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1

New Value

2

11 U.S.C. § 547(c)(4)

3

Russell v. Jones (In re Pro Page Partners, LLC),
151 F. App'x 366 (6th Cir. 2005)

4

Facts:

- The Debtor Pro Page Partners, LLC, was a paging and wireless communications company.
- The Defendant Carleton A. Jones held 30% equitable share in Debtor's company.
- The Defendant advanced money totaling \$140,500.00 directly to the Debtor and made tax payments on their behalf.
- Debtor filed for bankruptcy and sought to the recovery certain transfers made to Defendant during the year preceding bankruptcy.

5

Arguments:

- The Defendant argued that the payments made to the Debtor were loans and therefore payments received from the Defendant during the preference period should be off-set from the money advanced to the Defendant and be considered as 'new value'.
- The Debtor argued that the money advanced by the Defendant were contributions to capital and not loans.

6

Issue:

- Whether the payments made by the Defendant to the Debtor constituted a loan?
- Were the loan payments a new value which should be offset from transfers made?



7

§ 547(a)(2):

“new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;



8

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9

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

- (A) not secured by an otherwise unavoidable security interest; and
- (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



10

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11

Court’s ruling:

- As to the loan issue, the Bankruptcy Court noted that although the Debtor did not execute a written credit agreement or promissory note, the understanding was that the company would pay back the Defendant. Moreover, the company books duly noted it as a loan.

- As to the new value defense, the Court noted that regardless of the money advanced being a loan, it replenished the Debtor’s bankruptcy estate and therefore constituted new value.

- The Court of Appeal affirmed this decision.



12

Conclusion:

- Under the new value defense, 'money' or 'money's worth' whether in the form of loans or credit agreements is still money, whether it is paid back or not.
- New value does not have to be products or services that was not paid for, it can be a loan that was not paid for, in essence the Debtors estate is benefiting.
- The purpose of the new value defense is to allow a creditor to reduce the amount claimed by the estate as a preference to the extent it replenished the estate.



13

Burch v. Masiz (In re Vaso Active Pharms., Inc.),
500 B.R. 384 (Bankr. D. Del. 2013)



14

Facts:

- The Debtor Vaso Active Pharmaceuticals Inc. sold over the counter pharmaceutical products developed by BioChemics, Inc.
- The Defendants John J. Masiz, was a former Officer and Director of the Debtor.
- The Defendant Masiz, was the founder and controlling party of BioChem, Inc. and he founded and held 77% voting interest in Debtor.
- Due to Debtor's financial difficulty in April 2006, Defendants agreed to work at Debtor without compensation. Debtor agreed that \$175,000.00 per year salary, plus a \$50,000.00 bonus, was an appropriate valuation of the services offered by Defendant. Debtor and Defendant arranged that Defendant would only receive payment in consideration of their uncompensated services should Debtor succeed in its pending litigation proceedings against Robinson & Cole LLP.



15

Facts:

- In November 2006, Debtor brought a legal malpractice action against Robinson & Cole LLP. This was settled in December 2006, in favor of Debtor, who received \$1,905,000 after lawyer fees were deducted.
- Debtor immediately made a first payment to the Defendant on December 29, 2009 in the amount of \$598,000.00. A subsequent second payment of \$178,363.00 was made to Masiz, during the 90-day preference period.
- All the cash Debtor had during this time came from the settlement of Robinson & Cole LLP. Masiz knew at the time of the transfer that Debtor was insolvent. He nonetheless paid himself ahead of other creditors.
- After filing for bankruptcy, the Debtor sought to avoid and recover the total payments made to Defendant in the amount of \$776,363.00 received from the proceeds of the settlement, as alleged preference.



16

Arguments:

- The Debtor argued that the payments made to the Defendants were avoidable transfers.
- The Defendant, Masiz cited subsequent new value as a defense, disputing the amount of the new value.
- The Defendant argued that the first payment of \$598,000.00 he received from Debtor was for back pay wages and therefore represented a contemporaneous exchange for new value because the payments were made at essentially the same time as the services were being provided.



17

Issue:

- Were the payments made by Debtor avoidable preferences?
- What amount of new value did Masiz provide the Debtor during the preferential period?
- Whether Masiz provided contemporaneous exchange of new value to and for the benefit of the Debtor during the preferential period?



18

§ 547 (b) : Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) Made—
 - a) on or within 90 days before the date of the filing of the petition; or
 - b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - a) the case were a case under chapter 7 of this title;
 - b) the transfer had not been made; and
 - c) such creditor received payment of such debt to the extent provided by the provisions of this title.



19

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 - b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - a) the case were a case under chapter 7 of this title;
 - b) the transfer had not been made; and
 - c) such creditor received payment of such debt to the extent provided by the provisions of this title.



