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The Dogs That Didn't Bark: FTI, Lakeside and Unaddressed Questions

In *The Adventure of Silver Blaze*,[1] the great fictional detective Sherlock Holmes is called upon to solve the mystery of a stolen horse and a murder. He is met at the crime scene by Inspector Gregory, one of the better detectives Holmes dealt with over the course of his career. Gregory fills in Holmes with the results of his investigations. Among his reports were his observations regarding the review and inspection of the paddock from which the horse was taken, which included noting that the paddock was also occupied by a dog. Gregory and Holmes then have the following colloquy:

> Gregory: Is there any point to which you would wish to draw my attention?"
>
> Holmes: To the curious incident of the dog in the night-time."
>
> > Gregory: The dog did nothing in the night-time."
> >
> > Holmes: That was the curious incident

From inaction, Holmes deduced that the dog knew the person who took the horse; otherwise, it would have barked and woken some stable boys. From the dog's silence, Holmes led Gregory to the conclusion that the dog knew the perpetrator. That narrowed the list of suspects.

Sometimes law is like *Silver Blaze*; the meaning is in what isn't said. And that is the segue into the two recent Supreme Court cases that are the subject of this month's issue of the *Bankruptcy Law Letter*: *Merit Management Group, LP v. FTI Consulting, Inc.*;[2] and *U.S. Bank National Association v. The Village at Lakeridge, LLC.*[3]

Both cases involve critical issues in bankruptcy practice: *FTI* deals with the scope of Section 546(e)'s immunity from avoiding powers actions, and *Village at Lakeridge* deals with the concept of non-statutory insiders. Neither case, however, chose to answer the key questions behind each issue. These ignored issues are the dogs that didn't bark. And as in *Silver Blaze*, the reasons they didn't bark may be more important than the amount of noise they did make.

FTI

The Facts

Merit Management Group, LP v. FTI Consulting, Inc.[4] dealt with a fact pattern common in bankruptcy: an acquisition gone bad for which the debtor had paid dearly. In *FTI*, the debtor, Valley View Downs, LP entered into an agreement with Bedford Downs Management Corp. under which Valley View, if it obtained the last harness-racing license in Pennsylvania, would purchase all of Bedford Downs' stock for $55 million. Valley View was granted the license and arranged for the Cayman Islands branch of Credit Suisse to wire $55 million to third-party escrow agent Citizens Bank of Pennsylvania. The Bedford Downs shareholders, including Merit Management Group, LP, deposited their stock certificates into escrow. Citizens Bank then disbursed the $55 million over two installments. Merit received $16.5 million for its shares.

Although Valley View obtained the harness-racing license, it was unable to achieve its goal of opening a racetrack casino (or "racino"). Valley View then filed for Chapter 11 bankruptcy. FTI Consulting, Inc. was appointed to serve as trustee of a litigation trust established by the confirmed chapter 11 plan. In this trustee capacity, FTI sought to avoid the transfer from Valley View to Merit for the purchase of the Bedford Downs' stock, arguing that it was constructively fraudulent under § 548(a)(1)(B). Merit contended that the § 546(e) safe harbor barred FTI from avoiding the transfer.

What is Section 546(e)? This:

> (e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Here's the same statute, with the stuff not applicable to most financial transactions eliminated:

> (e) … [T]he trustee may not avoid a transfer that is a … **settlement payment**, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a … **financial institution**, … that is made before the commencement of the case, except under section 548(a)(1)(A) [intentional fraudulent transfers] of this title.

The two bolded terms, "settlement payment" and "financial institution," are terms the Bankruptcy Code defines, as follows (with appropriate editing and with italics added):

> The term "financial institution" means—(A) … an entity that is a *commercial or savings bank,* industrial savings bank, savings and loan association, trust company, federally-insured credit union [5] . . .

and

> "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or *any other similar payment commonly used in the securities trade* [6]

The upshot of these definitions is that most courts have treated payments that would otherwise be fraudulent transfers as immune if, at some point in the process, payment is routed through a bank (note the italicized language), as by wire transfer. The key is the breadth of "settlement payment."

