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The Use of Fraudulent Conveyance Principles to Overturn LBOs

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Fraudulent Conveyance

- Fraudulent conveyance laws exist to protect a company and its creditors from transactions that cause harm by extracting value without giving reasonable value in return.
- Anyone who benefited from the transaction can potentially be found liable for the fraudulent transfer.
- An LBO transaction that goes bad can be a prime target for fraudulent conveyance claims because lenders, management and shareholders may benefit greatly, while the debt used to finance the deal can render the company insolvent.
- Because fraudulent conveyance claims are difficult and expensive to litigate, these cases often, but not always, settle.

Leveraged Buyouts

- An LBO is typically an acquisition using a significant amount of borrowed money to meet the cost of the acquisition. Directly or indirectly, the assets of the company being acquired are used as collateral or support for the leveraged transactions.
- The purpose of LBOs is to allow companies to make acquisitions of companies without committing a lot of their capital to make the acquisition.
- LBOs are credited with creating a market for corporate control by funding potential owners who would not otherwise have access to sufficient capital.
- LBOs potentially create value for the firm as a whole but also potentially transfer value from creditors to equity holders.
- Loan proceeds are typically obtained by the acquiring entity, secured by the target entity's assets, and used by the acquiring entity to buy-out the existing holder(s) of the target entity.

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LBO Fraudulent Conveyance Litigation

- If the target of an LBO fails, parties may initiate fraudulent transfer litigation to:
 - Avoid the liens granted to the third party lenders that financed the LBO; and
 - Recover the payments made to the target company's former shareholders when they cashed out their equity positions.
- The potential for fraudulent conveyance liability most frequently arises when it is alleged that the debtor failed to receive adequate consideration for the transfer and the debtor at the time of, or as a result of, the transfer was balance sheet insolvent, equitably insolvent, or left with unreasonably small capital.
- Unsecured creditors need recourse under fraudulent conveyance laws because:
 - They are not a party to the LBO;
 - They have no good proxy among the parties to assert their claims; and
 - Absent legal recourse, many have no ability to negotiate protection against uncompensated harm.

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LBO Fraudulent Conveyance Litigation (cont'd)

- Fraudulent transfer law originally developed in response to the situation where debtors on the verge of insolvency would transfer their assets to friends or relatives, leaving little or no value in their estates for creditors.
- The English legal system responded to this problem by allowing creditors to petition a court to void the transfer as a “fraudulent conveyance.”
- The standard under which a fraudulent transfer could be voided was first codified in England in 1570, which permitted creditors to set aside transfers made with the intent to delay, hinder or defraud creditors. Similar standards are used in modern U.S. law.

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LBO Fraudulent Conveyance Litigation (cont'd)

- There has been increased attention on fraudulent conveyance litigation over the last few years.
- During the credit boom, banks and bondholders financed many highly leveraged transactions.
- As the debts became due and businesses struggled to refinance their debts, there was a wave of defaults, bankruptcies and inter-creditor disputes.

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Theory of Clawbacks

- The term “clawback” is used generally as a theory for recovering benefits that have been conferred under a claim of right, but that are still recoverable because unfairness would otherwise result.
 - Retroactive Clawbacks- imposed after the contractual right has arisen and benefits have been conferred.
 - Prospective Clawbacks- introduced into contracts before the claim of right to the benefits has arisen.

Increasing Attention on Clawbacks

- Madoff Clawbacks- trustee has sought to recover payments of fictitious profits and withdrawals of principal.
- Executive Compensation Clawbacks- based upon restatements or subsequent period losses.
- Sarbanes Oxley Section 304 gives the SEC the power to recover certain restatement-related compensation and stock profits from CEOs and CFOs of public companies in the event the restatement was caused by misconduct.
- Dodd-Frank Section 954 requires the SEC to order national securities exchanges and associations to prohibit the listing of a security whose issuer does not have a clawback policy.

Potential Defendants in Fraudulent Transfer Litigation

- Claims for Fraudulent Transfer (among others) can be brought against several parties involved in a failed transaction, including:
 - Officers and Directors;
 - Lenders;
 - Financial Advisors; and
 - Former Shareholders.

