Bankruptcy Supreme Court Round-Up: Is Functionalism Back?

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1. Introduction ................................................................. 2

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INTRODUCTION

As stated by Lawrence B. Solum, Professor of Law at the Georgetown University Law Center:

Positive legal theory attempts to explain and predict legal behavior, especially the content of legal rules. Normative legal theory makes claims about what those rules should be. This week's post is about an important and familiar concept in positive legal theory--the idea of a functional explanation.

Why do legal rules have the form and content that they do, in fact, have? One answer to this question is based on the idea that the function of a rule can be part of a causal explanation of the content of the rule. Why does corporations law limit the liability of stockholders? One kind of answer to that question might begin: “That rule is the way it is, because it serves the interest of the capitalist class.” Or, “The rule is that way, because that is the efficient rule, and common law adjudication selects for efficient rules.” In other words, the content of the rule is explained (causally) by the function the rule serves.

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Functionalist explanations are frequently invoked in positive legal theory. That is, when we ask the question, “Why does the law have such and such content?”, the answer frequently is, “Because such and such a rule functions in thus and so way.”

A look at three recent Supreme Court decisions involving bankruptcy law leads to the question: Is Functionalism Back?

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In this case, the Supreme Court granted certiorari to resolve a split among the Circuit Courts of Appeal “as to whether a statement about a single asset can be a ‘statement respecting the debtor’s financial condition’” for the purpose of determining whether a debt is excepted from discharge under 11 U.S.C. § 523(a)(2)(B). The Court held that such a statement can constitute a statement respecting the debtor’s financial condition and therefore must be in writing to bar the debtor’s discharge under 11 U.S.C. § 523(a)(2)(B).

The Chapter 7 Debtor and Respondent, Scott R. Appling (“Debtor”) retained Lamar, Archer & Cofrin, LLP (“Lamar”) to represent him in business litigation and the Debtor fell behind on payment for the legal fees incurred. Lamar informed the Debtor that it would cease representing him in the litigation and would commence collection actions for the outstanding fees. The Debtor then informed Lamar during a meeting in March, 2005, that he was expecting a tax refund of approximately $100,000, which would cover Lamar’s outstanding fees. In reliance on this statement, Lamar continued to represent the Debtor and did not commence any collection action against him.


6 Lamar, Archer & Cofrin, LLP v. Appling, ---- U.S. ----, 138 S. Ct. 1752, 1763 and n. 1 (2018) (citing In re Bandi, 683 F.3d 671, 676 (5th Cir. 2012) (a statement about a single asset is not a statement respecting the debtor’s financial condition); In re Joelson, 427 F.3d 700, 714 (10th Cir. 2005); In re Appling, 848 F.3d 953, 960 (11th Cir. 2017) (a statement about a single asset can be a statement respecting the debtor's financial condition); Engler v. Van Steinburg, 744 F.2d 1060, 1061 (4th Cir. 1984) (same)).
7 Appling, 138 S.Ct. at 1764.
8 Id. at 1757.
9 Id.
10 Id.
11 Id.
Ultimately, the Debtor and his wife filed a tax return requesting only $60,718, of which $59,851 was received. Rather than paying Lamar, the Debtor and his wife used the tax refund for their business, and then, at November 2005 meeting, the Debtor told Lamar he had not yet received the tax refund. Again relying on the Debtor’s statement, Lamar completed the litigation and further delayed collection of its outstanding fees. In March 2006, Lamar sent the Debtor a final invoice that the Debtor never paid, leading Lamar to sue in Georgia state court five years later. Lamar obtained a judgment for $104,179.60 from the Georgia state court, and thereafter, the Debtor and his wife filed Chapter 7 bankruptcy.

