11 USCS § 547

Current through PL 115-114, approved 1/10/18, with a gap of PL 115-91

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Notice

Part 1 of 3. You are viewing a very large document that has been divided into parts.

§ 547. *Preferences*

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

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

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(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 [11 USCS §§ 701 et seq.];

(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 [11 USCS §§ 101 et seq.].

(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;

(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;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title [11 USCS § 545];

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $ 600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $ 6,425.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability

of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e) (1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(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 nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

History

(Nov. 6, 1978,P.L. 95-598, Title I, § 101, 92 Stat. 2597; July 10, 1984, P.L. 98-353, Title III, Subtitle A, § 310, Subtitle H, § 462, 98 Stat. 355, 377; Oct. 27, 1986, P.L. 99-554, Title II, Subtitle C, § 283(m), 100 Stat. 3117; Oct. 22, 1994, P.L. 103-394, Title II, § 203, Title III, § 304(f), 108 Stat. 4121, 4133; April 20, 2005, P.L. 109-8, Title II, Subtitle A, § 201(b), Subtitle B, § 217, Title IV, Subtitle A, §§ 403, 409, Title XII, §§ 1213(a), 1222, 119 Stat. 42, 55, 104, 106, 194, 196; Feb. 14, 2007, 72 Fed. Reg. 708; Feb. 25, 2010, 75 Fed. Reg. 8747; Feb. 21, 2013, 78 Fed. Reg. 12089.)

(As amended Feb. 16, 2016,81 Fed. Reg. 8748.)

Prior law and revision:

Legislative Statements

No limitation is provided for payments to commodity brokers as in section 766 of the Senate amendment other than the amendment to section 548 of title 11. Section 547(c)(2) protects most payments.

Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

Contrary to language contained in the House report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2).

Section 547(c)(6) of the House bill is deleted and is treated in a different fashion in section 553 of the House amendment.

Section 547(c)(6) represents a modification of a similar provision contained in the House bill and Senate amendment. The exception relating to satisfaction of a statutory lien is deleted. The exception for a lien created under title 11 is deleted since such a lien is a statutory lien that will not be avoidable in a subsequent ***bankruptcy***.

Section 547(e)(1)(B) is adopted from the House bill and Senate amendment without change. It is intended that the simple contract test used in this section will be applied as under section 544(a)(1) not to require a creditor to perfect against a creditor on a simple contract in the event applicable law makes such perfection impossible. For example, a purchaser from a debtor at an improperly noticed bulk sale may take subject to the rights of a creditor on a simple contract of the debtor for 1 year after the bulk sale. Since the purchaser cannot perfect against such a creditor on a simple contract, he should not be held responsible for failing to do the impossible. In the event the debtor goes into ***bankruptcy*** within a short time after the bulk sale, the trustee should not be able to use the avoiding powers under section 544(a)(1) or 547 merely because State law has made some transfers of personal property subject to the rights of a creditor on a simple contract to acquire a judicial lien with no opportunity to perfect against such a creditor.

Preferences: The House amendment deletes from the category of transfers on account of antecedent debts which may be avoided under the ***preference*** rules, section 547(b)(2), the exception in the Senate amendment for taxes owed to governmental authorities. However, for purposes of the "ordinary course" exception to the ***preference*** rules contained in section 547(c)(2), the House amendment specifies that the 45-day period referred to in section 547(c)(2)(B) [deleted; see the 1984 amendment of subsec (c)(2) of this section] is to begin running, in the case of taxes from the last due date, including extensions, of the return with respect to which the tax payment was made.

Senate Report No. 95-989

This section is a substantial modification of present law. It modernizes the ***preference*** provisions and brings them more into conformity with commercial practice and the Uniform Commercial Code.

Subsection (a) contains three definitions. Inventory, new value, and receivable are defined in their ordinary senses, but are defined to avoid any confusion or uncertainty surrounding the terms.

Subsection (b) is the operative provision of the section. It authorizes the trustee to avoid a transfer if five conditions are met. These are the five elements of a ***preference*** action. First, the transfer must be to or for the benefit of a creditor. Second, the transfer must be for or on account of an antecedent debt owed by the debtor before the transfer was made. Third, the transfer must have been made when the debtor was insolvent. Fourth, the transfer must have been made during the 90 days immediately preceding the commencement of the case. If the transfer was to an insider, the trustee may avoid the transfer if it was made during the period that begins one year before the filing of the petition and ends 90 days before the filing, if the insider to whom the transfer was made had reasonable cause to believe the debtor was insolvent at the time the transfer was made [see the 1984 amendment of subsec. (b)(4)(B) of this section].

Finally, the transfer must enable the creditor to whom or for whose benefit it was made to receive a greater percentage of his claim than he would receive under the distributive provisions of the ***bankruptcy*** code.

Specifically, the creditor must receive more than he would if the case were a liquidation case, if the transfer had not been made, and if the creditor received payment of the debt to the extent provided by the provisions of the code.

The phrasing of the final element changes the application of the greater percentage test from that employed under current law. Under this language, the court must focus on the relative distribution between classes as well as the amount that will be received by the members of the class of which the creditor is a member. The language also requires the court to focus on the allowability of the claim for which the ***preference*** was made. If the claim would have been entirely disallowed, for example, then the test of paragraph (5) will be met, because the creditor would have received nothing under the distributive provisions of the ***bankruptcy*** code.

The trustee may avoid a transfer of a lien under this section even if the lien has been enforced by sale before the commencement of the case,

Subsection (b)(2) of this section in effect exempts from the ***preference*** rules payments by the debtor of tax liabilities, regardless of their priority status.

Subsection (c) contains exceptions to the trustee's avoiding power. If a creditor can qualify under any one of the exceptions, then he is protected to that extent. If he can qualify under several, he is protected by each to the extent that he can qualify under each.

The first exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. Normally, a check is a credit transaction. However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous", and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, U.C.C. § 3-503(2)(a), that will amount to a transfer that is "in fact substantially contemporaneous."

The second exception protects transfers in the ordinary course of business (or of financial affairs, where a business is not involved) transfers. For the case of a consumer, the paragraph uses the phrase "financial affairs" to include such nonbusiness activities as payment of monthly utility bills. If the debt on account of which the transfer was made was incurred in the ordinary course of both the debtor and the transferee, if the transfer was made not later than 45 days after the debt was incurred [see the 1984 amendment of subsec. (c)(2) of this section], if the transfer itself was made in the ordinary course of both the debtor and the transferee, and if the transfer was made according to ordinary business terms, then the transfer is protected. The purpose of 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 action by either the debtor or his creditors during the debtor's slide into ***bankruptcy***.

The third exception is for enabling loans in connection with which the debtor acquires the property that the loan enabled him to purchase after the loan is actually made.

The fourth exception codifies the net result rule in section 60c of current law [section 96(c) of former title 11]. If the creditor and the debtor have more than one exchange during the 90-day period, the exchanges are netted out according to the formula in paragraph (4). Any new value that the creditor advances must be unsecured in order for it to qualify under this exception.

Paragraph (5) codifies the improvement in position test, and thereby overrules such cases as DuBay v. Williams, 417 F.2d 1277 (C.A.9, 1966), and Grain Merchants of Indiana, Inc. v. Union Bank and Savings Co., 408 F.2d 209 (C.A.7, 1969). A creditor with a security interest in a floating mass, such as inventory or accounts receivable, is subject to ***preference*** attack to the extent he improves his position during the 90-day period before ***bankruptcy***. The test is a two-point test, and requires determination of the secured creditor's position 90 days before the petition and on the date of the petition. If new value was first given after 90 days before the case, the date on which it was first given substitutes for the 90-day point.

Paragraph (6) excepts statutory liens validated under section 545 from ***preference*** attack. It also protects transfers in satisfaction of such liens, and the fixing of a lien under section 365(j), which protects a vendee whose contract to purchase real property from the debtor is rejected.

Subsection (d), derived from section 67a of the ***Bankruptcy*** Act [section 107(a) of former title 11], permits the trustee to avoid a transfer to reimburse a surety that posts a bond to dissolve a judicial lien that would have been avoidable under this section. The second sentence protects the surety from double liability.

Subsection (e) determines when a transfer is made for the purposes of the ***preference*** section. Paragraph (1) defines when a transfer is perfected. For real property, a transfer is perfected when it is valid against a bona fide purchaser. For personal property and fixtures, a transfer is perfected when it is valid against a creditor on a simple contract that obtains a judicial lien after the transfer is perfected. "Simple contract" as used here is derived from ***Bankruptcy*** Act § 60a(4) [section 96(a)(4) of former title 11]. Paragraph (2) specifies that a transfer is made when it takes effect between the transferor and the transferee if it is perfected at or within 10 days after that time. Otherwise, it is made when the transfer is perfected. If it is not perfected before the commencement of the case, it is made immediately before the commencement of the case. Paragraph (3) specifies that a transfer is not made until the debtor has acquired rights in the property transferred. This provision, more than any other in the section, overrules *DuBay* and *Grain Merchants,* and in combination with subsection (b)(2), overrules In re King-Porter Co., 446 F.2d 722 (5th Cir. 1971).

Subsection (e) is designed to reach the different results under the 1962 version of Article 9 of the U.C.C. and under the 1972 version because different actions are required under each version in order to make a security agreement effective between the parties.

Subsection (f) creates a presumption of insolvency for the 90 days preceding the ***bankruptcy*** case. The presumption is as defined in Rule 301 of the Federal Rules of Evidence, made applicable in ***bankruptcy*** cases by sections 224 and 225 of the bill. The presumption requires the party against whom the presumption exists to come forward with some evidence to rebut the presumption, but the burden of proof remains on the party in whose favor the presumption exists.

Annotations

Notes

Effective date of section:

This section became effective on October 1, 1979, pursuant to § 402(a) of Act Nov. 6, 1978, P.L. 95-598, which appears as 11 USCS prec § 101 note.

Amendments:

1984 . Act July 10, 1984, in subsec. (a), in para. (2), inserted "including proceeds of such property,", and, in para. (4), inserted "without penalty" following "payable" and deleted ", without penalty" following "extension"; in subsec. (b), in the introductory matter, substituted "of an interest of the debtor in property" for "of property of the debtor", and substituted para. (4)(B) for one which read:

"(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer--

"(i) was an insider; and

"(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and".

Such Act further, in subsec. (c), in para. (2), in subpara. (A), inserted "by the debtor", deleted subpara. (B), which read: "made not later than 45 days after such debt was incurred;" and redesignated former subparas. (C) and (D) as subparas. (B) and (C), respectively, in para. (3), in the introductory matter, substituted "that creates" for "of", and in subpara. (B), inserted "on or" and substituted "the debtor receives possession of such property" for "such security interest attaches", in para. (5), in the introductory matter, substituted "that creates" for "of" and "all security interests" for "all security interest", in subpara. (A)(ii), substituted "or" for "and", in subpara. (B), deleted "or" following "interest;", in para. (6), substituted "; or" for a concluding period, and added para. (7); in subsec. (d), substituted "The" for "A" preceding "trustee may avoid", inserted "an interest in", inserted "to or for the benefit of a surety", and inserted "such" following "reimbursement of"; in subsec. (e)(2)(C)(i), substituted "or" for "and"; and added subsec. (g).

1986 . Act Oct. 27, 1986 (effective 30 days after enactment on 10/27/86, and applicable as provided by § 302 of such Act, which appears as 28 USCS § 581 note), in subsec. (b)(4)(B), substituted "; and" for the semicolon.

1994 . Act Oct. 22, 1994 (effective on enactment and inapplicable with respect to cases commenced before enactment, as provided by § 702 of such Act, which appears as 11 USCS § 101 note), in subsec. (c), in para. (3)(B), substituted "20" for "10", in para. (6), deleted "or" after the concluding semicolon, redesignated para. (7) as para. (8), and added new para. (7); and in subsec. (e)(2)(A), inserted ", except as provided in subsection (c)(3)(B)".

2005 . Act April 20, 2005 (applicable to any case that is pending or commenced on or after enactment, as provided by § 1213(b) of such Act, which appears as a note to this section), in subsec. (b), substituted "subsections (c) and (i)" for "subsection (c)"; and added subsec. (i).

Such Act further (effective 180 days after enactment and inapplicable to cases commenced before the effective date, as provided by § 1501 of such Act, which appears as 11 USCS § 101 note), in subsec. (c), substituted para. (2) for one which read:

"(2) to the extent that such transfer was--

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

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

"(C) made according to ordinary business terms;",

in para. (3)(B), substituted "30" for "20", substituted para. (7) for one which read:

"(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt--

"(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

"(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or",

in para. (8), substituted "; or" for a concluding period, and added para. (9); in subsec. (e)(2), in subparas. (A), (B), and (C)(ii), substituted "30" for "10"; and added subsec. (h).

2007 . Effective April 1, 2007, and applicable to cases commenced on or after such date, as provided by 11 USCS § 104(b), the dollar amount in subsec. (c)(9) was automatically adjusted by substituting "$ 5,475" for "$ 5,000".

2010 . Effective April 1, 2010, and applicable to cases commenced on or after such date, as provided by 11 USCS § 104(b), the dollar amount in subsec. (c)(9) was automatically adjusted by substituting "$ 5,850" for "$ 5,475".

2013 . Effective April 1, 2013, and applicable to cases commenced on or after such date, as provided by 11 USCS § 104(b), the dollar amount in subsec. (c)(9) was automatically adjusted by substituting "$ 6,225" for "$ 5,850".

2016 . Effective April 1, 2016, and applicable to cases commenced on or after such date, as provided by 11 USCS § 104(b), the dollar amount in subsec. (c)(9) was automatically adjusted by substituting "$ 6,425" for "$ 6,225".

Other provisions:

Application of July 10, 1984 amendments. Act July 10, 1984, P.L. 98-353, Title III, Subtitle K, § 553(a), 98 Stat. 392, which appears as 11 USCS § 101 note, provided that the amendments made to this section by such Act are applicable to cases filed 90 days after enactment on July 10, 1984.

Application of amendments made by § 1213 of Act April 20, 2005. Act April 20, 2005, P.L. 109-8, Title XII, § 1213(b), 119 Stat. 195, provides: "The amendments made by this section [amending subsec. (b) and adding

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I. IN GENERAL

A. General Matters

1. Generally

Pursuant to preferential-transfer provisions of 11 USCS § 547(b), trustee in liquidation under Chapter 7 has power to "avoid" (i.e., recover) certain payments made by debtor that would enable creditor to receive payment of a

greater percentage of creditor's claim against debtor than creditor would have received if transfer had not been made and creditor had participated in distribution of assets of bankrupt estate. Begier v IRS (1990) 496 US 53, 110 S Ct 2258, 110 L Ed 2d 46, 20 BCD 940, 22 CBC2d 1080, CCH Bankr L Rptr P 73403, 90-1 USTC P 50294, 65 AFTR 2d 1095 (criticized in Official Comm. of Unsecured Creditors v Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.) (2010, BC DC Del) 432 BR 135, 53 BCD 94).

One way in which federal ***bankruptcy*** laws seek to equalize positions of similarly situated creditors is by giving trustees power to set aside so-called preferential transfers of debtor's property; thus, trustee may ordinarily avoid transfer of debtor's interest in property made to creditor on account of antecedent debt if that transfer occurred within ***90 days*** of date of filing of debtor's ***bankruptcy*** petition, i.e., transfer may be avoided under 11 USCS § 547(b) if it involves property of debtor and transfer reduces amount of ***bankruptcy*** estate available for ***payment*** of other creditors. Mitsui Mfrs. Bank v Unicom Computer Corp. (In re Unicom Computer Corp.) (1994, CA9) 13 F3d 321, 94 CDOS 141, 94 Daily Journal DAR 244, 25 BCD 152, 30 CBC2d 655, CCH Bankr L Rptr P 75708.

11 USCS § 547 allows ***bankruptcy*** trustee, in certain circumstances, to avoid preferential transfers of interest of debtor if transfer was made within ***90 days*** before date of filing of ***bankruptcy*** petition. Grella v Salem Five Cent Sav. Bank (1994, CA1 Mass) 42 F3d 26, 26 BCD 402, 32 CBC2d 1303, CCH Bankr L Rptr P 76225.

When, within ninety days before declaring ***bankruptcy***, debtor makes ***payment*** to unsecured creditor, ***payment*** is considered "***preference***" under 11 USCS § 547; subject to certain exceptions in statute, trustee in ***bankruptcy*** can recover such ***payment*** and thus force creditor to take its chances with rest of debtor's unsecured creditors. In re Midway Airlines (1995, CA7 Ill) 69 F3d 792, 28 BCD 175, CCH Bankr L Rptr P 76686.

Preferential transfer occurs when creditor receives, under sanctions of 11 USCS § 547(b), payment of larger percentage of its claim than it would otherwise have received had it participated in ***bankruptcy*** distribution with rest of Chapter 7 debtors' creditors; if preferential payment has taken place, law regards transaction as nullity, requiring that it be returned to debtors' estate. In re Cockreham (1988, DC Wyo) 84 BR 757.

As precondition for pursuing recovery action against subsequent transferee, ***bankruptcy*** trustee need not first obtain fully litigated, final judgment of avoidance against relevant initial transferee. Sec. Investor Prot. Corp. v Bernard L. Madoff Inv. Sec. LLC (2013, SD NY) 501 BR 26, 58 BCD 177, motion den, Certificate of appealability denied (2014, SD NY) 2014 US Dist LEXIS 15285.

Chapter 7 Trustee may not assign interest in potential ***preference*** actions Trustee may have on behalf of debtors' ***bankruptcy*** estate to creditor under 11 USCS § 547(b). In re Bargdill (1999, BC ND Ohio) 238 BR 711, 42 CBC2d 1327 (criticized in In re Fink (2007, BC ND Ind) 366 BR 870, 57 CBC2d 1575).

Ordinary course of business defense exists under 11 USCS § 547 for preferential transfers. AFD Fund v Transmed Foods, Inc. (In re AmeriServe Food Distrib.) (2003, BC DC Del) 41 BCD 208, summary judgment gr, judgment entered (2004, BC DC Del) 315 BR 24, 43 BCD 190, 52 CBC2d 1201.

Where individual creditor, who was not trustee in original Chapter 7 ***bankruptcy*** proceeding, attempted to exercise avoidance powers afforded to Chapter 7 Trustee under 11 USCS §§ 547 and 548, court granted defendant's motion to vacate prior order because individual creditor was acting in its own interest, not in interest of all creditors, and creditor did not seek and obtain prior approval from court to exercise Chapter 7 trustee's strong-arm powers. Hyman v Harrold (In re Harrold) (2003, BC MD Fla) 296 BR 868, CCH Bankr L Rptr P 78901, 16 FLW Fed B 199.

Only exceptions to voidability of preferential transfers are contained in 11 USCS § 547(c) and ***Bankruptcy*** Court has no power to create new exceptions; thus court errs when it denies Chapter 11 debtor in possession recovery of preferential transfer to unsecured creditor on novel theory that recovery will only benefit sole secured creditor, not general class of unsecured creditors. In re Enserv Co. (1986, BAP9 Cal) 64 BR 519, 15 CBC2d 993, CCH Bankr L Rptr P 71515, affd without op (1987, CA9 Cal) 813 F2d 1230 and affd without op (1987, CA9 Cal) 813 F2d 1230 and (criticized in Muskin, Inc. v Industrial Steel Co. (1993, BC ND Cal) 151 BR 252) and (criticized in Blonder v Cumberland Engineering (1999, 4th Dist) 71 Cal App 4th 1057, 84 Cal Rptr 2d 216, 99 CDOS 3204, 99 Daily Journal DAR 4109).

Avoidance provisions of 11 USCS § 547 facilitate prime ***bankruptcy*** policy of equality of distribution among Chapter 7 debtor's creditors; however, contemporaneous exchange transfers are protected under 11 USCS § 547(c)(1) because, unlike payments to unsecured creditors, they do not affect equality of distribution of estate assets; thus, payments by debtor made in exchange for secured creditor's release of its lien or security interest on property of debtor falls within shelter of § 547(c)(1); however, under definition of new value stated in § 547(a)(2), release of right of indemnity or mere substitution of obligation for antecedent debt would not suffice as it would provide nothing of tangible value to ***bankruptcy*** estate. In re E.R. Fegert, Inc. (1988, BAP9 Wash) 88 BR 258, affd (1989, CA9 Wash) 887 F2d 955, 19 BCD 1532, CCH Bankr L Rptr P 73108.

2. Constitutional issues

Application of ***Bankruptcy*** Code provision regarding preferential transfers did not violate free exercise of religion because provisions was of general and neutral applicability, it was supported by compelling interest, and it was narrowly tailored to achieve that interest. Listecki v Official Comm. of Unsecured Creditors (2015, CA7 Wis) 780 F3d 731, 60 BCD 210, 73 CBC2d 552, CCH Bankr L Rptr P 82780, cert dismd (2015, US) 193 L Ed 2d 464.

11 USCS § 547(f), which provides that debtor is presumed to have been insolvent on and during 90 days immediately preceding date of filing of petition, is constitutional since only legal effect of this presumption is to require creditor to produce some evidence to contrary; it does not deny creditor of debtor due process because its operation is only to supply inference of insolvency in absence of evidence contradicting inference. In re Economy Milling Co. (1983, DC SC) 37 BR 914.

Application of 11 USCS § 547(b) to Ponzi scheme investors does not violate their Fifth Amendment rights of substantive due process and equal protection on theory that investors who are paid within statutory reachback period should be given special exemption from § 547(b) because other investors were paid before that period since rational connection exists between § 547(b) as applied to Ponzi scheme and purpose for which statute was enacted because avoiding ***preferences*** in Ponzi scheme served primary purpose of equalizing distribution to creditors and, to lesser extent, of discouraging race to debtor's assets and dismantling of debtor. Jobin v Matthews (In re M & L Business Mach. Co.) (1995, DC Colo) 184 BR 136, 12 Colo Bankr Ct Rep 123.

11 USCS § 547 does not violate Fifth Amendment due process to creditors whose property interest arose subsequent to enactment of act but prior to effective date since genesis of 11 USCS § 547(b) was § 60 of ***Bankruptcy*** Act and statute was not substantially changed by new section. In re Caro Products, Inc. (1982, BC ED Mich) 23 BR 245, 7 CBC2d 316, CCH Bankr L Rptr P 68878.

11 USCS § 547(b)(4)(B) may constitutionally be applied retroactively to gap period between enactment and effective date of amendment, particularly where retroactive application does not alter prior vested property right. In re Lemanski (1986, BC WD Wis) 56 BR 981, 13 BCD 1337.

Abrogation of action to set aside ***preference*** under 11 USCS § 547(b)(4)(B) by ***Bankruptcy*** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, was not unconstitutional under Fifth Amendment because interest in case was not vested when § 1213 of Act became effective, liens held by bank were not property of estate since they remained valid until avoided, and rights under mortgage contracts included right of Congress to make new laws. Official Comm. of Unsecured Creditors of ABC-NACO, Inc. ex rel ABC-NACO, Inc. v Bank of Am., N.A. (In re ABC-NACO, Inc.) (2005, BC ND Ill) 331 BR 773, 45 BCD 154, CCH Bankr L Rptr P 80379, affd (2009, ND Ill) 402 BR 816, 61 CBC2d 596.

Abrogation of action to set aside ***preference*** under 11 USCS § 547(b)(4)(B) by ***Bankruptcy*** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, was not unconstitutional under Fifth Amendment's substantive due process guarantee because there was rational basis for retroactive enactment; one of reasons for law was to correct legislative error. Official Comm. of Unsecured Creditors of ABC-NACO, Inc. ex rel ABC-NACO, Inc. v Bank of Am., N.A. (In re ABC-NACO, Inc.) (2005, BC ND Ill) 331 BR 773, 45 BCD 154, CCH Bankr L Rptr P 80379, affd (2009, ND Ill) 402 BR 816, 61 CBC2d 596.

Defendants correctly noted that many courts had held that Due Process Clause of Fifth Amendment required notice and opportunity to be heard before creditor's claim could be adversely affected by operation of federal ***bankruptcy*** law; but this holding was largely inapposite, since Plan Administrator was not attempting to bar defendants from asserting claim against ***bankruptcy*** estate but was instead attempting to recover claim on behalf of ***bankruptcy*** estate. Gray v W. Envtl. Servs. & Testing, Inc. (In re Dehon, Inc.) (2006, BC DC Mass) 352 BR 546, 47 BCD 60.

Persons other than those specifically enumerated as "insiders" in 11 USCS § 547 may qualify as "insiders" with respect to particular debtor in ***bankruptcy*** because "insider" is defined under 11 USCS § 101(31) by reference to its inclusion of various individuals and entities; pursuant to 11 USCS § 102(3), word "includes" as used in 11 USCS § 547 is not term of limitation. Stathopoulos v Maritime Law Ctr. for Personal Injury (In re Arana) (2008, BC MD Fla) 387 BR 868, 21 FLW Fed B 307.

3. Purpose

11 USCS § 547 has 2 purposes: (1) avoidance power promotes prime ***bankruptcy*** policy of equality of distribution among creditors by ensuring that all creditors of same class will receive same pro rata share of debtor's estate; and (2) by providing for recapture of payments to creditors, avoidance power reduces incentive to rush to dismember financially unstable debtor. In re Smith (1992, CA7 Ind) 966 F2d 1527, 27 CBC2d 754, CCH Bankr L Rptr P 74750, 20 UCCRS2d 228, cert dismd (1992) 506 US 1030, 113 S Ct 683, 121 L Ed 2d 604 and (criticized in Parks v FIA Card Serv. (In re Marshall) (2008, DC Kan) 2008 US Dist LEXIS 15336).

Purpose of 11 USCS § 547 is to discourage secret liens upon debtor's collateral which are not perfected until just before debtor files for ***bankruptcy*** as other creditors might extend credit on assumption that collateral was free and clear. In re Lane (1992, CA9) 980 F2d 601, 92 CDOS 9577, 92 Daily Journal DAR 16067, 23 BCD 1197, 27 CBC2d 1724, CCH Bankr L Rptr P 75041.

It is ultimate aim of ***preference*** law under 11 USCS § 547 to insure that all creditors receive equal distribution from available assets of debtor; although intent or state of mind of parties is not materially dispositive of whether transfer is ***preference***, there is no impediment to allowing ***Bankruptcy*** Court to look to nature of transaction and relationship among parties. Gill v Winn (1992, CA10 Colo) 983 F2d 964, 23 BCD 1375, CCH Bankr L Rptr P 75063.

Purpose of ***preference*** statute, 11 USCS § 547, is to prevent debtor during his slide toward ***bankruptcy*** from trying to stave off evil day by giving preferential treatment to his more importunate creditors, who may sometimes be those who have been waiting longest to be paid. In re Tolona Pizza Prods. Corp. (1993, CA7 Ill) 3 F3d 1029, 24 BCD 963, 29 CBC2d 716, CCH Bankr L Rptr P 75395 (criticized in Morris v Sampson Travel Agency, Inc. (In re U.S. Interactive, Inc.) (2005, BC DC Del) 321 BR 388, 53 CBC2d 1691) and (criticized in Gonzales v Conagra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.) (2007, BAP10) 373 BR 691, 48 BCD 190).

Goal of drafters of 11 USCS § 547 was to bring ***preference*** law more into conformity with commercial practices and Uniform Commercial Law; creditors are encouraged by our legal system to secure their loans, and general message to creditors is that should they follow state commercial law, their secured loans will be protected in ***bankruptcy***; creditor lends money in expectation that creditor's compliance with state law is sufficient to protect loan and debtors should not be given ability to surprise and upset established commercial practices by filing for ***bankruptcy*** and avoiding acceptable security interest. Webb v GMAC (In re Hesser) (1993, CA10 Okla) 984 F2d 345, 23 BCD 1516, CCH Bankr L Rptr P 75094 (criticized in Fitzgerald v First Sec. Bank, N.A. (In re Walker) (1996, CA9 Idaho) 77 F3d 322, 96 CDOS 1214, 28 BCD 832, 35 CBC2d 580) and (criticized in Pongetti v GMAC (In re Locklin) (1996, CA5 Miss) 101 F3d 435, CCH Bankr L Rptr P 77212).

Preference provisions are designed not to disturb normal debtor-creditor relationships, but to derail unusual ones which threaten to heighten likelihood of debtor filing for ***bankruptcy*** at all and, should that contingency materialize, to then disrupt paramount ***bankruptcy*** policy of equitable treatment of creditors. Fiber Lite Corp. v Molded Acoustical Prods. (In re Molded Acoustical Prods.) (1994, CA3 Pa) 18 F3d 217, 25 BCD 558, 30 CBC2d 1289, CCH Bankr L Rptr P 75760 (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

Avoidance power granted to trustee by 11 USCS § 547 promotes central policy of ***Bankruptcy*** Code--equality of distribution among creditors; thus, avoidance power is implicated only if there is transfer of property that would have been part of estate had it not been transferred before commencement of ***bankruptcy*** proceeding. Truck Drivers Local No. 164, Int'l Bhd. of Teamsters v Allied Waste Sys. (2008, CA6 Mich) 512 F3d 211, 183 BNA LRRM 2420, 155 CCH LC P 10951, 2008 FED App 3P.

Policy behind 11 USCS § 547's prohibition on preferential transfers is twofold: (1) to discourage any activity by Chapter 7 debtor or creditor prior to ***bankruptcy*** which might deplete debtor's assets; and (2) to provide equitable pro rata distribution among all creditors of debtor. In re Cockreham (1988, DC Wyo) 84 BR 757.

Object of prohibition of ***preferences*** is to prevent favoritism and assure equality of distribution, and transaction will not be found to be ***preference*** where there is no showing of favoritism or inequality of distribution, and debtor's estate is not diminished by transaction. In re Repro-Technics, Inc. (1981, BC DC Me) 8 BR 225, CCH Bankr L Rptr P 67799.

Preference avoidance fulfills original purpose of ***bankruptcy*** law (equality of distribution to creditors of assets of debtor) and 11 USCS § 547 is directed to bringing back into estate property of debtor transferred during ***preference*** period. In re E.P. Hayes, Inc. (1983, BC DC Conn) 29 BR 907, 10 BCD 779, 8 CBC2d 872.

Purpose of 11 USCS § 547 ***preference*** provisions is furtherance of congressional policy of recapturing certain prefiling transfers so that equitable distribution to estate's creditors can occur. In re Ullman (1987, BC SD Ohio) 80 BR 101.

Primary purpose of 11 USCS § 547(b) is two fold: (1) to prevent diminution of estate assets such that unsecured creditors are left with fewer assets from which to be paid their pro rata share, and (2) to prevent preferential treatment of one creditor at time when debtor is insolvent; thus, debtors' use of credits to reduce their obligations to defendant manufacturer, under parties' distributor cooperative advertising agreement, did not reduce amounts available to pay other creditors and was not ***preference*** under 11 USCS § 547(b). Microage, Inc. v Mitsubishi Elec. (In re Microage Corp.) (2003, BC DC Ariz) 288 BR 855, 40 BCD 223.

Purpose of 11 USCS § 547 is to discourage creditors from racing to dismember debtor that is sliding into ***bankruptcy*** and to promote equality of distribution to creditors in ***bankruptcy*** and, aided by 11 USCS § 547(f), which provides rebuttable presumption of insolvency under 11 USCS § 547(g), debtor-in-possession has burden of proof regarding elements for preferential transfer. Hoffinger Indus., Inc. v Bunch (In re Hoffinger Indus., Inc.) (2004, BC ED Ark) 313 BR 812, 43 BCD 153, 52 CBC2d 1263.

Purpose behind 11 USCS § 547 is not to return debtor and transferee to their positions at time of ***bankruptcy*** filing; rather, it is to ensure that creditor does not attain better position than other creditors of estate. Buchwald Capital Advisors LLC v Metl-Span I., Ltd. (In re Pameco Corp.) (2006, BC SD NY) 356 BR 327, 47 BCD 128.

11 USCS § 547 is generally thought to advance two ***bankruptcy*** policies: first, it achieves equality of distribution of debtor's assets among its unsecured creditors by allowing trustee to recover payments made that favor any particular creditor on eve of ***bankruptcy***; second, it encourages creditors to continue to do business with financially troubled debtors with eye toward avoiding ***bankruptcy*** altogether. Gonzales v Sun Life Ins. Co. (In re Furr's Supermarkets, Inc.) (2012, BC DC NM) 485 BR 672 (criticized in Friedman's Liquidating Trust v Roth Staffing Cos. LP (In re Friedman's Inc.) (2013, CA3 Del) 738 F3d 547, 58 BCD 239, 70 CBC2d 1241, CCH Bankr L Rptr P 82568).

Debtor was conducting business as usual right up to November 2, 2010, when bank placed hold on debtor's accounts, and as such, transfer at issue did not fall within spirit of 11 USCS § 547 as preferential transfer; purpose of ***preference*** statute is to prevent debtors, on eve of ***bankruptcy***, from favoring creditors with payment. Knauer v Krantz (In re Eastern Livestock Co., LLC) (2015, BC SD Ind) 544 BR 640.

Purposes of 11 USCS § 547 are (1) to prevent creditors' rush to courthouse, precipitating debtor's slide into ***bankruptcy***, and (2) to make all creditors of each class share equally in estate; thus ***Bankruptcy*** Court errs when it

denies Chapter 11 debtor in possession recovery from unsecured creditor for proven preferential transfer--a levy on debtor's account 40 days prior to filing--on theory that any recovery would only benefit sole secured creditor, whose claims exceeded all debtor's assets. In re Enserv Co. (1986, BAP9 Cal) 64 BR 519, 15 CBC2d 993, CCH Bankr L Rptr P 71515, affd without op (1987, CA9 Cal) 813 F2d 1230 and affd without op (1987, CA9 Cal) 813 F2d 1230 and (criticized in Muskin, Inc. v Industrial Steel Co. (1993, BC ND Cal) 151 BR 252) and (criticized in Blonder v Cumberland Engineering (1999, 4th Dist) 71 Cal App 4th 1057, 84 Cal Rptr 2d 216, 99 CDOS 3204, 99 Daily Journal DAR 4109).

Purpose of 11 USCS § 547 is to discourage creditors from racing to courthouse to dismember debtor and to facilitate prime ***bankruptcy*** policy of equality of distribution among creditors of debtor and it is intended to discourage imposition of secret liens upon debtor's collateral which are not perfected until just before debtor files for ***bankruptcy***, as other creditors might extend credit on assumption that collateral was free and clear. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

Purpose of preventing preferential transfers through 11 USCS § 547 is well established in legislative history of that section: purpose of ***preference*** section is twofold, i.e., first, by permitting trustee to avoid prebankruptcy transfers that occur within short period before ***bankruptcy***, creditors are discouraged from racing to courthouse to dismember debtor during his slide into ***bankruptcy***; second, and more important, ***preference*** provisions facilitate prime ***bankruptcy*** policy of equality of distribution among creditors of debtor; any creditor that received greater payment than others of his class is required to disgorge so that all may share equally. Rocin Liquidation Estate v UPAC (In re Rocor Int'l, Inc.) (2007, BAP10) 380 BR 567, 49 BCD 72 (criticized in Falcon Creditor Trust v First Ins. Funding (In re Falcon Prods.) (2008, BAP8) 381 BR 543, 49 BCD 112, 59 CBC2d 222).

4. Construction

Purposes of 11 USCS § 547(b) avoidance powers are: (1) to promote prime ***bankruptcy*** policy of equality of distribution among creditors by ensuring that all creditors of same class will receive same pro rata share of debtor's estate; and (2) to discourage creditors from attempting to outmaneuver each other in effort to carve up financially unstable debtor and to offer concurrent opportunity for debtor to work out its financial difficulties in atmosphere conducive to cooperation. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

Record supported subcontractor's contention that transaction between it, debtor, and bank, was intended to be irrevocable transaction to divest debtor of its ability to receive proceeds directly from government and to do with proceeds what it pleased; debtor assigned all rights, title, and interest in accounts receivables to subcontractor prior to ***preference*** period; therefore, $ 1,241,511 that subcontractor received for its work under delivery orders was not subject to trustee's avoidance powers. Advanced Testing Techs., Inc. v Desmond (In re Computer Eng'g Assocs.) (2003, CA1 Mass) 337 F3d 38, 41 BCD 175, CCH Bankr L Rptr P 78885.

District Court is persuaded that, under 11 USCS § 547, it is Trustee's burden to establish that there was in fact diminution of debtor's estate. Chase Manhattan Mortg. Corp. v Shapiro (In re Lee) (2006, ED Mich) 339 BR 165 (criticized in Encore Credit Corp. v Lim (2007, ED Mich) 373 BR 7) and revd (2008, CA6 Mich) 530 F3d 458, 50 BCD 47, 2008 FED App 223P, reh den, reh, en banc, den (2008, CA6) 2008 US App LEXIS 22359 and (Abrogated as stated in Bank of Am., N.A. v Mukamai (In re Egidi) (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922).

Interpretation of 11 USCS § 547 must proceed with particular attention being given to precise subsection in issue; care must be taken to avoid applying rationale of one subsection to provisions of another. In re Belknap, Inc. (1988, BC WD Ky) 96 BR 108, 8 UCCRS2d 415.

Because 11 USCS § 547(b) phrase "interest of the debtor in property" is not defined in ***Bankruptcy*** Code, courts look to state law to determine whether property is asset of debtor. In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325.

Creditor or other entity that dominates or controls business and financial decisions of debtor can become insider for purposes of one year reach back for ***preference*** recovery under 11 USCS § 547(b)(4)(B). Limor v Buerger (In re Del-Met Corp.) (2005, BC MD Tenn) 322 BR 781 (criticized in Official Comm. of Unsecured Creditors Propex Inc. v BNP Paribas (In re Propex Inc.) (2009, BC ED Tenn) 415 BR 321) and (criticized in Butler v Anderson (In re C.R. Stone Concrete Contrs., Inc.) (2010, BC DC Mass) 434 BR 208) and (criticized in Raytheon Co. v Boccard USA Corp. (2012, Tex App Houston (1st Dist)) 369 SW3d 626).

5. Application

Dismissal of debtors' ***bankruptcy*** petition under 11 USCS § 707(a) was reversed because debtors had right to take advantage of automatic stay provisions under 11 USCS § 362, if debtors engaged in "scorched earth" tactics then 11 USCS § 547(b) was appropriate code section for relief, and if debtors misstated liabilities and expenses, then 11 USCS § 727(a)(4)(A) was proper statute for relief. Sherman v SEC (In re Sherman) (2007, CA9 Cal) 491 F3d 948, CCH Bankr L Rptr P 80969, decision reached on appeal by (2009, CD Cal) 406 BR 883, revd (2011, CA9 Cal) 658 F3d 1009, 55 BCD 124 (criticized in Bullock v BankChampaign, N.A. (In re Bullock) (2012, CA11 Ala) 670 F3d 1160, 56 BCD 13, 67 CBC2d 7, CCH Bankr L Rptr P 82183, 23 FLW Fed C 781) and (Abrogated as stated in Estate of Earl Cournage v Warburton (In re Warburton) (2013, BC DC Mont) 2013 Bankr LEXIS 2071) and (Overruled in part as stated in Borsos v United Healthcare Workers-West (In re Borsos) (2013, BAP9) 2013 Bankr LEXIS 3243) and (Overruled as stated in Correia-Sasser v Rogone (In re Correia-Sasser) (2014, BAP9) 2014 Bankr LEXIS 3513) and (criticized in In re Yim Kealamakia (2013, BC DC Utah) 2013 Bankr LEXIS 2777).

Amendments to 11 USCS § 547 under 1984 ***Bankruptcy*** Amendments apply only to ***bankruptcy*** cases and do not apply to adversary proceedings arising in or related to case under Chapter 11; therefore preamendment version of statute applies to adversary proceeding arising in voluntary Chapter 11 case filed after effective date of amended statute. In re Hartwig Poultry, Inc. (1988, ND Ohio) 87 BR 30.

Preference provisions of 11 USCS § 547 does not apply to validly executed nonjudicial foreclosure, since § 547 applies only to creditors who by virtue of prepetition transfer receive more than they would under distributive provisions of ***Bankruptcy*** Code; fully secured mortgage holders are not entitled to distributive provisions of Code because they have liens covering specific assets. First Federal Sav. & Loan Asso. v Standard Bldg. Associates, Ltd. (1988, ND Ga) 87 BR 221.

Bankruptcy Court's dismissal of adversary proceeding seeking to avoid and recover alleged preferential transfers and to disallow claims filed by British and French banks, that was filed by Chapter 11 debtor, an English holding company that also had filed petition for administration in United Kingdom, and by examiner appointed to harmonize United States and British proceedings, is affirmed; presumption against extraterritoriality precludes use of 11 USCS § 547 to avoid the transfers to the foreign banks. Maxwell Commun. Corp. PLC by Homan v Societe Generale PLC (In re Maxwell Commun. Corp. PLC) (1995, SD NY) 186 BR 807, 34 CBC2d 1382, CCH Bankr L Rptr P 76681, affd (1996, CA2 NY) 93 F3d 1036, 29 BCD 788 and (criticized in Weisfelner v Blavatnik (In re Lyondell Chem. Co.) (2016, BC SD NY) 2016 Bankr LEXIS 19).

Motion to dismiss Chapter 7 trustee's 11 USCS § 547(b)(4)(B) ***preference*** action, filed by lender whose loan was secured by insider guarantor, is denied, despite lender's assertion that section 202 of ***Bankruptcy*** Reform Act of 1994, which eliminates trustee's ability to recover transfers from noninsider creditor and limits recovery solely to insider, applies to action, where section 202 applies only in cases commenced after October 22, 1994, which is effective date of Act; debtor's case was commenced by involuntary petition on August 10, 1993. Rosen v Air Forwarding Sys. (In re Air Forwarding Sys.) (1995, BC MD Fla) 176 BR 638, 26 BCD 720.

Section of Amendments of ***Bankruptcy*** Reform Act of 1994 prohibiting recovery in extended insider period from non-insider transferees, regardless of whether transfer benefited insiders was not intended by Congress to apply retrospectively, and therefore applies only prospectively. Pineo v Reeves Bank (In re Arthur F. Hazen & Co.) (1995, BC WD Pa) 184 BR 233, 27 BCD 620.

Preferential transfer provisions of 11 USCS § 547 applies only to initial transferee of preferential transfer, and only credit-transferee can extend new value to debtor and receive benefit of new value defense; subsequent transferees

could not assert defense when trustee was seeking turnover pursuant to 11 USCS § 550. Bakst v Sawran (In re Sawran) (2007, BC SD Fla) 359 BR 348, 20 FLW Fed B 298 (criticized in Meoli v Huntington Nat'l Bank (In re Teleservices Group, Inc.) (2012, BC WD Mich) 469 BR 713).

Creditor was entitled to invoke enabling loan exception of 11 USCS § 547(c)(3)(B) where it perfected its security interest for purposes of 11 USCS § 547(e)(1)(B) where it submitted application for its lien to be noted on vehicle's title and tendered requisite fee within 30 days of debtors taking possession, and under Texas law, creditor's lien was considered recorded when it submitted its application. Moser v Toyota Motor Credit Corp. (In re Davis) (2009, BC ED Tex) 61 CBC2d 1652.

Avoidance of preferential transfer under 11 USCS § 547 and 11 USCS § 550 to extent that lien is avoided does not erase original recordation of lien and notice thereby provided to other creditors. Logan v Citi Mortg., Inc. (In re Schubert) (2010, BC DC Md) 437 BR 787.

Unpublished Opinions

Unpublished: District court properly granted summary judgment to creditor on ***bankruptcy*** trustee's ***preference*** and breach of contract claims because creditor had effected recoupment, which was not ***preference***, so 11 USCS §§ 547(b) and 550 were inapplicable, and provision in contract between debtor and creditor precluding offset was inapplicable because (1) recoupment was not offset and parties could have said recoupment if they meant that; (2) provision referred to "late payments" by debtor rather than total breach of contract; and (3) debtor was not in position to assert right to recover from creditor on basis of contract that debtor had already breached. Joseph v Dillard's Inc. (In re ETM Entm't Network) (2005, CA9 Cal) 154 Fed Appx 4, 45 BCD 113.