Two Types of Fraudulent Transfer

- Actual Fraud- involves intent to defraud where the trustee must prove that the debtor made transfers with “actual intent to hinder, delay, or defraud” investors.
- Constructive Fraud- does not require fraudulent intent but looks at the underlying economics of the transaction.

Actual Fraud

- Because direct evidence of fraudulent intent is often unavailable, courts typically rely on circumstantial evidence to infer fraudulent intent. In evaluating the transferor's actions, courts have looked at various "badges of fraud" including:
 - Becoming insolvent because of the transfer;
 - Lack or inadequacy of consideration;
 - Family or insider relationship among parties;
 - The retention of possession, benefits or use of property in question;
 - The existence of the threat of litigation;
 - The financial situation of the debtor at the time of transfer or after transfer;
 - The existence or a cumulative effect of a series of transactions after the onset of debtor's financial difficulties;
 - The general chronology of events;
 - The secrecy of the transaction in question; and
 - Deviation from the usual method or course of business.

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Actual Fraud (cont'd)

- The presence of one or more badges of fraud shifts the burden of proof from the creditor to the debtor. The debtor must then prove that despite the circumstantial evidence, the transfer was made with no fraudulent intent.
- Proof of insolvency and fair consideration are not material to a determination of actual intent to defraud.

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Constructive Fraud

- A constructive fraudulent transfer typically occurs when a debtor makes a transfer and receives less than reasonably equivalent value, and at the time of such transfer the debtor:
 - Was insolvent;
 - Had unreasonably small capital for any business in which the debtor was or was about to become engaged; or
 - Intended to incur or believed that it would incur debts beyond the debtor's ability to pay as such debts matured.

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Reasonably Equivalent Value

- In the LBO context, the party that assumes the debt and pledges its assets generally does not receive the proceeds of the loan financing the transaction.
- The value received and given does not need to be equal, but a significant shortfall in the value received will result in a finding that the debtor received less than reasonably equivalent value.
- Whether the debtor received reasonably equivalent value is measured from the perspective of the creditors.
- Bankruptcy Code Section 548(a)(1)(B)(i) provides for avoidance of an obligation if the debtor received less than reasonably equivalent value in exchange (and the other requirements of Section 548(a)(1)(B) are also met).

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Unreasonably Small Capital

- The Bankruptcy Code does not define the term “unreasonably small capital.”
- Courts have described the term as a financial condition short of “equitable insolvency,” but which leaves the transferor unable to generate sufficient profits to sustain operations so that the transferor is technically solvent but doomed to fail. The transferor is left with so few assets that its inability to pay debts in the future should have been reasonably foreseeable.
 - Equitable insolvency occurs when an entity is unable to pay its debts as they become due in the ordinary course of business.
- Determination of “unreasonably small capital” is conducted on a case-by-case basis and often relies on industry-specific financial metrics.

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Unreasonably Small Capital (cont'd)

- Courts consider a variety of factors in determining “unreasonably small capital” including:
 - Historical performance;
 - Availability of funds;
 - Causation;
 - Time horizon;
 - Nature of business;
 - Likelihood of future growth or contraction;
 - Composition of asset portfolio;
 - Amount of insurance;
 - Likelihood of incurring substantial debt in the future.

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Bankruptcy Code Provisions

- Under the Bankruptcy Code, generally the debtor has the “avoiding power,” including the right to commence an action alleging fraudulent transfers under the Bankruptcy Code.
- Section 548 allows avoidance of transfers made or obligations incurred within 2 years of the filing of a bankruptcy petition. 11 U.S.C. § 548.
- Section 550 allows the debtor to recover property that has been “fraudulently” transferred. 11 U.S.C. § 550.
- Section 544 allows the debtor to avoid transfers under applicable non-bankruptcy laws, i.e., state fraudulent conveyance statutes. 11 U.S.C. § 544.
- Section 546(e) provides a safe harbor within which transfers cannot be avoided as fraudulent. 11 U.S.C. § 546(e).