As stated by the Third Circuit:

> we [have] held that the definition of "settlement payment" was broad and that in the securities trade, "a settlement payment is generally the transfer of cash or securities made to complete a transfer payment." Id. at 515 (citing Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846, 849 (10th Cir. 1990) (relying on several industry texts)). We concluded, "[a] payment for shares during [a leveraged buyout] is obviously a common securities transaction, and we therefore hold that it is also a settlement payment" for the purposes of section 546(e). Id. at 516. [7]

The Seventh Circuit Goes Its Own Way

In *FTI*, the district court agreed with this reasoning, dismissing the case on Merit's motion for judgment on the pleadings. The Seventh Circuit reversed. It noted that the payments were from a private party, through an escrow that was a financial institution, to another private party. As summarized by the Chief Judge Wood, the issue was: "whether the section 546(e) safe harbor protects transfers that are simply conducted through financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit … ." [8] So phrased, the Seventh Circuit reversed.

The Seventh Circuit's rationale appeared to be that Section 546(e)'s language did not protect "conduits;" that is, financial intermediaries who exercise no dominion or control over a funds transfer, but simply facilitate the transaction. Under prior cases, such financial intermediaries would not be "transferees" of those funds, and nothing in Section 546(e) would seem to run counter to that interpretation.

In reaching its decision, the Seventh Circuit decided not to follow decisions from Courts of Appeals in five other circuits. [9]

The Supreme Court's Take

At the Supreme Court, Merit's position was clear. The five circuits that had found immunity had it right. The transaction, they contended, started with the debtor, who transferred funds to a Cayman Bank, who transferred fund to a Pennsylvania bank acting as escrow, who then transferred funds to Merit. The funds from the debtor were thus settlement payments that either went through financial institutions (in which case Section 546(e) applied since it was a transfer "to" a financial institution), or the transfers were made for their benefit, as they were contractually bound to honor the passage of the consideration given the instructions of their various clients (in which case Section 546(e) applied since the transfers were "for the benefit" of financial institutions).

Not so fast, said the Court. There were preliminary and procedural problems with Merit's position. The trustee sought to set aside a transfer from the debtor to a selling shareholder, not a transfer to the intermediate financial institution. That made all the difference. As the Court stated:

> When determining whether the § 546(e) securities safe harbor saves the transfer from avoidance, should courts look to the transfer that the trustee seeks to avoid (i.e., A → D) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (i.e., A → B → C → D)? The Court concludes that the plain meaning of § 546(e) dictates that the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid. [10]

So stated, Merit's position almost looks foolish. Under the Court's logic, Merit was interposing an irrelevant statute as a defense, given that the selling shareholders were not "financial institutions."

The takeaway may very well be: read the complaint, and don't raise defenses that aren't applicable.

The Dogs That Didn't Bark

But there was and is some merit in Merit's position. The two intermediate banks did something, and they undoubtedly took fees to do whatever they did. According to Merit, what they did was to receive and make transfers. And since Section 548 requires a transfer "of an interest of the debtor in property," the only transfer that was possibly vulnerable was the first funds transfer ordered by the debtor.

But that is one of the silent issues in the case—did FTI actually plead a proper transfer? That was an issue dealt with at the Seventh Circuit, which had characterized the bank's activities as mere "conduits." As a result, their handling of the funds transfers were *not* transfers because they were not recipients or transferees of the funds transfer—they could not, for example, spend it as they wished, nor could bank creditors garnish it.

I'll come back to the conduit characterization later, because I disagree with it. For now, however, it is instructive to look at how the Court read FTI's complaint. It interpreted the complaint as simply alleging a transfer from the debtor to the selling shareholders. If Merit did not agree with this, its defense was not to be found in Section 546(e), but in an allegation that it never received a transfer of an interest of the debtor in property. The only transfer it received, that is, the only payment it received in consideration for the sale of its stock, came from a bank.

The Court was careful to finesse this point. It referred to the transaction between the debtor and Merit as the "overarching" transfer at least six times. [11] But what it never did was to say that the facts alleged in the complaint actually made out or constituted a transfer. Perhaps this is appropriate given the procedural context of a motion to dismiss on the basis of the pleadings, in which the allegations of the complaint are taken as true if not contested.

But it leaves unanswered whether there was one or many transfers under the facts.

The Concept of Transfer

The Court was faced with several possible ways to view the transaction. Ultimately, the trustee pled, and the Court agreed, that there was an overarching transfer of the debtor's property to the selling shareholder. Neither buyer or seller were financial institutions.

The Seventh Circuit got to this view by characterizing the transactions between the debtor and its bank, and between the debtor's bank and the seller's escrow, and between the seller's escrow and the seller, as "conduits" for the debtor's funds. In short, the banks were automatons without discretion as to the funds. They took orders, and executed upon them.

