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1

11 U.S.C. 547

2

A typical preference case.

3

What is the problem that the preference laws try to solve?

4

Welcome to the bankruptcy party!

5

This is a special party. Everyone is invited but some people get there early.

6

7

The host may say, “Please put the pieces back so that everyone will get an equal slice.”

8

Should everyone have to return the slices?

Did someone show up early on purpose?

What if no pie is left at all?

9

Not defined in the Bankruptcy Code. Only what can be “avoided” or not.

11

Sec. 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.

12

What is a preference clawback?

10

Sec. 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;

13

Any full payment to a creditor when the debtor is insolvent and followed by a bankruptcy.

14

The rationales for the preference clawback laws.

15

Rationale 1:
Equality of distribution during insolvency.

16

Equality of distribution means - Creditors of *equal* priority should receive pro rata shares of the debtor's property. In other words, the debtor is not permitted to favor one creditor over others by transferring property shortly before filing for bankruptcy.

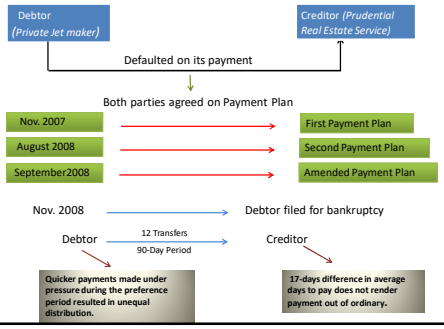
17

Burtch v. Prudential Real Estate & Relocation Servs. (In re AE Liquidation, Inc.),

2013 Bankr. LEXIS 2868 (Bankr. D. Del. July 17, 2013)

18

Background of the Case



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Findings - Business History of the Parties

	Pre - Preference Period (A year prior to pref. period)	Preference Period (90-day period prior to the bankruptcy filing)
Average Days to Pay	45.3 days	28 days
Payment Pattern	Late Payments	Quicker Payment as a result of credit pressure
Collection Pressure	No	Yes
Payment Term	Net 30	Weekly Payment
Payment Plan	Debtor was once placed on a accelerated payment plan for three months, but it was not recurrent negotiations of credit terms between parties throughout the business relationship	Prudential's knowledge of debtor's deteriorating financial condition prompted second and then, amended payment plan which resulted in quick transfers by debtors during the preference period

20

Reasoning and Court's Decision

- Transactions Not Ordinary Between the Parties.

•Creditor insisted on a quicker payment schedule as it became aware of the debtor's financial troubles.

•**Prudential was getting much more than other creditors who did not apply pressure and ended up with unpaid bankruptcy claims. This resulted in unequal distribution, which preference law aims to prevent.**

•Credit terms between the parties also changed significantly during the preference period after the creditor learned of the debtor's deteriorating financial condition.

•**Under pressure, the debtor was making big payments to one creditor and not to other creditors, thus unequal distribution.**

•Judgment was entered in favor of trustee and Prudential was asked to return the transfers received during the preference period.

•**Similar situated creditors should receive similar recoveries.**

21

Rationale 2:
Discourage creditors from being aggressive when a company is in trouble and thereby avoiding bankruptcy, if possible.

22

Race to the Courthouse

Section 547 is designed to discourage creditors from racing to the courthouse to sue and obtain judgments against a financially distressed company, or take any other action to collect their claims, that would precipitate the company's filing for bankruptcy.

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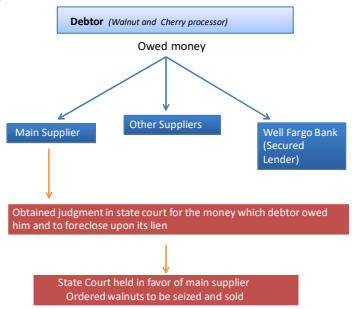
Richardson v. Wells Fargo Bank (In re Churchill Nut Co.),

251 B.R. 143 (Bankr. N.D. Cal. 2000)

24

Background of the Case



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Background of the Case

Subsequent to this, Debtor filed for bankruptcy and Trustee collected $400k from sales of the walnut crop.

To distribute funds, Trustee sought a judgment to determine the validity and priority of liens.

Arguments

Main Supplier	Trustee
It has interest in the proceeds of the walnut sales **superior to other suppliers as a result of state court judgment** in his favor	Main Supplier raced to courthouse to secure its claim.
	Main supplier was merely a second priority supplier, which should share pro rata in the proceeds with all other similar suppliers and should not be preferred for reason whatsoever.

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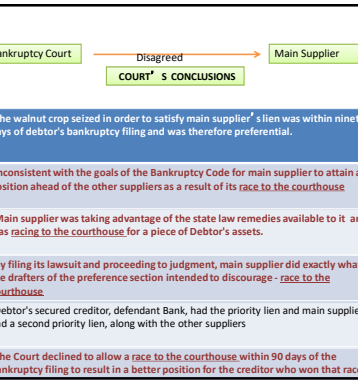

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No Intent is Required

Neither the intent nor motive of the parties is relevant in consideration of an alleged preference under 11 U.S.C.S. § 547(b). It is the effect of the transaction, rather than the debtor or creditor's intent, that is controlling. Therefore, what the parties might have intended to accomplish is immaterial; the effect of what was done is

28

29

Gladstone v. Bank of Am., N.A. (In re Vassau)

499 B.R. 864 (Bankr. S.D. Cal. 2013)

30

Background of the Case

Debtor took two loans from Bank

Loan No. 1 was fully secured with Debtor's property
Loan No. 2 was partially secured

Bank Acquired Lien on Debtor's property

Debtor made 10 transfers against Loan No. 1 during Preference Period

Trustee sought to recover these transfers as preference

Trustee asserted that the alleged payment, which might have otherwise been available to pay unsecured creditors, was transferred against loan no.1 and these transfers benefitted bank against Loan no.2(by enhancing bank's security interest), thereby reducing the bankruptcy estate

Bank argued that there was no intention on its part to get benefitted from the alleged transfers.

31

Court — Disagreed → Bank

COURT' S CONCLUSIONS

- **Intent of the parties is irrelevant to the preference analysis**
- What the parties **might have intended is immaterial**.
- While the alleged payments may not have been made by the debtors **with the intent of benefitting** the bank towards partially secured loan, the court held that the transfer actually benefitted the creditor and hence the alleged payments are avoidable as preference.

32

Standing To Bring A Preference Case

33

In re MPF Holding US LLC

443 B.R. 736 (Bankr. S.D. Tex. 2011)

34

Quick Summary

Trustee initiated preference actions against debtor's creditors

↓

Creditors argued – trustee has no proper authority to sue under debtor's reorganization plan, so can't initiate preference action

Court Conclusion

a) Debtor' s reorganization plan included the language
- that created an ambiguity
- did not definitively establish what claims actually trustee had to sue

b) The language in the plan must be "specific and unequivocal" to grant a standing to trustee to sue.

c) The plan must
- identify the parties individually
- set forth the legal basis for the suit clearly.
- clearly state that following confirmation, defendant will be sued

d) The trustee lacked standing to sue those creditors that were specifically not included in the plan as potential defendants.

35

Burden of Proof

36

Sec. 547 (g) : For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the non-avoidability of a transfer under subsection (c) of this section.

37

In other words, the trustee has the burden of proving the elements of preference.

The defendant has the burden of proving the defenses to a preference.

38

Trustee's burden of proving the elements of preference.

39

In Shapiro v. Art Leather, Inc. (In re Connolly N. Am., LLC)

398 B.R. 564 (Bankr. E.D. Mich. 2008)

40

Facts:

•Trustee sought to avoid $3.2 million as preference.

•Creditor argued that trustee failed to prove an element of preference under § 547(b)(5) – "the creditor received more" element

•Court noted that the trustee bore the burden of proving that the non-priority unsecured creditors in the hypothetical Chapter 7 liquidation case would have received less than a 100 percent distribution.

•Trustee submitted a testimony of a Certified Public Accountant (CPA).

•However, the court noted that the testimony was neither admissible nor entitled any weight.

41

Missing facts in trustee's proof

First, add up the value of the assets:	
1. Cash on hand (as of the time of trial)	$ [missing; no evidence admissible, against Art Leather, but Trustee admits as much as: $ 2,927,115.91]
2. Add-back the transfers the Trustee seeks to avoid in this case	$ 3,258,565.63
3. The liquidation value of the estate's claim against Plante & Moran LLP for accounting malpractice	$ [missing]
4. The liquidation value of the estate's claims against others, if any, not collected as of the time of trial	$ [missing]
Total Assets available to pay unsecured claims:	unknown, but on this record, must assume at least $ 6,185,681.54
Second,	
Subtract from the assets the present and projected allowable Chapter 7 administrative expenses, not yet paid as of the time of trial:	$ [missing]
Subtotal: remaining assets left to pay unsecured claims:	unknown, but on this record, must assume at least $ 6,185,681.54
Third, subtract allowable unsecured claims (as noted above, the Trustee admitted that there are no secured claims left to pay):	
1. Allowable unsecured claims:	$ [missing]
2. Add-back the preference recovery from Art Leather in this case:	$ 3,258,565.63
Total unsecured claims: unknown, but at least $ 3,258,565.63 Distribution to unsecured creditors: unknown, but may be 100%	

42

Court's ruling:

•Trustee's proof missed several critical facts to prove the "the creditor received more" element.

•Trustee failed to meet his burden of proof.

•Court ruled in favor of the creditor holding that the alleged transfers were not avoidable as preference.

43

Defendant's burden of proving the defenses to preference.

44

Mangan v. Clark Farms, Inc. (In re Quality Sales, LLC),

521 B.R. 450, 2014 Bankr. LEXIS 4702 (Bankr. D. Conn. 2014)

45

Facts:

•The Defendant operated a farm and agreed to grow agricultural produce for sale to the Debtor. Debtor paid $16,355.00 to the Defendant for the Produce during the preference period.

•Trustee sought to recover this amount as preference.

•Defendant sought protection under § 547(c)(1), (2), or (4) exceptions to preference.

•Court noted that Defendant had the burden to prove non-avoidability of the transfers.

46

Defendant failed to provided sufficient facts and evidence in support of its arguments.

New Value	Failed to prove that it provided new value in form of any goods or services after receipt of first alleged preference.
Contemporaneous Exchange	Failed to prove contemporaneous exchange as facts indicated a lapse of 18 days in payment from the invoice date.
Ordinary Course of Business	This was a single transaction between the parties. The Defendant failed to provide any evidence that the debt was incurred in accordance with either the past practices of debtor and defendant in relation to other similarly situated parties or what would be expected of other similarly situated parties.