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Section 546(e)

- Section 546(e) of the Bankruptcy Code is intended to reduce systemic risk to markets that can result from undoing transactions upon which counterparties have relied, hedged and re-allocated proceeds.
- Among other things, the trustee may not avoid transfers that are settlement payments or that are made in connection with securities contracts, by or to (or for the benefit of) a financial institution, unless the transfer was made with actual intent to hinder, delay or defraud creditors.
 - The term “settlement payment” is defined to mean “a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade or the securities trade.” 11 U.S.C. § 101(51A); 741(8).
 - The term “financial institution” is defined to include, among other things, all commercial and savings banks, savings and loan associations and federally-insured credit unions. 11 U.S.C. § 101(22).

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Section 546(e) (cont'd)

- Case law has been inconsistent in applying the requirement that the transfer be “by or to (or for the benefit of)” a financial institution. The majority of courts have held that any participation by a financial institution is adequate under the plain language of the statute and some judges have interpreted the provision to protect shareholders who trade through financial institutions.
- The safe harbor does not apply to claims for actual fraudulent conveyance.
- Creditors have sought to find a way around the safe harbor by suing for constructive fraudulent conveyance under state law, where they argue that Section 546(e) does not apply.

State Laws

- Section 544 of the Bankruptcy Code allows recovery under state law incorporating the Uniform Fraudulent Transfer Act (UFTA).
- 43 states and the District of Columbia have adopted the UFTA. The UFTA allows creditors to void transfers that are intentionally or constructively fraudulent under similar criteria to Section 548.
- UFTA Section 5 states:
 - (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made ... if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer ... and the debtor was insolvent at the time or ... became insolvent as a result of the transfer.
- State laws generally have a longer statute of limitations than the Bankruptcy Code, allowing a trustee to avoid transfers not otherwise voidable under Section 548 of the Bankruptcy Code.
 - UFTA has a 4-year statute of limitations, though a number of states have varied this.
 - New York has a 6-year statute of limitations.

Collapsing Transactions

- A threshold inquiry in certain LBO fraudulent transfer actions is whether the particular transaction(s) sought to be avoided can be considered in isolation or should be considered as part of an integrated transaction. Treating a series of LBO or restructuring transactions as a whole is referred to as “collapsing” the transactions.
- Courts typically consider three things in determining whether to collapse transactions:
 - Whether all of the parties had knowledge of the multiple transactions;
 - Whether each transaction would have occurred on its own; and
 - Whether each transaction was dependent or conditioned on the other transactions.
- The fact that transactions were separated by considerable time does not, by itself, prevent collapsing transactions.

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Tribune Co.

- In 2007, the board of directors of Tribune Company approved an LBO proposal by Sam Zell to take the company private. In connection with the LBO, Tribune borrowed over \$12 billion to buy out its public shareholders and become wholly owned by a newly formed employee stock ownership plan (“ESOP”).
- Two-Step Transaction:
 - In Step One, in June 2007, the ESOP purchased 8,928,571 shares of Tribune common stock at \$28 per share. An entity owned by Mr. Zell also made an initial investment of \$250 million in Tribune in exchange for 1,470,588 shares of Tribune common stock at a price of \$34 per share and an unsecured subordinated exchangeable promissory note of Tribune in the principal amount of \$200 million. Thereafter, Tribune commenced a cash tender offer to repurchase approximately 52% of its outstanding common stock. Tribune then retired the repurchased shares. Step One Shareholders received approximately \$4.3 billion for their shares.
 - In Step Two, in December 2007, Tribune merged with a Delaware corporation wholly owned by the ESOP, with Tribune surviving the merger. Upon completion of the merger, all issued and outstanding shares of Tribune’s common stock (other than shares held by Tribune or the ESOP) were cancelled and Tribune became wholly owned by the ESOP. Step Two Shareholders received approximately \$4 billion for their shares.