Unpublished: Decision of district court that determined that debtors could not assert claims for fraudulent transfers pursuant to 11 USCS §§ 544, 547(b), 548(a) and 550 was affirmed because those provisions applied only to trustee except for some limited circumstances that were not presented in debtors' case. Martin v Sanderson Farms, Inc. (In re Martin) (2007, CA5 Tex) 222 Fed Appx 360, cert den (2007) 552 US 821, 128 S Ct 128, 169 L Ed 2d 28.

Unpublished: In case in which pro se Chapter 7 debtor argued that lien was avoidable as preferential transfer under 11 USCS § 547(b), that provision granted avoidance powers only to trustee, not debtor. In re Jideani (2013, BC DC Dist Col) 2013 Bankr LEXIS 2155, claim dismissed, request den (2013, BC DC Dist Col) 2013 Bankr LEXIS 4892.

6. Sovereign immunity

Congress' determination in 11 USCS § 106(a) that States should be amenable to proceedings to recover preferential transfers under 11 USCS §§ 547(b), 550(a), was within scope of its power under ***Bankruptcy*** Clause, U.S. Const. art. I, § 8, cl. 4, to enact laws on subject of ***bankruptcies***; therefore, states cannot assert defense of sovereign immunity. Cent. Va. Cmty. College v Katz (2006) 546 US 356, 126 S Ct 990, 163 L Ed 2d 945, 45 BCD 254, 54 CBC2d 1233, CCH Bankr L Rptr P 80443, 19 FLW Fed S 75.

In enacting 11 USCS § 547(b), Congress was plainly exercising its plenary power to establish uniform laws on subject of ***bankruptcies***, and therefore Congress had power to create cause of action for money damages enforceable against unconsenting state in federal court and, in light of express statutory language of 11 USCS §§ 547, 101 and 106(c), intended to create such cause of action; debtor may, therefore, bring action to recover money allegedly improperly transferred to Secretary of State of Illinois for prospective highway use and flat-weight taxes; 11 USCS § 106 applies to state as well as federal governmental units. In re McVey Trucking, Inc. (1987, CA7 Ill) 812 F2d 311, 15 BCD 1105, 16 CBC2d 218, CCH Bankr L Rptr P 71613, cert den (1987) 484 US 895, 108 S Ct 227, 98 L Ed 2d 186.

In enacting 11 USCS § 547(b), Congress intended to create cause of action for money damages enforceable against unconsenting states in federal court. In re McVey Trucking, Inc. (1987, CA7 Ill) 812 F2d 311, 15 BCD 1105, 16 CBC2d 218, CCH Bankr L Rptr P 71613, cert den (1987) 484 US 895, 108 S Ct 227, 98 L Ed 2d 186.

11 USCS § 547(b), because it contains term "creditor," applies to any governmental unit regardless of its claim to sovereign immunity, as provided by 11 USCS § 106(c). In re T & D Management Co. (1984, BC DC Utah) 40 BR 781, 12 BCD 1, 10 CBC2d 1000, CCH Bankr L Rptr P 69898.

By filing proofs of claim against debtor for withheld income taxes, withheld FICA taxes, and unemployment taxes, U.S. is deemed to have waived its sovereign immunity with respect to trustee's ***preference*** claim against it. In re Malmart Mortg. Co. (1989, BC DC Mass) 109 BR 1.

11 USCS § 106(c) prevents IRS from asserting defense of sovereign immunity in action to avoid levy as preferential transfer under 11 USCS § 547. In re Ballard (1991, BC WD Wis) 131 BR 97, 25 CBC2d 823, CCH Bankr L Rptr P 74255, affd (1991, WD Wis) 1991 US Dist LEXIS 13111.

Bankruptcy court had discretion to allow state court to litigate issue of whether debtor could seek to avoid state's attachment of his property as preferential transfer, although ***bankruptcy*** court had exclusive jurisdiction over debtor's property in that state. O'Brien v Agency of Natural Resources (In re O'Brien) (1998, BC DC Vt) 216 BR 731, 32 BCD 78, 39 CBC2d 685.

11 USCS § 547 was silent as to procedural mechanisms that trustee should have utilized to petition for avoidance of transfer and, absent Fed. R. ***Bankr.*** P. 7001(1), trustee could have invoked 11 USCS § 547 through motion; thus, use of service of process was not dispositive and was not affront to state sovereignty. Official Comm. of Unsecured Creditors of 360networks (USA) Inc. v PUC (In re 360networks (USA) Inc.) (2004, BC SD NY) 316 BR 797, 43 BCD 275, 53 CBC2d 339.

11 USCS § 106(a) was valid abrogation of states' general retention of sovereign immunity with respect to pre-petition and allegedly preferential transfers made by Chapter 11 debtor to three universities; Constitution's text and structure, as well as Framers' apparent understanding and intent to alienate state sovereign immunity from suit when Congress exercised its ***bankruptcy*** power, indicated that Congress had authority to create private rights of action against states pursuant to ***Bankruptcy*** Clause, U.S. Const. art. I, § 8, cl. 4; proceedings in question, brought by debtor's plan administrator pursuant to 11 USCS §§ 547 and 550, were consistent with traditional jurisdiction and subject matter of ***bankruptcy*** courts. Gray v Fla. State Univ. (In re Dehon, Inc.) (2005, BC DC Mass) 327 BR 38, 44 BCD 269, CCH Bankr L Rptr P 80327, partial summary judgment gr, summary judgment den, motion to strike den (2006, BC DC Mass) 352 BR 546, 47 BCD 60.

Bankruptcy court denied utility company's motion to dismiss Chapter 7 trustee's adversary proceeding claiming that she was entitled under 11 USCS §§ 547 and 550 to recover payment corporation made to utility company before corporation declared Chapter 7 because payment was preferential transfer; utility company failed to carry its burden of establishing its claim that it was entitled to invoke Eleventh Amendment sovereign immunity because it was arm of state, and even if it was arm of state it was not entitled under 11 USCS § 106(a) and U.S. Supreme Court's decision in Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006), to sovereign immunity; although utility company claimed that decisions Supreme Court issued after it decided Katz overruled Katz, court found fault with that argument and held that it was duty bound to follow Katz. Fugate v Greeneville Light & Power Sys. (In re MD Recycling, Inc.) (2012, BC ED Tenn) 475 BR 885, 57 BCD 9.

Unpublished Opinions

Unpublished: Newspaper that was organized pursuant to Navajo Nation Corporation Code for benefit of members of Navajo Nation was allowed to assert sovereign immunity as defense in action Chapter 7 trustee filed against newspaper, which alleged that he was allowed under 11 USCS §§ 547 and 550 to avoid and recover preferential transfers communications company made to newspaper, because it was subordinate economic entity of Navajo Nation; Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes in 11 USCS § 106, and Navajo Nation was not "governmental unit" as that term was defined in 11 USCS § 101 and used in § 106. Subranni v Navajo Times Publ'g Co. (In re Star Group Communs., Inc.) (2016, BC DC NJ) 2016 Bankr LEXIS 1893.

7. Interest on awards, generally

Awards of prejudgment interest on preferential transfers under 11 USCS § 547 are discretionary, not mandatory. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

Bankruptcy Court had discretion to award prejudgment interest to trustee in action to recover preferential transfer from date when trustee first made demand for return of transferred funds. Sigmon v Royal Cake Co. (In re Cybermech, Inc.) (1994, CA4 Va) 13 F3d 818, 6 Fourth Cir & Dist Col Bankr Ct Rep 301, 25 BCD 230, 30 CBC2d 696, CCH Bankr L Rptr P 75653.

Bankruptcy Court must rely on its equitable powers to make award of prejudgment interest on ***preference*** amount pursuant to 11 USCS § 547 and such determination is left to sound discretion of court, but once awarded, interest accrues from date of demand for return of ***preference*** or, absent demand, upon commencement of suit. In re Art Shirt, Ltd. (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

Purpose of awarding prejudgment interest to Chapter 11 trustee pursuant to successful ***preference*** avoidance action under 11 USCS § 547 is to compensate debtor's estate for inability to use such property during time it was in hands of transferee. In re Art Shirt, Ltd. (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

In absence of proof of prior demand, filing of complaint under 11 USCS § 547 constitutes such demand and interest begins to run from that date; adoption of interest rate established under 28 USCS § 1961(a) in ***preference*** actions, by recognizing fluctuating interest rates in economy, not only fairly compensates prevailing litigants but also provides uniformity of treatment in judgments. In re Foreman Industries, Inc. (1986, BC SD Ohio) 59 BR 145, CCH Bankr L Rptr P 71058.

In action to set aside ***preference*** under 11 USCS § 547, trustee is entitled under authority of 11 USCS § 550--most applicable provision of ***Bankruptcy*** Code to instant situation--to prejudgment interest from date of demand for its return or, in absence of prior demand, from date of filing complaint; in order to recover interest, trustee is not required to show that value of debtor's estate would have been enhanced but for transferee's retention of property. In re H.P. King Co. (1986, BC ED NC) 64 BR 487.

Under authority of 11 USCS § 550--most applicable provision of ***Bankruptcy*** Code to instant situation--Chapter 7 trustee is entitled to prejudgment interest from transferee of preferential transfer under 11 USCS § 547 for period from demand for repayment, which was properly made on transferee's attorney, to date of repayment. In re H.P. King Co. (1986, BC ED NC) 64 BR 487.

In absence of substantial evidence showing that equities in particular case require different rate, 28 USCS § 1961 postjudgment rate of interest is appropriate in determining prejudgment interest in preferential transfer cases under 11 USCS §§ 547 and 550; interest is to be compounded annually. In re H.P. King Co. (1986, BC ED NC) 64 BR 487.

Availability of prejudgment interest is substantive issue of law of damages, rather than procedural issue, and therefore under Erie doctrine state law will apply to questions involving prejudgment interest in diversity cases; however, when right to recovery arises under and is governed by federal law, federal law also governs availability of interest; because liability in preferential transfer arises from federal law, i.e., 11 USCS § 547, federal rather than state law governs determination of interest rate under 11 USCS § 550. In re H.P. King Co. (1986, BC ED NC) 64 BR 487.

Trustee is not entitled to prejudgment interest on sums awarded in preferential transfer action where delay was caused, not by transferee, but by trustee, and transferee's defense of solvency was not frivolous. In re Art Shirt, Ltd. (1986, BC ED Pa) 68 BR 316, affd (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

Prejudgment interest to which trustee is entitled on award under 11 USCS § 549 is to be computed at rate set forth in 28 USCS § 1961; year begins for purposes of compounding, on date that interest commenced, not first date of calendar year; interest continues to run until date of payment. In re Missionary Baptist Foundation, Inc. (1987, BC ND Tex) 69 BR 536.

Trustee can recover prejudgment interest on sums recovered as preferential transfers under 11 USCS § 547, despite fact defendants are not wrongdoers and ***preference*** case is unique, complex, or decided on closely balanced facts, because defendants should not be permitted to maintain time value of monies they have withheld to detriment of debtor's other unsecured creditors. In re H & S Transp. Co. (1987, BC MD Tenn) 78 BR 519.

Prejudgment interest at rate established by 28 USCS § 1961(a) will be permitted from date trustee filed complaint to recover preferential payment pursuant to 11 USCS § 547(b) until payment is made to trustee. In re Dayton Circuit Courts # 2 (1987, BC SD Ohio) 80 BR 434, 16 BCD 1219.

In ***preference*** action debtor is entitled to prejudgment interest at rate set in 28 USCS § 1961(a) on payments made to creditor but not on property returned in view of good faith dispute as to value of returned products and suggestion that products be returned in lieu of money judgment. In re First Software Corp. (1988, BC DC Mass) 84 BR 278, 17 BCD 389, affd (1989, DC Mass) 107 BR 417, 29 Fed Rules Evid Serv 48.

Chapter 11 liquidating trustee is entitled to prejudgment interest on ***preference*** recoveries under 11 USCS § 547(b), though not mandated by statute, since United States Supreme Court has sanctioned such since 1904; such prejudgment interest accrues from date of demand on defendant, or absent demand, from date adversary proceeding is filed unless transferee behaves fraudulently or in bad faith, in which case interest is calculated from date of transfer. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1988, BC ED Tenn) 87 BR 518, 17 BCD 922.

Bankruptcy Court will not enter new judgments in ***preference*** actions in place of judgments which were formerly affirmed and add to those judgments interest which has accrued on them since date of entry of judgment; prejudgment interest is awardable in 11 USCS § 547 ***preference*** actions from date of filing of complaint but such interest awards are made as part of substantive damage award and therefore are to be subject of pleading and proof and included expressly in judgment; once judgment is final, court may not reopen it for purpose of making award of prejudgment interest. In re Ozark Restaurant Equipment Co. (1988, BC WD Ark) 96 BR 187.

Fact that prejudgment interest does not accrue on ***preference*** claim filed by Chapter 11 debtor against other Chapter 11 debtor until some point after claimant filed its petition does not change fact that ***preference*** cause of action accrued under 11 USCS § 547 and became "claim" under 11 USCS § 101(5) at time that claimant filed its Chapter 11 petition, prior to confirmation of other debtor's Chapter 11 plan. Wallach v Frink Am. (In re Nuttall Equip. Co.) (1995, BC WD NY) 188 BR 732, 28 BCD 107 (criticized in Eagle-Picher Indus v Caradon Doors & Windows, Inc. (In re Eagle-Picher Indus.) (2002, BC SD Ohio) 278 BR 437) and (criticized in Collins v J&N Rest. Assocs, Inc. (In re Mendolia) (2015, BC ND NY) 2015 Bankr LEXIS 327).

Settlement negotiations, or lack thereof, are not relevant to court's determination of whether to award prejudgment interest, especially without evidence that trustee used settlement negotiations to unduly delay adjudication of matter. Strauss v Hollis (In re Matlock) (2007, BC WD Mo) 361 BR 879.

8. --In particular circumstances

Bankruptcy Court did not err in awarding prejudgment interest to Chapter 7 trustee in actions under 11 USCS §§ 547 and 548, where there is no dispute that amount of contested payment was clearly determined prior to ***Bankruptcy*** Court's judgment; award of prejudgment interest would serve to compensate debtor's estate for defendant's use of those funds that were wrongfully withheld from debtor's estate during pendency of current suit. Turner v Davis, Gillenwater & Lynch (In re Investment Bankers) (1993, CA10 Colo) 4 F3d 1556, 29 CBC2d 1327, CCH Bankr L Rptr P 75448, CCH Fed Secur L Rep P 97764, cert den (1994) 510 US 1114, 114 S Ct 1061, 127 L Ed 2d 381.

Bankruptcy Court did not abuse its discretion in awarding prejudgment interest on ***preference*** recovery on total amount by which it found that creditor's position was improved when unauthorized loans were paid off, even though there was minor discrepancy between amount demanded by trustee and amount on which prejudgment interest was ultimately awarded; creditor knew that trustee was asserting voidable ***preference*** claim and it was appropriate to award interest on aggregate sum of ***preferences*** with such interest beginning to accrue as of date of demand for

payment. In re Montgomery (1993, CA6 Tenn) 983 F2d 1389, 23 BCD 1563, CCH Bankr L Rptr P 75075 (criticized in Parks v FIA Card Servs., N.A. (In re Marshall) (2007, BC DC Kan) 372 BR 511).

Financially distressed firm's sudden payment in full to all employee-depositors in its "thrift savings plan" prior to firm's being placed in involuntary ***bankruptcy*** was not in ordinary course of business, and court's order that recipients of such preferential transfers repay with prejudgment interest was not punitive, despite fact that litigation continued for ten years. Strauss v Milwaukee Cheese Wis. (In re Milwaukee Cheese Wis.) (1997, CA7 Wis) 112 F3d 845, 30 BCD 950, 21 EBC 1014, CCH Bankr L Rptr P 77348.

There is no evidence that debtor made demand for repayment of preferential transfers before adversary proceeding was filed and therefore debtor is entitled to prejudgment interest at legal rate on preferential payments under 11 USCS § 547 since date proceeding was filed; however, debtor is not entitled to attorneys' fees since, absent bad faith on part of creditor or statutory authority, no such award should be made; in action to set aside ***preference***, trustee or debtor is entitled to prejudgment interest from date of demand, or in absence of demand, from date of commencement of adversary proceeding. In re Demetralis (1986, BC ND Ill) 57 BR 278, CCH Bankr L Rptr P 70980.

Where Chapter 11 liquidating trustee is entitled to prejudgment interest on 11 USCS § 547 ***preference*** recoveries and such ***preference*** litigation has lasted more than 4 years, beginning prejudgment interest rate will be coupon issue yield equivalent of average accepted auction price for last auction of 52-week United States Treasury Bills settled immediately, prior to demand, and at each anniversary thereafter, rate shall be adjusted to reflect new interest rate for 52-week Treasury Bills; additionally, prejudgment interest shall be compounded annually. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1988, BC ED Tenn) 87 BR 518, 17 BCD 922.

Trustee in case under Securities Investor Protection act (15 USCS §§ 78aaa et seq.) who was successful in preferential and fraudulent-conveyance actions under 11 USCS §§ 547 and 548, will be awarded prejudgment interest on those amounts preferentially and fraudulently transferred from date complaint was filed, because there is no evidence that trustee demanded transferee's return of these funds prior to filing complaint and running through date on which court's order and judgment on remand from District Court to determine propriety of prejudgment interest and attorney's fees becomes final; fact that proceeding has been pending for 10 years is not relevant. In re Investment Bankers (1991, BC DC Colo) 135 BR 659, 2 Colo Bankr Ct Rep 216, affd (1992, DC Colo) 161 BR 507, affd (1993, CA10 Colo) 4 F3d 1556, 29 CBC2d 1327, CCH Bankr L Rptr P 75448, CCH Fed Secur L Rep P 97764, cert den (1994) 510 US 1114, 114 S Ct 1061, 127 L Ed 2d 381.

Prejudgment interest was not awarded where, inter alia, there was genuine dispute between parties as to whether or not preferential transfer had been made under 11 USCS § 547(b), there was genuine dispute as to whether or not payments were entitled to protection of § 547(c) defenses, and there was no evidence that fault for delay in filing adversary proceeding could be attributed to either trustee or defendant. Buckley v Carrier Corp. (In re Globe Holdings, Inc.) (2007, BC ND Ala) 366 BR 286.

9. Relationship to plans

Implied ***preference*** immunity was not integrated into confirmed plan which precluded trustee's proceeding to recover prepetition rent payments as ***preferences*** under 11 USCS § 547, although reasonable lessor probably would not agree to rent concession made by lessor if he also understood that he would have to return payments made by debtor, and although it is reasonable to assume that when parties stipulated that prepetition arrearage amounted to specified amount, they assumed that amount already paid by debtor would not be returned to trustee; these reasonable assumptions cannot be elevated into finding as matter of law that parties impliedly agreed that lessor would be immune from any ***preference*** action and incorporated that agreement into plan. Alvarado v Walsh (In re LCO Enters.) (1993, CA9) 12 F3d 938, 94 CDOS 10, 94 Daily Journal DAR 17, 25 BCD 136, 30 CBC2d 624, CCH Bankr L Rptr P 75648 (criticized in DeGiacomo v Raymond C. Green, Inc. (In re Inofin Inc.) (2014, BC DC Mass) 512 BR 19).

Chapter 11 debtor is judicially estopped from attempting to recover preferential transfers under 11 USCS § 547 where debtor had previously informed creditors voting on reorganization plan that it knew of no such transfers, and,

on basis of those representations, creditors and court approved reorganization plan that allowed debtor to receive benefit of recouped preferential transfers. In re Galerie Des Monnaies, Ltd. (1986, SD NY) 62 BR 224.

Failure of third amended Chapter 11 plan to use term "debtor in possession" in jurisdictional section or any other section of plan does not deprive ***Bankruptcy*** Court of jurisdiction to hear ***preference*** actions brought by debtor despite fact that right to bring ***preference*** action belongs to debtor in possession, rather than debtor, because plan clearly reserved for debtor right to bring ***preferences*** claims; interpretation of plan denying ***preference*** actions would render provision reserving debtor right to bring such ***preference*** action of no effect, which will not be allowed. In re Amarex, Inc. (1989, WD Okla) 96 BR 330, 18 BCD 1477.

Trustee is not barred from bringing 11 USCS § 547 ***preference*** actions where Chapter 11 plan is not fully consummated. In re Silver Mill Frozen Foods, Inc. (1982, BC WD Mich) 23 BR 179, 9 BCD 786, 7 CBC2d 443.

10. Miscellaneous

Once ***bankruptcy*** case has been closed, secured creditors having unavoided liens on fraudulently conveyed property can pursue their state law remedies independently of ***bankruptcy*** trustee; secured party with unavoided lien has right to attack allegedly fraudulent conveyances. Federal Deposit Ins. Corp. v Davis (1984, CA4 SC) 733 F2d 1083, 11 BCD 1298, 10 CBC2d 1413, CCH Bankr L Rptr P 69861.

British communications corporation as debtor estate in Chapter 11 was not entitled to recover under 11 USCS § 547 millions of dollars it transferred to three foreign banks shortly before declaring ***bankruptcy***, since doctrine of international comity supported deference to courts and laws of England and made § 547 inapplicable. Maxwell Commun. Corp. PLC by Homan v Societe Generale (In re Maxwell Commun. Corp. plc) (1996, CA2 NY) 93 F3d 1036, 29 BCD 788.

Prepetition liens do not attach to proceeds recovered by trustee as result of postpetition ***preference*** actions. Frank v Mich. State Unemployment Agency (In re Thompson Boat Co.) (1999, ED Mich) 261 BR 909, affd (2001, CA6 Mich) 252 F3d 852, 2001 FED App 187P, cert den (2002) 534 US 1080, 151 L Ed 2d 696, 122 S Ct 811.

Debtor-in-possession's liability for receipt of preferential payments recoverable from it under 11 USCS § 547 in another ***bankruptcy*** case is ordinary cost of doing business, just as are product liability claims, claims for personal injuries suffered upon business premises, and countless other claims of which debtor-in-possession might be unaware at time of confirmation of plan, in that debtor-in-possession is charged with knowledge of obligations it has incurred as ordinary cost of doing business, whether those obligations were incurred prepetition or postpetition. Wallach v Frink Am. (In re Nuttall Equip. Co.) (1995, BC WD NY) 188 BR 732, 28 BCD 107 (criticized in Eagle-Picher Indus v Caradon Doors & Windows, Inc. (In re Eagle-Picher Indus.) (2002, BC SD Ohio) 278 BR 437) and (criticized in Collins v J&N Rest. Assocs, Inc. (In re Mendolia) (2015, BC ND NY) 2015 Bankr LEXIS 327).

Where trustee asserted claims that transfers to corporation or, in alternative, to two individuals were voidable ***preferences***, his obtaining default judgment against corporation did not require entry of judgment on pleadings in favor of individuals under election of remedies doctrine; because corporation was dissolved and had no assets, there was no possibility of double recovery by trustee. Weinman v Miscio & Stroud, Inc. (In re Steele's Mkt.) (2003, BC DC Colo) 304 BR 447, 42 BCD 143.

Policy considerations for allowing ***bankruptcy*** trustee to avoid preferential payments pursuant to 11 USCS § 547(b) are to promote equitable distribution of debtor's assets and to deter creditors from racing to dismember financially distressed company sliding into ***bankruptcy***. Official Comm. of Unsecured Creditors of Enron Corp. v Martin (In re Enron Creditors Recovery Corp.) (2007, BC SD NY) 376 BR 442, 48 BCD 269, 58 CBC2d 1027.

Unpublished Opinions

Unpublished: In case in which pro se Chapter 7 debtor argued that lien was avoidable as preferential transfer under 11 USCS § 547(b), Fed. R. ***Bankr.*** P. 7001 required that action to avoid preferential transfer be brought as adversary proceeding; thus, debtor's request for relief under § 547(b) in support of motion filed in her main

bankruptcy case was procedurally improper. In re Jideani (2013, BC DC Dist Col) 2013 Bankr LEXIS 2155, claim dismissed, request den (2013, BC DC Dist Col) 2013 Bankr LEXIS 4892.

B. Relationship with Other Laws

1. In General

11. Federal law, generally

Nonforfeitability provision set forth in IRA custodial agreement in order to comply with 26 USCS § 408(a)(4) does not apply where depositor loses assets as result of bank's insolvency so that distribution of depositor's IRA assets to general creditors of bank was not forfeiture and use of depositor's assets to pay bank's creditors was not ***preference***. Goldblatt v FDIC (1997, CA9 Cal) 105 F3d 1325, 97 CDOS 783, 97 Daily Journal DAR 1155, 97-1 USTC P 50189, 46 Fed Rules Evid Serv 491.

Whether grounds exist to reopen judgment under FRCP 60(b) does not bear on debtor's ability to recover preferential transfer under 11 USCS § 547(b). In re Ottawa Cartage, Inc. (1985, ND Ill) 55 BR 371.

Intervenor's cross-claim against two other plaintiffs in Perishable Agricultural Commodities Act (PACA) action, which sought to recover allegedly preferential payments that plaintiffs received from debtors, was dismissed; having eschewed its ***bankruptcy*** remedy in favor of PACA, intervenor could not obtain recovery of ***preferences*** through remedy allowed only under ***Bankruptcy*** Code. H.C. Schmieding Produce Co. v Alfa Quality Produce, Inc. (2009, ED NY) 597 F Supp 2d 313, motion den, judgment entered (2009, ED NY) 2009 US Dist LEXIS 63434.

FDIC, as receiver of bank, is not able to prevent avoidance of perfection of security interest under 11 USCS § 547 by arguing that debtor requested security interest not be perfected and citing 12 USCS § 1823(e) which protects FDIC from secret agreements between insured bank and obligors; FDIC is only party seeking to enforce secret agreement and, therefore, 12 USCS § 1823(e) does not apply. In re La Mancha Aire, Inc. (1984, BC SD Fla) 41 BR 647, 39 UCCRS 675.

Perfection by produce supplier of its interest in Perishable Agricultural Commodities Act trust under 7 USCS § 449(e)(c) is not ***preference*** subject to avoidance under 11 USCS § 547, because inventory and proceeds derived therefrom were impressed with trust upon delivery to debtor, and therefore, no transfer of beneficial interest took place. In re Fresh Approach, Inc. (1985, BC ND Tex) 51 BR 412, 13 BCD 478.

Transfers made by Chapter 11 debtor to Cotton Board pursuant to debtor's cotton handling liabilities under Cotton Research and Promotion Act, 7 USCS § 2101, were property of debtor under 11 USCS § 547 where: (1) Act, which requires collecting handler of cotton to remit on monthly basis sums withheld from amounts due producers based on bales of cotton handled, does not impose constructive trust on funds collected; (2) payments were made one year past due date and with moneys received from sale of cotton rather than from fees which were to be withheld by debtor pursuant to Act; and (3) funds transferred consisted of commingled funds. In re Commodity Exchange Services Co. (1986, BC ND Tex) 62 BR 868, affd (1986, ND Tex) 67 BR 313.

Requiring creditor to return 11 USCS § 547 preferential transfer to debtor does not violate Interstate Commerce Act (49 USCS § 10101), because return of transfer is not tantamount to rebate or any other discriminatory act addressed under Act; rebate under act connotes consensual act between those parties engaged in interstate commerce whereas avoided and returned ***preference*** constitutes involuntary act on part of transferee; furthermore, Act's discriminatory acts of special rating, rebates, drawbacks, etc. require presence of intent to effectuate such proscribed activities whereas under 11 USCS § 547(b), intent is irrelevant, all that is required being actual transfer within preferential period. In re Service Bolt & Nut Co. (1989, BC ND Ohio) 98 BR 759.

Defense Production Act (50 USCS Appx § 2071) was not, in and of itself, grounds for disallowing debtor military contractor from avoiding preferential transfers to supplier during Persian Gulf conflict since Act did not mandate that supplier continue to provide goods when payment was late or not forthcoming and did not require contractor to make military hardware, and regulation promulgated pursuant to Act explicitly reserved right for manufacturer to

refuse goods where regularly established terms of sale or payment had not been met. Trinkoff v Porters Supply Co. (In re Daedalean, Inc.) (1996, BC DC Md) 193 BR 204, 8 Fourth Cir & Dist Col Bankr Ct Rep 390 (criticized in TWA, Inc. Post Confirmation Estate v World Aviation Supply, Inc. (In re TWA, Inc. Post Confirmation Estate) (2005, BC DC Del) 327 BR 706) and (superseded by statute as stated in Englander v Hekman Furniture Co. (In re Mastercraft Interiors, Ltd.) (2009, BC DC Md) 63 CBC2d 602) and (criticized in Jacobs v Gramercy Jewelry Mfg. Corp. (In re M. Fabrikant & Sons, Inc.) (2010, BC SD NY) 53 BCD 258, 64 CBC2d 1083).

Bankruptcy Rule 9006(a) operates to extend twenty days allowed for perfection contained in 11 USCS § 547(c)(3) when last day to achieve perfection falls on Saturday, Sunday, or legal holiday. Roost v GMAC (In re Boyer) (1997, BC DC Or) 212 BR 975, 31 BCD 607, 38 CBC2d 1243.

Trustee incorrectly relied on 26 USCS § 6151(a), general tax provision, rather than 11 USCS § 547(a)(4), specific ***bankruptcy*** ***preference*** provision; thus, to extent that § 547(a)(4) and § 6151(a) were in conflict, court was compelled to apply more specific provision, § 547(a)(4), to resolve present dispute (whether ***payment*** was for or on account of antecedent debt). Pryor v N.Y. State Dep't of Taxation & Fin. (In re Waring) (2013, BC ED NY) 491 BR 324 (criticized in KH Funding Co. v Escobar (In re KH Funding Co.) (2015, BC DC Md) 541 BR 308, 61 BCD 223).

12. --ERISA

ERISA section 29 USCS § 1103(c)(1) does not prohibit recovery by Chapter 7 trustee of ***payments*** made to pension fund within ***90 days*** before ***bankruptcy*** under 11 USCS § 547 where debtor is no longer in business and any recovery of preferential transfer will simply enlarge pool of assets available to satisfy administrative expenses and to provide fractional dividend to creditors and debtor will never receive any recovered contributions; further 29 USCS § 1144(d) provides that Act's provisions do not override other federal laws. In re Ottawa Cartage, Inc. (1985, ND Ill) 55 BR 371.

ERISA provision, 29 USCS § 1103, does not prevent ***bankruptcy*** court from ordering that debtor's eve of ***bankruptcy*** payments on judgment for arrearages to its employees' pension plan be recovered as ***preferences*** under 11 USCS § 547; § 1103 does not implicitly repeal or invalidate § 547. In re Pulaski Highway Express, Inc. (1984, BC MD Tenn) 41 BR 305, 12 BCD 34, CCH Bankr L Rptr P 69949.

13. --FIRREA

Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183, did not divest ***bankruptcy*** court of jurisdiction in Chapter 7 ***bankruptcy*** trustee's adversary action to avoid bank's mortgage as preferential transfer pursuant to 11 USCS § 547; bank was placed in receivership six months after adversary action was filed and 12 USCS § 1821(j) did not bar ***bankruptcy*** court's jurisdiction because there was no evidence that Federal Deposit Insurance Corporation sought to exercise any of its powers vis-a-vis debtor's property. Superior Bank, FSB v Boyd (In re Lewis) (2005, CA6 Mich) 398 F3d 735, CCH Bankr L Rptr P 80522, 2005 FED App 74P (criticized in Thomas v FDIC (2011, Colo) 255 P3d 1073).

Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183, did not divest ***bankruptcy*** court of jurisdiction in Chapter 7 ***bankruptcy*** trustee's adversary action to avoid bank's mortgage as preferential transfer pursuant to 11 USCS § 547; Congress did not intend to divest ***bankruptcy*** court of 28 USCS § 157(b)(2) pre-receivership jurisdiction through 12 USCS § 1821(d)(13)(D), and § 1821(d)(12)(A) explicitly recognized continued jurisdiction of court in pre-receivership case. Superior Bank, FSB v Boyd (In re Lewis) (2005, CA6 Mich) 398 F3d 735, CCH Bankr L Rptr P 80522, 2005 FED App 74P (criticized in Thomas v FDIC (2011, Colo) 255 P3d 1073).

14. State law

Debtor, whose employer was served with summons of garnishment approximately 5 months before filing of ***bankruptcy*** petition, is not entitled to set aside garnishment lien as preferential transfer under 11 USCS § 547(b), where under state law lien attaches to garnished funds upon service of summons of garnishment and once lien attaches, no contract creditor can obtain superior judicial lien. In re Conner (1984, CA11 Ga) 733 F2d 1560, CCH

Bankr L Rptr P 69897 (criticized in In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325) and (criticized in Chavez v Mercury Fin. (In re Chavez) (2001, BC DC NM) 257 BR 341, 45 CBC2d 1290) and (criticized in In re White (2001, BC DC NJ) 258 BR 129, 37 BCD 73, 45 CBC2d 970) and (criticized in Schott v First Pay Credit, Inc. (2013, MD La) 2013 US Dist LEXIS 113577).

Bankruptcy transfer may seek to avoid payment to creditor as ***preference*** under 11 USCS § 547(b) or under provisions of state law using avoidance powers authorized by 11 USCS § 544(b); in present case, where trustee is seeking to avoid transfer under state law, meaning of "***preference***" must be defined under state substantive law. Perkins v Petro Supply Co. (In re Rexplore Drilling) (1992, CA6 Ky) 971 F2d 1219, 23 BCD 462, CCH Bankr L Rptr P 74805.

In light of policy underlying enactment of 11 USCS §§ 522 and 547, Md. Code Ann., Cts. & Jud. Proc. § 11-504(e) permitted debtor, who filed petition for relief under Chapter 7 of U.S. ***Bankruptcy*** Code, to recover money that was withheld from his wages, pursuant to writ of garnishment, during 90-day period that preceded date he filed his petition. Bank of Am. v Stine (2003) 379 Md 76, 839 A2d 727.

State's insolvency ***preference*** statute, Wis. Stat. § 128.07, was not preempted by provisions of 11 USCS § 547 of ***Bankruptcy*** Code, federal ***bankruptcy preference*** statute; focus of principles embodied in ***Bankruptcy*** Code was on debtors, and not on distributions to creditors. Ready Fixtures Co. v Stevens Cabinets (2007, WD Wis) 488 F Supp 2d 787.

Under Massachusetts law, neither filing of complaint seeking appointment of receiver nor appointment of receiver creates equitable lien valid against ***bankruptcy*** trustee in absence of attachment or injunction; thus, since appointment of receiver occurred within 87 days of filing of involuntary Chapter 7 petition and no attachment or injunction was issued until after that date, trustee may avoid disbursements by receiver under 11 USCS § 547. In re Antinarelli Enterprises, Inc. (1985, BC DC Mass) 49 BR 412.

Chapter 11 debtor's action against utility under 11 USCS § 547 will not be dismissed due to illegality on grounds that Pennsylvania law prohibits utility from varying rates charged for services between customers where such action does not direct utility companies to charge debtors differently from nondebtors but merely seeks return of payment by debtor to debtor's estate to be distributed in accordance with ***bankruptcy*** law. In re Windsor Communications Group, Inc. (1985, BC ED Pa) 63 BR 126, 14 BCD 682.

11 USCS § 547(e)(1) makes it necessary to look to applicable state law in order to determine when transfer took place for § 547 purposes. Flatau v Asics Tiger Corp. (In re Wall) (1998, BC MD Ga) 216 BR 1016.

Walnut producer could not prevail on its motion for summary judgment seeking finding that it held interest superior to other growers in debtor's proceeds from walnut processing, where basis for its argument was potentially voidable transfer under federal ***bankruptcy*** law, which preempted California producer's lien law; sheriff's levy on walnuts did not cause other unsubordinated growers to lose their producer's liens, where sheriff did not complete sale prior to turnover order. Richardson v Wells Fargo Bank (In re Churchill Nut Co.) (2000, BC ND Cal) 251 BR 143, 44 CBC2d 1119.

As application of Michigan's Construction Lien Act (MCLA) would have potentially precluded ***bankruptcy*** estate's recovery of preferential transfers under federal ***bankruptcy*** law, federal ***bankruptcy*** law preempted MCLA; debtors stated avoidance claim under 11 USCS § 547(b). Hechinger Inv. Co. of Del. Inc. v M.G.H. Home Improvement , Inc. (In re Hechinger Inv. Co. of Del., Inc.) (2003, BC DC Del) 288 BR 398, 40 BCD 203 (criticized in IT Group, Inc. v Anderson Equip. Co. (In re IT Group, Inc.) (2005, BC DC Del) 332 BR 673, 45 BCD 191, 55 CBC2d 359) and (criticized in NLRB v J & D Masonry, Inc. (2008, WD Mich) 2008 US Dist LEXIS 94110).

Only way, as matter of law, under 11 USCS § 548(a)(1)(A) and N.Y. Debt. & Cred. Law § 276, to arguably make viable claim that debtor intended to make transfer that, in turn, enabled such debtor to effect ***preference*** was if, in conjunction with such claim, it could also be shown that, at time of ***preference***-enabling transfer, debtor possessed intent to: (1) utilize consideration obtained in return for such transfer to pay one or several, but not all, of its antecedent unsecured creditors; and (2) file for ***bankruptcy*** shortly subsequent to, that is generally within 90 days

of, transfer of such consideration to such antecedent creditors, thereby effecting ***preference*** within meaning of 11 USCS § 547. Brown v G.E. Capital Corp. (In re Foxmeyer Corp.) (2003, BC DC Del) 296 BR 327, 41 BCD 225.

Where Chapter 7 trustee alleged that two former directors of debtor wrongfully prolonged debtor's life by electing to informally liquidate debtor instead of filing for Chapter 7, specifically to enrich themselves through wasteful consulting contracts, trustee's fraudulent transfer claims were dismissed as redundant in light of trustee's state law breach of fiduciary duty claims because transfers covered under 11 USCS § 547 by directors of insolvent corporation to themselves were inherently breaches of fiduciary duty owed to corporation. Sec. Asset Capital Corp. v Tenney (In re Sec. Asset Capital Corp.) (2008, BC DC Minn) 390 BR 636, 50 BCD 54, adversary proceeding, judgment entered (2008, BC DC Minn) 396 BR 35, 50 BCD 230.

Articulated state interest outweighed what might be somewhat literal but inappropriate application of 11 USCS § 547, and should be seen as overarching policy consideration dictating result in this situation; court found no clear and manifest purpose for which federal ***bankruptcy*** law should be construed or applied to interfere with property tax foreclosures, which were traditionally state matter, at least in context of type of proceeding involved in this case. RL Mgmt. Group, LLC v Coffman (In re RL Mgmt. Group, LLC) (2014, BC ED Mich) 2014 Bankr LEXIS 206 (criticized in Canandaigua Land Dev., LLC v County of Ontario (In re Canandaigua Land Dev., LLC) (2014, BC WD NY) 521 BR 457, 60 BCD 81, 72 CBC2d 926).

Chapter 7 debtor had standing to avoid garnishment of his wages as preferential transfer where he claimed wages as exempt under Maryland law and where trustee could have avoided transfer but did not do so. Guzik v Ford Motor Credit Co., LLC (In re Guzik) (2016, BC DC Md) 75 CBC2d 394.

State statutory tax refund provisions do not preclude action to set aside ***preference*** made to creditor by insolvent debtor within 90 days of ***bankruptcy***, especially since statutory bases for refund do not include ***preference*** situation. Scott v Ohio Dep't of Taxation (1983, Franklin Co) 11 Ohio App 3d 20, 11 Ohio BR 32, 462 NE2d 1234.

Since restraining notice under state law operates as injunction which merely restrains party upon which it is served from making any transfer of judgment debtor's property in its possession, restraining notice gives creditor no lien on judgment debtor's property and no special priority in race with other judgment creditors; thus, 11 USCS § 547 is inapplicable where judgment creditor moves for order in state court extending period of restraining order served upon judgment debtor's bank since restraining notice creates no voidable ***preference***. Medi-Physics, Inc. v Community Hospital of Rockland County (1980) 105 Misc 2d 574, 432 NYS2d 594 (criticized in Doubet, LLC v Trustees of Columbia Univ. in the City of New York (2011, Sup) 32 Misc 3d 1209-A, 934 NYS2d 33).

Consistent with usage of term in federal ***bankruptcy*** law, 11 USCS § 547(b) transfers to creditors are preferential when effect of transfer may enable creditor to obtain greater percentage of debt than another creditor of same class would receive, and courts therefore interpret term "prefer" as act of making transfer that enables creditor to obtain greater percentage of debt than another creditor of same class would receive; therefore, under Utah Code Ann. § 59-1-302(7)(b)(i), responsible party does not prefer creditor over state government when he or she makes transfer to creditor whose interest is superior to that of state. Utah State Tax Comm'n v Stevenson (2006) 2006 UT 84, 150 P3d 521, 567 Utah Adv Rep 35.

Colo. Rev. Stat. § 4-9-317 was not applicable to creditor who had purchase money security interest in vehicle and could not be used as safe harbor or relation back provision to perfect creditor's security interest in vehicle to pre-petition date when creditor presented security interest for filing pre-petition but county clerk did not accept security interest until after ***bankruptcy*** petition was filed; avoidance by trustee under 11 USCS § 547 was thus warranted. Hill v WFS Fin., Inc. (In re O'Neill) (2007, BAP10) 370 BR 332 (criticized in Sovereign Bank v Hepner (In re Roser) (2010, CA10 Colo) 613 F3d 1240, 64 CBC2d 96, CCH Bankr L Rptr P 81820, 72 UCCRS2d 766).

Bankruptcy court did not err when it found that Chapter 7 trustee was entitled to avoid bank's interest in payments due under various leases, and in contract rights under surety bonds that secured those payments, pursuant to 11 USCS §§ 544 and 547(b), because bank had not perfected its interest in payments or bonds outside ***preference*** period; parties agreed that Nevada law controlled interpretation of their agreements, and although bank could have perfected its security interest under Nev. Rev. Stat. § 104.9313 by possessing leases, or by filing financing

statement, it did neither. FDIC v Kipperman (In re Commer. Money Ctr., Inc.) (2008, BAP9) 392 BR 814, 50 BCD 127, 60 CBC2d 157, 66 UCCRS2d 832, 53 ALR6th 657.

Unpublished Opinions

Unpublished: Chapter 7 trustee was not permitted to avoid transfers under 11 USCS § 547(b) from debtor to creditor because creditor would have received 100% of money it was owed pursuant to Tex. Prop. Code Ann. §§ 162.001(a) and 162.032 by virtue of construction trust funds and debtor's estate was not depleted of money otherwise available to unsecured creditors. In re N A Flash Found. (2008, CA5 Tex) 298 Fed Appx 355.

15. Applicable law

What constitutes transfer under 11 USCS § 547 and when it is complete is matter of federal law, but that definition in turn includes references to parting with property and interests in property, and in absence of controlling federal law, "property" and "interests in property" are creatures of state law. Barnhill v Johnson (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

For purposes of 11 USCS § 547, time of perfection of creditor's interest in Chapter 11 debtor's airplanes was governed by state law rather than Federal Aviation Act (former 49 USCS § 1403(c)), since Act does not preempt state law on this issue; state law ordinarily determines when creditor or contract cannot acquire superior judicial lien. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

Whether particular occurrence is transfer for purposes of 11 USCS § 547 is matter of federal characterization, but when transfer occurs is defined by state law. In re Ehring (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

For purposes of Chapter 11 trustee's 11 USCS § 547 action, time lien is perfected against debtor's estate is determined under state law. Battery One-Stop v Atari Corp. (In re Battery One-Stop) (1994, CA6 Ohio) 36 F3d 493, 31 CBC2d 1547, CCH Bankr L Rptr P 76102, 1994 FED App 336P.

Although 11 USCS § 101(54) defines term "transfer," and 11 USCS § 547(e)(2)(A) specifies when preferential transfer is made, thus making whether and when transfer occurs issues of federal law, courts must look to state law for definition of terms "property" and "interest in property." Freedom Group v Lapham-Hickey Steel Corp. (In re Freedom Group) (1995, CA7 Ind) 50 F3d 408, 26 BCD 1147, 32 CBC2d 1958, CCH Bankr L Rptr P 76421A (criticized in Kramer Consulting, Inc. v McCarthy (In re McCarthy) (2006, BC ND Ind) 350 BR 820) and (criticized in Fairweather v Monument Bank (In re Fairweather) (2014, BC DC Md) 515 BR 208).