47

Court's ruling:

•Defendant failed to prove its burden due to lack critical facts and evidence to prove non-avoidability.

•Court ruled in favor of the Trustee.

•Payments were held to be preferential transfers.

48

Jurisdiction

49

In re American Aluminum Window Corp.,

15 B.R. 803, 1981 Bankr. LEXIS 2438, Bankr. L. Rep. (CCH) P68,638, 8 Bankr. Ct. Dec. 713 (Bankr. D. Mass. 1981)

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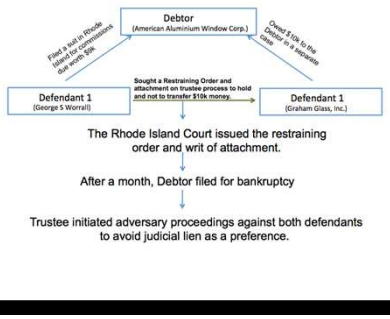
FACTS OF THE CASE



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Defendant 1 —Motion to dismiss→ **Lack of Jurisdiction**

Defendants Arguments

- No sufficient nexus between the Defendant's employment in Rhode Island and the Debtor's bankruptcy petition to confer personal jurisdiction over the Defendant.
- Basis for personal jurisdiction is governed by the Massachusetts Long Arm Statute, Mass.Gen.Laws Ann. ch. 223A, § § 1-14, and since Defendant was employed and worked in Rhode Island, the necessary minimum contacts did not exist.

52

- "Source of the Bankruptcy Court's jurisdiction, whether in rem or in personam, comes directly from the 1978 Bankruptcy Act and not from any state long arm statute…."
- "Jurisdiction of a federal court when it is applying a federal statute is not limited by state law. It is not the Commonwealth of Massachusetts but the United States which is exercising its jurisdiction over the Defendant".
- "In *Erie Railroad v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938)*, the Supreme Court stated that "(e) except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."
- " § 1471 controls the jurisdiction of the Bankruptcy Court. Therefore, under even the court created Erie doctrine, the Bankruptcy Court does not look to the Massachusetts Long-Arm statute to determine the extent of its [**14] in personam jurisdiction "

53

28 U.S.C. § 1471:

The basic jurisdictional provision of this Court is set forth in 28 U.S.C. § 1471:

(a)Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts

54

Courts' Ruling

- **Under 28 U.S.C.S. § 1471, the court had original and exclusive jurisdiction over cases arising under Title 11**
- The Defendant was properly served and had notice of the proceedings;
- Procedural due process was satisfied.
- After finding that jurisdiction was proper, the court noted that the judicial lien was transfer within the expansive definition of *11 U.S.C.S. 101(40)* and voided the lien as a ***preference***.

55

Tucker Plastics v. Pay 'N Pak Stores (In re PNP Holdings Corp.),

184 B.R. 805, 1995 Bankr. LEXIS 1088, Bankr. L. Rep. (CCH) P76,631, 27 Bankr. Ct. Dec. 772, 95 Cal. Daily Op. Service 6521, 95 Daily Journal DAR 10976 (B.A.P. 9th Cir. Wash. 1995)

56

Defendant → Motion to dismiss → Lack of Jurisdiction

Defendants Arguments

- Defendant was a Canadian corporation with no business installations or employees in the United States.
- All of its sales were made by manufacturer's representatives who are independent contractors of Tucker,
- All goods sold were shipped and invoiced from Canada.
- Requirements for service of process in a foreign country as provided by Bankruptcy Rule 7004(e) were not met.

57

Courts' Ruling

- Defendant's motion to dismiss denied. Defendant had submitted itself to the court's jurisdiction by filing a proof of claim.
- Defendant was liable as an initial transferee and awarded judgment for return of preferences.
- Filing a proof of claim evidences consent to jurisdiction, Appellant's Rule 7004(e) argument is without merit.
- No need to address whether personal jurisdiction over Defendant would be proper under Washington's long-arm statute. "Consent is [a] traditional basis of jurisdiction, existing independently of long-arm statutes."
- "Creditor cannot reasonably expect to invoke those portions of the bankruptcy code that allow it to recover on its claims and yet avoid the legal effect of other sections that do not work in its favor."

58

Venue

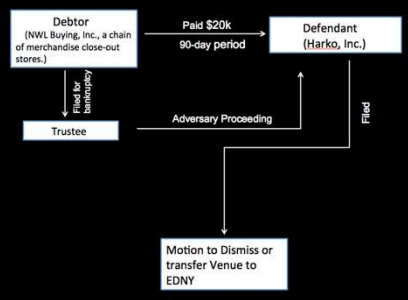
59

Giuliano v. Harko, Inc. (In re NWL Holdings, Inc.),

2011 Bankr. LEXIS 580, 2011 WL 767777 (Bankr. D. Del. Feb. 24, 2011)

60

FACTS OF THE CASE



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Arguments

Defendant	Trustee
Venue in this Court is no longer proper after the Debtors' cases were substantively consolidated under NWL Holdings.	Defendant misstates the effects of substantive consolidation.
As a result of the substantive consolidation of the Debtors there is no longer a pending affiliate case that would justify venue in Delaware.	Effect of the substantive consolidation was not to eliminate each of the consolidated cases nor to divest this Court of jurisdiction over the consolidated cases
Court should transfer venue to the Eastern District of New York.	Venue in Delaware is proper
Claim arose in the Eastern District of New York because that is where defendant formed its relationship with the Debtors.	Dispute is centered upon the payments received by defendant within ninety days period, not the relationship that existed prior to filing.
Venue should be transferred as its records are located in New York	Location of books and records not a significant factor due to the ease of transporting documents
More convenient for it to litigate in EDNY	More convenient in Delaware. Venue change would increase the administrative expenses of the estate
As this court focuses on the laws of Delaware and not the laws of New York, this Court would have to	Action is a preference action arising under the Bankruptcy Code, which is the same in both Delaware

62

1412 does not require that the action could have been brought in the transferee district. See, e.g., In re Manville Forest Prods. Corp., 896 F.2d 1384, 1390-91 (2d Cir. 1990); Thomson McKinnon Sec., Inc. v. White (In re Thomson McKinnon Sec., Inc.), 126 B.R. 833, 834-35 (Bankr. S.D.N.Y. 1991). HN10 In making a determination of whether to transfer venue, the Third Circuit has held that courts should consider numerous factors, including:

> 1) plaintiff's choice of forum; 2) defendant's forum preference; 3) whether the claim arose elsewhere; 4) the location of books and records and/or the possibility of viewing premises if applicable; 5) the convenience of the parties as indicated by their relative physical and financial condition; 6) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; 7) the enforceability of the judgment; 8) practical considerations [13] that would make the trial easy, expeditious, or inexpensive; 9) the relative administrative difficulty in the two fora resulting from congestion of the courts' dockets; 10) the public policies of the fora; 11) the familiarity of the judge with applicable state law; and 12) the local interest in deciding local controversies at home.

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995).

63

Court's Decision

Substantive consolidation did not eliminate the effect of the filing of the Debtors' affiliate cases.
NWL Buying case was not closed and was still an open case. Nothing in the substantive consolidation Order directed that it or the other affiliate cases be closed.
Under section 1408(2), a bankruptcy case may be filed in the district "in which there is a pending case under title 11 concerning such person's affiliate. . . ." 28 U.S.C. § 1408(2). Once filed, a bankruptcy case is "pending" unless it has been closed.
Consequently, the Court finds that venue in Delaware is proper for the NWL Holdings case, as there is still a pending affiliate case. 28 U.S.C. § 1408(1).
After weighing the twelve factors laid down by Third Circuit, the Court found that most of the factors favored venue to remain in Delaware or are neutral.
Transfer of venue is unwarranted.
Defendant's motion to transfer venue was denied.

64

DEADLINE TO BRING A PREFERENCE CASE (STATUE OF LIMITATION)

65

Sec. 546 (a) - An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
(1)the later of—

(A) 2 years after the entry of the order for relief; or

(B)1 year after the appointment or election of the first trustee under section 702,1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

66

2 year statute of limitation under § 546(a)(1)

67

ELEMENTS OF A PREFERENCE CASE (Sec 547(b))

68

Sec. 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.

69

Transfer of Interest of the Debtor in Property.

71

11 U.S. Code § 101 (54) - The term "transfer" means-

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—
(i) property; or
(ii) an interest in property.

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Indirect Transfers

73

INDIRECT TRANSFER

Debtor A pays Entity C for benefit of Creditor B = Indirect Transfer

74

Sec. 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;
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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.

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ThermoView Indus. v. Clemmens (In re ThermoView Indus.)

358 B.R. 330, 332 (Bankr. W.D. Ky. 2007)

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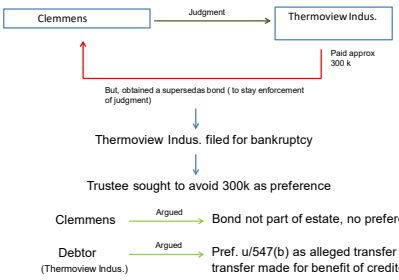

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Court's Conclusion

Interest of the debtor was transferred when the funds came out of the Debtor's account and went to Clemmens
Debtor's estate was diminished by $300,000
Those funds were not available to other creditors
Bond was obtained specifically to stay enforcement of execution of the Judgment. Thus, the transfer certainly for the benefit of a creditor.
Alleged transfer was an indirect transfer of property of the Debtor for the benefit of Clemmens, hence preference

78

Voidable indirect preferential transfer occurs when a purchaser of assets assumes liabilities as part of the purchase price and makes payments on those liabilities to a creditor of the debtor.

