

13-3992-cv (L)

In re: Tribune Company Fraudulent Conveyance Litigation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: November 5, 2014

Decided: March 29, 2016)

Docket Nos. 13-3992-cv; 13-3875-cv; 13-4178-cv; 13-4196-cv

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

NOTE HOLDERS, Deutsche Bank Trust Company Americas, Law Debenture Trust Company of New York, Wilmington Trust Company, INDIVIDUAL RETIREES, William A. Niese, on behalf of a putative class of Tribune Company retirees,

Plaintiffs-Appellants-Cross-Appellees,

MARK S. KIRSCHNER, as Litigation Trustee for the Tribune Litigation Trust,

Plaintiff,

TENDERING PHONES HOLDERS, Citadel Equity Fund Ltd., Camden Asset Management LLP and certain of their affiliates,

Plaintiffs-Intervenors,

v.

LARGE PRIVATE BENEFICIAL OWNERS, FINANCIAL INSTITUTION HOLDERS, FINANCIAL INSTITUTION CONDUITS, Merrill Lynch, Pierce, Fenner & Smith, Inc., on behalf of a putative class of former Tribune Company shareholders, PENSION FUNDS, including public, private, and Taft Hartley Funds, INDIVIDUAL BENEFICIAL OWNERS, Mario J. Gabelli, on behalf of a putative class of former Tribune Company shareholders, MUTUAL FUNDS, AT-LARGE, ESTATE OF KAREN BABCOCK, PHILLIP S. BABCOCK, DOUGLAS BABCOCK, DEFENDANTS LISTED ON EXHIBIT B,

Defendants-Appellees-Cross-Appellants,

CURRENT AND FORMER DIRECTORS AND OFFICERS, Betsy D. Holden, Christopher Reyes, Dudley S. Taft, Enrique Hernandez, Jr., Miles D. White, Robert S. Morrison, William A. Osborn, Harry Amsden, Stephen D. Carver, Dennis J. FitzSimons, Robert Gremillion, Donald C. Grenesko, David Dean Hiller, Timothy J. Landon, Thomas D. Leach, Luis E. Le, Mark Hianik, Irving Quimby, Crane Kenney, Chandler Bigelow, Daniel Kazan, Timothy Knight, Thomas Finke, SAM ZELL AND AFFILIATED ENTITIES, EGI-TRB, LLC, Equity Group Investments, LLC, Sam Investment Trust, Samuel Zell, Tower CH, LLC, Tower DC, LLC, Tower DL, LLC, Tower EH, LLC, Tower Gr, LARGE SHAREHOLDERS, Chandler Trusts and their representatives, FINANCIAL ADVISORS, Valuation Research Corporation, Duff & Phelps, LLC, Morgan Stanley & Co. Inc. and Morgan Stanley Capital Services, Inc., GreatBanc Trust Company, Citigroup Global Markets, Inc., CA PUBLIC EMPLOYEE RETIREMENT SYSTEM, CALPERS, UNIVERSITY OF CA REGENTS, T. ROWE PRICE ASSOCIATES, INC., MORGAN KEEGAN & COMPANY, INC., NTCA, DIOCESE OF TRENTON-PENSION FUND, FIRST ENERGY SERVICE COMPANY, MARYLAND STATE RETIREMENT AND PENSION SYSTEM, T BANK LCV QP, T BANK-LCV-PT, JAPAN POST INSURANCE, CO., LTD., SERVANTS OF RELIEF FOR INCURABLE CANCER (AKA DOMINICAN SISTERS OF HAWTHORNE), NEW LIFE INTERNATIONAL, NEW LIFE INTERNATIONAL TRUST, SALVATION ARMY, SOUTHERN TERRITORIAL HEADQUARTERS, CITY OF PHILADELPHIA EMPLOYEES, OHIO CARPENTERS' MIDCAP (AKA OHIO CARPENTERS' PENSION FUND), TILDEN H. EDWARDS, JR., MALLOY AND EVANS, INC., BEDFORD OAK PARTNERS, LP, DUFF AND PHELPS LLC, DURHAM J. MONSMA, CERTAIN TAG-ALONG DEFENDANTS, MICHAEL S. MEADOWS, WIRTZ CORPORATION,

Defendants.*

B e f o r e: WINTER, DRONEY, Circuit Judges, and HELLERSTEIN, District Judge.**

Appeal from a dismissal by the United States District Court for the Southern District of New York (Richard J. Sullivan, Judge), of state law, constructive fraudulent conveyance claims brought by creditors' representatives against the Chapter 11

* The Clerk of the Court is instructed to conform the caption in accordance with this opinion.

** The Honorable Alvin K. Hellerstein, of the Southern District of New York, sitting by designation.

1 debtor's former shareholders, who were cashed out in an LBO. The
 2 district court held that plaintiffs lacked statutory standing
 3 under the Bankruptcy Code. We hold that appellants have
 4 statutory standing but affirm on the ground that appellants'
 5 claims are preempted by Section 546(e) of that Code.

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 37 Appellees Individual Retirees.

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34 Appellants Pension Funds.

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3 Appellants Mutual Funds.

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14 Appellants Defendants Listed on
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38 WINTER, Circuit Judge:

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40 Representatives of certain unsecured creditors of the
41 Chapter 11 debtor Tribune Company appeal from Judge Sullivan's
42 grant of a motion to dismiss their state law, constructive
43 fraudulent conveyance claims brought against Tribune's former
44 shareholders. Appellants seek to recover an amount sufficient to

1 satisfy Tribune's debts to them by avoiding (recovering) payments
2 by Tribune to shareholders that purchased all of its stock. The
3 payments occurred in a transaction commonly called a leveraged
4 buyout ("LBO"),¹ soon after which Tribune went into Chapter 11
5 bankruptcy. Appellants appeal the district court's dismissal for
6 lack of statutory standing, and appellees cross-appeal from the
7 district court's rejection of their argument that appellants'
8 claims are preempted.²

9 We address two issues: (i) whether appellants are barred by
10 the Bankruptcy Code's automatic stay provision from bringing
11 state law, constructive fraudulent conveyance claims while
12 avoidance proceedings against the same transfers brought by a
13 party exercising the powers of a bankruptcy trustee on an
14 intentional fraud theory are ongoing; and (ii) if not, whether
15 the creditors' state law, constructive fraudulent conveyance
16 claims are preempted by Bankruptcy Code Section 546(e).

17 On issue (i), we hold that appellants are not barred by the
18 Code's automatic stay because they have been freed from its
19 restrictions by orders of the bankruptcy court and by the
20 debtors' confirmed reorganization plan. On issue (ii), the

¹ In a typical LBO, a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets.

² Because the issue has no effect on our disposition of this matter, we do not pause to consider whether a cross-appeal was necessary for appellees to raise the preemption issues in this court, but, for convenience purposes, we sometimes refer to those issues by the term cross-appeal.

1 subject of appellees' cross-appeal, we hold that appellants'
2 claims are preempted by Section 546(e). That Section shields
3 from avoidance proceedings brought by a bankruptcy trustee
4 transfers by or to financial intermediaries effectuating
5 settlement payments in securities transactions or made in
6 connection with a securities contract, except through an
7 intentional fraudulent conveyance claim.

8 We therefore affirm.

9 BACKGROUND

10 a) The LBO

11 Tribune Media Company (formerly known as "Tribune Company")
12 is a multimedia corporation that, in 2007, faced deteriorating
13 financial prospects. Appellee Samuel Zell, a billionaire
14 investor, proposed to acquire Tribune through an LBO. In
15 consummating the LBO, Tribune borrowed over \$11 billion secured
16 by its assets. The \$11 billion plus, combined with Zell's \$315
17 million equity contribution, was used to refinance some of
18 Tribune's pre-existing bank debt and to cash out Tribune's
19 shareholders for over \$8 billion at a premium price -- above its
20 trading range -- per share. It is undisputed that Tribune
21 transferred the over \$8 billion to a "securities clearing agency"
22 or other "financial institution," as those terms are used in
23 Section 546(e), acting as intermediaries in the LBO transaction.
24 Those intermediaries in turn paid the funds to the shareholders

1 in exchange for their shares that were then returned to Tribune.
2 Appellants seek to satisfy Tribune's debts to them by avoiding
3 Tribune's payments to the shareholders. Appellants do not seek
4 money from the intermediaries. See Note 8, infra.

5 b) Bankruptcy Proceedings

6 On December 8, 2008, with debt and contingent liabilities
7 exceeding its assets by more than \$3 billion, Tribune and nearly
8 all of its subsidiaries filed for bankruptcy under Chapter 11 in
9 the District of Delaware. A trustee was not appointed, and
10 Tribune and its affiliates continued to operate the businesses as
11 debtors in possession. See 11 U.S.C. § 1107(a) ("Subject to any
12 limitations on a trustee . . . a debtor in possession shall have
13 all the rights . . . , and powers, and shall perform all the
14 functions and duties . . . of a trustee"). In discussing
15 the powers of a bankruptcy trustee that can be exercised by a
16 trustee or parties designated by a bankruptcy court, we shall
17 refer to the trustee or such parties as the "trustee et al."