State law determines when transfer is perfected, but question of whether transfer is preferential and avoidable by creditor is governed by 11 USCS § 547; merely because state law deems transfer as perfected as of certain date does not necessarily mean that state-controlled perfection date is date transfer is deemed made for federal ***bankruptcy*** law purposes; as matter of ***bankruptcy*** law, transfer is not made between debtor and creditor until creditor has acquired some rights in property transferred. Redmond v Mendenhall (1989, DC Kan) 107 BR 318.

Date of attachment of judicial lien on property of debtor, as well as nature, extent, and validity of lien, is to be determined by state law unless application of state law would frustrate or debilitate federally enacted policy. In re Antinarelli Enterprises, Inc. (1985, BC DC Mass) 49 BR 412.

To determine whether payments made by Chapter 11 debtor to steel supplier were property of estate for purposes of 11 USCS § 547(b), or whether they were to be held in trust for subcontractors, court must look to state law; generally, ***Bankruptcy*** Courts must look to law of appropriate state regarding existence, nature, requirements, and priorities of state law when issue involved is one derived from state law and court is bound by laws of state in which it sits and must not judicially legislate matters which state has not addressed. In re Georgia Steel, Inc. (1985, BC MD Ga) 56 BR 509, revd on other grounds (1986, MD Ga) 66 BR 932 (criticized in Watts v Pride Util. Constr., Inc.

(In re Sudco, Inc.) (2007, BC ND Ga) 2007 Bankr LEXIS 3730) and (criticized in In re J.A. Jones (2007, BC WD NC) 361 BR 94).

For purposes of determining whether 11 USCS § 547(b) or English ***preference*** law governs suit for recovery of alleged preferential transfers made by English Chapter 11 debtor to 2 English banks and one French bank on account of debts incurred in England, most reasonable outcome would be to apply English law, notwithstanding that estate may be precluded from recovering challenged transfers, where there is nothing in language or legislative history of 11 USCS § 547 which demonstrates clearly expressed congressional intent that § 547 apply extraterritorially; where foreign debtor makes preferential transfer to foreign transferee and center of gravity of transfer is overseas, presumption against extraterritoriality prevents utilization of § 547 to avoid transfer. Maxwell Commun. Corp. v Barclays Bank (In re Maxwell Commun. Corp.) (1994, BC SD NY) 170 BR 800, 25 BCD 1567, affd, complaint dismd (1995, SD NY) 186 BR 807, 34 CBC2d 1382, CCH Bankr L Rptr P 76681, affd (1996, CA2 NY) 93 F3d 1036, 29 BCD 788 and (criticized in Weisfelner v Blavatnik (In re Lyondell Chem. Co.) (2016, BC SD NY) 2016 Bankr LEXIS 19) and (criticized in French v Liebmann (In re French) (2004, DC Md) 320 BR 78, CCH Bankr L Rptr P 80232).

What constitutes transfer under 11 USCS § 547(b) and when transfer is complete is matter of federal law; by contrast, in absence of any controlling federal law, "property" and "interests in property" for purpose of 11 USCS § 547(b) are creatures of state law. Hall-Mark Elecs. Corp. v Sims (In re Lee) (1995, BAP9 Cal) 179 BR 149, 95 CDOS 2727, 27 BCD 1, 33 CBC2d 1360, 26 UCCRS2d 386, affd (1997, CA9) 108 F3d 239, 97 CDOS 1591, 97 Daily Journal DAR 3065, 30 BCD 628, 37 CBC2d 991, CCH Bankr L Rptr P 77289, 31 UCCRS2d 1044.

16. Miscellaneous

Where defunct corporation had not been adjudicated bankrupt under ***bankruptcy*** code, creditors did not have remedy for preferential transfers that were allegedly made to lender. B.E.L.T., Inc. v Wachovia Corp. (2005, CA7 Ill) 403 F3d 474.

Statutory language itself strongly suggests that transfer may be avoidable as both ***preference*** and fraudulent transfer under federal ***bankruptcy*** law. McFarland v GE Capital Corp. (In re Int'l Mfg. Group) (2015, BC ED Cal) 538 BR 22, 61 BCD 164.

2. Other Code Provisions

17. 11 USCS § 362

Nature of 11 USCS § 362 complaint precludes ordinary application of ***Bankruptcy*** Rule 7013 requiring filing of compulsive counterclaims because 11 USCS § 362 complaint is not "claim" within meaning of ***Bankruptcy*** Rule 7013, ***preference*** action filed subsequent to hearing on relief from stay is not barred. In re Torco Equipment Co. (1986, WD Ky) 65 BR 353.

Motion by debtor's state court codefendants in liability action to lift stay to bring debtor into litigation will be denied where: (1) debtor settled litigation prior to petition; (2) forced litigation would waste estate assets; and (3) if settlement was in fact unwise, trustee could later set it aside as preferential under 11 USCS § 547(b). In re Pacor, Inc. (1987, ED Pa) 74 BR 20.

Payments made pursuant to escrow agreements were not excepted from avoidance as having been made in ordinary course of business where number of days between invoice and payment exceeded normal range, and escrow agreements did not work as intended. Murphy v Arrow Elecs., Inc. (In re RISCmanagement, Inc.) (2004, BC DC Mass) 304 BR 566, 42 BCD 158.

Creditor was not entitled to the dismissal of a Chapter 7 trustee's complaint seeking to avoid certain preferential transfers under 11 USCS § 547; collateral estoppel did not preclude the trustee from pursuing the complaint because the issue of preferential transfers had not been actually litigated in a hearing on relief from the automatic stay under 11 USCS § 362(d); that issue was never submitted to the finder of fact; the court made no decision

relating to any alleged preferential transfer; and the trustee had no incentive to litigate the transfer at the hearing on the motion for relief from stay because to do so would have been procedurally improper and would not have granted her the right to avoid an indemnity deed of trust. Simpson v SunTrust Mortg., Inc. (In re Hurst) (2009, BC DC Md) 409 BR 79.

18. 11 USCS § 503

Creditor that provided supplies to LLC less than 20 days before LLC declared Chapter 11 ***bankruptcy*** was not entitled to assert "new value" defense under 11 USCS § 547(c)(4) in adversary proceeding LLC filed, seeking determination that certain transfers were avoidable under § 547, because creditor had filed claim against LLC's ***bankruptcy*** estate under 11 USCS § 503(b)(9), seeking payment for supplies, and court had allowed claim and claim was fully funded; allowing both new value credit and payment of § 503(b)(9) claim when property that was basis for claim and new value defense was same elevated creditor's claim and resulted in double payment to creditor; estate would have had to pay allowed claim but would not have been able to recover ***preference*** payment that would otherwise have been available for distribution to other creditors. TI Acquisition, LLC v Southern Polymer, Inc. (In re TI Acquisition, LLC) (2010, BC ND Ga) 429 BR 377, 64 CBC2d 426, CCH Bankr L Rptr P 81795 (criticized in Friedman's Liquidating Trust v Roth Staffing Cos. LP (In re Friedman's Inc.) (2013, CA3 Del) 738 F3d 547, 58 BCD 239, 70 CBC2d 1241, CCH Bankr L Rptr P 82568).

Unpublished Opinions

Unpublished: Unlike specific provisions of 11 USCS § 547(b)(1) and 550(a)(1), provisions of 11 USCS § 503(b)(9) do not allow administrative expense against debtor who may not have received value or benefit from sale of goods unless that debtor actually received goods themselves. In re Plastech Engineered Prods. (2008, BC ED Mich) 50 BCD 197.

19. 11 USCS § 522

Although lien is valid under 11 USCS § 547, it may be avoided under § 522 to extent that it impairs exemption. In re Bradford (1980, BC DC Nev) 5 BR 18, 6 BCD 75, 1 CBC2d 952, affd (1980, DC Nev) 6 BR 741, 3 CBC2d 39.

11 USCS § 522 provides that if trustee does not exercise avoiding power to recover property, including preferential transfer under 11 USCS § 547, debtor may exercise right and exempt property. In re Pierce (1980, BC ND Ill) 6 BR 18, 2 CBC2d 148.

11 USCS § 547 gives debtor right to protect exemptions from preferential transfers if preferential transfer were involuntary and debtor had not concealed property. In re Roberson (1980, BC DC Idaho) 7 BR 34.

Time parameters of 11 USCS § 522(f) and 11 USCS § 547(b) should not be equated since neither 11 USCS § 522(f) nor its legislative history indicate that it is limited in manner similar to 11 USCS § 547(b) and its intent is in no way related to that section; 11 USCS § 547(b) allows avoidance by trustee of preferential transfers made within 90 day period preceding filing of ***bankruptcy*** petition during which there is presumption of insolvency in order to deter "race of diligence" of creditors to dismember debtor before ***bankruptcy*** court can insure equality of distribution among members of same creditor class; 11 USCS § 522(f) protects interest of debtors and in order to assist in promoting "fresh start" concept it allows debtor to avoid liens and certain security interests on his or her otherwise exempt property and there is no need for ***90 day*** period. In re Lumpkins (1981, BC DC RI) 12 BR 44, CCH Bankr L Rptr P 68059.

Payment of preferential transfer out of potentially exempt funds can nevertheless be recovered by ***bankruptcy*** trustee pursuant to 11 USCS § 547(b) where transfer was voluntary; debtor cannot claim money as exempt since transfer was voluntarily made by him. In re Kewin (1982, BC ED Mich) 24 BR 158.

Although Chapter 7 debtor has standing to bring action to avoid preferential transfer under 11 USCS § 547 or to avoid fraudulent transfer under 11 USCS § 548 when transfer of exempt property is involuntary, voluntary grant of security interest in form of mortgage, as opposed to lien created by operation of law or fixing of judicial lien, is

clearly voluntary transfer of exempt property which would not be voidable under 11 USCS § 522(g), (h), or (i). In re Ward (1984, BC DC SD) 36 BR 794.

Though Chapter 13 debtor only seeks under 11 USCS § 522(h) to avoid recently perfected lien on residence to extent of state homestead exemption, under ***Bankruptcy*** Rule 7008 ***Bankruptcy*** Court can construe complaint as asserting full avoidance power of 11 USCS § 547 to do substantial justice. In re Einoder (1985, BC ND Ill) 55 BR 319, CCH Bankr L Rptr P 70865 (criticized in In re Binghi (2003, BC SD NY) 299 BR 300, 51 CBC2d 485) and (criticized in Wood v Mize (In re Wood) (2003, BC WD Mo) 301 BR 558) and (criticized in Carrasco v Richardson (In re Richardson) (2004, BC SD Fla) 311 BR 302, 17 FLW Fed B 201) and (criticized in In re Hannah (2004, BC DC NJ) 316 BR 57).

Creditor cannot raise issue of exemptibility as defense to 11 USCS § 547(b) ***preference*** action by Chapter 7 trustee, since right of exemption is personal to debtor, and if debtor transfers such exemptible property in preferential transfer, he has at least impliedly made choice not to claim property as exempt and exemptions are thereby waived. In re Richards (1988, BC ND Ind) 92 BR 369.

IRS's levy on Chapter 7 debtor's wages to collect past-due taxes during 90 days prior to debtor's ***bankruptcy*** filing when debtor was insolvent is avoidable ***preference*** under 11 USCS § 547, but recovery is limited under 11 USCS § 522(h) to amount of funds claimed as exempt. Williams v United States Dep't of Treasury (In re Williams) (1992, BC SD Ala) 153 BR 74, 71 AFTR 2d 690, affd (1993, SD Ala) 156 BR 77, 71 AFTR 2d 1352.

Debtors failed to state cause of action for lien avoidance under 11 USCS §§ 522(b) and 547(b)(5), where judgment lien taken against husband-debtor did not impair exemption in property held by entireties. Natale v French & Pickering Creeks Conservation Trust, Inc. (In re Natale) (1999, BC ED Pa) 237 BR 865, subsequent app (2002, CA3 Pa) 295 F3d 375.

Because debtor had not served copy of amended exemption on ***bankruptcy*** trustee as required by Fed. R. ***Bankr.*** P. 1009(a), trustee could not be said to have approved debtor's action under 11 USCS § 522(h) to avoid creditor's prepetition garnishment on funds that had been claimed as exempt in amended exemption; thus, action was dismissed as premature, because court was unable to find that 11 USCS § 522(h)(2)'s required showing had been established. Saults v First Tenn. Bank (Saults) (2002, BC ED Tenn) 293 BR 739.

Avoidance as preferential transfer by trustee of mortgage that was given to creditor by debtors did not create impermissible windfall for debtors; debtors could not expand their exemption to avoided interest under 11 USCS § 522(g)(1) because they voluntarily transferred avoided interest. Gold v Interstate Fin. Corp. (In re Schmiel) (2005, BC ED Mich) 319 BR 520 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

Chapter 7 debtor's adversary proceeding seeking order avoiding transfer of funds from her checking account to creditor before she declared ***bankruptcy*** was governed by 11 USCS § 522(g) and (h), not by 11 USCS § 547; transfer of debtor's interest occurred when creditor served writ of garnishment on bank, not when debtor signed Consent to Disbursement, and debtor was entitled to recover funds because her decision to sign Consent to Disbursement did not transform what was involuntary transfer into one that was voluntary for purposes of 11 USCS § 522(g). Smith v Primus Auto. Fin. (In re Smith) (2006, BC DC Md) 382 BR 279.

Debtor has no authority to set aside ***preference*** under 11 USCS § 547; however, if ***bankruptcy*** trustee chooses not to use his avoidance powers under § 547 to recover property which debtor could claim exempt, then debtor may seek to avoid transfer pursuant to 11 USCS § 522(h); and § 522(h) is not only weapon in debtor's arsenal for recovering exempt property; § 522(f) permits debtor to avoid judicial liens to extent that such liens impair exemption to which debtor would otherwise be entitled. In re Tinkess (2008, BC DC Alaska) 459 BR 76.

Debtor could not invoke 11 USCS § 547 indirectly through 11 USCS § 522 as debtor never had ownership interest in any of properties transferred prepetition and properties were all owned by entities other than debtor when transfers were made; § 547 only authorized avoidance of transfers of debtor's interests in property, and debtor could not claim exemption in properties as they were not property of estate since debtor pled only that he held

ownership interest in entities that owned properties, not that he, individually, ever had had ownership interest in any of properties themselves. Kashkashian v Lerner (In re Kashkashian) (2016, BC ED Pa) 544 BR 824, 62 BCD 50.

Generally, only trustee may bring action to avoid prepetition transfer; however, pursuant to 11 USCS § 522(g) and (h), debtor has standing to avoid transfer if property transferred would have been exempt, property was not transferred voluntarily, and trustee has not sought to bring avoidance action. James v Planters Bank (In re James) (2001, BAP8) 257 BR 673, 37 BCD 76, 45 CBC2d 787.

As provided by 11 USCS § 547, ***bankruptcy*** trustees may bring action to avoid pre-petition transfers; however, 11 USCS § 522 allows debtors to avoid pre-petition preferential transfers if (1) property transferred would have been exempt, (2) property was not transferred voluntarily, and (3) trustee has not sought to bring avoidance action. Pierce v Collections Assocs. (In re Pierce) (2013, BAP8) 504 BR 506, 70 CBC2d 1746, affd (2015, CA8) 779 F3d 814, 60 BCD 199, CCH Bankr L Rptr P 82778, reh den, reh, en banc, den (2015, CA8 Neb) 2015 US App LEXIS 6513.

Unpublished Opinions

Unpublished: In case in which pro se Chapter 7 debtor, pursuant to 11 USCS § 522(f), sought to avoid nonpossessory, non-purchase-money security interest held by creditor, in limited circumstances not present in current case, § 522(h) conferred standing on debtors to avoid transfers under 11 USCS § 547(b); however, debtor could not rely on § 522(h) to avoid voluntary transfer such as consensual lien at issue in current proceeding. In re Jideani (2013, BC DC Dist Col) 2013 Bankr LEXIS 2155, claim dismissed, request den (2013, BC DC Dist Col) 2013 Bankr LEXIS 4892.

20. 11 USCS § 541

Both older subsec. (b) language ("property of the debtor") and current language ("interest of the debtor in property") are to be read as coextensive with "interests of the debtor in property" as that term is used in 11 USCS § 541(a)(1). Begier v IRS (1990) 496 US 53, 110 S Ct 2258, 110 L Ed 2d 46, 20 BCD 940, 22 CBC2d 1080, CCH Bankr L Rptr P 73403, 90-1 USTC P 50294, 65 AFTR 2d 1095 (criticized in Official Comm. of Unsecured Creditors v Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.) (2010, BC DC Del) 432 BR 135, 53 BCD 94).

Pursuant to 11 USCS § 541(d), trustee cannot use 11 USCS § 544(a) against assignees of interests in mortgages; 11 USCS § 541(d) does not, however, preclude trustee from attacking assignment of interest in mortgage, or creation of any trust generally, as preferential under 11 USCS § 547 or fraudulent under 11 USCS § 548. In re Lemons & Associates, Inc. (1986, BC DC Nev) 67 BR 198, 15 BCD 395, 16 CBC2d 356, CCH Bankr L Rptr P 71624.

Amended counterclaim by creditor bank that demanded, inter alia, that ***bankruptcy*** court impose equitable lien on land that had been owned by Chapter 7 debtor and his father as tenants in common, had been subjected to mortgage in favor of bank, and had been sold prepetition, survived motion to dismiss filed by Chapter 7 trustee; though bank's claim might appear to relate to interest that, given prepetition sale of land, was never part of debtor's estate, fact that trustee was seeking to recover that interest as ***preference*** under 11 USCS § 547(b) meant that it was property that was deemed to belong to estate under 11 USCS § 541(a)(3) and 11 USCS § 550, and thus in fact might be subjected to equitable lien in favor of bank, which was not properly determined on motion to dismiss. Woodard v Synovus Bank (In re Alford) (2007, BC MD Fla) 381 BR 345.

LLC that declared Chapter 11 ***bankruptcy*** and operated its business as debtor in possession was not allowed under 11 USCS §§ 547, 548, or 549 to avoid bank's liens on real property LLC owned because mortgages LLC gave lender were not property of LLC's ***bankruptcy*** estate under 11 USCS § 541; although assignments of mortgages that were given to bank contained scrivener's errors, mortgages were properly perfected before LLC declared ***bankruptcy*** and LLC was not prejudiced by reformation of assignments because it executed mortgages to secure its obligation to repay loan and had already received loan proceeds. Aum Shree of Tampa, LLC v HSBC

Bank USA (In re Aum Shree of Tampa, LLC) (2011, BC MD Fla) 449 BR 584, amd, corrected, adversary proceeding, findings of fact/conclusions of law, summary judgment gr (2011, BC MD Fla) 2011 Bankr LEXIS 1832.

21. 11 USCS § 546

Chapter 11 debtor's prepetition exercise of its right of reclamation under state law was subject to trustee's power to recover ***preference*** where demand for reclamation was not made in writing as required by 11 USCS § 546(c)(1), notwithstanding that state law did not require written demand. Barry v Shrader Holding Co. (In re M.P.G., Inc.) (1998, BC WD Ark) 222 BR 862, 32 BCD 1226, 40 CBC2d 720, 36 UCCRS2d 110.

Insurance company and other entities that held notes issued by companies that declared ***bankruptcy*** were awarded summary judgment on their claim that ***payments*** companies made when they redeemed notes less than ***90 days*** before they declared ***bankruptcy*** were "settlement ***payments***" under 11 USCS § 741(8) that qualified for safe harbor treatment under 11 USCS § 546(e), and were not subject to avoidance under 11 USCS § 547 as preferential transfers; under Second Circuit's decision in In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 2011 U.S. App. LEXIS 13177, ***payments*** made to noteholders were "settlement ***payments***" in cases where ***payments*** involved transfer of cash to complete securities transaction. Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.) (2011, BC SD NY) 453 BR 201, 55 BCD 60, affd (2012, SD NY) 480 BR 468, CCH Bankr L Rptr P 82355, affd (2013, CA2) 719 F3d 94, 58 BCD 12, 69 CBC2d 1253, CCH Bankr L Rptr P 82505, cert den (2014, US) 134 S Ct 1278, 188 L Ed 2d 298 and (criticized in FTI Consulting, Inc. v Merit Mgmt. Grp., LP (2015, ND Ill) CCH Bankr L Rptr P 82875).

Bankruptcy law preferential transfer counts had to be dismissed because transactions under certain workout agreements were protected transactions under safe harbor provisions of 11 USCS § 546; original agreements were repurchase agreements and there was solid nexus between workout agreements and original agreements. Sher v TMST Hedging Strategies, Inc. (In re TMST, Inc.) (2014, BC DC Md) 518 BR 329.

22. 11 USCS § 550, generally

11 USCS § 547(b) law entitles debtors' estates to recover preferential transfers, including ***payments*** on account of antecedent debts made during ***90 days*** before commencement of proceeding; ***preferences*** are recovered for benefit of estate (11 USCS § 550(a)) and thus profit all creditors according to their statutory and contractual entitlements. Mellon Bank, N.A. v Dick Corp. (2003, CA7 Ind) 351 F3d 290, 42 BCD 68, CCH Bankr L Rptr P 80011, cert den (2004) 541 US 1037, 124 S Ct 2103, 158 L Ed 2d 723.

Right to recover ***preference*** under 11 USCS § 547(b) is asset of estate that may be assigned or distributed to particular class of creditors to satisfy their entitlements, and suit on behalf of all creditors in money is "for benefit of estate" as that term is used in 11 USCS § 550(a). Mellon Bank, N.A. v Dick Corp. (2003, CA7 Ind) 351 F3d 290, 42 BCD 68, CCH Bankr L Rptr P 80011, cert den (2004) 541 US 1037, 124 S Ct 2103, 158 L Ed 2d 723.

Bankruptcy court did not err in holding that trustee could recover value of mortgage it received from debtor pursuant to 11 USCS § 550(a)(1) from appellant mortgage company (instead of entity that subsequently purchased mortgage from company); by providing that trustee can seek recovery from initial transferee or immediate transferee of initial transferee, 11 USCS § 550(a) allows trustee to pick his named defendant when transfer is avoided under 11 USCS § 547(b). Wells Fargo Home Mortg., Inc. v Lindquist (2010, CA8 Minn) 592 F3d 838, CCH Bankr L Rptr P 81665.

Having avoided preferential car lien under 11 USCS § 547, plaintiff ***bankruptcy*** trustee could not have money judgment against defendant creditors equal to value of avoided liens under 11 USCS § 550(a); language in § 550 was permissive: "the trustee may recover" property or its value, and avoidance of lien and its preservation for estate sufficiently made estate whole. Rodriguez v Drive Fin. Servs. L.P. (In re Trout) (2010, CA10) 609 F3d 1106, 64 CBC2d 257, CCH Bankr L Rptr P 81797.

"Avoidance" of transfer under 11 USCS § 547 is different from "recovery" of transferred property under 11 USCS § 550 since avoidance nullifies transfer so that transferred property automatically becomes part of estate while

recovery forces transferee to return property or become personally liable for its value; when property is subject to creditor's lien or other interest and has not yet been transferred to third party, action for recovery is unnecessary since, through avoidance alone, trustee holds property free of lien or other interest while if trustee does not have control over property, he or she must seek its recovery under § 550. Congress Credit Corp. v AJC Int'l (1995, DC Puerto Rico) 186 BR 555 (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

In action to set aside ***preference*** under 11 USCS § 547, trustee is entitled under authority of 11 USCS § 550--most applicable provision of ***Bankruptcy*** Code to instant situation--to prejudgment interest from date of demand for its return or, in absence of prior demand, from date of filing complaint; in order to recover interest, trustee is not required to show that value of debtor's estate would have been enhanced but for transferee's retention of property. In re H.P. King Co. (1986, BC ED NC) 64 BR 487.

Where debtor made transfer to noninsider bank within year preceding ***bankruptcy*** but not within 90 days preceding ***bankruptcy***, trustee cannot recover transfer as ***preference*** against bank under 11 USCS § 550(a)(1) on basis that insider guarantor benefited from such transfer, because specific provisions of 11 USCS § 547 against recovery from noninsider recipient of transfer more than 90 days before ***bankruptcy*** are not overruled by provisions of § 550(a)(1) allowing trustee to recover preferential transfer from initial transferee or entity for whose benefit such transfer was made; under § 550(a)(1), "initial transferee" must be read to include only initial transferees who have received transfers which are prohibited as to them as preferential, and here, transfer not within 90 days before ***bankruptcy*** to bank was not prohibited as preferential under § 547. In re Midwestern Cos. (1988, BC WD Mo) 96 BR 224, 21 CBC2d 190, affd (1989, WD Mo) 102 BR 169.

Extended one-year recovery period of 11 USCS § 547(b) subjects to avoidance transfers made within one year of ***bankruptcy*** to noninsider creditors for benefit of insider guarantors under 11 USCS § 550. Banner v S.S. Pierce Co. (In re Pine Springs Farm & Casino) (1992, BC ND NY) 139 BR 90, 26 CBC2d 1794, CCH Bankr L Rptr P 74562.

11 USCS § 542(a) did not apply, where plan trustee did not seek to recover property other than money; plan trustee's invocation of § 542(a) could not result in judgment under 11 USCS § 550, which only permitted judgment for transfers avoided under 11 USCS § 544, 545, 547, 548, 549, 553(b) or 724(a), or in money judgment under applicable non-***bankruptcy*** law. Network Staffing Servs., Inc. Liquidating Trust v Jenkens & Gilchrist (In re Network Staffing Servs.) (2004, BC ND Tex) 43 BCD 237, judgment entered (2005, BC ND Tex) 2005 Bankr LEXIS 1288.

Determination under 11 USCS § 547 that transfer of property is avoidable is not tantamount to money judgment, injunctive relief, or any specific remedy at all, and court's power to determine whether transfer is avoidable as ***preference*** is not dependant on its power to order affirmative remedy pursuant to 11 USCS § 550. Official Comm. of Unsecured Creditors of 360networks (USA) Inc. v PUC (In re 360networks (USA) Inc.) (2004, BC SD NY) 316 BR 797, 43 BCD 275, 53 CBC2d 339.

23. --In particular circumstances

Escrow company was financial conduit rather than transferee and its transfer of insolvent debtor's funds to a finance company was preferential transfer where it occurred while debtor was insolvent, within ninety days of filing of ***bankruptcy*** petition, and would allow finance company to receive more than it would otherwise receive from estate; although finance company had conversion claim against debtor, funds it sought could not be reasonably traced or identified, so it could not assert property rights over them. Bailey v Big Sky Motors, Ltd. (In re Ogden) (2002, CA10 Utah) 314 F3d 1190, 40 BCD 208, CCH Bankr L Rptr P 78794.

Under control test, broker was not initial transferee under 11 USCS § 550 where debtor sent wire transfer to cover check with insufficient funds to pay for insurance premiums since broker did not intend to become creditor when it sent checks out to keep coverage from lapsing, it had no prior problems with debtor, no interest was charged, it was unaware of debtor's financial difficulties, and it did not have total control over trust account; therefore, amount paid was not avoidable transfer under 11 USCS § 547. Andreini & Co. v Pony Express Delivery Servs. (2006, CA11 Ga)

440 F3d 1296, 46 BCD 24, CCH Bankr L Rptr P 80465, 19 FLW Fed C 305, reh, en banc, den (2006, CA11) 179 Fed Appx 686.

Defendant was not "transferee" within meaning of 11 USCS § 550 where defendant was simply acting as payment conduit between debtor and its services providers, having no legal right to put money it received from debtor to its own use; fact that defendant may have placed, in its own accounts, payments received from debtor before forwarding funds to third-party principals did nothing to change equation. Wheeling Pittsburgh Steel v Keystone Metals Trading (In re Wheeling Pittsburgh Steel) (2006, BC ND Ohio) 360 BR 649.

Because trustees were authorized under 11 USCS § 550 to recover for benefit of estate property in respect to transfers avoided under 11 USCS § 547 but were not mandated to do so under 11 USCS § 704, court ordered trustee not to sue creditors listed in certain categories of preferential transfers in order to strike fair balance in ***preference*** litigation in case. In re Brook Mays Music Co. (2007, BC ND Tex) 48 BCD 164, 58 CBC2d 874.

Postpetition payments made by debtor to lender to avoid repossession of his truck were proceeds of lender's lien, and Chapter 7 Trustee, having avoided lien under 11 USCS § 547(b) and preserved it for benefit of estate, was therefore entitled, under 11 USCS § 550(a), to recover those payments as proceeds of lien. White v Wachovia Dealer Servs. (In re Wyatt) (2010, BC DC Dist Col) 440 BR 204, adversary proceeding, judgment entered (2010, BC DC Dist Col) 2010 Bankr LEXIS 4711 and (criticized in Ostrander v Source One Financial Corp. (In re Mollison) (2012, BC DC Mass) 463 BR 169, CCH Bankr L Rptr P 82151) and (criticized in Agin v PNC Mortg. (In re Spodris) (2014, BC DC Mass) 516 BR 196).

Where Chapter 11 debtor made preferential transfers to law firm as part of settlement agreement in ***preference*** action in another Chapter 11 case and where firm deposited funds into its trust account, firm was not initial transferee, as it served as mere conduit for transfers and otherwise acted in good faith, as processes by which it received and handled funds were subject to federal court orders, federal law, and rules of professional responsibility. Fact that part of funds were paid to firm did not change result, as those payments were made from funds transferred to client as approved by final binding ***bankruptcy*** court order. Hyman v Bast Amron LLP (In re Cargo Transp. Servs.) (2013, BC MD Fla) 502 BR 875, 70 CBC2d 1404, 24 FLW Fed B 253.

Grant of summary judgment in favor of transferee was reversed in case where committee representing debtor's estate sought to avoid transfer as ***preference*** under 11 USCS § 547(b), as transferee was "transferee" under 11 USCS § 550 in that it was actual recipient of transfer; appellate court had not intended to create new equitable exception to § 550 nor did it intend "dominion or control" test to be applied in case of one-step transaction. Post-Confirmation Comm. of Unsecured Creditors of Incomnet Communs. Corp. v Universal Serv. Admin. Co. (In re Incomnet, Inc.) (2003, BAP9) 299 BR 574, 2003 CDOS 8768, 2003 Daily Journal DAR 11046, 41 BCD 271 (criticized in AmeriServe Food Distrib., Inc. v Transmed Foods, Inc. (In re AmeriServe Food Distrib., Inc.) (2004, BC DC Del) 315 BR 24, 43 BCD 190, 52 CBC2d 1201) and affd (2006, CA9) 463 F3d 1064, 47 BCD 23, CCH Bankr L Rptr P 80717.

Unpublished Opinions

Unpublished: Summary judgment was improperly granted to law firm in case involving avoidable transfer under 11 USCS § 547(b) because, upon recovery of settlement funds, law firm became legal owner of its contingency fee and was entitled to withdraw money from client trust account; law firm had dominion over funds and was initial transferee under 11 USCS § 550(a)(1); portion of funds belonging to law firm as its fee was required to be withdrawn from client trust account at earliest reasonable time after law firm's interest in that portion became fixed, unless disputed by client. In re Gonzalez, Inc. (2006, BAP9) 2006 Bankr LEXIS 4806.

Unpublished: Wire transfer of funds by hospital from account on which creditor holding default judgment had levied, made three weeks before hospital filed Chapter 11 was recoverable as ***preference*** under 11 USCS § 547 because even though account had been levied upon, it still constituted 11 USCS § 101(54)(D) transfer of "interest of debtor in property" within meaning of 11 USCS § 541; moreover, debtor was entitled to prejudgment interest thereon on theory that such value was properly recoverable for estate per 11 USCS § 550. Nathan & Miriam Barnert Mem.

Hosp. Ass'n v Onward Healthcare, Inc. (In re Nathan & Miriam Barnert Mem. Hosp. Ass'n) (2009, BC DC NJ) 2009 Bankr LEXIS 5569.

24. 11 USCS § 551

Where Chapter 7 Trustee avoided non-possessory transfer of lien interest on debtor's vehicle, preservation of that lien interest for benefit of estate under 11 USCS § 551 was sufficient to place estate in exactly same position it would have been in, but for granting of lien; there was no need for Trustee to "recover" any property or its value. Rodriguez v Drive Fin. Servs. LP (In re Trout) (2008, BC DC Colo) 392 BR 869, affd (2009, BAP10) 408 BR 355, affd (2010, CA10) 609 F3d 1106, 64 CBC2d 257, CCH Bankr L Rptr P 81797.

Where Chapter 7 Trustee avoided non-possessory transfer of lien interest on debtor's vehicle, preservation of that lien interest for benefit of estate under 11 USCS § 551 was sufficient to place estate in exactly same position it would have been in, but for granting of lien; there was no need for Trustee to "recover" any property or its value. Rodriguez v DaimlerChrysler Fin. Servs. Americas, LLC (In re Bremer) (2008, BC DC Colo) 392 BR 873, affd (2009, BAP10) 408 BR 355, affd (2010, CA10) 609 F3d 1106, 64 CBC2d 257, CCH Bankr L Rptr P 81797.

Denial of Chapter 7 trustee's motion to abandon property and order directing trustee to turn over money received from bank to debtor was reversed because $ 4,000 bank paid trustee was not equivalent of rents; rather, each transaction between trustee and bank was separate, with distinct consideration, since bank held valid assignment of rents on property and thus was entitled to $ 4,000 in rents collected by trustee, and proceeds from sale of trust mortgage were preserved for benefit of estate under 11 USCS § 551, as proceeds of asset recovered pursuant to 11 USCS § 547. Kaler v Remily (In re Remily) (2005, BAP8) 324 BR 706.

25. 11 USCS § 553

Present 11 USCS § 553(b) clarifies effect of 1978 version of 11 USCS § 550(a), applicable to case where guarantor on Chapter 7 debtor's bank loan also has junior security interest in debtor's assets deriving from another loan, and where bank preferentially offset debtor's checking account against debtor's debt to bank, thereby indirectly increasing value of guarantor's junior secured interest; trustee may reach under 11 USCS § 547 any party who inequitably benefits from 11 USCS § 553 setoff during ***preference*** period. In re Prescott (1986, CA7 Wis) 805 F2d 719, CCH Bankr L Rptr P 71497 (criticized in Chrysler Credit Corp. v Hall (2004, ED Va) 312 BR 797, 43 BCD 125, 52 CBC2d 919) and (criticized in Roberds, Inc. v Broyhill Furniture (In re Roberds, Inc.) (2004, BC SD Ohio) 315 BR 443, 43 BCD 200) and (criticized in Phoenix Rest. Group, Inc. v Denny's Corp. (In re Phoenix Rest. Group, Inc.) (2005, BC MD Tenn) 53 CBC2d 1348) and (criticized in Intercontinental Polymers, Inc. v Equistar Chems., LP (In re Intercontinental Polymers, Inc.) (2005, BC ED Tenn) 359 BR 868, 44 BCD 183, 54 CBC2d 710) and (criticized in Bogdanov v Avnet, Inc. (In re Amherst Techs., LLC) (2010, BC DC NH) 2010 BNH 27) and (criticized in Bogdanov v Avnet, Inc. (2011, DC NH) 2011 DNH 153) and (criticized in HB Logistics, LLC v Pilot Travel Ctrs. (In re HB Logistics, LLC) (2013, BC ND Ala) 58 BCD 248, 70 CBC2d 1265).

Since 11 USCS § 553 bestows secured status upon creditor for amount of setoff, and payments to secured creditor are not preferential, 11 USCS § 547 cannot be used to avoid amount of setoff. Braniff Airways v Exxon Co. (1987, CA5 Tex) 814 F2d 1030, 16 CBC2d 1447, CCH Bankr L Rptr P 71794.

Defendant transferee in ***preference*** action under 11 USCS § 547(b) was not precluded by 11 USCS § 502(d) from asserting affirmative defense of prepetition setoff under 11 USCS § 553 merely because trustee has asserted that defendant has failed to disgorge unrelated ***preference***; in asserting defense of setoff, defendant was not seeking to assert "claim" as term is used in 11 USCS § 502(d). Durham v SMI Industries Corp. (1989, CA4 NC) 882 F2d 881, 1 Fourth Cir & Dist Col Bankr Ct Rep 200, CCH Bankr L Rptr P 73065.

Where prepetition setoff is asserted in defense to proceeding brought by trustee under 11 USCS § 547(b), court must first determine whether setoff is valid under 11 USCS § 553; only if court finds setoff invalid, and further concludes that no right of setoff exists in ***bankruptcy***, is § 547(b) applied. Durham v SMI Industries Corp. (1989, CA4 NC) 882 F2d 881, 1 Fourth Cir & Dist Col Bankr Ct Rep 200, CCH Bankr L Rptr P 73065.

Bank's setoff of amounts in debtor's account against debt to bank more than 7 months prepetition is not avoidable as ***preference*** made to insider within one year of ***bankruptcy*** under 11 USCS § 547 where 11 USCS § 553(a)(3) invalidates prearranged buildup of bank account in anticipation of setoff only when deposits are made within 90 days of ***bankruptcy*** filing. Pineview Care Ctr. v Mappa (In re Pineview Care Ctr.) (1993, DC NJ) 152 BR 703, 24 BCD 315, 28 CBC2d 1470.

Bank's setoff of funds in debtor's account against amount debtor owed it cannot be avoided as ***preference*** under 11 USCS § 547 because setoffs do not fall within scope of that section. In re Intermountain Porta Storage, Inc. (1986, BC DC Colo) 59 BR 793, 1 UCCRS2d 987, affd (1987, DC Colo) 74 BR 1011, 4 UCCRS2d 608.

11 USCS § 547 is inapplicable where setoff is involved because 11 USCS § 553 is only provision that limits prebankruptcy setoffs. In re Hinson (1986, BC WD Tenn) 65 BR 675.

To extent that operating interest owner of wells had possession, prepetition, of proceeds of production relating to Chapter 11 debtor's working interest, operating interest owner was secured party in possession of collateral and was entitled to apply those proceeds to debtor's operating expenses; operating interest owner was merely exercising its lien rights, not exercising improper setoff under 11 USCS § 553, nor was it receiving preferential or fraudulent transfer under 11 USCS § 547 or 11 USCS § 548. In re Wilson (1987, BC ND Tex) 69 BR 960.

Where 11 USCS § 553 is applicable to debt owed to Chapter 11 debtor by Commodity Credit Corporation and debt owed by debtor to CCC, 11 USCS § 547 cannot be utilized to undo its effect. In re Brooks Farms (1987, BC ED Wis) 70 BR 368, 15 BCD 674, CCH Bankr L Rptr P 71706.

Bankruptcy Code does not create, but rather recognizes right of setoff under 11 USCS § 553; setoff has similar substantive effect as ***preference*** and is commonly viewed as type of ***preference*** permitted by statute; once right of setoff has been established, 11 USCS § 547 cannot be utilized. In re Moses (1988, BC MD Fla) 91 BR 994.

Setoff is not proper defense to 11 USCS § 547(b) ***preference*** action because theory behind ***preference*** action is that preferential payments are brought back into ***bankruptcy*** estate for equitable distribution in accordance with priorities of ***Bankruptcy*** Code and to apply setoff in ***preference*** action would defeat very nature of action. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

Prepetition setoffs are not considered "transfers' for 11 USCS § 547 ***preference*** purposes; prepetition setoffs are to be dealt with as prescribed by 11 USCS § 553(b), whose particular provisions must be taken to override general provisions of § 547. Jarboe v United States Small Business Admin. (1992, BC ND Okla) 137 BR 835, 22 BCD 1157, CCH Bankr L Rptr P 74696 (criticized in In re Nuclear Imaging Sys. Inc. (2000, BC ED Pa) 260 BR 724, 45 UCCRS2d 218).

If transfers of proceeds from each debtors' deposit account to creditor were viewed as ***preferences***, creditor demonstrated that transfers were protected by ordinary course of business defense of 11 USCS § 547(c)(2); when analyzed under 11 USCS § 553, creditor's application of funds in each debtors' account was recoupment and not setoff or otherwise unauthorized post-petition transfer, and transfers could not be recovered by debtors. Warsco v Household Bank F.S.B. (In re Various Cases) (2002, BC ND Ind) 272 BR 246, 89 AFTR 2d 1210.

Where pre-petition ***bankruptcy*** transfer was at heart of ***preference*** action, it first must be determined if setoff was valid for purposes of 11 USCS § 553 because 11 USCS § 547(b) could apply only if setoff was not valid for ***bankruptcy*** purposes; as creditor exercised valid setoff which was preserved for ***bankruptcy*** purposes when it applied debtor's income tax refund to past-due debt, debtor could not utilize § 547(b) to avoid this transaction. Nase v GNC Cmty. Fed. Credit Union (In re Nase) (2003, BC WD Pa) 297 BR 12, 41 BCD 185, 50 CBC2d 1242, 92 AFTR 2d 5944.

Customer's setoff rights under 11 USCS § 553 were not avoidable either as preferential transfers under 11 USCS § 547(b) or fraudulent transfers under 11 USCS § 548 because setoffs were not transfers of property of estate under 11 USCS § 101. Claybrook v Metro Auto Xpress, LLC (In re Am. Remanufacturers, Inc.) (2008, BC DC Del) 50 BCD 84, 60 CBC2d 129.

Bankruptcy debtor was unable to recover social security withholdings under section relating to avoidance of transfers because setoffs were not transfers. Congress intended to exclude setoff from transfer definition to ensure that setoff was treated exclusively under another code section. Damas v United States (In re Damas) (2014, BC DC Mass) 504 BR 290.

Court granted SSA's motion to dismiss Chapter 7 debtor's adversary proceeding seeking determination that he was entitled under 11 USCS § 547 to recover $ 3,710 in retirement benefits SSA withheld during 90-day period preceding date he declared ***bankruptcy***, to recoup part of $ 31,148 in disability benefits he was overpaid; SSA's action in withholding debtor's retirement benefits based on its pre-petition overpayment of disability benefits constituted pre-petition setoff that was governed by 11 USCS § 553 and could not be avoided as preferential transfer under § 547, and even if debtor had sought to avoid SSA's offset under § 553, he would not have prevailed because SSA did not improve its position during ***preference*** period. Ahmad v United States, SSA (In re Ahmad) (2015, BC ED Pa) 536 BR 152.

Unpublished Opinions

Unpublished: Debtor could amend its complaint under Fed. R. Civ. P. 15(c)(1)(B) to add 11 USCS § 553(b) setoff claim even though statute of limitations had expired on that claim under 11 USCS § 546, as it arose out of same transaction or occurrence that gave rise to its 11 USCS § 547(b) claim. Appalachian Oil Co. v Ky. Lottery Corp. (In re Appalachian Oil Co.) (2011, BC ED Tenn) 2011 Bankr LEXIS 3254.

26. 11 USCS § 727

Fact that payment made by debtor may be recoverable as ***preference*** per 11 USCS § 547 has no bearing on question of whether payment was made to one creditor with intent to hinder, delay or defraud another creditor within meaning of 11 USCS § 727(a)(2). Stewart Tilghman Fox & Bianchi, P.A. v Kane (In re Kane) (2012, BC SD Fla) 470 BR 902, 23 FLW Fed B 365, affd, motion den, as moot (2013, SD Fla) 485 BR 460, CCH Bankr L Rptr P 82408, affd (2014, CA11 Fla) 755 F3d 1285, 59 BCD 193, 71 CBC2d 1459, 25 FLW Fed C 9, cert den (2014, US) 135 S Ct 718, 190 L Ed 2d 441 and (criticized in Taylor v Snyder (In re Snyder) (2015, BC ND Ill) 2015 Bankr LEXIS 4136).