79

In re Food Catering & Housing, Inc.,

971 F.2d 396, 1992 U.S. App. LEXIS 17409, Bankr. L. Rep. (CCH) P74,811, 92 Cal. Daily Op. Service 6636, 92 Daily Journal DAR 10704 (9th Cir. Wash. 1992)

(Court of Appeals for the Ninth Circuit, July 31, 1992)

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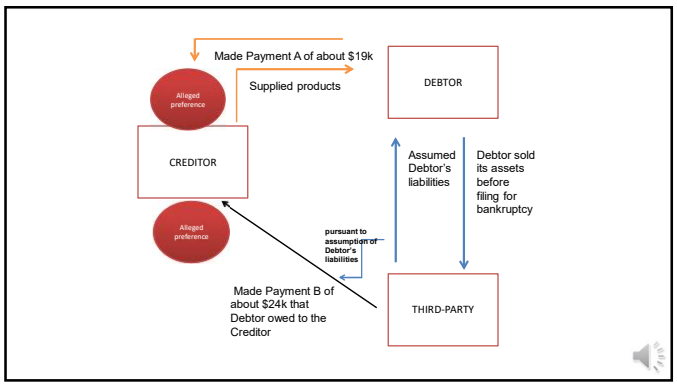

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Court's ruling:

•The court noted that indirect payment by third-party pursuant to assumption of Debtor's liabilities reduced the amount the Debtor received in exchange of sale of its assets.

•Payment B was avoidable. Defendant benefitted from the third-party's assumption of the debtors' debt, the court found the transfer was a voidable preference.

82

Lubetkin v. Anthony Brusco Consulting (In re Astoria Graphics, Inc.)

2013 Bankr. LEXIS 609,
2013 WL 587321 (Bankr. D.N.J. Feb. 14, 2013)

83

Defendant's Arguments:

•The interest transferred in the assumption of the Brusco Contract was not an interest in property

•Rather it was a debt of the Debtor, and, therefore, only represents the transfer of a debt out of the estate.

•If the funds the third party used to pay the creditor were consideration for the debtor's sale of its assets, then those funds would have been part of the debtor's estate and would have been available for distribution had they not been transferred to the creditor.

•Third party did not assume the Brusco contract and paid pursuant to it, for the benefit of the Defendant. It paid for the benefit of the Debtor.

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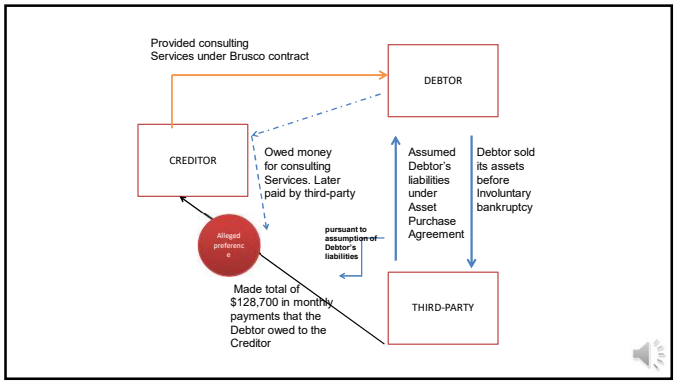

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Court's ruling:

•Alleged transfers were preferential.

•Even though the transfer was indirect, there was a direct and traceable link between the consideration given for the Debtor's assets and the payments to Defendant.

•If not for that assumption by third-party, the Debtor would have had the right to additional consideration in the amount of $287,000.

•As a result of the transfer, the Defendant received 100% of the amount owed by the Debtor. Transfer was for the benefit of the Defendant.

86

Involuntary Transfers

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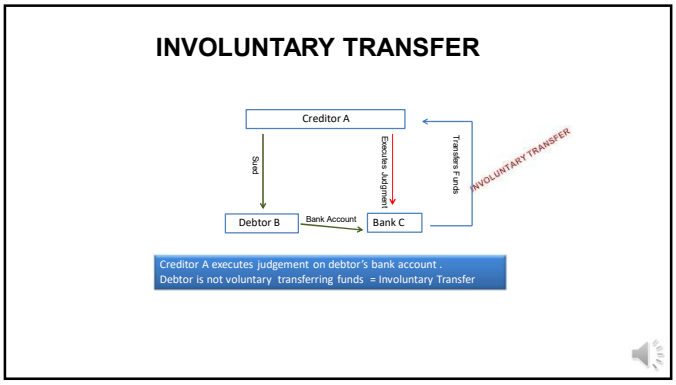


88

In re Maytag Sales & Service, Inc.

23 B.R. 384 (Bankr. N.D. Ga. 1982)

89

"Lien" as an involuntary transfer.

90

Pysz v. Hawkins (In re Pysz)

2008 Bankr. LEXIS 2828, 2008 BNH 4 (Bankr. D.N.H. 2008)

91

Court's ruling:

•Records established that Debtor was insolvent. Liabilities exceeded the assets.

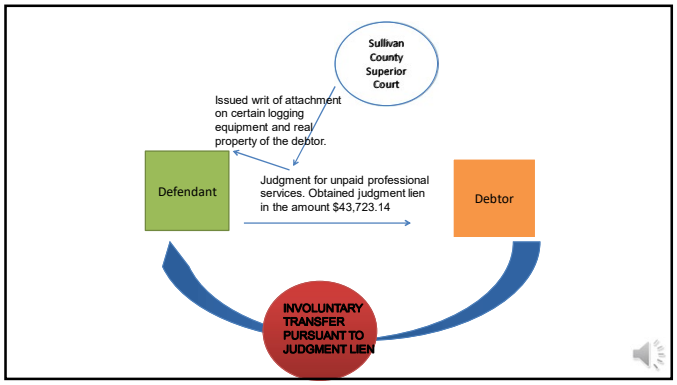
•The Defendant's judgment was for unpaid professional services, which, absent the attachment, was a general unsecured debt.

•By obtaining and recording the attachment, the Defendant converted an otherwise unsecured claim to a secured one.

•Thus, the lien enabled the Defendant to receive more than he would without the lien in a Chapter 7 case.

•It was preferential transfer.

94



92

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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.

95

Arguments:

- Trustee sought to avoid judicial lien as preference.
- Defendant argued that the Defendant was solvent at the time of the attachment.
- Defendant also argued that it did not receive more with the judicial lien than it would without the lien in a chapter 7 case.

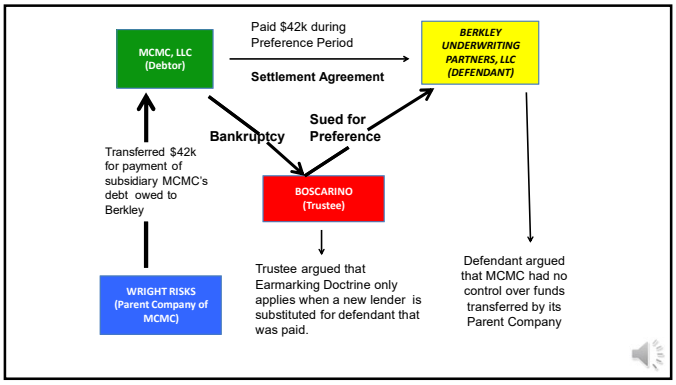
93

Transfer of Interest of the Debtor in Property.

96

Transfer of Interest of the Debtor in Property.

97



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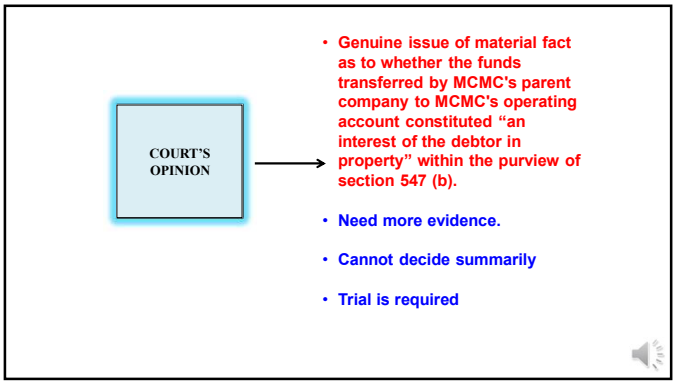
Earmarking

98



101

Boscarino v. Berkley Underwriting Partners, LLC (In re MCMC, LLC)

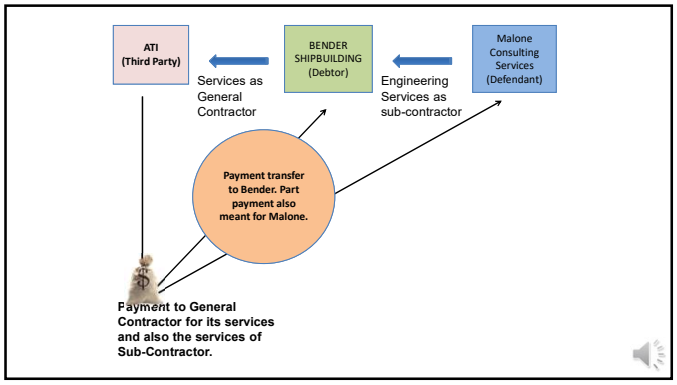
2011 Bankr. LEXIS 1295 (Bankr. D. Conn., Mar 31, 2011)

99

Bender Shipbuilding & Repair Co. v. Malone Consulting Servs. (In re Bender Shipbuilding & Repair Co.)

2012 Bankr. LEXIS 4834 (Bankr. S.D. Ala. Oct. 15, 2012)

102



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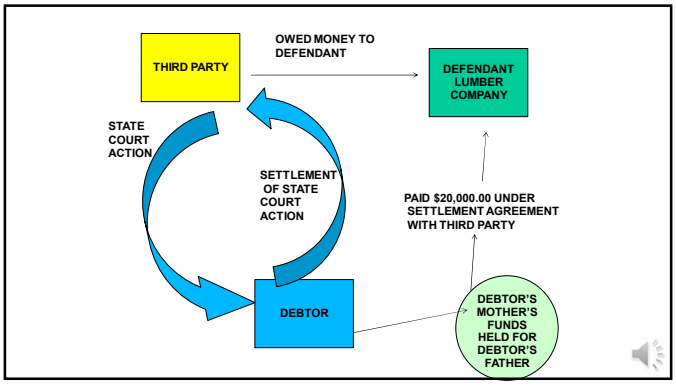

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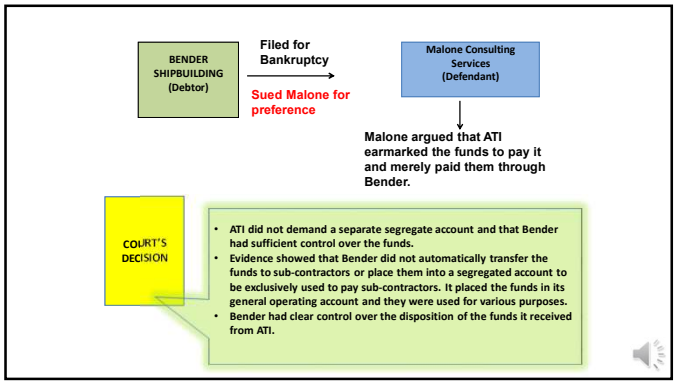

104

Arguments:

•Defendant argued that the funds transferred were protected under earmarking doctrine as they were taken from his mother's account.