20

§ 547 (c)- The trustee may not avoid under this section a transfer—

- (1) to the extent that such transfer was—
 - (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
 - (B) in fact a substantially contemporaneous exchange;



21

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22

§ 547 (c)- The trustee may not avoid under this section a transfer—

- (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
 - (A) not secured by an otherwise unavoidable security interest; and
 - (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



23

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 - (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



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Court's ruling:

- As to the issue of the payment being an avoidable transfer, the Bankruptcy Court held that all five conditions under 547(1)-(5) were satisfied. Therefore, the payments were avoidable as preference.

- As to the new value defense, the Court held that after receiving the first payment of \$598,000.00, Masiz then provided Debtor with new value of 72 days of employment services. Masiz was therefore entitled to the defense of subsequent new value in the amount of \$34,520.55 being the 72 days of subsequent new value provided to the Debtor at his normal salary rate.

- As to the issue of contemporaneous exchange for new value, the Court held that the first payment of \$598,000.00 made to Defendant was not intended to be in exchange for contemporaneous value but payment for unpaid wages. Defendant failed in this defense.



25

Conclusion:

- Subsequent new value defense is intended to encourage creditors to work with companies on the verge of insolvency.
- Intention by both the Debtor and Defendant should be evident when claiming contemptuous exchange for new value, for the benefit of the Debtor.



26

Diamond v. Disney, Lederhaus & Rodriguez (In re Inland Glob. Med. Grp., Inc.),

Nos. RS 02-26263 PC, RS 04-02235 PC, 2006 Bankr. LEXIS 2460 (U.S. Bankr. C.D. Cal. Apr. 5, 2006)



27

Facts:

- The Debtor is Inland Global Medical Group, Inc.
- The Defendants Disney, Lederhaus & Rodriguez, are a medical association company who provided medical services to Debtor's patients on a 'fee for service' basis.
- The parties entered into a written agreement in 2001, and Defendant terminated its services to Debtor on August 20, 2002.
- Debtor wrote three checks totaling \$68,377.37 to Defendant between July 8, 2002 and August 8, 2002, during the 90-day preference period.
- Debtor sought to avoid and recover transfers made to Defendant as alleged preference.



28

Arguments:

- Debtor argued that he is entitled to recover the sum of \$68,377.37 with interest and costs of court.

- Defendant claimed that it provided services to Debtor between July 8, 2002 and August 20, 2002 in the amount of \$27,313.84, to Debtor, after the transfer was made, which constituted new value.



29

Issue:

- Were the payments made to Defendant during the preference period protected under the new value defense?



30

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

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31

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(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



32

Court's ruling:

- As to the issue of new value, the Court ruled that the Defendant provided sufficient evidence in the form of the testimony of their Office Manager who was responsible for the billing and accounts of the company. She proved that Defendant gave new value to Debtor in the amount of \$27,313.84.

- The Court awarded Debtor the sum of \$41,063.53 together with interest and cost of court.



33

Conclusion:

- The principle of the new value defense is that the transfer of new value to the debtor will offset payments made, without depleting the estate of the debtor to the detriment of its creditors.
- The creditors bear the onus of establishing with specificity the measure of the new value given to the debtor.



34

Schnittjer v. Pickens (In re Pickens),

Nos. 06-01120, 06-9166, 2008 Bankr. LEXIS 228 (U.S. Bankr. N.D. Iowa Feb. 5, 2008)



35

Facts:

- The Debtor are Wesley A. Pickens and Brooke R. Pickens.
- The Defendants are Dennis Pickens and Debbie Pickens.
- The Defendant sought the reconsideration of a previous judgment made on January 3, 2008 granting Trustee \$6,351.00 for avoidable preferential payments made by the Debtor to Defendant.
- The Defendant sought to reduce the amount of the previous judgment by the amount of subsequent new value she granted the Debtor on her credit card.
- During the one-year preference period, Debtor made charges to Defendant's credit card totaling twice the amount of the preferential payments made to Defendant, during the same period.



36

Arguments:

- The Defendant argued that Debtor made additional charges on her credit card, prior to January 10, 2006 exceeding the preference amount thus granting new value to the Debtor.
- The Debtor argued that the Defendant failed to previously identify the new value defense as being an issue, thus she should not be allowed to raise it.



37

Issue:

- Whether the judgment should be reduced by the amount of subsequent new value the Defendant granted to the Debtor?



38

§ 547 (c)- The trustee may not avoid under this section a transfer—

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39

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(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



40

Court's ruling:

• As to the issue of new value, the Court ruled that in calculating new value, the Garland Rule is to be applied. The Court concluded that the Defendant was entitled to the subsequent new value defense as she had previously received preferential payments. Thus the original judgment was reduced and amended to \$4,426.00.