During the Chapter 7, Lamar filed an adversary proceeding to have its debt deemed nondischargeable pursuant to § 523(a)(2)(A) as a “debt arising from false pretenses, false representations, or actual fraud, other than a statement respecting the debtor’s financial condition . . .” The Debtor filed a motion to dismiss asserting that the his statements to Lamar were respecting his financial condition and therefore had to be in writing in order to bar the discharge of Lamar’s debt as required by § 523(a)(2)(B). The Bankruptcy Court denied the Debtor’s motion to dismiss, ruling that “a statement about a single asset [i.e., the tax refund] is not a statement respecting the debtor’s financial condition”; and finding that the Debtor “made two false representations on which Lamar justifiably relied and Lamar incurred damages as a result.”

12 *Appling*, 138 S.Ct. at 1757.
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Appling*, 138 S.Ct. at 1757–58.
18 *Id.* at 1758.
19 *Id.*
On appeal from the District Court’s affirmance,20 the Eleventh Circuit reversed, finding that “statements respecting the debtor’s financial condition may include a statement about a single asset” and holding that the debt was dischargeable because the Debtor’s statements were not in writing.21 The Supreme Court granted certiorari and affirmed the Eleventh Circuit’s decision. The Court conducted a textual analysis of the plain language of § 523(a)(2)(B) and specifically focused on the word “respecting” in the phrase “statement respecting the debtor’s . . . financial condition.”22

The Court rejected Lamar’s argument that use of the word “respecting” had a limited meaning in § 523(a)(2)(B) that would include “a formal financial statement providing a detailed accounting of one’s assets and liabilities . . . [and] statements like ‘Don’t worry, I am above water,’ and ‘I am in good financial shape.’ [but would not include] [a] statement about a single asset . . . ”23 Instead the Court noted that the “[u]se of the word ‘respecting’ in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject.”24 The ordinary (dictionary) uses of “respecting” are “in view of: considering; with regard or relation to: regarding or concerning.”25 Accordingly, the Court found that:

[G]iven the ordinary meaning of “respecting,” Lamar’s preferred statutory construction—that a “statement respecting the debtor’s financial condition” means only a statement that captures the debtor’s overall financial status—must be rejected, for it reads “respecting” out of the statute.

20 Id. (citing 2016 WL 1183128 (M.D. Ga., Mar. 28, 2016).
21 Id. (citing In re Appling, 848 F.3d 953,960 (11th Cir. 2017)).
22 Appling, 138 S.Ct. at 1759.
23 Id.
24 Id. at 1755 (referring to Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976)).
25 Id. at 1759 (citing Webster’s (1934); American Heritage Dictionary 1107 (1969); Random House Dictionary of the English Language 1221 (1966); Webster's New Twentieth Century Dictionary 1542 (2d ed. 1967)).
[A] statement is “respecting” a debtor’s financial condition if it has a direct relation to or impact on the debtor’s overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor’s overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a “statement respecting the debtor’s financial condition.”

The statutory history and precursors to § 523(a)(2)(B), and the case law interpreting the Bankruptcy Code also supported the Court’s reading of the word “respecting” to include statements about single assets that would affect the Debtor’s financial condition. The Court rejected Lamar’s argument that the Debtor’s application of § 523(a)(2)(B) would give it an “implausibly broad reach such that little would be covered by § 523(a)(2)(A),” noting that “Section 523(a)(2)(A) has been applied when a debt arises from ‘forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation’” [and] “to bar the discharge of debts resulting from misrepresentations about the value of goods, property, and services.”

The Court also rejected Lamar’s argument that the Debtor’s interpretation is inconsistent with the policy of only affording relief to the “honest but unfortunate debtor,” and found that the heightened requirements of § 523(a)(2)(B) “reflect Congress’ effort to balance the potential

