

JAN 07 2015

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re:)
)
EPD INVESTMENT COMPANY, LLC)
and JERROLD S. PRESSMAN,)
)
Consolidated Debtors.)

BAP Nos. CC-13-1374-KiKuDa
CC-13-1375-KiKuDa
(Related Appeals)
Bk. No. 2:10-bk-62208-ER
Adv. Nos. 2:12-ap-02576-ER
2:12-ap-02596-ER

_____)
JASON M. RUND, Chapter 7)
Trustee,)
)
Appellant,)

v.)

O P I N I O N

BANK OF AMERICA CORPORATION;)
BANK OF AMERICA, N.A.; FIA)
CARD SERVICES, N.A. fka MBNA)
AMERICA BANK,)
)
Appellees.)

_____)
JASON M. RUND, Chapter 7)
Trustee,)
)
Appellant,)

COUNTRYWIDE HOME LOANS, INC.)
and BANK OF AMERICA, N.A.,)
)
Appellees.)

Argued and Submitted on September 18, 2014,
at Pasadena, California

Filed - January 7, 2015

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Appearances: Corey R. Weber, Esq. of Ezra Brutzkus Gubner LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

argued for appellant Jason M. Rund, Chapter 7
Trustee; Zareh A. Jaltorossian, Esq. argued for
appellees Bank of America, N.A., Bank of America
Corporation and FIA Card Services, N.A.

Before: KIRSCHER, KURTZ and DAVIS,¹ Bankruptcy Judges.

¹ Hon. Laurel E. Davis, Bankruptcy Judge for the District of Nevada, sitting by designation.

1 KIRSCHER, Bankruptcy Judge:

2
3 Chapter 7² trustee Jason M. Rund ("Trustee") appeals orders
4 granting the motions of Bank of America Corporation, Bank of
5 America, N.A. and FIA Card Services, N.A. fka MBNA America Bank
6 (together "Bank of America") and Countrywide Home Loans, Inc.,
7 Bank of America, N.A. successor by merger to BAC Home Loans
8 Servicing, LP fka Countrywide Home Loans Servicing, LP (together
9 "Countrywide") (collectively "Defendants" or "Appellees") to
10 dismiss Trustee's claims against Appellees for certain fraudulent
11 transfers.

12 Under § 544(b) and CAL. CIV. CODE §§ 3439-3439.12, Trustee
13 sought to avoid certain fraudulent transfers to Appellees that
14 occurred up to seven years prior to the debtors' petition date.
15 Trustee filed his complaints against Appellees within the two
16 years prescribed in § 546(a)(1)(A). Finding that the California
17 fraudulent transfer statute, CAL. CIV. CODE § 3439.09(c), is a
18 statute of repose, the bankruptcy court, relying on an unpublished
19 Ninth Circuit decision, ruled that Trustee could reach back only
20 to those transfers occurring up to seven years prior to the filing
21 of his complaint, not the petition date. In other words, the
22 bankruptcy court determined that § 546(a) has no effect on the
23 seven-year limitations period set forth in CAL. CIV. CODE
24 § 3439.09(c); it runs concurrently with the two year statute of
25 limitations set forth in § 546(a). Trustee appeals, contending

26
27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 that the filing of a bankruptcy petition tolls the California
2 statute and gives a trustee an additional two years to investigate
3 and file an avoidance action, regardless of whether CAL. CIV. CODE
4 § 3439.09(c) is a statute of repose.

5 The narrow question of whether § 546(a) preempts a state-law
6 statute of repose such as CAL. CIV. CODE § 3439.09(c) is an issue of
7 first impression in this circuit. At least no published decisions
8 have addressed it. While relatively few courts have addressed
9 this particular issue, virtually all have held in favor of
10 Trustee. We conclude that the bankruptcy court erred in its
11 application of § 546(a), and we REVERSE.

12 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

13 EPD Investment Company, LLC ("Debtor") was operated by
14 Jerrold S. Pressman (together "Debtors")³ as a sole proprietorship
15 between the 1970s and June 27, 2003. On June 27, 2003, when
16 Debtor was formed as a California limited liability company,
17 Pressman transferred the sole proprietorship's assets to Debtor.

18 Trustee filed his complaints against Defendants on November
19 30 and December 2, 2012 (the "Complaints"). Trustee alleged that
20 Debtor operated as a Ponzi scheme between 2003 and the petition
21

22 ³ EPD Investment Company, LLC was filed as an involuntary
23 case on December 7, 2010. The bankruptcy court entered an order
24 for relief on February 9, 2011, nunc pro tunc to December 7, 2010.
25 It also ordered substantive consolidation of Debtor's case and
26 Mr. Pressman's individual voluntary case nunc pro tunc to
27 December 7, 2010. Therefore, the petition date and the order for
28 relief date are the same; Trustee could arguably recover transfers
going back seven years from December 7, 2010. See Alexander v.
Compton (In re Bonham), 229 F.3d 750, 771 (9th Cir. 2000) (when
court orders substantive consolidation nunc pro tunc, the filing
date of the original involuntary bankruptcy petition is the
controlling date from which to measure the limitations period for
trustee's avoidance actions).

