossible . . . to comply with both state and federal law" or "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [25]

In arriving at its decision, the court reasoned that it was only necessary to discuss that the application of New York law was an obstacle to the accomplishment of the full purpose and objective of Congress. The court stated that "permitting a trustee that is the creature of a [c]hapter 11 plan to avoid a 'swap transaction' by way of a state fraudulent conveyance action

[20] *See id*. at 198–99 ("But section 544 is subject to several limitations, of which the one relevant here is the provision of section 546(g), which deprives a bankruptcy trustee of the power to bring avoidance actions otherwise given to her by the Code where she seeks to avoid 'a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case.' ").
[21] *See id*. at 201.
[22] *See id.*
[23] *See id*. at 199–200.
[24] *See id*. at 199.
[25] *See* Brief of Defendants-Appellees at 13, Whyte v. Barlcays PLC Bank, No. 13-2653-CV (2nd Cir. October 3, 2013). *See also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000); Hillman v. Maretta, 133 S. Ct. 1943, 1950 (2013); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

would stand as a major obstacle to the purposes and objectives of Congress in passing, and then expanding, the 546(g) 'safe harbor.' " [26] Thus, the court held that section 546(g) of the Bankruptcy Code conflicted with New York law because New York law allowed the trustee to bring a claim to avoid the novation as a constructively fraudulent transfer when federal law clearly prohibited such a claim.[27]

Under the first part of its analysis, the court also considered the legislative history of section 546(g) of the Bankruptcy Code to support the holding that a swap transaction could not be avoided under state-law.[28] In particular, the court opined that the "obvious purpose of section 546(g), fully confirmed by the legislative history, is to protect securities markets from the disruptive effects that unwinding such transactions would inevitably create." [29] Moreover, the court noted that Congress enacted section 546(g) of the Bankruptcy Code "to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code and to minimize volatility in swap markets." The court used the legislative history to disallow the trustee's avoidance claims.

Second, the court examined section 546(g) of the Bankruptcy Code, which prohibits a bankruptcy trustee from avoiding a swap agreement made prior to the filing of a bankruptcy claim.[30] The litigation trustee argued that section 546(g) of the Bankruptcy Code applies only to "an estate representative who is exercising federal avoidance powers under section 544 of the Bankruptcy Code." The litigation trustee also argued that "section 546(g) should not apply to

[26] *See* Barclays Bank PLC, 494 B.R. at 200.
[27] *See* Mary Jo C. v. New York State & Local Ret. Sys., 707 F.3d 144, 161 (2d Cir. 2013) *cert. dismissed*, 133 S. Ct. 2823 (U.S. 2013) ("Under the doctrine of federal preemption, 'state laws that conflict with federal law are without effect.' ").
[28] *See* Barclays Bank PLC, 494 B.R. at 199; *See also In re* Nat'l Gas Distribs., LLC, 556 F.3d 247, 259 (4th Cir. 2009) ("Even though an overarching policy of the Bankruptcy Code is to provide equal distribution among creditors … congress intended to serve a countervailing policy of protecting financial markets and therefore favoring an entire class of instruments and participants.").
[29] *See* Barclays Bank PLC, 494 B.R. at 200.
[30] *See* 11 U.S.C. §546(g).

'claims asserted by creditors' after the bankruptcy concludes . . . making section 546(g) irrelevant."[31] The court, however, rejected the litigation trustee's arguments because it found the arguments, although clever, lacked support. The court based its decision on the principle of federal preemption, arguing that the trustee's argument, if accepted by the court, would render section 546(g) a nullity because the litigation trustee was functionally equivalent to a bankruptcy trustee.[32]

Finally, the court analogized the reasoning advanced by courts interpreting section 546(e) of the Bankruptcy Code, which is a similar safe harbor provisions, to determined that a bankruptcy trustee cannot circumvent section 546(g) by merely repackaging or labeling fraudulent conveyance claims under section 544 as creditor's state law fraudulent conveyance claims.[33] Here, the court noted that if it were to do so, it would nullify Congress' goal of creating stability in financial markets due to the legislative purpose of section 546(g) and other courts' interpretation of section 546(e).[34] This case is currently on appeal and it is still uncertain whether higher courts will affirm the holding and implications of this case.[35]

Part C. New Interpretations to Section 546(e)

The *Barclays* court arrived at its holding by adopting interpretations of section 546(e), which contains a similar safe-harbor provision as section 546(g). However, recent decisions,

[31] *See* Barclays Bank PLC, 494 B.R. at 199
[32] *See id*.
[33] *See* Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 988 (8th Cir. 2009) (holding recovery under state law claims would render § 546(e) exemption meaningless, and would wholly frustrate legislative intent); *See also In re* U.S. Mortgage Corp., 491 B.R. 642, 666–67 (Bankr. D.N.J. 2013) ("circumventing the provision of § 546(e) by merely re-labeling avoidance actions but seeking essentially the same relief frustrates the purpose of § 546(e). Thus, common law claims for damages that are merely 're-labeled' avoidance actions are preempted by the Code so as not to render § 546(e) 'useless.' ").
[34] *See* Barclays Bank PLC, 494 B.R. at 200; *see supra* H.R. REP. No. 101–484, 2, (1990).
[35] *See* Brief of Defendants-Appellees at 13, Whyte v. Barlcays PLC Bank, No. 13-2653-CV (2nd Cir. October 3, 2013).

such as *In re Tribune Co. Fraudulent Conveyance Litig.*,[36] ("*Tribune*"), and *In re Lyondell Chem. Co.*,[37] ("*Lyondell*"), have distinguished between the application of section 546(g) and section 546(e) and have also explicitly distinguished the *Barclays* decision. In particular, *Tribune* and *Lyondell* both held that section 546(e) does not preempt state law fraudulent transfer claims.