18 The bankruptcy court appointed an Official Committee of
19 Unsecured Creditors (the "Committee") to represent the interests
20 of unsecured creditors. In November 2010, alleging that the LBO-
21 related payments constituted intentional fraudulent conveyances,
22 the Committee commenced an action under Code Section 548(a)(1)(A)
23 against the cashed out Tribune shareholders, various officers,
24 directors, financial advisors, Zell, and others alleged to have

1 benefitted from the LBO. An intentional fraudulent conveyance is
2 defined as one in which there was "actual intent to hinder,
3 delay, or defraud" a creditor. 11 U.S.C. § 548(a)(1)(A).

4 In June 2011, two subsets of unsecured creditors filed state
5 law, constructive fraudulent conveyance claims in various federal
6 and state courts. The plaintiffs, the appellants before us,
7 were: (i) the Retiree Appellants, former Tribune employees who
8 hold claims for unpaid retirement benefits and (ii) the
9 Noteholder Appellants, the successor indenture trustees for
10 Tribune's pre-LBO senior notes and subordinated debentures. A
11 constructive fraudulent conveyance is, generally speaking, a
12 transfer for less than reasonably equivalent value made when the
13 debtor was insolvent or was rendered so by the transfer. See
14 Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 208-09 (2d Cir.
15 2014).

16 Before bringing these actions, appellants moved the
17 bankruptcy court for an order stating that: (i) after the
18 expiration of the two-year statute of limitations period during
19 which the Committee was authorized to bring avoidance actions
20 under 11 U.S.C. § 546(a), eligible creditors had regained the
21 right to prosecute their creditor state law claims; and (ii) the
22 automatic stay imposed by Code Section 362(a) was lifted solely
23 to permit the immediate filing of their complaint. In support of
24 that motion, the Committee argued that, under Section 546(a), the

1 “state law constructive fraudulent conveyance transfer claims
2 ha[d] reverted to individual creditors” and that the “creditors
3 should consider taking appropriate actions to preserve those
4 claims.” Statement of the Official Committee of Unsecured
5 Creditors in Supp. of Mot. 3, In re Tribune Co., No 08-13141
6 (KJC) (Bankr. D. Del. Mar. 17, 2011).

7 In April 2011, the bankruptcy court lifted the Code’s
8 automatic stay with regard to appellants’ actions. The court
9 reasoned that because the Committee had elected not to bring the
10 constructive fraudulent conveyance actions within the two-year
11 limitations period following the bankruptcy petition imposed by
12 Section 544, fully discussed infra, the unsecured creditors
13 “regained the right, if any, to prosecute [such claims].” J.
14 App’x at 373. Therefore, the court lifted the Section 362(a)
15 automatic stay “to permit the filing of any complaint by or on
16 behalf of creditors on account of such Creditor [state law
17 fraudulent conveyance] Claims.” Id. The court clarified,
18 however, that it was not resolving the issues of whether the
19 individual creditors had statutory standing to bring such claims
20 or whether such claims were preempted by Section 546(e).

21 On March 15, 2012, the bankruptcy court set an expiration
22 date of June 1, 2012 for the remaining limited stay on the state
23 law, fraudulent conveyance claims. In July 2012, the bankruptcy
24 court ordered confirmation of the proposed Tribune reorganization

1 plan. The plan terminated the Committee and transferred
2 responsibility for prosecuting the intentional fraudulent
3 conveyance action to an entity called the Litigation Trust. The
4 confirmed plan also provided that the Retiree and Noteholder
5 Appellants could pursue "any and all LBO-Related Causes of Action
6 arising under state fraudulent conveyance law," except for the
7 federal intentional fraudulent conveyance and other LBO-related
8 claims pursued by the Litigation Trust. J. App'x at 643. Under
9 the plan, the Retiree and Noteholder Appellants recovered
10 approximately 33 cents on each dollar of debt. The plan was
11 scheduled to take effect on December 31, 2012, the date on which
12 Tribune emerged from bankruptcy.

13 c) District Court Proceedings

14 Appellants' various state law, fraudulent conveyance
15 complaints alleged that the LBO payments, made through financial
16 intermediaries as noted above, were for more than the reasonable
17 value of the shares and made when Tribune was in distressed
18 financial condition. Therefore, the complaints concluded, the
19 payments were avoidable by creditors under the laws of various
20 states. These actions were later consolidated with the
21 Litigation Trust's ongoing federal intentional fraud claims in a
22 multi-district litigation proceeding that was transferred to the
23 Southern District of New York. In re: Tribune Co. Fraudulent
24 Conveyance Litig., 831 F. Supp. 2d 1371 (J.P.M.L. 2011).

1 After consolidation, the Tribune shareholders moved to
2 dismiss appellants' claims. The district court granted the
3 motion on the ground that the Bankruptcy Code's automatic stay
4 provision deprived appellants of statutory standing to pursue
5 their claims so long as the Litigation Trustee was pursuing the
6 avoidance of the same transfers, albeit under a different legal
7 theory. In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R.
8 310, 325 (S.D.N.Y. 2013). The court held that the bankruptcy
9 court had only "conditionally lifted the stay." Id. at 314.

10 The district court rejected appellees' preemption argument
11 based on Section 546(e). That Section bars a trustee et al. from
12 exercising its avoidance powers under Section 544 to avoid
13 transfers by the debtor to specified financial intermediaries,
14 e.g. a "securities clearing agency" or "financial institution,"
15 that is a "settlement payment" in a securities transaction or is
16 a transfer "in connection with a securities contract." The
17 district court held that Section 546(e) did not bar appellants'
18 actions because: (i) Section 546(e)'s prohibition on avoiding
19 the designated transfers applied only to a bankruptcy trustee et
20 al., id. at 315-16; and (ii) Congress had declined to extend
21 Section 546(e) to state law, fraudulent conveyance claims brought
22 by creditors, id. at 318.

1 DISCUSSION

2 We review de novo the district court's grant of appellees'
3 motion to dismiss. See Mary Jo C. v. N.Y. State & Local Ret.
4 Sys., 707 F.3d 144, 151 (2d Cir. 2013). The relevant facts being
5 undisputed for purposes of this proceeding, only issues of law
6 are before us.

7 a) Statutory Standing to Bring the Claims

8 We first address the district court's dismissal of
9 appellants' claims on the ground that they lacked standing to
10 bring them because of Section 362(a)(1).³ In re Tribune, 499
11 B.R. at 325. When a bankruptcy action is filed, any "action or
12 proceeding against the debtor" is automatically stayed by Section
13 362(a). The purpose of the stay is "to protect creditors as well
14 as the debtor," Ostano Commerzanstalt v. Telewide Sys., Inc.,
15 790 F.2d 206, 207 (2d Cir. 1986) (per curiam), by avoiding
16 wasteful, duplicative, individual actions by creditors seeking
17 individual recoveries from the debtor's estate, and by ensuring
18 an equitable distribution of the debtor's estate. See In re
19 McMullen, 386 F.3d 320, 324 (1st Cir. 2004) (noting that Section
20 362(a)(1), among other things, "safeguard[s] the debtor estate

³ The term "standing" has been used to describe issues arising in bankruptcy proceedings when individual creditors sue to recover funds from third parties to satisfy amounts owed to them by the debtor, and that action is defended on the ground that the recovery seeks funds that are recoverable under the Code only by a representative of all creditors. St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 696-97 (2d Cir. 1989), disapproved of on other grounds by In re Miller, 197 B.R. 810 (W.D.N.C. 1996). The use of the term "standing" is based on the suing creditors' need to demonstrate an injury other than one redressable under the Code only by the trustee et al. Id. at 704.

1 from piecemeal dissipation . . . ensur[ing] that the assets
2 remain within the exclusive jurisdiction of the bankruptcy court
3 pending their orderly and equitable distribution among the
4 creditors"). Although fraudulent conveyance actions are against
5 third parties rather than a debtor, there is caselaw, discussed
6 infra, stating that the automatic stay applies to such actions.⁴
7 See In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992).

8 The district court ruled that Section 362's automatic stay
9 provision deprived appellants of statutory standing to bring
10 their claims because the Litigation Trustee was still pursuing an
11 intentional fraudulent conveyance action challenging the same
12 transfers under Section 548(a)(1)(A). In re Tribune, 499 B.R. at
13 322-23. We disagree. The Bankruptcy Code empowers a bankruptcy
14 court to release parties from the automatic stay "for cause"
15 shown. In re Bogdanovich, 292 F.3d 104, 110 (2d Cir. 2002)
16 (quoting 11 U.S.C. § 362(d)(1)). Once a creditor obtains "a
17 grant of relief from the automatic stay" under Section 362(d), it
18 may "press its claims outside of the bankruptcy proceeding." St.
19 Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 702
20 (2d Cir. 1989), disapproved of on other grounds by In re Miller,
21 197 B.R. 810 (W.D.N.C. 1996).

⁴ The implications of applying the automatic stay to fraudulent conveyance actions are discussed infra.