27. Other provisions

Trustee may not recover as preferential transfers under 11 USCS § 547 payments made by Chapter 11 debtor to secured party under purchase money aircraft chattel mortgage where parties had entered into postpetition stipulation under 11 USCS § 1110 wherein debtor agreed to perform its obligations under note and mortgage and to cure any existing default because debtor's estate would be unjustly enriched if permitted to avoid conditions which premised its possession of aircraft; allowing recovery of prepetition payments as ***preferences*** creates arbitrary results contrary to congressional intent of § 1110. Seidle v GATX Leasing Corp. (1985, CA11 Fla) 778 F2d 659, 14 BCD 77, 13 CBC2d 1308, CCH Bankr L Rptr P 70898.

Chapter 7 trustee could not bring ***preference*** suit to recoup payments made pursuant to validly assumed executory contract, since 11 USCS §§ 365 and 547 were mutually exclusive avenues for trustee. In re Superior Toy & Mfg. Co. (1996, CA7 Ill) 78 F3d 1169, 28 BCD 933, 35 CBC2d 637, CCH Bankr L Rptr P 76970.

Enactment of new ***Bankruptcy*** Code eliminated confusion in prior law, under which it had appeared that provision of former 11 USCS § 96 relating to pre-1938 judgment overlapped provisions of former USCS § 107, dealing with same general subject; 11 USCS § 547, unlike former ***Bankruptcy*** Act, refers simply to transfers of debtor's property, and former 11 USCS § 107 of ***Bankruptcy*** Act has been eliminated in ***Bankruptcy*** Code as separate provision. In re Thomas (1980, BC WD Va) 7 BR 389, 30 UCCRS 750.

Prepetition security interest may extend to property which is acquired postpetition through 11 USCS § 547 ***preference*** action and whether it does so is determined by security agreement and applicable non-***bankruptcy*** law pursuant to 11 USCS § 552(b). In re Cambria Clover Mercantile Co. (1985, BC ED Pa) 51 BR 983, 13 BCD 463.

Fact that transferees of preferential and fraudulent conveyances from Chapter 7 corporate debts received their own Chapter 7 discharge under 11 USCS § 524 does not bar trustee from setting aside transfers and recovering properties transferred for benefit of corporate estate under 11 USCS §§ 547 and 548; even assuming that revocation of transferees' discharge is condition precedent to trustee's right to recover, trustee has clearly established grounds for revocation where debtors failed to disclose transfers in their schedules. In re Craft Plumbing Service (1985, BC MD Fla) 53 BR 654.

Although ***Bankruptcy*** Courts do have authority under 11 USCS § 105(a) to take equitable steps not specifically authorized by ***bankruptcy*** laws, that section does not give courts authority to contravene specific provisions of Code; therefore purchaser of precious metals from debtor may not rely on 11 USCS § 105 to estop trustee from avoiding transaction as ***preference*** on grounds of debtor's fraud because such request that court take superior cognizance of 11 USCS § 105(a) over specific provisions of both 11 USCS §§ 547 and 544 is impermissible. In re International Gold Bullion Exchange, Inc. (1985, BC SD Fla) 53 BR 660, 42 UCCRS 156.

Issues whether health care provider's pre-petition payments withheld from debtor and its health care affiliates fell within scope of debtor's property interest under 11 USCS § 547, were used in ordinary course of business under 11 USCS § 363 and, hence, not subject to turnover under 11 USCS § 542, or were debt owed debtor under 11 USCS § 553 were not susceptible of determination on Rule 12(b)(6) motion; however, plaintiff pled sufficiently colorable claims of prepetition setoff under 11 USCS § 553(b) and avoidance of ***preference*** transfer under 11 USCS § 547 to withstand dismissal. Pardo v NYLCare Health Plans, Inc. (In re APF Co.) (2001, BC DC Del) 274 BR 408.

To extent creditor was pre-transfer creditor, it's pre-petition lien would attach to any property recoverable by trustee as 11 USCS § 548 fraudulent conveyance, and under those circumstances its claim was superior to that of trustee; to extent it was post-transfer creditor it's pre-petition lien would attach to any property recoverable by trustee as fraudulent conveyance under theory of actual fraud, and it's claim was superior to that of trustee; however, because creditor had no independent nonbankruptcy cause of action for preferential transfer, property recoverable by trustee as 11 USCS § 547 ***preference*** was to be preserved for benefit of estate and lien did not attach. Coleman v J&B Enters. (In re Veterans Choice Mortg.) (2003, BC SD Ga) 291 BR 894, 50 CBC2d 825.

In action brought after confirmation of Chapter 11 ***bankruptcy*** case, fund administering estate was not required to file action seeking preferential transfer under 11 USCS § 502; § 502 addressed allowability of creditor's proof of claim where creditor received voidable transfer, not debtor's ability to commence ***preference*** action where debtor fails to object to creditor's claim. AmeriServe Food Distrib., Inc. v Transmed Foods, Inc. (In re AmeriServe Food Distrib., Inc.) (2004, BC DC Del) 315 BR 24, 43 BCD 190, 52 CBC2d 1201.

Bankruptcy trustee was able to avoid unperfected lien on assets of involuntary Chapter 11 debtor under 11 USCS § 544(a) and Mass. Gen. Laws ch. 106, § 9-317; 11 USCS § 546 was inapplicable, 11 USCS § 547(e)(2) was expressly limited in ***preference*** analysis, and automatic stay exception under 11 USCS § 362(b)(3) operated independently of avoidance powers. Ostrander v Gardner (In re Millivision, Inc.) (2005, BC DC Mass) 331 BR 515, 45 BCD 125, 54 CBC2d 1862, affd (2006, BAP1) 2006 Bankr LEXIS 514 and affd (2007, CA1) 474 F3d 4, 47 BCD 177, CCH Bankr L Rptr P 80832.

Where contracting parties contended that assumption of their contracts and subcontracts transformed them from being general unsecured creditors to priority administrative claimants, thus precluding trust, which sought to avoid allegedly preferential transfers from satisfying requirements of 11 USCS § 547(b)(5); trust was entitled to partial summary judgment regarding defense, as to any contract or subcontract assumed by debtors and assigned to successful bidder in connection with purchase of debtors' assets, where contract or subcontract was not listed on schedule filed with sale order, as contract or subcontract was not assumed by debtors under 11 USCS § 365. IT Litigation Trust v Alpha Analytical Labs (In re IT Group, Inc.) (2005, BC DC Del) 331 BR 597, 45 BCD 151.

Where creditor was issued check pre-petition for services rendered pre-petition, but actual payment occurred post-petition when check was honored, defenses of contemporaneous new value and payment in ordinary course of business which would have been available under 11 USCS § 547 had check been cashed pre-petition were nevertheless not available under 11 USCS § 549. Mukamal v Enriquez (In re Rx Cardiovascular Specialties, Inc.) (2006, BC SD Fla) 355 BR 873, 20 FLW Fed B 70.

Chapter 7 trustee had authority to assert turnover action under 11 USCS § 542 to determine ownership extent that debtor had in personal property that was purportedly transferred to debtor's non-filing spouse and daughter without first bringing action under 11 USCS §§ 544, 547, or 548, because trustee alleged that when case was filed debtor had controlled property and that property belonged to estate under 11 USCS § 541. Cohen v Ulz (In re Ulz) (2008, BC ND Ill) 388 BR 865.

Bankruptcy court had authority under 11 USCS § 1521(a)(5) and (b) to vacate maritime attachments foreign creditors obtained, pursuant to Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions B, on funds two Danish corporations held in New York banks, and to order transfer of those funds to court in Denmark that had jurisdiction over ***bankruptcy*** action corporations filed; court rejected creditors' argument that funds could not be transferred to Danish court under Chapter 15 of U.S. ***Bankruptcy*** Code because debtors had not commenced case under Chapters 7 or 11 of ***Bankruptcy*** Code, and that only way to dissolve attachments was through ***preference*** avoidance action filed under 11 USCS § 547. In re Atlas Shipping A/S (2009, BC SD NY) 404 BR 726, 51 BCD 145, 61 CBC2d 1141, 2009 AMC 1150 (criticized in In re AJW Offshore, Ltd. (2013, BC ED NY) 488 BR 551).

Where debtor who was doing business as construction company made ***payment*** to creditor for materials within ***90 days*** of filing his Chapter 7 petition, trustee could not avoid transfer because 11 USCS § 547(c)(9) defense applied, as debtor's debts were not primarily consumer debts as defined in 11 USCS § 101(8) and amount transferred to creditor was less than $ 5,850; in making this determination, court found that trustee improperly included IRS claim as consumer debt where amounts owed were primarily liabilities for unpaid employee withholding taxes. Hopkins v Marble (In re Kempkers) (2012, BC DC Idaho) 68 CBC2d 703.

Denial of discharge was warranted because debtor failed to keep or preserve sufficient records and papers from which debtor's financial condition or business transactions might be ascertained; trustee was unable to determine whether debtor made preferential or fraudulent transfers which would be voidable and recoverable for benefit of estate. Grossman v Garabedian (In re Garabedian) (2014, BC DC Mass) 520 BR 326, 72 CBC2d 669.

Transfer from family trust to Chapter 7 debtor's father to reimburse him for expenses charged on his credit card by debtor, even if it were deemed to be from debtor, was at most preferential payment to debtor's father of valid expenses, and ***preferences*** were not type of transfers that could block debtor's discharge because they did not involve moral turpitude; further, debtor did not omit listing payment by trust to his father knowingly and fraudulently, as he believed trust was separate entity and that schedule did not ask for transfers from parties other than himself. Moyer v Geer (In re Geer) (2014, BC ND Ga) 522 BR 365.

Bankruptcy court found that Chapter 7 trustee was precluded under safe harbor provision of 11 USCS § 546 from recovering transfers LLC made to bank to pay debt that was owed by business LLC owned, to extent that payments were preferential transfers under 11 USCS § 547 or constructively fraudulent transfers under 11 USCS § 548 or 740 ILCS 160/5, because they were made in connection with securities contract, and it dismissed trustee's claim under § 547 and recommended that district court dismiss trustee's claims under 11 USCS §§ 544, 548, and 740 ILCS 160/5 with prejudice to extent they were based on allegations of constructive fraud. Krol v Key Bank N.A. (In re MCK Millennium Ctr. Parking, LLC) (2015, BC ND Ill) 532 BR 716 (criticized in FTI Consulting, Inc. v Merit Mgmt. Grp., LP (2015, ND Ill) 541 BR 850, CCH Bankr L Rptr P 82875).

Unpublished Opinions

Unpublished: ***Bankruptcy*** court dismissed corporate debtor's Chapter 11 ***bankruptcy*** case, pursuant to 11 USCS § 1112(b), because debtor's primary asset was adversary proceeding it filed against its former CEO and his wife, most of claims debtor alleged in its adversary proceeding were state-law claims which were subject to arbitration under settlement agreement debtor entered with its former CEO, and debtor did not have ability to propose viable reorganization plan until arbitrator resolved those claims; although debtor asserted claims under 11 USCS §§ 547 and 548 that were not subject to arbitration, seeking recovery of preferential transfers and fraudulent transfers former CEO allegedly made, court found that debtor's likelihood of prevailing on those claims was sufficiently doubtful and that continuation of debtor's case to litigate those claims was inappropriate. In re Stingfree Techs., Inc. (2009, BC ED Pa) 2009 Bankr LEXIS 3023, affd, motion den (2010, ED Pa) 427 BR 337.

II. ELEMENTS OF VOIDABLE *PREFERENCE*

A. In General

28. Generally

Preference exists under 11 USCS § 547(b) when debtor makes ***payment*** or other transfer to certain creditor or creditors, and not to others. In re George Rodman, Inc. (1986, CA10 Okla) 792 F2d 125, 14 CBC2d 1230, CCH Bankr L Rptr P 71169.

In general, voidable ***preference*** under 11 USCS § 547 is transfer by debtor of his property to creditor on account of antecedent debt within ***90 days*** of ***bankruptcy*** whereby creditor receives more than he would have received had debtor liquidated under Chapter 7. Coral Petroleum, Inc. v Banque Paribas-London (1986, CA5 Tex) 797 F2d 1351, CCH Bankr L Rptr P 71434, reh den, en banc (1986, CA5 Tex) 801 F2d 398 and (criticized in Mukamal v Bank of Am. (In re Egidi) (2008, BC SD Fla) 386 BR 884, 59 CBC2d 1003, 21 FLW Fed B 278).

Purpose of transfer is not dispositive of question whether it qualifies as avoidable ***preference*** under 11 USCS § 547(b) because it is effect of transaction, rather than debtor's or creditor's intent, that is controlling. In re T.B. Westex Foods (1992, CA5 Tex) 950 F2d 1187, 26 CBC2d 682, CCH Bankr L Rptr P 74448.

One way in which federal ***bankruptcy*** laws seek to equalize positions of similarly situated creditors is by giving trustees power to set aside so-called preferential transfers of debtor's property; thus, trustee may ordinarily avoid transfer of debtor's interest in property made to creditor on account of antecedent debt if that transfer occurred within ***90 days*** of date of filing of debtor's ***bankruptcy*** petition, i.e., transfer may be avoided under 11 USCS § 547(b) if it involves property of debtor and transfer reduces amount of ***bankruptcy*** estate available for ***payment*** of other creditors. Mitsui Mfrs. Bank v Unicom Computer Corp. (In re Unicom Computer Corp.) (1994, CA9) 13 F3d 321, 94 CDOS 141, 94 Daily Journal DAR 244, 25 BCD 152, 30 CBC2d 655, CCH Bankr L Rptr P 75708.

Escrow company was financial conduit rather than transferee and its transfer of insolvent debtor's funds to a finance company was preferential transfer where it occurred while debtor was insolvent, within ninety days of filing of ***bankruptcy*** petition, and would allow finance company to receive more than it would otherwise receive from estate; although finance company had conversion claim against debtor, funds it sought could not be reasonably traced or identified, so it could not assert property rights over them. Bailey v Big Sky Motors, Ltd. (In re Ogden) (2002, CA10 Utah) 314 F3d 1190, 40 BCD 208, CCH Bankr L Rptr P 78794.

Prepetition transferees of transfers avoidable under 11 USCS §§ 544, 545, 547, 548, and 553 are not entitled to formal notice of ***bankruptcy*** proceedings; such notice is not condition precedent to pursuit of ***preference*** action against party in interest. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1986, BC ED Tenn) 66 BR 349, 15 BCD 249.

Motion to dismiss post confirmation estate's action to recover alleged preferential transfers was granted, where complaint did not provide nature and amounts of debts, dates of payment transactions, and amounts of payment transactions. TWA Inc. Post Confirmation Estate v Marsh USA Inc. (In re TWA Inc. Post Confirmation Estate) (2004, BC DC Del) 305 BR 228, 42 BCD 117 (criticized in Neilson v Southern (In re Webvan Group, Inc.) (2004, BC DC Del) 2004 Bankr LEXIS 269) and (criticized in Neilson v Cor Karaffa (In re Webvan Group, Inc.) (2004, BC DC Del) 42 BCD 198) and (criticized in Pernick v Computershare Trust Co. (2015, DC Colo) 2015 US Dist LEXIS 132833).

Whether debtor's repayment of advanced funds to insider within one year of filing of ***bankruptcy*** petition constituted avoidable ***preference*** under 11 USCS § 547(b) or contemporaneous exchange of new value protected by 11 USCS § 547(c), remained factual issue to be resolved in adversary trial. Tomsic v Stockard (In re Salience Assocs.) (2007, BC DC Mass) 371 BR 571, 48 BCD 137.

11 USCS § 547, 11 USCS § 548(a), and 11 USCS § 544(b) all permit only avoidance of questioned transfer; recovery of transfer is different matter. Richardson v Huntington Nat'l Bank (In re CyberCo Holdings, Inc.) (2008, BC WD Mich) 382 BR 118, 49 BCD 139.

29. Formal requirements, generally

Trustee may avoid transfer under 11 USCS § 547(b) where transfer: (1) benefits creditor; (2) is on account of antecedent debt; (3) is made while debtor was insolvent; (4) is within 90 days of ***bankruptcy***; and (5) enables creditor to receive larger share of estate than if transfer had not been made. Union Bank v Wolas (1991) 502 US 151, 112 S Ct 527, 116 L Ed 2d 514, 91 Daily Journal DAR 15145, 22 BCD 574, 25 CBC2d 1011, CCH Bankr L Rptr P 74296A, on remand, remanded on other grounds (1994, CA9) 40 F3d 317, 94 CDOS 8880, 94 Daily Journal DAR 16511.

In order to establish voidable ***preference*** under 11 USCS § 547(b), trustee must prove each of following 7 conditions: (1) transfer (2) of debtor's property (3) to or for benefit of creditor; (4) for or on account of antecedent debt (5) made while debtor was insolvent (6) within 90 days of ***bankruptcy*** filing (7) that enables creditor to receive more than he would under Chapter 7 liquidation. United States v Daniel (In re R & T Roofing Structures & Commercial Framing) (1989, CA9 Nev) 887 F2d 981, 19 BCD 1546, CCH Bankr L Rptr P 73089, 89-2 USTC P 9607, 64 AFTR 2d 5835.

11 USCS § 547 allows trustee to void any transfer of debtor's property made within 90 days of ***bankruptcy*** filing where transfer: (1) is to or for benefit of creditor; (2) is for or on account of antecedent debt; (3) is made while debtor was insolvent; and (4) enables creditor to receive more than he/she would in liquidation. In re Muncrief (1990, CA8 Ark) 900 F2d 1220, 20 BCD 665, 23 CBC2d 427.

In order for transfer to be set aside as preferential it must be shown that transfer was: (1) of interest of debtor in property; (2) to or for benefit of creditor; (3) for or on account of antecedent debt owed by debtor before transfer was made; (4) made while debtor was insolvent; (5) made on or within 90 days of filing of ***bankruptcy*** petition; and (6) one that enabled creditor to receive greater percentage of its claim than it would under normal distributive provisions in liquidation case. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

Trustee may avoid any prepetition transfer of debtor's assets if transfer: (1) is to or for benefit of creditor; (2) is for antecedent debt owed by debtor before transfer; (3) is made while debtor was insolvent; (4) is made within 90 days of ***bankruptcy*** filing; and (5) enables creditor to receive more than such creditor would receive if debtor liquidated and distributed estate to all creditors. In re Food Catering & Housing, Inc. (1992, CA9 Wash) 971 F2d 396, 92 CDOS 6636, 92 Daily Journal DAR 10704, CCH Bankr L Rptr P 74811.

11 USCS § 547(b) requires that in order for transfer to be subject to avoidance as a ***preference***: (1) there must be transfer of interest of debtor in property; (2) on account of antecedent debt; (3) to or for benefit of creditor; (4) made while debtor was insolvent; (5) within 90 days prior to commencement of ***bankruptcy*** case; (6) that left creditor better off than it would have been if transfer had not been made and creditor had asserted its claim in Chapter 7 liquidation. In re Interior Wood Prods. Co. (1993, CA8 Minn) 986 F2d 228, 23 BCD 1676, CCH Bankr L Rptr P 75154.

Under 11 USCS § 547(b), trustee may recover certain transfers made by debtor within 90 days before ***bankruptcy*** petition was filed; transfer is avoidable if 6 elements are shown: (1) there must be transfer of interest of debtor in property; (2) to or for benefit of creditor; (3) for or on account of antecedent debt; (4) made while debtor was insolvent; (5) made on or within 90 days before date of filing petition; and (6) one that enables creditor to receive more than such creditor would receive in Chapter 7 liquidation of estate. Hansen v MacDonald Meat Co. (In re Kemp Pac. Fisheries) (1994, CA9 Wash) 16 F3d 313, 94 CDOS 841, 94 Daily Journal DAR 1411, 30 CBC2d 991, CCH Bankr L Rptr P 75694.

Transfer may be avoided under 11 USCS § 547(b) if trustee proves: (1) that transfer was transfer of debtor's interest in property; (2) to or for benefit of creditor; (3) on account of debtor's antecedent debt; (4) made during 90-

day period preceding debtor's filing for ***bankruptcy*** relief, or, if creditor is "insider," made within 1 year preceding filing; (5) made at time when debtor was insolvent; and (6) enabled creditor to receive more than it would receive in Chapter 7 distribution. Dent v Martin (1988, SD Fla) 86 BR 290.

In order to prevail on ***preference*** claim under 11 USCS § 547(b), trustee must establish following elements: (1) there was transfer of interest of debtor in property; (2) transfer was to or for benefit of creditor; (3) transfer was for or on account of antecedent debt; (4) debtor was insolvent at time of transfer; (5) transfer was made between 90 days and one year before date of debtor's ***bankruptcy*** filing; and (6) transfer enabled creditor to receive more than it would have received in Chapter 7 liquidation. Laws v United Mo. Bank of Kan. City, N.A. (1995, WD Mo) 188 BR 263, 29 UCCRS2d 266, affd (1996, CA8 Mo) 98 F3d 1047, 29 BCD 1148, CCH Bankr L Rptr P 77129, 30 UCCRS2d 1155, reh, en banc, den (1996, CA8) 1996 US App LEXIS 30754 and cert den (1997) 520 US 1168, 137 L Ed 2d 540, 117 S Ct 1432 and (criticized in Moseley v Arth (In re Vendsouth, Inc.) (2003, BC MD NC) 2003 Bankr LEXIS 1437).

11 USCS § 547 provides that trustee may avoid any transfer of property of debtor: (1) to or for benefit of creditor; (2) for or on account of antecedent debt owed by debtor before transfer was made; (3) made while debtor was insolvent, (4) within ***90 days*** before filing of petition, and (5) that enables creditor to recover more than it would receive if case was Chapter 7 case, the transfer had not been made, and creditor received ***payment*** for debt as provided in ***Bankruptcy*** Code; since debtor's property is exempt, both real and personal, and transfer of homestead was also made within ***90 days*** of filing of petition, levy and sale constitute a preferential transfer which trustee can avoid. In re Smith (1982, BC MD Fla) 21 BR 345.

Preference occurs under 11 USCS § 547 where transfer of property is made (1) to or for benefit of creditor, (2) on account of preexisting debt, (3) while debtor was insolvent, (4) within 90 days of filing of ***bankruptcy*** petition, or if certain conditions are met, during full year prior to ***bankruptcy*** under 11 USCS § 547(b)(4)(B), and (5) realizing more for creditor than he would have received in ***bankruptcy*** liquidation and distribution, absent such transfer. In re Teasley (1983, BC WD Ky) 29 BR 314.

In order to prevail on action to avoid preferential transfer under 11 USCS § 547, trustee must prove: (1) transfer of debtor's property; (2) to or for benefit of creditor; (3) on account of antecedent debt; (4) made within 90 days (or 1 year if creditor was insider) prior to filing of ***bankruptcy*** petition; (5) at time when debtor was insolvent; (6) which enabled creditor to receive more than it would have in Chapter 7 distribution. In re Day Telecommunications, Inc. (1987, BC ED NC) 70 BR 904.

Burden of persuasion under 11 USCS § 547 that voidable transfer occurred is on complaining party by clear and convincing evidence, and though there is rebuttable presumption of insolvency during 90-day ***preference*** period, party must prove: (1) transfer was to or for benefit of creditor; (2) for antecedent debt owed by debtor; (3) made while debtor was insolvent; (4) within 90 days of petition filing; and (5) causing creditor to receive more than he would receive had case been filed under Chapter 7. In re Cleveland Graphic Reproduction, Inc. (1987, BC ND Ohio) 78 BR 819, 16 BCD 876.

In ***preference*** action brought by debtor in ***bankruptcy***, debtor was awarded summary judgment where creditor admitted that elements of 11 USCS § 547(b)(1), (2) and (4) were satisfied; as to § 547(b)(3), 11 USCS § 547(f) created presumption of insolvency that creditor failed to rebut and, as to § 547(b)(5), affidavit on behalf of debtor provided that debtor would not be able to pay 100 percent dividend to unsecured creditors such as creditor. Smith Rd. Furniture, Inc. v IBC Group, Inc. (In re Smith Rd. Furniture, Inc.) (2003, BC SD Ohio) 304 BR 793.

To prevail on claim against alleged insider under 11 USCS § 547, Chapter 7 trustee must prove transfer at issue was (1) for benefit of creditor, (2) for antecedent debt owed before date of transfer, (3) made while debtor was insolvent, (4) made between 90 days and one year before ***bankruptcy*** filing, and (5) enabled creditor to receive more than it would have received under Chapter 7 if transfer had not been made; trustee must prove all these elements by preponderance of evidence. Seitter v Wedow (In re Tankersley) (2008, BC DC Kan) 382 BR 522.

In order to establish voidable ***preference*** under 11 USCS § 547, trustee must establish: (1) transfer; (2) of debtor's property; (3) to or for benefit of creditor; (4) for or on account of antecedent debt; (5) made while debtor was

insolvent; (6) within 90 days before original filing of petition; (7) which enables creditor to receive more than he would receive under Chapter 7 liquidation. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

30. --Fulfillment of all elements

For preferential transfer to exist, all 5 statutory criteria of 11 USCS § 547 must be proven by trustee by preponderance of evidence and failure to meet burden as to any element insulates transfer from trustee; even if all 5 elements are present, trustee may not be able to exercise his powers of avoidance if creditor can demonstrate existence of statutory defense which would except transfer. In re Cockreham (1988, DC Wyo) 84 BR 757.

Where creditor, that provided staffing and other services for debtor, received payment from debtor immediately prior to debtor's ***bankruptcy*** filing for services that it had previously rendered on behalf of debtor, transfer clearly constituted preferential transfer within 11 USCS § 547(b). Authentic Fitness Corp. v Dobbs Temp. Help Servs., Inc. (In re Warnaco Group, Inc.) (2006, SD NY) 97 AFTR 2d 958.

Transfers are not avoidable under 11 USCS § 547 where there is no proof of first 2 elements essential to establishment of preferential transfer. In re Ocean Dev. of America (1983, BC SD Fla) 29 BR 129.

Garnishment is not preferential transfer when debtor in possession establishes only 2 of 5 elements of ***preference*** as set forth in 11 USCS § 547(b). In re Pendleton (1984, BC WD Ky) 40 BR 306, 38 UCCRS 1805.

All 5 elements set forth in 11 USCS § 547(b) must be found before ***preference*** may be avoided. In re Harley (1984, BC ND Ga) 41 BR 276.

Court denies summary judgment on issue of whether debtor's fuel assistance grant applied prepetition by power company is preferential transfer under 11 USCS § 547 because, although fuel assistance grants have been held property of estate, power company must address § 547(b)'s 5 elements of ***preference***. In re Kennedy (1985, BC ED Pa) 45 BR 624, CCH Bankr L Rptr P 70206.

Where creditor bank made pre-petition transfer of $ 31,207,000 to supplier of Chapter 11 debtor holding company, such transfer is recoverable as avoidable ***preference*** under 11 USCS § 547(b) where undisputed facts indicate that bank's debit of creditor's account satisfies all five elements of § 547(b). Bergner v Bank One, N.A. (In re P.A. Bergner & Co. Holding Co.) (1995, BC ED Wis) 187 BR 964, affd in part and revd in part on other grounds, remanded (1998, CA7 Wis) 140 F3d 1111, 32 BCD 536, CCH Bankr L Rptr P 77688, 35 UCCRS2d 373, cert den (1998) 525 US 964, 119 S Ct 409, 142 L Ed 2d 332.

In ***bankruptcy preference*** action ***bankruptcy*** court found, in addressing solvency, that commercial enterprise was going concern if it was actively engaged in business with expectation of indefinite continuance. Silverman Consulting, Inc. v Hitachi Power Tools, U.S.A., Ltd. (In re Payless Cashways, Inc.) (2003, BC WD Mo) 290 BR 689, 50 CBC2d 82.

Trustee failed, under 11 USCS § 547(b), to establish that transfers that were made by debtor to his father were voidable because evidence did not show that father was co-debtor on loan obligation, even though debtor originally thought that was case, and thus, trustee failed to show that father was creditor to debtor, which was required element under § 547(b). Schilling v Montalvo (In re Montalvo) (2005, BC WD Ky) 324 BR 619.

Where Chapter 7 trustee sought to recover certain transfers pursuant to 11 USCS § 547, trustee failed to prove that transfers were made for or on account of antecedent debt owed by debtor before each transfer was made, and also that transfers enabled transferee to receive more than he would have received had transfers not been made and he received payment for such debts to extent provided by provision of ***Bankruptcy*** Code St. Petersburg v Musselman (In re Energy Smart, Inc.) (2007, BC MD Fla) 381 BR 359 (criticized in Grayson Consulting, Inc. v Wachovia Sec., LLC (In re Derivium Capital, LLC) (2008, BC DC SC) 396 BR 184).

Although Chapter 11 trustee did not sufficiently allege fraud, insider status, or perpetuating debtor's insolvency on part of creditor bank, trustee stated claim for avoidance, pursuant to 11 USCS § 547(b), of unperfected liens on proceeds of motor vehicles that creditor caused to be auctioned off. Dixon v Am. Cmty. Bank & Trust (In re Gluth Bros. Constr.) (2009, BC ND Ill) 424 BR 379, findings of fact/conclusions of law, motion den (2010, BC ND Ill) 426 BR 771, 52 BCD 283.

While plaintiff Chapter 7 trustee was able to show several elements of ***preference*** under 11 USCS § 547(b) against defendant transferees, summary dismissal of that claim was denied; however, where elements of avoidance under 11 USCS § 544(a)(3), and constructive fraud under 11 USCS § 548(a)(1)(B) were not addressed, dismissal was proper. Rainsdon v Garcia (In re Garcia) (2011, BC DC Idaho) 465 BR 181, judgment entered (2012, BC DC Idaho) 2012 Bankr LEXIS 76.

Where judgment creditor garnished debtors' wages during period immediately prior to filing of their Chapter 7 ***bankruptcy***, all elements of preferential transfer were met, including that wage garnishments allowed creditor to receive more than she would have received in Chapter 7 case if transfers had not been made. McLane v Bostater (In re McLane) (2015, BC ND Ohio) 526 BR 238.

Unpublished Opinions

Unpublished: ***Bankruptcy*** trustee was entitled to summary judgment on his claim that defendant, part owner of debtor corporation, received ***preference*** in contravention of 11 USCS § 547(b) because owner was paid his entire debt of $ 19,000.00 on antecedent leases, at time when debtor's liabilities exceeded its assets leaving debtor insolvent, and payment allowed owner to receive more funds that he would have been entitled to in case under Chapter 7. Cole v Cortner (In re Cortner Container & Concrete Co.) (2007, BC ED Mo) 2007 Bankr LEXIS 264.

Unpublished: ***Bankruptcy*** trustee was entitled to summary judgment on his claim that defendant, part owner of debtor corporation, received ***preference*** in contravention of 11 USCS § 547(b) because owner received salary payment from debtor for services rendered, at time when debtor's liabilities exceeded its assets leaving debtor insolvent, and payment allowed owner to receive more funds that he would have been entitled to in case under Chapter 7. Cole v Cortner (In re Cortner Container & Concrete Co.) (2007, BC ED Mo) 2007 Bankr LEXIS 264.

31. Effect of intent

Intent of parties is not factor to consider when determining whether payment constitutes a voidable ***preference*** under 11 USCS § 547. In re Interior Wood Prods. Co. (1993, CA8 Minn) 986 F2d 228, 23 BCD 1676, CCH Bankr L Rptr P 75154.

In consideration of alleged ***preference*** under 11 USCS § 547, intent or motive is not material factor; it is effect of transaction rather than debtor's or creditor's intent that is controlling. In re Acme-Dunham, Inc. (1985, DC Me) 50 BR 734.

Underlying intent or motive for "transfer" as used in 11 USCS § 547(b) and defined in 11 USCS § 101 is irrelevant; instead, it is effect of transfer that is controlling. In re Service Bolt & Nut Co. (1989, BC ND Ohio) 98 BR 759.

Cross-motions for summary judgment on issue of whether company had received preferential transfers from debtor were denied due to disputed issues of genuine fact; testimony of parties was murky as to what they intended at time of transfers. Harbour v ABX Enters. (In re APS Holding Corp.) (2002, BC DC Del) 282 BR 795, 40 BCD 4.

32. Effect of debtor or creditor misconduct

Creditor's good faith in dealing with debtor is not factor to be considered in 11 USCS § 547 preferential payments provision. In re Saco Local Dev. Corp. (1982, BC DC Me) 25 BR 876.

Fraud by Chapter 11 debtor in precious metals transactions has no effect on and does not impair authority of trustee to recover precious metals under 11 USCS § 547 by virtue of fact that trustee exercises these derivative

powers for benefit and on behalf of general creditor body, without imputation of knowledge as to any alleged acts of fraud committed by debtor. In re International Gold Bullion Exchange, Inc. (1986, BC SD Fla) 60 BR 256.

Equity will not bar debtors from avoiding preferential judgment liens under 11 USCS § 547, even though judgments are based on debtors' wrongdoing, where preferential transfer deprives other creditors of their share of proceeds of assets. In re Rose (1988, BC WD Mo) 86 BR 193.

Refinancing of Chapter 7 debtor's' pickup did not effect avoidable ***preference*** under 11 USCS § 547(b) where refinancing lien lacked preferential effect for § 547 purposes even though manner in which creditor documented refinancing (by failing to perfect its security interest within ten days after transfer) created technical elements of ***preference***. Gregory v Community Credit Co. (In re Biggers) (2000, BC MD Tenn) 249 BR 873.

33. Miscellaneous

Preferential transfers must involve transfer of property of debtor, to or for benefit of creditor, and transfer must be for or on account of antecedent debt owed by debtor before such transfer was made; levy of writ of execution on judgment meets these elements; although levy is not personally performed by creditor, it is for creditor's benefit because it is an effort to satisfy a judgment in its favor; since debt arises on date that state court rendered its judgment in favor of creditor, transfer thereafter is made on account of antecedent debt. In re Rocky Mountain Ethanol Systems, Inc. (1981, BC DC NM) 21 BR 707.

Trustee establishes by preponderance of evidence each of elements of preferential transfer pursuant to 11 USCS § 547(b) where ***payments*** were made on account of antecedent debt, transfer was made while debtor was insolvent, check was honored within ***90-day*** period prior to ***bankruptcy*** filing, and creditor received more from transfer than it would have received in Chapter 7 liquidation. In re Richter & Phillips Jewelers & Distributors, Inc. (1983, BC SD Ohio) 31 BR 512, 13 Fed Rules Evid Serv 1674.

Third parties, including ***bankruptcy*** trustee, can override unperfected lien or collect back sums that were paid against ostensibly secured debt as ***preferences***. Howard v Burlington Northern & Santa Fe Ry. (In re Bangor & Aroostook R.R.) (2005, BC DC Me) 320 BR 226, 53 CBC2d 1435, affd (2007, DC Me) 2007 US Dist LEXIS 13125.

Stipulated or default judgment entered in avoidance action does not preclude defendants in recovery action from disputing avoidability of transfer and raising appropriate defenses. Dye v Sachs (In re Flashcom, Inc.) (2007, BC CD Cal) 361 BR 519, 47 BCD 220, affd (2013, CD Cal) 503 BR 99.

Entry of ***bankruptcy*** trustee's settlement with individual (whereby individual consented to entry of judgment avoiding transfer as preferential) did not avoid transfer; respondents, alleged intended beneficiaries of transfer, had constitutional right to defend 11 USCS § 547(b) claim asserted against them before they could be deprived of value of property transferred under 11 USCS § 550(a) (to recover amount of transfer from respondents, trustee had to prove elements of avoidance under 11 USCS § 547(b) by preponderance of evidence). Dye v Sachs (In re Flashcom, Inc.) (2007, BC CD Cal) 361 BR 519, 47 BCD 220, affd (2013, CD Cal) 503 BR 99.

B. Transfer

1. Generally

34. Generally

Even though state law might impose constructive trust on Chapter 11 debtor who failed to perfect transfer of real property to creditors by filing warranty deed, and 11 USCS § 541(d) does exclude from estate property held in trust, transfers are still of "property of estate" under 11 USCS § 547(b) where (1) no actual state decision has imposed trust, (2) state law of constructive trust is not determinative in ***bankruptcy***, and (3) equities favor ratable distribution among all creditors; thus transfers are voidable ***preferences***. In re Lewis W. Shurtleff, Inc. (1985, CA9 Cal) 778 F2d 1416, 13 CBC2d 1400, CCH Bankr L Rptr P 70902 (criticized in Sierra Invs., LLC v SHC, Inc. (In re SHC, Inc.) (2005, BC DC Del) 329 BR 438, 45 BCD 98, 58 UCCRS2d 573).

Definition of "transfer" in cases of transfers by check, need not be different under 11 USCS § 547(b) and (c)--there is no persuasive reason for giving word "transfer" different meaning, despite contention that date of delivery should only apply as date of transfer for exceptions to avoidance under § 547(c). In re Belknap, Inc. (1990, CA6 Ky) 909 F2d 879, CCH Bankr L Rptr P 73558, 16 UCCRS2d 408.

It is fact of attainment of superior interest, not creation of lien or rendering of judgment, that creates transfer under 11 USCS § 547 in both California and Arizona. In re Lane (1992, CA9) 980 F2d 601, 92 CDOS 9577, 92 Daily Journal DAR 16067, 23 BCD 1197, 27 CBC2d 1724, CCH Bankr L Rptr P 75041.

Nonconsensual transfers such as executions obtained through judicial proceedings are within purview of 11 USCS § 547's definition of transfer. In re Cockreham (1988, DC Wyo) 84 BR 757.

Payments made by Chapter 11 debtor on tax obligations are subject to avoidance as preferential transfers, like any other transfers which meet criteria of 11 USCS § 547(b), because no exception is contained in § 547 for payments on taxes. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Perfection of security interest in Chapter 11 debtor's property falls within broad definition of "transfer" under 11 USCS § 101(50) [now 101(54)] and therefore, at time of perfection, "transfer" occurs for ***preference*** purposes of 11 USCS § 547(b), benefiting creditor whose security interest was perfected. In re Four Winds Enterprises, Inc. (1988, BC SD Cal) 94 BR 694, 18 BCD 1032, CCH Bankr L Rptr P 72597, 8 UCCRS2d 556.

Affirmative defense of pre-***bankruptcy*** transferee that it did not improve its position was stricken, as that position would be relevant only if transferee was were secured creditor with lien on inventory, receivables, and proceeds. Gonzales v DPI Food Prods. (In re Furrs Supermarkets, Inc.) (2003, BC DC NM) 296 BR 33.

Where transfers satisfied all elements of 11 USCS § 547(b) and did not qualify for ordinary course of business exception stated in 11 USCS § 547(c)(2), plaintiff was entitled to summary judgment. Waslow v Interpublic Group of Cos. (In re M Group, Inc.) (2004, BC DC Del) 308 BR 697, 42 BCD 280, 52 CBC2d 478.

In adversary action involving numerous claims against prior directors and officers of Chapter 11 debtor, preferential transfer claims based on arranged transfer approach were inconsistent with plain language of statute for ***preference*** period which required exact date approach. Think3 Litig. Trust v Zuccarello (In re Think3, Inc.) (2015, BC WD Tex) 529 BR 147.

35. Perfection of transfer

Under statutory text, history, and structure, transfer of security interest is perfected under 11 USCS § 547(c)(3)(B) on date that secured party has completed steps necessary to perfect its interest. Fidelity Fin. Servs. v Fink (1998) 522 US 211, 118 S Ct 651, 139 L Ed 2d 571, 15 Colo Bankr Ct Rep 1, 10 Fourth Cir & Dist Col Bankr Ct Rep 142, 98 CDOS 288, 98 Daily Journal DAR 392, 31 BCD 1329, 38 CBC2d 1155, CCH Bankr L Rptr P 77595, 1998 Colo J C A R 153, 11 FLW Fed S 296.

Definition of transfer under 11 USCS § 547 is unambiguous: transfer is perfected when subsequent purchaser cannot acquire superior interest; Code does not require attachment of lien in order to perfect interest. In re Lane (1992, CA9) 980 F2d 601, 92 CDOS 9577, 92 Daily Journal DAR 16067, 23 BCD 1197, 27 CBC2d 1724, CCH Bankr L Rptr P 75041.

Under 11 USCS § 547(b), time at which transfer is made depends upon when transfer is perfected. In re Hensley (1987, BC DC Kan) 70 BR 237, 16 CBC2d 608.

For purposes of 11 USCS § 547(e)(2)(A), term "perfection" does not include act performed by debtor within its discretion. TWA v Travellers Int'l AG. (In re TWA) (1994, BC DC Del) 180 BR 389, 27 UCCRS2d 733, affd in part and revd in part on other grounds, remanded on other grounds (1996, DC Del) 203 BR 890, revd on other grounds (1998, CA3 Del) 134 F3d 188, 32 BCD 53, 39 CBC2d 493, CCH Bankr L Rptr P 77615, cert den, motion gr (1998) 523 US 1138, 118 S Ct 1843, 140 L Ed 2d 1093.

Twenty thousand dollar transfer from debtor to ex-employee who had been paid sales-based commission, in settlement of ex-employee's prepetition suit against debtor, was not avoidable ***preference*** since ex-employee had perfected his lien under Indiana Code by filing notice of intention to hold lien on debtor's corporate property; filing complaint to enforce lien was not also required for perfection. Petr v Wheeler (In re Florline Corp.) (1996, BC SD Ind) 190 BR 342, 28 BCD 470.

Under Miss. Code Ann. § 75-9-310(a), filing of financing statement is required to perfect security interest in equipment; creation of security interest in property is considered transfer for purposes of 11 USCS § 547(b). O & G Leasing, LLC v First Sec. Bank (In re O & G Leasing, LLC) (2011, BC SD Miss) 456 BR 652.

Establishing date on which transfer was made, for purposes of 11 USCS § 547, requires preliminary determination of when transfer was perfected under state law. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

Unpublished Opinions

Unpublished: ***Bankruptcy*** court found that debtor's payments to creditor constituted ***preferences*** under 11 USCS § 547(b) and creditor was initial transferee of payments and therefore was liable for transfers under 11 USCS § 550(a)(1); summary judgment was granted in favor of Chapter 7 trustee. Grochocinski v Lederman (In re Builders Plumbing & Heating Supply Co.) (2007, BC ND Ill) 2007 Bankr LEXIS 505.

36. Miscellaneous

Administrator of universal service fund (USF) established under 47 USCS § 254 was "transferee" for purposes of 11 USCS §§ 547 and 550 because administrator was neither agent nor mere conduit for some other party; also, because administrator had dominion over USF, it had dominion over debtor's universal service support contributions; therefore it was transferee under 11 USCS § 550(a)(1). Universal Serv. Admin. Co. v Post-Confirmation Comm. (In re Incomnet, Inc.) (2006, CA9) 463 F3d 1064, 47 BCD 23, CCH Bankr L Rptr P 80717.

Claims by Chapter 7 trustee of fraudulent conveyance under 11 USCS § 548 and Mich. Comp. Laws § 566.35, and preferential transfer under 11 USCS § 547(b), were dismissed because debtor never transferred property in question to transferee; alleged sale of property was sham to defraud creditors based on evidence that (1) debtor and transferee had intimate relationship at time alleged transfer occurred, (2) transferee generously supported debtor and her family for several months before and after alleged transfer, (3) transferee produced no documentation evidencing any payments for property, (4) transferee allowed debtor to keep possession and control of personal property after alleged sale, and (5) debtor did not disclose transfer in her initial statement of financial affairs. Shapiro v Matouk (In re Hayes) (2005, BC ED Mich) 322 BR 644, 53 CBC2d 1613.

Because characterization of payments (whether to reimburse defendant for claims that it paid or to replenish loss fund) was material fact in dispute, court could not grant summary judgment to either party with respect to 11 USCS § 547(b)(1). Argus Mgmt. Group v Gab Robins, Inc. (In re CVEO Corp.) (2005, BC DC Del) 327 BR 210, 45 BCD 30.

Bank's motion for rehearing was denied because bank did not present any new evidence to show that deposits made to bank were not transfers that could not be set aside as preferential; when deposits were made to cover debtor's preexisting overdrafts deposits were transfers that were subject to avoidance. Feltman v City Nat'l Bank Corp. (In re Sophisticated Communs., Inc.) (2007, BC SD Fla) 369 BR 689, 48 BCD 176, 20 FLW Fed B 507, judgment entered (2007, BC SD Fla) 2007 Bankr LEXIS 3744.