• The Court rejected Debtor's argument that Defendant failed to identify the new value defense as an issue in the case as this argument was raised in Defendant's pre-trial statements.



41

Conclusion:

• Subsequent new value defense can be used to the extent that the creditor had previously received preference payments.

• The subsequent new value defense aims to protect creditors who have provided services, goods or revolving credit card to a debtor.



42

Unsecured Creditors Comm. of Sparrer Sausage Co. v. Jason's Foods, Inc.,

No. 15-2356, 2016 U.S. App. LEXIS 10569 (7th Cir. June 10, 2016)



43

Facts:

- The Debtor, The Unsecured Creditors Committee of Sparrer Sausage Company, Inc. is a sausage manufacturing company.
- The Defendants, Jason's Foods, Inc. is a wholesale meat supplier, who provided unprocessed meat products to Debtor.
- Defendant and Debtor conducted business together from February 2, 2010 until the filing of bankruptcy on February 7, 2012.
- During the 90 day preference period, Debtor made 23 payments to Defendant, totaling \$587,000.00.
- The bankruptcy court held that 11 payments made to Defendant were paid either too late or too early to be treated as ordinary. Thus the Defendant's preference liability was limited to payments outside the baseline. The Defendant appealed.



44

Arguments:

- The Debtor argued that the payments made to Defendant were avoidable preferences.
- The Defendant argued that the baseline used to determine the company's payment practice was too narrow and did not reflect the company's entire payment history.
- Defendant also argued that it had provided meat products to the value of \$63,514.00 to the Debtor between January 18, 2012 and February 2012, without receiving payment and this new value should be off-set from its preference liability.



45

Issue:

- Whether the baseline used to determine the company's ordinary payment practices was too narrow?
- Whether the new value Defendant granted to Debtor, should be off-set from the preferential transfer?



46

§ 547 (c)- provides that an otherwise preferential transfer is non avoidable

to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

- (A) made in the ordinary course of business or financial affairs of the debtor and transferee; or
- (B) made according to ordinary business terms[.]



47

§ 547 (c)- provides that an otherwise preferential transfer is non avoidable

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- (B) made according to ordinary business terms[.]



48

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49

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(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



50

Court's ruling:

- As to the issue of the baseline used by the bankruptcy court in determining the ordinary payment practice utilised by the Debtor, the court found it to be too restrictive and concluded that Defendant's preference liability was limited to only 2 invoices, totaling \$60,679.00, as their payment terms were substantially outside the 14 to 30 baseline.

- As to the issue of new value, the Court ruled that the Defendant is entitled to a reduction of its preference liability in the amount of \$63,514.00 as it was undisputed that Defendant did supply Debtor with the product well after Debtor had paid some invoices during the preference period.

- Therefore, the Court reversed and remanded the bankruptcy court's judgment.



51

Conclusion:

- By extending new value to the Debtor without receiving payment, the creditor effectively replenishes the bankruptcy estate in the same way that returning a preferential transfer would.



52

Wahoski v. Am. & Efrid, Inc. (In re Pillowtex Corp.),

416 B.R. 123 (Bankr. D. Del. 2009)



53

Facts:

- The Debtor, Pillowtec Corporation
- The Defendant, American & Efrid, Inc.

- On July 27, 2005 the Debtor filed an adversary complaint against Defendant stating that transfers made during the 90 day preferential period, totaling \$326,295.90 should be avoided as preferential transfers.

- In response to the complaint, Defendant filed a subsequent new value defense. as Defendant continued to ship products to Debtor during the preference period.



54

Arguments:

- The Debtor argued that payments made during the preferential period should be avoided as preferential transfers.
- The Debtor argued that it had paid the Defendant for the new value and therefore Defendant could not rely on the subsequent new value defense.
- Defendant argued that since it continued to ship products to Debtor during the preference period, it provided new value to the Debtor.



55

Issue:

- Whether subsequent new value must remain unpaid to support a new value defense?



56

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57

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(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



58

Court's ruling:

- The court ruled that as long as the payments for new value from the Debtor were not unavoidable, the Defendant could assert the subsequent new value defense.
- The court ruled that the purpose of § 547 (c)(4)(B) was to encourage creditors to continue doing business with the Debtor and to fairly treat a creditor who had replenished the estate of the Debtor after having received a preference.



59

Conclusion:

- A debtor's payment of the subsequent new value will deprive the creditor of this defense only if the payment is unavoidable.



