Professor Kenneth N. Klee and Whitman L. Holt on

Supreme Court's Holding in *Merit Management Group, LP v. FTI Consulting, Inc.*, 2018 U.S. LEXIS 1514 (Feb. 27, 2018)

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Summary of Holding and Lessons to Be Learned

In a 9-0 decision authored by Justice Sotomayor, the United States Supreme Court concludes that the relevant "transfer" for purposes of applying the safe harbor in Bankruptcy Code section 546(e) is the specific transfer that an estate representative seeks to avoid pursuant to the statutory avoiding powers. When the transfer sought to be avoided is an "overarching transfer" from one private party to another private party, the involvement of a "financial institution" or other covered entity in transactional steps within the overarching transfer will *not* insulate the overarching transfer from avoidance attack. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 2018 U.S. LEXIS 1514, at *31–32 (Feb. 27, 2018). The Court's holding restricts the breadth of the section 546(e) safe harbor and overrules the contrary decisions of five circuit courts of appeals that had applied the safe harbor when a financial institution's role in a transaction was only as a "conduit" or similar intermediary.

The lessons to be learned from this decision are that even when it employs a textual analysis, the Supreme Court will look at the substance of an overall transaction, rather than just its formal steps, in order to determine how the Bankruptcy Code should be applied to that transaction. Moreover, although there are plausible textual and policy arguments in favor of a broad application of section 546(e), those arguments are insufficient to overcome the application of the statute that results from allowing parties to reframe the particular "transfer" that is at issue.

The Court's narrowing of section 546(e)'s scope is likely to immediately affect pending and potential avoidance litigation. There are a variety of issues related to application of the safe harbor that either are not addressed or are created by the Court's analysis. Those issues will continue to demand the attention of lower courts nationwide.

Legal Background

As part of advancing the equal treatment of similar creditors and repairing unwarranted depletion of the estate, the Bankruptcy Code contains several sections that permit the avoidance (i.e., invalidation) of certain transfers or obligations, including preferential transfers, actual and constructive fraudulent transfers, the fixing of statutory liens, and transfers or obligations that would be voidable by certain creditors outside of bankruptcy. *See* 11 U.S.C. §§ 544, 545, 547, 548.

The avoidance powers are not unlimited, however, and Bankruptcy Code section 546 contains a variety of different limitations on the avoiding powers. Among those limitations is a restriction in section 546(e) designed to protect financial institutions and other covered parties from the avoiding powers (excluding an "actual" fraudulent transfer that occurred within the two years preceding the petition date and, hence, is avoidable under Bankruptcy Code section 548(a)(1)(A)), which restriction states in its entirety:

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> 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.

11 U.S.C. § 546(e). Section 546(e) is a turgid text—a 137-word sentence that includes numerous component clauses and cross-references to various other parts of the Bankruptcy Code. The scope of the text has also been revised and expanded through periodic amendments. *See generally* *Merit Mgmt.*, 2018 U.S. LEXIS 1514, at *11–14 (describing the genesis of, and various amendments to, section 546(e)).

On its face, section 546(e) is susceptible to an expansive interpretation. And thus several circuit courts of appeals had adopted an expansive reading that effectively insulated transactions in which any of the assorted protected parties had any involvement at all. *See, e.g.*, Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. Life Ins. Co. (In re Quebecor World (USA) Inc.), 719 F.3d 94, 99 (2d Cir. 2013); *QSI Holdings, Inc. v. Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545, 551 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009); *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505, 516 (3d Cir. 1999); *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 (10th Cir. 1991). Prior to the *Merit Management* case, the Court of Appeals for the Eleventh Circuit stood alone in taking a contrary position, in an opinion that predated multiple amendments to section 546(e) and several of the other circuits' decisions by many years. *See* *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604, 610 (11th Cir. 1996) (per curiam). In the period immediately preceding the *Merit Management* case, the trend in the case law was moving firmly toward narrowing the scope of the avoiding powers through an ever-broader application of section 546(e).

Facts and Proceedings Below

The debtor in *Merit Management*—Valley View Downs, LP ("Valley View")—was in the horse racing and gambling business. For several years, Valley View had been competing with a different entity, Bedford Downs Management Corporation ("Bedford Downs"), to obtain a harness-racing license from the state of Pennsylvania, which in turn would allow for the operation of a "racino" (shorthand for a racetrack casino). *Merit Mgmt.*, 2018 U.S. LEXIS 1514, at *14. After several years of unsuccessful competition between the entities, the parties agreed that Valley View would obtain the license and purchase Bedford Downs, and the combined entity would then operate the racino. *See id.* at *14–15.