The conduit theory handles the Court's reasoning reasonably well. But as I have argued in these pages before, there are fatal legal flaws in this argument. In the May 2017 edition of the *Bankruptcy Law Letter*, *Stumbling at the Sixth: A Troubling Test for Transfers in Meoli v. The Huntington National Bank,* I argued that, in the context of payment by check, the check-writer's bank—not the check-writer—makes a transfer when the payee cashes the check. After all, funds deposited in a bank are the bank's; the bank's customers are, at most, unsecured creditors with, depending on their circumstances, the benefit of a government guaranty of the bank's obligation to pay. Should a bank fail, a bank customer has no property right in funds it had previously deposited with the bank. Unlike the underlying assumption made by the bank, the amounts the debtor's bank owed the debtor *could* be spent it as the bank wished, and bank creditors *could* garnish or levy upon the funds the debtor had provided to the bank.

Although the details are worked out in the prior *Bankruptcy Law Letter* piece, if adopted this would enable Merit to defend, not on the basis of Section 546(e), but on the basis that there was never a transfer from the debtor to it. The debtor made transfers to entities who were obligated to pass the value of those transfers on, but that is different than a direct transfer.

The Doctrine of Collapse

Then again, maybe that argument is too facile. It is a long-standing tenet of fraudulent transfer law that courts can "collapse" a series of transactions intended to achieve indirectly what could not be obtained directly. [12] Under this line of cases, the Court was justified in ignoring the intermediate transfers through the financial institutions, as no one doubted that the intended effect of the transactions was to move funds from the debtor to the selling shareholders (and the shares from the shareholders to the debtor).

The problem, along the theme of this piece, was silence. The never mentioned collapse or focused on conduits. Which theory was the Court following?

The Issues Ahead

FTI is now back before the district court. Technically, the issue of what was a transfer and who received it could be resolved at trial or on summary judgment. But the theory or rule of decision telling courts how to resolve those issues is not resolved. Until resolution of the transfer/conduit dispute, attorneys will argue notions of equity (and the consequent uncertainty) with respect to collapse; other attorneys will push for the certainty (and likely injustice) of counting every transfer, even if doing so effectively removes all transactions involving banks from the avoiding powers.

Not a pretty picture.

Lakeridge

The Facts

In *U.S. Bank National Association v. The Village at Lakeridge, LLC*, [13] Lakeridge was a limited liability company with a single owner and member, MBP Equity Partners. Lakeridge had two substantial debts; one to U.S. Bank over $10 million and one to its owner MBP for another $2.76 million.

Lakeridge became financially troubled and filed chapter 11. Its reorganization plan proposed to impair the interests of both creditors. U.S. Bank rejected Lakeridge's plan, thus precluding confirmation under Section 1129(a). [14] Lakeridge then sought cram down under Section 1129(b). [15] Cramdown, however, requires confirmation with all of Section 1129(a)'s requirements, and that includes satisfaction of Section 1129(a)(10). That paragraph requires at least one class to consent, but that consenting class cannot consist of insiders. [16]

Here, the other debt holder, MBP, was the sole equity security holder of Lakeside, and hence an affiliate [17] and an insider. [18] It thus could not provide the class consent needed for a cramdown plan.

Then things got weird. MBP sought to transfer its claim against Lakeridge to a non-insider who could agree to the cramdown plan. Kathleen Bartlett, an MBP board member and Lakeridge officer (and hence herself an insider), offered MBP's claim to Robert Rabkin, a retired surgeon, for $5,000. Rabkin purchased the claim and consented to Lakeridge's proposed reorganization.

Rabkin, however, was in a "romantic" relationship with Bartlett, and so the purchase was not an arm's-length transaction. On this basis, U.S. Bank objected, claiming that Rabkin's relationship with Bartlett made him an "non-statutory" insider. If correct, the Rabkin's vote would also not count as satisfying Section 1129(a)(10).

The bankruptcy court rejected U.S. Bank's argument. The Ninth Circuit affirmed. Viewing the bankruptcy court's decision as one based on a finding that the relevant transaction was conducted at arm's length, the Ninth Circuit held that that finding was entitled to clear-error review, and could not be reversed under that deferential standard. U.S. Bank had argued that the amount of legal components involved in the insider test converted the factual determination into essentially a legal one, and argued for de novo review. In its view, it could not understand how a transfer between two romantically-entwined persons, one of whom was an insider, could result in anything other than both being insiders.

