Summary of Decision on Motions to Dismiss in the State Law Clawback Action

***Edward S. Weisfelner, as Trustee of the LB Creditor Trust v. Fund 1, et al.* (Adv. Pro. 10-04609)**

On January 14, 2014, Judge Robert E. Gerber of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") issued the *Decision and Order on Motions to Dismiss* in the State Law Clawback Action [Docket No. 1891] (the "Decision"). A copy of the Decision may be viewed on the LB Trusts' website (http://www.kccllc.net/lbtrust). The following is a summary of the most significant aspects of the Decision.

We have previously provided summaries and updates with respect to the State Law Clawback Action in the "Status Updates" that can be found on the LB Trusts' website. As a brief refresher, the State Law Clawback Action seeks to recover, pursuant to state fraudulent transfer law, amounts that were paid to former shareholders of Lyondell Chemical Company ("Lyondell") in connection with the leveraged buyout of Lyondell by Basell AF S.C.A. (the "LBO"), on or about December 20, 2007. The State Law Clawback Action contends that these payments constitute fraudulent transfers and should be returned to the Creditor Trust (a litigation trust created pursuant to Lyondell's 2010 plan of reorganization) for distribution to unsecured creditors of Lyondell and its affiliated debtors.

The defendants moved to dismiss the State Law Clawback Action on various grounds, and the Decision addresses the arguments raised in the defendants' motions:

- First, and most significantly, the Bankruptcy Court denied the motions to dismiss to the extent they were premised on the contention that the Creditor Trust's fraudulent transfer claims are preempted by Section 546(e) or other federal law. The Bankruptcy Court undertook a detailed discussion of the issue (see pp. 12-43), explaining why none of the branches of the federal preemption doctrine (express, field, or conflict preemption) applied to preempt the state law claims. In so holding, the Bankruptcy Court adopted the reasoning of Judge Sullivan of the U.S. District for the Southern District of New York in In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310 (S.D.N.Y. 2013) (Sullivan, J.), and disagreed with the reasoning of District Judge Rakoff (also of the Southern District of New York) in Whyte v. Barclays Bank PLC, 494 B.R. 196 (S.D.N.Y. 2013) (Rakoff, J.). (Both the Tribune and Barclays decisions regarding preemption are currently on appeal to the Second Circuit Court of Appeals, where there is a joint briefing schedule. The briefing in the Tribune appeal is ongoing at this time and set to conclude in April 2014, with oral argument likely to occur in or around June 2014.)

- Second, the Bankruptcy Court granted the motions to dismiss the Creditor Trust's intentional fraudulent transfer claims on the basis that the allegations with respect to such claims were deficient. However, because the Bankruptcy Court found that the deficiencies may be able to be remedied, it granted the Creditor Trust leave to replead the intentional fraudulent transfer claims. The Bankruptcy Court held that, in order for the Creditor Trust to survive a motion to dismiss, it would be necessary for an amended complaint to, among other things, either (i) plead facts supporting an intent to hinder, delay, or defraud on the part of the directors who made the decision to engage in the leveraged buyout, or (ii) allege facts plausibly suggesting that the company's CEO (Dan

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Smith) or his fellow officers could control the decision (either by influence on the other board members or otherwise).

- Third, the defendants' motions to dismiss were granted insofar as the claims were brought on behalf of the lenders who provided the financing for the LBO, on the grounds that the LBO lenders had, in effect, ratified the transfers by being parties to the financing transaction.

- Lastly, the Bankruptcy Court identified two issues on which it was inclined to give parties an opportunity to be heard, likely by additional briefing: (i) the relevance of Section 362 of the Bankruptcy Code, which was an issue addressed in the Tribune case but not raised by the Lyondell defendants in their motions to dismiss (see p. 43 n. 148),[1] and (ii) the obligation of shareholder-defendants to return LBO payments received until the claims of qualifying creditors have been fully satisfied (see pp. 53-4 n. 182).

- The Decision concluded by noting that an on-the-record status conference with the parties to the State Law Clawback Action would be scheduled by the Bankruptcy Court to discuss next steps in the case.

We will continue to provide updates as material developments occur in the State Law Clawback Action.

[1] The Section 362 issue relates to the applicability of the automatic stay to creditors' state law fraudulent transfer claims where an estate representative is simultaneously targeting the same transactions and similar defendants. In the Lyondell case, the LB Litigation Trust is currently prosecuting the separate Federal Law Clawback Action (*Edward S. Weisfelner, as Trustee of the LB Litigation Trust v. Alfred R Hoffman Charles Schwab & Co Inc Cust IRA Contributory, et al*. (Adv. Pro. No. 10-05525)), which seeks to recover the payments made in connection with the LBO pursuant to Section 548 of the Bankruptcy Code. The Creditor Trust does not believe that Section 362 or the existence of the Federal Law Clawback Action is a bar to the continuation of the State Law Clawback Action.