• Trustee argued that Debtor exercised control over the funds.

Court's ruling:

•Evidence on record pointed towards the fact that Debtor exercised control over the funds in his mother's account.

•Debtor had the ability to withdraw the funds to pay the Defendant.

•As money used to pay the Defendant was held to be Debtor's, the earmarking doctrine did not apply.

107

Riley v. Nat'l Lumber Co. (In re Reale)

393 B.R. 821 (B.A.P. 1st Cir. 2008)

(Bankruptcy Appellate Panel For 1st Circuit, August 14, 2008)

105

Diminution of Debtor's Property

108

Yoppolo v. MBNA Am. Bank, N.A. (In re Dilworth),

560 F.3d 562, 2009 U.S. App. LEXIS 6419, 2009 FED App. 0118P (6th Cir.), Bankr. L. Rep. (CCH) P81,451, 61 Collier Bankr. Cas. 2d (MB) 875 (6th Cir. Ohio 2009)

109

Facts:

•In order to make payment towards her credit card debt, Debtor Jeannette Dilworth transferred $10,500.00 to the creditor bank MBNA America Bank, N.A., using a balance transfer check drawn on her CitiPlatinum Select Card.

•This transfer took place during the preference period. Trustee Louis Yoppolo sought to recover the payment as preferential transfer.

Arguments:

•Creditor bank argued that the Debtor had simply used the balance transfer check to substitute one creditor for another, and therefore, the transfer did not diminish the bankruptcy estate.

•Trustee argued that bank-to-bank transfer dimished Debtor's assets.

110

Court's ruling:

•Bankruptcy Court ruled in favor of the Trustee. Held the transfers as preferential. On appeal, the Court of Appeals for the Sixth circuit affirmed.

•The court observed that the debtor demonstrated significant control over the distribution of the funds when she decided to pay the former creditor and not her other creditors.

•The transfer thus resulted in a diminution of value in the bankruptcy estate.

•The Court opined in favor of the Trustee and concluded that bank-to-bank transfer of funds diminished Dilworth's assets.

111

Constructive Trusts

112

Claybrook v. Consol. Foods, Inc. (In re Bake-Line Group, LLC),

359 B.R. 566, 2007 Bankr. LEXIS 275, 47 Bankr. Ct. Dec. 217 (Bankr. D. Del. 2007)

113

Facts:

•The Debtor and the Defendant did not have any business relationship with each other but they both had offices in the same building.

•One of the Defendant's customers mailed a check that was mailed to the Debtor by mistake.

•The Debtor erroneously deposited the check in its own account.

•On realizing the mistake, the Debtor issued a check to the Defendant in the same amount.

•4 days later, the Debtor filed for bankruptcy. Trustee sought to recover the transfer of amount to the Defendant as preferential transfer.

114

Defendant's Arguments:

•It was not a creditor of the Debtor.

•The Debtor held the money for the defendant in a constructive trust

•No transfer of Debtor's property occurred.

Court's ruling:

•The Court that the transfer was not avoidable. Defendant was not a creditor. The Debtor was only holding the money in constructive trust.

•The Debtor had never had any interest in the money and had essentially converted it.

• Due to the reason that the Debtor had no legal or equitable interest in the funds, the funds could not be estate property available for distribution to the estate's creditors.

115

Sec. 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;
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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.

116

To Or For The Benefit Of A Creditor

117

Status of a conduit

118

Kirschenbaum v. Leeds Morelli & Brown and Nancy Isserlis (In re The Robert Plan of New York)

2011 Bankr. LEXIS 1845 (Bankr. E.D.N.Y. May 5, 2011)

119

Facts:

- Defendant Leeds Morelli & Brown (LMB) was the law firm representing the co-defendant Nancy Isserlis in a suit against the Debtor.
- The Debtor and Isserlis executed a settlement agreement pursuant to which the Debtor made the settlement payments in the amount $33,000.00 to LMB, which were placed in its escrow account.
- As per its retention agreement with Isserlis, LMB deducted its fees from the settlement payments and conveyed the remainder to Isserlis.

Arguments:

- The Trustee sought to recover the transfers as preference payments.
- Defendant argued that it received the transfers from the Debtor in the capacity of a conduit. It was not a creditor of the Debtor.

120

Court's ruling:

•The court found that LMB was merely acting on behalf of the Isserlis.

•The Debtor did not owe any debt to LMB.

•LMB did not have any separate collection rights as against the Debtor pursuant to an agreement between the Debtor and Nancy Isserlis.

•LMB was not a creditor of the Debtor. The Transfers could not be avoided from LMB.

121

To Or For The Benefit Of A Creditor

122

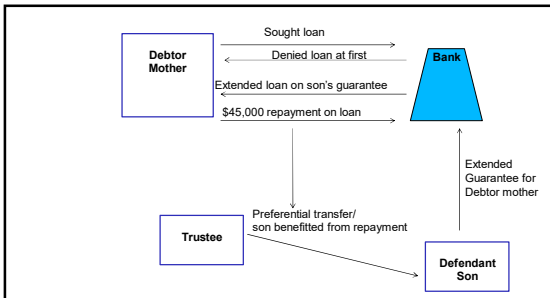
Guarantors

123

Osberg v. Halling (In re Halling),

449 B.R. 911, 2011 Bankr. LEXIS 2128 (Bankr. W.D. Wis. 2011)

124



125

Arguments:

- Trustee sought to avoid this amount from the son contending that he benefited from the transfer and that the transfer was preferential payment.
- The son argued that the amount could not be avoided as he was not a 'creditor' of his mother's estate because he would have never attempted to collect the repayment.

126

Court's ruling:

•Son had a contingent "right to payment" from the Debtor mother which constituted his claim against her. Son was a creditor.

•The alleged payment reduced son's obligations towards the bank as the guarantor of debtor's loan. Therefore, son benefitted from the alleged payment.

•Court held that alleged payment was avoidable from the defendant son.

127

Sec. 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;**
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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.

128

For or on account of an antecedent debt

129

Tomlins v. BRW Paper Co. (In re Tulsa Litho Co.)

232 B.R. 240 (Bankr. N.D. Okla. 1998)

130

Facts:

•Debtor, a printing company, purchased paper from the Defendant BRW Paper Co., Inc. on open account.

•One week prior to the bankruptcy filing, Tulsa issued a cashier's check in the amount $18,900.00 to BRW in payment of invoices, within the time period specified by the parties.

•Neal Tomlins, the Trustee of Tulsa filed a preference action to recover the payment as preferential transfer.

Defendant's argument:

•BRW argued that because the amounts owed to it were not past due, the debt at issue were not "antecedent."

131

Court's ruling:

•The Court observed that BRW shipped paper products to Tulsa on an open line of credit.

•Under the terms of the credit agreement between the parties, payment of that invoice was due on the 20th day of the month following the month in which product was delivered.

•Therefore, the Court found that the amounts owed to BRW by Tulsa at the time of delivery of the Cashier's Check constituted "antecedent debt".

132

Anderson News, LLC v. News Group, Inc. (In re Anderson News, LLC)

2012 Bankr. LEXIS 3855 (Bankr. D. Del. Aug. 22, 2012)

133

Facts:

•Defendant, The News Group, was a magazine and book wholesaler and was a competitor of Debtor Anderson.

•During the 90 days before filing bankruptcy, the Debtor transferred about $2.5 million to the Defendant. The transfers represented a certain pre-petition Settlement Amount against four pre-petition invoices.

•Thereafter, Anderson as debtor-in-possession, sought to recover the transfers as alleged preference transfers..

Defendant's argument:

•The Defendant argued that the alleged transfers were payments made for a simultaneous debt and not for an antecedent debt. It contended that the issuance of the invoices and payments by the Debtor were simultaneous.

134

Court's ruling:

•For three of the four transactions, the invoice date and check date were identical, and the fourth transaction occurred shortly after the alleged invoice date.

• The Court granted an opinion in favor of the Defendant.

•The transfers were held to have not been made on account of an antecedent debt.

135

Sec. 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—
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(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
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c) such creditor received payment of such debt to the extent provided by the provisions of this title.

136

Made while debtor was insolvent

137

101(32)(A) defines an insolvent corporate debtor as one whose "financial condition [is] such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation."

138

“going concern” valuation test

139

Brown v. Shell Can. (In re Tennessee Chem. Co.)

143 B.R. 468, 1992 Bankr. LEXIS 1225, 23 Bankr. Ct. Dec. 455 (Bankr. E.D. Tenn. 1992)

140

Facts:

•Shortly before filing bankruptcy, Debtor secured a debt to the Defendant by giving it a security interest in its property.

•The Trustee sought to recover the transfer of the security interest as preferential transfer.

Arguments:

•Defendant argued that at the time of making the transfer, the Debtor was solvent. Defendant relied on Debtor’s schedules and an operating report of the Debtor filed with the Trustee.

•The schedules showed assets worth $45,300,000 and debts totalling $41,200,000.

•Defendant argued that the values in the schedules must be treated as market value because the schedules are supposed to give market value.

141

Timing of Transfer

144

Sec. 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—
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142

Sec. 547 (b) (4) Made—
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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

Barnhill v. Johnson

503 U.S. 393, 394 (U.S. 1992)

(Supreme Court of the United States, March 25, 1992)

145

Facts:

•The Debtors made payment on a debt by delivering a check to the Creditor.

•Check delivered to Creditor on: November 18, 1985

•Check was dated: November 19, 1985

•Check was honored: November 20, 1985

•Debtors' bankruptcy was filed on: February 18, 1986
(90th day from check honor date)

Arguments:

•Defendant contended that the "transfer" was made on the date the check was delivered. Therefore, it was made out of preference period.

146

Supreme Court's ruling:

•A check is simply an order to the drawee bank to pay the sum stated on demand. If the check is honored, the debtor's obligation is discharged, but if it is not honored, a cause of action against the debtor accrues to the check recipient "upon demand following dishonor."

•Honoring the check left the debtor in the position that it would have occupied had it withdrawn cash from its account and handed it over to Barnhill.