1 In the present matter, the bankruptcy court granted
2 appellants relief from the automatic stay on three occasions. On
3 April 25, 2011, the bankruptcy court granted appellants relief
4 "to permit the filing of any complaint by or on behalf of
5 creditors on account of such Creditor [state law fraudulent
6 conveyance] Claims." J. App'x at 373. A second order, entered
7 on June 28, 2011, clarified that "neither the automatic stay of
8 [Section 362] nor the provisions of the [original lift-stay
9 order]" barred the parties in the state law actions from
10 consolidating and coordinating these actions. J. App'x at 376.
11 And the bankruptcy court's third order, entered on March 15,
12 2012, set an expiration date of June 1, 2012, for the "stay
13 imposed on the state law constructive fraudulent conveyance
14 actions." J. App'x at 521. None of the Tribune shareholders
15 filed objections to these orders.

16 Finally, the reorganization plan, confirmed by the
17 bankruptcy court and in all pertinent respects an order of that
18 court, expressly allowed appellants to pursue "any and all
19 LBO-Related Causes of Action arising under state fraudulent
20 conveyance law." J. App'x at 643. Section 5.8.2 of the plan
21 provided that "nothing in this Plan shall or is intended to
22 impair" the rights of creditors to attempt to pursue disclaimed
23 state law avoidance claims. J. App'x at 695.

1 Thus, under both the bankruptcy court's orders and the
2 confirmed reorganization plan, if appellants had actionable state
3 law, constructive fraudulent conveyance claims, assertion of
4 those claims was no longer subject to Section 362's automatic
5 stay. See, e.g., In re Heating Oil Partners, LP, 422 F. App'x
6 15, 18 (2d Cir. 2011) (holding that the automatic stay terminates
7 at discharge); United States v. White, 466 F.3d 1241, 1244 (11th
8 Cir. 2006) (similarly recognizing that the automatic stay
9 terminates when "a discharge is granted").

10 For the foregoing reasons, we hold that appellants' claims
11 are not barred by Section 362.

12 b) Section 546(e) and Preemption

13 We turn now to the issue raised by the cross-appeal:
14 whether appellants' claims are preempted because they conflict
15 with Code Section 546(e).

16 1. Conflict-Preemption Law

17 Under the Supremacy Clause, Article VI, Clause 2 of the
18 Constitution, federal law prevails when it conflicts with state
19 law. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

20 As discussed throughout this opinion, Section 546(e)'s
21 reference to limiting avoidance by a trustee provides appellants
22 with a plain language argument that only a trustee et al., and
23 not creditors acting on their own behalf, are barred from
24 bringing state law, constructive fraudulent avoidance claims.

1 However, as discussed infra, we believe that the language of
 2 Section 546(e) does not necessarily have the meaning appellants
 3 ascribe to it. Even if that meaning is one of multiple
 4 reasonable constructions of the statutory scheme, it would not
 5 necessarily preclude preemption because a preemptive effect may
 6 be inferred where it is not expressly provided.

7 Under the implied preemption doctrine,⁵ state laws are “pre-
 8 empted to the extent of any conflict with a federal statute.
 9 Such a conflict occurs . . . when [] state law stands as an
 10 obstacle to the accomplishment and execution of the full purposes
 11 and objectives of Congress.” Hillman v. Maretta, 133 S. Ct.
 12 1943, 1949-50 (2013) (citations and internal quotation marks
 13 omitted); accord In re Methyl Tertiary Butyl Ether (MTBE) Prods.
 14 Liab. Litig., 725 F.3d 65, 97 (2d Cir. 2013) cert. denied sub
 15 nom. Exxon Mobil Corp. v. City of New York, 134 S. Ct. 1877
 16 (2014) (courts will find implied preemption when “state law
 17 directly conflicts with the structure and purpose of a federal
 18 statute”) (citation and internal quotation marks omitted).

⁵ We see no need for a full discussion of various modes of analysis used to determine federal preemption, i.e., “express” preemption, Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977 (2011), “field” preemption, Arizona v. United States, 132 S. Ct. 2492, 2502 (2012), or even that branch of “implied” preemption that requires a showing of “impossibility” of complying with both state and federal law, id. at 2501. The only relevant analysis in the present matter is preemption inferred from a conflict between state law and the purposes of federal law, as discussed in the text.

1 Appellants argue that a recognized presumption against
2 preemption limits the implied preemption doctrine. They argue
3 that Section 546(e) preempts creditors' state law, fraudulent
4 conveyance claims only if the claims would do "'major damage' to
5 'clear and substantial' federal interests." Resp. & Reply Br. of
6 Pls.-Appellants-Cross-Appellees 45 (quoting Hillman, 133 S. Ct.
7 1943, 1950 (2013) (citation omitted)). The presumption against
8 inferring preemption is premised on federalism grounds and,
9 therefore, weighs most heavily where the particular regulatory
10 area is "traditionally the domain of state law." Hillman, 133 S.
11 Ct. at 1950; see also Madeira v. Affordable Hous. Found., Inc.,
12 469 F.3d 219, 241 (2d Cir. 2006) ("The mere fact of 'tension'
13 between federal and state law is generally not enough to
14 establish an obstacle supporting preemption, particularly when
15 the state law involves the exercise of traditional police
16 power."). According to appellants, the presumption against
17 preemption fully applies in the present context because
18 fraudulent conveyance claims are "among 'the oldest [purposes]
19 within the ambit of the police power.'" Resp. & Reply Br. of
20 Pls.-Appellants-Cross-Appellees 36 (quoting California v. Zook,
21 336 U.S. 725, 734 (1949)).

22 Preemption is always a matter of congressional intent, even
23 where that intent must be inferred. See Cipollone v. Liggett
24 Grp., Inc., 505 U.S. 504, 516 (1992) (congressional intent is the

1 “ultimate touchstone of pre-emption analysis”) (quoting Malone v.
2 White Motor Corp., 435 U.S. 497, 504 (1978)) (internal quotation
3 marks omitted); N.Y. SMSA Ltd. P’ship v. Town of Clarkstown, 612
4 F.3d 97, 104 (2d Cir. 2010) (“The key to the preemption inquiry
5 is the intent of Congress.”). As in the present matter, the
6 presumption against preemption usually goes to the weight to be
7 given to the lack of an express statement overriding state law.

8 The presumption is strongest when Congress is legislating in
9 an area recognized as traditionally one of state law alone. See
10 Hillman, 133 S. Ct. at 1950 (stating that because “[t]he
11 regulation of domestic relations is traditionally the domain of
12 state law . . . [t]here is [] a presumption against pre-emption”)
13 (internal quotation marks and citation omitted). However, the
14 present context is not such an area. To understate the
15 proposition, the regulation of creditors’ rights has “a history
16 of significant federal presence.” United States v. Locke, 529
17 U.S. 89, 90 (2000).

18 Congress’s power to enact bankruptcy laws was made explicit
19 in the Constitution as originally enacted, Art. 1, § 8, cl. 4,
20 and detailed, preemptive federal regulation of creditors’ rights
21 has, therefore, existed for over two centuries. Charles Jordan
22 Tabb, The History of the Bankruptcy Laws in the United States, 3
23 Am. Bankr. Inst. L. Rev. 5, 7 (1995). Once a party enters
24 bankruptcy, the Bankruptcy Code constitutes a wholesale

1 preemption of state laws regarding creditors' rights. See
2 Eastern Equip. and Servs. Corp. v. Factory Point Nat. Bank,
3 Bennington, 236 F.3d 117, 120 (2d Cir. 2001) ("The United States
4 Bankruptcy Code provides a comprehensive federal system of
5 penalties and protections to govern the orderly conduct of
6 debtors' affairs and creditors' rights."); In re Miles, 430 F.3d
7 1083, 1091 (9th Cir. 2005) ("Congress intended the Bankruptcy
8 Code to create a whole scheme under federal control that would
9 adjust all of the rights and duties of creditors and debtors
10 alike").

11 Consider, for example, the present proceeding. While the
12 issue before us is often described as whether Section 546(e)
13 preempts state fraudulent conveyance laws, Resp. & Reply Br. of
14 Pls.-Appellants-Cross-Appellees 33, that is a
15 mischaracterization. Appellants' state law claims were preempted
16 when the Chapter 11 proceedings commenced and were not dismissed.
17 Appellants' own arguments posit that those claims were, at the
18 very least, stayed by Code Section 362. Whether, as appellants
19 argue, they were restored in full after two years, see 11 U.S.C.
20 § 546(a)(1)(A), or by order of the bankruptcy court, see 11
21 U.S.C. § 349(b)(3), is hotly disputed. But if they were
22 restored, it was by force of federal law.

