

Insolvency and Restructuring Update - January 2014

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On January 14, 2014, U.S. Bankruptcy Judge Robert E. Gerber of the Southern District of New York issued a decision with potential implications for the interpretation of Section 546(e) of the Bankruptcy Code, the statute that protects “settlement payments” in securities transactions from claims for constructive fraudulent transfer and preference actions. In a 65-page opinion, Judge Gerber denied a motion – based on Section 546(e) – to dismiss state-law constructive fraudulent conveyance claims brought by a trust seeking to claw back payments that were made to former shareholders of LyondellBasell Industries (“Lyondell”) in a leveraged buyout transaction (“LBO”). While Judge Gerber granted in part and denied in part motions to dismiss on other bases, he rejected the defendants’ principal argument that Section 546(e) bars such claims. The Court found that Section 546(e) only bars claims brought by a bankruptcy estate “trustee” – and does not preempt individual creditors or a trust acting on their behalf from bringing state-law constructive fraudulent conveyance claims. The Court endorsed the recent decision in the ongoing *Tribune Company Fraudulent Conveyance Litigation* where Judge Richard Sullivan of the Southern District of New York reached a similar conclusion. The *Tribune* decision has been appealed to the U.S. Court of Appeals for the Second Circuit, where oral argument will occur together with the appeal of *Whyte v. Barclays Bank PLC*, where Judge Jed. S. Rakoff of the Southern District of New York dismissed similar claims brought by a litigation trust created under a reorganization plan in the *SemGroup* bankruptcy matter. As a practical matter, the viability of the Lyondell decision will likely rise or fall based on the Second Circuit’s conclusions in *Tribune* and *Whyte*. The case is *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, No. 10-4609 (REG), 2014 WL 118036 (Bankr. S.D.N.Y. Jan. 14, 2014).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Donald S. Bernstein

+1 212 450 4092
donald.bernstein@davispolk.com

Hilary Dengel

+1 212 450 4354
hilary.dengel@davispolk.com

Timothy Graulich

+1 212 450 4639
timothy.graulich@davispolk.com

Marshall S. Huebner

+1 212 450 4099
marshall.huebner@davispolk.com

Ben Kaminetzky

+1 212 450 4259
ben.kaminetzky@davispolk.com

Elliot Moskowitz

+1 212 450 4241
elliot.moskowitz@davispolk.com

Brian M. Resnick

+1 212 450 4213
brian.resnick@davispolk.com

Damian S. Schaible

+1 212 450 4580
damian.schaible@davispolk.com

Karen E. Wagner

+1 212 450 4404
karen.wagner@davispolk.com

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