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Tribune Co. (cont'd)

- Tribune filed for bankruptcy on December 8, 2008.
- In February 2010, a group of unsecured creditors, the Official Committee of Unsecured Creditors (the "Committee") sued for relief under fraudulent conveyance law arguing that Tribune did not receive reasonably equivalent value in exchange for the debt it incurred in the LBO and that Tribune took on this debt for the benefit of the parties driving the deal (i.e., the buyers, the former shareholders, and the lenders financing the LBO).
- The Committee argued that Tribune was rendered insolvent by the LBO or, if not, it was foreseeable Tribune would become insolvent if the LBO occurred.
- They asked the Delaware bankruptcy court to strip the lenders of their liens and subordinate their claims, denying them their position at the front of the line for distribution of the remaining value in Tribune.

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Tribune Co. (cont'd)

- In April 2010, the bankruptcy court directed the appointment of an independent examiner, Kenneth Klee, to evaluate allegations that the LBO violated bankruptcy law. In July 2010, the examiner issued a report concluding that Tribune did not receive reasonably equivalent value in exchange for the obligations it incurred to finance the LBO, that it was "highly likely" that Tribune was rendered insolvent and without adequate capital by Part Two of the LBO.
- The examiner wrote in his report that fiduciaries charged with the responsibility for overseeing management's actions and determining whether the Step Two transactions would render Tribune insolvent did not adequately discharge their duties.
- The examiner found some evidence suggesting intentional fraud in Step Two of the transaction, however, he said that the evidence supporting constructive fraud was much stronger.

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Tribune Co. (cont'd)

- In December 2010, Tribune ceded its rights to bring suits to the Committee, which obtained permission to file a claim alleging intentional fraud against shareholders before the two-year statute of limitations expired.
 - The bankruptcy court recently granted the Committee's motion to dismiss claims against former named shareholders who received less than \$50,000 in proceeds from the LBO.
- The bankruptcy judge stayed the suit pending the completion of the Chapter 11 process, hoping that the various parties could find a way to settle the charges.
- The Committee let the statute of limitations lapse on the constructive fraudulent conveyance claims in December 2010, which meant that individual creditors could bring claims under state law, arguably beyond the reach of the Section 546(e) safe harbor.
- In March 2011 creditors sought authority from the bankruptcy court to bring state law fraudulent conveyance actions.

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Tribune Co. (cont'd)

- Several parties objected to the state law fraudulent conveyance actions arguing that, among other things:
 - the debtor has exclusive authority to pursue the claims; and
 - the prohibition on pursuing avoidance of transfers subject to Section 546(e) has preempted state law and cannot be avoided by pursuing the claims in state court instead of bankruptcy court.
- In April 2011, the bankruptcy court issued an order allowing noteholders to file their avoidance actions in state court, stating:
 - "Because no state law constructive fraudulent conveyance claims against shareholders whose stock was redeemed or purchased in connection with the [LBO] were commenced by or on behalf of the Debtors' estates before the expiration of the applicable statute of limitations under 11 U.S.C. § 546(a), the Debtors' creditors have regained the right, if any, to prosecute their respective state law constructive fraudulent conveyance claims against [the shareholders] to recover stock redemption/purchase payments made to such shareholders in connection with the LBO."
 - The bankruptcy court, however, specifically stated that it was making no finding regarding the standing of the noteholders or any creditors to assert the state fraudulent conveyance claims or whether such claims were preempted or otherwise impacted by Section 546(e).

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Tribune Co. (cont'd)

- Approximately 1,700 individual defendants have been named in the state lawsuits, including institutions and individuals who sold more than \$75,000 worth of stock. Junior noteholders have also asserted “class allegations” intended to include all other shareholders.
- In all, 33,000 to 35,000 investors are potentially liable for money they received in 2007 when the company went private.
- On December 20, 2011 the U.S. Judicial Panel on Multidistrict Litigation consolidated 44 fraudulent conveyance suits that had been filed in 21 states in the U.S. District Court for the Southern District of New York.
- However, the consolidated cases were stayed due to Tribune’s bankruptcy proceedings pending further order of the Bankruptcy Court for the District of Delaware or the Southern District of New York.
- The Tribune case differs from many other fraudulent conveyance cases because it includes a number of large deep-pocketed shareholders who have sold billions of dollars worth of stock in the deal.