26 Id. at 1761 (citing TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)) (“[A] statute ought ... to be so construed that ... no clause, sentence, or word shall be superfluous, void, or insignificant”).
27 Appling, 138 S.Ct. at 1762 and n. 3 (2018) (citing Act of May 27, 1926, § 6, 44 Stat. 663–664; Act of July 12, 1960, Pub. L. 86–621, § 2, 74 Stat. 409; Tenn v. First Hawaiian Bank, 549 F.2d 1356, 1358 (9th Cir. 1977) (per curiam); In re Butler, 425 F.2d 47, 49, 52 (3d Cir. 1970); Shainman v. Shear’s of Affton, Inc., 287 F.2d 33, 38 (8th Cir. 1967); Albinak v. Kuhn, 149 F.2d 108, 110 (6th Cir. 1945); In re Weiner, 103 F.2d 421, 423 (2d Cir. 1939)).
28 Id. at 1763 and n. 4 (citing Husky Int’l Electronics, Inc. v. Ritz, 578 U.S. ----, ----, 136 S.Ct. 1581, 1586, 194 L.Ed.2d 655 (2016); In re Tucker, 539 B.R. 861, 868 (Bankr. Ct. D. Idaho 2015); In re Drummond, 530 B.R. 707, 710, and n. 3 (Bankr. Ct. E.D. Ark. 2015)).
29 Id. at 1763 and n. 5 (citing In re Boccino, 794 F.3d 376, 380–383 (3d Cir. 2015); In re Cohen, 106 F.3d 52, 54–55 (3d Cir. 1997); United States v. Spicer, 57 F.3d 1152, 1154, 1161 (D.C. Cir. 1995)).
The Court noted that creditors can protect themselves by requiring written statements about financial condition before extending credit and gave examples of how creditors have trapped debtors into nondischargeable debts through the credit application process by requiring debtors to list only a few, or the most important, debts followed by the statement “I have no other debts.” This type of collection action was sufficient to induce a debtor to settle for a reduced sum, even when the creditor’s claim that the debt was nondischargeable was weak.

The Court delved into the specific words of the Bankruptcy Code to reach its result. Once again, the effort led to as much of a bright line as the Court is likely to present in a case that requires a trek through definitions in its statutory analysis.

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30 Id.
32 Id.
The Supreme Court accepted certiorari to address a narrow question, which it answered just as narrowly. The question: “This Court granted certiorari to decide a single question: Whether the Ninth Circuit was right to review for clear error (rather than de novo) the Bankruptcy Court’s determination that Rabkin does not qualify as a non-statutory insider because he purchased MBP’s claim in an arm’s-length transaction. 580 U.S. ———, 137 S.Ct. 1372, 197 L.Ed.2d 553 (2017).”33 Stated more generally, what is the standard of review, clear error or de novo, in the mixed question of law and fact used to determine whether a person is a non-statutory insider in a bankruptcy case? A unanimous Court (opinion by Justice Kagan, with two concurring opinions) provided the answer: clear error. And that statement is the “clearest” statement in the Court’s analysis.

As succinctly stated by the Court, this is the background:

This case came about because the Code’s list of insiders placed an obstacle in the way of respondent Lakeridge’s attempt to reorganize under Chapter 11. Lakeridge is a corporate entity which, at all relevant times, had a single owner, MBP Equity Partners, and a pair of substantial debts. The company owed petitioner U.S. Bank over $10 million for the balance due on a loan. And it owed MBP another $2.76 million. In 2011, Lakeridge filed for Chapter 11 bankruptcy. The reorganization plan it submitted placed its two creditors in separate classes and proposed to impair both of their interests. U.S. Bank refused that offer, thus taking a fully consensual plan off the table. But likewise, a cramdown plan based only on MBP’s consent could not go forward. Recall that an insider cannot provide the partial agreement needed for a cramdown plan. See supra, at 963; § 1129(a)(10). And MBP was the

consummate insider: It owned Lakeridge and so was—according to the Code's definition—“in control” of the debtor. § 101(31)(B)(iii).

The path to a successful reorganization was thus impeded, and Lakeridge was faced with liquidation. Unless ...

Unless MBP could transfer its claim against Lakeridge to a non-insider who would then agree to the reorganization plan. So that was what MBP attempted. Kathleen Bartlett, a member of MBP’s board and an officer of Lakeridge, approached Robert Rabkin, a retired surgeon, and offered to sell him MBP’s $2.76 million claim for $5,000. Rabkin took the deal. And as the new holder of MBP’s old loan, he consented to Lakeridge’s proposed reorganization. As long as he was not himself an insider, Rabkin's agreement would satisfy one of the prerequisites for a cramdown plan. See § 1129(a)(10); supra, at 963. That would bring Lakeridge a large step closer to reorganizing its business over U.S. Bank’s objection.