•The rule of honor is consistent with § 547(e)(2)(A), which provides that a transfer occurs at the time it "takes effect between the transferor and the transferee," particularly since the debtor here retained the ability to stop payment on the check until the very last.

147

Delay in perfection of a lien may affect the timing of "transfer"

148

French v. State Farm Mut. Auto. Ins. Co. (In re LaRotonda)

436 B.R. 491, 2010 Bankr. LEXIS 3241 (Bankr. N.D. Ohio 2010)

149

Arguments:

•Defendant argued that it because a secured creditor on the day it obtained lien i.e. in the year 2006. Therefore, the transfer was outside the preference period.

•Trustee argued that the lien was perfected during the preference period. Here the transfer was preferential.

Court's ruling:

•Pre-petition lien judgment standing alone does not give rise to a secured interest. Defendant needed to perfect the lien as per State law.

•As lien was perfected during the preference period, it was a valid preferential transfer avoidable by the Plaintiff.

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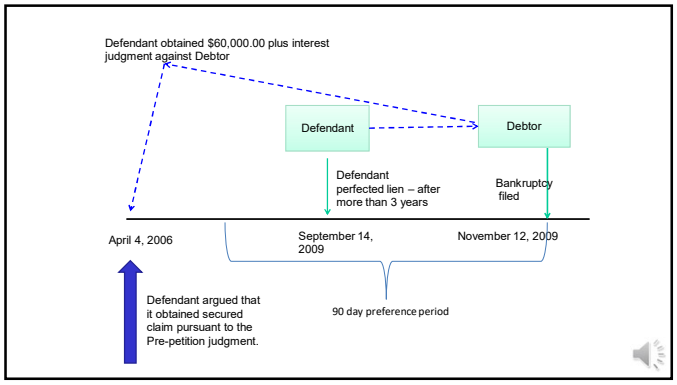

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c) such creditor received payment of such debt to the extent provided by the provisions of this title.

152

How are transfers made before an involuntary petition treated?

153

Sec. 547 (b) (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
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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.

154

Affiliates are deemed insiders

155

Weinman v. Walker (In re Adam Aircraft Indus.)

2012 Bankr. LEXIS 5998 (Bankr. D. Colo. Dec. 28, 2012)

156

Facts:

•The president of an aircrafts company was made to resign the company by its board of directors.

•The company paid him over $200,000 pursuant to his separation agreements with the company.

•Seven months after this transfer, the company filed for bankruptcy.

•The Trustee sought to recover the amount as preference.

Defendant's argument:

•The ex-president argued that the transfer was made in the ordinary course of business and as per the terms of the separation agreement.

•He had no insider information about the bankruptcy because he did not attend company's office after resignation and had no control or influence over company's affairs.

157

Court's ruling:

•Ex-president remained friends with the founder of the company and may have been in a strong bargaining position at the time of entering into the separation agreement.

•The ex-president failed to show that the separation agreements were entered at arm's length.

•Although evidence the parties presented suggested that the former president did not fall within the statutory definition of an "insider", the U.S. Court of Appeals for the Tenth Circuit had held that a person could be a "non-statutory insider" for purposes of the Bankruptcy Code.

158

Its all relative.

159

(31) The term "insider" includes— (A) if the debtor is an individual— (i) relative of the debtor or of a general partner of the debtor;
(ii) partnership in which the debtor is a general partner;
(iii) general partner of the debtor; or
(iv) corporation of which the debtor is a director, officer, or person in control;
(B) if the debtor is a corporation— (i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;
(iv) partnership in which the debtor is a general partner;
(v) general partner of the debtor; or
(vi) relative of a general partner, director, officer, or person in control of the debtor;
(C) if the debtor is a partnership— (i) general partner in the debtor;
(ii) relative of a general partner in, general partner of, or person in control of the debtor;
(iii) partnership in which the debtor is a general partner;
(iv) general partner of the debtor; or(v) person in control of the debtor;D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;
(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and
(F) managing agent of the debtor.

160

101(45) The term "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

161

Gold v. Rubin (In re Harvey Goldman & Co.),

2011 Bankr. LEXIS 3149, Bankr. L. Rep. (CCH) P82,072, 55 Bankr. Ct. Dec. 99 (Bankr. E.D. Mich. Aug. 24, 2011)

162

Facts:

•David Simcha, was the President of the Debtor company. Yitzchok Rubin was the second cousin of the President.

•During more than 90 days before filing of Debtor's bankruptcy, the President made a transfer of $22,000.00 to Rubin.

•The Trustee sought to recover this transfer as alleged preferential transfer.

163

Arguments:

- Trustee argued that Rubin, as Simcha's second cousin, was within the third degree of consanguinity, and was therefore Simcha's relative as per the definition of the term "relative" under § 101(45) of the Bankruptcy Code.
- Also, as Rubin was Simcha's relative, he was an "insider" of the Debtor.
- Hence, the Trustee claimed that the payment was preferential as it was made by Rubin, an insider, during the one year reach back period prior to the petition date.
- Rubin argued that as Simcha's second cousin, he was only related to Simcha by consanguinity within the sixth degree and, therefore, was not his relative.

164

Court's ruling:

•The court looked to Michigan common law to determine the proper method of counting degrees of consanguinity because the Debtor was a Michigan corporation in a bankruptcy case filed in Michigan.

•Applying the common law of Michigan, the court held that Rubin, although a second cousin of the Simcha, was related within the sixth degree of consanguinity and therefore was not Simcha's relative and not an insider for the purpose of preference issue.

•The court held that the transfers could not be avoided as Trustee could not recover transfers made beyond the 90 days preference period.

165

Sec. 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—
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c) such creditor received payment of such debt to the extent provided by the provisions of this title.

166

The Hypothetical Chapter 7 Distribution Test

167

Sec. 547 (b) (5) that enables such creditor to receive more than such creditor would receive if—
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(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.

168

Luker v. Heartland Cmty. Bank (In re Frankum)

2011 Bankr. LEXIS 2816 (Bankr. E.D. Ark. July 18, 2011)

169

The hypothetical Chapter 7 test compares two calculations: (1) the amount a creditor would receive on its claim in a hypothetical Chapter 7 liquidation had no transfer been made (the "**hypothetical liquidation**"), and (2) the amount the creditor received from the allegedly preferential transfer combined with the amount the creditor would be entitled to receive on its claim in the actual bankruptcy case (the "**real liquidation**"). *11 U.S.C. § 547(b)(5)*.

170

Secured creditors realize in a chapter 7 case the value of their collateral. But partially secured creditors paid in full may be preferred.

171

Luker v. Heartland Cmty. Bank (In re Frankum)

453 B.R. 352, 2011 Bankr. LEXIS 2816 (Bankr. E.D. Ark. July 18, 2011)

172

Facts:

•The debtors owned several medical facilities, including two nursing homes, a hospital, and a clinic, before they declared bankruptcy.

•When they were unable to pay their debts they decided to sell the hospital to a corporation that offered to buy it.

•As part of the purchase agreement, the corporation agreed to pay each debtor $250,000 in exchange for their agreement not to compete with the corporation, and that payment was made by the corporation's closing agent to a bank less than 90 days before the debtors declared bankruptcy.

•Trustee James C. Luker sought to obtain both payments of $250,000 as preferential transfers.

173

Court's ruling:

- The payments allowed the only partially secured Defendant Bank, in its capacity as a creditor of the Debtors' bankruptcy estate, to receive more than it would have received as a creditor if the payments had not been made.
- No evidence as to the value of its security interest at time of transfer.
- Bank argued that post-petition it became fully secured through payments to the estate.

174

Sec. 547 (b) (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.

175

In Leicht v. Fifth Third Bank (In re Zaring)

2012 Bankr. LEXIS 2777 (Bankr. S.D. Ohio May 18, 2012)

176

Facts:

- Defendant FTB was the holder of two notes and a guaranty executed by the Debtor, Zaring.
- During the preference period, the Debtor made payments totaling $553,875.30 to the Defendant.
- Trustee sought to avoid these payments as preferential transfers.

Arguments:

- The Defendant argued that it could have set off the $553,875.30 in bankruptcy if the transfers had not been made.
- The Trustee argued that the Defendant never effectuated a setoff and therefore did not possess a security interest in the funds.

177

Court's ruling:

- The Court concluded even if the Defendant did not effectuate setoff, it possessed hypothetical setoff rights under § 553(a) of the bankruptcy code which provides that non-bankruptcy rights of setoff are preserved in bankruptcy, with limited exceptions not raised by the Trustee.
- The Court also observed that the Defendant possessed setoff rights under the applicable Ohio law.
- Thus, the Court granted summary judgment in favor of the Defendant and dismissed Trustee's complaint.

178

Defenses To A Preference Claim

179

§ 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;

(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 the transferee; or
(B) made according to ordinary business terms;

180

(3) that creates a security interest in property acquired by the debtor—
(A) to the extent such security interest secures new value that was—
(i) given at or after the signing of a security agreement that contains a description of such property as collateral;
(ii) given by or on behalf of the secured party under such agreement;
(iii) given to enable the debtor to acquire such property; and
(iv) in fact used by the debtor to acquire such property; and
(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(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;

181

Contemporaneous Exchange Defense

182

§ 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;

(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 the transferee; or
(B) made according to ordinary business terms;

183

Purpose behind this provision:

•The section protects transfers that do not result in diminution of the estate because unsecured creditors are not harmed by the transfer if the estate was replenished by an infusion of assets that are of roughly equal value to those transferred.

184

•To prevent from avoidance the transactions that are technically “on account of an antecedent debt,” but were not really credit transactions.

185

If it’s a simultaneous exchange of cash for goods, then in theory that debt is really not created.

The purpose of the preference law is to make sure that creditors are treated equally.

186

If a vendor is paid immediately, that vendor is not a creditor because he/she is not owed money.

187

Silverman Consulting, Inc. v. Canfor Wood Prods. Mktg. (In re Payless Cashways, Inc.)

306 B.R. 243,Bankr. L. Rep. (CCH) P80,057, 51 Collier Bankr. Cas. 2d (MB) 1213, 42 Bankr. Ct. Dec. 180, 53 U.C.C. Rep. Serv. 2d (Callaghan) 518 (B.A.P. 8th Cir. 2004)

188

Facts:

•The creditor shipped lumber to the debtor.

•The goods were shipped via trucks and rail.