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The transaction was structured such that Valley View would purchase 100 percent of Bedford Downs' stock for $55 million. *Id.* at *15. The transaction consideration would be funded via financing provided by the Cayman Islands branch of Credit Suisse. *Id.* Credit Suisse would wire the purchase price to Citizens Bank of Pennsylvania, and Citizens Bank in turn would distribute ratable payments to all of the Bedford Downs shareholders. *Id.* at *15–16.

Although the acquisition closed and consolidated Valley View obtained the desired harness-racing license, consolidated Valley View failed to obtain another necessary license, which ultimately prompted chapter 11 bankruptcy filings by the consolidated entity and several affiliates. *Id.* at *16. A chapter 11 plan was confirmed in these cases, which appointed FTI Consulting, Inc. ("FTI") as trustee of a typical litigation trust. *Id.*

FTI sued Merit Management Group, LP ("Merit Management") to avoid and recover approximately $16.5 million that Merit Management had received as consideration for the sale of its portion of Bedford Downs' stock—FTI's theory was that the acquisition was a constructive fraudulent transfer undertaken while Valley View was insolvent and without an exchange of reasonably equivalent value. *Id.* at *16–17. Merit Management interposed the section 546(e) safe harbor as a defense, claiming that the participation of Credit Suisse and Citizens Bank in the acquisition transaction barred avoidance of the transfer to Merit Management. District Judge Joan B. Gottschall granted judgment on the pleadings in Merit Management's favor, largely adopting the "majority position" articulated by numerous circuit court of appeals opinions that broadly applied section 546(e). *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 541 B.R. 850, 855–60 (N.D. Ill. 2015). FTI appealed to the Court of Appeals for the Seventh Circuit, which reversed on the ground "that section 546(e) does not provide a safe harbor against avoidance of transfers between non-named entities where a named entity acts as a conduit." *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 830 F.3d 690, 697 (7th Cir. 2016). The Seventh Circuit panel "recognize[d] that we are taking a different position from the one adopted by five of our sister circuits, which have interpreted section 546(e) to include the conduit situation," but took comfort in the fact that the Eleventh Circuit had reached a similar conclusion in *Munford* and "[i]f Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor" in its post-*Munford* amendments to section 546(e), "it would have been easy to do that," but Congress did not. *Id.*

In the face of this clear circuit split, Merit Management filed a petition for a writ of certiorari. After being distributed for eight separate conferences of the Justices, the Court ultimately granted the petition on May 1, 2017. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 137 S. Ct. 2092, 197 L. Ed. 2d 894 (2017). Briefing was completed in the summer of 2017 (including several *amici curiae* briefs on both sides), and the case was argued on November 6, 2017.

Analysis

Justice Sotomayor's opinion begins by framing the issue before the Court through an effective use of arrow symbols; the "Court is asked to determine how the [section 546(e)] safe harbor operates in the context of a transfer that was executed via one or more transactions, *e.g.,* a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer include A → B → C → D." *Merit Mgmt.*, 2018 U.S. LEXIS 1514, at *8. More specifically, "should courts look to

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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)?" *Id.* Having so framed the question, the Court recites its ultimate conclusion "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." *Id.*

The Court's analysis begins with a broad overview of the avoiding powers, *id.* at *8–11, a discussion of the genesis and evolution of section 546(e), *id.* at *11–14, and a recitation of the facts of the case, *id.* at *14–17. The Court then turns to the question before it, which is framed as the need to "first identify the relevant transfer to test" against the safe harbor in a contest between an approach that would focus on "the overarching transfer between Valley View and Merit of $16.5 million for purchase of the stock" and an approach that instead would "look not only to the Valley View-to-Merit end-to-end transfer, but also to all its component parts." *Id.* at *18–19.

The Court engages in an analysis of the text of section 546(e) and related sections to determine that "[t]he language of § 546(e), the specific context in which that language is used, and the broader statutory structure all support the conclusion that the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions." *Id.* at *19–23. The Court notably includes the section heading for section 546 as among the material demonstrating "the close connection between the transfer that the trustee seeks to avoid and the transfer that is exempted from that avoiding power pursuant to the safe harbor." *Id.* at *21–22.

The Court further concludes that the Bankruptcy Code's statutory structure of allowing avoidance of particular transfers supports "view[ing] the pertinent transfer under §546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers." *Id.* at *23–25. Under the statute, an estate representative "must establish to the satisfaction of a court that the transfer it seeks to set aside meets the characteristics set out under the substantive avoidance provisions" and the need to satisfy "the carefully set out criteria in the Code" to initially trigger an avoiding power means that the plaintiff "is not free to define the transfer that it seeks to avoid in any way it chooses." *Id.* at *24. Thus, because "FTI identified the purchase of Bedford Downs' stock by Valley View from Merit as the transfer that it sought to avoid," there is no need to consider the involvement of two financial institutions—"the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under §546(e)." *Id.* at *25.