60

Diamond v. Gemmel Pharm. Grp., Inc. (In re Inland Glob. Med. Grp., Inc.),

362 B.R. 459 (Bankr. C.D. Cal. 2006)

61

Facts:

- The Debtor, Inland Global Medical Group, Inc.
- The Defendant, The Gemmel Pharmacy Group, Inc. provided medical services to the Debtor.
- The parties entered into a written agreement in 2001. Defendant would render medical services to Debtor's patients on a fee for service basis.
- On July, 8, 2002, Debtor wrote Defendant a check for \$17,289.89, which was honored on July 16, 2002, during the 90-day preference period.
- The Debtor sought to avoid preferential transfers totaling \$17,289.89

62

Arguments:

- The Debtor argued that they were entitled to recover the sum of \$17,289.89 from Defendant as this was a payment made during the preferential period which was avoidable and that Defendant received more than it would have received if the case was a case under chapter 7.
- The Defendant argued that after receiving the Debtor's check, it continued to provide medical services from July 16, 2001 to October 4, 2002 to the Debtor's patients on a fee for service basis, in the amount of \$8,812.88. Debtor was billed for this sum but Defendant never received compensation for the services provided, therefore providing new value to Debtor.
- The Defendant argued that the transfer made by Debtor was in the ordinary course of business.

63

Issue:

- Whether Defendant had a new value defense?

64

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- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) Made—
 - a) on or within 90 days before the date of the filing of the petition; or
 - b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - a) the case were a case under chapter 7 of this title;
 - b) the transfer had not been made; and
 - c) such creditor received payment of such debt to the extent provided by the provisions of this title.

65

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 - a) on or within 90 days before the date of the filing of the petition; or
 - b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - a) the case were a case under chapter 7 of this title;
 - b) the transfer had not been made; and
 - c) such creditor received payment of such debt to the extent provided by the provisions of this title.

66

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67

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(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



68

Court's ruling:

•Both parties agreed that the payment was a transfer.

•The court ruled that Defendant's vice president provided sufficient evidence to establish that Defendant provided new value to Debtor which had not been paid by an unavoidable transfer. Defendant was therefore entitled to a new value defense in the amount of \$8,812.88.

•The court ruled that the Defendant failed to provide sufficient evidence to demonstrate that the balance of the preferential payment was in the ordinary course of business.



69

"The invoices admitted as Exhibits A-1 through A-10 show that Gemmel's services were rendered to two Inland Global patients, Robert Davidson and Gloria Lewis, between July 23, 2002 and September 30, 2002. Exhibits A-1 through A-10 identify the (a) name and patient number of the Inland Global patient receiving the service; (b) medical record number; (c) date of service; (d) nature of service performed; (e) payer and provider number; (f) a treatment authorization code, and (g) the total charge for the service. Vantiger testified that Gemmel did not receive compensation for the services described in Exhibits A-1 through A-10 from Inland Global or any other person."



70

Conclusion:

•Creditors have the burden of establishing with specificity the measure of the new value given to the debtor.



71

Gouveia v. RDI Grp., Inc. (In re Globe Bldg. Materials, Inc.),

325 B.R. 253 (Bankr. N.D. Ind. 2005)



72

Facts:

- The Debtor, Globe Building Materials, Inc. a manufacturer of roofing shingles.
- The Defendant, The RDI Group, Inc. custom builds equipment.
- Debtor contracted with Defendant to purchase a machine to produce laminated shingles, for \$4,210,745.00.
- The terms of their agreement where that Debtor would pay Defendant according to an installment payment schedule and Defendant would deliver the machine in identifiable component parts to Debtor. The component parts would then be assembled on Debtor's premises.
- As of November 2, 2000 Debtor had paid \$3,786,555.72 to Defendant.



73

Facts:

- The final installment was made during the 90 day preferential period.
- Debtor sought to recover \$360,643.63 of payment transfers made during the preferential period.



74

Arguments:

- The Debtor argued that they were current with respect to the agreed installment payment schedule, in fact Defendant never considered Debtor to be in default with their payments. Therefore, the amount of \$360,643.63 payments made during the preferential period was avoidable.
- The Defendant argued that the value of the component parts shipped to Debtor subsequent to the making of the preferential payment added new value.
- The Defendant argued that the payments made by the Debtor during the preferential period is not recoverable as it was made in the ordinary course of business.



75

Issue:

- Whether the Defendants shipping of the component parts subsequent to the making of the preferential payment, constituted new value?



76

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



77

§ 547 (c)- The trustee may not avoid under this section a transfer—

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(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



78

Court's ruling:

- The court ruled that this case involves a unitary transaction whereby Defendant agreed to sell and Debtor agreed to buy a single item i.e. a machine. Defendant provided value to Debtor by delivering certain components of the purchased machine as it was commercially required to provide under the terms of the parties agreement, but that nothing was new about the value. As such, the Trustee was entitled to recover \$360,643.63 from Defendant.

- The court ruled that the Defendant did not provide substantial expert testimony to establish the manner in which payments are normally made in the industry. Their ordinary course of business defense was not sustained.



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Conclusion:

- Creditor has the burden of establishing that 'new value' benefitted the debtor.