1 date. Pursuant to § 544(b) and CAL. CIV. CODE §§ 3439.04(a) and
2 3439.07, Trustee's first claim for relief sought to avoid
3 transfers from Debtors to Defendants occurring up to seven years
4 prior to the petition date: December 7, 2003 through December 7,
5 2010 (the "First Claim").⁴ As to Bank of America, Trustee sought
6 to avoid transfers made between December 24, 2003 and December 18,
7 2009. Trustee sought to avoid transfers to Countrywide made
8 between December 15, 2003 and June 11, 2009.

9 Defendants moved to dismiss Trustee's Complaints under Civil
10 Rule 12(b)(6) ("Motions to Dismiss"). Citing CAL. CIV. CODE
11 § 3439.09(a) and (b),⁵ Defendants argued that Trustee's recovery
12 was limited to transfers made within four years preceding the date
13 the bankruptcy court entered the order for relief, or February 9,
14 2011. Thus, argued Defendants, all transfers made prior to
15 February 9, 2007, were time-barred and should be dismissed. Based
16 on their arguments, Defendants maintained that the time
17 limitations in CAL. CIV. CODE § 3439.09(a) and (b) were "tolled" as
18

19 ⁴ Although Trustee alleged other claims for relief, his
20 First Claim is the only claim at issue in these appeals.

21 ⁵ CAL. CIV. CODE § 3439.09(a) and (b) provides:

22 A cause of action with respect to a fraudulent transfer or
23 obligation under this chapter is extinguished unless action
24 is brought pursuant to subdivision (a) of Section 3439.07 or
25 levy made as provided in subdivision (b) or (c) of Section
26 3439.07:

27 (a) Under paragraph (1) of subdivision (a) of Section
28 3439.04, within four years after the transfer was made or the
obligation was incurred or, if later, within one year after
the transfer or obligation was or could reasonably have been
discovered by the claimant.

(b) Under paragraph (2) of subdivision (a) of Section 3439.04
or Section 3439.05, within four years after the transfer was
made or the obligation was incurred.

1 of the date of the order for relief, and that Trustee could reach
2 back to any transfers within the four-year period preceding
3 February 9, 2011.

4 Trustee opposed the Motions to Dismiss. Citing Von Gunten v.
5 Neilson (In re Slatkin), 243 F. App'x 255, 258 (9th Cir. 2007)
6 ("Slatkin II"), an unpublished Ninth Circuit case, Trustee argued
7 that §§ 544(b) and 546(a) effectively preempted the statute of
8 limitations set forth in CAL. CIV. CODE § 3439.09, including the
9 seven-year period in subdivision (c).⁶ Trustee argued Slatkin II,
10 relying on Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d
11 800 (9th Cir. 1994), held that the filing of a bankruptcy petition
12 tolls the limitations period on a creditor's state-law fraudulent
13 transfer action and permits a trustee up to two years to file an
14 avoidance action, even if the state's limitations period has
15 otherwise expired. Therefore, argued Trustee, because he filed
16 his Complaints within the two years required under § 546(a),
17 Defendants had failed to show his claims were time-barred.

18 Defendants argued that CAL. CIV. CODE § 3439.09(c) was a
19 statute of repose, not limitations, and was not subject to
20 tolling. To support their argument, Defendants cited Jenner v.
21 Neilson (In re Slatkin), 222 F. App'x 545, 547 (9th Cir. 2007)
22 ("Slatkin I"), another unpublished Ninth Circuit case issued six
23 months prior to Slatkin II, for the proposition that the seven
24 year reach back period should be measured from the date of the

25 ⁶ CAL. CIV. CODE § 3439.09(c) provides, in relevant part:

26 Notwithstanding any other provision of law, a cause of action
27 with respect to a fraudulent transfer or obligation is
28 extinguished if no action is brought . . . within seven years
after the transfer was made or the obligation was incurred.

1 filing of the complaint, not the petition date. Thus, argued
2 Defendants, to the extent Trustee sought to avoid transfers made
3 more than seven years prior to the date of the filing of the
4 Complaints, such claims should be dismissed with prejudice.

5 In its decision, the bankruptcy court identified CAL. CIV. CODE
6 § 3439.09(a) and (c) as the applicable "statute of limitations"
7 for a fraudulent transfer claim under CAL. CIV. CODE § 3439.04(a).
8 Relying on Slatkin I, the court dismissed Trustee's First Claim
9 against Defendants, with prejudice, to the extent it sought to
10 avoid transfers occurring more than seven years prior to the date
11 he filed his Complaints. After considering the parties' arguments
12 at the hearing on the Motions to Dismiss, the court added:

13 First, I believe that the Slatkin I case better reflects
14 the application of relevant California law. And so I
15 think it's a better -- it's not binding on the Court, but
16 I think it reflects appropriately what the state of the
17 law is in California with respect to that statute of
18 repose.

19 Hr'g Tr. (July 16, 2013) 13:2-7 (emphasis added). We granted
20 Trustee's motion for leave to file interlocutory appeals. Rule
21 8004.

22 **II. JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
24 and 157(b)(2)(H). We have jurisdiction under 28 U.S.C. § 158.