Based on these recent interpretations of section 546(e), there is a possibility that future courts might not follow the *Barclays* decision. Indeed, the Second Circuit may adopt the reasoning from these cases and reverse the *Barclays* court on appeal. These courts distinguished the *Barclays* decision to differentiate the application of section 546(e) and 546(g).[38] Moreover, one of the cases even criticized the *Barclays* decision as not conducting a thorough analysis of the safe harbor provision's purpose and scope.

I. The *Tribune* Case:

In the *Tribune* case, the court held that section 546(e) of the Bankruptcy Code does not prevent creditor trustees from asserting state law fraudulent transaction claims under principles of statutory preemption. In this case, an unsecured creditors' committee brought an action alleging fraudulent transfer claims against former shareholders of the debtor who benefited from prepetition leveraged buyout ("LBO") of debtor.[39] There, the creditors' committee sought to unwind the LBO by asserting that the shareholder buyouts constituted intentional fraudulent conveyances.[40] Since the creditors' committee never asserted a constructive fraud claim, individual creditors sought leave from the bankruptcy court to bring state law constructive fraud

[36] 499 B.R. 310 (S.D.N.Y. 2013).
[37] 503 B.R. 348 (Bankr. S.D.N.Y. 2014), as corrected (Jan. 16, 2014).
[38] *See In re* Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310; In re Lyondell Chem. Co., 503 B.R. 348.
[39] *See In re* Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310.
[40] *See id*. at 314.

claims outside of bankruptcy.[41] In response, the defendants moved to dismiss the individual-creditors actions, arguing that section 546(e) barred not only the "[c]ommittee from asserting constructive fraudulent conveyance claims, but [i]ndividual [c]reditors as well."[42]

The district court held that the individual creditors' claims were barred and that bankruptcy law statutes barring trustees from avoiding transfers that were settlement payments did not preempt individual creditors' state law constructive fraudulent transfer claims. The court opined that "[s]tatute barring trustee from avoiding transfers that were settlement payments applied only to trustee, and thus did not preempt state law claims alleging constructive fraudulent transfers asserted by individual creditors to unwind buyouts of [c]hapter 11 debtor's shareholders in prepetition [LBO]."[43]

In reaching that determination, the *Tribune* court distinguished the facts present there to those that were present in *Barclays*.[44] The *Tribune* court stated that in *Barclays*, the trustee bringing the action was both the bankruptcy trustee and the representative of outside creditors. [45] As a result, the trustee in *Barclays* was not allowed to pick which hat to wear when looking to avoid fraudulent transactions, because allowing the trustee to do this would frustrate the purpose and objectives of section 546(g).[46] By contrast, the *Tribune* court found that the individual creditors in this case*,* unlike the litigation trustee in *Barclays*, were not creatures of a chapter 11 plan and were not connected with the bankruptcy trustee. Therefore, the court found that section 546(e) of the Bankruptcy Code should not apply to individual creditors the way that Section

[41] *See id.*
[42] *See* id. at 315.
[43] *See id.* at 320.
[44] *See id.* at 319 ("Defendants also make much out of a recent decision in which Judge Rakoff held that a Bankruptcy Code provision very similar to Section 546(e) prohibits an avoidance action by creditors, not just the bankruptcy trustee. However, that case is readily distinguishable.").
[45] *See id*. at 312–313.
[46] *See id.*

546(g) of the Bankruptcy Code applied to the trustee in *Barclays* as a representative of outside creditors.[47]

II. The *Lyondell* Case

The *Lyondell* court, just like the *Tribune* court, also distinguished its case from the *Barclays* case.[48] However, unlike the *Tribune* court, the *Lyondell* court also criticized the *Barclays* decision. In *Lyondell*, the trustee of creditors' trusts that were established under the debtors' confirmed chapter 11 plan brought an action to avoid, as constructively fraudulent transfers, payments made to the debtors' former shareholders in connection with a prepetition LBO that had allegedly left the debtors either insolvent or inadequately capitalized. [49] In response, the defendants moved to dismiss the complaint.[50] The bankruptcy court concluded that section 546(e) applied only to bankruptcy trustee and did not affect each independent creditor's ability to pursue the state-law constructive fraudulent transfer claims.[51] Thus, the *Lyondell* court, just like the court in *Tribune,* held that constructive fraudulent transfer claims brought under state law on behalf of individual creditors were not impliedly preempted, under section 546(e). [52]