Hence commenced this litigation about whether Rabkin, too, was an insider. U.S. Bank argued that he qualified as a non-statutory insider because he had a “romantic” relationship with Bartlett and his purchase of MBP’s loan “was not an arm’s-length transaction.” At an evidentiary hearing, both Rabkin and Bartlett testified that their relationship was indeed “romantic.” But the Bankruptcy Court still rejected U.S. Bank’s view that Rabkin was a non-statutory insider. The court found that Rabkin purchased the MBP claim as a “speculative investment” for which he did adequate due diligence. And it noted that Rabkin and Bartlett, for all their dating, lived in separate homes and managed their finances independently.35

It can be argued that the case supports the concept that functionalism is back. Two points illuminate the Court’s approach. First, to explain why the case was before the Court regarding “non-statutory insiders,” the Court looked to the definition of “insider” of a

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34 With an unusual display of humor, the Court included explanatory footnote 2:
Perhaps Bartlett expressed some ambivalence on that score. The transcript of her direct examination reads:
“Q. Okay. And I think the term has been a romantic relationship—you have a romantic relationship?
A. I guess.
Q. Why do you say I guess?
A. Well, no—yes.”
One hopes Rabkin was not listening.

Id., n.2.

35 Id. at 964–65 (2018) (internal citations omitted).
corporate debtor in §§ 101(31)(B)(i)-(iii) of Code and noted that it “includes” any director, officer, or “person in control” of the entity. The Court stated:

Because of the word “includes” in that section, courts have long viewed its list of insiders as non-exhaustive. See § 102(3) (stating as one of the Code’s “[r]ules of construction” that “‘includes’ and ‘including’ are not limiting”); 2 A. Resnick & H. Sommer, COLLIER ON BANKRUPTCY ¶ 101.31, p. 101–142 (16th ed. 2016) (discussing cases). Accordingly, courts have devised tests for identifying other, so-called “non-statutory” insiders. The 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.” Ibid. (quoting In re U.S. Medical, Inc, 531 F.3d 1272, 1280 (10th Cir. 2008)).

Secondly, to delve into the issue for which it had accepted certiorari, i.e., standard of review, the unsurprising statement that all mixed questions of law and fact are not the same is the crux of the analysis. The Court reminded readers that when the decision is not capable of generalization and provides no guidance for future analysis, appellate courts should usually review a decision with deference. But “when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision de novo.” In the context of this case, the Court noted that

What remains for a bankruptcy court, after all that, is to determine whether the historical facts found satisfy the legal test chosen for conferring non-statutory insider status. We here arrive at the so-called “mixed question” of law and fact at the heart of this case. Pullman–Standard v. Swint, 456 U.S. 273, 289, n. 19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (A mixed question asks whether “the historical facts ... satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated”).

With the understanding that deciding whether a transaction is at arm’s length involves deciding whether the parties behaved as though they were strangers, the Court opined that the

36 Id. at 963–64.
37 Id. at 967.
court best able to make that determination is the court that hears the evidence, not an appellate court. The Court concluded that the finding of whether a creditor engaged in an arm’s length deal and, thus is not a non-statutory insider, as the bankruptcy court ruled in this case, was largely factual with little legal analysis required. Justice Kagan wrote:

And we can arrive at the same point from the opposite direction—by asking how much legal work applying the arm’s-length test requires. Precious little, in our view— as shown by judicial opinions addressing that concept. Our own decisions, arising in a range of contexts, have never tried to elaborate on the established idea of a transaction conducted as between strangers; nor, to our knowledge, have lower courts.\(^\text{39}\)

Because the only factor the Court reviewed was whether the transaction that created the issue was an arm’s length one, the bankruptcy court’s finding addressed only historical facts such as who did what, when or where, how or why. That determination did not involve any analysis that would assist in developing auxiliary legal principles and did not warrant de novo review. The Court found that the standard of review of the bankruptcy court’s findings in such a circumstance should be clear error.