25 **III. ISSUE**

26 Does § 546(a) preempt a state-law fraudulent transfer statute
27 of repose such as CAL. CIV. CODE § 3439.09(c)?

28 **IV. STANDARDS OF REVIEW**

The bankruptcy court's dismissal of an adversary complaint
for failure to state a claim under Civil Rule 12(b)(6) is reviewed

1 de novo. Barnes v. Belice (In re Belice), 461 B.R. 564, 572 (9th
2 Cir. BAP 2011). A dismissal without leave to amend is reviewed
3 for abuse of discretion. Ditto v. McCurdy, 510 F.3d 1070, 1079
4 (9th Cir. 2007). A bankruptcy court abuses its discretion if it
5 applies an incorrect legal standard or its factual findings are
6 illogical, implausible or without support from evidence in the
7 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,
8 832 (9th Cir. 2011).

9 We review a bankruptcy court's conclusions of law, including
10 its interpretations of provisions of the Bankruptcy Code and state
11 law, de novo. See New Falls Corp. v. Boyajian (In re Boyajian),
12 367 B.R. 138, 141 (9th Cir. BAP 2007), aff'd, 564 F.3d 1088 (9th
13 Cir. 2009).

14 V. DISCUSSION

15 A. Civil Rule 12(b)(6) standards

16 Under Civil Rule 12(b)(6), made applicable in adversary
17 proceedings through Rule 7012, a bankruptcy court may dismiss a
18 complaint if it fails to "state a claim upon which relief can be
19 granted." In reviewing a Civil Rule 12(b)(6) motion, the trial
20 court must accept as true all facts alleged in the complaint and
21 draw all reasonable inferences in favor of the plaintiff. Navarro
22 v. Block, 250 F.3d 729, 732 (9th Cir. 2001). However, the trial
23 court need not accept as true conclusory allegations in a
24 complaint or legal characterizations cast in the form of factual
25 allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56
26 (2007); Hartman v. Gilead Scis., Inc. (In re Gilead Scis. Sec.
27 Litig.), 536 F.3d 1049, 1055 (9th Cir. 2008).

28 We do not ignore affirmative defenses to a claim; if the

1 allegations show that relief is barred as a matter of law, the
2 complaint is subject to dismissal. Jones v. Bock, 549 U.S. 199,
3 215 (2007) (dismissal is appropriate under Civil Rule 12(b)(6) if
4 the allegations show that relief is barred by the applicable
5 statute of limitations).

6 To avoid dismissal under Civil Rule 12(b)(6), a plaintiff
7 must aver in the complaint "sufficient factual matter, accepted as
8 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550
9 U.S. at 570). It is axiomatic that a claim cannot be plausible
10 when it has no legal basis. A dismissal under Civil Rule 12(b)(6)
11 may be based either on the lack of a cognizable legal theory or on
12 the absence of sufficient facts alleged under a cognizable legal
13 theory. Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121
14 (9th Cir. 2008).
15

16 **B. The interplay of § 544(b), § 546(a) and the statute of**
17 **limitations in Cal. Civ. Code § 3439.09(a) and (b).**

18 Section 544(b)(1) authorizes a trustee to avoid "any transfer
19 of an interest of the debtor in property . . . that is voidable
20 under applicable law" - i.e., state law. The transfers at issue
21 here were argued to be fraudulent transfers under the California
22 Uniform Fraudulent Transfer Act ("UFTA"), found in CAL. CIV. CODE
23 §§ 3439-3439.12. Specifically, Trustee sought to avoid certain
24 transfers under CAL. CIV. CODE §§ 3439.04(a) and 3439.07. Monies
25 lost by Ponzi-scheme investors are recoverable under the UFTA.
26 See Donell v. Kowell, 533 F.3d 762, 767 (9th Cir. 2008). A
27 trustee's right to bring a state-law fraudulent transfer action
28 under § 544(b) is a creation of the Bankruptcy Code; it is not an

1 action to assert an independent state law created right. Gen.
2 Elec. Capital Auto Lease, Inc. v. Broach (In re Lucas Dallas,
3 Inc.), 185 B.R. 801, 804 (9th Cir. BAP 1995) (citing Mahoney,
4 Trocki & Assocs., Inc. v. Kunzman (In re Mahoney, Trocki &
5 Assocs., Inc.), 111 B.R. 914, 918 (Bankr. S.D. Cal. 1990)).

6 CAL. CIV. CODE § 3439.09(a) and (b) are statutes of limitation
7 requiring a plaintiff to file a fraudulent transfer action within
8 four years of the transfer or, for an intentional fraud, within
9 one year after the transfer was or could reasonably have been
10 discovered. In re JMC Telecom LLC, 416 B.R. 738, 742 (C.D. Cal.
11 2009); Macedo v. Bosio, 86 Cal. App. 4th 1044, 1050 n.4 (2001).