•The parties had agreed that shipments would only be made if the debtor paid by electronic funds transfer (EFT).

•All of the payments were made within 15 days of the shipment date for rail shipments and within 6 days of the shipment date for truck shipments.

•At least as to eight of the payments, the creditor received payment prior to delivery.

•The parties intended that the debtor would not obtain possession until after payment.

189

Arguments:

- Trustee - any transaction that was evidenced by an invoice was an antecedent debt.
- Creditor - By allowing the goods to be delivered to the debtor, it made a contemporaneous exchange for a new value.

190

Court's ruling:

The Court held that the payments were contemporaneous exchanges for new value because of the following reasons:

1. The creditor treated each shipment as a receivable on the date of shipment, and the debtor treated it as a payable on that same date.

2. The estate was not diminished, as shipments were to be diverted if payment was not received.

3. In any event, payments were made within 15 days of shipment which was substantially contemporaneous.

On appeal, the BAP for the 8th Circuit affirmed Bankruptcy Court's ruling.

191

Section 547(c) (1) 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.

192

Section 547(c) (1) The trustee may not avoid under this section a transfer —

(1) to the extent that such transfer was —

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(B) in fact a substantially contemporaneous exchange.

193

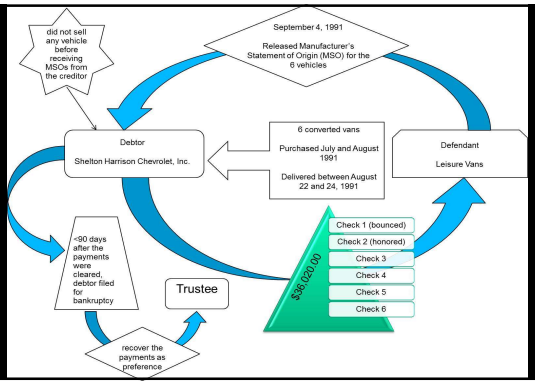
New value in context of contemporaneous exchange defense

194

Stevenson v. Leisure Guide of Am., Inc. (In re Shelton Harrison Chevrolet, Inc.)

202 F.3d 834, 2000 FED App. 0038P (6th Cir.), Bankr. L. Rep. (CCH) P78,105 (6th Cir. Tenn. 2000)

195



196

Court's ruling:

Bankruptcy Court and, on appeal, the District Court held in favor of the creditor.

On appeal, the Court of Appeals for the 6th Circuit reversed the previous decisions and held that the release of MSOs did not amount to new value due to the following reasons:

•There was no security agreement between the creditor and debtor to secure payment of the vans.

• The debtor derived full value of the vans upon receipt/delivery because it had the ability to sell the vans immediately.

•MSOs did not have any independent value.

197

Velde v. Kirsch

366 B.R. 902, (D. Minn. 2007)

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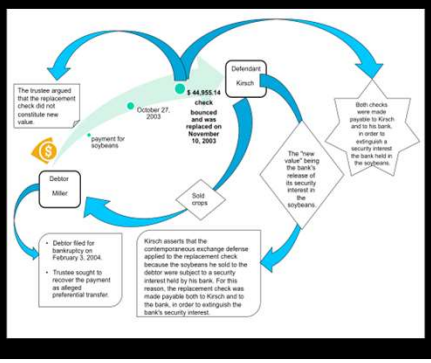

199

Court's ruling:

➢Bankruptcy Court – defense not applicable in a bounce-check situation.

➢District Court – The debtor did not receive his "new value" (the bank's release of its security interest in the soybeans) when he issued the bounced check.

•Release of the security interest occurred only when the bank received "payment" for the soybean.

•Only after the debtor issued the replacement check (which was honored) that the bank's security interest was released.

•Thus, the necessary contemporaneousness between the transfer (the replacement check) and the new value (the bank's release of its security interest) existed in the transaction.

200

Section 547(c) (1) 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.

201

Can be inferred from circumstantial evidence.

202

In re Lewellyn & Co.,

(929 F.2d 424, 1991 U.S. App. LEXIS 5253, Bankr. L. Rep. (CCH) P73,880 (8th Cir. Iowa 1991)

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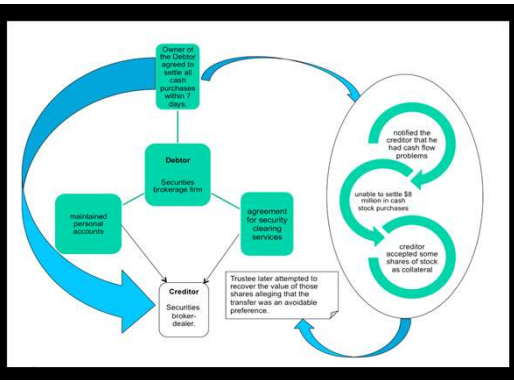


204

Court's ruling:

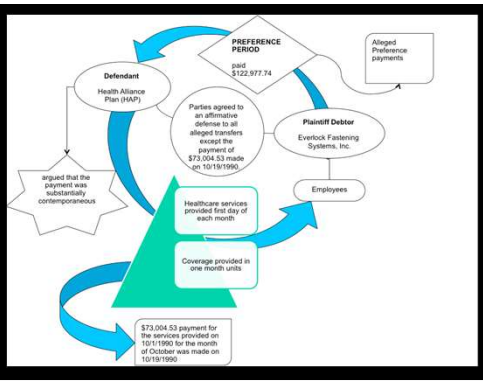
•The transfer was a contemporaneous exchange for new value.

•The parties intended the transfer to have been a contemporaneous exchange in lieu of cash settlement.

• The transfer did, in fact, occur within 7 business days of purchases through the owner's cash account.

•The creditor extended new value in the form of $ 8 million worth of new credit to the owner.

205



208

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(B) in fact a substantially contemporaneous exchange.

206

Court's ruling:

•Exchange of money payment for healthcare services was substantially contemporaneous.

•The payment for services occurred during the same month the services were provided even though it was made after 19 days of providing the healthcare services for that month.

•Alleged payment was contemporaneous exchange for new value.

209

Everlock Fastening Sys. v. Health Alliance Plan (In re Everlock Fastening Sys.),

171 B.R. 251, 1994 Bankr. LEXIS 1326 (Bankr. E.D. Mich. 1994)

207

Dill v. Brad Hall & Assocs. (In re Indian Capitol Distrib.)

2012 Bankr. LEXIS 3725, 2012 WL 3292891 (Bankr. D.N.M. Aug. 10, 2012)

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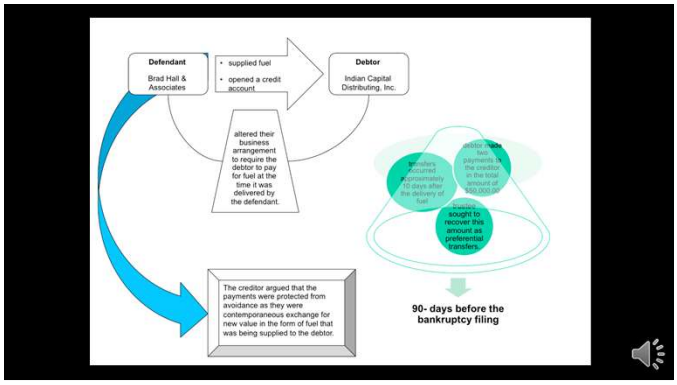


211

Court's ruling:

•The payments could not be avoided.

•The transfers occurred approximately 10 days after the delivery of fuel to the debtor and such periods qualified as substantially contemporaneous with the deliveries of fuel.

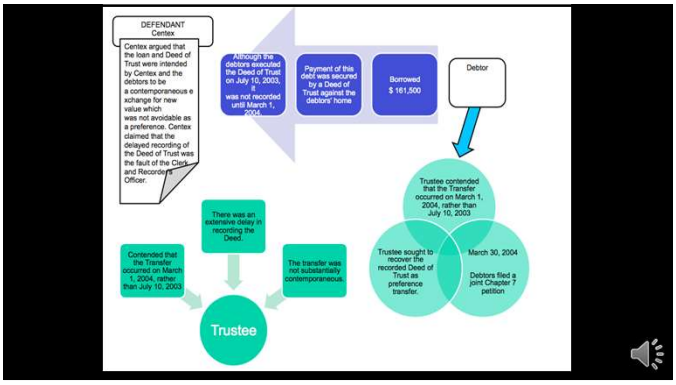
•10 days was sufficiently immediate in view of the time required for administrative tasks such as determining the amounts due, preparing invoices, and arranging for payment.

212

Anstine v. Centex Home Equity Co., LLC (In re Pepper)

339 B.R. 756, 2006 Bankr. LEXIS 427, 55 Collier Bankr. Cas. 2d (MB) 1707 (B.A.P. 10th Cir. 2006)

213



214

Court's ruling:

•Centex presented no evidence justifying the extensive delay in filing of the Deed of Trust.

•Despite Centex's claim that the delay was caused by the fault of the clerk and the Recorder's Officer, the Bankruptcy Court held that Centex was less than 100 percent diligent and had different opportunities to remedy the problem. However it did not act diligently.

•The extensive delay of 7 months and 18 days was not held as substantially contemporaneous.

215

The bright-line rule for substantially contemporaneous exchange

216

Grace period to perfect a lien under section 547 (e)(2):

Earlier under Code	10 Days
2005, Bankruptcy Abuse Prevention and Consumer Protection Act	30 Days

Courts have held that the perfection of lien within this 10 days (now 30 days) grace period is to be deemed as substantially contemporaneous exchange.

217

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

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(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;

(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 the transferee; or
(B) made according to ordinary business terms;

218

Ordinary Course of Business Defense

219

The policy behind this exception is "to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual transactions by either the debtor or his creditors during the debtor's slide into bankruptcy."

220

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

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

221

Ordinary course exception is directed primarily to ordinary trade credit transactions.

222

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

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

223

In re Craig Oil Co.,

785 F.2d 1563, 1986 U.S. App. LEXIS 23769, 14 Bankr. Ct. Dec. 553 (11th Cir. Ga. 1986)

224

Facts

•Defendant supplied gas to the debtor Craig Oil, a gas station.

•Payment was due within ten days of billing.

•Despite the stated payment, defendant did not consider any payment overdue unless it arrived more than sixteen days after billing.

•Few months prior to Craig's bankruptcy, Craig made 14 payments to the defendant via cashier's checks rather than the corporate checks which it previously used.