The Court ends by rejecting contrary statutory and policy arguments advanced by Merit Management. Like the Seventh Circuit, the Court finds "nothing in the text or legislative history that corroborates the proposition that Congress sought to overrule *Munford* in its 2006 amendment" and nothing in the as-now-amended text that has "changed the focus of the § 546(e) safe-harbor inquiry on the transfer that is otherwise avoidable under the substantive avoiding powers." *Id.* at *26–27. The Court further concludes that Merit Management's "purposivist arguments" are unsupported by legislative intention and inconsistent with the plain text of the statute. *Id.* at *30–31.

As the Court recapitulates, "the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers." *Id.* at 31. And

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because in the case before it, that specific transfer was only "the $16.5 million Valley View-to-Merit transfer" and not "the component transactions by which that overarching transfer was executed," the relevant transfer does not involve parties covered by section 546(e) and thus, as the Court of Appeals for the Seventh Circuit concluded, is not protected by the safe harbor. *Id.* at *31–32.

Practice Tips

Merit Management is a decision that will significantly alter the course of future avoidance action litigation. Most directly, the Supreme Court has overruled key decisions by the Courts of Appeals for the Second and Third Circuits that gave broad effect to the safe harbor, including in many large and significant bankruptcy cases filed in New York and Delaware. It seems likely that at least some avoidance plaintiffs, such as the trustee in the Madoff case, will be filing motions seeking relief from dismissal orders under Federal Rule of Civil Procedure 60(b)(6) (either on its own or as that rule is incorporated by Federal Rule of Bankruptcy Procedure 9024).

More broadly, *Merit Management* is a decision that fits with a long line of Supreme Court opinions dating back to the 1800s that adopt a "substance over form" approach when assessing the proper treatment of transactions in the bankruptcy context. *See* Kenneth N. Klee & Whitman L. Holt, *Bankruptcy and the Supreme Court: 1801–2014,* at 174–75 nn.1254–59 & accompanying text (West Academic 2015). Much like courts that use "collapsing" or similar doctrines when considering the application of substantive avoiding powers, the Court refused to allow the technical involvement of intermediary financial institutions to insulate from avoidance what was essentially a transaction between two private business parties. This approach vindicates courts that have previously declined to apply the safe harbor to private transactions that are of no consequence to the financial system as a whole. *See, e.g.*, *Geltzer v. Mooney (In re MacMenamin's Grill Ltd.)*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011).

There are many questions either unaddressed or raised by *Merit Management*, including:

- What are the outer limits on an avoidance plaintiff's ability to isolate a particular component of a transaction as the targeted "transfer"? Much like the famous duck-rabbit that Ludwig Wittgenstein utilized in his *Philosophical Investigations (Part II)* 194 (1964), the definition of a given transfer may depend on one's perspective and be a fluid matter if that perspective is shifted. The Court has now invited creative framing of the particular "transfer" as a device to work around the safe harbor.
- Will the scope of the safe harbor now be further narrowed by lower courts in other respects? For example, the Court of Appeals for the Second Circuit concluded that the safe harbor applies in contexts even when no securities transactions actually occurred. *See* *Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Secs. LLC)*, 773 F.3d 411 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 2859, 192 L. Ed. 2d 910 (2015). Now that the Supreme Court has rejected the most broad interpretation of section 546(e), other courts may conclude that the interpretation used in the *Madoff* case was likewise too broad.
- Is the avoidability of given transfers made to similarly situated parties dependent on the identities of the individual recipients? For example, assume that in an LBO

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transaction some cashed-out shareholders are individual "mom and pop" investors whereas others are large financial institutions that own shares for their own books. Are the individual investors subject to avoidance actions while the financial institutions participating in the exact same transaction are insulated? If so, this is arguably the converse of a result that may be most defensible from a policy perspective (i.e., that the individual shareholders, who are least likely to be sophisticated and sell their shares immediately before consummation of a buyout transaction, are stuck with avoidance exposure while sophisticated financial institutions are insulated).