The Supreme Court found the issue to be one that needed resolution, and granted certiorari on the issue of the proper standard of review. Of some importance, however, is that review was not granted on the property standard for determining non-statutory insider status.

The Supreme Court's Take

Justice Kagan started by laying out the statutory framework for the Code's concept of insider. As she noted, the Code's definitional section, an insider of a corporate debtor "includes" any director, officer, or "person in control" of the entity. [19] Because of the word "includes" in that section, courts have long viewed its list of insiders as non-exhaustive. [20] Accordingly, courts have devised tests for identifying other, so-called "non-statutory" insiders. As Justice Kagan noted, "[t]he decisions are not entirely uniform, but many focus, in whole or in part, on whether a person's 'transaction of business with the debtor is not at arm's length.'" [21]

This was in essence the test that the Ninth Circuit had used before Lakeside came to it, [22] and the test that the bankruptcy court had applied. But to some, the bankruptcy court didn't apply it correctly. One of those was Judge Clifton, who dissented from the Ninth Circuit's opinion, stating:

> What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by parties acting like they were strangers? We don't know, because the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to de novo review. [23]

To state the obvious, the standard of review makes a difference. A factual finding subject to deferential review can be overturned only if "clearly erroneous," while anything subject to de novo review can be reversed based on nothing more than simple disagreement.

The majority opinion in the Ninth Circuit thought the deferential review standard applied. [24] And ultimately, so did the Supreme Court. It found the the "transactional test" of whether the parties were at arm's length was a

> finding[] of what we have called [a] "basic" or "historical" fact—addressing questions of who did what, when or where, how or why. … The set of relevant historical facts will of course depend on the legal test used: So under the Ninth Circuit's test, the facts found may relate to the attributes of a particular relationship or the circumstances and terms of a prior transaction. By well-settled rule, such factual findings are reviewable only for clear error—in other words, with a serious thumb on the scale for the bankruptcy court. See Fed. Rule Civ. Proc. 52(a)(6) (clear-error standard); Fed. Rules Bkrtcy. Proc. 7052 and 9014(c) (applying Rule 52 various bankruptcy proceedings). [25]

U.S. Bank, however, contended that Judge Clifton had got it right: this was a mixed question of law and fact, and thus subject to de novo review. Avoiding a sweeping characterization of the appropriate standard of review when such mixed questions are presented, Justice Kagen reduced what the bankruptcy court had to find to the following: "Given all the basic facts found, was Rabkin's purchase of MBP's claim conducted as if the two were strangers to each other?" [26] After a paragraph's pause, she answered the questions as follows: "That is about as factual sounding as any mixed question gets." [27]

The Dogs That Didn't Bark

As in *FTI*, *Lakeside* is probably more important for what it didn't decide. The Court was careful to note that it was not looking at the proper test for when a person should be classified as a non-statutory insider. Indeed, the majority opinion carefully states that "we specifically rejected U.S. Bank's request to include that question in our grant of certiorari. See 580 U.S.——, 137 S.Ct. 1372, 197 L.Ed.2d 553; Pet. for Cert. i." [28]

And that's important. The concurring opinion expressed skepticism that the Ninth Circuit's arm's length transaction test was appropriate. Justice Sotomayor, joined by Justices Kennedy, Thomas, and Gorsuch, spent time taking a hard look as just what "insider" would mean other than the listed categories. As she noted,

> the only clue we have as to which persons or entities fall within that category is the list of enumerated insiders and the presumption of lack of arm's length that follows from that label. Because each of those persons or entities are considered insiders regardless of whether a particular transaction appears to have been conducted at arm's length, it is not clear why the same should not be true of non-statutory insiders. That is, an enumerated "insider" does not cease being an insider just because a court finds that a relevant transaction was conducted at arm's length. Then why should a finding that a transaction was conducted at arm's length, without more, conclusively foreclose a finding that a person or entity is a "non-statutory insider"? [29]