Neither definition of transfer in 11 USCS § 101 nor 11 USCS § 547 itself required proof of actual receipt of property by creditor. Guzik v Ford Motor Credit Co., LLC (In re Guzik) (2016, BC DC Md) 75 CBC2d 394.

Unpublished Opinions

Unpublished: ***Bankruptcy*** court correctly found that debtors could not establish that equitable lien order imposed by state court transferred property interest to lender such that it was voidable transfer because this section required actual transfer of interest in property, so assignment between lenders fell outside of scope of this section. D'Angelo v JP Morgan Chase Bank, N.A. (In re D'Angelo) (2016, CA3 Pa) 639 Fed Appx 132.

2. Applicable Law

37. Generally

"Bona fide purchaser" test of 11 USCS § 547(e)(1)(A) does not grant trustee status of actual bona fide purchaser regardless of state law limitations on bona fide purchaser's ability to take title to real property when given actual or constructive notice; thus, where debtor's transferees resided in property transferred, trustee is subject to law of constructive notice by possession and cannot avoid transfer despite debtors' failure to record deed. In re Gulino (1985, CA9 Cal) 779 F2d 546, 14 CBC2d 289, CCH Bankr L Rptr P 70907.

State law determines when transfer is perfected, but question of whether transfer is preferential and avoidable by creditor is governed by 11 USCS § 547; merely because state law deems transfer as perfected as of certain date does not necessarily mean that state-controlled perfection date is date transfer is deemed made for federal ***bankruptcy*** law purposes; as matter of ***bankruptcy*** law, transfer is not made between debtor and creditor until creditor has acquired some rights in property transferred. Redmond v Mendenhall (1989, DC Kan) 107 BR 318.

To determine whether transfer within meaning of 11 USCS § 547(b) occurred when secured creditor received monies from escrow account within 90 days of filing Chapter 11 petition, court must look to state law to see if judgment lien creditor could acquire interest greater than beneficiary of escrow by attachment of escrow account. In re O.P.M. Leasing Services, Inc. (1985, BC SD NY) 46 BR 661, CCH Bankr L Rptr P 70287, 40 UCCRS 1422.

To determine whether creation of security interest is preferential transfer under 11 USCS § 547, reference to state law is necessary. In re Walters (1986, BC DC Mont) 61 BR 426.

Where issuance and service of writ of garnishment was outside ***90-day preference*** period but ***payment*** on judgment was not, issue of whether transfer was perfected as defined by 11 USCS § 547(e)(1)(B) prior to or within ***90-day preference*** period depends on state law. In re B-Way Constr. (1986, BC DC Or) 68 BR 651.

38. Time of transfer

With respect to principle that creditor may not invoke 11 USCS § 547(c)(3) enabling loan exception if creditor performs acts necessary to perfect its security interest more than 20 days after debtor receives property, but within relation-back or grace period provided by otherwise applicable state law, time within which creditor must complete necessary acts is governed by federal, not state law, when issue is voidability of ***preference*** under ***Bankruptcy*** Code (11 USCS §§ 101 et seq.). Fidelity Fin. Servs. v Fink (1998) 522 US 211, 118 S Ct 651, 139 L Ed 2d 571, 15 Colo Bankr Ct Rep 1, 10 Fourth Cir & Dist Col Bankr Ct Rep 142, 98 CDOS 288, 98 Daily Journal DAR 392, 31 BCD 1329, 38 CBC2d 1155, CCH Bankr L Rptr P 77595, 1998 Colo J C A R 153, 11 FLW Fed S 296.

Bankruptcy court properly held that Chapter 7 trustee was barred by statute of limitations that was set forth in 11 USCS § 546(a) from avoiding preferential transfers under 11 USCS § 547 because election of trustee as permanent trustee was more than two years after entry of order of relief. Singer v Franklin Boxboard Co. (In re Am. Pad & Paper) (2005, DC Del) 319 BR 791, affd (2007, CA3 Del) 478 F3d 546, 47 BCD 245, CCH Bankr L Rptr P 80868 (criticized in Fogel v Shabat (In re Draiman) (2012, BC ND Ill) 483 BR 338).

In ***bankruptcy*** action wherein debtor filed for voluntary relief under Chapter 11 on May 4, 2004, and requested conversion to Chapter 7 on June 13, 2006, ***bankruptcy*** court properly dismissed trustee's ***preference*** actions involving pre-petition transfers of debtor, filed by trustee on June 11, 2007, as time barred, pursuant 11 USCS § 546 since trustee's complaint was not filed within two years after entry of order for relief nor was filed within one year after appointment of first trustee. Wiscovitch-Rentas v Super Roof & Gen. Contr. (2009, DC Puerto Rico) 405 BR 397.

Although issue of when transfer is complete for purposes of 11 USCS § 547 is federal question, ***Bankruptcy*** Court must make its determination in accordance with state law; it is not delivery or acceptance of check which constitutes payment of underlying debt, but rather its payment by drawee bank and, absent agreement, it is presumed that mere taking of check does not discharge underlying indebtedness. In re Midwest Boiler & Erectors, Inc. (1985, BC ED Mo) 54 BR 793, 3 BAMSL 1729.

Question of when transfer of debtor's funds takes place for ***preference*** purposes under 11 USCS § 547 is federal question which federal courts are to decide by reference to state law. In re Ramy Seed Co. (1985, BC DC Minn) 57 BR 425.

Creditor landlord's prepetition application of security deposit was not preferential transfer because setoff occurred well outside of 90-day ***preference*** period under 11 USCS § 547(b)(4)(A) and as matter of law, prepetition setoff was not avoidable as ***preference*** under 11 USCS § 553(a)(1). ITXS, Inc. v F & S Hayward, LLC (In re ITXS, Inc.) (2004, BC WD Pa) 318 BR 85, 44 BCD 6.

"Transfer" of mortgage took effect when lender actually disbursed funds, and under Mich. Comp. Laws. Ann. § 565.29, mortgage was perfected upon recording; because perfection occurred within 10 days of transfer, transfer was not "on account of antecedent debt" and was therefore not voidable as ***preference*** under 11 USCS § 547(b). Jin Lim v Chase Home Fin., LLC (In re Comps) (2005, BC ED Mich) 334 BR 235.

Factual allegations did not support claims to avoid preferential and fraudulent transfers, as alleged transfers were post-petition; even assuming transfer was pre-petition, time for pursuing such action had passed. Carr v JP Morgan Chase Bank, N.A. (In re New Century TRS Holdings, Inc.) (2014, BC DC Del) 505 BR 431, app dismd, motion den (2014, DC Del) 526 BR 562.

When determining when transfer is made for 11 USCS § 547(b) purposes, federal law, not state law, must be invoked since uniform application is required. In re Nucorp Energy, Inc. (1988, BAP9) 92 BR 416, 18 BCD 550, 19 CBC2d 851, CCH Bankr L Rptr P 72499.

39. Perfection of transfer

Creditor may invoke enabling loan exception in 11 USCS § 547(c)(3) only by satisfying state-law perfection requirements within 20-day period provided by federal statute, where (1) under enabling loan exception to displacing security interest for loan used to acquire encumbered property, transfer of interest securing lien must be perfected by creditor on or before 20 days after debtor receives possession in order to prohibit trustee in ***bankruptcy*** from avoiding transfer as impermissibly preferential, and (2) under definition provided by § 547(e)(1)(B), transfer of property other than real property is perfected when creditor on simple contract cannot acquire judicial lien that is superior to interest of transferee; for purposes of analyzing § 547(c)(3) limit on power of trustee in ***bankruptcy*** to avoid impermissibly preferential transfers, acts necessary to perfect security interest under state law are whatever acts must be done to effect perfection under terms of applicable state statute. Fidelity Fin. Servs. v Fink (1998) 522 US 211, 118 S Ct 651, 139 L Ed 2d 571, 15 Colo Bankr Ct Rep 1, 10 Fourth Cir & Dist Col Bankr Ct Rep 142, 98 CDOS 288, 98 Daily Journal DAR 392, 31 BCD 1329, 38 CBC2d 1155, CCH Bankr L Rptr P 77595, 1998 Colo J C A R 153, 11 FLW Fed S 296.

For purposes of voiding preferential transfer under 11 USCS § 547(b), determination of when transfer is perfected must be made by reference to state law. In re Conner (1984, CA11 Ga) 733 F2d 1560, CCH Bankr L Rptr P 69897 (criticized in In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325) and (criticized in Chavez v Mercury Fin. (In re Chavez) (2001, BC DC NM) 257 BR 341, 45 CBC2d 1290) and (criticized in In re White (2001, BC DC NJ) 258 BR 129, 37 BCD 73, 45 CBC2d 970) and (criticized in Schott v First Pay Credit, Inc. (2013, MD La) 2013 US Dist LEXIS 113577).

For purposes of 11 USCS § 547, time of perfection of creditor's interest in Chapter 11 debtor's airplanes was governed by state law rather than Federal Aviation Act (former 49 USCS § 1403(c)), since Act does not preempt state law on this issue; state law ordinarily determines when creditor or contract cannot acquire superior judicial lien. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

Bankruptcy Code adopts state law to determine date of perfection under 11 USCS § 547(e)(1)(B). Webb v GMAC (In re Hesser) (1993, CA10 Okla) 984 F2d 345, 23 BCD 1516, CCH Bankr L Rptr P 75094 (criticized in Fitzgerald v First Sec. Bank, N.A. (In re Walker) (1996, CA9 Idaho) 77 F3d 322, 96 CDOS 1214, 28 BCD 832, 35 CBC2d 580) and (criticized in Pongetti v GMAC (In re Locklin) (1996, CA5 Miss) 101 F3d 435, CCH Bankr L Rptr P 77212).

State law will be applied in determining time when transfer shall be deemed to have been perfected. Selby v Ford Motor Co. (1975, ED Mich) 405 F Supp 164, affd (1979, CA6 Mich) 590 F2d 642, 4 BCD 1206, 19 CBC 466, 1 CBC2d 42, CCH Bankr L Rptr P 67033.

Where issuance and service of writ of garnishment was outside ***90-day preference*** period but ***payment*** on judgment was not, issue of whether transfer was perfected as defined by 11 USCS § 547(e)(1)(B) prior to or within ***90-day preference*** period depends on state law. In re B-Way Constr. (1986, BC DC Or) 68 BR 651.

State law determines when transfer is "perfected" under 11 USCS § 547, but federal law determines when transfer is "made." In re Hogg (1987, BC DC SD) 76 BR 735, 4 UCCRS2d 1254.

Time of perfection of security interest for purposes of avoiding transfer under 11 USCS § 547 is governed by state law; date on which purchase of nonproducing working interests in oil or gas wells were recorded is date of transfer where such is date of perfection under Ohio law. In re Bethel Resources, Inc. (1987, BC SD Ohio) 79 BR 717.

Trustee may not avoid improperly-executed mortgage as bona fide purchaser under his strong-arm powers under 11 USCS § 544(a) or as preferential transfer under 11 USCS § 547, since he had constructive notice of mortgage of record as of effective date of statute creating irrebuttable presumption of proper execution; thus, his interest was not superior to that of mortgagee. Logan v BankAmerica Hous. Servs. (In re Delong) (2001, BC SD Ohio) 273 BR 141.

Where ***bankruptcy*** debtors' prior mortgages were refinanced into one mortgage by same mortgagee, new mortgage was not avoidable ***preference*** even though new mortgage was not perfected under state law within time limit of 11 USCS § 547(e)(2), since no bona fide purchaser could acquire interest superior to mortgagee's continuous interest, and thus transfer was perfected within meaning of § 547(e)(1)(A). George v Guaranty Mortgage Co. (In re Ljubic) (2007, BC ED Wis) 362 BR 914.

Chapter 7 trustee could avoid debtor husband's grant of lien on his undivided one-half interest in property under 11 USCS § 547; since mortgage was not recorded in substantial compliance with Ohio law pursuant to Ohio Rev. Code Ann. § 5301.01(A), transfer was never properly perfected, and under such circumstances, transfer was deemed to have occurred immediately prior to petition date and thus within ninety day ***preference*** period. Rieser v Fifth Third Mortg. Co. (In re Wahl) (2009, BC SD Ohio) 407 BR 883.

Establishing date on which transfer was made, for purposes of 11 USCS § 547, requires preliminary determination of when transfer was perfected under state law. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

40. State grace periods

Creditor may not invoke 11 USCS § 547(c)(3) enabling loan exception if creditor performs acts necessary to perfect its security interest more than 20 days after debtor receives property, but within relation-back or grace period provided by otherwise applicable state law. Fidelity Fin. Servs. v Fink (1998) 522 US 211, 118 S Ct 651, 139 L Ed 2d 571, 15 Colo Bankr Ct Rep 1, 10 Fourth Cir & Dist Col Bankr Ct Rep 142, 98 CDOS 288, 98 Daily Journal DAR 392, 31 BCD 1329, 38 CBC2d 1155, CCH Bankr L Rptr P 77595, 1998 Colo J C A R 153, 11 FLW Fed S 296.

Concept of relation-back of liens to establish priority under state law is inapplicable in determining time ***preference*** took place for purposes of 11 USCS § 547; any determination of state law relative to time of transfer does not control in determining whether ***preference*** exists. In re Jones (1985, BC ED Va) 47 BR 786, 12 BCD 1173, CCH Bankr L Rptr P 70365.

State grace periods are not relevant under 11 USCS § 547(c)(3) and (e)(2); § 547(c)(3) and (e)(2) create single, uniform grace period. Fitzgerald v First Sec. Bank, N.A. (In re Walker) (1993, BC DC Idaho) 161 BR 484, affd (1994, DC Idaho) 178 BR 497, affd (1996, CA9 Idaho) 77 F3d 322, 96 CDOS 1214, 28 BCD 832, 35 CBC2d 580.

State-law grace periods, or "relation-back" statutes, are not applicable under 11 USCS § 547(e)--language of § 547(e)(1) is not ambiguous and Congress drafted § 547(e) with this result in mind to create uniform rule throughout country which corresponds with grace period provided in UCC; creditor on simple contract is barred from acquiring judicial lien superior to interest of transferee when transferee takes last step required by state law to perfect its security interest, and until that last step is taken, other creditors could potentially obtain superior rights, and it is not possible to say that other creditors "cannot" obtain superior rights; this interpretation, that term "perfected" refers to single date, or moment in time, when state perfection statute is satisfied, is consistent with general usage of term; plain language of § 547(e)(1) provides that secured creditor will have 10-day grace period for perfecting its security interest, and pursuant to § 547(e)(1), courts must look to state law to determine moment in time in which last step is taken to perfect security interest, and varying grace periods provided for under state law are irrelevant; if last necessary act was done within 10-day period of § 547(e)(2)(A), transfer will have been made when it became effective between parties, but if it is made after 10-day period, it will have been made when perfected under § 547(e)(2)(B). Long v Joe Romania Chevrolet (In re Loken) (1994, BAP9 Or) 175 BR 56, 94 CDOS 9493, 94 Daily Journal DAR 17719, 32 CBC2d 898, CCH Bankr L Rptr P 76345, 25 UCCRS2d 1253.

41. Miscellaneous

Chapter 7 trustee was not entitled to summary judgment on claim in which he argued that transfers to creditor were avoidable under Kansas Uniform Fraudulent Transfer Act where, although he showed facts that could potentially support claim against transferee, he made no effort to pinpoint that creditor's liability as separate and distinct from transferee's liability. Trustee neither made argument as to how or why corporate veil of transferee should be pierced as to creditor or alleged that creditor personally received any transfer of funds from debtor. Convenience USA, L.P. v Martin (In re Convenience Xpress, Inc.) (2014, BC DC Kan) 508 BR 215.

3. Particular Transactions as Transfers

42. Consolidation of credit accounts

Debtor's efforts to obtain lower interest rate resulted in consolidation of his two credit card accounts issued by same bank and thus, because there was no transfer of interest of debtor in property, this transaction did not constitute ***preference*** under 11 USCS § 547(b). Harder v Citibank (South Dakota), N.A. (In re Ratner) (2005, BC WD Mo) 332 BR 604.

Lien created by service of a writ of garnishment under Fla. Stat. § 77.06 was a judicial lien, and, accordingly, could be avoided under the provisions of 11 USCS § 547(b). Advantage One Mortg. Corp. v SCP-Capri MG Owner, LLC (In re Advantage One Mortg. Corp.) (2008, BC SD Fla) 50 BCD 231, 21 FLW Fed B 694.

43. Constructive trust

Because constructive trust on realty to which Chapter 7 debtors allegedly held legal title arose on date that husband debtor fraudulently conveyed property to himself and debtor spouse, trust beneficiary owned its equitable interest in that realty from date of fraudulent conveyance so that there was no transfer of that equitable interest to beneficiary which could be avoided as ***preference*** pursuant to 11 USCS § 547(b); even if court could discern legal transfer of equitable interest via the constructive trust, that transfer would not be transfer of interest of debtor in property for purposes of § 547(b). Electric M & R v Aultman (In re Aultman) (1998, BC WD Pa) 223 BR 481, 33 BCD 32.

Constructive trust imposed on residence allegedly purchased by Chapter 7 debtor with funds embezzled from his employer and prejudgment attachment order against residence were not preferential transfers avoidable under 11 USCS § 547(b) since constructive trust was not transfer by debtor and attachment was mere enforcement tool which did not transfer any equitable interest because employer already held equitable ownership of home by virtue of constructive trust. Clark v Wetherill (In re Leitner) (1999, BC DC Kan) 236 BR 420.

Where parents of ***bankruptcy*** debtor transferred real property to debtors to allow debtors to obtain loan in their names secured by property, with understanding that title to property would be transferred back to parents after loan closed, transfer of property back to parents was not preferential transfer under 11 USCS § 547(b); property was subject to constructive or resulting trust in favor of parents, and thus debtors' transfer of title back to parents transferred only bare legal title to property. Montoya v Garcia (In re Garcia) (2007, BC DC NM) 367 BR 778, app dismd (2009, CA10 NM) 347 Fed Appx 381.

Checks that were made payable to debtor and its subcontractor jointly were eligible for "constructive trust" status under Texas law where checks were issued by general contractor and immediately indorsed over to subcontractor, there was no commingling of funds, and subcontractor relied on separateness of general contractor's joint checks in going forward with project and joint checks were issued for full amounts which debtor owed to subcontractor; accordingly, checks were not property of estate pursuant to 11 USCS § 541(d) and thus were not ***preferences*** under 11 USCS § 547. Guttman v Impulse NC, Inc. (In re Railworks Corp.) (2008, BC DC Md) 387 BR 156.

Where debtor advanced $ 90,000 to insider creditor based on alleged mistaken transfer of funds to debtor six months prior, better interpretation of Minnesota law mandated that later transfer by debtor was avoidable as ***preference*** under 11 USCS § 547(b), and constructive trust theory was not applicable. Dietz v Langlie (In re Farr) (2009, BAP8) 407 BR 343, CCH Bankr L Rptr P 81535.

44. Correction of court's error as to amount

State appellate court's correction of lower court's error within 90 days of ***bankruptcy*** filing in amount due and owing creditor on secured note, resulting in increase in allowed amount of recovery, does not itself constitute transfer of property for ***preference*** purposes under 11 USCS § 547. In re Hogg (1987, BC DC SD) 76 BR 735, 4 UCCRS2d 1254.

45. Division or transfer of property upon divorce

Preference occurs when debtor "chooses" to favor one creditor or another in derogation of rules for property distribution set out in ***Bankruptcy*** Code; thus, where marital dissolution court which decided that debtor and his former spouse were merely trustees for benefit of debtor's parents and had no ownership in seven acre lot ordered that debtor and his former spouse convey that lot to debtor's parents, conveyance was not ***preference***. Gresk v Brown (In re Brown) (1998, BC SD Ind) 227 BR 875.

Noncollusive divorce decree changing ownership of entireties property for fair consideration is not "transfer" and no ***preference*** can arise from award under decree to nondebtor spouse based on unpaid support. Webster v Hope (In re Hope) (1999, BC DC Dist Col) 231 BR 403, 11 Fourth Cir & Dist Col Bankr Ct Rep 290.

Trustee's claim under 11 USCS § 547 must fail where debtor deeded one-half interest in real property to former spouse because, as matter of law, division of marital property under Oregon law by way of non-collusive dissolution decree is not avoidable as preferential transfer. Roost v Wilber (In re Parker) (1999, BC DC Or) 241 BR 722, 43 CBC2d 378.

Debtor's transfer of proceeds from sale of marital property, which was ordered by state family court under New Hampshire law pending resolution of divorce proceedings, was not preferential transfer under 11 USCS § 547, even if proceeds were eventually awarded to wife in family court proceeding, because wife was not creditor as contemplated by ***Bankruptcy*** Code and matter was not antecedent debt. Ford v Skorich (In re Skorich) (2006, BC DC NH) 2006 BNH 6, 337 BR 441, affd (2006, DC NH) 2006 DNH 100, affd (2007, CA1 NH) 482 F3d 21, 57 CBC2d 1481, CCH Bankr L Rptr P 80895.

To extent transfers were made to Chapter 7 debtor's wife to satisfy his obligations under divorce decree or resulted in such satisfaction, transfers were at most ***preference*** on debt that was nondischargeable and might also have been priority claim, but preferential transfer was not type of transfer that could bar discharge, and no fraudulent intent was established. Moyer v Geer (In re Geer) (2014, BC ND Ga) 522 BR 365.

Where debtor received $ 11,500, which constituted reasonably equivalent value for her net equity interest in her former marital residence, and where she had option of selling residence and receiving half proceeds, her quitclaiming of residence to her former spouse was not preferential transfer under 11 USCS § 547. Slone v Dirks (In re Dirks) (2009, BAP6) 61 CBC2d 364.

Unpublished Opinions

Unpublished: Where Chapter 7 trustee brought appeals from denial of his claims to avoid transfers of cash to seller of interest in debtor, under 11 USCS §§ 547 and 548, judgments need not be certified as final for purposes of Fed. R. Civ. P. 54(b), but trustee failed to show rulings were clearly erroneous. Ehrenberg v Tenzer (In re Heartbeat of the City, N.W., Inc.) (2006, BAP9) 2006 Bankr LEXIS 4859, affd (2008, CA9) 270 Fed Appx 635.

46. Escrow of funds

Escrow company was financial conduit rather than transferee and its transfer of insolvent debtor's funds to finance company was preferential transfer where it occurred while debtor was insolvent, within ninety days of filing of ***bankruptcy*** petition, and would allow finance company to receive more than it would otherwise receive from estate; although finance company had conversion claim against debtor, funds it sought could not be reasonably traced or identified, so it could not assert property rights over them. Bailey v Big Sky Motors, Ltd. (In re Ogden) (2002, CA10 Utah) 314 F3d 1190, 40 BCD 208, CCH Bankr L Rptr P 78794.

Applicable state law that unless judgment debtor, as grantor, retains interest in escrowed property over and above interest of grantee, escrow account cannot be reached by debtor's judgment creditors is consistent with provisions of 11 USCS § 541(d) specifying that estate does not include that to which debtor holds bare legal title and no equitable interest; where Chapter 11 debtor placed monies in hand of escrow agent as security beyond its control, retaining only contingent right to funds, money transferred from escrow account opened by debtor to creditor upon debtor's default within ***90 days*** of filing petition does not constitute a "transfer" and is thus not avoidable under 11 USCS § 547(b). In re O.P.M. Leasing Services, Inc. (1985, BC SD NY) 46 BR 661, CCH Bankr L Rptr P 70287, 40 UCCRS 1422.

Payments related to escrow agreements were preferential transfers because creditor's receipt of term ***payments*** enabled it to receive more than it would have if its claim were paid in accordance with provisions of ***Bankruptcy*** Code; term payments were made to or for benefit of creditor and were made on account of antecedent debts owed by debtors. Murphy v Arrow Elecs., Inc. (In re RISCmanagement, Inc.) (2004, BC DC Mass) 304 BR 566, 42 BCD 158.

Debtor could not set aside creditor's stated security interest in patent as preferential transfer under 11 USCS § 547, when last lending agreement specifying patent as collateral was entered into during preferential period, because first two financing agreements entered in 2003 and 2004 gave creditor perfected security in "general intangibles."; general intangibles included patent, and creditor's interest in patent had thus been perfected outside of look back period. Phoenix Sys. & Components, Inc. v First State Bank (In re Phoenix Sys. & Components, Inc.) (2007, BC DC Neb) 47 BCD 264.

Chapter 7 trustee could not avoid, as preferential transfer under 11 USCS § 547(b), or as improper postpetition transfer under 11 USCS § 549, payment of escrowed funds by district court to judgment creditor, which vested funds in creditor; two-year statute of limitations had also run. Shearer v Buschmeier (In re G & G Invs., Inc.) (2011, BC WD Pa) 458 BR 707, 55 BCD 149.

47. Execution liens or garnishments

Nonconsensual transfers such as executions obtained through judicial proceedings are within purview of 11 USCS § 547's definition of transfer. In re Cockreham (1988, DC Wyo) 84 BR 757.

Execution lien is transfer for purposes of 11 USCS § 547; in Alabama, judgment alone does not create lien but it is established as of date of levy and, where execution lien was thus created within ***90 days*** from date of ***bankruptcy***

filing, lien is preferential transfer which should be set aside for benefit of all creditors. In re Pouncey (1986, BC MD Ala) 59 BR 615.

For purposes of 11 USCS § 547(b), judicial precedent supports, not undermines, referencing of state law in determining voidability of ***payments*** made to creditor within ***preference*** period window pursuant to wage execution served and otherwise perfected prior to opening of that window. Mangan v Hong Kong Shanghai Banking Corp. (In re Flanagan) (2003, BC DC Conn) 296 BR 293, 41 BCD 189, 50 CBC2d 1031, 50 CBC2d 1445.

Pursuant to Fed. R. ***Bankr.*** P. 7056, Chapter 7 debtor's employer was granted summary judgment in trustee's action to avoid and recover alleged preferential transfers made pursuant to wage garnishment where Conn. Gen. Stat. § 52-361a(d) and (g) (1998) described duly served and perfected wage execution as continuing levy and provided for employer liability in event of non-compliance with wage execution; garnishments were not considered transfers of interest of debtor in property. Mangan v Hong Kong Shanghai Banking Corp. (In re Flanagan) (2003, BC DC Conn) 296 BR 293, 41 BCD 189, 50 CBC2d 1031, 50 CBC2d 1445.

Where Chapter 7 trustee claimed that debtor's former owner received preferential transfer under 11 USCS § 547(b) when he executed upon his security interest in certain of debtor's contracts after debtor defaulted on payments to former owner for redemption of former owner's stock, transfer was transfer within meaning of § 547(b) because execution affected (1) at least transfer of debtor's possession of, custody of, and control over contracts, and (2) transfer of debtor's title to such contracts as well, given that former owner possessed, prior to such execution, no more than collateral interest in such contracts. Shearer v Tepsic (In re Emergency Monitoring Techs., Inc.) (2007, BC WD Pa) 366 BR 476, 48 BCD 63.

Chapter 7 trustee was allowed to recover $ 42,200 limited liability company ("LLC") obtained when it garnished debtor's bank account after debtor and her son failed to make ***payments*** on loan debtor guaranteed and LLC obtained default judgment against them, because garnishment occurred within ***90 days*** of date debtor declared ***bankruptcy*** and was preferential transfer under 11 USCS § 547(b). Samson v Western Capital Partners, LLC (In re Blixseth) (2013, BC DC Mont) 489 BR 154, affd (2014, DC Mont) 514 BR 871, CCH Bankr L Rptr P 82682.

48. Forfeitures

Chapter 7 debtor's forfeiture of down ***payment*** on hotel property upon failure to pay balance of contract price is not transfer for purposes of 11 USCS § 547 or 548; down payment is not avoidable as ***preference*** under 11 USCS § 547(b)(2) because there is no antecedent debt; forgiveness of debt on hotel by virtue of forfeiture of down payment is reasonably equivalent value, precluding claim of fraudulent transfer under 11 USCS § 548. In re Wey (1988, CA7 Ill) 854 F2d 196, 18 BCD 401, CCH Bankr L Rptr P 72436 (criticized in Brown v Job (In re Polo Builders, Inc.) (2010, BC ND Ill) 433 BR 700, 53 BCD 174).

Transfer occurs under 11 USCS § 547 where debtors have paid $ 520,000 under contract for purchase of hotel and subsequent forfeiture causes them to lose money as well as other readily marketable rights under contract. In re Wey (1987, CD Ill) 78 BR 892, affd (1988, CA7 Ill) 854 F2d 196, 18 BCD 401, CCH Bankr L Rptr P 72436 (criticized in Brown v Job (In re Polo Builders, Inc.) (2010, BC ND Ill) 433 BR 700, 53 BCD 174).

By operation of relation back doctrine, 21 USCS § 853(c), defendant's forfeited property vested in United States at time of his criminal acts, six years before creation of ***bankruptcy*** estate; because defendant lacked ownership interest in property at time of his ***bankruptcy***, ***bankruptcy*** trustee lacked standing to challenge forfeiture order under 21 USCS § 853(n)(2); avoiding powers of ***bankruptcy*** trustee under 11 USCS §§ 545, 547, 548, and 553, did not apply to criminal forfeiture action. United States v French (2011, ED Va) 822 F Supp 2d 615.

49. Indirect transfers

Transfer was made by "debtor" where it was made by subsidiary whose ***bankruptcy*** was consolidated, with notice to all creditors, with that of parent, even though caption of ***bankruptcy*** adjudication contained name of parent only. In re Meredosia Harbor & Fleeting Service, Inc. (1976, CA7 Ill) 545 F2d 583, cert den (1977) 430 US 967, 52 L Ed 2d 359, 97 S Ct 1649.

There was no voidable ***preference*** under 11 USCS § 547 where bank loan was repaid from fiduciary deposit made by Chapter 11 corporate debtor's subsidiary, fiduciary deposit was at all times earmarked for repayment of loan, and debtor at no time had general control over funds whereby it could independently designate to whom money would go. Coral Petroleum, Inc. v Banque Paribas-London (1986, CA5 Tex) 797 F2d 1351, CCH Bankr L Rptr P 71434, reh den, en banc (1986, CA5 Tex) 801 F2d 398 and (criticized in Mukamal v Bank of Am. (In re Egidi) (2008, BC SD Fla) 386 BR 884, 59 CBC2d 1003, 21 FLW Fed B 278).

Payment to creditor is generally avoidable as ***preference*** under 11 USCS § 547 unless it can be demonstrated that another party controlled application of funds by providing funds only on condition that monies be used to repay particular creditor. In re Chase & Sanborn Corp. (1987, CA11 Fla) 813 F2d 1177, CCH Bankr L Rptr P 71753 (criticized in Meoli v Huntington Nat'l Bank (In re Teleservices Group, Inc.) (2012, BC WD Mich) 469 BR 713).

Application of diminution of estate doctrine in context of determining whether payment by third party to creditor on behalf of debtor is voidable preferential transfer under 11 USCS § 547(b) when debtor grants security interest to third party in exchange for payment requires court to ask whether debtor controlled property given in payment by third party to extent that debtor owned it and, if so, what was value of assets, if any, which secured loan to debtor, in order to determine to what extent transfer diminished his estate. In re Hartley (1987, CA6 Ohio) 825 F2d 1067, CCH Bankr L Rptr P 71951.

To constitute ***preference*** under 11 USCS § 547, it is not necessary that transfer be made directly to preferred creditor; where direct transfer to third party may be valid and not subject to ***preference*** attack, indirect transfer arising from same action by debtor may constitute voidable ***preference*** as to creditor who indirectly benefited from direct transfer to third party; trustee does not need to attack direct transfer in order to recover from indirect transferee under 11 USCS § 550; trustee may recover from creditor beneficiary of letter of credit issued by bank with security interest in Chapter 7 debtor's property value of property upon which bank foreclosed; creditor beneficiary has no valid claim against bank for reimbursement of amounts it must pay under ***preference*** claim. In re Compton Corp. (1987, CA5 Tex) 831 F2d 586, 16 BCD 1265, 17 CBC2d 987, CCH Bankr L Rptr P 72107 (criticized in Crafts Plus+ v Foothill Capital Corp. (In re Crafts Plus+) (1998, BC WD Tex) 220 BR 331, 32 BCD 701, 40 CBC2d 388).

Transfer of debtor's property is not immune from recovery as a voidable ***preference*** under 11 USCS § 547 merely because it was not transferred directly by debtor but through escrow agent. In re Interior Wood Prods. Co. (1993, CA8 Minn) 986 F2d 228, 23 BCD 1676, CCH Bankr L Rptr P 75154.

Payment by purchaser of debtor's assets to debtor's creditor as part of purchase price is a voidable ***preference*** under 11 USCS § 547(b) regardless of whether creditor was paid directly by debtor or indirectly by purchaser because transfer was of debtor's property; fact that payment went through debtor's attorney, who acted as escrow agent for unsecured creditors, does not refute fact that payment was made from debtor's property and thus implicitly diminished estate. In re Interior Wood Prods. Co. (1993, CA8 Minn) 986 F2d 228, 23 BCD 1676, CCH Bankr L Rptr P 75154.

Fact that payment by bankrupt to allegedly preferred creditor was not made directly by bankrupt but was repaid by bankrupt to escrow as reimbursement for fund wrongfully disbursed by escrow to bankrupt, and was then paid by escrow to creditor, does not save transfer from being ***preference***. Feinblatt v Block (1978, DC Md) 456 F Supp 776, affd without op, in part, mod, in part (1979, CA4 Md) 605 F2d 1201.

Bankruptcy Court had sufficient evidence upon which to base its conclusion that $ 105,062 check drawn on account of company owned by debtor constituted transfer of interest in property pursuant to 11 USCS § 547(b)(1): debtor's ***bankruptcy*** petition indicated debtor was doing business under assumed name of realty company, testimony was given that debtor conducted business through realty company, and realty company's name was trade name for debtor. Alfa Mut. Fire Ins. Co. v Memory (In re Martin) (1995, MD Ala) 184 BR 985, 34 CBC2d 182, affd (1996, CA11 Ala) 101 F3d 708.

Fact that alleged preferential payment to creditor was made by third party on behalf of debtor, rather than by debtor himself, does not take transaction outside scope of 11 USCS § 547(b). In re Kirk (1984, BC DC Kan) 38 BR 257, 10 CBC2d 815.

Bankruptcy Court denies motion to amend judgment and orders that transfer of funds to parent corporation of debtor by party indebted to parent corporation and, only derivatively, to debtor is not subject to avoidance or preferential transfer under 11 USCS § 547(b) because debtor had no property interest in funds so transferred. In re Marketing Resources International Corp. (1984, BC ED Pa) 41 BR 575, 11 CBC2d 157, mod in part on other grounds (1984, BC ED Pa) 41 BR 580.

Transfer of funds to creditor of debtor in ***bankruptcy*** by entity indebted to debtor in ***bankruptcy*** is not subject to avoidance under 11 USCS § 547(b) because debtor in ***bankruptcy*** had no property interest in money transferred. In re Marketing Resources International Corp. (1984, BC ED Pa) 41 BR 575, 11 CBC2d 157, mod in part on other grounds (1984, BC ED Pa) 41 BR 580.

Fact that local port agent delayed making payments to vendors until it received disbursement from debtor shipper establishes that vendors were looking to debtor for payment and indebtedness ran from debtor to vendors and, thus, agent is not creditor of debtor and disbursements to agent are not voidable as ***preferences*** under 11 USCS § 547; any vendors paid by agent immediately or essentially contemporaneously with rendition of services would be free from ***preference*** attack, having either received no money from debtor or having received funds of debtor in agent's hands; however, to extent that vendors were not paid until after agent received funds from debtor, vendors are vulnerable to ***preference*** attack. In re Timber Line, Ltd. (1986, BC SD NY) 59 BR 728.

Transfers made by Chapter 11 debtor airline for benefit of another airline, through their mutual agent, are avoidable under 11 USCS § 547 and recoverable just as if they had been made directly to airline; transfers for purposes of 11 USCS § 547 include indirect dispositions of property and interests in property. In re Jet Florida System, Inc. (1986, BC SD Fla) 59 BR 886.

"Transfer" for purposes of 11 USCS § 547(b) is defined by 11 USCS § 101 and includes indirect transfers for benefits of creditors; thus where bank manages to reduce outstanding debt of Chapter 7 debtor liquor store by siphoning off part of proceeds of sale of liquor store to third parties, transfer from debtor to bank has occurred. In re Express Liquors, Inc. (1986, BC DC Md) 65 BR 952.

Net payment by debtor airline to creditor airline through industry clearinghouse is a transfer for antecedent debt, for purposes of avoiding preferential transfers under 11 USCS § 547(e) where clearinghouse rules require monthly settlement of balances among members. In re Jet Florida System, Inc. (1987, BC SD Fla) 73 BR 552, affd (1988, CA11 Fla) 861 F2d 1555, 18 BCD 1343, 20 CBC2d 33, CCH Bankr L Rptr P 72579.

If transferred funds were never intended for debtor's accounts, but debtor was merely conduit through which funds were transferred to creditor banks, funds may never become "interest of the debtor" recoverable by debtor's trustee under 11 USCS § 547(b). In re Standard Law Enforcement Supply Co. (1987, BC ED Wis) 74 BR 608, 16 BCD 406.

Although engagement letter allowed creditor to control "fund checking account" and to "disburse monies from fund account," accounts were nevertheless debtor's, so that disbursement of checks from debtor's account--whether by hired accountant or by debtor itself--is transfer of property of debtor to which 11 USCS § 547(b) applies. In re Excel Enterprises, Inc. (1988, BC WD La) 83 BR 427.

Unpublished Opinions

Unpublished: Issue before court was whether payments made by third-party purchaser to creditor on account of assumed liabilities in connection with asset sale constituted voidable ***preferences*** under 11 USCS § 547(b); other courts had labeled such transaction as "indirect preferential transfer"; in instant case, elements of § 547(b) were satisfied. Lubetkin v Anthony Brusco Consulting (In re Astoria Graphics, Inc.) (2013, BC DC NJ) 2013 Bankr LEXIS 609.

50. International sales transactions

Payments from debtor to international shoe company were avoided pursuant to 11 USCS § 547 and 11 USCS § 550 where purchase order required delivery and inspection in U.S., company retained title to shoes until debtor had opportunity to inspect them, debtor's obligation to pay arose only after shoes were inspected in U.S., and as result, transaction's center of gravity was in U.S. Florsheim Group Inc. v USASIA Int'l Corp. (In re Florsheim Group, Inc.) (2005, BC ND Ill) 336 BR 126.

Concerns of international comity did not weigh against applying 11 USCS § 547 where international shoe company had voluntarily agreed to sell shoes to American company whose obligation to pay arose only upon satisfactory tender of shoes in U.S., preferential transfers were of national importance to ***bankruptcy*** proceedings, and mere inconsistencies with foreign law was insufficient to raise serious concerns of international comity, especially since there was no parallel proceeding in any other country to compete with ***bankruptcy*** case. Florsheim Group Inc. v USASIA Int'l Corp. (In re Florsheim Group, Inc.) (2005, BC ND Ill) 336 BR 126.

51. Judicial liens

Bank's filing of judgment lien against properties which debtor had conveyed to children's trust constituted avoidable ***preference*** under 11 USCS § 547(b), since debtor retained "equitable" interest in fraudulently conveyed properties; bank could not assert good faith transferee defense of 11 USCS § 550(b), since it was only initial transferee. Cullen Ctr. Bank & Trust v Hensley (In re Criswell) (1997, CA5 Tex) 102 F3d 1411, 30 BCD 235, CCH Bankr L Rptr P 77255, corrected (1997, CA5 Tex) 1997 US App LEXIS 12784 and (criticized in Midland Euro Exchange Inc. v Swiss Finance Corp. (In re Midland Euro Exchange Inc.) (2006, BC CD Cal) 347 BR 708, 47 BCD 32, 56 CBC2d 1041).

Lenders, who failed to record their loan to debtor before involuntary Chapter 11 petition was filed, failed on their argument that ***bankruptcy*** court ignored exceptions to trustee's strong-arm power that permitted their recording to "relate back" to date of loan; argument that 11 USCS § 547(c) and (e) were exceptions to 11 USCS § 544(b)'s avoidance provisions was foreclosed, since 11 USCS § 547(c) and (e) did not constitute generally applicable relation-back law under 11 USCS § 546(b). Ostrander v Gardner (In re Millivision, Inc.) (2007, CA1) 474 F3d 4, 47 BCD 177, CCH Bankr L Rptr P 80832.

Transfer, in form of creation of judgment lien, occurred, for purposes of 11 USCS § 547, when creditor obtained judgment in foreclosure against Chapter 7 debtor, not when creditor filed foreclosure action against debtor, and because judgment was entered within 90-day ***preference*** period, transfer was preferential; creditor's interest in debtor's property was perfected under state law at time it took effect between parties--when judgment was entered. Redmond v Mendenhall (1989, DC Kan) 107 BR 318.

Imposition of liens which automatically occurred by virtue of state law were preferential transfers under 11 USCS § 547(b) and were avoidable where creditors obtained judgment against debtors and pursuant to writ of execution 2 notices of levy were recorded on farm acquired by debtor as residuary legatee of aunt's will within 90 days of filing of Chapter 7 petition since imposition of liens occurred within 90 day period, and was involuntary transfer of property, transfer was made on account of antecedent debt and was clearly for benefit of creditor, creditor received more than it would receive without this transfer from distribution under Chapter 7, debtors are presumed insolvent during 90 days immediately preceding filing of petition and none of 11 USCS § 547(c) exceptions are applicable; any liens which might otherwise be created under state law by recording of notices of levy are void as being in violation of automatic stays under 11 USCS § 362(a) and are also avoidable under 11 USCS § 549(a). In re Lassiter (1984, BC ED Mo) 42 BR 631, 3 BAMSL 1305.

Creation of judicial lien on property in which debtor has interest is transfer as contemplated by 11 USCS § 547; duly docketed judgment lien becomes lien under New York law for purposes of 11 USCS § 547 when execution is delivered to sheriff. In re Syed Industries Corp. (1986, BC ED NY) 58 BR 920.

Under 11 USCS § 547(b), judgment lien obtained by creditor constitutes transfer to or for benefit of such creditor, and Chapter 7 trustee can seek to avoid judgment lien as preferential transfer. In re Martin (1988, BC ED NC) 87 BR 394, 19 CBC2d 186.

State court judgment which determined that 70 percent of debtor's share of recovered treasure belonged to contractor in return for his services in recovering treasure did not create lien or any transfer for purposes of allowing Chapter 13 trustee to avoid state court judgment as ***preference*** under 11 USCS § 547(b) on basis that treasure was not "divisible"; fact that treasure may be more valuable if sold as whole rather than partitioned does not create lien on any other transfer. In re Wilson (1989, BC SD Fla) 95 BR 841.

Prepetition creation of judicial lien within statutory ***preference*** period represents transfer which may be avoided as preferential if all elements of 11 USCS § 547(b) are present. In re Nelson Co. (1990, BC ED Pa) 117 BR 813, 20 BCD 1486, affd (1991, ED Pa) 128 BR 930, affd (1992, CA3 Pa) 959 F2d 1260, 26 CBC2d 979, CCH Bankr L Rptr P 74518, 117 ALR Fed 751 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211) and (criticized in Wilcox v CSX Corp. (2003) 2003 UT 21, 70 P3d 85, 473 Utah Adv Rep 25).

Chapter 7 trustee was awarded summary judgment on his claim that judgment creditors obtained in Minnesota court that was docketed in Wisconsin and created statutory lien on real property debtor owned was preferential transfer that could be avoided under 11 USCS § 547; "transfer" under § 547 included creation of lien under 11 USCS § 101, trustee met his burden of showing that debtor was insolvent at time lien was placed on her property by relying on presumption of insolvency and debtor's schedules, and transfer was avoidable under § 547 because it converted creditors' unsecured claim into secured claim and enabled them to receive more than they would have received from debtor's ***bankruptcy*** estate if transfer had not occurred. Mathias v Kriescher (In re Gibson) (2016, BC WD Wis) 62 BCD 38, 75 CBC2d 75.