23 Once Tribune entered bankruptcy, the creditors' avoidance
24 claims were vested in the federally appointed trustee et al. 11

1 U.S.C. § 544(b)(1). A constructive fraudulent conveyance action
2 brought by a trustee et al. under Section 544 is a claim arising
3 under federal law. See In re Intelligent Direct Mktg., 518 B.R.
4 579, 587 (E.D. Cal. 2014); In re Trinsum Grp., Inc., 460 B.R.
5 379, 387-88 (S.D.N.Y. 2011); In re Sunbridge Capital, Inc., 454
6 B.R. 166, 169 n.16 (Bankr. D. Kan. 2011); In re Charys Holding
7 Co., Inc., 443 B.R. 628, 635-36 (Bankr. D. Del. 2010). Although
8 such a claim borrows applicable state law standards regarding
9 avoiding the transfer in question, see Universal Church v.
10 Geltzer, 463 F.3d 218, 222 n.1 (2d Cir. 2006), the claim has its
11 own statute of limitations, 11 U.S.C. § 546(a)(1)(A), measure of
12 damages, see 11 U.S.C. § 550, and standards for distribution, 11
13 U.S.C. § 726. A disposition of this federal law claim
14 extinguishes the right of creditors to bring state law,
15 fraudulent conveyance claims. See St. Paul Fire, 884 F.2d at 701
16 disapproved of on other grounds by In re Miller, 197 B.R. 810
17 (W.D.N.C. 1996) (noting that “creditors are bound by the outcome
18 of the trustee’s action”); see also In re PWS Holding Corp., 303
19 F.3d 308, 314-15 (3d Cir. 2002) (barring creditor’s state law,
20 fraudulent transfer claims after trustee released § 544 claims).
21 And, if creditors are allowed by a bankruptcy court, trustee, or,
22 as appellants argue, by the Bankruptcy Code, to bring state law
23 actions in their own name, that permission is a matter of grace
24 granted under federal authority. The standards for granting that

1 permission, moreover, have everything to do with the Bankruptcy
2 Code's balancing of debtors' and creditors' rights, In re Coltex
3 Loop Cent. Three Partners, L.P., 138 F.3d 39, 44 (2d Cir. 1998),
4 or rights among creditors, United States v. Ron Pair Enters,
5 Inc., 489 U.S. 235, 248 (1989), and nothing to do with the
6 vindication of state police powers.

7 We also note here, and discuss further infra, that the
8 policies reflected in Section 546(e) relate to securities
9 markets, which are subject to extensive federal regulation. The
10 regulation of these markets has existed and grown for over eighty
11 years and reflects very important federal concerns.

12 In the present matter, therefore, there is no measurable
13 concern about federal intrusion into traditional state domains.
14 Our bottom line is that the issue before us is one of inferring
15 congressional intent from the Code, without significant
16 countervailing pressures of state law concerns.

17 2. The Language of Section 546(e)

18 Section 544(b) empowers a trustee et al. to avoid a
19 "transfer . . . [by] the debtor . . . voidable under applicable
20 law by a[n] [unsecured] creditor." Section 548(a) also provides
21 the trustee et al. with independent federal intentional, 11
22 U.S.C. § 548(a)(1)(A), and constructive fraudulent conveyance
23 claims, 11 U.S.C. § 548(a)(1)(B).
24

1 Section 546(e) provides in pertinent part:

2 Notwithstanding sections 544, . . . 548(a)(1)(B) . . . of
3 this title, the trustee may not avoid a transfer that is a
4 . . . settlement payment . . . made by or to (or for the
5 benefit of) a . . . stockbroker, financial institution,
6 financial participant, or securities clearing agency, or
7 that is a transfer made by or to (or for the benefit of) a .
8 . . stockbroker, financial institution, financial
9 participant, or securities clearing agency, in connection
10 with a securities contract . . . except under section
11 548(a)(1)(A). . . .
12

13 Id. § 546(e). Section 546(e) thus expressly prohibits trustees
14 et al. from using their Section 544(b) avoidance powers and
15 (generally) Section 548 against the transfers specified in
16 Section 546(e). However, Section 546(e) creates an exception to
17 that prohibition for claims brought by trustee et al. under
18 Section 548(a)(1)(A) that, as noted, establishes a federal
19 avoidance claim to be brought by a trustee et al. based on an
20 intentional fraud theory. As discussed supra, the Litigation
21 Trust has brought a Section 548(a)(1)(A) claim against the same
22 transfers challenged by appellants' actions before us on this
23 appeal. That claim is still pending.

24 The language of Section 546(e) covers all transfers by or to
25 financial intermediaries that are "settlement payment[s]" or "in
26 connection with a securities contract." Transfers in which
27 either the transferor or transferee is not such an intermediary
28 are clearly included in the language. The Section does not
29 distinguish between kinds of transfers, e.g., settlements of
30 ordinary day-to-day trading, LBOs, or mergers in which

1 shareholders of one company are involuntarily cashed out. So
2 long as the transfer sought to be avoided is within the language
3 quoted above, the Section includes avoidance proceedings in which
4 the intermediary would escape a damages judgment. But see In re
5 Lyondell Chem. Co., 503 B.R. 348, 372-73 (Bankr. S.D.N.Y. 2014),
6 as corrected (Jan. 16, 2014), that Section 546(e) does not
7 include "LBO payments to stockholders at the very end of the
8 asset transfer chain, where the stockholders are the ultimate
9 beneficiaries of the constructively fraudulent transfers, and can
10 give the money back to injured creditors with no damage to anyone
11 but themselves."

12 3. Appellants' Legal Theory

13 Appellants' state law, constructive fraudulent conveyance
14 claims purport to be brought under mainstream bankruptcy
15 procedures directly mandated by the Code. However, an
16 examination of the Code as a whole, in contrast with an isolated
17 focus on the word "trustee" in Section 546(e), reveals that
18 appellants' theory relies upon adhering to statutory language
19 only when opportune and resolving various ambiguities in a way
20 convenient to that theory. Even then, their legal theory results
21 in anomalies and inconsistencies with parts of the Code. The
22 consequence of those ambiguities, anomalies, and conflicts is
23 that a reader of Section 546(e), at the time of enactment, would
24 not have necessarily concluded that the reference only to a

1 trustee et al. meant that creditors may at some point bring state
2 law claims seeking the very relief barred to the trustee et al.
3 by Section 546(e). Its meaning, therefore, is not plain.

4 (i) Appellants' Theory of Fraudulent Conveyance
5 Avoidance Proceedings

6 Appellants' theory goes as follows. When a debtor enters
7 bankruptcy, all "legal or equitable interests of the debtor in
8 property," 11 U.S.C. § 541(a)(1), vest in the debtor's bankruptcy
9 estate. This property includes legal claims that could have been
10 brought by the debtor. See U.S. ex rel. Spicer v. Westbrook, 751
11 F.3d 354, 361-62 (5th Cir. 2014) ("The phrase 'all legal or
12 equitable interests' includes legal claims-whether based on state
13 or federal law."). Therefore, "the Trustee is conferred with the
14 authority to represent all creditors and the Debtor's estate and
15 with the sole responsibility of bringing actions on behalf of the
16 Debtor's estate to marshal assets for the estate's creditors."
17 In re Stein, 314 B.R. 306, 311 (D.N.J. 2004). However,
18 fraudulent conveyance claims proceed on a theory that an
19 insolvent debtor may not make what are essentially gifts that
20 deprive creditors of assets available to pay debts. See Grupo
21 Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S.
22 308, 322 (1999). Therefore, before a bankruptcy takes place,
23 fraudulent conveyance claims belong to creditors rather than to
24 the debtor. As a consequence, Section 544(b)(1) provides that a
25 bankruptcy trustee may avoid "any transfer of an interest of the

1 debtor . . . that is voidable under applicable law by a creditor
2 holding an unsecured claim." 11 U.S.C. § 544(b)(1). The
3 responsibility of the trustee et al. is to "step into the shoes
4 of a creditor under state law and avoid any transfers such a
5 creditor could have avoided." Univ. Church v. Geltzer, 463 F.3d
6 218, 222 n.1 (2d Cir. 2006).

7 The trustee et al., however, is subject to a statute of
8 limitations that requires such claims to be brought within two
9 years of the commencement of the bankruptcy proceeding. See 11
10 U.S.C. § 546(a)(1)(A). Appellants infer from this statute of
11 limitations that if the trustee et al. fails to act to enforce
12 such claims during that two-year period, the claims revert to
13 creditors who may then pursue their own state law, fraudulent
14 conveyance actions. Resp. & Reply Br. of Pls.-Appellants-Cross-
15 Appellees 1. This position assumes that, although the power to
16 bring such actions is clearly vested in the trustee et al. when
17 the bankruptcy proceeding begins, if the power is not exercised,
18 it returns in full flower to the creditors after the bankruptcy
19 ends or after two years.

20 Appellants' theory also is that their fraudulent conveyance
21 claims were only stayed under Section 362(a), rather than
22 extinguished when assumed by the trustee on behalf of the
23 bankrupt estate by the trustee et al. under Section 544, and
24 could be asserted by them as creditors when the Section 362(a)
25 stay was lifted. Accordingly, appellants argue, when the

1 Committee did not bring constructive fraudulent conveyance
2 actions against the LBO transfers by December 8, 2010, appellants
3 regained the right to bring their own state law actions. See
4 Resp. & Reply Br. of Pls.-Appellants-Cross Appellees 6.
5 Moreover, they correctly note that Section 362's automatic stay
6 was, as discussed supra, lifted. In either case -- automatically
7 after two years or by the bankruptcy court's lifting of the stay
8 -- appellants assert that the right to bring state law actions
9 has reverted to them.

10 (ii) Ambiguities, Anomalies, and Conflicts

11 When appellants' arguments and their relation to the Code
12 are viewed, as we must view them, in their entirety, In re
13 Boodrow, 126 F.3d 43, 49 (2d Cir. 1997) ("The Supreme Court has
14 thus explained . . . 'we must not be guided by a single sentence
15 or [part] of a sentence [of the Code], but look to the provisions
16 of the whole law, and to its object and policy.'" (quoting Kelly
17 v. Robinson, 479 U.S. 36, 43 (1986))), they reveal material
18 ambiguities, anomalies, and outright conflicts with the purposes
19 of Code Sections 544, 362, and 548, not to mention the outright
20 conflict with Section 546(e) discussed infra.