The Court devoted a substantial portion of its opinion to explaining what it did not decide. One important undecided area may be fodder for litigation for many years. That is, exactly how one determines that a mixed question of law and fact is largely factual or what degree of legal analysis is enough to require de novo review was not adjudicated and is left for further development by the trial courts.

A second area of future inquiry was whether the Ninth Circuit’s two-factor approach to determining non-statutory insider status is the correct one. The Ninth Circuit’s standard for finding non-statutory insider status requires satisfaction of two conditions: “(1) the closeness of

\(^{39}\) Id. at 968.
its relationship with the debtor is comparable to that of the enumerated insider classifications in
[the Code], and (2) the relevant transaction is negotiated at less than arm’s length.” 40 Both of the
concurring opinions, one by Justice Kennedy and the other by Justice Sotomayor, with Justices
Kennedy, Thomas, and Gorsuch joining, criticized the bankruptcy court’s finding that the
purchaser was not a non-statutory insider and left open the question of whether the Ninth
Circuit’s formulation would be upheld if the issue ever came before the Court. The justices were
concerned about the relationship that led to the transaction, and questioned whether the debtor
obtained anything of real value other than a contrived vote on its plan. 41

On balance, the opinion asks more questions than it resolves and delays the answers to
another day.

40 Id. at 965 (quoting In re Village at Lakeridge, LLC, 814 F.3d 993, 1001 (2016)).
41 What constitutes “value” in this context is a reasonable question when a claim for $2.76 million was
sold to a romantic partner for $5,000 without having been offered to anyone other than the purchaser.
MERIT MANAGEMENT GROUP, LP v. FTI CONSULTING, INC.,


In a case that involves the proper application of the § 546(e) safe harbor, the Supreme Court granted certiorari to resolve a conflict among the circuit courts. The case involved principles of statutory interpretation of a provision of the Bankruptcy Code favored by creditors, 11 U.S.C. § 546(e), commonly referred to as the “securities safe harbor” because it insulates from a trustee’s avoidance powers those settlement payments by, to or for the benefit of a securities clearing agency. The Supreme Court carefully parsed the language of the statute and the context in which it was used. In so doing, the Court engaged in a fairly traditional analysis and, unanimously affirming the opinion of the Court of Appeals for the Seventh Circuit and resolving a circuit split, utilized a “plain meaning” approach. The Court came to the conclusion that regardless of intermediate transfers through financial institutions, the only transfer that is relevant to the inquiry of whether it is protected by the safe harbor provision is that which the trustee seeks to avoid.

The facts are straightforward. One party (Valley View) obtained the last harness racing license in Pennsylvania but never opened for business as it was not able to obtain slot-machine licenses in the time required by its financing package. Valley View and Centaur, its parent, filed bankruptcy. After a plan was confirmed, FTI was appointed trustee of the Centaur litigation trust. Litigation ensued in FTI’s effort to set aside the transfers at issue, which occurred in several steps with various financial institutions involved in the sequence, as constructively fraudulent. The Supreme Court described the substance of the transactions as follows:
On one side, Merit posits that the Court should look not only to the Valley View–to–Merit end-to-end transfer, but also to all its component parts. Here, those component parts include one transaction by Credit Suisse to Citizens Bank (i.e., the transmission of the $16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (i.e., the transmission of $16.5 million over two installments by Citizens Bank as escrow agent to Merit). Because those component parts include transactions by and to financial institutions, Merit contends that § 546(e) bars avoidance.