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Lyondell Chemical Co.

- Lyondell Chemical Company merged with Basell AF S.C.A. in July 2007, creating one of the world’s largest polymers, petrochemicals and fuel companies.
- Basell was an international chemicals company controlled by Leonard Blavatnik. Over a few years, Blavatnik made several offers for Lyondell’s shares. In May 2007, Blavatnik acquired 21 million shares of Lyondell stock and disclosed in his SEC filing that he might seek to acquire all Lyondell’s outstanding stock.
- In July 2007, Basell agreed to purchase Lyondell in an LBO for \$48 per share. As a result of the LBO, Lyondell shareholders received \$12.5 billion.
- In January 2009, Lyondell and certain affiliates and subsidiaries filed for Chapter 11 protection.

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Lyondell Chemical Co. (cont'd)

- In July 2009, the Creditors Committee filed a fraudulent conveyance lawsuit against Lyondell and its financing parties, among others, alleging that at the time of the merger (i) Lyondell was insolvent because the stated value of its liabilities exceeded the fair value of its assets; (ii) Lyondell was insufficiently capitalized to fund its operations through a downturn; and (iii) the bankruptcy was foreseeable. In the same action, the Creditors Committee sued Barclays Global Investors, N.A. individually and as class representative of the Lyondell shareholders.
- In a settlement approved by the bankruptcy court in March 2010, the Creditors Committee settled with the LBO lenders for \$450 million.

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Lyondell Chemical Co. (cont'd)

- In April 2010, the bankruptcy court confirmed a plan of reorganization for Lyondell.
- The Creditors Committee then amended its complaint and removed the claim against the shareholder class. A creditor trust was created to litigate state law avoidance actions against the former Lyondell shareholders.
- In October 2010, the trustee of the creditor trust filed a lawsuit against former Lyondell shareholders, asserting only state-law fraudulent conveyance claims in the Supreme Court of the State of New York.
- In December 2010, the case was referred to the United States Bankruptcy Court for the Southern District of New York, which is administering the Lyondell bankruptcy case.

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Lyondell Chemical Co. (cont'd)

- Since January 2011, the shareholders have filed numerous motions to dismiss and related joinders, arguing in part, that the creditor trust may not make an end run around the safe harbor of Section 546(e) of the Bankruptcy Code.
 - Shareholders have argued that the creditor trust's claims are preempted by the Bankruptcy Code.
 - The creditor trust has countered that, although creditors may not prosecute fraudulent transfer claims against nondebtors as long as the trustee retains standing to do so, the bankruptcy case does not relieve a transferee's liability to such creditors. The creditor trust asserted that these causes of action could revert to the creditors once relinquished by the trustee, through abandonment, expiration of the automatic stay of Section 362 of the Bankruptcy Code or otherwise.
 - The creditor trust has also taken the position that the language, context and legislative history of Section 546(e) indicate that Congress intended to protect financial markets only from the sweeping avoidance powers of the bankruptcy trustee and not the independent state law claims of creditors.
 - The court has not yet ruled on the motions to dismiss.

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Consequences of Fraudulent Conveyance Suits

- Markets that depend on the finality of a settled transaction can be disrupted.
- Investors may not be able to properly assess the risks of participating in a leveraged buyout.

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For Some LBO Participants, Section 546(e)'s "Blanket" Protection for Securities Contract Settlement Payments Has Holes

By Michael L. Bernstein and Charles A. Malloy¹

In a typical LBO, the target company's assets are pledged in order to obtain financing, which is then used to purchase the company's equity from the current owners. If a target company subsequently encounters financial trouble and files bankruptcy, creditors of the company may seek to undo the LBO as a constructively fraudulent transaction and to recover payments from shareholders who cashed out while leaving behind an over-leveraged company.

A formidable defense available to shareholders in these actions is found in section 546(e) of the Bankruptcy Code, which provides that a payment that qualifies as a "settlement payment" (a term that encompasses certain payments made in settlement of a securities trade or transaction) or a "transfer...made in connection with a securities contract" (a broadly defined term that includes contracts for the purchase or sale of securities and ancillary agreements) is protected from avoidance as a constructively fraudulent transfer if such payment or transfer is made by or to a "financial institution" or other entity specified in section 546(e).