- New value must be measured against the parties contractual arrangement.

- The definition of 'new value' does not elaborate on the adjective 'new'. Thus the meaning of 'new' is to be determined by the courts.



80

Newhouse v. Trizec Props. (In re Hencie Consulting Servs.),

Nos. 03-39402-BJH-7, 05-03645-BJH, 2006 Bankr. LEXIS 3562
(U.S. Bankr. N.D. Tex. Dec. 21, 2006)



81

Facts:

- The Debtor, Hencie Consulting Services, Inc.

- The Defendant, Trizec Properties, Inc.

- Debtor and Defendant entered into an office lease agreement on October 24, 2001.

- By January 1, 2003 Debtor had fallen behind on its rental payments in the amount \$300,000.00. On May 23, 2003 Defendant locked Debtor out of the premises for non-payment of rent. Thirty-five days later, Defendant agreed to allow Debtor to re-enter the premises and not collect back payment from Debtor. In exchange Debtor agreed to make a payment of \$50,000.00 to Defendant.

- Payment of \$50,000.00 was made by Debtor to Defendant, during the 90 day preferential period.



82

Arguments:

- The Debtor argued that the Defendant did not provide new value to the Debtor and sought to recover the payment of \$50,000.00.

- The Defendant argued that it provided Debtor with new value by allowing Debtor to re-enter the premises.

- The Defendant argued that payment was contemporaneous with Debtor being allowed to re-enter the premises.



83

Issue:

- Whether the Defendant provided new value to Debtor by allowing Debtor to re-enter the premises?



84

§ 547(a)(2):

“new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;



85

§ 547(a)(2):

“new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;



86

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



87

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



88

Court’s ruling:

•The court ruled that the Defendant’s allowance of the Debtor re-entering the premises did not constitute new value, as the re-entry had no monetary value and did not replenish the bankruptcy estate.

•The court ruled that § 547(c)(4) specified that new value must be after the transfer. In this case, Defendant had allowed the Debtor to re-enter the premises 35-days before Debtor made the preferential transfer to Defendant.

•The court ruled that the transfer was not substantially contemporaneous as the payment was made 35-days after Debtor was allowed to re-enter the premises, which exceeded the 30-day period stipulated by previous case law.



89

Conclusion:

•New value must be *after* the transfer by the debtor.

•New value must replenish the debtors estate thereby being of benefit to the debtor.



90

Gouveia v. Seneca Petroleum Co. (In re Globe Bldg. Materials),
334 B.R. 416 (Bankr. N.D. Ind. 2005)



91

Facts:

- The Debtor, Globe Building Materials, Inc.
- The Defendant, Seneca Petroleum Co., Inc.
- Debtor contracted with Defendant for the purchase of goods, namely undifferentiated petroleum products.
- Following each shipment of goods made to the Debtor, Defendant would issue Debtor with an invoice for payment of that particular shipment. Debtor would then make payment to Defendant by check.
- Debtor sought to recover payments in the amount of \$356,823.73 made during the 90 day preferential period.



92

Arguments:

- The Defendant argued that it continued to ship goods to the Debtor without receiving prior payment, thereby providing the Debtor with new value.
- Defendant argued that the court should consider the date a check was issued when considering new value.
- Debtor argued that the court should apply the date the check was honored when considering new value.



93

Issue:

- Whether Defendant did provide Debtor with new value benefiting the Debtor?
- Whether when determining new value payments, should the court consider the date of issue of a check or the date the check was honored?



94

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



95

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, **after such transfer**, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



96

Court Ruling:

- The court ruled that because some shipments were made after receipt of the preferential payment, the value of those shipments were 'new value'.
- The court further ruled that the Defendant failed to show when payments were received. Therefore, for the purposes of this case, the date of receipt of the payments was deemed to be the dates that the checks were deposited into the Defendant's account, resulting in the offset of almost all the preferential payments. As a result, the Defendant did provide the Debtor with new value of \$347,797.16 as it continued to ship goods to the Debtor after the preferential payments were made.



97

Conclusion:

- As regards check payments, it is the date of receipt rather than the date the check is honored, that applies. However, courts can allow exceptions so as to maintain the purpose of § 547(c)(4) which seeks to encourage creditors to deal with businesses in trouble in the hope of rehabilitation.



98

Official Comm. of Unsecured Creditors v. Columbia Forest Prods. (In re Hardwood P-G, Inc.),

Nos. 06-50057-LMC, 06-5278-LMC, 2007 Bankr. LEXIS 2054
(U.S. Bankr. W.D. Tex. June 12, 2007)



99

Facts:

- The Debtor, Hardwood P-G, Inc. and Custom Forest Products Ltd. and Custom Forest Products Transportation, Inc.
- The Defendant, Columbia Forest Products, Inc. and Columbia Forest Products-Imports.