Unpublished Opinions

Unpublished: Trustee had established that judicial lien obtained by construction company was preferential transfer that was subject to avoidance because lien was perfected less than three months before petition for ***bankruptcy*** was filed and trustee had established that construction company would have received more from lien than it was entitled to receive from estate. Canney v Engelberth Constr., Inc. (In re Rome Family Corp.) (2006, BC DC Vt) 2006 Bankr LEXIS 751.

52. Lien on personal property

Even assuming that bank which loaned $ 130,000 to corporate debtor knew that debtor already borrowed $ 250,000 from another lender and pledged all its personal property to other lender at time bank made loan, that fact did not mean that lien bank obtained on debtor's property could be avoided under 11 USCS §§ 544(a) and 547, and bank's lien was superior to other lender's lien because bank filed its financing statement before other lender filed its financing statement, and Wis. Stat. § 409.322(1)(a) provided that party which filed its financing statement first had superior interest. Swanson v Trasino Park-Hudsons, LLC (In re Vission, Inc.) (2008, BC ED Wis) 50 BCD 44.

Transfer, which occurred when debtor's primary lender perfected lien on debtor's personal property within year of petition date, was made for benefit of guarantor of debtor's promissory note, regardless of debtor's subjective intent for transfer to benefit guarantor, and recovery of transfer would benefit estate, even if it only benefitted lender. Scully v Danzig (In re Valley Food Servs., LLC) (2008, BC WD Mo) 51 BCD 10.

53. Payment by check

Payments by check constitute transfers under 11 USCS § 101 for purposes of 11 USCS § 547 as does payment with promissory notes that creditor discounts with bank, even though notes were discounted prior to ***preference*** period, because discounting did not alter creditor's continued position as creditor of notes' maker and payment of notes eliminated creditor's liability to bank and debtors' liability to creditor. In re Candor Diamond Corp. (1986, BC SD NY) 68 BR 588.

Credit card payments made by balance transfer checks, transferring balance to another bank, were voidable ***preferences*** under 11 USCS § 547, since funds made available to debtor by bank were not designated to be used to pay off certain specified creditors but to pay some but not all of particular class of creditors, with choice to be made entirely by debtor. Rafool v Citizens Equity Fed. Credit Union (In re Hurt) (1996, BC CD Ill) 202 BR 611, 37 CBC2d 179.

In adversary proceeding commenced under 11 USCS §§ 547 and 550(a), Chapter 7 trustee sought avoidance of certain transfers and recovery of $ 23,871.54 (plus interest and costs) as ***preferences*** paid to defendant involving, inter alia, three checks made payable to defendant and debtor jointly, judgment was entered in favor of trustee where (1) earmarking doctrine did not apply because joint checks were not proceeds of third party loan substituting one creditor for another, (2) when defendant signed joint pay agreements and simultaneously accepted joint checks, debtor's interest in receivables was transferred to defendant and that was transfer of property of debtor within ***preference*** period, and (3) no cogent argument had been made that receivables were not property of debtor which would have become part of its ***bankruptcy*** estate upon filing. Napolitano v Vibra-Conn, Inc. (In re R.J. Patton Co.) (2006, BC DC Conn) 348 BR 618, 47 BCD 5.

Where defendant provided support to related Taiwanese company, and Chapter 11 debtor paid Taiwanese company's invoices by sending checks to defendant, which forwarded checks to Taiwanese company, defendant did not receive "transfer of interest of debtor in property" under 11 USCS § 547(b) because transfers occurred only when Taiwanese company honored checks. Broadway Advisors, LLC v Hipro Elecs., Inc. (In re Gruppo Antico, Inc.) (2007, BC DC Del) 359 BR 578, 47 BCD 206.

54. Payment of attorney's fees

Pre-petition payment of matrimonial attorneys fees was not preferential transfer under 11 USCS § 547 because divorce decree was not collusive and divided property in accordance with considerations allowed by state law; furthermore, there was no suggestion that divorce decree was result of collusive effort to hinder, delay, and defraud creditors. Ring v Moriarty (In re Smith) (2005, BC WD NY) 321 BR 385.

55. Provisional credit

Provisional credit accorded depositor by bank pending collection of deposited checks does not create "debt" for ***preference*** purposes until depositor uses credit to borrow funds or obtain good or services; similarly, routine advances by bank against uncollected deposits do not create "debt" to bank. Laws v United Mo. Bank, N.A. (1996, CA8 Mo) 98 F3d 1047, 29 BCD 1148, CCH Bankr L Rptr P 77129, 30 UCCRS2d 1155, reh, en banc, den (1996, CA8) 1996 US App LEXIS 30754 and cert den (1997) 520 US 1168, 117 S Ct 1432, 137 L Ed 2d 540 and (criticized in Moseley v Arth (In re Vendsouth, Inc.) (2003, BC MD NC) 2003 Bankr LEXIS 1437).

56. Recordation of lis pendens

Recordation of lis pendens constitutes "transfer" within meaning of 11 USCS § 547(e)(1)(A), and hence judgment creditor's interest in debtor's property relates back to filing of lis pendens, which occurred outside ***preference*** period and is therefore not avoidable. In re Lane (1992, CA9) 980 F2d 601, 92 CDOS 9577, 92 Daily Journal DAR 16067, 23 BCD 1197, 27 CBC2d 1724, CCH Bankr L Rptr P 75041.

Bankruptcy court and district court properly held that creditor's notice of lis pendens filed in Colorado did not constitute preferential transfer because Colorado law delineated that lis pendens served limited purpose of providing potential purchasers notice of possible judgment, and created no new interest for filer. UTE Mesa Lot 1, LLC v First-Citizens Bank & Trust Co. (In re UTE Mesa Lot 1, LLC) (2013, CA10 Colo) 736 F3d 947, 58 BCD 210, 70 CBC2d 1477, CCH Bankr L Rptr P 82560 (criticized in Henderson v Bank of Am. N.A. (In re Simmons) (2014, BC SD Miss) 510 BR 76).

Bank's filing of lis pendens against debtors' property was not transfer for purposes of preferential disqualification under ***Bankruptcy*** Code, 11 USCS § 547, because it was not transfer under 11 USCS § 101(54) since because under applicable New York law, lis pendens was merely method of giving notice, and it did not create lien on

property. Perosio v NBT Bank Nat'l Ass'n (In re Perosio) (2006, ND NY) 364 BR 868, affd (2008, CA2 NY) 277 Fed Appx 110.

Filing of lis pendens was transfer as contemplated under 11 USCS § 547 because bona fide purchaser could not acquire interest that was superior to interest of bank; therefore, assuming lis pendens was authorized under Mississippi law, trustee could avoid it under § 547 as preferential transfer. Henderson v Bank of Am. N.A. (In re Simmons) (2014, BC SD Miss) 510 BR 76.

Although lis pendens itself may not constitute traditional transfer of property, if filer of lis pendens is successful in underlying lawsuit, any lien or other property interest obtained would relate back to time of filing of lis pendens; lis pendens could be avoided pursuant to 11 USCS § 547, and as result, trustee was no longer precluded from avoiding Deed of Trust under 11 USCS § 544(a)(1), as judicial lien creditor. Gallo v Gallo (In re Gallo) (2015, BC ED NC) 539 BR 88.

Unpublished Opinions

Unpublished: Transfer of interest of debtor in property occurs where transfer diminishes directly or indirectly fund to which creditors of same class can legally resort for payment of their debts; to extent filing of lis pendens in New York perfects party's interest in real property against third parties that was not previously perfected, it might constitute "transfer of interest of debtor in property" for purposes of 11 USCS § 547(b). Perosio v NBT Bank Nat'l Ass'n (In re Perosio) (2008, CA2 NY) 277 Fed Appx 110.

Unpublished: Debtors, acting ***bankruptcy*** trustee, could not avoid appellee bank's filings of two lis pendens under 11 USCS § 547(b) because lis pendens did not constitute transfers of interests of debtor in property within meaning of 11 USCS § 547(b); it was not bank's filings of lis pendens that perfected its interest in debtors' property, but original recording of mortgages in 1999 (the bank's interest was perfected at time bank originally recorded mortgages because, despite substantial errors in description of debtors' property in mortgage documents, hypothetical prospective purchaser would have had constructive and inquiry notice of bank's interest). Perosio v NBT Bank Nat'l Ass'n (In re Perosio) (2008, CA2 NY) 277 Fed Appx 110.

57. Recordation of mortgage or deed of trust

Because appellant mortgage company failed to record mortgage from debtor at time it was granted, 11 USCS § 547(e)(2)(C) deemed transfer of mortgage to have occurred immediately before debtor filed his ***bankruptcy*** petition; thus, company was already creditor of debtor when it received mortgage from debtor, so mortgage was transferred "to or for benefit of creditor." Wells Fargo Home Mortg., Inc. v Lindquist (2010, CA8 Minn) 592 F3d 838, CCH Bankr L Rptr P 81665.

Because appellant mortgage company failed to record mortgage from debtor at time it was granted, 11 USCS § 547(e)(2)(C) deemed transfer of mortgage to have occurred immediately before debtor filed his ***bankruptcy*** petition; thus, transfer of mortgage was "for or on account of antecedent debt owed by debtor before such transfer was made," because debtor was deemed to have transferred mortgage more than two years after incurring debt on note. Wells Fargo Home Mortg., Inc. v Lindquist (2010, CA8 Minn) 592 F3d 838, CCH Bankr L Rptr P 81665.

Where creditor bank's mortgage deeds were still pending recordation when debtors filed ***bankruptcy*** 3 years later, bank had attained pre-petition "interest in property" under 11 USCS §§ 362(b)(3), 546(b)(1)(A), and, P.R. Laws Ann. tit. 30, § 2256's relation back provision established priority at presentment; thus, debtors could not prevent perfections or avoid mortgages under 11 USCS §§ 544(a), 547(b). Soto-Rios v Banco Popular de P.R. (2011, CA1 Puerto Rico) 662 F3d 112, 55 BCD 199, 66 CBC2d 1083, CCH Bankr L Rptr P 82114.

Mortgage constitutes transfer within meaning of 11 USCS § 547(b) where mortgagee benefits by mortgage because his creditor status thereby changes from unsecured to secured, only consideration received by debtors is ***payment*** by mortgagee of outstanding construction obligations 20 days prior to execution of mortgage, transfer occurs within ***90 day*** period preceding filing of petition, and mortgagee would receive more as mortgage holder than he would as unsecured creditor under Court's distributive provisions. In re Lyon (1982, BC DC Kan) 35 BR 759.

Recordation of real estate deeds of trust within ***90 days*** of filing of Chapter 7 petition is "transfer" avoidable by debtors under 11 USCS § 547 where § 547(e)(2)(B) specifies that transfer occurs upon perfection of security interest and under state law deed of trust recorded more than 10 days after execution is deemed to be perfected upon recordation. In re Strom (1985, BC ED NC) 46 BR 144.

Recordation of real estate deeds of trust within 90 days of filing of Chapter 7 petition is "transfer" avoidable by debtors under 11 USCS § 547 where § 547(e)(2)(B) specifies that transfer occurs upon perfection of security interest and under state law deed of trust recorded more than 10 days after execution is deemed to be perfected upon recordation. In re Strom (1985, BC ED NC) 46 BR 144.

When debtors granted mortgage on their residence to creditor in order to refinance their existing mortgage, they transferred interest in their residence to creditor. Gold v Interstate Fin. Corp. (In re Schmiel) (2005, BC ED Mich) 319 BR 520 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

Where Chapter 7 trustee sought to reopen inadvertently closed case by vacating closure order, pursuant to Fed. R. ***Bankr.*** P. 9024, rather than under 11 USCS § 350, trustee's right to avoid late-recorded mortgage survived closure; for purposes of 11 USCS §§ 554(c) and 546(a), estate had never in fact been closed. Moyer v ABN AMRO Mortg. Group, Inc. (In re Feringa) (2007, BC WD Mich) 376 BR 614.

Affidavits of equitable interest, which attempted to give notice of creditor's lien against debtors' property interest, did not meet sole purpose requirement of Kan. Stat. Ann. § 79-3102(d)(5), which is limited to providing notice of purchaser's interest under contract for deed, because they gave notice of two encumbrances, sellers' first priority interest under contracts and its second mortgage on debtors' interest under contracts for deed; therefore, recording of assignments and affidavits without payment of mortgage registration fee did not impart notice as matter of Kansas law and trustee was entitled to avoid assignments and affidavits of equitable interest as unenforceable as of petition date as against bona fide purchaser. Redmond v M & I Marshall & Ilsley Bank (In re Coffelt) (2008, BC DC Kan) 395 BR 133, judgment entered (2008, BC DC Kan) 2008 Bankr LEXIS 3066 and amd (2008, BC DC Kan) 2008 Bankr LEXIS 2878.

Trustee's claims against mortgage company under 11 USCS §§ 547, 548, and 549 failed to state claim upon which relief could be granted; transfer of mortgage from one lender to another did not involve transfer of interest in property of debtor or property of ***bankruptcy*** estate. Hamilton v CitiMortgage, Inc. (In re Kunze) (2011, BC DC Kan) 459 BR 468.

Court rejected mortgage creditors' argument to effect that for all 11 USCS § 547 purposes, recordation of older mortgage was not challengeable transfer; recordation in this case was set aside because it came too late; now that recordation was set aside because of statute, Trustee could set aside not only recordation, but also mortgage itself because statute said that transfer of mortgage interest was deemed to have been "made" when mortgage was perfected; and so mortgage itself could be set aside by trustee, and it could be "preserved" under 11 USCS § 551 for benefit of all of debtors' creditors. Moorhouse v Rote (In re Moorhouse) (2013, BC WD NY) 487 BR 151, 69 CBC2d 386.

Recording of mortgages in favor of lenders within ninety day period preceding debtor's ***bankruptcy*** petition constituted preferential transfers, that were subject to avoidance and recovery of value of property under 11 USCS §§ 547 and 550. Seaver v Mortg. Elec. Registration Sys. (In re Schwartz) (2008, BAP8) 383 BR 119.

58. Refinancing of loan

New mortgage was avoided as preferential transfer under 11 USCS § 547(e)(2)(B), because transfer of debtor's interest in property occurred at time such transfer was perfected under Mich. Comp. Laws § 565.29 and was accordingly made on account of antecedent debt and lender was not "new creditor," which precluded it from invoking earmarking doctrine. Chase Manhattan Mortgage Corp. v Shapiro (In re Lee) (2008, CA6 Mich) 530 F3d 458, 50 BCD 47, 2008 FED App 223P, reh den, reh, en banc, den (2008, CA6) 2008 US App LEXIS 22359.

In action to avoid loan under 11 USCS § 547(b), trustee failed to show diminution of debtor's estate where refinance loan added value in same amount that refinance mortgage encumbered estate; when transaction was viewed as whole, as it had to be under earmarking doctrine, debtor's estate had same value before refinance transaction took place. Chase Manhattan Mortg. Corp. v Shapiro (In re Lee) (2006, ED Mich) 339 BR 165 (criticized in Encore Credit Corp. v Lim (2007, ED Mich) 373 BR 7) and revd (2008, CA6 Mich) 530 F3d 458, 50 BCD 47, 2008 FED App 223P, reh den, reh, en banc, den (2008, CA6) 2008 US App LEXIS 22359 and (Abrogated as stated in Bank of Am., N.A. v Mukamai (In re Egidi) (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922).

Where ***bankruptcy*** debtors' prior mortgages were refinanced into one mortgage by same mortgagee, and mortgagee contended that refinancing was not avoidable ***preference*** because there was no diminution of ***bankruptcy*** estate and thus was not interest of debtors in property as required under 11 USCS § 547(b), lack of diminution of debtor's estate was not determinative since mortgages were secured by same property and thus there was no substitution of collateral to implicate diminution-of-estate theory. George v Guaranty Mortgage Co. (In re Ljubic) (2007, BC ED Wis) 362 BR 914.

Though interest of lender that had refinanced mortgage granted by debtors to lender's predecessor in interest was voidable by Chapter 7 trustee per 11 USCS § 547 because new deed of trust was recorded only 59 days before debtors' Chapter 7 filing, doctrine of equitable subrogation applied to defeat trustee's seizure of contested proceeds for distribution to unsecured creditors. Logan v Citi Mortg., Inc. (In re Schubert) (2010, BC DC Md) 437 BR 787.

Under 11 USCS § 547(b), Chapter 7 trustee avoided lien of mortgage lender who refinanced debtor's previous mortgage loan but failed to record its lien in proper county until one month before debtor filed for ***bankruptcy***; neither earmarking nor subrogation applied to avoid transfer within 90-day preferential period; 765 ILCS 5/30, providing that all mortgages took effect from and after time of filing for record but not before, applied. Grochocinski v Panzarino (In re Panzarino) (2012, BC ND Ill) 469 BR 286.

59. Release of claims

Release of claims was avoidable by ***bankruptcy*** trustee because cause of action held by debtor was property, and release of action by way of agreement with debtor constituted transfer because it was method of disposing of property. e2 Creditors' Trust v Farris (In re e2 Commun's, Inc.) (2004, BC ND Tex) 320 BR 849, 43 BCD 277.

Unpublished Opinions

Unpublished: Where creditor, terminated employee of debtor, received $ 29,000 in settlement proceeds from debtor that were paid within 90 days of debtor's petition date, transfer was made for antecedent debt and was avoidable under 11 USCS § 547(b) and recoverable from terminated employee under 11 USCS§ 550. Creditors' Liquidation Trust v Haskins (In re Git-N-Go, Inc.) (2007, BC ND Okla) 2007 Bankr LEXIS 3303.

60. Security interest in motor vehicle

Under Kansas law, secured creditor was required to comply with state law certificate of title statutes, not Uniform Commercial Code, in order to perfect security interest in previously titled motor vehicle and bank's security interest could not be deemed perfected at time that application was submitted to county treasurer for filing when application was ultimately rejected; security interest could not be deemed perfected until it was accepted by county agency and security interest could be set aside as preferential transfer under 11 USCS § 547 when perfection occurred within 90 day period before ***bankruptcy*** petition was filed. Rajala v Cmty. Bank (In re Kierl) (2007, BC DC Kan) 64 UCCRS2d 474.

Unpublished Opinions

Unpublished: Creditor's security interest in Chapter 7 debtors' motor vehicle could not be avoided under 11 USCS § 547 because no transfer was involved; security interest was perfected in California and remained perfected under Idaho Code Ann. § 28-9-316(d) when debtors moved to Idaho and new certificate of title was issued; pursuant to

Cal. Com. Code §§ 9303 and 9316, security interest did not become unperfected upon issuance of Idaho certificate of title. Gugino v Wachovia Dealer Servs. (In re Owen) (2009, BC DC Idaho) CCH Bankr L Rptr P 81592.

61. Setoff or offset

Wife did not have "claim" against debtor as "creditor" since wife's equitable interest in marital property was not "claim" at all under 11 USCS § 101(5) because it was neither right to payment nor right to equitable remedy for breach of performance; nor was transfer of legal title to escrow agents "on account of antecedent debt"; 11 USCS § 547 therefore did not treat transfer of debtor's legal title to proceeds from sale of jointly owned real estate to escrow agents as avoidable ***preference***, and district court's holding that trustee could not avoid transfer was affirmed. Ford v Skorich (In re Skorich) (2007, CA1 NH) 482 F3d 21, 57 CBC2d 1481, CCH Bankr L Rptr P 80895.

11 USCS § 547 may not be used to avoid setoff itself since act of setoff is not transfer, which is initial element of § 547(b). In re Balducci Oil Co. (1983, BC DC Colo) 33 BR 847, 11 BCD 237 (criticized in In re Lehman Bros. (2011, BC SD NY) 458 BR 134, 55 BCD 137, 66 CBC2d 860).

Chapter 7 debtors could not recover prepetition setoff that was granted to their creditor, U.S. Department of Agriculture (USDA) pursuant to 31 USCS § 3720A and 26 USCS § 6402, because USDA had authority to take setoff, and USDA was not put in better position as result of setoff. Harrison v United States Dep't of Agric. Rural Dev. (In re Harrison) (2008, BC WD Ky) 383 BR 398.

Where Chapter 7 debtors sought to recover setoff by Social Security Administration (SSA) of debtors' federal tax refund against indebtedness owed to SSA for overpayment of Social Security benefits, debtors could not utilize 11 USCS § 547 for purposes of recovery of setoff because setoff was valid. Comer v United States SSA (In re Comer) (2008, BC WD Va) 386 BR 607.

Where debtor travel agency received funds from its customers which it had right to deposit and use in general operation of its business, no trust relationship arose, thus, trustee in ***bankruptcy*** could not recover from debtor's bank funds set off against debtor's indebtedness to bank; it is well settled that when bank and depositor have mutual debts, bank may set off deposit against debt owed it by depositor. Aebig v Commercial Bank of Seattle (1984) 36 Wash App 477, 674 P2d 696.

62. Stoppage of goods in transit

Stoppage of goods in transit by seller is not preferential transfer under 11 USCS § 547 where there was no transfer of property of debtor as debtor's refusal to receive delivery caused title to revest in seller and where there was no transfer for or on account of antecedent debt as there was no delivery of possession because seller did not tender required documents; even if revocation of credit terms was deemed ineffective seller would still be able to stop goods in transit without creating ***preference*** since debtor's attempt to receive goods on credit while insolvent renders sale voidable and triggers seller's right to stop goods in transit. In re Fabric Buys (1983, BC SD NY) 34 BR 471, 11 BCD 259, 9 CBC2d 995.

63. Termination of contract

Bankruptcy judge erred in agreeing with lessor that lease terminations were not transfers because lessee had interest in property which it parted with by transferring that interest to lessor, and distinction between value of leases and leases themselves enabled purpose of 11 USCS § 365(c)(3) to be fulfilled without making inroads into 11 USCS § 101(54)(D). Official Comm. of Unsecured Creditors of Great Lakes Quick Lube LP v T.D. Invs. I, LLP (In re Great Lakes Quick Lube LP) (2016, CA7 Wis) 816 F3d 482, 62 BCD 89, 75 CBC2d 390, CCH Bankr L Rptr P 82937.

Prepetition termination of contract pursuant to its terms and consequent cessation of debtor's rights under contract does not constitute transfer within 11 USCS § 547(b) so that termination of servicing agreement under which Chapter 7 debtor was seller/servicer for Freddie Mac mortgage loans was not "transfer" within § 547(b). Edwards v Federal Home Loan Mortg. Corp. (In re LiTenda Mortg. Corp.) (2000, BC DC NJ) 246 BR 185, affd without op

(2001, CA3 NJ) 276 F3d 578 and (criticized in EBC I, Inc. v Am. Online, Inc. (In re EBC I, Inc.) (2006, BC DC Del) 356 BR 631, 47 BCD 131).

Creditor Committee's avoidance action was subject to dismissal because lease termination agreement was not subject to avoidance as fraudulent transfer or ***preference*** given that termination agreement was valid under Wisconsin law, and subleases were terminated under applicable law prior to petition, meaning that subleases could not be assumed by debtor. Official Comm. of Unsecured Creditors of Great Lake Quick Lube, L.P. v T.D. Invs. I, LLP (In re Great Lakes Quick Lube Ltd. P'ship) (2015, BC ED Wis) 528 BR 893, 60 BCD 245, 73 CBC2d 941.

64. --Franchise

Where franchise agreement was terminated by franchisor when Chapter 11 debtor-franchisees fell into default under franchise agreement, and franchisor filed for and obtained writ of possession prior to debtors filing for ***bankruptcy*** protection under Chapter 11, termination could not be avoided under 11 USCS §§ 547 and 548; although literal definition of term "transfer" encompasses termination of franchise agreement and its leases, its application in §§ 547 and 548 so as to avoid terminations is inconsistent with statutory framework. In re Egyptian Bros. Donut (1995, BC DC NJ) 190 BR 26.

65. Transactions involving letters of credit

When Chapter 7 debtor pledges its assets to secure letter of credit, transfer of debtor's property has occurred under 11 USCS §§ 547 and 101(50) [now 101(54)]. In re Compton Corp. (1987, CA5 Tex) 831 F2d 586, 16 BCD 1265, 17 CBC2d 987, CCH Bankr L Rptr P 72107 (criticized in Crafts Plus+ v Foothill Capital Corp. (In re Crafts Plus+) (1998, BC WD Tex) 220 BR 331, 32 BCD 701, 40 CBC2d 388).

Fee of $ 1,464 paid to bank by Chapter 7 debtor in return for bank's issuance of letter of credit to debtor's creditor may not be avoided as preferential transfer under 11 USCS § 547 where bank has fully performed its duties under letter of credit and earned its fee. In re Compton Corp. (1987, CA5 Tex) 831 F2d 586, 16 BCD 1265, 17 CBC2d 987, CCH Bankr L Rptr P 72107 (criticized in Crafts Plus+ v Foothill Capital Corp. (In re Crafts Plus+) (1998, BC WD Tex) 220 BR 331, 32 BCD 701, 40 CBC2d 388).

Creditor's receipt of payment under letter of credit issued by bank for account of debtor is ***preference*** voidable under 11 USCS § 547(b), notwithstanding nature of letter of credit as independent obligation of bank to beneficiary, where letter of credit was issued to pay antecedent debt of debtor and issuance was secured by assignment of certificate of deposit which is property of debtor to bank. In re Air Conditioning, Inc. (1987, SD Fla) 72 BR 657, affd in part and revd in part on other grounds (1988, CA11 Fla) 845 F2d 293, 17 BCD 1385, 18 CBC2d 973, CCH Bankr L Rptr P 72302, cert den (1988) 488 US 993, 109 S Ct 557, 102 L Ed 2d 584.

Where bank issues letter of credit to creditor upon debtor's promise to transfer certificate of deposit to bank, there is transfer of property of debtor for benefit of creditor within meaning of 11 USCS § 547(b)(1). In re Air Conditioning, Inc. (1987, SD Fla) 72 BR 657, affd in part and revd in part on other grounds (1988, CA11 Fla) 845 F2d 293, 17 BCD 1385, 18 CBC2d 973, CCH Bankr L Rptr P 72302, cert den (1988) 488 US 993, 109 S Ct 557, 102 L Ed 2d 584.

Transfer of letter of credit constitutes transfer within meaning of 11 USCS § 547. In re AOV Industries, Inc. (1986, BC DC Dist Col) 64 BR 933.

66. Other security interests, generally

Creation of perfected security interest in property is itself ***preference*** under 11 USCS § 547 when creation or perfection takes place during ***preference*** period and other criteria are satisfied. In re Melon Produce (1992, CA1 Mass) 976 F2d 71, 23 BCD 825, CCH Bankr L Rptr P 74967, 19 UCCRS2d 300.

Federal filing is not necessary to perfect security interest in patents as against Chapter 7 trustee; therefore, since transfer of security interest in patents occurs immediately upon execution of security agreement and since

execution occurred more than 90 days prepetition, such transfer does not constitute voidable ***preference*** under 11 USCS § 547 despite fact patent assignment and filing of assignment occurred within ***preference*** period. City Bank & Trust Co. v Otto Fabric, Inc. (1988, DC Kan) 83 BR 780, 7 USPQ2d 1719, 5 UCCRS2d 1459.

Lender's security interest was at all times perfected, despite trustee's argument that novation occurred when parties entered into note and security agreement consolidating all loans made by lender to Chapter 7 debtor and lender did not file financing statement until 27 days later, where financing statement filed 2 years earlier at time previous note by lender was executed was on file at time of consolidation and such financing statement was sufficient to perfect security interest; fact that financing statement at issue was originally filed in connection with another security agreement is of no importance; UCC filing system is set up so that single filing can cover continuously changing arrangement of collateral. Blasbalg v Tarro (In re Hyperion Enters.) (1993, DC RI) 158 BR 555, 29 CBC2d 1281, 24 UCCRS2d 670.

Creditor properly perfects security interests more than 90 days preceding filing of petition by filing UCC Form 1 in New Jersey where inventory covered by lien was located, rather than in New York where corporate debtor had headquarters, thus, indirect remittance to creditor of $ 98,157.85 is not voidable ***preference*** under 11 USCS § 547(b). In re Lucasa International, Ltd. (1981, BC SD NY) 13 BR 600, 4 CBC2d 1515, 32 UCCRS 622.

Under 11 USCS § 547(b), creditor cannot limit power of trustee to avoid possible preferential transfer by reason of its being secured creditor where creditor was secured in credit only for amount of $ 200 and unsecured creditor in amount of $ 3300. In re Satterla (1981, BC WD Mich) 15 BR 166, 5 CBC2d 664, CCH Bankr L Rptr P 68617.

Giving of mortgage constitutes transfer within 11 USCS § 547; transfer by debtor is voidable as preferential transfer even though parents paid consideration for property. In re Steele (1983, BC WD Wis) 27 BR 474.

Creditor's perfection of security interest in aircraft as required under Civil Aeronautics Act of 1938 2 months before filing of petition in ***bankruptcy*** which was almost one year following date debt arose is a "transfer" on account of antecedent debt pursuant to 11 USCS § 547(b) and subject to avoidance by debtor in possession. In re La Mancha Aire, Inc. (1984, BC SD Fla) 41 BR 647, 39 UCCRS 675.

Chapter 11 debtor's transfer to bank, which had previously loaned it money, of security interest in its inventory, accounts, and contract rights constitutes double transfer for purposes of 11 USCS § 547(b)(1) in that it benefited not only bank but also guarantors of debtor's note to bank; since bank did not perfect its security interest within 10 days, transfer was on account of antecedent debt. In re Aerco Metals (1985, BC ND Tex) 60 BR 77.

Bank properly perfected its security interest in debtor's livestock by filing statement with county clerk and recorder before 90 days prior to ***bankruptcy***; under state law, as to trustee or debtor, it is not necessary to file notice of security agreement with Department of Livestock, and thus filing of notice with department did not satisfy requirement that transfer be made within ***90 days*** under 11 USCS § 547; perfection of security interest in debtor's property is transfer at time of perfection of that interest. In re Douglas Hereford Ranch, Inc. (1986, BC DC Mont) 59 BR 863, 1 UCCRS2d 955.

Chapter 7 debtor's execution of form provided by federal government to secure ***payment*** of debtor's antecedent debt and to secure any future advances made by creditor for purchases of cattle feed under dairy termination program is transfer within meaning of 11 USCS § 547; since creditor failed properly to perfect its security interest created by such assignment under state law, § 547(e)(2)(C) operates to bring effective date of transfer to immediately before date of filing of petition and therefore trustee is entitled under state law to subordinate creditor's lien and may avoid such lien. In re Propst (1988, BC WD Va) 81 BR 406, 17 BCD 335, 5 UCCRS2d 1106.

Lender perfected its security interest in certificates of deposit, naming nondebtors as payees, at time they were pledged as collateral for loan to debtor and lender took possession of them; therefore, subsequent filing of financing statements within ***preference*** period, upon debtor's renewal of loan, at which time debtor's name was added as payee on certificates at request of lender, was not preferential transfer under 11 USCS § 547. In re Pembroke Dev. Corp. (1991, BC SD Fla) 124 BR 396.

When secured claim is satisfied by alleged preferential transfer, collateral must be valued as of time of transfer, not as of time of ***bankruptcy*** filing. Telesphere Liquidating Trust v Galesi (In re Telesphere Communs.) (1999, BC ND Ill) 229 BR 173, remanded (2000, ND Ill) 246 BR 315, 43 CBC2d 1568 and (criticized in Falcon Creditor Trust v First Ins. Funding (In re Falcon Prods.) (2008, BAP8) 381 BR 543, 49 BCD 112, 59 CBC2d 222) and (criticized in Ogier v Steele (In re Buckhead Oil Co.) (2011, BC ND Ga) 454 BR 242) and (criticized in Official Comm. of Unsecured Creditors of Adamson Apparel, Inc. v Simon (In re Adamson Apparel, Inc.) (2012, CD Cal) CCH Bankr L Rptr P 82331).

Creditor received transfer from debtors within meaning of 11 USCS § 547 when parties closed on mortgage transaction, despite fact that mortgage might have been invalid under state law as containing forged or unauthenticated signatures; all of debtors' actions indicated intent and understanding of granting mortgage lien on their residence and fact that cause for potential invalidity was that creditor's title insurer or mortgage broker inserted one or more signatures into mortgage, misrepresented date that mortgage was signed, and then "fudged" notary acknowledgment did not insulate transaction from ***preference*** attack. Givens v Countrywide Home Loans, Inc. (In re Jarosz) (2005, BC ED Wis) 322 BR 662.

Trustee had authority pursuant to 11 USCS §§ 544 and 547 to avoid security interest obtained by creditor because creditor did not properly perfect its security interest outside of 90-day period for preferential transfers, and equitable defenses did not apply to case. Swanson v M&I Marshall (In re Vission, Inc.) (2008, BC ED Wis) 400 BR 215, 50 BCD 275, 61 CBC2d 811.

Undisputed facts established each element of trustee's ***preference*** claim where, inter alia, creation of creditor's privilege under Louisiana law was transfer of interest of debtor in property and arose on account of antecedent debt. In re Cent. La. Grain Coop., Inc. (2013, BC WD La) 497 BR 229.

67. --Reperfection after lapse

For purposes of 11 USCS § 547, transfer is deemed to have occurred at time of re-perfection of security interest where perfection has previously lapsed. In re Provident Hospital & Training Asso. (1987, BC ND Ill) 79 BR 374, 5 UCCRS2d 451.

There is no fraudulent transfer under 11 USCS § 547 where under nonbankruptcy law, re-perfection of lapsed financing statement involves no transfer of any property of Chapter 11 debtor. In re Provident Hospital & Training Asso. (1987, BC ND Ill) 79 BR 374, 5 UCCRS2d 451.

Where creditor allowed financing statement to lapse and reperfected such interest within 10 days of its lapse, such reperfection does not relate back in time to date of original perfection for ***preference*** purposes nor does 11 USCS § 547(e)(2)(A) provide 10-day grace period for security agreements that have lapsed during 90-day period prior to filing petition; therefore "transfer" occurred when security interest became reperfected. In re Four Winds Enterprises, Inc. (1988, BC SD Cal) 94 BR 694, 18 BCD 1032, CCH Bankr L Rptr P 72597, 8 UCCRS2d 556.

Trustee's motion for reconsideration pursuant to E.D. Mich. ***Bankr.*** R. 9024-1 of order granting creditors' motion for summary judgment in connection with trustee's ***preference*** action pursuant to 11 USCS § 547(b) relating to refinancing of property in entireties by debtor and his non-filing spouse was denied because, even if granting of security interest and creditors' perfection of that security interest outside 10-day period that was provided for in 11 USCS § 547(e) were not subject to earmarking doctrine, property was not subject to 11 USCS § 547(b) ***preference*** action because: (1) it could not have been severed from interest of non-filing spouse; (2) existence of creditors' lien did not diminish estate; (3) avoidance of lien did not increase dividend to other creditors; and (4) such finding was consistent with policies behind § 547(b). Shapiro v Homecomings Fin. Network, Inc. (In re Davis) (2005, BC ED Mich) 319 BR 532, 53 CBC2d 1466.

Bank's attempt to re-perfect security interest it had in corporation's accounts receivable and inventory by filing UCC-5 Correction Statement in 2009 after it learned that it had filed UCC-3 Termination Statement in 2008 by mistake was ineffective under N.C. Gen. Stat. § 25-9-518, and bank did not re-perfect its security interest in corporation's property until May 2010, when it filed new financing statement; however, bank's security interest was subject to

avoidance under 11 USCS §§ 547 and 550 because new financing statement was filed less than 90 days before corporation was forced into Chapter 7 ***bankruptcy***. Ward v Bank of Granite (In re Hickory Printing Group, Inc.) (2012, BC WD NC) 479 BR 388, 78 UCCRS2d 314 (criticized in Official Comm. v JPMorgan Chase Bank, NA (In re Motors Liquidation Co.) (2013, BC SD NY) 486 BR 596).

68. Miscellaneous

Transfers of airplanes to creditor were sales, for purposes of 11 USCS § 547, rather than security for loans, where parties intended that creditor would not be reimbursed for funds dispersed to Chapter 11 debtor unless third parties subsequently bought airplanes. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

Debtor's pre-***bankruptcy*** petition payment of debt owed to credit card company, using balance transfers, credit card advances drawn on other cards, and convenience checks issued by three other credit card account holders, constituted property of debtor, so that transfers were voidable ***preferences*** under 11 USCS § 547(b), because transfers were property of debtor and diminished funds available to other creditors. Bank of Am., N.A. v Mukamai (In re Egidi) (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922.

Transfer of funds from one credit card company to another to pay credit card debt, at direction of debtor, constitutes ***preference*** that can be avoided by trustee under 11 USCS § 547(b) because debtor had control of funds, directed their distribution, and transfer diminished estate by depriving ***bankruptcy*** estate of resources which would otherwise have been used to satisfy claims of creditors; thus, use of convenience checks drawn on credit card account to pay debt owed on another credit card is preferential transfer, subject to avoidance, because new lender does not direct or require loaned funds to be paid to other credit card account, and debtor could have used borrowed funds to purchase assets instead of paying credit card debt. Bank of Am., N.A. v Mukamai (In re Egidi) (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922.

Nursing home providers have property interest in funds owed to them by State Department of Public Welfare, therefore Department's offset of payments to Chapter 11 debtor nursing home providers to recoup overpayments made to other nursing home providers under common ownership with debtors constitutes "transfer" under 11 USCS § 547. In re WJM, Inc. (1986, DC Mass) 84 BR 268.

Unilateral alteration to collateral reference date in future advance promissory notes does not constitute "transfer" within meaning of 11 USCS § 547 where creditor had valid mortgage securing notes at issue because it was intent of parties that advances be secured by collateral notes and error in collateral reference date was clerical. In re Carmack (1988, WD Mo) 94 BR 148.

Because court could determine who acknowledged mortgage, by presence of debtors' initials at bottom of certificate of acknowledgment, court could correct omission of debtors' full names on acknowledgment; corrected acknowledgment resulted in valid mortgage, which gave constructive notice to subsequent purchasers, and plaintiff ***bankruptcy*** trustee could not exercise his avoidance powers under 11 USCS §§ 544(a) or 547 to avoid mortgage. Stanzione v Bank of Am., N.A. (In re Stanzione) (2009, DC Vt) 404 BR 762, affd (2009, CA2 Vt) 356 Fed Appx 512.

Because appellee law firm merely held funds for judgment creditors in its client trust account until state court order could be obtained allowing disbursement, and law firm took from judgment creditors in satisfaction of its contractual fee arrangement with judgment creditors for its representation of judgment creditors in their suit against debtor, law firm was not initial transferee and ***bankruptcy*** court was correct in concluding same. Stevenson v Siciliano, Mychalowych, Van Dusen and Fuel, P.C. (In re Jackson) (2010, ED Mich) 436 BR 29.

Conveyance of hogs by Chapter 7 debtors to debtor-husband's father in partial repayment of debt to him constitutes transfer for purposes of 11 USCS § 547(b); even if hogs actually belonged to father, debtors had exclusive right to possess, control, and dispose of animals and return of possession is transfer of property notwithstanding actual ownership thereof. In re Albers (1986, BC ND Ohio) 60 BR 206, dismd (1986, ND Ohio) 64 BR 154.

Chapter 13 debtor's obligation to adjoining landowner, pursuant to agreed order entered prior to 90-day ***preference*** period, to erect retaining wall to remedy damage done when debtor constructed driveway that encroached on adjoining landowner's property, predated ***preference*** period, and anyone dealing with debtor's land subsequent to date of order took subject to debtor's obligation; therefore, lien created by supplemental order entered after adjoining landowner was forced to resort to self-help to have retaining wall erected, as he was permitted to do under agreed order in event debtor failed to do so, may not be avoided, even though it was not entered until 50 days prior to ***bankruptcy***; fact that lien ripened within ***preference*** period does not constitute sort of transfer that 11 USCS § 547 proscribes. In re Beverley (1991, BC ND Ohio) 129 BR 490.

Mortgagee's dispatch of rent demand letter to Chapter 11 debtor's tenants effected "transfer" of "property interest of debtor" for purposes of 11 USCS § 547(b) ***preference*** action, where debtor's right to use rents prior to secured creditor's enforcement of its lien is "interest of debtor in property," and it is obvious that once debtor's tenants started paying rents to mortgagee as result of demands, debtor, at minimum, was deprived of right to possess and use rents. Union Meeting Partners v Lincoln Nat'l Life Ins. Co. (In re Union Meeting Partners) (1994, BC ED Pa) 163 BR 229, CCH Bankr L Rptr P 75697.

Payments received by judgment creditors from debtors did not relate back to date of their judgment which was outside ***preference*** period where (1) there was no pre-***preference*** period acknowledgment of execution on which to relate back, (2) Supreme Court has indicated terms of 11 USCS § 547(e)(1)(B) appear to imply that transfer is "perfected" only when secured party has done all acts required to perfect its interest, not at moment state law may retroactively deem that perfection effective, and (3) no judgment lien on debtor's personal property existed until levy on execution of judgment and it was questionable whether absence of lien could be finessed by theory that ***payments*** were substitution for real property collateral. Womack v Houk (In re Bangert) (1998, BC DC Mont) 226 BR 892.

Summary judgment was granted to debtor in proceeding to avoid transfer made to judgment creditor because creditor's assertion of lien interest on debtor's beneficial interest in land trust, made within ***90 day*** period before debtor petitioned for ***bankruptcy***, because transfer was attempt to recover on antecedent debt and to recover more than creditor would have received with division of ***bankruptcy*** estate. McGuane v Everest Trading, LLC (In re McGuane) (2004, BC ND Ill) 305 BR 695.

Whether debtor was legally bound to pay transferee before transfer was made under 11 USCS § 547 depended on how Loss Fund that it had established with transferee was characterized. Argus Mgmt. Group v Gab Robins, Inc. (In re CVEO Corp.) (2005, BC DC Del) 327 BR 210, 45 BCD 30.

Bankruptcy trustee failed to prove by preponderance of evidence that transfer of debtors' tax refund from debtors' savings account to bank to cover outstanding balance on debtors' tax refund loan was preferential transfer under 11 USCS § 547; even if trustee had proven that transfer was preferential, bank met its burden of proving that transfer was done within ordinary course of business and within ordinary business terms such that bank could retain amount which it transferred from debtors' savings account. Kaler v Harwood State Bank (In re Bohjanen) (2006, BC DC ND) 365 BR 916.

Where transferee received refund of unsolicited deposit of $ 100,000 from debtor within ***preference*** period, transfer was deemed to be debtor's property and did not constitute contemporaneous exchange for value, and thus was preferential transfer for value under 11 USCS § 547(b). Sarachek v Ari Chitrik (In re Agriprocessors, Inc.) (2011, BC ND Iowa) 55 BCD 65.

Chapter 7 trustee's preferential transfer claim against bank was unable to withstand motion to dismiss because complaint itself admitted that debtor was "not obligor" on loan to bank; therefore, there was no transfer which was subject to recovery under 11 USCS § 547(b). Neilson v Agnew (In re Harris Agency, LLC) (2011, BC ED Pa) 465 BR 410, adversary proceeding, motion gr, in part, motion den, in part, claim dismissed, without prejudice (2011, BC ED Pa) 2011 Bankr LEXIS 5336, motion gr, in part, motion den, in part, claim dismissed, without prejudice, in part (2012, BC ED Pa) 477 BR 590.

Trustee sustained burden to show preferential transfers of $ 1.3 million in payments on loans to creditor during ***preference*** period, as well as certain other payments, and was entitled to relief because creditor failed to show credible evidence it received less than what it would receive in hypothetical liquidation on petition date or that ordinary course of business defense was applicable to installment contract transfers. DeGiacomo v Raymond C. Green, Inc. (In re Inofin Inc.) (2014, BC DC Mass) 512 BR 19.

Diminution requirement is not limited to cases in which dispute centers on whether property transferred belonged to debtor; instead, it applies to all ***preference*** actions. Van Winkle v 3Form, Inc. (In re Trainor Glass Co.) (2015, BC ND Ill) 72 CBC2d 1871.