FTI, by contrast, maintains that the only relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer between Valley View and Merit of $16.5 million for purchase of the stock, which is the transfer that the trustee seeks to avoid under § 548(a)(1)(B). Because that transfer was not made by, to, or for the benefit of a financial institution, FTI contends that the safe harbor has no application.42

FTI’s complaint alleged that the transfer was constructively fraudulent under § 548(a)(1)(B) of the Code because Valley View was insolvent when it purchased Bedford Downs and significantly overpaid for the Bedford Downs stock. Merit disagreed and sought judgment on the pleadings asserting that the § 546(e) safe harbor barred FTI from avoiding the transfer from Valley View to Merit because the transfer was a settlement payment made by, to or for the benefit of a Credit Suisse and Citizens Bank that are financial institutions. The District Court granted the motion on the ground that the financial institutions transferred or received funds in connection with a securities contract or settlement payment. That ruling was reversed by the Court of Appeals, which held that § 546(e) does not protect transfers in which financial institutions are mere conduits.

The Supreme Court agreed with the Court of Appeals. After reciting a history of avoidance powers and the safe harbor provision, the Court engaged in a plain meaning review to

conclude that the statute applies only to the transfer that is sought to be avoided, regardless of the number of intervening transfers required to get there. The Court explained:

The transfer that the “the trustee may not avoid” is specified to be “a transfer that is” either a “settlement payment” or made “in connection with a securities contract.” § 546(e) (emphasis added). Not a transfer that involves. Not a transfer that comprises. But a transfer that is a securities transaction covered under § 546(e). The provision explicitly equates the transfer that the trustee may otherwise avoid with the transfer that, under the safe harbor, the trustee may not avoid. In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria.43

To reach that conclusion, the Court cited the Seventh Circuit’s opinion with favor:

As the Seventh Circuit aptly put it, the Code “creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin.” 830 F.3d, at 694; see also Fidelity Financial Services, Inc. v. Fink, 522 U.S. 211, 217, 118 S.Ct. 651, 139 L.Ed.2d 571 (1998) (“Section 546 of the Code puts certain limits on the avoidance powers set forth elsewhere”). Given that structure, it is only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers.44

Functionalism “attempts to explain and predict legal behavior” by analyzing the functions that law serves.45 The functionalism construct calls for an efficient resolution to legal problems. The argument can be made that the Court reached a functional result in this case while utilizing a plain meaning approach to the resolution.

In support of its plain meaning approach, the Court read the statutory language, determined the context in which the language was used, and looked at the structure of the statute, overall. The Court discounted Merit’s suggestion that Congress intended to include within the

43 Id. at 894.
44 Id.
scope of § 546(e) any transaction that utilized a financial institution as an intermediary even when that institution had no beneficial interest in the outcome. In addressing Merit’s contention regarding the purpose of the statute, the Court disclaimed Merit’s “purposivist” argument. Merit asserted that Congress enacted a broad safe harbor as a “comprehensive approach to securities and commodities transactions” that “was prophylactic, not surgical,” and meant to “advanc[e] the interests of parties in the finality of transactions.” In this context, Merit raised two points: (1) that the nature of the transaction should govern over the identity of the investor and the manner in which it held its investment; and (2) “[t]here is no reason to believe that Congress was troubled by the possibility that transfers by an industry hub could be unwound but yet was unconcerned about trustees’ pursuit of transfers made through industry hubs.” The Court made short shrift of the arguments, specifically noting that even if this were the kind of case in which the Court would consider the statutory purpose, Merit’s idea of the purpose was actually contradicted by the plain language of the safe harbor. Because, of course, here we do have a good reason to believe that Congress was concerned about transfers “by an industry hub” specifically: The safe harbor saves from avoidance certain securities transactions “made by or to (or for the benefit of)” covered entities. See § 546(e). Transfers “through” a covered entity, conversely, appear nowhere in the statute. And although Merit complains that, absent its reading of the safe harbor, protection will turn “on the identity of the investor and the manner in which it held its investment,” that is nothing more than an attack on the text of the statute, which protects only certain transactions “made by or to (or for the benefit of)” certain covered entities.

The result of the Supreme Court’s “plain meaning” ruling provided a bright line. Where the financial institution did nothing more than act as a conduit to facilitate a transaction for other

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46 Merit Management Group, 138 S.Ct. at 896.
47 Id.
48 Id.
parties, the safe harbor does not apply and the transaction can be avoided if the trustee satisfies the terms of the underlying avoidance provision.