12 A trustee's action under § 544 is also subject to the time
13 limitations set forth in § 546(a), which provides, in relevant
14 part, that an action or proceeding under § 544 to avoid a transfer
15 must be commenced within "2 years after the entry of the order for
16 relief." § 546(a)(1)(A). Many courts, including the Ninth
17 Circuit, have held that if the statute of limitations period
18 governing a state-law fraudulent transfer action has not yet
19 expired on the petition date (or the date the order for relief is
20 entered, which is generally the same date), the trustee may bring
21 the action under § 544(b), provided it is filed within the
22 § 546(a) limitations period. This rule applies even if the state
23 statute of limitations expired while the bankruptcy case was
24 pending. Acequia, Inc., 34 F.3d at 807 (applying Idaho fraudulent
25 transfer law and describing Karnes v. McDowell (In re McDowell),
26 87 B.R. 554, 558 (Bankr. S.D. Ill. 1988), as holding that "a
27 bankruptcy petition tolls the statute of limitations on a
28 creditor's state-law fraudulent conveyance action and permits the

1 trustee to initiate avoidance litigation even where the
2 limitations period otherwise would have expired"); Slatkin II, 243
3 F. App'x at 258 (applying CAL. CIV. CODE § 3439.09 and citing
4 Acequia, Inc.); Richardson v. Preston (In re Antex, Inc.), 397
5 B.R. 168, 174 (1st Cir. BAP 2008); Rosania v. Haligas (In re Dry
6 Wall Supply, Inc.), 111 B.R. 933, 936 (D. Colo. 1990); Picard v.
7 Estate of Chais (In re Bernard L. Madoff Inv. Secs. LLC), 445 B.R.
8 206, 231 (Bankr. S.D.N.Y. 2011); Summit Secs., Inc. v. Sandifur
9 (In re Metro. Mortg. & Secs. Co.), 344 B.R. 138, 141 (Bankr. E.D.
10 Wash. 2006); Bay State Milling Co. v. Martin (In re Martin), 142
11 B.R. 260, 265 (Bankr. N.D. Ill. 1992); In re Mahoney, Trocki &
12 Assocs., Inc., 111 B.R. at 919-20.

13 Simply put, so long as the state-law fraudulent transfer
14 claim exists on the petition date (or the order for relief date),
15 the state statutes of limitations cease to have any continued
16 effect, and the only applicable statute of limitations for
17 bringing the claim thereafter is within § 546(a). Accordingly,
18 the reach back period is established on the petition date (or the
19 order for relief date) and encompasses all transfers within the
20 relevant period provided by state law. Trustee's Complaints were
21 timely filed under § 546(a).

22 **C. The interplay of § 546(a) and CAL. CIV. CODE § 3439.09(c) and**
23 **similar state statutes of repose**

24 In contrast to subdivisions (a) and (b), the seven year time
25 limitation set forth in CAL. CIV. CODE § 3439.09(c) is a statute of
26 repose. Donell v. Keppers, 835 F. Supp. 2d 871, 877 (S.D. Cal.
27 2011) (citing Forum Ins. Co. v. Comparet, 62 F. App'x 151, 152
28 (9th Cir. 2003) ("[W]e find that CAL. CIV. CODE § 3439.09(c) is a

1 statute of repose pertaining to all actions relating to fraudulent
2 transfers.”) (relying on Macedo, 86 Cal. App. 4th at 1050 n.4));
3 In re JMC Telecom LLC, 416 B.R. at 742.

4 Relying on Slatkin I, the bankruptcy court determined that
5 the seven-year repose period in CAL. CIV. CODE § 3439.09(c) was not
6 tolled and, therefore, Trustee could not avoid any transfers that
7 occurred more than seven years prior to the filing of the
8 Complaints as those claims were extinguished. In Slatkin I, the
9 chapter 7 trustee initiated an avoidance action to recover
10 fraudulent transfers made by debtor during the course of a Ponzi
11 scheme. 222 F. App’x at 546. Citing CAL. CIV. CODE § 3439.09(c),
12 the Ninth Circuit found the bankruptcy court had erred in
13 measuring the trustee’s seven-year claims from the petition date
14 rather than the date he filed his complaint. Following Macedo,
15 the Ninth Circuit reasoned that the seven-year repose period
16 “extinguished the Trustee’s ability to reach the transfers that
17 occurred more than seven years prior” to the filing of the
18 complaint. Id. at 547. The court concluded that such error was
19 harmless, however, because the transfers at issue had occurred
20 within the seven-year period prior to when the trustee filed his
21 complaint. Id.

22 In Slatkin II, which involved a different transferee of the
23 debtor and was decided six months after Slatkin I, the Ninth
24 Circuit stated in its introductory paragraph: “The bankruptcy
25 court determined that Slatkin had been running a fraudulent Ponzi
26 scheme and that the transfers from Slatkin were voidable
27 fraudulent conveyances that occurred within seven years of
28 Slatkin’s bankruptcy. We affirm the bankruptcy court’s order.”

1 243 F. App'x at 257 (emphasis added). The court rejected the
2 transferee's argument that the trustee could not avoid transfers
3 reaching back seven years from the petition date. Id. at 258.
4 Relying on Acequia, Inc., 34 F.3d at 807, the Slatkin II court
5 concluded that upon the bankruptcy petition filing, the trustee
6 then has two years to initiate avoidance litigation as § 546(a)
7 tolls the statute of limitations on a creditor's state-law
8 fraudulent transfer proceeding pursued through § 544(b). Id.