In so holding, the court found that Congress did not intend to limit or prohibit the ability of independent creditors to pursue state law constructive fraudulent transfer claims. The court agreed with the *Tribune* decision that "[s]ection 546(e) provides that 'the *trustee* may not avoid a transfer' Congress did not make section 546(e) applicable to claims by or on behalf of individual creditors . . . . If Congress intended section 546(e) to be more broadly applicable, 'it could

[47] *See id.*
[48] *See In re* Lyondell Chem. Co., 503 B.R. 348 (stating that for a number of reasons this Court cannot regard *Barclays* as persuasive authority with respect to the petitioners' 546(e) defense to the claims asserted).
[49] *See id.*
[50] *See id.*
[51] *See id.* at 358.
[52] *See id.*

simply have said so.' "[53] The *Lyondell* court also noted that historically bankruptcy laws do not preempt, either expressly or impliedly, state constructive fraudulent transfer laws.[54] The court reasoned that "[d]espite the 'sweeping language' of the Supremacy Clause, 'courts do not readily assume preemption. To the contrary, 'in the absence of compelling congressional direction,' courts will not infer that 'Congress ha[s] deprived the States of the power to act.' "[55] As such, the court concluded that the legislative history indicated that Congress had not intended to preempt the state-law fraudulent transfer claims when it enacted section 546(e).

In addition to examining the legislative history, the *Lyondell* court also criticized the *Barclays* decision. In its analysis, the *Lyondell* court first distinguished the facts in the case from the facts from *Barclays*. The *Lyondell* court said that "[i]n this case, estate claims and creditor claims are not being asserted by the same trustee, and the Creditor Trust is not asserting claims on behalf of the Lyondell estate."[56] However, unlike the *Tribune* court, this court went on to note that "it ha[d] reservations as to the correctness of the 'bottom-line' judgment in *Barclays,* and especially the *Barclays'* reasoning. Respectfully, the [c]ourt consider[ed] the *Barclays* analysis to be less thorough than that of *Tribune,* and considers a number of the elements of the *Barclays* analysis to be flawed."[57]

In criticizing the *Barclays* decision, the *Lyondell* court first opined that the *Barclays* court failed to apply the presumption against implied preemption.[58] The *Lyondell* court indicated that section 546(g) was a new creation of Congress and that state laws protecting against fraudulent transactions have been in place since the early days of the Republic.[59] For the *Lyondell* court, this

[53] *See id*.
[54] *See id.* at 360
[55] *See id.*
[56] *See id.* at 375.
[57] *See id.* at 376.
[58] *See id.*
[59] *See id.*

distinction is important because fraudulent transactions laws have been implemented by states even before Congress created them. As such, the court believed that "given the elemental nature of fraudulent transfer law, however, there was no preemption intended, and states (as well as the federal government) continued to adapt parts of fraudulent transfer law for their own purposes."[60]

Next, the *Lyondell* court stated that the *Barclays* court gave no consideration to any congressional objectives other than protection of the financial markets and that "the *Barclays* court drew conclusions based on a view of the 'obvious purpose' of section 546(g) without likewise considering the 'obvious purpose' of other key elements of bankruptcy policy." [61]

PART D. Conclusion: Significance of the *Barclays'* Decision in Light of the *Tribune* and *Lyondell* Decisions

As a case of first impression, *Barclays* is significant because it is the first decision to hold that the safe harbor provision of section 546(g) preempts, and therefore bars, a bankruptcy trustee's state law fraudulent conveyance claim that is commenced after a chapter 11 plan is confirmed and while also representing creditors' interest as a result of assigned claims. Indicating that entities created and appointed pursuant to a confirmed chapter 11 plan, cannot file state law actions in an effort to circumvent safe harbor provisions guaranteed under section 546(g).

Barclays is also significant in light of the two subsequent decisions holding that bankruptcy statutes barring trustees from avoiding fraudulent transactions, apply only to bankruptcy trustees. As a result, these two subsequent decisions create a split of authority with respect to the limitations of bankruptcy trustees' avoidance powers. In light of this significance,

[60] *See id.*
[61] *See id.*

Tribune and *Lyondell* will likely affect future decisions interpreting the scope of section 546(g). Currently, as mentioned above, the *Barclays* decision was a case of first impression. Despite its importance, it is likely that the recent decisions, which interpret section 546(e) and distinguish and/or criticize the *Barclays* decision, may persuade future courts, including the Second Circuit in the *Barclays* appeal, that *Barclays* was incorrectly decided.

As it stands, the *Barclays* case holds that a bankruptcy trustee, a litigation trustee, or any other trustee appointed under a chapter 11 plan, is prohibited from attempting to circumvent section 546(g) with state law fraudulent conveyance claims. Yet, the *Barclays* decision is currently being appealed to the Second Circuit, and even though the court has yet to issue a decision, it is likely that the Second Circuit will closely examine the *Barclays* decision in light of the *Tribune* and *Lyondell* decisions.