100

Arguments:

- Debtor argued that same day payment is not subsequent.
- Debtor argued that the honor date of the check matters and not the date of delivery.



101

Issue:

- Is it the honor date or the delivery date of the check, which is pertinent during the preference period?
- Whether transfers of new value occurring on the same day as a preference, were subsequent to the preference?



102

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



103

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



104

Court Ruling:

- The court opined that any transfer of new value that occurred on the same day as a preference was not subsequent to the preference.
- Transfer date not honor date controls



105

This is a sensible rule, for if it were the honor date - rather than the delivery date - that controlled, creditors concerned about a distressed customer's check being a preference would hold off extending new credit to that customer until that customer's check cleared the bank. This would act to discourage the granting of new credit to troubled customers - the very opposite of the "new value" exception's purpose. *Aristech*, 157 B.R. at 722.



106

Conclusion:

- The Defendant will bear the burden of proving the dates checks were received as representing preferential transfers.
- The Defendant bears the burden of proving that checks were received prior to same-day shipments.



107

Rifken v. Entec Distrib., LLC (In re Felt Mfg. Co.),

2009 BNH 26



108

Facts:

- The Debtor, Felt Manufacturing Co., Inc., f/k/a Foss Manufacturing Co., Inc. manufactured nonwoven fabrics from polyester resins.
- The Defendant, Entec Distribution, LLC, f/k/a Goldmark Distribution, LLC, f/k/a Goldmark Distribution, LLD (DE), f/k/a Goldmark Distribution, Inc. supplied Debtor with raw polyester resin.
- Defendant was the distributor of polymer resin which it sourced from major chemical companies. As polymer resin comes in small pellet form, bulk quantities would be shipped to Defendant's customers directly from their suppliers, in this case, Pinnacle Polymers.
- In October 2004, the parties signed a written anticipated requirements contract for the period January 1, 2005 to December 31, 2006. The contract stipulated that all Debtor's purchase orders were subject to Defendant's written acceptance. Also Defendant's delivery obligation would be fulfilled when the resin was shipped from Pinnacle's plant.

109

Facts:

- Under the contract, Defendant was allowed to revise the credit terms at its option to protect its interest. Debtor had a \$500,000.00 credit limit with Defendant.
- On May 18, 2005 Debtor placed a purchase order for resin. However, Defendant noticed that Debtor was close to meeting its credit limit and could therefore would not authorize the delivery of resin until payment was made. Debtor informed Defendant that payment would be made later in the month but that the delay in the delivery of resin would hamper its business.
- On May 25, 2005 Defendant and Debtor entered into a consignment agreement which allowed Defendant to continue to provide resin to be extracted from a railcar sitting on Debtor's facility, to sustain Debtor's business. **Debtor would therefore not have to pay for the resin until it needed it.**

110

Facts:

- **The consignment agreement changed the sale date from the shipping date from Pinnacle to the date the Debtor extracted the resin.** This also delayed invoices Defendant sent to Debtor by two to four weeks after the railcar reached Debtor's facility.
- **Defendant therefore owned the resin sitting on Debtor's facility until Defendant authorized the release of the resin to Debtor.** Defendant would release the resin after Defendant received proof of payment from Debtor.
- Debtor sought to recover six payments made to Defendant, in the amount of \$519,346.00 within the 90 preferential period.

111

Arguments:

- The Defendant argued that it provided Debtor with four additional railcars of resin, which added new value to the Debtor in the amounts of \$94,728.00, \$94,704.00, \$22,736.00 and \$22,185.90 totaling \$234,353.90. But Defendant believes it provided \$391,128.00 in additional new value.
- The Defendant argued that the payments terms of 60 to 95 days with Debtor was the ordinary course of business between the parties. While, the Debtor argued that as per their expert evidence, their payment terms with Defendant was narrower 67 to 80 days.
- **The Debtor argues that Defendant gave new value at the time it shipped the resin to the Debtor's facility on May 27, 2005. Defendant argues that the delivery date was when the new value was given as this is when it authorized Debtor to withdraw the resin from the railcars sitting at Debtor's facility.**

112

Issue:

- When did Defendant provide Debtor with new value?
- Whether the payment terms were ordinary business practices between the parties ?

113

§ 547 (c)- The trustee may not avoid under this section a transfer—

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

114

§ 547 (c)- The trustee may not avoid under this section a transfer—

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;



115

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



116

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



117

Court Ruling:

- The court ruled that the Defendant failed to prove the defense of ordinary course of business as certain payments were made outside the ordinary period and the consignment agreement deviated from the ordinary business practices.
- The court ruled, however that the consignment agreement brought new value to the Debtor as it allowed the Debtor to have a supply of resin subsequent to certain payments being made for prior invoices. Therefore, Defendant provided new value in the amount of \$391,128.00 when it delivered the resin by giving Debtor authorization to withdraw it from the railcars on its premises.