9 Trustee argues that Slatkin I and Slatkin II are inconsistent
10 as to whether a trustee can recover transfers that occurred up to
11 seven years prior to the petition date or to the date the
12 complaint is filed. We agree. Slatkin I appears to hold that,
13 unlike the four year statute of limitations set forth in CAL. CIV.
14 CODE § 3439.09(a), the seven-year repose period in CAL. CIV. CODE
15 § 3439.09(c) is not tolled upon the filing of the bankruptcy
16 petition, and therefore a trustee can only recover transfers
17 occurring up to seven years from when the complaint is filed.
18 Slatkin II arguably holds just the opposite, that a trustee can
19 recover transfers occurring up to seven years prior to the
20 petition date. Slatkin II, however, made no mention of whether
21 CAL. CIV. CODE § 3439.09(c) is a statute of repose or limitations.
22 Either way, while the Slatkin cases may provide persuasive
23 authority on the matter at hand, we are not bound by them.⁷ See

24
25 ⁷ Appellees argue that in the underlying district court
26 order from Slatkin II, it is clear the issue there was only the
27 four year statute of limitations set forth in CAL. CIV. CODE
28 § 3439.09(a), not the seven-year repose period in CAL. CIV. CODE
§ 3439.09(c). While that was certainly one of the issues, the
district court nonetheless proceeded to affirm the bankruptcy

(continued...)

1 9th Cir. R. 36-3(a). We disagree with Trustee that Acequia, Inc.
2 has answered the question before us. That case did not address
3 the effect of § 546(a) on a state statute of repose such as CAL.
4 CIV. CODE § 3439.09(c).

5 No published Ninth Circuit case has addressed this specific
6 issue. Therefore, we turn to other jurisdictions which have
7 considered it. First, however, we believe a brief explanation
8 about the difference between statutes of limitations and statutes
9 of repose is in order. In a recent decision, we explained that a
10 statute of limitations creates an affirmative defense if a party
11 fails to initiate an action within a specific time period, whereas
12 a statute of repose extinguishes a party's claim after a fixed
13 period of time, usually measured from one of the defendant's acts.
14 The former involves a party's diligence; the latter promotes a
15 defendant's peace from litigation. DeNoce v. Neff (In re Neff),
16 505 B.R. 255, 263 (9th Cir. BAP 2014). "A statute of repose is
17 thus harsher than a statute of limitations in that it cuts off a
18 right of action after a specified period of time, irrespective of

19

20

21 ⁷(...continued)
22 court's finding that the trustee could bring fraudulent transfer
23 claims up to seven years prior to the date of the debtor's
24 bankruptcy filing:

25 The Court finds that pursuant to CAL. CIV. CODE § 3439.09(a),
26 the Trustee presented sufficient evidence to avoid transfers
27 up to seven years prior to Slatkin's bankruptcy and the
28 transfers actually avoided did not go beyond seven years.

29 The Court finds that pursuant to [§ 546(a)(1)(A)], the
30 Bankruptcy Court did not err in finding that the Trustee's
31 claims against Appellants were timely.

32 Von Gunten v. Neilson (In re Slatkin), No. 2:04-cv-10280, at 4
33 (C.D. Cal. Aug. 31, 2005) (emphasis added).

1 accrual or even notice that a legal right has been invaded.”
2 Giest v. Sequoia Ventures, Inc., 83 Cal. App. 4th 300, 305 (2000)
3 (citation omitted).

4 Although statutes of limitations are subject to equitable
5 tolling, equitable tolling is inconsistent with statutes of
6 repose. In re Neff, 505 B.R. at 264 (citing Lampf, Pleva,
7 Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363
8 (1991)). Several federal courts in California have held that CAL.
9 CIV. CODE § 3439.09(c) is not subject to tolling. See Donell, 835
10 F. Supp. 2d at 878 (dismissing claims filed more than seven years
11 after fraudulent transfers were made and holding that repose
12 period in CAL. CIV. CODE § 3439.09(c) was not subject to tolling
13 under CAL. CODE CIV. PROC. § 356 (relating to tolling where an
14 injunction against commencement of an action exists) because
15 tolling is inconsistent with the statute’s plain language, which
16 is “absolute” and “cannot be tolled or otherwise extended”); In re
17 JMC Telecom LLC, 416 B.R. at 742-43 (following Macedo and holding
18 that CAL. CIV. CODE § 3439.09(c) “operates as an absolute bar on
19 fraudulent transfer claims older than seven years” and is not
20 subject to extension by CAL. CODE CIV. PROC. § 338(d), the statute
21 of limitations applicable to California common law fraudulent
22 transfer claims); Roach v. Lee, 369 F. Supp. 2d 1194, 1198-99
23 (C.D. Cal. 2005) (holding that seven-year repose period in CAL.
24 CIV. CODE § 3439.09(c) trumps the statute of limitations period in
25 CAL. CODE CIV. PROC. § 338(d) and dismissing claims for transfers
26 outside seven years).