Congress' purpose in enacting Section 546(e) was to balance the rights of creditors to recover fraudulent transfers against the risks that bankruptcy presents to the securities markets. If securities settlement payments and similar transfers were generally avoidable, the ability of market participants to rapidly close out and replace positions could be impaired. The bankruptcy of a single broker or other institution could cause a ripple effect and

threaten to collapse the entire industry. Thus, section 546(e) prohibits the avoidance of "settlement payments" and transfers in connection with a securities contract on grounds they are constructively fraudulent, while preserving the ability to avoid such transfers in cases of actual fraud.

While courts initially applied section 546(e) in the context of publicly traded securities, a series of appellate decisions recently applied it in cases where stock was privately held:

- *In Contemporary Industries Corp. v. Frost*, 564 F.3d 981 (8th Cir. 2009), section 546(e) protected a \$26.5 million cash payment to the shareholders of a closely held corporation because the transfer qualified as a "settlement payment" for securities and was made by or to a financial institution, because both the purchaser and sellers of the stock deposited the cash and shares necessary to settle the transaction in escrow with a bank pending closing of the sale.
- Then, in *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009), *cert. denied*, -- U.S. --, 130 S.Ct. 1141 (2010), a \$111.5 million cash payment to shareholders of a privately held corporation was shielded because it qualified as a "settlement payment," and a bank served as the exchange agent.
- Finally, in *In re Plassein International Corp.*, 590 F.3d 252 (3rd Cir. 2009), *cert. denied*, -- U.S. --, 130 S.Ct. 2389 (2010), section 546(e) protected \$51.1 million in cash transferred through a bank to the shareholders of four companies that were acquired by a single purchaser pursuant to a series of LBOs.

Following these decisions, one could ask whether, in an LBO, *all* payments or transfers for stock are protected so

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long as the parties utilize a financial institution to effectuate the transfer. Recent decisions suggest, however, that there are limits to the section 546(e) defense:

- *In re MacMenamin's Grill Ltd.*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011), three stockholders sold their ownership interests in a bar and grill pursuant to an LBO for amounts ranging from \$334,983.07 to \$390,000. The payments were made to the stockholders by wire transfers from the bank that financed the LBO. Citing legislative history, the court held section 546(e) inapplicable because of the small size of the transaction, the lack of any evidence that the parties were acting as participants in a securities market, and the fact that avoiding the transfers would not threaten the functioning of any securities market.
- *In re DEI Systems, Inc.*, 2011 WL 1261603 (Bankr. D. Utah Mar. 31, 2011), two individuals sold 44.8% of their shares in the target company to the purchaser for \$3,920,000. The funds flowed from the purchaser's bank to an escrow account of the sellers' attorneys, and ultimately to the sellers. The court concluded that section 546(e) did not apply because of the small size of the transaction and the fact that the banks were involved merely as conduits for payments, and not in their capacity as participants in any securities market.
- Also limiting section 546(e), but under much different facts, is *In re Mervyn's Holdings LLC*, 426 B.R. 488 (Bankr. D. Del. 2010), a case that involved an LBO comprised of series of securities and non-securities transactions. In addition to transfers of more than \$1 billion in loan proceeds to the owner of the target corporation, the LBO involved transfers of real estate and grants of liens on property of the target company. As happens with some complex LBOs, the court determined that it was appropriate to collapse the transfers into a single transaction and look to the overall financial impact on creditors. As a result of collapsing the LBO, the court held that the protections of section

546(e) fell away, because certain of the transactions that comprised the LBO — such as transfers of real estate — could not qualify as settlement payments or transfers in connection with a securities contract.

These cases indicate that participants in an LBO should not assume that section 546(e) offers blanket protection against actions to avoid and recover transfers to selling shareholders. This is particularly true where the size of the transaction is small enough that a court could conclude it would not impact securities markets, or where a single integrated transaction involves both securities and non-securities transfers.

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