Complaint stated prima facie preferential transfer claim where trustee alleged that debtor's principal transferred shares of stock to county prothonotary, that transfer was for benefit of holder of claim against debtor, that creditor's judgment against debtor preceded transfer of shares, that debtor was insolvent at date of transfer, that transfer was made in 90 day ***preference*** period, and that transfer enabled creditor to receive more than it would have received in Chapter 7 distribution. Seitz v Frorer (In re Covenant Partners, L.P.) (2015, BC ED Pa) 531 BR 84.

Unpublished Opinions

Unpublished: Portion of debtor corporation's $ 1.6 million distribution to its parent corporation, sole shareholder of debtor, which was made after $ 1.2 million default judgment was reinstated against debtor, was properly avoided as preferential transfer under 11 USCS § 547; however, directors of debtor corporation could not be held personally liable under Tex. Bus. Corp. Act Ann. arts. 2.38, 2.41 for remainder of distribution that was made via cash management system; although payments arguably qualified as "distributions" under Tex. Bus. Corp. Act Ann. art. 1.02(13)(c), debtor's Chapter 7 ***bankruptcy*** trustee did not sufficiently prove that debtor's directors assented to enough payments to justify $ 1.6 million liability demanded. Boudloche v A G Holdings, Inc. (In re Avante Villa of Corpus Christi) (2005, CA5 Tex) 2005 US App LEXIS 17188.

Unpublished: In Chapter 7 ***bankruptcy*** case in which ***bankruptcy*** court's finding that insurance broker was permitted to exercise legal control over debtor's transfers before forwarding payment to insurers was based on inaccurate factual assumption, ***bankruptcy*** court had to revisit issue of legal control test. Peachtree Special Risk Brokers, LLC v Kartzman (In re John A. Rocco Co.) (2014, DC NJ) 2014 US Dist LEXIS 178043.

Unpublished: Evidence amply supported ***bankruptcy*** court's finding that debtor intended his printed signature to be valid and effective on deed of trust (DOT) because debtor recorded DOT, included it in his schedules, which he prepared under oath, initially did not make claim for exemption, and did not remove DOT when he amended his schedules; therefore, trustee properly avoided DOT under 11 USCS § 547(b) and debtor's homestead exemption under Colo. Rev. Stat. § 38-41-201 was properly denied. Walker v Rodriguez (In re Walker) (2008, BAP10) 2008 Bankr LEXIS 1952.

4. Time Transfer is Deemed to Occur

a. In General

69. Generally

In order to determine date of perfection of transfer, it is necessary to determine when perfected security interest can beat judicial lien in priority battle, and this determination is made by reference to state law; after date of perfection is determined, time of transfer must be ascertained and must fit within 10-day grace period provided in 11 USCS § 547(e)(2); this grace period is period of time in which unperfected security interest takes precedence over other creditors, including trustee in ***bankruptcy***; thus, § 547(e) provides for 2-step process: first, determine date of perfection according to state law pursuant to § 547(e)(1)(A) or (B), and second, determine time of transfer pursuant to § 547(e)(2). Webb v GMAC (In re Hesser) (1993, CA10 Okla) 984 F2d 345, 23 BCD 1516, CCH Bankr L Rptr P 75094 (criticized in Fitzgerald v First Sec. Bank, N.A. (In re Walker) (1996, CA9 Idaho) 77 F3d 322, 96 CDOS 1214, 28 BCD 832, 35 CBC2d 580) and (criticized in Pongetti v GMAC (In re Locklin) (1996, CA5 Miss) 101 F3d 435, CCH Bankr L Rptr P 77212).

11 USCS § 547 gives transferee 10-day grace period from actual date of transfer within which to perfect transfer, and if this is not done, transfer is deemed made at time transfer is perfected, and such date will be used by ***Bankruptcy*** Court to determine whether various elements of voidable ***preference*** exist. In re Meritt (1980, BC WD Mo) 7 BR 876, 7 BCD 28, CCH Bankr L Rptr P 67883.

Timing rules depend upon 3 points in time: time transfer takes effect, time transfer is perfected, and time debtor acquires rights in transferred property. In re Larson (1982, BC DC Utah) 21 BR 264.

Transfer of personal property is perfected under 11 USCS § 547(e)(1)(B) when creditor on simple contract cannot acquire judicial lien that is superior to interest of transferee. Meister v State Nat'l Bank (In re Mailbag International, Inc.) (1983, BC DC Conn) 28 BR 905, 10 BCD 496, CCH Bankr L Rptr P 69173, 37 UCCRS 182 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

Transfer for purposes of 11 USCS § 547(b) can never be said to occur earlier than physical transfer of funds by debtor to creditor, and may in fact be held to occur considerably thereafter. In re Mason (1987, BC ED Pa) 69 BR 876.

In determining when creditor's judgment lien was perfected, rule under 11 USCS § 547(e)(1)(A) is that transfer of real property is perfected when bona fide purchaser could not have acquired superior interest to that of transferee, where transfer is taking of judgment lien on debtor's real property. In re Martin (1988, BC ED NC) 87 BR 394, 19 CBC2d 186.

Relevant date for determining whether creditor has received ***preference*** is date of filing of ***bankruptcy*** petition. Krafsur v Scurlock Permian Corp. (In re El Paso Refinery, L.P.) (1995, BC WD Tex) 178 BR 426, revd on other grounds (1999, CA5 Tex) 171 F3d 249, 34 BCD 106, 38 UCCRS2d 631.

For nonpurchase money security interests in property which debtor seeks to avoid as ***preferences*** pursuant to 11 USCS § 547(b), 10-day period of 11 USCS § 547(e)(2)(A) and (B) generally defines longest gap allowed between attachment and perfection for "contemporaneous" exchanges so as to protect security interests from avoidance pursuant to 11 USCS § 547(c)(1); Congress elected to change former 10-day period in 11 USCS § 547(c)(3), which relates to purchase money secured creditors, to 20 days in ***Bankruptcy*** Reform Act of 1994, but left relation-back period of § 547(e)(2)(A) and (B) at 10 days; in fact, Congress added phrase to § 547(e)(2)(A) to make it clearer that such section does not deal with special protection granted to purchase money secured creditors in § 547(c)(3); secured creditor may use 11 USCS § 547(e)(1)(B) to look to state certificate of title law providing 20-day period for relation-back to time security interest was created, to define gap allowed between attachment and perfection for "contemporaneous" exchanges so as to protect from avoidance only nonpurchase money security interests in property which were required to be perfected under state certificate of title law; therefore, to be considered contemporaneous rather than antecedent so as to be protected under 11 USCS § 547(c)(1), nonpurchase money, non-certificate of title security interest must be perfected within 10 days of its creation. W.T. Vick Lumber Co. v Chadwick (In re W.T. Vick Lumber Co.) (1995, BC ND Ala) 179 BR 283, 26 BCD 1089, 33 CBC2d 348.

When transfer occurs within meaning of 11 USCS § 547(e)(2) is question of law and subject to de novo review. In re Schuman (1987, BAP9 Cal) 81 BR 583, 17 BCD 57.

70. Time transfer took effect or is perfected

Transfer of property to debtor's spouse pursuant to terms of marital agreement was deemed not to have occurred until marital agreement was perfected by recording, pursuant to Va. Code Ann. § 11-1 and § 55-96. Prunty v Terry (In re Paschall) (2009, ED Va) 408 BR 79, affd (2010, CA4 Va) 388 Fed Appx 299, cert den (2011) 562 US 1257, 131 S Ct 1575, 179 L Ed 2d 475.

Under 11 USCS § 547, transfer is deemed to be made when it takes effect between parties if it is perfected no more than 10 days after it takes effect, and, if it is perfected more than 10 days after it takes effect, transfer is deemed to be made when perfected; where, under state law, Uniform Commercial Code, dozer would be classified as

equipment, rather than farm products, inasmuch as debtor was excavating contractor whose customers were general public, including farmers, and debtor was required to file such security interest in office of secretary of state in order to perfect interest, perfection of such interest within 90 days of debtor's filing created transfer within 90 days, which trustee could avoid, and sell dozer free and clear of any claimed lien. In re Butler (1980, BC ED Tenn) 3 BR 182, 6 BCD 32, 1 CBC2d 533, 28 UCCRS 596.

Under 11 USCS § 547(e)(2)(A) transfer is deemed to occur (1) when it takes effect between 2 parties, if it is perfected no more than 10 days after it takes effect, (2) at time perfected, if perfected after 10 days, or (3) if not perfected before commencement of case, immediately prior to filing of ***bankruptcy*** petition. In re Suppa (1981, BC DC RI) 8 BR 720, CCH Bankr L Rptr P 67901.

Transfer is not made any earlier than when it takes effect between parties under 11 USCS § 547(e)(2). In re Southeast Community Media, Inc. (1983, BC ED Tenn) 27 BR 834.

Under 11 USCS § 547(e)(2)(A) date of transfer, for purposes of determining whether there has been preferential transfer, takes place as of date transfer is effective between debtor and creditor provided such transfer is perfected against bona fide purchaser within 10 days thereafter; perfection date does not determine date of transfer, but is only condition precedent to validity of transfer. In re Ward (1984, BC DC SD) 36 BR 794.

Where 10th day of period set forth in 11 USCS § 547(e)(2) lands on Sunday, by virtue of ***Bankruptcy*** Rule 9006(a) relation back period is extended to include following Monday; therefore, security interest perfected by bank on 11th day is deemed to have been transferred on former date, so that transfer took place more than 90 days before date ***bankruptcy*** petition was filed and trustee may not avoid security interest as ***preference*** under 11 USCS § 547(b). In re Plante (1984, BC DC Me) 38 BR 239, 11 BCD 1046, CCH Bankr L Rptr P 69834.

Under 11 USCS § 547(e)(2), transfer is deemed made at time transfer took effect between parties if transfer was perfected within 10 days, and if transfer is not perfected within 10 days, date of perfection is date of transfer. In re Martin (1988, BC ED NC) 87 BR 394, 19 CBC2d 186.

11 USCS § 362(b)(3)'s exception to automatic stay for acts to perfect interest in property within time period of 11 USCS § 547(e)(2)(A) is inapplicable to county's lien arising from payment to hospital for emergency medical services rendered to Chapter 7 debtor's indigent wife where lien did not arise until payment, 2 months postpetition and 8 months after services were rendered. In re Claussen (1990, BC DC SD) 118 BR 1009, 24 CBC2d 398.

Defendant's payment to its insurance company will be avoided as ***preference*** where it was made within ***preference*** period on account of invoice dated prior to ***preference*** period. Field v Md. Motor Truck Ass'n (In re George Transfer, Inc.) (2001, BC DC Md) 259 BR 89.

11 USCS § 547(c)(3)(B), which sets forth ten-day time period for perfection of security interest, does not mean that defendant must perfect its security interest within ten days after transfer took effect in order to avail itself of contemporaneous exchange defense. Roost v Toyota Motor Credit Corp. (In re Moon) (2001, BC DC Or) 262 BR 97, 37 BCD 243, 46 CBC2d 333.

Because debtor never recorded instrument of conveyance when he reached settlement with his brother to transfer his interest in real property in satisfaction of both his unpaid contribution for taxes and balance due on outstanding, debtor's interest was not perfected until current owners recorded their deed; therefore, trustee was entitled to avoid debtor's transfer of property interest in satisfaction of obligations to his brother because current owners recorded deed within ***preference*** period, but tax contribution would have been charge against debtor's interest in real estate, and trustee could not establish any preferential payment of that obligation. Wallach v Korniczky (In re Korniczky) (2004, BC WD NY) 308 BR 153.

No bona fide dispute existed concerning ***bankruptcy*** estate's rights to technology within meaning of 11 USCS § 363(f), or right to avoid transfer of technology as preferential transfer under 11 USCS § 547, where debtor had returned technology to owner more than one year prior to debtor's filing its petition. In re Robotic Vision Sys. (2005, BC DC NH) 2005 BNH 5, 322 BR 502, 44 BCD 171.

Where debtors and creditor closed on mortgage but mortgage was not recorded until almost three weeks later, transfer was made, at earliest, on date when mortgage was recorded; transfer could not be deemed to have taken place on closing date under 11 USCS § 547(e)(2)(A) because transfer was not perfected within 10 days thereafter. Givens v Countrywide Home Loans, Inc. (In re Jarosz) (2005, BC ED Wis) 322 BR 662.

Although debtors had placed funds in their attorney's trust account to be used to pay settlement once such settlement was negotiated, ***90-day*** period in 11 USCS § 547(b) did not begin until funds were actually paid where attorney did not have freedom to issue check out of his trust account to fund settlement without debtors' explicit consent, and at any time prior to ***payment***, debtors could have ordered return of funds. Morton v Commer. Loan Servs. (In re Henninger) (2005, BC ND Tex) 336 BR 733.

Under Colorado's Certificate of Title Act, Colo. Rev. Stat. §§ 42-6-101 et seq., vehicle lien was perfected when filed by entry into state's central registry; as that event occurred 28 days after debtor took possession and was outside of 20 day time-frame of 11 USCS § 547(c)(3), creditor's "enabling loan" defense to trustee's avoidance action failed. Baker v Americredit Fin. Sers., Inc. (In re Baker) (2005, BC DC Colo) 338 BR 470, affd, in part, app dismd, in part, stay gr (2006, DC Colo) 345 BR 261 (criticized in Hill v WFS Fin., Inc. (In re O'Neill) (2007, BAP10) 370 BR 332).

Unpublished Opinions

Unpublished: Credit corporation's act of obtaining duplicate title to motor vehicle after original title was lost was not "transfer" of Chapter 7 debtor's interest in vehicle, and court dismissed ***bankruptcy*** trustee's claim that lien corporation held on vehicle could be avoided as preferential transfer under 11 USCS § 547(b) because corporation obtained duplicate title less than 90 days before debtor declared ***bankruptcy*** on May 8, 2008; corporation's lien was perfected on November 29, 2006, pursuant to Tenn. Code Ann. § 55-3-126(b)(2) and (c), when application for certificate of title was delivered to county clerk, not when it obtained duplicate title. Fitzpatrick v Toyota Motor Credit Corp. (In re Hartline) (2009, BC ED Tenn) 2009 Bankr LEXIS 2907.

71. Time debtor acquired rights in property

Where perfection of lien occurs upon date of service of summons under state law, that date controls for purposes of determining whether creditor has perfected its lien outside of ***preference*** period prescribed in 11 USCS § 547(e)(3), and not date declaratory judgment determined that purported spendthrift trust assets subject to such lien were not exempt from execution, since declaratory judgment did not effect transfer of right to those assets but merely verified that lien was valid and did attach to trust assets when writ of garnishment was served. In re Latham (1987, CA5 Tex) 823 F2d 108, CCH Bankr L Rptr P 71950.

Under 11 USCS § 547(e)(3), transfer is not made until debtor has acquired rights in property transferred; since employee does not acquire rights to his wages until he has earned them, even though service of summons is generally critical point for dating transfer, critical point for dating transfer where debtor has not acquired rights to property is date those rights are acquired; accordingly, to extent that garnishment consisted of wages that debtor earned for work done during ***90-day preference*** period, debtor is entitled to recover said amount under 11 USCS § 547. In re Morton (1984, BC ND Ga) 44 BR 750, 11 CBC2d 969, CCH Bankr L Rptr P 70171.

For purposes of determining when transfer was made under 11 USCS § 547(e)(3), Chapter 11 debtor's assignment of future accounts receivable occurred on date of ***payment*** rather than date of assignment since debtor had no right to ***payment*** whether or not earned through performance until debtor obtained net credit or debit after monthly process by clearinghouse of crediting debtor its receivables and debiting its payables. In re Gull Air, Inc. (1988, BC DC Mass) 90 BR 10 (criticized in Desmond v State Bank of Long Island (In re Computer Eng'g Assocs.) (2002, DC Mass) 278 BR 665).

11 USCS § 547(e)(3), which provides transfer is not made until debtor has acquired rights in property transferred, is not limited to transfers involving security interests of after acquired property, but may preclude effective assignment of future accounts receivable until those accounts actually come into existence. In re Gull Air, Inc. (1988, BC DC Mass) 90 BR 10 (criticized in Desmond v State Bank of Long Island (In re Computer Eng'g Assocs.) (2002, DC Mass) 278 BR 665).

11 USCS § 547(e)(3) stated that transfer was not made until debtor had acquired rights in property transferred; genuine issue of material fact existed as to whether two railcars stored at yard were in debtor's constructive possession, thereby cutting off rights of creditor to stop delivery. Zeta Consumer Prods. Corp. v Equistar Chem. L.P. (In re Zeta Consumer Prods. Corp.) (2003, BC DC NJ) 291 BR 336, 50 UCCRS2d 459.

Where debtor agreed to buy and took possession of car on Feb. 7 under contract, and secured creditor purchased contract from dealer on March 12, transfer of security interest to creditor was on account of antecedent debt and was avoided in ***bankruptcy*** by debtor's trustee under 11 USCS § 547(b); under § 547(e)(3), debtor acquired rights in collateral when she received possession of vehicle pursuant to contract. In re Jeans (2005, BC WD Tenn) 326 BR 722, 54 CBC2d 1007.

Where debtor received large tax refund for applying net operating loss rules, which refund was transferred to secured creditor, transfer constituted ***preference*** pursuant to 11 USCS § 547(e)(3) that could be avoided by official committee of unsecured creditors. Official Comm. of Unsecured Creditors of Tousa, Inc. v Citigroup N.Am., Inc.(In re Tousa, Inc) (2009, BC SD Fla) 406 BR 421 (criticized in Siegel v FDIC (In re IndyMac Bancorp Inc.) (2012, BC CD Cal) 2012 Bankr LEXIS 1462).

Creditor's garnishments of ***bankruptcy*** debtor's real estate commissions were subject to avoidance as preferential transfers since creditor received transfers when commissions were earned by debtor within ***preference*** period, rather than when garnishment lien attached prior to ***preference*** period. Fairweather v Monument Bank (In re Fairweather) (2014, BC DC Md) 515 BR 208.

72. Miscellaneous

Article 53 of Mortgage Law of Puerto Rico, P.R. Laws. Ann. tit. 30, § 2256, had relation back mechanism that established that mortgage liens become effective against third parties from date mortgage deeds were presented to Property Registry; it was important to note that, entry of presentation was constructive notice to all world until document was recorded; thus, transfers of three mortgages between debtors and creditor occurred well over two and half years from date of filing of ***bankruptcy*** petition, meaning that in order for bonafide purchaser to acquire interest superior to creditor's interest in these properties same had to present to Property Registrar for recordation mortgage deed prior to date in which creditor presented its mortgage deeds. Tosado v Banco Popular De P.R. (In re Rios) (2009, BC DC Puerto Rico) 420 BR 57.

b. Particular Transfers

73. Assignments

Chapter 7 debtor's ex-wife who assigned to her attorneys her right to receive attorneys' fees from ex-husband in exchange for dollar-for-dollar credit against fees she owed attorneys was not granted ***preference*** over other creditors, where there was no evidence ex-wife had ever filed ***bankruptcy*** and especially in light of fact that no payments had been made, or were being made, on debt. In re Adams (2000, DC Md) 254 BR 857, affd (2001, CA4 Md) 246 F3d 662, reported in full (2001, CA4 Md) 4 Fed Appx 209.

Transfer affected by assignment in quit claim was never perfected prior to filing of ***bankruptcy***, either in real estate or personal property records, therefore, transfer occurred immediately before filing of ***bankruptcy*** petition and could have been voidable by trustee. In re Luttrell (1983, BC ED Mo) 2 BAMSL 535.

Where agreement by Chapter 7 debtor to reimburse county for interim general assistance while her claim for supplemental security income of authorization for reimbursement was pending included authorization which assigned her right to ***payment*** of benefits to county, transfer of debtor's right of ***payment*** occurred at time assignment was executed and not date Social Security Administration granted her claim; since no transfer of debtor's right to ***payments*** occurred within ***90 days*** of filing of petition, trustee may not avoid transfer because one of elements of ***preference*** under 11 USCS § 547 has not been met. In re Trejo (1984, BC ED Cal) 44 BR 539, 12 BCD 568, CCH Bankr L Rptr P 70143.

Transfer of right to proceeds of lawsuit occurred when assignment of right was made by debtor or, at latest, when assignment was recorded not when proceeds became identifiable at time of settlement; because assignment was made outside 90-day period, transfer may not be avoided under 11 USCS § 547. In re Roy Young, Inc. (1986, BC WD La) 66 BR 16.

Assignment constituting transfer under 11 USCS § 547 occurred when stakeholder received notice of assignment, and not 3 days earlier when assignment was executed and delivered to assignee's attorney. In re Trans Air, Inc. (1987, BC SD Fla) 78 BR 351, 16 BCD 791.

In adversary proceeding where Chapter 11 debtor-contractor executed assignment of its right to ***payments*** for future performance to subcontractor well before ***90-day preference*** period, debtor can recover ***payments*** made to subcontractor pursuant to such assignment on account of work performed by debtor during ***90-day preference*** period since, under 11 USCS § 547(e)(3), such "transfer" does not relate back to date of original agreement but rather is deemed to occur only after debtor acquired rights in collateral, which in this case relates to date debtor earned his right to ***payment***. In re Northwest Electric Co. (1988, BC WD Pa) 84 BR 400, 18 CBC2d 1029.

Transfer was perfected for 11 USCS § 547 ***preference*** purposes when debtor assigned to creditor/feed seller interest in any recovery or judgment which debtor might obtain against third-party feed manufacturer, which was outside ***preference*** period, rather than when debtor's attorney delivered settlement check to creditor. Wagner v Farmers Coop. Elevator Co. (1992, BC ND Iowa) 144 BR 430, app den (1994, ND Iowa) 173 BR 916, mod on other grounds (1994, ND Iowa) 1994 US Dist LEXIS 14884.

Trustee may not avoid debtor's assignment of expectancy interest in real property as preferential transfer under 11 USCS § 547, where assignment, which was effective when executed and perfected at time of execution within meaning of 11 USCS § 547(e)(1)(B), was intended to be, and was in fact, substantially contemporaneous exchange for new value. Greene v Rosin (In re Rosin) (1998, BC MD Fla) 248 BR 625.

While bank, under assignment of rents, had served notice on debtor's tenants and began collecting the rents during the 90-day ***preference*** period, it was not preferential transfer that could be avoided because it did not enable bank to receive more than it would otherwise have received under Chapter 7; and in any event, the title to the rents was conveyed by the assignment which was executed more than one year before the ***bankruptcy***. Robin Assocs. v Metro. Bank & Trust Co. (In re Robin Assocs.) (2001, BC WD Pa) 275 BR 218.

Where ***bankruptcy*** debtor assigned proceeds of letter of credit to creditors, transfers were not avoidable ***preferences*** under 11 USCS § 547(b) since assignments were valid under state law and assignments did not occur within ***preference*** period, regardless of when creditors actually received proceeds of letter of credit. Floyd v Am. Block Roland Niles Int'l, Inc. (In re Cooper Mfg. Corp.) (2006, BC SD Tex) 344 BR 496, 46 BCD 117, 60 UCCRS2d 143.

Bankruptcy trustee was not allowed under 11 USCS § 547 to avoid ***payment*** in amount of $ 10,046 which Chapter 7 debtor's attorney made to corporation less than ***90 days*** before debtor declared ***bankruptcy*** because ***payment*** was not preferential transfer; corporation bought $ 5,953 interest in debtor's workers' compensation claim for $ 5,000 two years before debtor declared ***bankruptcy***, and it had absolute right under parties' contract to receive ***payment*** of principal amount plus interest once debtor's workers' compensation claim was resolved. Shapiro v US Claims, Inc. (In re Welch) (2014, BC ED Mich) 511 BR 99.

For purposes of 11 USCS § 547, transfer of Chapter 11 debtor's real property interest occurred when mortgagee's assignee perfected its interest under state law by recording deed of trust, not at time of foreclosure sale. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

Unpublished Opinions

Unpublished: Transfer of interest in mortgage was merely assignment from one creditor to another, not transfer of debtor's property or obligation incurred by debtor; assignments did not constitute transfers of debtor's interest. Barney v Bank of Am., N.A. (In re Gifford) (2016, CA10) 651 Fed Appx 792.

74. Attachments

Attachment filed under Rhode Island law more than 90 days before debtor's filing of ***bankruptcy*** petition cannot be avoided as ***preference*** under 11 USCS § 547; under state law any subsequent purchaser would be charged with constructive knowledge of and would take subject to attachment and therefore transfer occurred on date of recording of attachment despite fact that execution of subsequent judgment was not levied until date within the 90 days of filing of ***bankruptcy*** petition. In re Suppa (1981, BC DC RI) 8 BR 720, CCH Bankr L Rptr P 67901.

Inchoate right that arose under lien created by trustee process under state law on Chapter 7 debtor's deposits in "payroll account" is transfer within meaning of 11 USCS § 101 and, other requirements of 11 USCS § 547(b) being met, trustee may recover from those bank deposits. In re Clough Enterprises, Inc. (1985, BC DC Vt) 53 BR 426.

Effective date of attachment made on debtors' home, for purposes of 11 USCS § 547, was on date that sheriff stated on writ that he had "attached" property and presented writ for recording, not on date when state court entered order approving attachment. Hebert v S.S. Hartwell & Co. (In re Hebert) (1994, BC DC Mass) 162 BR 637.

Security interest perfected 32 days after attachment and within ***90 days*** preceding debtor's Chapter 7 ***bankruptcy*** petition cannot be said to be contemporaneous, and qualifies as preferential transfer of property interest under 11 USCS § 547. Kepler v Security Pac. Hous. Servs. (In re McLaughlin) (1995, BC WD Wis) 183 BR 171, 33 CBC2d 1011, 26 UCCRS2d 1110.

Debtor's ***payment*** of gambling debts ("markers") with gambling chips was preferential transfer under 11 USCS § 547; court rejected casino's contention that gambling chips were not property of debtor because they were accounting mechanism and placeholder to evidence debt owed by casino; transaction was simply straightforward short-term loan transaction between casino and debtor, and chips exchanged for marker reflected same value amount as marker but were used specifically to gamble in casino. Homann v R.I.H. Acquisitions IN, LLC (In re Lewinski) (2008, BC ND Ind) 410 BR 828, 60 CBC2d 1388.

Where debtor did not, outside ***preference*** period, own sufficient personal property, but only debtor's unexercised stock options, within State of Florida to which creditor's judgment lien could attach under Fla. Stat. §§ 55.202 and 56.061, creditors' judgment lien was avoidable under 11 USCS §§ 547(b). Cohen v Roy (In re Cohen) (2009, BC SD Fla) 70 UCCRS2d 396.

75. Checks, generally

In determining if transfer occurred within 90-day ***preference*** period of 11 USCS § 547, transfer made by check is deemed to occur on date that drawee bank honors check, rather than date check is presented to recipient; when debtor has directed drawee bank to honor check and bank has done so, debtor has implemented "mode, direct or indirect . . . of disposing of property or of an interest in property" within meaning of 11 USCS § 101(54), and although recipient of check may have gained chose in action against debtor at time of delivery, such right cannot be characterized as conditional right to property or interest in property. Barnhill v Johnson (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

Debtor cannot recover as ***preference*** under 11 USCS § 547(b) funds paid by check to creditors prior to 90-day period, even if checks were cashed within 90-day period, as long as checks were presented to bank within reasonable time. In re Kenitra, Inc. (1986, CA9 Or) 797 F2d 790, CCH Bankr L Rptr P 71421, cert den (1987) 479 US 1054, 107 S Ct 928, 93 L Ed 2d 980.

For purposes of 11 USCS § 547, check transactions normally take place at time of delivery; when there is inexplicable 4-month delay between delivery and honoring of Chapter 7 debtor's checks, such delay is

unreasonable and therefore transactions are deemed completed only when checks are honored; a reasonable time for honoring check under 11 USCS § 547(c)(1) is limited to not more than 30 days. In re Wolf & Vine (1987, CA9 Cal) 825 F2d 197, 16 BCD 736, CCH Bankr L Rptr P 71934.

For purposes of 11 USCS § 547(b) and (c), payment of debt by means of check is equivalent to cash payment, unless check is dishonored. In re Belknap, Inc. (1990, CA6 Ky) 909 F2d 879, CCH Bankr L Rptr P 73558, 16 UCCRS2d 408.

Rule that transfer occurs on date check is delivered for purposes of ordinary-course-of-business exception under 11 USCS § 547(c)(2) does not apply under § 547(b) because purpose and function of these subsections differ; § 547(b) is intended to promote common good of all estate's creditors, and intent of parties as to when transfer is deemed completed is irrelevant, whereas under § 547(c) purpose is to encourage trade creditors and other suppliers to continue dealing with troubled business, and it is important to protect ordinary commercial expectations of parties; furthermore, § 547(e) should not be used to determine when check is transferred for purposes of § 547(b) because § 547(e) deals with security interests, not checks--it is unnecessary and incorrect to analogize to security interests and UCC Article 9 perfection rules when UCC Article 3 squarely covers commercial paper such as checks. In re Antweil (1991, CA10 NM) 931 F2d 689, 21 BCD 1069, 24 CBC2d 1772, CCH Bankr L Rptr P 73928, 16 UCCRS2d 400, affd (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

When check bounces, date of delivery of dishonored check no longer determines time of transfer for purpose of 11 USCS § 547(b); thus, it was not error to refuse to relate time of wire transfers to make good on bounced check back to date bad check was delivered. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

Transfer of money that occurred outside 90 day ***preference*** period cannot be avoided by trustee as ***preference*** under 11 USCS § 547; transfer is deemed to have occurred on date that check was mailed pursuant to § 547(e)(2)(A) because transfer was perfected within 10 days thereafter when check cleared debtor's bank account. In re Sider Ventures & Services Corp. (1983, BC SD NY) 33 BR 708, 11 BCD 524, 10 CBC2d 657, CCH Bankr L Rptr P 69462, affd (1985, SD NY) 47 BR 406, CCH Bankr L Rptr P 70264 (criticized in Staff Builders of Phila., Inc. v Koschitzki (1992, ED Pa) 1992 US Dist LEXIS 22928).

Acceptance by supplier of material of post-dated checks and promissory notes from Chapter 11 debtor construction company at time when supplier could have perfected materialman's lien, but chose not to, does not prevent later payments from being preferential under 11 USCS § 547 because acceptance is not equivalent to payment. In re Alkap, Inc. (1984, BC DC NJ) 54 BR 151.

Bankruptcy Code is silent as to when transfer by check is deemed to have occurred for purposes of 1 USCS § 547(b); therefore court will look to state law to determine when transfer is effected by check. In re Belknap, Inc. (1988, BC WD Ky) 96 BR 108, 8 UCCRS2d 415.

Transfer by check occurs for purposes of 11 USCS § 547(c) when check is delivered to creditor; difference in this treatment from that accorded under § 547(b) where transfer takes place when check is honored can be understood when viewed in light of underlying purposes and functions of respective provisions; § 547(b) is designed to recover funds for equitable distribution among creditors and to avoid transactions that favor certain creditors while purpose of § 547(c) is to encourage creditors to deal with troubled businesses on regular basis. Brandt v Sprint Corp. (In re Sonicraft, Inc.) (1999, BC ND Ill) 238 BR 409, 35 BCD 30, 42 CBC2d 1679.

For purposes of 11 USCS § 547(e), which defines when transfer occurs for purposes thereof and generally provides that it occurs when it takes effect between transferor/debtor and transferee, if perfected at or within ten days, after such time, transfer made by check is properly treated as occurring on date on which checks clear transferor/debtor's bank, not on date of execution of some agreement, note, or lease which created obligation to make such payments. Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656.

76. --Delivery

Transfer made by check occurs upon delivery, not on date bank honors check, for purposes of avoiding fraudulent transfer under 11 USCS § 547. In re White River Corp. (1986, CA10 Colo) 799 F2d 631, 14 BCD 1341, 15 CBC2d 617, CCH Bankr L Rptr P 71462 (criticized in Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124).

Payment by check occurs on date check is delivered for purposes of 11 USCS § 547(c)(2). Braniff Airways, Inc. v Midwest Corp. (1989, CA5 Tex) 873 F2d 805, 19 BCD 990, 21 CBC2d 549, CCH Bankr L Rptr P 72912, reh den (1989, CA5) 1989 US App LEXIS 9481.

Transfer of check occurs upon delivery from debtor to creditor, and delivery occurs when payee obtains possession of check; check must be presented for payment within 30-day period deemed reasonable by UCC and honored upon presentment for delivery date to be considered time of transfer. In re Belknap, Inc. (1990, CA6 Ky) 909 F2d 879, CCH Bankr L Rptr P 73558, 16 UCCRS2d 408.

Transfer of funds by check occurs at time of delivery rather than at time check is honored by drawee bank, for purposes of 11 USCS § 547(b). In re Virginia Information Systems Corp. (1991, CA4 Va) 932 F2d 338, 3 Fourth Cir & Dist Col Bankr Ct Rep 478, 21 BCD 1094, CCH Bankr L Rptr P 74031, 20 FR Serv 3d 262, 16 UCCRS2d 421.

Trustee was entitled to recover as preferential transfer cashier's check delivered to creditor by debtor following bank's dishonor of debtor's personal check; transfer could not be deemed to have occurred when personal check was delivered to creditor, since check was not honored, hence transfer would not be deemed to have occurred at time of delivery of personal check, and to permit separate, later payment by cash or cashier's check to relate back to date of delivery of dishonored check would open door to endless manipulation. Hall-Mark Elecs. Corp. v Sims (In re Lee) (1997, CA9) 108 F3d 239, 97 CDOS 1591, 97 Daily Journal DAR 3065, 30 BCD 628, 37 CBC2d 991, CCH Bankr L Rptr P 77289, 31 UCCRS2d 1044.

For purposes of determining whether liquidating trust may avoid transfer of $ 10,596.11 check from Chapter 11 debtor to trade creditor as preferential transfer under 11 USCS § 547, transfer took place on date of delivery of check to trade creditor, and, therefore, since trade creditor gave new value in amount of $ 8,349.47 after that transfer, liquidating trust may avoid only that portion of transfer for which new value was not provided, even though check was not honored by bank until day after goods were shipped to debtor, where generally creditors should be allowed to rely on receipt of check rather than waiting for check to be honored, because § 547(c)(4) is intended to encourage creditors to continue doing business with troubled enterprise. National Enters. v Tee-Lok Corp. (In re National Enters.) (1994, BC ED Va) 174 BR 429, 7 Fourth Cir & Dist Col Bankr Ct Rep 300, 26 BCD 352, CCH Bankr L Rptr P 76312.

Chapter 7 trustee could not defeat equitable mortgage that secured loan made by creditor to Chapter 7 debtor under either 11 USCS § 544 or 11 USCS § 547 because date of equitable mortgage related back in time to prepetition date on which loan check was delivered to debtor and resulting equitable mortgage was deemed to have been perfected on prepetition date on which creditor obtained lis pendens, which was more than 90 days prior to debtor's Chapter 7 ***bankruptcy*** filing. Kedzuf v Turetsky (In re Turetsky) (2009, BC WD Pa) 402 BR 663, 61 CBC2d 1277.

Preferential transfer occurred on date check was delivered to creditor for purposes of 11 USCS § 547(c)(4). Rushton v E & S Int'l Enter. (In re Eleva, Inc.) (1999, BAP10) 235 BR 486, 16 Colo Bankr Ct Rep 264, 42 CBC2d 512.

77. --Receipt

Transfer occurs for purposes of 11 USCS § 547(b) on receipt of check, provided check is honored within 10 days; in present case where creditor received checks 95 days prepetition, initiated collection same day, and debtor's bank honored instruments 5 days later, transfer occurred outside ***preference*** period and was completed within days allowed by § 547(e), and therefore payments are not avoidable. Global Distribution Network, Inc. v Star Expansion Co. (1991, CA7 Ill) 949 F2d 910, CCH Bankr L Rptr P 74321, 16 UCCRS2d 394.

Time of transfer of check, for purposes of exceptions to ***preference*** under 11 USCS § 547(c)(4), is date of receipt of check by creditor. Leathers v Prime Leather Finishes Co. (1984, DC Me) 40 BR 248, CCH Bankr L Rptr P 69879 (criticized in DeGiacomo v Draper Knitting Co. (In re Jannel Indus.) (2000, BC DC Mass) 245 BR 757, 35 BCD 226) and (criticized in Official Comm. of Unsecured Creditors of Contempri Homes, Inc. ex rel. Chapter 11 Estate of Contempri Homes, Inc. v Seven D. Wholesale (In re Contempri Homes, Inc.) (2001, BC MD Pa) 269 BR 124) and (criticized in Roberds, Inc. v Broyhill Furniture (In re Roberds, Inc.) (2004, BC SD Ohio) 315 BR 443, 43 BCD 200) and (criticized in Strauss v Janesville Prods. (In re Acoustiseal, Inc.) (2004, BC WD Mo) 318 BR 521, 53 CBC2d 617) and (criticized in Speth v Kimball Int'l Mktg. (In re Interior Res., Inc) (2007, BC DC Kan) 2007 Bankr LEXIS 835).

Trustee cannot avoid ***payment*** by check as ***preference*** under 11 USCS § 547(e) because section applies only to perfection of security interests in property, not to "perfection" of check by ***payment*** by bank; ***payment*** by check is governed by § 547(c) contemporaneous exchange exception, and governing date is date creditor received check; thus, when creditor received check prior to ***90-day*** period, and check was presented within 30 days and not dishonored, there was no ***preference***. In re Walker Industrial Auctioneers, Inc. (1984, BC DC Or) 45 BR 452, CCH Bankr L Rptr P 70141.

Evidence that investors in corporate debtor received checks drawn on accounts of debtor in amounts alleged by trustee and honored by drawee bank constitutes prima facie proof that investors received transfers of debtor's property under 11 USCS § 547. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

78. --Honor

In determining if transfer occurred within 90-day ***preference*** period of 11 USCS § 547, transfer made by check is deemed to occur on date that drawee bank honors check, rather than date check is presented to recipient; when debtor has directed drawee bank to honor check and bank has done so, debtor has implemented "mode, direct or indirect . . . of disposing of property or of an interest in property" within meaning of 11 USCS § 101(54), and although recipient of check may have gained chose in action against debtor at time of delivery, such right cannot be characterized as conditional right to property or interest in property. Barnhill v Johnson (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

For purposes of 11 USCS § 547(b), payment made by check is deemed to have occurred when check is honored by drawee bank, rather than when it is delivered to payee. In re Antweil (1991, CA10 NM) 931 F2d 689, 21 BCD 1069, 24 CBC2d 1772, CCH Bankr L Rptr P 73928, 16 UCCRS2d 400, affd (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

For purposes of 11 USCS § 547 transfer took place on date Chapter 11 debtor's check was honored by bank, not on date check was tendered to creditor. In re Almarc Mfg., Inc. (1986, BC ND Ill) 60 BR 584, 14 BCD 466.

For purposes of 90-day ***preference*** avoidance period contained in 11 USCS § 547(b)(4)(A), transfer occurs when check is honored by Chapter 11 debtor's bank rather than when check was delivered. In re Newman Cos. (1988, BC ED Wis) 83 BR 571, 6 UCCRS2d 1187, dismd, in part (1992, BC ED Wis) 140 BR 495, 27 CBC2d 321 (criticized in United States v Walters (2012, ND Okla) 112 AFTR 2d 7383).

For purposes of 11 USCS § 547(b) transfer occurs when check is honored, not when it is delivered; therefore, transfers to insurer in ***payment*** of policy premiums did not take place until bounced checks were replaced with cashier's checks or checks that were honored by bank, all of which occurred within ***90-day preference*** period. In re St. Louis Globe Democrat, Inc. (1989, BC ED Mo) 99 BR 946, 5 BAMSL 4463, 21 CBC2d 180.

Date that check is honored by debtor's bank is operative date for 11 USCS § 547(b)(4) purposes. In re Jolly "N", Inc. (1991, BC DC NJ) 122 BR 897.

Transfer of check occurs when check is honored, for purposes of determining whether transfer falls within preferential period of 11 USCS § 547(b). Lawson v Ford Motor Co. (In re Roblin Indus.) (1991, BC WD NY) 127 BR 722, 21 BCD 1323, affd (1996, CA2 NY) 78 F3d 30, 28 BCD 882, CCH Bankr L Rptr P 76903 (criticized in Luper v Columbia Gas (In re Carled, Inc.) (1996, CA6 Ohio) 91 F3d 811, 29 BCD 601, 36 CBC2d 732, CCH Bankr L Rptr P 77123, 1996 FED App 249P) and (criticized in Gonzales v Conagra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.) (2007, BAP10) 373 BR 691, 48 BCD 190) and (criticized in Official Comm. of Unsecured Creditors v Dow Chem. Co. (In re Erie County Plastics Corp.) (2010, BC WD Pa) 438 BR 89, 53 BCD 250).

Transfer by check occurs for purposes of 11 USCS § 547 when check is honored, rather than when it is delivered, but for purposes of 11 USCS § 547(c), transfer by check occurs when check is delivered. In re Chicago, M. & W. R. Co. (1991, BC ND Ill) 127 BR 839, 21 BCD 573.

Transfer by debtor to bank of counter check, dated one day after delivery, occurred on date when check was dated and paid, which was within ***90-day*** period of 11 USCS § 547, rather than on previous day when check was delivered where no action was taken with respect to check on date it was delivered, bank had taken no steps which would constitute final ***payment***, and while bank held check, debtor could have stopped ***payment*** or IRS levy could have intervened and obtained priority. Barber v Reynolds State Bank (In re Jones) (1993, BC CD Ill) 161 BR 809, 24 UCCRS2d 1190.

Transfer to thrift savings plan participant occurred on August 23, 1985, date Chapter 11 debtor's check was honored by bank, and therefore that transfer occurred within ***90-day preference*** period for purposes of 11 USCS § 547 action, despite participant's assertion that debtor intended his transfer to occur on date check was issued, that he was paid on that date, and, therefore, his ***payment*** was not made within ***90-day preference*** period, where for purposes of ordinary check, transfer as defined by 11 USCS § 101 occurs on date of honor, and not before; honor is defined as when drawee bank pays check. Milwaukee Cheese Wis. v Bukowski (In re Milwaukee Cheese Wis.) (1993, BC ED Wis) 164 BR 297, 30 CBC2d 520, judgment entered (1995, BC ED Wis) 191 BR 397, affd (1997, CA7 Wis) 112 F3d 845, 30 BCD 950, 21 EBC 1014, CCH Bankr L Rptr P 77348.

Debtor's payments by cashier's checks to satisfy antecedent debt, incurred two weeks' prior when checks he presented for payment for cattle he purchased on day of auction were dishonored by bank, were preferential transfers which trustee could recover under 11 USCS § 547(b), since defenses did not apply, where there could be no contemporaneous exchange for new value involving dishonored check, and auction's ordinary business practice was to require ***payment*** on day of sale, not two weeks later. Stewart v Barry County Livestock Auction, Inc. (In re Stewart) (2002, BC WD Ark) 274 BR 503, 39 BCD 59, CCH Bankr L Rptr P 78612, 47 UCCRS2d 554, judgment entered (2002, BC WD Ark) 2002 Bankr LEXIS 187.

Although debtors posted bond outside ***90-day preference*** period, funds were transferred (honored) by check to creditor within ***preference*** period; accordingly, transfer was avoidable as ***preference***. Cruse v Hannibal Reg'l Health Care Sys. (In re Watkins) (2005, BC ED Mo) 325 BR 277.

For purposes of determining if transfers were received by utility provider within 90 days prior to petition date, transfers made by check were deemed to occur when check was honored, not when written or when received. Stoebner v San Diego Gas & Elec. Co. (In re LGI Energy Solutions, Inc.) (2012, BC DC Minn) 2012 Bankr LEXIS 6246, affd in part and revd in part (2012, BAP8) 482 BR 809, 57 BCD 57, CCH Bankr L Rptr P 82376, affd (2014, CA8) 746 F3d 350, 59 BCD 77, 71 CBC2d 474, CCH Bankr L Rptr P 82613.

Although date check was honored is date that ***preference*** occurred for purposes of 11 USCS § 547(b), date check was received is relevant date to be considered in connection with defenses under § 547(c). Burtch v Opus, LLC (In re Opus East, LLC) (2015, BC DC Del) 528 BR 30.