27 While these cases have determined that the repose period in
28 CAL. CIV. CODE § 3439.09(c) is not subject to equitable tolling or

1 any type of extension provided in potentially conflicting
2 California statutes, such as CAL. CODE CIV. PROC. §§ 356 or 338(d),
3 none confronted the interplay between CAL. CIV. CODE § 3439.09(c)
4 and the Bankruptcy Code, namely § 546(a).⁸ In fact, few cases
5 have dealt with the interplay between § 546(a) and a state statute
6 of repose.

7 **1. Cases supporting Trustee's position**

8 Trustee argues that § 546(a) makes no distinction between
9 statutes of limitations and statutes of repose, and therefore the
10 bankruptcy court erred in determining he could reach back only to
11 those transfers occurring within seven years from the filing of
12 his Complaints. Several cases support Trustee's position.

13 In Gibbons v. First Fid. Bank, N.A. (In re Princeton-New York
14 Invs., Inc.), 199 B.R. 285 (Bankr. D.N.J. 1996) ("Princeton I"),
15 the chapter 11 trustee sought to avoid an alleged fraudulent
16 transfer under §§ 544, 548 and the New Jersey UFTA. The transfer
17 in question occurred on November 14, 1990. The bankruptcy
18 petition was filed on August 12, 1994. The four-year repose
19 period under the New Jersey UFTA expired on November 14, 1994.
20 The trustee filed his avoidance action on October 6, 1995. Id. at
21 288-89. Defendants moved to dismiss the trustee's complaint under
22

23 ⁸ In In re JMC Telecom LLC, the district court held that
24 because of the language contained in CAL. CIV. CODE § 3439.09(c) –
25 "Notwithstanding any other provision of law" – all fraudulent
26 transfer claims were barred after seven years whether they arose
27 under the UFTA or CAL. CODE CIV. PROC. § 338(d). 416 B.R. at 742-
28 43. However, § 546(a) is not mentioned anywhere in the decision,
and it is not clear whether the district court even considered it.
While the cases cited by Appellees on pages 14-15 of their brief
have held that equitable tolling is inconsistent with the statute
of repose in CAL. CIV. CODE § 3439.09(c), none dealt with § 546(a),
and some did not involve the Bankruptcy Code at all.

1 Civil Rule 12(b)(6), contending that his right to bring such an
2 action was extinguished on or about November 14, 1994, and so his
3 complaint filed on October 6, 1995, was untimely. Id. at 292.
4 Both parties agreed the fraudulent transfer claim existed as of
5 the petition date. Id. at 293.

6 As with Appellees in the instant case, the defendants in
7 Princeton I argued that § 544(b) gave the trustee no more rights
8 than a hypothetical unsecured creditor has under state substantive
9 law, which requires that the fraudulent transfer action be brought
10 within four years. Id. at 292-93. They further argued that even
11 though a state statute of limitations on a fraudulent transfer
12 action may be tolled upon the bankruptcy petition date, the same
13 rule did not apply to a statute of repose. Id. at 294. The
14 bankruptcy court disagreed, holding that the four-year statute of
15 repose in the New Jersey UFTA was preempted by § 546. Id. at 297-
16 98. Accordingly, because the fraudulent transfer claims were
17 viable on the petition date, the trustee's avoidance action filed
18 within the two years prescribed in § 546(a) was timely.

19 The district court affirmed. First Union Nat'l Bank v.
20 Gibbons (In re Princeton-New York Invs., Inc.), 219 B.R. 55, 64
21 (D.N.J. 1998) ("Princeton II"). Rejecting the bank's argument
22 that the trustee's avoidance action was governed by the
23 substantive limitations of New Jersey law, the district court held
24 that because the trustee's action under § 544(b) and the New
25 Jersey UFTA was filed within the time prescribed in § 546(a), his
26 complaint was timely. Id. at 64-65. In other words, as long as
27 the applicable statute of repose has not yet expired at the time
28 the bankruptcy petition is filed, a trustee's complaint is timely

1 if filed in accordance with § 546(a). The district court found
2 that holding otherwise would frustrate a trustee's ability to
3 recover property for the bankrupt estate's benefit, "a
4 congressional goal intended to be accomplished by the Code." Id.
5 at 65.

6 Not convinced by the bank's argument that a statute of repose
7 should be treated differently under § 546(a), the district court
8 in Princeton II stated:

9 The Court is not convinced that § 25:2-31's status as a
10 statute of repose, alone, is sufficient to establish an
11 overriding state public policy requiring subordination of
12 the Code's goals for §§ 544(b) and 546(a). After
13 carefully weighing the goals of the Code, namely for the
14 Trustee to maximize the bankruptcy estate for creditors'
15 benefit, with the New Jersey legislature's purposes for
16 enacting the statute of repose, pursuant to the Supremacy
17 Clause and substantive countervailing federal law
18 considerations, the state statute must give way. Section
19 546(a)'s wording is clear. It applies to those actions
20 brought under § 544. If § 546(a)'s plain meaning has led
21 to unworkable results, it is for Congress and not the
22 courts to remedy that problem.