•The trustee sought to avoid all payments made by cashier's check.

225

Arguments

•Creditor claimed – Payments were immune from avoidance as they were made in the ordinary course of business.

•The Bankruptcy Court rejected creditor's argument and avoided the alleged payment as preferences.

•On appeal, the court affirmed

226

Court's Observation

"…. Marathon correctly concludes that a creditor's state of mind is now immaterial in finding a preference. In making this argument, Marathon slides away from the issue in the case -- which is not whether there was a preference, but whether the preferred transfer was in the ordinary course of business between Marathon and Craig and whether the payments were made according to ordinary business terms. Conceptually, it is difficult to disentangle these legal propositions and the facts which go to prove three separate statutory sections. It does not follow from the above that a *debtor's* state of mind or motivation is likewise immaterial in applying the preference *exception* of *§ 547(c)(2)*."

227

Ruling

- Debtor had not previously paid by cashier's check
- A significant number of the payments were overdue
- Payments were made after Craig stopped buying from defendant.
- Continued payment was induced by the creditor's request for assurance of payment and because another creditor was attempting to push the debtor into bankruptcy
- Such payments were not made in the ordinary course of business or according to ordinary business terms.

228

Baseline of Dealings

229

Ellenberg v. Tulip Prod. Polymerics (In re T.B. Home Sewing Enters.),

173 B.R. 782 (Bankr. N.D. Ga. 1993)

230

Facts of the Case

- Defendant, Tulip was a supplier of paints to the Debtor pre petition.
- Payment was due within 60 days.
- Tulip took some extraordinary collection measures approximately one-year before bankruptcy when the debtor fell seriously in arrears in payments, threatening to withhold shipments until its invoices were paid.
- The debtor paid, but then again fell behind before the 90-day period.
- Trustee sought to recover $ 141,813 paid during the preference period.

231

Baseline of Dealing

….."A creditor must establish a "baseline of dealings" so that the court may compare the practice of late payments during the preference period with the prior course of dealing".

….."This "baseline of dealings" must be fixed at least in part during a time in which debtor's day-to day operations were "ordinary" in the laymen's sense of the word. Preferably, the material period should extend back into the time before the debtor became financially distressed"

232

Tulip established a "baseline of dealings" with the debtor in which late payments were the norm :

•A review of the payment history during the pre-preference showed that debtor's payments to defendant ranged from 27 to 176 days after the invoice date. During the preference period, payments were made from 90 to 98 days past the invoice date.

•A review of the payment history also showed a similarity in the average number of days to pay.Payments during the preference period averaged 93.42 days after the invoice date, while payments during the entire pre-preference period averaged 87.36 days after the invoice date.

233

- The expert's affidavit established that late payments were the norm in the industry, to meet § 547(c)(2)(C)'s objective requirement.
- Subject payments are preferences; that defendant has proven the ordinary course of business exception under § 547(c)(2) and that there is no genuine issue of material fact which precludes summary judgment

234

Subjective Similarity Between Base Period Transactions and Preference Period Transactions

235

McCord v. Venus Foods (In re Lan Yik Foods Corp.),

185 B.R. 103, 1995 Bankr. LEXIS 1073, 27 Bankr. Ct. Dec. 743 (Bankr. E.D.N.Y. 1995)

236

Facts of the Case

•Debtor was a distributor of Chinese food products.

•Defendant Venus, was a manufacturer and supplier of Chinese food products.

•Payment terms were net 14 days. However, debtor never paid in 14 days and, in general, Defendant's' payment terms were 60 to 90 days.

•Defendant received payments aggregating $ 65k during the preference period.

237

- After offsetting the new value worth $ 37,474.10 the amount of alleged preferential transfers at issue was approx. $ 27k. The trustee sought to recover this amount as preference.
- The Defendant argued that the payments are protected under Sec. 547 (c) (2).
- Trustee argued - payments do not fell under the protection of the ordinary course of business defense because

  (a) they differed substantially from previous payments in terms of the amount of time from invoice date until payment;

  (b) the dollar amount of the payments significantly exceeded the dollar amount of payments during other time periods of the same duration

238

Court's Ruling

•During the pre-preference period, the Debtor's payments averaged 89 days after the invoice date. During the preference period, the Debtor made 4 payments which were 104, 110, 112 and 115 days after the invoice date for an average of 110 days after invoicing.

•Between 58 and 142 days in 9 year base period.

•A comparison of the pre-preference and preference payments showed that in both periods there were substantial and significant delays in payments.

•Absolute consistency in actual or average payment dates is unrealistic and not required.

•The submitted payment history demonstrates a practice of substantially late payments

239

- No evidence to indicate that there was any unusual action by Venus to collect the debt,
- No evidence to show that Venus did anything to gain any advantages based upon the Debtor's deteriorating financial condition or that Venus even knew of such condition.
- No change in the form of payment.
- No evidence indicating that the subject payments were made after the Debtor ceased business operations.
- Alleged Payments were within the scope of "recurring, customary credit transactions" which the statute was designed to protect.
- Defendant carried its burden in establishing that the subject preference payments were made in the ordinary course of business of the parties as required by section 547(c)(2)(B).

240

Payment Averages

241

Branch v. Ropes & Gray (In re Bank of New England Corp.),

161 B.R. 557

242

Facts of the case

•In November 1989, Defendant R&G was retained by Debtor bank, BNEC to provide legal services.

•BNEC made ten payments to R&G by check or wire transfer totalling $ 614k. All of these transfers occurred within ninety (90) days of BNEC's petition date.

•All of these transfers occurred within ninety (90) days of BNEC's petition date and the trustee sought to recover them as preferences.

•Defendant asserted an affirmative defense of "ordinary course of business" payments under § 547(c)(2).

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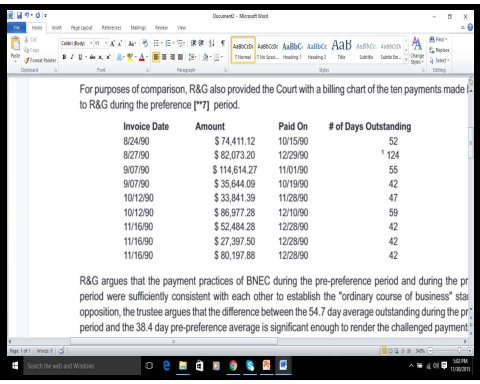

For purposes of comparison, R&G also provided the Court with a billing chart of the ten payments made [to R&G during the preference [**7] period.

Invoice Date	Amount	Paid On	# of Days Outstanding
8/24/90	$ 74,411.12	10/15/90	52
8/27/90	$ 82,073.20	12/29/90	[1] 124
9/07/90	$ 114,614.27	11/01/90	55
9/07/90	$ 35,644.09	10/19/90	42
10/12/90	$ 33,841.39	11/28/90	47
10/12/90	$ 86,977.28	12/10/90	59
11/16/90	$ 52,484.28	12/28/90	42
11/16/90	$ 27,397.50	12/28/90	42
11/16/90	$ 80,197.88	12/28/90	42

R&G argues that the payment practices of BNEC during the pre-preference period and during the pr period were sufficiently consistent with each other to establish the "ordinary course of business" sta opposition, the trustee argues that the difference between the 54.7 day average outstanding during the pr period and the 38.4 day pre-preference average is significant enough to render the challenged payment

244

Arguments

- R&G argued that the payment practices of BNEC during the pre-preference period and during the preference period were sufficiently consistent with each other to establish the "ordinary course of business" standard.
- The trustee argued that the difference between the 54.7 day average outstanding during the preference period and the 38.4 day pre-preference average is significant enough to render the challenged payments outside of the ordinary course of business. All ten of the challenged payments were made outside the 38.4 pre-preference average

245

Court's Ruling

- While the Court did not question the accuracy of the trustee's mathematics or statistical computations, the Court did not find that the difference between the two averages was significant, with the exception of the payment made on December 29, 1990.
- The fact that R&G issued its bills to BNEC an average of 17.75 days more quickly during the preference period did not suggest that the debts they represented were not incurred in the ordinary course, nor did it change the fact that the payment of these bills was consistent with the prior practices of the parties.
- Except for the December 29, 1990 payment, R&G sustained its burden R&G of proving the "ordinary course" exception as to nine of the ten challenged payments.

246

No Prior Payment History

247

Smith v. Shearman & Sterling (In re BCE West, L.P.),

2008 Bankr. LEXIS 569 (Bankr. D. Ariz. Feb. 28, 2008)

248

"When there are no prior transactions with which to compare, the court may analyze other indicia, including whether the transaction is out of the ordinary for a person in the debtor's position, or whether the debtor complied with the terms of the contractual arrangement, generally looking to the conduct of the parties, or to the parties' ordinary course of dealing in other business transactions."

249

Facts:

- Debtor Board of Directors of Boston Chicken, Inc. ("BCI") engaged Defendant Shearman & Sterling ("Shearman") to advise it in connection with a proposed merger and roll up transaction.
- The transaction closed July 15, 1998. BCI filed for Chapter 11 relief on October 5, 1998.
- During the ninety days prior to the filing, BCI paid Shearman three checks for legal fees in the total amount of $ 582,832.54.
- The Trustee sued Shearman to recover these amounts as preferential.
- The parties agree that all five subsections of § 547(b) have been satisfied. Shearman asserts that the payments may not be avoided because they were made in the ordinary course of business under § 547(c)(2)

251

Ranges of Payments

252

Bills were paid on average within 72 days of billing;

-92% of bills were paid between 0-179 days of billing;

-Clients regularly paid bills at the closing of financing or at the completion of a project;

-Bills covering 60 days, 45 days and 20 days of work were normal within the practice;

-Payment of multiple invoices with one check was ordinary;
-There was no policy regarding engagement letters; and
-That payment of Bills # 3, # 4, # 5, # 6, # 7, and # 8 were within the ordinary course of Shearman's business.

250

Continentalafa Liquidation Trust v Human Resource Staffing, (In re Continentalafa Dispensing Company),

2011 Bankr. LEXIS 1743 (Bankr. E.D. Mo. May 9, 2011)

253

Facts:

- Plaintiff Continentalafa Liquidation Trust sought to recover an alleged preferential payment of $103,856.28 paid to creditor Human Resource Staffing
- Trustee contended that the transfer amounts were unusually large as compared to the payment amounts during the comparison period. The two transfers made during the preference period represented 419% and 211% increases as compared to the average base period payment amounts.
- The defendant counter argued that the alleged preferential payments were consistent with the payments in the base period as they were made within a period of 30-60 days which was the usual practice.