- Are there strange consequences that may result from the distinction between "avoidance" of a transfer and the "recovery" of money or property under Bankruptcy Code section 550? Given the Court's invitation to creatively frame the relevant "transfer" subject to avoidance, it is possible that circumstances may result where a given transfer is avoided and yields multiple recovery routes under Bankruptcy Code section 550(a), some of which routes may have been unavailable under a different framing of the relevant transfer.
- Will parties attempt to structure transactions to work around *Merit Management*? For example, rather than acting as a conduit, perhaps a financial institution could be a beneficial recipient of a transfer and then promptly transfer a participation in its interests in a separate step (and for a small fee, of course) to a third party, thereby perhaps separating the third party from the debtor such that there is no "overarching transfer" that can be avoided.
- Will the financial services industry seek to further amend section 546(e) to legislatively overrule *Merit Management*? Congress does occasionally amend the Bankruptcy Code in response to the Supreme Court's bankruptcy decisions, most recently via amendments to chapter 12 to address the decision in *Hall v. United States*, 566 U.S. 506 (2012). The financial services industry has shown itself to be especially adroit at using the legislative process to continue to expand the scope of section 546(e) and various other special exceptions in the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 362(b)(6), (b)(7), (b)(17), (b)(27) & (*o*); 546(e), (f), (g) & (j); 555–556; 559–562. Thus, if history is any guide, it would be reasonable to expect lobbying efforts to "fix" the holding in *Merit Management*.

These are undoubtedly only some of the many issues that the bankruptcy community will confront in the wake of the *Merit Management* decision. For now, however, the take-home message is that the Supreme Court's first substantive encounter with the section 546(e) avoidance safe harbor has produced a highly significant opinion that will undoubtedly be relevant to many pending and future avoidance actions and that may more generally shift the tide against what has largely been a weakening of the avoiding powers through an increasingly broader application of this statutory protection.

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the Judiciary, U.S. House of Representatives, where he was one of the principal drafters of the 1978 Bankruptcy Code. He served as a consultant on bankruptcy legislation to the U.S. Department of Justice in 1983–1984. From 1992 to 2000, he served as a member of the Advisory Committee on Bankruptcy Rules to the Judicial Conference of the United States. From 2000 to 2003, and previously from 1988 to 1990, Professor Klee has served since 2017 as a board member of the Ninth Judicial Circuit Historical Society and served as a member of the Advisory Board for several years before that. He has served three times as a lawyer delegate to the Ninth Circuit Judicial Conference. Professor Klee served as member of the executive committee of the National Bankruptcy Conference from 1985 to 1988, 1992 to 1999, 2005 to 2008, and 2011 to 2014 and currently serves as Chair of its Membership Committee. He served from 2011 to 2014 as Chair of the NBC's Committee to Rethink Chapter 11 and also served as chair of its legislation committee from 1992 to 2000. Professor Klee is a past president and member of the board of governors of the Financial Lawyers Conference. Professor Klee was included in "The Best Lawyers in America" 2018 edition and has been included for at least 25 years. He has been named by *Who's Who Legal*, since 2012, as one of the top ten insolvency & restructuring attorneys in the world and was named by *The Legal 500* as one of the top nine leading attorneys in the municipal bankruptcy field for 2014. From 2003 to 2011 and periodically thereafter he was named by the *Daily Journal* as one of California's Top 100 Lawyers. Professor Klee is an author or co-author of four books: *Bankruptcy and the Supreme Court: 1801*–2014 (with Whitman L. Holt) (West Academic 2015); *Bankruptcy and the Supreme Court* (LexisNexis 2008); *BusinessReorganization in Bankruptcy* (West 1996; 2d ed. 2001; 3d ed. 2006; 4th ed. 2012); and *Fundamentals of Bankruptcy Law* (ALI-ABA 4th ed. 1996). He has authored or co-authored 32 law review articles on bankruptcy law. Recently, and within the past few years, Professor Klee has served as cocounsel for Bettina Whyte as COFINA agent in the Puerto Rico PROMESA restructuring cases; cocounsel for defendants Anadarko Petroleum Corp. and Kerr McGee in *Tronox v. Anadarko* (Bankr. S.D.N.Y.). and the Blavatnik defendants in *Weisfelner v. Blavatnik (In re Lyondell Chemical Co.)* (Bankr. S.D.N.Y.). During the summer of 2010, Professor Klee served as the appointed Examiner in the Tribune chapter 11 cases. He also represented Jefferson County, Alabama, in its successful Chapter 9 case from 2011 to 2014. Professor Klee also serves clients as an expert witness, mediator, arbitrator, attorney, or consultant in his Chapter 11 business reorganization practice.

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Bankruptcy Conference, which is an invitation-only organization dedicated to advising Congress about the operation of bankruptcy and related laws and which is widely regarded as the most prestigious professional organization in the bankruptcy field. In 2017, Mr. Holt was included in the American Bankruptcy Institute's inaugural list of "40 Under 40" bankruptcy, insolvency, and restructuring professionals from around the world. Mr. Holt is a graduate of Bates College (B.A., 2002, *magna cum laude* and Phi Beta Kappa) and Harvard Law School (J.D., 2005, *cum laude*).

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