23 Id. at 65-66 (footnote omitted).

24 In a factually similar case, the transferee defendants moved
25 under Civil Rule 12(b)(6) to dismiss the trustee's avoidance
26 actions as barred by the limitations period set forth in the New
27 Jersey UFTA, arguing that the transfers occurred more than five
28 years before the trustee filed his complaint. Tsai v. Bldgs. by
Jamie, Inc. (In re Bldgs. by Jamie, Inc.), 230 B.R. 36, 40, 45
(Bankr. D.N.J. 1998). Persuaded by the district court's analysis
in Princeton II, the bankruptcy court held that because the four-
year statute of repose had not expired at the time the bankruptcy
petition was filed, the trustee's avoidance actions were not time-
barred as long as they were filed within the two years prescribed

1 in § 546. Id. at 45.

2 The bankruptcy court in Mi-Lor Corp. v. Gottsegen (In re Mi-
3 Lor Corp.), 233 B.R. 608, 619 (Bankr. D. Mass. 1999), reached the
4 same conclusion as Princeton I, Princeton II and In re Bldgs. by
5 Jamie, Inc. There, the chapter 11 debtors' bankruptcy cases were
6 filed in March 1995. Based on the date of the alleged transfers,
7 the six-year contract claims limitations period applicable under
8 the Massachusetts Uniform Fraudulent Conveyance Act (the precursor
9 to the UFTA) expired in March 1996. The debtors filed their
10 fraudulent conveyance action under § 544(b) and Massachusetts
11 state law in February 1997. Id. at 618. Defendants argued that
12 debtors' claims were extinguished by March 1996, and therefore
13 their action was time-barred because the alleged "transfers were
14 not then, in the words of section 544(b)(1), 'voidable under
15 applicable law by a creditor.'" Id. The debtors argued that
16 § 546(a) gave them an additional two years from the bankruptcy
17 filing to bring their avoidance action under § 544(b). The
18 bankruptcy court agreed with debtors and held that, whether viewed
19 as a statute of limitations or repose, because the state law
20 limitations period had not expired when debtors filed their
21 bankruptcy petitions, debtors' action was timely under § 546(a).
22 Id. at 619.

23 In Smith v. Am. Founders Fin. Corp., 365 B.R. 647, 676-78
24 (S.D. Tex 2007), the district court for the Southern District of
25 Texas rejected arguments similar to those raised by the defendants
26 in Princeton I and Princeton II. In considering the interplay
27 between § 546(a) and the repose period set forth in the Texas
28 UFTA, the district court agreed with the holdings of Princeton I,

1 Princeton II and In re Bldgs. by Jamie, Inc., and held that
2 § 546(a) preempted state law and controlled the timing of the
3 trustee's avoidance action. Id. at 678-79. As long as the
4 trustee's claims are viable when the debtor files its bankruptcy
5 case, the trustee has two years from the petition date to file the
6 avoidance action. Id. at 679.

7 While Appellees argue that CAL. CIV. CODE § 3439.09(c) cannot
8 be equitably tolled or held in abeyance until the discovery of
9 alleged fraudulent transfers, none of the above courts based their
10 decisions on the doctrine of equitable tolling. Rather, each
11 concluded, either expressly or implicitly, the statute of repose
12 in their respective state fraudulent transfer statute was
13 preempted by § 544(b) and the statute of limitations set forth in
14 § 546(a).

15 **2. Cases supporting Appellees' position**

16 Far fewer cases support Appellees' position that Trustee's
17 claims for fraudulent transfers occurring more than seven years
18 prior to the complaint date are barred by California's statute of
19 repose. We located two.

20 The first case supporting Appellees is Official Comm. of
21 Unsecured Creditors v. Action Indus., Inc. (In re Phar-Mor, Inc.
22 Secs. Litig.), 178 B.R. 692 (W.D. Pa. 1995), aff'd, 101 F.3d 689
23 (3d Cir. 1996) ("Phar-Mor"). In Phar-Mor, the creditors committee
24 filed an avoidance action under §§ 544, 548 and Ohio's fraudulent
25 transfer statutes. Id. at 693-94. One of the defendants who
26 participated in the alleged fraudulent transfers died during the
27 bankruptcy case. The committee did not learn of the man's death
28 until his estate executor moved for summary judgment on the

1 committee's claim against the man's estate; the committee had not
2 filed its claim against his estate until eighteen months after his
3 death. Id. at 694. The executor moved for summary judgment on
4 the basis that the applicable Ohio probate statute (referred to as
5 a "nonclaim" statute, which is effectively a statute of repose)
6 barred all claims against a decedent's estate not presented within
7 one year of the decedent's death. Id. The committee contended
8 the one-year nonclaim statute was inapplicable because it
9 conflicted with the two year statute of limitations in § 546(a).
10 Id.

11 In considering the interplay between § 546(a) and the Ohio
12 probate statute, the district court held that § 546(a) did not
13 preempt Ohio law. Id. at 694-96. Preemption in this case was
14 "inappropriate because [the court could not] discern a 'clear and
15 manifest' intention on the part of Congress to override the
16 state's strong and traditional interest in regulating the probate
17 matters of its citizens." Id. at 696. See also Marshall v.
18 Marshall, 547 U.S. 293, 308 (2006) (recognizing the probate
19 exception as described in Markham v. Allen, 326 U.S. 490, 494
20 (1946)). Notably, the district court did say, in dicta, that had
21 the Ohio probate statute been a statute of limitations, it would
22 have been inclined to find that § 546(a) preempted it. Id. at
23 695. It concluded that when considering a probate nonclaim
24 statute the calculus requires attention to a "state's traditional
25 right to regulate probate matters" and "the right to determine the
26 capacity of its citizens to be sued," thereby defeating a
27 preemption argument. Id. at 695-96.