21 A critical step in the logic of appellants' theory finds no
22 support in the language of the Code. In particular, the
23 inference that fraudulent conveyance actions revert to creditors
24 if either the two-year statute of limitations passes without an
25 exercise of the trustees' et al. powers under Section 544 or the

1 Section 362(a) stay is lifted by the bankruptcy court has no
2 basis in the Code's language. To begin, the language of the
3 automatic stay provision applies only to actions against "the
4 debtor." 11 U.S.C. § 362. To be sure, there are cases barring
5 fraudulent conveyance actions brought by creditors before the
6 passing of the limitations period or lifting of the stay. See,
7 e.g., In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1101 (2d
8 Cir. 1990). The rationales of these cases vary. Some rely on
9 Section 362(a) on the theory that the fraudulent conveyance
10 claims are the property of the debtors' estate. See In re
11 MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983);
12 Matter of Fletcher, 176 B.R. 445, 452 (Bankr. W.D. Mich. 1995),
13 rev'd and remanded on other grounds sub nom. In re Van Orden, No.
14 1:95-CV-79, 1995 WL 17903731 (W.D. Mich. Sept. 5, 1995). Some do
15 not mention Section 362(a) and rely on the need to protect
16 trustees' et al. powers to bring Section 544 avoidance actions.
17 See In re Van Diepen, P.A., 236 F. App'x. 498, 502-03 (11th Cir.
18 2007); In re Clark, 374 B.R. 874, 876 (Bankr. M.D. Ala. 2007); In
19 re Tessmer, 329 B.R. 776, 780 (Bankr. M.D. Ga. 2005). All the
20 caselaw agrees that the trustee et al.'s powers under Section 544
21 are exclusive, at least until the stay is lifted or the two-year
22 period expires.

23 Equally important is the fact that the inference of a
24 reversion of fraudulent conveyance claims to creditors drawn from
25 Section 544's statute of limitations is not based on the language

1 of the Code, which says nothing about the reversion of claims
2 vested in the trustee et al. by Section 544. Statutes of
3 limitation usually are intended to limit the assertion of stale
4 claims and to provide peace to possible defendants, Converse v.
5 Gen. Motors Corp., 893 F.2d 513, 516 (2d Cir. 1990), and not to
6 change the identity of the authorized plaintiffs without some
7 express language to that effect. A decisive part of appellants'
8 legal theory thus has no support in the language of the Code.

9 Even if this gap is assumed not to exist, or can be
10 otherwise traversed, appellants' theory encounters other serious
11 problems. Section 544, vesting avoidance powers in the trustee
12 et al., is intended to simplify proceedings, reduce the costs of
13 marshalling the debtor's assets, and assure an equitable
14 distribution among the creditors. See In re MortgageAmerica
15 Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983) (noting that "[t]he
16 'strong arm' provision of the [Bankruptcy] Code, 11 U.S.C. § 544,
17 allows the bankruptcy trustee to step into the shoes of a
18 creditor for the purpose of asserting causes of action under
19 state fraudulent conveyance acts for the benefit of all
20 creditors, not just those who win a race to judgment" and Section
21 362 helps prevent "[a]ctions for the recovery of the debtor's
22 property by individual creditors under state fraudulent
23 conveyance laws [that] would interfere with [the bankruptcy]
24 estate and with the equitable distribution scheme dependent upon

1 it"). However, these purposes are hardly consistent with the
2 process hypothesized by appellants.

3 Accepting for purposes of argument appellants' view of the
4 applicable process, Section 362, at the very least, prevented
5 appellants (for a time) from bringing their state law, fraudulent
6 conveyance claims, while Section 546(e) barred the Committee from
7 seeking to enforce or, necessarily, to settle them. Appellants'
8 argument thus seems to posit that their claims are on hold until
9 the trustees et al. decide whether to bring an action they are
10 powerless to bring or to pass on to creditors a power they do not
11 have. In short, it assumes that, when creditors' avoidance
12 claims are lodged in the trustee et al. and are diminished in
13 that hand by the Code, they reemerge in undiminished form in the
14 hands of creditors after the statute of limitations governing
15 actions by the trustee et al. has run or the bankruptcy court
16 lifts the automatic stay.

17 In the context of the Code, however, any such process is a
18 glaring anomaly. Section 548(a)(1)(A) vests trustees with a
19 federal claim to avoid the very transfers attacked by appellants'
20 state law claims -- but only on an intentional fraud theory.
21 There is little apparent reason to limit trustees et al. to
22 intentional fraud claims while not extinguishing constructive
23 fraud claims but rather leaving them to be brought later by
24 individual creditors. In particular, enforcement of the
25 intentional fraud claim is undermined if creditors can later

1 bring state law, constructive fraudulent conveyance claims
2 involving the same transfers. Any trustee would have grave
3 difficulty negotiating more than a nominal settlement in the
4 federal action if it cannot preclude state claims attacking the
5 same transfers but not requiring a showing of actual fraudulent
6 intent. Unable to settle, a trustee et al. will be reluctant to
7 expend the estate's resources on vigorously pursuing the federal
8 claim while awaiting the stayed state claims to revert and to be
9 litigated by creditors. As happened in the present matter, the
10 result is that the trustee et al.'s action awaits the pursuit of
11 piecemeal actions by creditors. This is precisely opposite of
12 the intent of the Code's procedures. While a bankruptcy court
13 can reduce the delay by an early lifting of the automatic stay
14 with regard to constructive fraudulent conveyance actions, that
15 action would underline the anomaly of applying the stay to the
16 bringing of claims that are barred to trustees et al.

17 Staying ordinary state law, constructive fraudulent
18 conveyance claims by individual creditors while the trustee
19 deliberates is a rational method of avoiding piecemeal litigation
20 and ensuring an equitable distribution of assets among creditors.
21 See MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006)
22 ("The objectives of the Bankruptcy Code . . . include . . . 'the
23 need to protect creditors and reorganiz[e] debtors from piecemeal
24 litigation'") (quoting Ins. Co. of N. Am. v. NGC
25 Settlement Trust & Asbestos Claims Mgmt. Corp., 118 F.3d 1056,

1 1069 (5th Cir. 1997)). However, the scheme described by
2 appellants does not resemble this method either in simplicity or
3 in the equitable treatment of creditors.

4 To rationalize these anomalies, appellants speculate as to
5 -- more accurately, imagine -- a deliberate balancing of
6 interests by Congress. They argue that Congress wanted to
7 balance the need for certainty and finality in securities
8 markets, recognized in Section 546(e), against the need to
9 maximize creditors' recoveries, recognized in various other
10 provisions. Congress did so, they argue, by limiting only the
11 avoidance powers of trustees et al., not those of individual
12 creditors (save for the stay), in Section 546(e) because actions
13 by trustees et al. are a greater threat to securities markets
14 than are actions by individual creditors. Resp. & Reply Br. of
15 Pls.-Appellants-Cross-Appellees 71. That greater threat results
16 from the fact that a trustee's power of avoidance is funded by
17 the debtor's estate, see 11 U.S.C. §§ 327, 330, supported by
18 national long-arm jurisdiction, see Fed. R. Bankr. P.
19 7004(d),(f), and can be used to avoid the entirety of a transfer,
20 Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.), 464
21 B.R. 606, 615-17 (Bankr. S.D.N.Y. 2012) (citing Moore v. Bay, 284
22 U.S. 4 (1931)). Creditors, in turn, have no such funding, are
23 limited by state jurisdictional rules, and can sue only for their
24 individual losses. See In re Integrated Agri, Inc., 313 B.R.
25 419, 428 (Bankr. C.D. Ill. 2004). Therefore, appellants argue

1 that a deliberate “balance” was struck by protecting securities
2 markets from trustees’ et al. actions while subjecting them to
3 the lesser disruption individual creditors’ actions might cause
4 after a two-year stay. Resp. & Reply Br. of Pls.-Appellants-
5 Cross-Appellees 83-85. For a court to upset this delicate
6 balance would constitute judicial intrusion on policy decisions
7 rightfully left to the Congress.

8 However, the balance described above is an ex post
9 explanation of a legal scheme that appellants must first
10 construct, and then justify as rational, because it is essential
11 to their claims. Although they argue that the scheme was
12 deliberately constructed by Congress, that argument lacks any
13 support whatsoever in the legislative deliberations that led to
14 Section 546(e)’s enactment.

15 Moreover, appellants’ arguments understate the number of
16 creditors who would sue, if allowed, and the corresponding extent
17 of the danger to securities markets. Creditors may assign their
18 claims and various methods of aggregation can lead to billions of
19 dollars of claims, as here.