Justice Sotomayor was quick to come up with two alternatives. "First, it could be that the inquiry should focus solely on a comparison between the characteristics of the alleged non-statutory insider and the enumerated insiders, and if they share sufficient commonalities, the alleged person or entity should be deemed an insider regardless of the apparent arm's-length nature of any transaction." [30] Next, "it could be that the test should focus on a broader comparison that includes consideration of the circumstances surrounding any relevant transaction. If a transaction is determined to have been conducted at less-than-arm's length, it may provide strong evidence in the context of the relationship as a whole that the alleged non-statutory insider should indeed be considered an insider. Relatedly, if the transaction does appear to have been undertaken at arm's length, that may be evidence, considered together with other aspects of the parties' relationship, that the alleged non-statutory insider should not, in fact, be deemed an insider." [31]

Fair enough, but would adoption of either of those standards change the result in the case? Maybe. But since the Court had not taken the issue of the appropriate standard, and did not make any sweeping pronouncements regarding what the standard of review should be regardless of the test chosen, Justice Sotomayor chose to concur. [32]

The Issues Ahead

It only takes four justices to grant certiorari, [33] and three other justices joined Justice Sotomayor's concurrence. One can easily infer from that simple math that should the issue be presented again, the court, at least as presently composed, would likely take the issue.

Will the issue arise again? Most assuredly. Perhaps not in the same context as *Lakeridge*: a debtor with but two debts, one secured and the other unsecured, and each in the millions of dollars, is not likely to recur. And the vagaries of Chapter 11 practice indicate that 1129(a)(10)'s main use is in single-asset debtors whose primary lender is undersecured.

But the Code uses "insider" in many places. The term: plays a key role in the definition of a disinterested person; [34] is a factor in counting the debt of potential small business debtors; [35] matters for counting creditors in an involuntary filing; [36] permits disallowance of an otherwise allowable claim for services if the compensation paid, though legal, is unreasonable; [37] plays a role in Key Employee Retention Plans; [38] matters for false statements made in nondischargeability actions; [39] can factor in denial of a discharge; [40] can disqualify a trustee; [41] matters for fraudulent transfer analysis to employees; [42] matters in counting debt when seeking a trustee in a chapter 11; [43] matters for compensating and curing non-impaired claims in a plan; [44] and must factor into disclosures necessary to confirm a chapter 11 plan. [45]

But the most common use is in preferences. Insiders have an extended preference period; instead of the normal 90 days, a transfer to an insider is vulnerable for one year. [46] Given the high stakes that often occur in preference litigation, this is the area in which the definition of insider matters most, and is likely to be the most fiercely litigated. Given the gigantic hint dropped by the concurring justices in *Lakeside*, this is an area in which lawyers will be able to pitch their battles.

Conclusion

In both *FTI* and *Lakeside*, the Court elected to prefer silence over clarification. The two opinions leave unresolved major issues involving key concepts: the definition and application of "transfer" in *FTI*; and the definition of "insider" in *Lakeside*.

Silence may contain the word of God, as the prophet Elijah found. [47] Another view holds, as the song goes, that "silence like a cancer grows." [48] Which of these two outcomes the law will take depends on how lawyers and lower courts will apply and interpret the Court's silence. But it's a good bet that, unlike Sherlock Holmes' insight in *Silver Blaze*, silence will not solve the mystery.

Footnotes

1 The story was first published in *The Strand* magazine in 1892, and later collected with other stories and published in book form in 1894 in *The Memoirs of Sherlock Holmes*. Out of copyright now, the story can be read in full at https://en.wikisource.org/wiki/The_Memoirs_of_Sherlock_Holmes/Silver_Blaze

2 Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018).

3 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

4 Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018).

5 11 U.S.C. § 101(22).

6 11 U.S.C. § 741(8).

7 Brandt v. B.A. Capital Co. LP (In re Plassein Int'l Corp.), 590 F.3d 252, 258 (3d Cir. 2009).

8 FTI Consulting, Inc. v. Merit Management Group, LP, 830 F.3d 690, 691, 62 Bankr. Ct. Dec. (CRR) 250, 75 Collier Bankr. Cas. 2d (MB) 1855, Bankr. L. Rep. (CCH) P 82972 (7th Cir. 2016), cert. granted, 137 S. Ct. 2092, 197 L. Ed. 2d 894 (2017) and aff'd and remanded, 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018).