254

Defendant argues that the ordinary course of business defense applies because the Transfers were consistent with the past practice between Debtors and Defendant in that 90% of payments during the Pre-Preference Period were paid between 30 and 60 days of invoicing — the remaining 10% was paid between 15 and 30 days of invoicing — while 100% of the Transfers during the Preference Period were paid between 30 and 60 days of
invoicing.

255

Conclusion

- Given the nature of the services provided, and the nature of the business relationship between debtors and the agency, the court did not find the variation in the amount of invoices and thus variation in payment amounts to dispel the ordinary course of business defense.
- Payments came out to be consistent when calculated using the range of payments. The range of payment during preference period was similar to the range during the preference period.

256

Change to wires payment during preference period

257

Modern Metal Prods. Co. v. Virtual Eng'g, Inc. (In re Modern Metal Prods. Co.),

2015 Bankr. LEXIS 1188 (Bankr. N.D. Ill. Apr. 8, 2015)

258

Facts of the Case

- Debtor Modern Metal Products Co. was a manufacturer of seat mechanisms and other automotive parts.
- Defendant Virtual Engineering, Inc. provided engineering services to the debtor.
- Payment terms were net 30 days.
- Despite the terms stated on the invoices, the debtor generally paid as late as 60 to 90 days after the invoice date.
- Debtor paid defendant $50k by wire transfer to pay 21 separate invoices for engineering services during the preference period.

259

Arguments

- The Defendant asserted the "ordinary course defense" under Section 547(c)(2) which the Trustee contested.
- The Trustee argued that the payments were not ordinary course because: (1) they were made by wire transfer instead of check, (2) Defendant sent an e-mail to the Debtor inquiring about payment, and (3) Defendant knew at the time of the transfer that Debtor was contemplating bankruptcy.

260

Court's Ruling

- Although check had been the usual form of tender in the past, the Debtor had paid by wire transfer also one or more times in the past.
- In *Brown Transp. Corp. v. BP Exploration & Oil, Inc. (In re Brown Transp. Truckload, Inc.)*, 161 B.R. 735, 740 - it was held that "the mere fact the Defendant paid by wire transfer" rather than "corporate check as the parties had done in the past" did "not take this conduct outside the ordinary course of business".
- The Court concluded that there was no indication that payment by wire transfer rather than check was intended to convey any benefit upon the defendant.
- Defendant met its burden, and showed by the preponderance of the evidence that the payment was made in the ordinary course of business.

261

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(B) in fact a substantially contemporaneous exchange;

(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 the transferee; or
(B) made according to ordinary business terms;

262

What is an industry standard

263

Buchwald v. Avista Energy, Inc. (In re North American Energy Conservation, Inc.),

339 B.R. 75 (Bankr. S.D.N.Y. 2006)

264

Facts:

- Debtor North American Energy Conservation Inc. filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code
- Defendant, was a supplier to the Debtor's electric energy trading division.
- At issue were transfers worth $ 1,698,400 made by wire to Avista during the ninety-day preference period.
- Avista argued that Debtor's complaint is without merit and that the transfers fall squarely within the Code § 547(c)(2) ordinary course of business exception

265

…."courts generally focus on determining whether the transfers were consistent with the parties' previous transactions, conformed to standard industry practices, or were made as a result of unusual actions of either party or other extraordinary circumstances"

….."to be deemed objectively ordinary, the subject transfer must be shown to be consistent with the industry norm"….

Court accepted as probative of industry standards the statement of the defendant creditor's credit manager that the invoice and payment practice between the parties was a commonplace in the energy trading industry.

266

- The Debtor and Avista are both entities whose businesses consist or consisted in part of entering into contracts regarding the purchase and sale of Electricity.
- Both parties have similar contracts with other entities, as evidenced by the other adversary proceedings and the associated pleadings in this case regarding similar business arrangements.
- The Debtor has put forth no evidence to dispute Avista's contention that in the electrical energy trading industry, invoices evidencing financial terms are typically generated and sent to the other party as the Electrical Agreement set forth; that the monthly settlement payment is a typical structure of these types of contracts; and that the Transfers constituted payments that were timely paid in the amounts due according to the Invoices.
- Both the Debtor and Avista have other relationships with other entities which parallel the financial relationship between the Debtor and Avista.
- Transfers were made according to ordinary industry standards.

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Evidence required

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Testimony by a lay person

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Webster v. Fujitsu Consulting, Inc. (NETtel Corp.)

369 B.R. 50, 2007 Bankr. LEXIS 1796 (Bankr. D.D.C. 2007)

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Facts:

- Trustee sought to avoid and recover two transfers made by debtor, as a result of cash infusions, to defendant vendor as preferential payments.

Arguments:

- The vendor argued that the payment were made according to the ordinary terms of the industry.
- The vendor demonstrate that debtor's preference period payments were made in accordance with the practices in which firms similar in some general way to the creditor in question engaged.
- The vendor submitted a declaration by a vendor witness as evidence of the IT consulting industry standards by itself to satisfy § 547(c)(2)(C).
- Trustee argued that the declaration by a vendor witness was inadmissible as it was based on personal experiences.

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Court's ruling:

- Without going into the substance of the vendor witness's declaration, the Court held that the declaration provided enough evidence of the relevant industry standards by itself.
- The Court granted vendor's motion for summary judgment on ordinary course of business defense.

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Some courts have based their decisions on reports obtained from Risk Management Association and Dun & Bradstreet.

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Dietz v. Jacobs

2014 U.S. Dist. LEXIS 37144 (D. Minn. Mar. 21, 2014)

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Facts:

- Plaintiff sought to avoid certain payments as preferential transfers, made by the Debtor to the Defendants during the preference period.

Arguments:

- The Defendants sought protection under the ordinary course of business defense. The Trustee argued that based on a report obtained by Risk Management Association (RMA), the payments were not made as per industry standard.
- Defendants contended Plaintiff's reliance on data from RMA's yearly report to determine industry norms on the "payment date range," without any independent validation or additional evidence renders his opinion unreliable.
- Defendants noted that the RMA characterizes its statistics as providing "general guidelines" and not "absolute industry norms."

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Court's ruling:

•Court held that RMA reports were a respected source of industry information.

•While Defendants pointed to certain caveats that RMA included in its publication "The Annual Statement Studies: Financial Ratio Benchmarks, 2009-2010," the same document also claimed that RMA is the "most respected source" of industry information and that for over 88 years, RMA's Annual Statement Studies® had been the industry standard for comparison financial data."

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New Value Defense

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§ 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;

(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 the transferee; or
(B) made according to ordinary business terms;

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(3) that creates a security interest in property acquired by the debtor—
(A) to the extent such security interest secures new value that was—
(i) given at or after the signing of a security agreement that contains a description of such property as collateral;
(ii) given by or on behalf of the secured party under such agreement;
(iii) given to enable the debtor to acquire such property; and
(iv) in fact used by the debtor to acquire such property; and
(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(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;

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Section 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;

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Bogdanov v. Avnet, Inc.

2011 U.S. Dist. LEXIS 113080, 2011 DNH 153, 2011 WL 4625698 (D.N.H. 2011)

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Facts:

• Defendant Avnet, a global distributor of electronic products, supplied goods, primarily software and computer components, to Debtor Amherst on an unsecured basis for over nine years.

•June, 2005 – The Debtor placed an ordered with the Defendant for $4 million in software.

•July 1, 2005 – The Defendant shipped $4 million worth of software to the Debtor.

•July 13, 2005 – The Debtor wrote its last prepetition check to the Defendant in the amount of $400,202.13.

•Between April 20, 2005 and July 13, 2005: The Debtor paid the Defendant $8.1 million on outstanding invoices. The Defendant shipped goods worth over $7 million to the Debtor on an unsecured basis.

•On July 20, 2005 – Debtor filed bankruptcy.

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Arguments:

- Trustee sought to recover the $7 million transfers to the Defendant as preference.
- The Defendant claimed that it was owed over $5.3 million in unpaid invoices.

Court's ruling:

- Bankruptcy Court's decision - $ 7 million worth of goods shipped to the Debtor constituted new value.
- District court affirmed.
- It was supported by the evidence and was not clearly erroneous as each time the Defendant shipped on credit for the debtor for an order, the order constituted new value.

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"Under the subsequent ***new value*** defense, *§ 547(c)(4)*, a creditor will escape preference liability to the extent it provides ***new value*** after the debtor made a preference transfer to the creditor."

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"On the other hand, the subsequent ***new value*** defense will ***not*** apply if the creditor, who has the burden of proof, does ***not*** establish that "the debtor did ***not*** make an otherwise unavoidable transfer" "on account of" the ***new value***. *11U.S.C. § 547(c)(4)(B)*."

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"The double negatives are unnecessarily complicated, but, essentially, the creditor must show that the debtor did ***not*** later pay for the ***new value*** with an "otherwise unavoidable transfer." Id.

That is, the creditor cannot both shield a prior preference payment by offsetting it with subsequent ***new value***, and also keep a subsequent preferential payment for the ***new value*** under some other defense (e.g., contemporaneous exchange)."

286

That is, the creditor cannot both shield a prior preference payment by offsetting it with subsequent ***new value***, and also keep a subsequent preferential payment for the ***new value*** under some other defense (e.g., contemporaneous exchange)."

287

"On the other hand, the subsequent ***new value*** defense will ***not*** apply if the creditor, who has the burden of proof, does ***not*** establish that "the debtor did ***not*** make an otherwise unavoidable transfer" "on account of" the ***new value***. *11U.S.C. § 547(c)(4)(B)*."

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"The bankruptcy court plausibly concluded that "otherwise" should be construed as referring to all defenses to avoidability **other** than the subsequent ***new value*** defense described in *§ 547(c)(4)*." Emphasis added.

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Section 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;

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Controlling date of transfer for the purpose of new value is the "check delivery date" and not the "check honor date".

•*Barnhill v. Johnson*, 503 U.S. 393, 394 (U.S. 1992) (U.S Supreme Court)

•*Giuliano v. Innovative Nationwide Builders, Inc. (In re Ultimate Acquisition Partners LLP)*, 2014 Bankr. LEXIS 1559, 8-10 (Bankr. D. Del. Jan. 31, 2014)

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