118

Conclusion:

- The delivery date rather than the shipment date determines when new value is provided because the parties created a destination contract i.e. goods remain the property of the creditor until they are released.



119

Harrelson Utils., Inc. v. Ferguson Enters. (In re Harrelson Utils., Inc.),

Nos. 09-02815-8-RDD, 09-00094-8-RDD, 2010 Bankr. LEXIS 1899 (U.S. Bankr. E.D.N.C. June 11, 2010)



120

Facts:

- The Debtor, Harrelson Utilities, Inc.
- The Defendant, Ferguson Enterprises, Inc. of Virginia
- Debtor sought to recover five payments from Defendant. The parties did not dispute the new value extended to the Debtor by the Defendant for the first four payments, totaling \$108,807.27, but argued over the fifth payment.
- As regards the fifth payment, Debtor and Defendant did not dispute the payment made by Debtor in the amount of \$15,587.19 or the new value advanced by Defendant in the amount of \$15,183.96 but argued over the credits given to Debtor by Defendant.
- Debtor had returned goods to Defendant during the preference period, and Defendant had issued Debtor with four credits.



121

Arguments:

- The Debtor argued that Defendant could not use the new value defense to payments where it was entitled to a statutory security interest.
- The Debtor argues that Defendant's new value defense is limited to amounts that were repaid through transfers that may be unavoidable transfers.
- The Debtor argues that new value is extended when credit is issued at the time goods are returned.
- The Defendant argues that the credit should be deducted as new value from the date of the invoice for which the credit relates.



122

Issue:

- Whether new value is given on the date the goods are returned by the Debtor or the date shipped?



123

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



124

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



125

Court Ruling:

- The court ruled new value is extended on the date of the purchase of the goods and **should not be reduced by a credit for returned goods that was subsequently given**. The court ruled in favor of Defendant, and Defendant was entitled to new value in the amount of \$123,819.26.



126

Conclusion:

- New value is given at the time the goods are 'given / shipped' to the debtor, as opposed to 'received'.



127

Sarachek v. Crown Heights House of Glatt, Inc. (In re Agriprocessors, Inc.).

521 B.R. 292 (Bankr. N.D. Iowa 2014)



128

Facts:

- The Debtor, Agriprocessors, Inc. operated a kosher meatpacking and food processing facility in Iowa.
- The Defendant, Crown Heights House of Glatt, Inc. is in the business of selling kosher food products.
- The Debtor and Defendant entered into an oral loan agreement, whereby the Defendant made numerous short term loans to Debtor between August 2007 to September 2008, totaling \$6,414,515.14. Normally, Debtor repaid Defendant with checks which cleared within a few days.
- The Defendant did not require any form of contract or evidence of the loan. The families of the Debtor and Defendant came from the same Orthodox Jewish community where loaning money without requesting for interest or written guidelines, was common practice and tied to religious duty.



129

Facts:

- The Defendant also provided Debtor with window checks which gave Debtor a direct line of credit on Defendant's bank account. No limit was placed on Debtor's access.
- Debtor wrote 111 checks to Defendant in the two years preceding the filing of bankruptcy by Debtor.
- The Debtor sought to recover the preferential amount of \$5,363,090.33 from Defendant.



130

Arguments:

- The Debtor argued that all the payments made to Defendant were not made for reasonably equivalent value.
- The Defendant argued that it made loans to the Debtor, and the repayment by the Debtor was reasonably equivalent in value to the loans.
- The Defendant also argued that it made more loans to Debtor than Debtor repaid. Thus the Debtor received more than reasonably equivalent in value.
- The Debtor argued that certain transfers were made to Defendant before the loan arrangement began and are therefore constructively fraudulent.



131

Arguments:

- The Defendant argues that the short term loan arrangement was intended to be a contemporaneous exchange for new value and occurred in the ordinary course of business.
- The Defendant argues that in providing loans to the Debtor it also provided the Debtor with new value.
- The Debtor argues that the Defendant failed to show that it provided Debtor with subsequent new value during the preference period.
- The Debtor sought to avoid payment totaling \$4,427,090.33 to Defendant within one year of filing bankruptcy as preferential transfers to an insider.



132

Issue:

- Whether the transfer was made for reasonably equivalent value?
- Whether the transfer was a contemporaneous exchange for new value and in the ordinary course of business?
- Whether the Defendant provided the Debtor with new value?
- Whether a portion of the preferential transfer was to an insider?