9 In re Quebecor World (USA) Inc., 719 F.3d 94, 58 Bankr. Ct. Dec. (CRR) 12, 69 Collier Bankr. Cas. 2d (MB) 1253, Bankr. L. Rep. (CCH) P 82505 (2d Cir. 2013) (abrogated by, Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018)); Contemporary Industries Corp. v. Frost, 564 F.3d 981, 987, 51 Bankr. Ct. Dec. (CRR) 157, Bankr. L. Rep. (CCH) P 81473 (8th Cir. 2009) (abrogated by, Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018)); In re QSI Holdings, Inc., 571 F.3d 545, 551, 51 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 81528 (6th Cir. 2009) (abrogated by, Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018)); In re Plassein Intern. Corp., 590 F.3d 252, 52 Bankr. Ct. Dec. (CRR) 145, Bankr. L. Rep. (CCH) P 81653 (3d Cir. 2009); In re Kaiser Steel Corp., 952 F.2d 1230, 1240, 26 Collier Bankr. Cas. 2d (MB) 443, Bankr. L. Rep. (CCH) P 74387 (10th Cir. 1991) (abrogated by, Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018)).

Courts are also split whether section 546(e) is available to a state law constructive fraudulent transfer defendant post-bankruptcy. The Court of Appeals for the Second Circuit held that section 546(e) should continue to provide post-bankruptcy protection. See In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d Cir. 2016), cert. filed, Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation, Sept. 12, 2016 (No. 16-317). At least one other court has disagreed. PAH Litig. Trust v. Water St. Healthcare Partners L.P. In re Physiotherapy Holdings, Inc., 62 Bankr. Ct. Dec. (CRR) 213, 2016 WL 3611831 (Bankr. D. Del. 2016), leave to appeal denied, Bankr. L. Rep. (CCH) P 83193, 2017 WL 6524524 (D. Del. 2017).

Although the parties in the Tribune case sought certiorari before the parties in FTI did, the Court has still not decided what to do. On April 4, 2018, two justices indicated that the Court had deferred consideration in the Tribune case to "allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court's decision in Merit Management Group, LP v. FTI Consulting, Inc., 583 U.S.——, 138 S.Ct. 883,——L.Ed.2d—— (2018)." Deutsche Bank Trust Co. Americas v. Robert R. McCormick Foundation, 138 S. Ct. 1162, 1163 (2018) (Statement of Kennedy and Thomas, JJ). The reasons for this statement are unclear, but Justices Kennedy and Thomas indicated that such a deferral and possible reconsideration by the lower courts was necessary "given the possibility that there might not be a quorum in this Court." Id. In the Supreme Court, six justices constitute a quorum. 28 U.S.C.A. § 2109.

10 Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 888, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018).

11 Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, at 888, 892, 893 (twice) & 897 (twice), 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018).

12 See, e.g., Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2d Cir. 1993) ("an allegedly fraudulent conveyance must be evaluated in context; '[w]here a transfer is only a step in a general plan, the plan 'must be viewed as a whole with all its composite implications.' "); Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206 (3d Cir. 1990) (collapsing sham transactions intended to defraud creditors); In re Tronox Incorporated, 503 B.R. 239, 269 (Bankr. S.D. N.Y. 2013) (collapsing transactions that spanned period of statute of limitations); In re Sunbeam Corp., 284 B.R. 355, 370, 40 Bankr. Ct. Dec. (CRR) 101 (Bankr. S.D. N.Y. 2002) ("Courts have 'collapsed' a series of transactions into one transaction when it appears that despite the formal structure erected and the labels attached, the segments, in reality, comprise a single integrated scheme when evaluated focusing on the knowledge and intent of the parties in the transaction."). See also 5 Collier on Bankruptcy ¶ 548.03[6] (Richard Levin & Henry Sommer, eds., 2018).

13 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

14 Section 1129(a) requires satisfaction of all 16 paragraphs, including paragraph (8), which requires the acceptance of all impaired classes.

15 Section 1129(b) relieves the plan proponent from obtaining the acceptance of all classes, but imposes the requirement that the plan be fair and equitable, and not unfairly discriminate, against any rejecting class.

16 Section 1129(a)(10) states: "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

17 Section 101(2) states, in relevant part, that:

> The term "affiliate" means—
>
> (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, … .

18 Section 101(31) states, in relevant part, that:
(31) The term "insider" includes—

> (B) if the debtor is a corporation—

* * *

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

* * *

> (E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and
> (F) managing agent of the debtor.

19 11 U.S.C.A. §§ 101(31)(B)(i)-(iii).

20 11 U.S.C.A. § 102(3) (stating as one of the Code's "[r]ules of construction" that " 'includes' and 'including' are not limiting");.