28 The other case is Floyd v. Option One Mortg. Corp. (In re

1 Supplement Spot, LLC, 409 B.R. 187 (Bankr. S.D. Tex. 2009).

2 There, the trustee sought to recover fraudulent transfers under
3 § 544(b), § 548 and the Texas UFTA. Id. at 197. Applying the
4 same Texas statute of repose as the district court did in Smith,
5 the bankruptcy court determined the trustee could avoid transfers
6 going back four years from the date he filed his complaint.

7 Id. at 202-03. We do not find In re Supplemental Spot, LLC

8 persuasive. The bankruptcy court believed it did not need to
9 conduct a preemption analysis between § 546(a) and the Texas UFTA
10 and thus did not do so. Id. at 197. The court indicated that, if
11 it had done such a preemption analysis, it would have required the
12 trustee to comply with both the state and federal limitations
13 periods. Id. at 198.

14 **D. The bankruptcy court erred when it dismissed Trustee's First**
15 **Claim in part as being barred by the seven year statute of**
16 **repose in CAL. CIV. CODE § 3439.09(c).**

17 We are persuaded by the well-reasoned holdings of Princeton I
18 and Princeton II and their progeny and conclude that the state
19 statute of repose at issue here presents an obstacle to the
20 objectives of Congress in enacting the Code. In cases like Phar-
21 Mor, which involve state probate statutes, we agree that because
22 Congress has not expressed an intention to override a state's
23 strong and traditional interest in regulating probate matters, the
24 Code may not control.

25 However, by enacting the Code, Congress has expressed an
26 intent to regulate bankruptcy and maximize the bankruptcy estate
27 for the benefit of creditors. Congress enacted § 544(b) and
28 § 546(a) to foster a trustee's ability to avoid fraudulent
transfers of property under state law and to recover that property

1 for the benefit of the estate. Section 546 was created with the
2 intent to give trustees sufficient time or "breathing room" to
3 determine whether to assert any claims under § 544. Princeton I,
4 199 B.R. at 297 (citing In re Dry Wall Supply, Inc., 111 B.R. at
5 936). Although "§ 544(b) does not explicitly preempt state law,
6 inclusion of § 546(a) in the Code evidences Congress' intent to
7 subordinate state law restrictions." Princeton II, 219 B.R. at
8 64.

9 The California Legislature has expressed an intent in CAL.
10 CIV. CODE § 3439.09(c) to extinguish liability if an avoidance
11 action is not timely filed. In addition, the phrase
12 "notwithstanding any other provision of law" found in CAL. CIV. CODE
13 § 3439.09(c) expresses the legislature's intent for the seven-year
14 repose period to control despite the existence of other laws which
15 might otherwise govern. See Roach, 369 F. Supp. 2d at 1199.
16 However, to the extent CAL. CIV. CODE § 3439.09(c) tries to affect
17 or conflicts with federal bankruptcy law, the state law must
18 yield.

19 In considering both California and federal law, we conclude
20 the time bar set forth in CAL. CIV. CODE § 3439.09(c) frustrates
21 Congress' intent in § 546 and collides with federal bankruptcy
22 law. And, unlike the probate statute at issue in Phar-Mor, we see
23 no substantial countervailing state interest that outweighs
24 Congress' goal of maximizing the bankruptcy estate for the benefit
25 of creditors. Princeton I, 199 B.R. at 297. Therefore, pursuant
26 to the Supremacy Clause, the state law must yield. Id. at 298;
27 Princeton II, 219 B.R. at 65-66.

28 Accordingly, we hold that so long as a state-law fraudulent

1 transfer claim exists on the petition date (or the date the order
2 for relief is entered), i.e., the state's applicable repose period
3 governing the action has not yet expired on the petition date (or
4 the order for relief date), the trustee may bring the avoidance
5 action under § 544(b), provided it is filed within the limitations
6 period in § 546(a). The "reach back" period is established on the
7 petition date (or the order for relief date) and encompasses all
8 transfers within the relevant period provided by state law.

9 In this case, Trustee should have been allowed to bring a
10 claim for those transfers occurring within seven years prior to
11 the petition date - i.e., back to December 7, 2003 - and the
12 bankruptcy court erred in dismissing his First Claim under Civil
13 Rule 12(b)(6) to the extent it sought to avoid the transfers to
14 Bank of America from December 24, 2003 through November 21, 2005,
15 and the transfers to Countrywide from December 15, 2003 through
16 November 16, 2005. Because Trustee timely filed his First Claim
17 within the two years prescribed in § 546(a)(1)(A), recovery of
18 these transfers was not time-barred.

19 **VI. CONCLUSION**

20 For the foregoing reasons, we REVERSE.
21
22
23
24
25
26
27
28