20 (iii) No Plain Meaning

21 These issues reflect ambiguities as to exactly what is
22 transferred to trustees et al. by Section 544(b)(1). It is clear
23 that trustees et al. own the debtors’ estates, which include the
24 debtors’ property and legal claims. See 11 U.S.C. § 541(a)(1)
25 (Among other things, the “estate is comprised of . . . all legal

1 or equitable interests of the debtor in property as of the
2 commencement of the case"); U.S. ex rel. Spicer v. Westbrook, 751
3 F.3d 354, 361-62 (5th Cir. 2014) ("The phrase 'all legal or
4 equitable interests' includes legal claims -- whether based on
5 state or federal law."). Avoidance claims belong to creditors,
6 however, and whether they become the property of the debtors'
7 estates is a debated, and somewhat metaphysical, issue. See Note
8 7, infra. The issue does have a limited practical bearing on the
9 present matter, however. If the claims asserted by appellants
10 became the property of the debtor's estate upon Tribune's
11 bankruptcy and were thereby limited in the hands of the
12 Committee, their reversion in an unaltered form, whether
13 occurring automatically or by act of the Committee or bankruptcy
14 court, might seem counterintuitive.

15 Appellants' reliance on the applicability of the automatic
16 stay to their claims would arguably support the "property" view.
17 The stay is intended in part to protect the property rights of
18 the trustee et al. in the debtor's estate. Subjecting avoidance
19 actions by creditors to the stay has been supported by various
20 courts on the ground that such claims are either the property of
21 the debtor's estate or have an equivalent legal status. See In
22 re MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983);
23 In re Swallen's, Inc., 205 B.R. 879, 882 (Bankr. S.D. Ohio 1997);
24 Matter of Fletcher, 176 B.R. 445, 452 (Bankr. W.D. Mich. 1995).

1 Whether, and to what degree, fraudulent conveyance claims
2 become the property of a bankrupt estate was, at the time of
3 Section 546(e)'s enactment, and now, anything but clear. The
4 principal Supreme Court precedent held that such claims are the
5 property of the debtor's estate. Trimble v. Woodhead, 102 U.S.
6 647, 649 (1880). It is a very old decision but has not been
7 expressly overruled. Subsequent court of appeals decisions are
8 bountiful in contradictory statements regarding the property
9 issue. Compare In re Cybergene Corp., 226 F.3d 237, 241, 246
10 (3d Cir. 2000) (stating that "fraudulent transfer claims have
11 long belonged to a transferor's creditors, whose efforts to
12 collect their debts have essentially been thwarted as a
13 consequence of the transferor's actions" but also noting that the
14 debtor's "'assets' and 'property of the estate' have different
15 meanings, evidenced in part by the numerous provisions in the
16 Bankruptcy Code that distinguish between property of the estate
17 and property of the debtor, or refer to one but not the other"),
18 and Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 212 (2d
19 Cir. 2014) ("Our case law is clear that assets targeted by a
20 fraudulent conveyance action do not become property of the
21 debtor's estate under the Bankruptcy Code until the Trustee
22 obtains a favorable judgment."), with Cumberland Oil Corp. v.
23 Thropp, 791 F.2d 1037, 1042 (2d Cir. 1986) (noting that causes of
24 action alleging violation of fraudulent conveyance laws would be
25 property of the estate), and Nat'l Tax Credit Partners v. Havlik,

1 20 F.3d 705, 708-09 (7th Cir. 1994) (“[T]he right to recoup a
2 fraudulent conveyance, which outside of bankruptcy may be invoked
3 by a creditor, is property of the estate that only a trustee or
4 debtor in possession may pursue once a bankruptcy is underway.”).

5 Use of the term “property” as a short-hand way of suggesting
6 exclusivity has merit, Henry E. Smith, Property and Property
7 Rules, 79 N.Y.U. L. Rev. 1719, 1770-74 (2004), but Section
8 544(b)(1) does not expressly state whether the bundle of rights
9 transferred can revert. However, we need not resolve either the
10 “property” or the reversion issues. Whether the statutory
11 language has a plain meaning turns on whether a consensus would
12 have existed among reasonable, contemporaneous readers as to
13 meaning of that language in the particular statutory context.
14 See Pettus v. Morgenthau, 554 F.3d 293, 297 (2d Cir. 2009) (“[W]e
15 attempt to ascertain how a reasonable reader would understand the
16 statutory text, considered as a whole.”); Engine Mfrs. Ass’n v.
17 S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252-53 (2004)
18 (noting that “[s]tatutory construction must begin with the
19 language employed by Congress and the assumption that the
20 ordinary meaning of that language accurately expresses the
21 legislative purpose”) (quoting Park ‘N Fly, Inc. v. Dollar Park &
22 Fly, Inc., 469 U.S. 189, 194 (1985)). If differing views as to
23 meaning were reasonable at the time of Section 546(e)’s
24 enactment, its meaning is less than plain. See, e.g., Rodriguez
25 v. Cuomo, 953 F.2d 33, 39-40 (2d Cir. 1992).

1 Appellants' arguments on meaning rely not only on the
2 reference to a trustee's et al. powers but equally, or more so,
3 on a claim of settled law at the time of Section 546(e)'s
4 enactment that creditors' avoidance rights not only revert to
5 creditors but also revert in their original breadth. However,
6 whether fraudulent conveyance claims revert as a matter of law
7 upon a trustee's failure to act was, both at the time Section
8 546(e) was passed as well as now, unclear, as discussed supra. A
9 contemporaneous reader would not, therefore, necessarily have
10 believed it plain that Section 546(e)'s reference only to a
11 trustee's et al. avoidance claim meant that creditors could bring
12 their own claims.⁶

13 A contemporaneous reader would also notice that the language
14 of the automatic stay provision does not literally apply to
15 appellants' actions and that no provision for the reversion of
16 claims vested in the trustee et al. by Section 544 exists. As
17 explained supra, having to draw an inference of reversion of
18 rights from that provision's statute of limitations might well
19 have appeared as a leap several bridges too far to such a reader.
20 Indeed, the vesting of avoidance claims in the trustee et al.,
21 the lack of applicable language in the automatic stay provision,
22 and the lack of a statutory basis for reversion might well have
23 suggested to such a reader that Section 544's vesting of

⁶ Our task of determining how a contemporaneous reader would have read Section 546(e) does not depend on the caselaw of one particular circuit.

1 avoidance proceedings in the trustee et al. cut off creditors
2 from any avoidance rights other than a share of the proceeds in
3 bankruptcy.

4 Even passing these obstacles, the structure of the Code and
5 the relationship of its pertinent sections might have suggested
6 to a contemporaneous reader that altered rights do not revert to
7 creditors unaltered, or to put it another way, a trustee et al.
8 cannot pass on, or "allow" to revert through passivity, a right
9 the trustee et al. does not have. To be sure, contemporaneous
10 readers might have taken other views, including those of
11 appellants, but that is the very definition of ambiguity.

12 (iv) Conclusion

13 We need not resolve these issues or even hold that the lack
14 of statutory support, ambiguities, anomalies, or conflicts with
15 purposes of the Code are sufficient to support a preemption
16 holding. They are sufficient, however, to dispel the suggestions
17 found in some discussions of these issues of a clear textual
18 basis for appellants' theory in the Code and an overall
19 consistency with congressional purpose. See In re Lyondell Chem.
20 Co., 503 B.R. 348, 358-59 (Bankr. S.D.N.Y. 2014) as corrected
21 (Jan. 16, 2014); In re: Tribune Co. Fraudulent Conveyance Litig.,
22 499 B.R. at 315. We also need not issue a decision that affects
23 fraudulent conveyance actions brought by creditors whose claims
24 are not subject to Section 546(e). Our ensuing discussion
25 concludes that the purposes and history of that Section

1 necessarily reflect an intent to preempt the claims before us.
2 We turn now to the conflict between those claims and Section
3 546(e).

4 4. Conflict with Section 546(e)

5 As discussed supra, the meaning of Section 546(e) with
6 regard to appellants' rights to bring the actions before us is
7 ambiguous. We must, therefore, look to its language, legislative
8 history, and purposes to determine its effect. Marvel
9 Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002).

10 Every congressional purpose reflected in Section 546(e), however
11 narrow or broad, is in conflict with appellants' legal theory.
12 Their claims are, therefore, preempted.

13 Section 546(e) was intended to protect from avoidance
14 proceedings payments by and to financial intermediaries in the
15 settlement of securities transactions or the execution of
16 securities contracts. The method of settlement through
17 intermediaries is essential to securities markets. Payments by
18 and to such intermediaries provide certainty as to each
19 transaction's consummation, speed to allow parties to adjust the
20 transaction to market conditions, finality with regard to
21 investors' stakes in firms, and thus stability to financial
22 markets. See H.R. Rep. No. 97-420 (1982); H.R. Rep. No. 95-595
23 (1977). Unwinding settled securities transactions by claims such
24 as appellants' would seriously undermine -- a substantial
25 understatement -- markets in which certainty, speed, finality,

1 and stability are necessary to attract capital. To allow
2 appellants' claims to proceed, we would have to construe Section
3 546(e) as achieving the opposite of what it was intended to
4 achieve.

5 Allowing creditors to bring claims barred by Section 546(e)
6 to the trustee et al. only after the trustee et al. fails to
7 exercise powers it does not have would increase the disruptive
8 effect of an unwinding by lengthening the period of uncertainty
9 for intermediaries and investors. Indeed, the idea of preventing
10 a trustee from unwinding specified transactions while allowing
11 creditors to do so, but only later, is a policy in a fruitless
12 search of a logical rationale.