21 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018) (quoting 2 A. Resnick & H. Sommer, Collier on Bankruptcy ¶ 101.31, p. 101-142 (16th ed. 2016) and

In re U.S. Medical, Inc., 531 F.3d 1272, 50 Bankr. Ct. Dec. (CRR) 57, 59 Collier Bankr. Cas. 2d (MB) 1900, Bankr. L. Rep. (CCH) P 81275 (10th Cir. 2008))

22 In re The Village at Lakeridge, LLC, 814 F.3d 993, 1001, 62 Bankr. Ct. Dec. (CRR) 44, 75 Collier Bankr. Cas. 2d (MB) 125, Bankr. L. Rep. (CCH) P 82921 (9th Cir. 2016), certiorari granted in part, 137 S. Ct. 1372, 197 L. Ed. 2d 553 (2017) and aff'd, 138 S. Ct. 960, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

23 In re The Village at Lakeridge, LLC, 814 F.3d 993, 1006, 62 Bankr. Ct. Dec. (CRR) 44, 75 Collier Bankr. Cas. 2d (MB) 125, Bankr. L. Rep. (CCH) P 82921 (9th Cir. 2016), certiorari granted in part, 137 S. Ct. 1372, 197 L. Ed. 2d 553 (2017) and aff'd, 138 S. Ct. 960, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018) (Clifton, J. dissenting).

24 In re The Village at Lakeridge, LLC, 814 F.3d 993, 62 Bankr. Ct. Dec. (CRR) 44, 75 Collier Bankr. Cas. 2d (MB) 125, Bankr. L. Rep. (CCH) P 82921 (9th Cir. 2016), certiorari granted in part, 137 S. Ct. 1372, 197 L. Ed. 2d 553 (2017) and aff'd, 138 S. Ct. 960, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

25 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 966, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

26 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 968, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

27 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 968, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

28 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 965, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018).

29 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 971, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018) (Sotormayor, J, concurring).

30 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 971, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018) (Sotormayor, J, concurring).

31 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 971-72, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018) (Sotormayor, J, concurring).

32 U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 973, 200 L. Ed. 2d 218, 65 Bankr. Ct. Dec. (CRR) 91, Bankr. L. Rep. (CCH) P 83220 (2018) ("In the event that the appropriate test for determining non-statutory insider status is different from the one that the Ninth Circuit applied, and involves a different balance of legal and factual work than the Court addresses here, it is possible I would view the applicable standard of review differently. Because I do not read the Court's opinion as foreclosing that result, I join it in full.").

33 This "rule of four" is an unwritten rule. As Justice Douglas once noted:

> The 'rule of four' is not in the statute. But in the hearings on the bill that became the 1925 Act, Mr. Justice Van Devanter, who headed the committee of the Court sponsoring the Act before the Congress, said:
>
> > 'For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered.'
>
> Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 29 (1924).
> U. S. v. Generes, 1972-1 C.B. 61, 405 U.S. 93, 116, 92 S. Ct. 827, 31 L. Ed. 2d 62, 72-1 U.S. Tax Cas. (CCH) P 9259, 29 A.F.T.R.2d 72-609 (1972) (Douglas, J., dissenting).

See also New York v. Uplinger, 467 U.S. 246, 249, 104 S. Ct. 2332, 81 L. Ed. 2d 201 (1984) (Stevens, J., dissenting); John Paul Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U.L.Rev. 1, 11-14 (1983); Joan Maisel Leiman, The Rule of Four, 57 Colum.L.Rev. 975, 981-982 (1957).

34 11 U.S.C.A. § 101(14).

35 11 U.S.C.A. § 101(51D).

36 11 U.S.C.A. § 303(b)(2).

37 11 U.S.C.A. § 502(b)(4).

38 11 U.S.C.A. § 503(c)(1).

39 11 U.S.C.A. § 523(a)(2)(A).

40 11 U.S.C.A. § 727(a)(7).

41 11 U.S.C.A. § 702.

42 11 U.S.C.A. § 548(a)(1)(B)(IV).

43 11 U.S.C.A. § 1104(c)(2)

44 11 U.S.C.A. § 1124(2)(D).

45 11 U.S.C.A. § 1129(a)(5)(B).

46 11 U.S.C.A. § 547(b)(4)(B).

47 Kings 19: 11-13.

48 Simon & Garfunkel, The Sounds of Silence, on Wednesday Morning 3AM (Columbia Records 1964). The song was later retitled as the Sound of Silence in various collections.

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