133

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



134

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



135

Court Ruling:

- The court ruled that transfers made by the Debtor to the Defendant before the existence of the loan agreement, payments made to third parties and overpayments on loans were not reasonable equivalent value and thus constructively fraudulent as no debt was owed by Debtor to Defendant at that time. The amount of \$1,297,150.68 was recoverable by the Trustee.
- The court ruled that none of the transactions were contemporaneous exchanges for new value as the loans were intended to be a credit arrangement between the parties. Neither were the transfers made in the ordinary course of business as the Defendant as the loans gave Debtor a line of credit and was not in the business of making loans.



136

Court Ruling:

- The court rejected Trustees argument that Defendant failed to show that new value remained unpaid and it did not replenish the Debtor's estate. The court held that the Defendant provided money to Debtor which provided value to Debtor. What Debtor chose to do with the funds goes beyond what was intended by the new value defense. Defendant showed \$92,384.13 of the preferential transfer could be offset by the subsequent new value.
- The court held that the Defendant was the niece of the owner of Debtor and had a close relationship with the Debtor. As a result Defendant was a non-statutory insider of the Debtor and Trustee could avoid preferential payments within one year before the filing of bankruptcy.



137

Bruno Mach, Corp. v. Troy Die Cutting Co. (In re Bruno Mach, Corp.),

435 B.R. 819 (Bankr. N.D.N.Y. 2010)



138

Facts:

- The Debtor, Bruno Machinery Corporation, manufactured and sold presses for a variety of industries and performed die cutting services.
- The Defendant, Troy Die Cutting Company, LLC and Herbert Chorbajian, an individual.
- In the late 1990s, Debtor's two sons formed Troy Die Cutting, Inc. which was controlled and operated by Bruno, the owner of Debtor company.
- In 2000, Debtor sought capital to expand his business. He approached his longtime friend Herbert Chorbajian who agreed to provide Debtor with capital by purchasing Defendant's company (old TDC) on the premise that Debtor would buy it back in the future.



139

Facts:

- Both companies occupied the same premises.
- On August 1, 2000 Defendant entered into an asset purchase agreement and acquired substantially all the assets of the old TDC.
- Debtor experienced financial difficulties in 2001. On June 5, 2001, Chorbajian made an unsecured personal loan of \$300,000.00 to Bruno. The loan was to be paid within 90 days, without interest.
- The Defendant company made a series of loans to the Debtor starting 2001. There was no written agreement between the companies for any of the loans.
- Debtor made thirteen payments to the Defendant in the amount of \$185,864.91 during the one-year preference period.



140

Arguments:

- The Debtor argues that as a result of the close relationship between Bruno and Chorbajian, Defendants are non-statutory insiders.
- The Debtor argues that it has transferred computer, labor and administrative services to Defendant company and that those transfers are fraudulent transfers.
- The Debtor argued that the transfers made to Defendant were on account of an antecedent debt. Defendant challenged the existence of the requirement of an antecedent debt.
- The Defendant further argued that the payments made to Debtor were within the ordinary course of business or new value exception applied because it had continued to provide services after each payment from the Debtor.



141

Issue:

- Whether Defendant was an insider subject to the one year reachback period?
- Whether the transfers made were in connection with an antecedent debt?
- Were the payments made to the Defendant during the preference period protected under the ordinary course of defense or the new value exception?



142

§ 547 (b) : Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) Made—
 - a) on or within 90 days before the date of the filing of the petition; or
 - b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - a) the case were a case under chapter 7 of this title;
 - b) the transfer had not been made; and
 - c) such creditor received payment of such debt to the extent provided by the provisions of this title.



143

§ 547 (b) : Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) Made—
 - a) on or within 90 days before the date of the filing of the petition; or
 - b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - a) the case were a case under chapter 7 of this title;
 - b) the transfer had not been made; and
 - c) such creditor received payment of such debt to the extent provided by the provisions of this title.



144

§ 547 (c)- provides that an otherwise preferential transfer is non avoidable

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and transferee; or

(B) made according to ordinary business terms[.]



145

§ 547 (c)- provides that an otherwise preferential transfer is non avoidable

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and transferee; or

(B) made according to ordinary business terms[.]



146

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



147

§ 547 (c)- The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;



148

Court Ruling:

- The court ruled that the Defendants shared a close relationship with Debtor and they both engaged in less-than-arm's length transactions. Thus the Defendants were non-statutory insiders of the Defendant and subject to the one year reachback period.
- The court ruled that the Debtor had met its burden of proving that the transfers made to Defendant were made on account of an antecedent debt.
- The court ruled that the Defendants did not establish that the debts and corresponding payments were made in the ordinary course of business between the parties. Also, the court further ruled that the new value the Defendants relied upon was repaid and thus none of the transfer provided subsequent value to the Debtor. Judgment was awarded to Debtor for \$185,864.91.



149

Conclusion:

- Preferential transfers that are repaid by the Debtor to the creditor do not provide new value to the Debtor.



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