13 The narrowest purpose of Section 546(e) was to protect other
14 intermediaries from avoidance claims seeking to unwind a bankrupt
15 intermediary's transactions that consummated transfers between
16 customers. See H.R. Rep. No. 97-420 (1982). It must be
17 emphasized that appellants' legal theory would clearly allow such
18 claims to be brought (later) by creditors of the bankrupt
19 intermediary. Even the narrowest purpose of Section 546(e) is
20 thus at risk.

21 Some judicial and other discussions of these issues avoid
22 addressing the full effects of adopting appellants' arguments.
23 See In re Lyondell Chem. Co., 503 B.R. 348, 359-78 (Bankr.
24 S.D.N.Y. 2014) as corrected (Jan. 16, 2014). Such analysis
25 always begins by reliance on the "trustee" language, id. at 358,

1 but then narrows the scope of the transfers covered by Section
2 546(e)'s language. For example, appellants argue that the
3 concerns of the amicus curiae Securities and Exchange Commission
4 regarding the effect of the district court's decision on the
5 securities markets are misplaced, because appellants are not
6 seeking money from the intermediaries.⁷ Resp. & Reply Br. of
7 Pls.-Appellants Cross-Appellees 78-82. In doing so, they rely
8 upon the Lyondell opinion, which, after relying on the "trustee"
9 language, held that Section 546(e) is not preemptive of state
10 law, fraudulent conveyance actions involving LBOs because such
11 actions do not implicate the purposes of Section 546(e). 503
12 B.R. at 372-73.

13 There is no little irony in putting lynchpin reliance on the
14 word "trustee" while ignoring the language that follows. In any
15 event, Section 546(e)'s language clearly covers payments, such as
16 those at issue here, by commercial firms to financial
17 intermediaries to purchase shares from the firm's shareholders.
18 11 U.S.C. § 546(e) (limitations on avoidance of transfers made to
19 a financial intermediary "in connection with a securities
20 contract"). A search for legislative purpose is heavily informed
21 by language, and analyzing all the language of a provision and

⁷ Under the "Collapsing Doctrine," "[c]ourts analyzing the effect of LBOs have routinely analyzed them by reference to their economic substance, 'collapsing' them, in many cases, to consider the overall effect of multi-step transactions." In re Lyondell Chem. Co., 503 B.R. 348, 354, 379 (Bankr. S.D.N.Y. 2014) as corrected (Jan. 16, 2014). Monies passed through intermediaries are deemed to be the property only of the ultimate recipients, here the cashed out shareholders.

1 its relationship to the Code as a whole is preferable to using
2 literalness here and perceived legislative purpose (without
3 regard to language) there as needed to reach particular results.
4 See King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (“[O]ftentimes
5 the meaning -- or ambiguity -- of certain words or phrases may
6 only become evident when placed in context. So when deciding
7 whether the language is plain, we must read the words in their
8 context and with a view to their place in the overall statutory
9 scheme. Our duty, after all, is to construe statutes, not
10 isolated provisions.”) (internal quotation marks and citations
11 omitted).

12 We do not dwell on this because we perceive no conflict
13 between Section 546(e)’s language and its purpose. Section
14 546(e) is simply a case of Congress perceiving a need to address
15 a particular problem within an important process or market and
16 using statutory language broader than necessary to resolve the
17 immediate problem. Such broad language is intended to protect
18 the process or market from the entire genre of harms of which the
19 particular problem was only one symptom. The legislative history
20 of Section 546(e) clearly reveals such a purpose. That history
21 (confirmed by the broad language adopted) reflects a concern over
22 the use of avoidance powers not only after the bankruptcy of an
23 intermediary, but also after a “customer” or “other participant”
24 in the securities markets enters bankruptcy. See H.R. Rep. No.
25 97-420 (1982). To be sure, the examples used by the Section’s

1 proponents focused on the immediate concern of creditors of
2 bankrupt brokers seeking to unwind payments by the bankrupt firm
3 to other intermediaries. Id. Such actions were perceived as
4 creating a danger of “a ripple effect,” id., a chain of
5 bankruptcies among intermediaries disrupting the securities
6 market generally. From these examples, appellants, and others,
7 have argued that when monetary damages are sought only from
8 shareholders, or an LBO is involved, the purposes of Section
9 546(e) are not implicated. See Resp. & Reply Br. of Pls.-
10 Appellants-Cross-Appellees 79; In re Lyondell, 503 B.R. at 358-
11 59. Even apart from using the oil and water mixture of applying
12 a narrow literalness to the word “trustee” and disregarding the
13 rest of the Section’s language, we disagree.

14 As courts have recognized, Congress’s intent to “minimiz[e]
15 the displacement caused in the commodities and securities markets
16 in the event of a major bankruptcy affecting those industries,”
17 In re Quebecor World (USA) Inc., 719 F.3d 94, 100 (2d Cir. 2013)
18 (quoting Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.,
19 651 F.3d 329, 333 (2d Cir. 2011)), reflected a larger purpose
20 memorialized in the legislative history’s mention of bankrupt
21 “customers” or “other participant[s]” and in the broad statutory
22 language defining the transactions covered. That larger purpose
23 was to “promot[e] finality . . . and certainty” for investors, by
24 limiting the circumstances, e.g., to cases of intentional fraud,
25 under which securities transactions could be unwound. In re

1 Kaiser Steel Corp., 952 F.2d 1230, 1240 n.10 (10th Cir. 1991)
2 (quoting H. Rep. No. 484, 101st Cong. 2d Sess. 2 (1990),
3 reprinted in 1990 U.S.C.C.A.N. 223, 224).

4 The broad language used in Section 546(e) protects
5 transactions rather than firms, reflecting a purpose of enhancing
6 the efficiency of securities markets in order to reduce the cost
7 of capital to the American economy. See Bankruptcy of Commodity
8 and Securities Brokers: Hearings Before the Subcomm. on
9 Monopolies and Commercial Law of the Comm. on the Judiciary, 47th
10 Cong. 239 (1981) (statement of Bevis Longstreth, Commissioner,
11 SEC) (explaining that, without 546(e), the Bankruptcy Code's
12 "preference, fraudulent transfer and stay provisions can be
13 interpreted to apply in harmful and costly ways to customary
14 methods of operation essential to the securities industry"). As
15 noted, central to a highly efficient securities market are
16 methods of trading securities through intermediaries. Section
17 546(e)'s protection of the transactions consummated through these
18 intermediaries was not intended as protection of politically
19 favored special interests. Rather, it was sought by the SEC --
20 and corresponding provisions by the CFTC, see Bankruptcy Act
21 Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on
22 Civil & Constitutional Rights of the H. Comm. on the Judiciary,
23 94th Cong., Supp. App. Pt. 4, 2406 (1976) -- in order to protect
24 investors from the disruptive effect of after-the-fact unwinding
25 of securities transactions.

1 A lack of protection against the unwinding of securities
2 transactions would create substantial deterrents, limited only by
3 the copious imaginations of able lawyers, to investing in the
4 securities market. The effect of appellants' legal theory would
5 be akin to the effect of eliminating the limited liability of
6 investors for the debts of a corporation: a reduction of capital
7 available to American securities markets.

8 For example, all investors in public companies would face
9 new and substantial risks, if appellants' theory is adopted. At
10 the very least, each would have to confront a higher degree of
11 uncertainty even as to the consummation of securities transfers.
12 The risks are not confined to the consummation of securities
13 transactions. Pension plans, mutual funds, and similar
14 institutional investors would find securities markets far more
15 risky if exposed to substantial liabilities derived from
16 investments in securities sold long ago. If appellants were to
17 prevail, a pension plan whose position in a firm was cashed out
18 in a merger would have to set aside reserves in case the
19 surviving firm went bankrupt and triggered avoidance actions
20 based on a claim that the cash out price exceeded the value of
21 the shares. Every economic downturn would expose such
22 institutional investors not only to a decline in the value of
23 their current portfolios but also to claims for substantial
24 monies received from mergers during good times.

1 Given the occasional volatility of economic events, any
2 transaction buying out shareholders would risk being attacked as
3 a fraudulent conveyance avoidable by creditors if the firm
4 faltered. Appellants' legal theory would even reach investors
5 who, after voting against a merger approved by other
6 shareholders, were involuntarily cashed out. Tender offers,
7 which almost always involve a premium above trading price, Lynn
8 A. Stout, Are Takeover Premiums Really Premiums? Market Price,
9 Fair Value, and Corporate Law, 99 Yale L.J. 1235, 1235 (1990),
10 would imperil cashed out shareholders if the surviving entity
11 encountered financial difficulties.

12 If appellants' theory was adopted, individual investors
13 following a conservative buy-and-hold strategy with a diversified
14 portfolio designed to reduce risk might well decide that such a
15 strategy would actually increase the risk of crushing
16 liabilities. Such a strategy is adopted because it involves low
17 costs of monitoring the prospects of individual companies and
18 emphasizes the offsetting of unsystematic risks by investing in
19 multiple firms. See Leigh v. Engle, 858 F.2d 361, 368 (7th Cir.
20 1988). Appellants' legal theory might well require costly and
21 constant monitoring by investors to rid their portfolios of
22 investments in firms that might, under then-current
23 circumstances, be subject to mergers, stock buy-backs, or tender
24 offers (and would otherwise be good investments). Investing in

1 multiple companies, the essence of diversification, would
2 increase the danger of avoidance liability.

3 The threat to investors is not simply losing a lawsuit.
4 Given the costliness of defending such legal actions and the long
5 delay in learning their outcome, exposing investors to even very
6 weak lawsuits involving millions of dollars would be a
7 substantial deterrent to investing in securities. The need to
8 set aside reserves to meet the costs of litigation -- not to
9 mention costs of losing -- would suck money from capital markets.

10 As noted, concern has been expressed that LBOs are different
11 from other transactions in ways pertinent to the Bankruptcy Code.
12 In re Lyondell Chem. Co., 503 B.R. 348, 354, 358-59 (Bankr.
13 S.D.N.Y. 2014), as corrected (Jan. 16, 2014). However, the
14 language of Section 546(e) does not exempt from its protection
15 payments by firms to intermediaries to fund ensuing payments to
16 shareholders for stock.

17 Moreover, securities markets are heavily regulated by state
18 and federal governments. The statutory supplements used in law
19 school securities regulation courses are thick enough to rival
20 Kevlar in stopping bullets. Mergers and tender offers are among
21 the most regulated transactions. See, e.g., Williams Act, 15
22 U.S.C.A. §§ 78m(d)-(e), 78n(d). Much of the content of state and
23 federal regulation is designed to protect investors in such
24 transactions. Much of that content is also designed to maximize
25 the payout to shareholders cashed out in a merger, see, e.g.,

1 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173,
 2 182 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d
 3 946, 955-56 (Del. 1985), or accepting a tender offer, see
 4 Williams Act, 15 U.S.C.A. §§ 78m(d)-(e), 78n(d). Appellants'
 5 legal theory would allow creditors to seek to portray that
 6 maximization as evidence supporting a crushing liability. A
 7 legal rule substantially undermining those goals of state and
 8 federal regulation -- again, one akin to eliminating limited
 9 liability -- is a systemic risk.

10 It is also argued that the Bankruptcy Code has many
 11 different purposes and that Section 546(e) does not clearly
 12 "trump[] all [the] other[s]." In re Tribune Co. Fraudulent
 13 Conveyance Litig., 499 B.R. 310, 317 (S.D.N.Y. 2013). The
 14 pertinent -- and "trumping" -- "other" purpose of the Code is
 15 said to be the maximization of assets available to creditors.
 16 Id. Courts customarily accommodate statutory provisions in
 17 tension with one another where the principal purpose of each is
 18 attainable by limiting each in achieving secondary goals. See,
 19 e.g., In re Colonial Realty Co., 980 F.2d 125, 132 (2d Cir.
 20 1992). However, Section 546(e) is in full conflict with the goal
 21 of maximizing the assets available to creditors. Its purpose is
 22 to protect a national, heavily regulated market by limiting
 23 creditors' rights. Conflicting goals are not accommodated by
 24 giving value with the right hand and taking it away with the
 25 left. Section 546(e) cannot be trumped by the Code's goal of

1 maximizing the return to creditors without thwarting the
2 Section's purposes.

3 5. Additional Considerations Regarding Congressional Intent

4 We therefore conclude that Congress intended to protect from
5 constructive fraudulent conveyance avoidance proceedings
6 transfers by a debtor in bankruptcy that fall within Section
7 546(e)'s terms. As discussed supra, appellants' theory hangs on
8 the ambiguous use of the word "trustee," has no basis in the
9 language of the Code, leads to substantial anomalies, ambiguities
10 and conflicts with the Code's procedures, and, most importantly,
11 is in irreconcilable conflict with the purposes of Section
12 546(e). In this regard, we do not ignore Section 544(b)(2),
13 which prohibits avoidance of a transfer to a charitable
14 contribution by a trustee but also expressly preempts state law
15 claims by creditors. It states: "Any claim by any person to
16 recover a transferred contribution described in the preceding
17 sentence under Federal or State law in a Federal or State March
18 14, 2016 court shall be preempted by the commencement of the
19 case." 11 U.S.C. § 544(b)(2). Appellants rely heavily upon this
20 provision to argue that, while Congress knew how to explicitly
21 preempt state law in the Bankruptcy Code, it chose not to do so
22 in the context of Section 546(e).

23 Appellants' argument suffers from a fatal flaw, however. In
24 Arizona v. United States, the Supreme Court made clear that "the
25 existence of an express pre-emption provisio[n] does not bar the

1 ordinary working of conflict pre-emption principles or impose a
2 special burden that would make it more difficult to establish the
3 preemption of laws falling outside the clause." 132 S. Ct. 2492,
4 2504-05 (2012) (quotation marks and citations omitted); see also
5 Hillman, 133 S. Ct. at 1954 ("[W]e have made clear that the
6 existence of a separate pre-emption provision does not bar the
7 ordinary working of conflict pre-emption principles.") (internal
8 quotation marks and citations omitted). Section 544(b)(2) does
9 not, therefore, undermine our conclusion as to Congress's intent.

10 Next, appellants argue that Congress's failure to amend
11 Section 546(e) over the years that it has existed in pertinent
12 form reflects a congressional intent to allow their actions to
13 proceed. In support, they point only to requests for an
14 amendment by the Chair of the CFTC and by Comex, see Bankruptcy
15 Act Revision: Hearings on H.R. 31 and H.R. 32 Before the
16 Subcomm. on Civil & Constitutional Rights of the H. Comm. on the
17 Judiciary, 94th Cong., Supp. App. Pt. 4, 2406 (1976); Bankruptcy
18 Reform Act: Hearings on S. 2266 and H.R. 8000 Before the
19 Subcomm. on Improvements in Judicial Machinery of the S. Comm. on
20 the Judiciary, 95th Cong. 1297 (1978), the enactment of Section
21 544(b)(2) with an express preemption provision, and a decision in
22 the District of Delaware, PHP Liquidating, LLC v. Robbins, 291
23 B.R. 603, 607 (D. Del. 2003), aff'd sub nom. In re PHP Healthcare
24 Corp., 128 F. App'x 839 (3d Cir. 2005).

1 To be sure, a history of relevant practice may support an
2 inference of congressional acquiescence. See, e.g., Fiero v.
3 Fin. Indus. Regulatory Auth., 660 F.3d 569, 577 (2d Cir. 2011)
4 (noting that FINRA's "longstanding reliance" on enforcement
5 mechanisms other than fines -- and Congress's failure to alter
6 FINRA's enforcement powers -- "indicates that FINRA is not
7 authorized to enforce the collection of its fines through the
8 courts"); Am. Tel. & Tel. Co. v. M/V Cape Fear, 967 F.2d 864, 872
9 (3d Cir. 1992) ("The Supreme Court in the past has implied
10 private causes of action where Congress, after a 'consensus of
11 opinion concerning the existence of a private cause of action'
12 had developed in the federal courts, has amended a statute
13 without mentioning a private remedy.") (quoting Merrill Lynch,
14 Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 380
15 (1982)). However, the effect or meaning of legislation is not to
16 be gleaned from isolated requests for more protective, but
17 possibly redundant, legislation. The impact of Section 544(b)(2)
18 is discussed immediately above and need not be repeated here.

19 Finally, the failure of Congress to respond to court
20 decisions is of interpretive significance only when the decisions
21 are large in number and universally, or almost so, followed. See
22 Merrill Lynch, 456 U.S. at 379 (holding that congressional
23 amendment of the Commodity Exchange Act that was silent on the
24 subject of private judicial remedies did not overturn federal
25 court decisions routinely and consistently [] recogniz[ing] an

1 implied private cause of action") (emphasis added); see also
2 Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.19 (1979)
3 (holding that the Supreme Court's implication of a private right
4 of action under § 10(b) of the Securities and Exchange Act of
5 1934 was simply acquiescence in "the 25-year-old acceptance by
6 the lower federal courts of an implied action"). The present
7 decision is far from a departure from a generally accepted
8 understanding. The district court decision in this very case and
9 the bankruptcy court decision in Lyondell are in fact the sole
10 extensive judicial discussions of the issue. Indeed, our present
11 decision does not even constitute a split among the circuits. As
12 or more telling with regard to the existence of a general
13 understanding or a need for action, we find no history of the use
14 of state law, constructive fraudulent conveyance actions to
15 unwind settled securities transactions, either after a bankruptcy
16 or in its absence.

17 The Constitution's establishment of two legislative branches
18 that must act jointly and with the executive's approval was
19 designed to render hasty action possible only in circumstances of
20 widely perceived need. Congress's failure to act must be viewed
21 in that context, and reliance upon an inference of satisfaction
22 with the status quo must at least be based on evidence of a long-
23 standing and recognized status quo. In the present matter, we
24 cannot draw the suggested inference on the basis of the skimpy

1 evidence submitted while the inference of a preemptive intent is
2 easily drawn.

3 CONCLUSION

4 For the reasons stated, we affirm the dismissal of the
5 complaint, on preemption rather than standing grounds. We
6 resolve no issues regarding the rights of creditors to bring
7 state law, fraudulent conveyance claims not limited in the hands
8 of a trustee et al. by Code Section 546(e) or by similar
9 provisions such as Section 546(g) which is at issue in an appeal
10 heard in tandem with the present matter, see Whyte v. Barclays
11 Bank.