79. Escrow arrangements

Trustee cannot avoid debtor's prepetition transfer into escrow pending appeal of judgment for Farmer's Home Administration, because transfer took place when escrow agreement was entered into, more than 90 days prior to filing of petition, even though condition of escrow--debtor's loss on appeal--was met within 90-day period, because

transfer of legal title in escrowed funds relates back to transfer of equitable interest. In re Newcomb (1984, CA8 Mo) 744 F2d 621, CCH Bankr L Rptr P 70040.

Escrow company was financial conduit rather than transferee and its transfer of insolvent debtor's funds to a finance company was preferential transfer where it occurred while debtor was insolvent, within ninety days of filing of ***bankruptcy*** petition, and would allow finance company to receive more than it would otherwise receive from estate; although finance company had conversion claim against debtor, funds it sought could not be reasonably traced or identified, so it could not assert property rights over them. Bailey v Big Sky Motors, Ltd. (In re Ogden) (2002, CA10 Utah) 314 F3d 1190, 40 BCD 208, CCH Bankr L Rptr P 78794.

Payments to judgment creditors pursuant to escrow arrangement entered into one year before ***bankruptcy*** are not preferential transfers under 11 USCS § 547(b)(4)(A) since debtors' property was transferred at time they entered into escrow arrangement. In re Estates of Pelc (1983, BC DC Or) 34 BR 823, CCH Bankr L Rptr P 69497.

In order to determine when transfer of Chapter 7 debtor's rent arrearages into escrow account occurred for purposes of 11 USCS § 547, court must inquire into whether, under New York law, judgment lien creditor of debtor would acquire interest greater than that of landlord by attachment of escrow account; under New York law, unless judgment debtor as grantor, retains interest in property over and above interest of grantee, escrow account cannot be reached by debtor's judgment creditors, therefore transfer is found to have occurred when monies were deposited into escrow, not when funds were subsequently ordered released, because upon deposit, debtor reserved only contingent right to escrowed funds. In re Coco (1986, BC SD NY) 67 BR 365.

Transfer of funds from Chapter 13 debtor former tenant to former landlord from bank account in which debtor deposited rentals during pendency of appeal from judgment in favor of landlord did not occur on date when judge ordered transfer, but on date of actual remittance of funds; where this was within ***90 days*** of ***bankruptcy***, transfer is avoidable under 11 USCS § 547 and debtor may exempt funds under 11 USCS § 522; all but portion of funds representing current rental ***payment*** were ***payments*** for antecedent debt and are avoidable. In re Mason (1987, BC ED Pa) 69 BR 876.

For purposes of determining when transfer occurred under 11 USCS § 547(b), funds placed by debtor contractor into counsel's trust account for ***payment*** to subcontractor where not held in escrow where there is no evidence of escrow agreement among parties, no evidence of agreement to condition delivery of funds to subcontractor upon performance of some act or happening of some event, and counsel was not acting as agent for both parties, but rather was acting as agent for contractor, and therefore transfer occurred when counsel transferred funds to subcontractor and check was honored not when debtor deposited funds with counsel. Rajala v Holland Corp. (1992, BC DC Kan) 141 BR 737.

Funds deposited pursuant to undertaking were held in manner substantially similar to escrowed funds and transfer occurred, for ***preference*** purposes under 11 USCS § 547 when funds were transferred into undertaking rather than when funds were released upon settlement of state-court litigation because once funds were deposited into escrow, equitable principles removed funds from Chapter 11 debtor's estate. Shron v M & G Promo Service, Ltd. (In re Anthony Sicari, Inc.) (1992, BC SD NY) 144 BR 656, 23 BCD 700.

80. Foreclosure sale

Earmarking doctrine did not provide escape from preferential transfer rule under 11 USCS § 547(b) to mortgagee that belatedly-perfected its mortgage and transfer of mortgage debt from one mortgagee to another was not excepted under § 547(c) because court refused to expand 10-day recording limitation so that transfer might qualify as contemporaneous exchange. Collins v Greater Atl. Mortg. Corp. (In re Lazarus) (2007, CA1 Mass) 478 F3d 12, 57 CBC2d 400, CCH Bankr L Rptr P 80839 (criticized in George v Argent Mortg. Co., LLC (In re Radbil) (2007, BC ED Wis) 364 BR 355) and (criticized in Gordon v Novastar Mortg., Inc. (In re Hedrick) (2008, CA11 Ga) 524 F3d 1175, CCH Bankr L Rptr P 81211, 21 FLW Fed C 569) and (criticized in Burtch v Conn. Cmty. Bank, N.A. (In re J. Silver Clothing, Inc.) (2011, BC DC Del) 453 BR 518, 54 BCD 180).

Foreclosure sale constitutes transfer of interest in property of debtor, and transfer is perfected when trustee's foreclosure deed is recorded; debtor's equity of redemption is interest in property and foreclosure sale disposes of debtor's interest in property; property right of debtor is disposed of by sale, and this is clearly within definition of transfer under 11 USCS § 101. In re Lakeview Inv. Group, Inc. (1984, BC ED NC) 40 BR 449, 10 CBC2d 1319, CCH Bankr L Rptr P 69918.

Debtor could not avoid sheriff's foreclosure sale under 11 USCS § 547, where offending transaction was not sale which effected transfer of residence but yet-to-occur allegedly improper distribution of sale proceeds which did not meet elements of preferential transfer, and distributions were not transfers of property of debtor, did not occur prior to ***bankruptcy*** petition being filed, and, in case of disputed tax payments to city, were not on account of antecedent debt. In re Townsville (2001, BC ED Pa) 268 BR 95.

Where Chapter 11 debtor/contractor made preferential payment to subcontractor, funds transferred to subcontractor were property of ***bankruptcy*** estate, within meaning of 11 USCS § 547(b), because source of funds was loan, and there was no evidence that lender required or instructed debtor to use proceeds of loan to pay subcontractor. Lovett v Homrich, Inc. (In re Philip Servs. Corp.) (2006, BC SD Tex) 359 BR 616, 47 BCD 152.

Where ***bankruptcy*** debtors' prior mortgages were refinanced into one mortgage by same mortgagee, and mortgagee contended that refinancing was not avoidable ***preference*** because refinanced loan was essentially earmarked to pay prior mortgages and thus was not interest of debtors in property as required under 11 USCS § 547(b), earmarking doctrine was not implicated since there was only one mortgagee and issue was perfection of new mortgage rather than payment. George v Guaranty Mortgage Co. (In re Ljubic) (2007, BC ED Wis) 362 BR 914.

Bankruptcy court dismissed adversary proceeding which Chapter 13 debtor filed against creditor seeking judgment finding that debt she owed on house was avoidable under 11 USCS §§ 544 and 547; there was no merit to debtor's claim that state court judgment which recognized validity of creditor's mortgage effected transfer of property and resulted in avoidable ***preference*** under 11 USCS § 547 and debtor's complaint did not allege facts sufficient to obtain avoidance under 11 USCS § 544; that said, court recognized that there might be circumstance under which debtor could avoid debt utilizing trustee's strong arm powers under § 544(b)(1) if she met conditions specified in 11 USCS § 522(g) and (h), and it allowed debtor to amend her complaint to establish those circumstances, if they existed. Funches v Household Fin. Consumer Disc. Co. (In re Funches) (2008, BC ED Pa) 381 BR 471 (criticized in Smith v US Bank N.A. (In re Smith) (2014, BC WD Ky) 2014 Bankr LEXIS 1538).

In adversary proceeding brought by Chapter 13 debtor seeking to avoid pre-petition foreclosure sale, defendant bank was entitled to dismissal because debtor's rights in real property were extinguished as of conclusion of foreclosure sale and property was not part of estate; moreover, debtor had not pleaded any fact that could be basis for avoiding foreclosure sale under 11 USCS §§ 544, 547, 548 or 549. Cerrato v BAC Home Loans Servicing (In re Cerrato) (2014, BC ED NY) 504 BR 23.

For purposes of 11 USCS § 547, transfer of Chapter 11 debtor's real property interest occurred when mortgagee's assignee perfected its interest under state law by recording deed of trust, not at time of foreclosure sale. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

81. Future installment payments

Debt for lease payments is incurred, for purposes of 45 day requirement of former 11 USCS § 547(c)(2)(B), at end of billing period where lease provides for advance payment but also provides for proration of various expenses and parties' actual practice was not to pay in advance. In re J.T.L., Inc. (1985, BC ED Mo) 3 BAMSL 1513.

To determine when transfer occurs under 11 USCS § 547, like wages, contract installment payments cannot be transferred until installments are paid and received by debtor; therefore when creditor levied and seized Chapter 11 debtors' right to receive installment payments under real estate contract, it seized debtors' right to after-acquired

installment payments when earned, which payments are property payments are property of estate under 11 USCS § 541. In re Walters (1986, BC DC Mont) 61 BR 426.

Bankruptcy trustee sufficiently alleged that transfers occurred during ***preference*** period since transfers occurred when ***bankruptcy*** ***bankruptcy*** debtor made payments rather than when debtor executed agreement to make payments which created antecedent debt. Gordon v Harrison (In re Alpha Protective Servs.) (2015, BC MD Ga) 531 BR 889.

82. Letter of credit transactions

In secured letter of credit transaction, transfer of Chapter 7 debtor's property takes place under 11 USCS § 547 at time letter of credit is issued and received by beneficiary and security interest is granted in debtor's property, not at time issuer pays on letter of credit; but where security interest in debtor's property is granted by issuer pursuant to security agreement with future advances clause that took effect 2 years prior to issuance of letter of credit, transfer of debtor's property to issuer will, under 11 USCS § 547(e)(2)(A), relate back to time security agreement took effect, though time of transfer to beneficiary does not relate back. In re Compton Corp. (1987, CA5 Tex) 831 F2d 586, 16 BCD 1265, 17 CBC2d 987, CCH Bankr L Rptr P 72107 (criticized in Crafts Plus+ v Foothill Capital Corp. (In re Crafts Plus+) (1998, BC WD Tex) 220 BR 331, 32 BCD 701, 40 CBC2d 388).

83. Levy, execution or seizure

No voidable ***preference*** occurs when writ of execution is delivered to a United States marshal 92 days prior to filing of ***bankruptcy*** petition notwithstanding fact that marshal levies on debtor's property within 90 days of filing of petition because under applicable state law superpriority of interest between 2 judgment creditors is determined as of date writ of execution is delivered to levying authority once levy is made. In re Ramco American International, Inc. (1985, CA3 NJ) 754 F2d 130, 12 CBC2d 40, CCH Bankr L Rptr P 70247.

IRS's seizure of Chapter 7 debtor's funds in general office bank account to satisfy tax lien for unpaid employee withholding taxes is ***preference*** under 11 USCS § 547 where funds were not segregated from other funds of debtor; transfer occurs when funds are seized, not when lien is filed; transfer is not fixing of statutory lien under 11 USCS § 547(c)(6) because fixing of lien occurs when notice of levy is filed, rather than when funds are seized. In re R & T Roofing Structures & Commercial Framing, Inc. (1987, DC Nev) 79 BR 22, affd (1989, CA9 Nev) 887 F2d 981, 19 BCD 1546, CCH Bankr L Rptr P 73089, 89-2 USTC P 9607, 64 AFTR 2d 5835.

Transfer of money from debtor to bank is not preferential and therefore is not recoverable under 11 USCS § 547, as transfer took place before 90 day period allowed by § 547(b)(4)(A) for avoiding such transfers, where transfer was perfected at time bank had judicial liens superior to any other levying creditor acquiring judicial lien, which under state law, was after bank's delivery of writ of execution to sheriff first in time and sheriff's subsequent seizure of property; ***Bankruptcy*** Court will not consider allegedly improper conduct of sheriff as invalidating perfection, as conduct was pursuant to order of state court, and ***Bankruptcy*** Court will not disturb state court ruling made prior to ***bankruptcy*** proceeding absent exceptional circumstances. Butz v Bancohio Nat'l Bank (1981, BC SD Ohio) 13 BR 425.

Where creditor failed to perfect security interest in automobiles outside of 90 day period preceding ***bankruptcy***, sheriff's levy was preferential and may be avoided by trustee; for purposes of 11 USCS § 547, transfer is deemed made as of date of perfection of security interest and not on date on which it was created except where perfection occurs within 10 days of creation. In re Fregosi (1982, BC ED Va) 23 BR 641, 35 UCCRS 659.

Sale of debtor's property on execution of judgments was not preferential transfer where certificate of judgment, which although failing to include costs, substantially complied with Alabama law, was filed prior to 90 day period, even though another certificate of judgment, reflecting amended judgment, was filed within 90 day period; where original certificates of judgment were filed in certain counties within 90 day period preferential transfers had occurred and could be avoided at instance of trustee. In re Norman (1983, BC MD Ala) 41 BR 1.

Creditor did not receive preferential transfer under 11 USCS § 547 where he levied on security interest in farm equipment within 90 days of ***bankruptcy***; but levy relates back to date of perfection of security interest. In re Hogg (1987, BC DC SD) 76 BR 735, 4 UCCRS2d 1254.

Transfer of funds from debtor's bank accounts pursuant to execution is perfected under 11 USCS § 547(e)(2)(B) when writ of execution is served upon bank in accordance with Connecticut law, not when bank pays sheriff. Lind v O'Connell (In re Lind) (1998, BC DC Conn) 223 BR 64, 40 CBC2d 701.

Transfer of Chapter 11 debtor's interest in rents to mortgagees pursuant to state court foreclosure judgment was made within 90 days before filing of petition as required by 11 USCS § 547(b)(4) since transfer occurred on date final judgment was entered in foreclosure action even though mortgagee had perfected its security interest in rents by recording mortgage more than 90 days prepetition; transactions involving assignment of rents may include separate "transfer" of interest of debtor in property subsequent to perfection of creditor's assignment of rents and this subsequent transfer may occur within 90-day ***preference*** period even if perfection of security interest occurred prior to 90 day period; although § 547(e) provides method of calculating date on which security interest is transferred, that subsection does not provide that transfer of security interest is only transfer in secured transaction that may be subject to avoidance under § 547(b). Villamont-Oxford Assoc. Ltd. Pshp. v Multifamily Mort.g Trust (In re Villamont-Oxford Assocs.) (1999, BC MD Fla) 236 BR 467, 42 CBC2d 935, 12 FLW Fed B 286.

Since transfer of property under 11 USCS § 547 must be determined by application of federal rather than state law, levy of debtor's wages was "transfer" that occurred at time of payment of wages which may be avoided as ***preference*** under 11 USCS § 547. Price v Mfrs. & Traders Trust Co. (In re Price) (2002, BC WD NY) 272 BR 828, 39 BCD 10.

Chapter 7 trustee did not have any legal or equitable claim for alleged preferential transfer under 11 USCS § 547(b) of funds to unrelated party, where debtor had converted funds payable to unrelated party, and held funds in constructive trust for benefit of unrelated party; funds never became estate property. Claybrook v Consol. Foods, Inc. (In re Bake-Line Group, LLC) (2007, BC DC Del) 359 BR 566, 47 BCD 217 (criticized in Secure Leverage Group, Inc. v Bodenstein (In re Peregrine Fin. Group, Inc.) (2013, BC ND Ill) 487 BR 498).

84. License transfers

Under state law establishing that transfer of liquor license occurs only when state liquor authority approves transfer, transfer of debtors' liquor license occurs postpetition when approved 3 days after filing, even though agreement to transfer and payment for license all occurred months prior to filing, and thus, transfer is avoidable under 11 USCS § 549, not 11 USCS § 547; in addition, state law prohibits transfer of liquor license by insolvent licensee, thus making transfer void in any event. In re Miller (1986, BC WD Pa) 68 BR 385.

Creditor that received transfers from debtor and paid health insurance claims on behalf of independent contractors engaged by debtor was liable for amount of transfers it received during 90 day ***preference*** period prior to debtor's petition, under 11 USCS § 547, and none of defenses to avoidance was factually supported. Rocin Liquidation Estate v Alta AH&L (In re Rocor Int'l, Inc.) (2006, BC WD Okla) 352 BR 319, 47 BCD 77, 56 CBC2d 1649.

85. Liens and judgments

Under Pennsylvania law Chapter 7 debtor had property rights in judgment entered in its favor when it executed on its judgment against judgment debtor, well before 90-day ***preference*** period, for purposes of determining whether other creditor's garnishment lien on debtor's judgment is avoidable ***preference*** under 11 USCS § 547. Decatur Contracting v Belin, Belin & Naddeo (1990, CA3 Pa) 898 F2d 339, 22 CBC2d 908, CCH Bankr L Rptr P 73316.

In ***bankruptcy*** liquidation proceeding, debtor's lien payoffs of consignment vehicle to creditor was avoidable as preferential transfer under 11 USCS § 547(b), but debtor's lien payoffs of trade-in vehicles and refund of mistaken double payment to creditor were not avoidable as preferential transfers under 11 USCS § 547(b) because they was made according to ordinary business terms. Ganis Credit Corp. v Anderson (In re Jan Weilert RV, Inc.) (2003, CA9 Cal) 315 F3d 1192, 2003 CDOS 303, 2003 Daily Journal DAR 413, 40 BCD 190, CCH Bankr L Rptr P 78780, amd

(2003, CA9 Cal) 326 F3d 1028 and (criticized in Official Comm. of Unsecured Creditors v Dow Chem. Co. (In re Erie County Plastics Corp.) (2010, BC WD Pa) 438 BR 89, 53 BCD 250).

Provision of 11 USCS § 547(c) that certain types of transfers may not be set aside as ***preferences***, although they literally fall within statutory definition of ***preference***, to extent transfer was contemporaneous exchange for new value given by debtor, and to extent transfer is purchase money security interest, must be read with provision of 11 USCS § 547(e) that transfer is made when it takes effect between parties if it is perfected against judgment lien creditors then or within 10 days thereafter, and otherwise is deemed made when perfected, or if not perfected before ***bankruptcy***, deemed to have been made immediately before ***bankruptcy***. In re Kelley (1980, BC ED Tenn) 3 BR 651, 6 BCD 395, 2 CBC2d 15, CCH Bankr L Rptr P 67688.

Under Wisconsin law, garnishing creditor's lien, which dates from service of garnishment summons and complaint, is perfected according to 11 USCS § 547 at time of such service where, under state law, garnishing creditor would have rights superior to those that could be acquired by creditor with subsequent judicial lien based on simple contract and there is no merit in contention that, because lien created by service of garnishee summons is in nature of judicial lien which would be voidable if in existence on date of order for relief by operation of 11 USCS § 522, it should be deemed ineffective as transfer. In re Woodman (1981, BC WD Wis) 8 BR 686, 3 CBC2d 798, CCH Bankr L Rptr P 67822.

Transfer occurs on date on which lien attaches to realty rather than on date judgment was docketed against debtors. In re Paolini (1981, BC WD NY) 11 BR 317.

Applicable date for determining when transfer takes place insofar as 11 USCS § 547(b)(4) is concerned where creditor holds garnishment "lien" on proceeds of contract is when garnished funds are paid to clerk of courts by garnishee. In re Gray (1984, BC SD Ohio) 41 BR 374, CCH Bankr L Rptr P 69983.

Entry of judgment, or entry of court order requiring payment of debt as of date certain, does not constitute transfer of all interests of debtor in funds that could be utilized to comply with judgment or court directive of payment; only payment itself constitutes transfer under 11 USCS § 547. In re Mason (1987, BC ED Pa) 69 BR 876.

Pursuant to 11 USCS § 547(e)(1)(B), where judgment creditor improperly serves writ of execution, garnishment lien is not perfected for ***preference*** purposes until date objection to improper service is waived. Pennsylvania Capital Bank v Glosser (In re Allen) (1998, BC WD Pa) 228 BR 115 (criticized in Korman Commer. Props. v Furniture.com, LLC (2013) 2013 PA Super 295, 81 A3d 97).

In ***preference*** action brought by Chapter 11 debtor seeking to avoid transfer of rents to mortgagee, date of transfer for purposes of 11 USCS § 547 is date state court entered final judgment of foreclosure awarding ownership of rents to mortgagee, not date security interest in rents was perfected when mortgage was recorded. In re Venice-Oxford Assocs. (1999, BC MD Fla) 236 BR 820, 12 FLW Fed B 305.

Where debtor paid liens on real estate that was sold prior to date of ***bankruptcy*** filing, creditor received preferential transfers because once real estate was sold, debtor no longer owned property and creditor's claim against debtor became unsecured claim. Chancellor v Jones Carpet & Rug Gallery, Inc. (In re Reliant Contrs., Inc.) (2001, BC ND Fla) 280 BR 705.

Payment of tax lien was not preferential transfer because government did not receive more than it would have under Chapter 7 liquidation. Menotte v IRS (In re Hoey) (2002, BC SD Fla) 48 CBC2d 1729, 90 AFTR 2d 5824.

Bankruptcy court entered injunction against debtor and her family members for repeatedly filing vexatious pleadings attacking valid state judgment against debtor that was entitled to full faith and credit and Rooker-Feldman protection. Woodard v Dicks (In re Dicks) (2004, BC MD Fla) 306 BR 700, 17 FLW Fed B 121.

Under 11 USCS § 547(e)(2)(B), transfer of security interest was deemed to be at time such transfer was perfected unless security interest was perfected within 10 days and, where creditor had judgment entered in her favor on August 23, 2001, and on September 5, 2001, she filed her judgment with county records, judgment was perfected

more than 10 days after it was entered and, thus, transfer occurred on September 5, 2001. Hoffinger Indus., Inc. v Bunch (In re Hoffinger Indus., Inc.) (2004, BC ED Ark) 313 BR 812, 43 BCD 153, 52 CBC2d 1263.

By signing check for proceeds from sale of cattle, and making check payable jointly to both debtor and creditor, agent for auctioneer authenticated record acknowledging possession of collateral for benefit of creditor, so as to effect perfection under N.Y. U.C.C. Law § 9-313(c)(1); thus, creditor's lien in cattle was perfected upon issuance of check, and since check was issued outside ***preference*** period in 11 USCS § 547(b)(4), there was no preferential transfer. Heyer v Conesus Milk Producers Coop. Ass'n (In re Clayson) (2006, BC WD NY) 341 BR 137, 46 BCD 85, 59 UCCRS2d 341.

Amendment to Fla. Stat. § 77.06, which fixed date upon which judgment creditors' lien attached to debtors' property, did not have any application to Chapter 7 trustee's ability to avoid judicial lien as voidable ***preference*** under trustee's lien avoidance powers set forth in 11 USCS § 547. Tardif v Congro Finanz AG (In re Engler) (2008, BC MD Fla) 394 BR 598, 21 FLW Fed B 444.

Funds that judgment creditors received from state court judgment constituted preferential transfer under 11 USCS § 547 because ***payments*** were received within ***90 days*** of filing of debtor's ***bankruptcy*** petition, ***payments*** were applied to antecedent debt, debtor was presumed to be insolvent. Stevenson v Genna (In re Jackson) (2010, BC ED Mich) 426 BR 701, 63 CBC2d 1025, affd (2010, ED Mich) 436 BR 29.

86. --Judicial or judgment lien

Neither ***Bankruptcy*** Court nor District Court erred in determining that consent judgment between Chapter 11 debtor and secured creditor which provided that confessed judgment entered on February 28 was to be stricken and judgment entered in reduced amount, but then provided that postjudgment interest was to run from March 1, was ambiguous, or in determining that consent order was intended to modify, rather than strike, confessed judgment and permit creditor to retain its lien; based on this interpretation of consent order, ***Bankruptcy*** Court properly concluded that judicial lien or property transfer occurred, for 11 USCS § 547 purposes, on March 6, when confessed judgment was filed and docketed, at which time creditor's security interest in property was perfected, rather than on date of settlement agreement pursuant to which amount of confessed judgment was reduced. In re Nelson (1992, CA3 Pa) 959 F2d 1260, 26 CBC2d 979, CCH Bankr L Rptr P 74518, 117 ALR Fed 751 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

Lien of judgment creditor who instituted supplementary proceedings under Wisconsin law was superior to other creditors as of date debtor was served notice to appear in supplementary proceedings so that where service occurred more than 90 days before debtor filed its Chapter 7 petition, transfer was not avoidable as preferential. In re Badger Lines, Inc. (2000, CA7 Wis) 202 F3d 945.

Transfer, in form of creation of judgment lien, occurred, for purposes of 11 USCS § 547, when creditor obtained judgment in foreclosure against Chapter 7 debtor, not when creditor filed foreclosure action against debtor, and because judgment was entered within 90-day ***preference*** period, transfer was preferential; creditor's interest in debtor's property was perfected under state law at time it took effect between parties--when judgment was entered. Redmond v Mendenhall (1989, DC Kan) 107 BR 318.

Where state law treats federal court judgments as docketed only upon filing of transcript with county clerk's office, federal court judgment creates lien only upon such filing, and such state statute does not violate 28 USCS § 1962 or Supremacy Clause; in present case where less than 90 days after federal judgment was docketed by state's county clerk but more than 90 days after issuance of federal judgment debtor filed Chapter 11 petition, debtor may avoid judgment lien under 11 USCS § 547. In re Sterling Die Casting Co. (1991, ED NY) 132 BR 99.

Where there is substantial compliance in every essential particular of obtaining judgment lien under state law, lien is perfected as of its date of initial issuance for purposes of 11 USCS § 547 despite filing of another certificate of judgment within 90 day period preceding filing of ***bankruptcy*** petition; judgment liens obtained less than 90 days

prior to filing of ***bankruptcy*** petition, however, are preferential transfers under 11 USCS § 547. In re Norman (1983, BC MD Ala) 41 BR 1.

Under 11 USCS § 547(e)(2)(A), transfer is considered to be made when it "takes effect" between transferor and transferee if transfer is perfected within 10 days, and consent judgment does not take effect between transferor and transferee under North Carolina law until judgment is docketed since judgment lien in North Carolina is neither created nor perfected until it is docketed. Wilmington Nursery Co. v Burkert (In re Wilmington Nursery Co.) (1984, BC ED NC) 36 BR 813 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

In determining whether judicial lien is avoidable as preferential transfer under 11 USCS § 547(b), transfer is deemed to have been made when judicial lien attached to debtor's property, a question controlled by state law. In re Foluke (1984, BC ND Ill) 38 BR 298 (criticized in Dominick's Finer Foods v Makula (1998, ND Ill) 217 BR 550).

Where under state law judicial lien is created on debtor's bank account at moment citation proceeding is initiated, such date, rather than date of turnover of assets, is date of transfer for purposes of determining preferential transfers under 11 USCS § 547(b). In re Foluke (1984, BC ND Ill) 38 BR 298 (criticized in Dominick's Finer Foods v Makula (1998, ND Ill) 217 BR 550).

Docketing state court judgment converts judgment into lien, giving creditor secured status and constituting "transfer" under 11 USCS § 547(b)(5), where unsecured creditors will receive less than 100 percent of their claims. In re Zachman Homes, Inc. (1984, BC DC Minn) 40 BR 171.

Since creditor's debt was fully secured by judgment lien on Chapter 13 debtor's real property prior to running of ***preference*** period, ***payment*** made in satisfaction of lien from sale proceeds is deemed to have occurred at time of perfection of lien pursuant to 11 USCS § 547(e)(1)(B); thus, ***payment*** is not deemed effected within ***90-day preference*** period and is unavoidable. In re Garris (1985, BC ED Pa) 50 BR 714.

In determining when transfer occurred under 11 USCS § 547, entry of judgment against Chapter 7 debtors and in favor of secured creditors did not create, much less perfect, lien; creditors did not acquire lien upon debtors' property until judgment was registered and that registration is transfer of interest of debtor in property. In re Ressler (1986, BC ED Tenn) 61 BR 403.

For purposes of determining when transfer occurred under 11 USCS § 547, date on which creditor obtained judgment lien is irrelevant where Chapter 7 debtors are not trying to avoid lien, but rather are trying to avoid payment of funds to creditor in satisfaction of its debt which payment was made 6 days before filing ***bankruptcy***. In re Washkowiak (1986, BC ND Ill) 62 BR 884, 15 CBC2d 206.

Trustee is not entitled to summary judgment under ***Bankruptcy*** Rule 7056 in action to avoid preferential transfer under former 11 USCS § 547 where (1) absence of evidence as to date of filing judicial lien, which gave rise to transfer, leaves material question as to whether or not transfer occurred within time frame set forth by 11 USCS § 547(b)(4)(A) and (2) nothing shows that debtor had any property in county where judgment was filed, leaving question of whether there has been transfer of interest in debtor's property. In re W.L. Mead, Inc. (1986, BC ND Ohio) 70 BR 651.

Filing of judicial lien is transfer of interest in property for purposes of 11 USCS § 547. In re W.L. Mead, Inc. (1986, BC ND Ohio) 70 BR 651.

In adversary proceeding brought by Chapter 7 trustee to avoid judgment lien, transfer occurred within 90 days prior to November 16, 1987, date debtor filed his petition, and is subject to avoidance under 11 USCS § 547(b) where transfer occurred when lien was perfected under § 547(e)(2)(B) and creditor's judgment lien was not perfected prior to time creditor filed its notice of lis pendens on August 21, 1987, since before notice of lis pendens was filed, bona fide purchaser could have acquired superior interest in property to that of creditor. In re Martin (1988, BC ED NC) 87 BR 394, 19 CBC2d 186.

Chapter 12 debtor's complaint to avoid judgment lien is granted pursuant to 11 USCS § 547(e)(2) where judgment against debtor was entered within 90 ***preference*** period even though under Kansas statute lien was effective as early as four months prior to entry of judgment; transfer was perfected on date judgment was entered and even if lien "took effect" four months earlier, it was not perfected until judgment was entered. Williams v McCoy Grain Co. (In re Williams) (1998, BC DC Kan) 216 BR 447, 32 BCD 34, 39 CBC2d 433.

Creditors who had won judgment in state court against Chapter 11 debtor and were seeking dismissal of debtor's complaint to avoid transfer of stock certificate pursuant to 11 USCS § 547(b) were granted summary judgment on their claim that they and not debtor were entitled to stock certificate because lien by which creditors claimed their interest had attached as of date on which state court citation had been served on third party who had possession of certificate per 735 Ill. Comp. Stat. 5/2-1402(m); because date on which citation was served was more than one year before debtor filed his Chapter 11 proceeding, lien was not ***preference*** that was avoidable under 11 USCS § 547(b). Cassidy v Advanced Imaging Ctr. of N. Ill. LP (In re Cassidy) (2006, BC MD Fla) 352 BR 511, 20 FLW Fed B 29.

For purposes of preferential transfer claim, judgment creditor's filing of Notice of Judgment Lien was effective on date Notice was filed because, pursuant to Cal. Civ. Proc. Code § 697.510(a) and § 697.530(a)-(b), filing of Notice of Judgment Lien created judgment lien that took effect when notice was filed. Imagine Fulfillment Servs., LLC v DC Media Capital, LLC (In re Imagine Fulfillment Servs., LLC) (2013, BC CD Cal) 489 BR 136, affd (2014, BAP9) 2014 Bankr LEXIS 3369.

Debtor's challenge to involuntary petition under 11 USCS § 303 failed, where judgment lien was imposed on debtor's assets under Cal. Code Civ. Proc. § 708.110(d), so other creditors could preserve right to avoid lien pursuant to 11 USCS § 547; court also properly declined to stay proceedings pursuant to 11 USCS § 305(a). Marciano v Fahs (In re Marciano) (2011, BAP9) 459 BR 27, CCH Bankr L Rptr P 82132, affd (2013, CA9) 708 F3d 1123, 57 BCD 171, 69 CBC2d 506, CCH Bankr L Rptr P 82431.

87. Overpayments

Bankruptcy Court correctly found that state welfare department's offset of percentage of debtor nursing homes' Medicaid overpayments against department's monthly payments to nursing homes were "preferential transfers" under 11 USCS § 547, thus voidable by nursing homes as debtors in possession. WJM, Inc. v Massachusetts Dep't of Pub. Welfare (1988, CA1 Mass) 840 F2d 996, 17 BCD 468, CCH Bankr L Rptr P 72203 (ovrld in part as stated in Mills v Maine (1997, CA1 Me) 118 F3d 37, 3 BNA WH Cas 2d 1802, 134 CCH LC P 33585) and (ovrld as stated in, questioned in Bozeman v DOR of Fl. (In re Bozeman) (2002, BC MD Ga) 278 BR 275).

Chapter 11 debtor transferred, for purposes of 11 USCS § 547, right to refund for overpayment to employee pension plan at time debtor transferred security interest in right to refund to creditor, even though debtor had to wait until refund was approved by plan before receiving refund. In re Long Chevrolet, Inc. (1987, ND Ill) 79 BR 759, 5 UCCRS2d 462.

When defendant received overpayment for equipment rental on July 13, but did not credit debtor's account until August 31, overpayment is nevertheless preferential transfer as of July 13, even though defendant satisfied overpayment on August 31. In re Fulghum Constr. Corp. (1984, BC MD Tenn) 45 BR 112, 11 CBC2d 1378.

Transfer occurred for purposes of 11 USCS § 547 when Massachusetts Department of Public Welfare made deductions from current prepetition reimbursements to Chapter 11 debtor nursing home operators to satisfy overpayments made by department to other nursing home whose ownership was related. In re WJM, Inc. (1986, BC DC Mass) 65 BR 531, affd (1986, DC Mass) 84 BR 268.

Transfers made by Chapter 7 debtor company to related company which provided plating for metal components manufactured by debtor and which was owned by one spouse of husband/wife team which owned debtor were not fraudulent transfers within 11 USCS § 548(a)(1) where (1) there were legitimate invoices in excess of $ 341,000 in year prior to debtor's ***bankruptcy*** filing, (2) debtor contemporaneously repaid related company in excess of $ 60,000 in consideration of third-party payments made by related by related company on debtor's behalf, and (3) it

was quite common for debtor to make payments to related company without correlating amounts and due dates of particular invoices so that it would be difficult for court to make determination that debtor did not receive reasonably equivalent value for payments it made to related company during relevant period. Crews v National Coating (In re National Aero.) (1998, BC MD Fla) 219 BR 625, 11 FLW Fed B 240.

Where Chapter 11 debtor/contractor made preferential payment to subcontractor, funds transferred to subcontractor were property of ***bankruptcy*** estate, within meaning of 11 USCS § 547(b), despite fact that debtor received funds from client as trustee under Michigan Building Contract Trust Fund Act, Mich. Comp. Laws § 570.151-153, because payment to subcontractor could not be traced directly to funds that came from client. Lovett v Homrich, Inc. (In re Philip Servs. Corp.) (2006, BC SD Tex) 359 BR 616, 47 BCD 152.

88. Receipt of payment

Conclusion that debtor corporation had no interest in loan proceeds checks for ***preference*** purposes under 11 USCS § 547(b) was supported by evidence where, despite fact that checks were delivered to debtor's principal who indorsed them and handed them to old lender in payment of debtor's obligation to it, principal never testified as to his intent and attorney for new lender testified that he, not principal, controlled checks and that principal would never have been allowed to leave closing with checks. Glinka v Bank of Vermont (In re Kelton Motors) (1996, CA2 Vt) 97 F3d 22, 29 BCD 1009, 30 UCCRS2d 1032.

Transfer date for purposes of 11 USCS § 547 is time transfer takes effect as specified in 11 USCS § 547(e)(2)(A), and not time transfer is set in motion; transfer of $ 2 million by debtor to repay loan owed to bank in which debtor owned 55 percent of stock of holding company that controlled bank where payment occurred one day after filing of Chapter 11 petition is not avoidable preferential transfer even though debtor's payment was set in motion by arranging payment through intermediary before date petition was filed. In re Duque Rodriguez (1987, BC SD Fla) 77 BR 933.

Alleged preferential transfer from Chapter 11 debtor to bank occurred not when transfer was "set in motion," but when bank received payment, for purposes of avoidance under 11 USCS § 547. In re Duque Rodriguez (1987, BC SD Fla) 77 BR 933.

Where (1) lenders were missionaries in India and, because they had no feasible way to receive debtors' loan payments, (2) lenders directed debtors to make loan payments via certificate of participation maintained with church fund and (3) debtors opened account in their own name and subsequently deposited full amount due on loan into that account, and (4) upon lenders return to United States, debtors withdrew account funds and had certified check issued to third party designated by lenders, "transfer" occurred for ***preference*** purposes when check was written rather than at time deposit to account was made because lenders gained interest in debtors' property superior to subsequent judicial lienors only when check was written rather than at time deposit was made; accordingly, since transfer by check occurred within 90 days of debtors' filing of ***bankruptcy***, transfer was avoidable pursuant to 11 USCS § 547. Chambers v Pickard (In re Lewis) (1999, BC MD Fla) 237 BR 506, 12 FLW Fed B 343.

89. Recording of lis pendens

Under Arkansas law, recording of lis pendens in connection with fraudulent conveyance action is itself "transfer" within meaning of 11 USCS § 547 which transfer occurred when notice was recorded since recording of lis pendens affects possession and interests of debtor's property. Dupwe v Worthen Nat'l Bank (In re Rising Fast Rentals) (1993, BC ED Ark) 162 BR 203, 25 BCD 113.

Recording of notice of lis pendens on Chapter 7 debtor's property by mortgage lender, who held defectively acknowledged mortgage, within 90 days prior to debtor filing Chapter 7 petition, was transfer subject to avoidance as preferential transfer because creditor's mortgage did not become perfected until it recorded notice of lis pendens. Kendrick v CIT Small Bus. Lending Corp. (In re Gruseck & Son) (2008, BAP6) 49 BCD 245.

90. Return or exchange of property

Debtor's return of refrigerators and ice makers to creditor within 90 days of filing of ***bankruptcy*** is ***preference*** and is not recoupment; when goods were sold by creditor to debtor and when goods were delivered and accepted, sales transaction was completed, and return long afterward of those goods was different transaction; remedy for this preferential transfer is order requiring property to be returned to trustee since there is no evidence of market value and there is no justification for concluding that sales price equals market value. In re Handsco Distributing, Inc. (1983, BC SD Ohio) 32 BR 358.

Transaction was not voidable as ***preference*** where secured creditor received 2 antique firearms within 90 days of debtor's filing Chapter 11 petition, in exchange for antique rifle in which he had acquired perfected security interest and thus, under Vermont law, acquired perfected interest in firearms he received as of date of perfection of security interest in exchanged rifle; substitution of collateral did not result in new transaction which broke chain of possession. In re STN Enterprises, Inc. (1985, BC DC Vt) 45 BR 959.

Return of several heaters from Chapter 7 debtor distributor to its supplier and payments made by debtor to supplier for shipment are preferential under 11 USCS § 547; subparagraph (c)(2) exception is inapplicable because, for purposes of that section, date debt is incurred is date debtor first became obligated to pay for goods, i.e., date heaters were received by debtor. In re Handsco Distributing, Inc. (1985, BC SD Ohio) 51 BR 700.

91. Security interests, generally

State law determines perfection of right; Uniform Commercial Code, as adopted in Kansas, provides that security interest is perfected at time it attaches, and interest cannot attach until value is given by binding commitment to extend credit or by consideration sufficient to support simple contract; value was given by accountant when he performed services within four month period [now 90 days], and not when he, prior to four month period, accepted note secured by mortgage and security interests for accounting services rendered and for future accounting services. E. F. Corp. v Smith (1974, CA10 Kan) 496 F2d 826, 15 UCCRS 120.

Creditor's security interest in Chapter 11 debtor's assets remained perfected where debtor moved its headquarters after October 5, 1984 as specified under Pennsylvania law; thus, creditor's refilling of financing statement in debtor's new location did not constitute voidable ***preference*** under 11 USCS § 547--creditor's lien did not lapse and therefore filing statements in new location did not constitute reperfection rather than continuation of earlier perfected status. Mellon Bank, N.A. v Metro Communications, Inc. (1991, CA3 Pa) 945 F2d 635, 22 BCD 251, 25 CBC2d 1064, CCH Bankr L Rptr P 74288, 15 UCCRS2d 1119, cert den (1992) 503 US 937, 112 S Ct 1476, 117 L Ed 2d 620.

Transfer is deemed to have been made within 4 months of ***bankruptcy*** [now 90 days], where original security agreement and transfer was made approximately 5 years before ***bankruptcy***, such security interest lapsed due to operation of state law, and new security agreement was filed approximately 3 weeks before filing of ***bankruptcy*** petition; when lapse occurs, security interest is dead as to all other creditors of bankrupt and filing of new security agreement does not make time of transfer relate back to original time of lapsed security agreement. In re E & Q Steel Fabricators, Inc. (1976, BC DC Minn) 2 BCD 1048, 10 CBC 876, CCH Bankr L Rptr P 66075.

Where security interest was perfected more than 10 days after date upon which it was created, transfer is deemed to have occurred on date of perfection. In re Davis (1982, BC MD Ga) 22 BR 644, 9 BCD 657, 6 CBC2d 1391.

For purposes of 11 USCS § 547, transfer is deemed made as of date of perfection of security interest and not on date on which it was created except where perfection occurs within 10 days of creation; definition of "transfer" contained in § 547(e)(2) supersedes general definition of "transfer" contained in 11 USCS § 101. In re Fregosi (1982, BC ED Va) 23 BR 641, 35 UCCRS 659.

Transfer date for preferential transfer purposes under 11 USCS § 547 is date security interest was perfected under applicable state law and not date of foreclosure or date of delivery of sheriff's deed; there is no avoidable ***preference*** where perfection occurred more than 90 days before filing of petition. In re Hill (1984, BC DC Or) 39 BR 894, revd on other grounds (1985, CA9 Or) 775 F2d 1385, CCH Bankr L Rptr P 70852.

In order to obtain loan, debtor gave bank security interest in all its assets and therefore debtor's transfer to creditor of loan proceeds is transfer of debtor's interest in property equal to value of assets used to secure loan for purposes of determining preferential transfer under 11 USCS § 547. In re F & S Cent. Mfg. Corp. (1985, BC ED NY) 53 BR 842, 13 BCD 823, 13 CBC2d 805, CCH Bankr L Rptr P 70819 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Transfer of debtor's property occurred for purposes of 11 USCS § 547 where third party made payment to bank to reduce debtor's overdraft in exchange for debtor granting third party security interest in debtor's equipment, accounts, and other collateral since bank received money on unsecured debt and third party made loan only after receiving security interests. In re Hartley (1985, BC ND Ohio) 55 BR 770.

Chapter 11 debtor's transfer to bank, which had previously loaned it money, of security interest in its inventory, accounts, and contract rights constitutes double transfer for purposes of 11 USCS § 547(b)(1) in that it benefited not only bank but also guarantors of debtor's note to bank; since bank did not perfect its security interest within 10 days, transfer was on account of antecedent debt. In re Aerco Metals (1985, BC ND Tex) 60 BR 77.

Creditor has failed to establish that creation of security interest in favor of bank which had previously loaned Chapter 11 debtor money is preferential where it did not establish that debtor was insolvent at time of transfer or that transfer enabled guarantors of debtor's note to receive more than they would have in Chapter 7; even if transfer were preferential; however, recovery would be restricted to insider who guaranteed note. In re Aerco Metals (1985, BC ND Tex) 60 BR 77.

Even if 11 USCS § 547 ***preference*** period was tolled during life of Chapter 7 debtor's previous Chapter 11 case, security interest was not created and transfer thus did not occur until outside ***preference*** period where transfer did not occur until 100 days before petitions were filed. In re Baird (1986, BC WD Ky) 63 BR 60, 15 CBC2d 231.

Creditor's improvement in status from unsecured to secured is transfer within meaning of 11 USCS § 547(b). In re Rude (1990, BC ED Wis) 122 BR 533 (criticized in Morton/Southwest Co. v Resolution Trust Corp. (1994, CA5 Tex) 1994 US App LEXIS 43281).

Letter from premium finance company to debtor's workers' compensation carrier notifying carrier that debtor had assigned unearned premiums to company and had appointed company as its attorney-in-fact with authority to cancel policy upon default was not avoidable ***preference*** as perfecting company's security interest within 90 days of ***bankruptcy*** petition where state law provided security interest was perfected upon its creation; 11 USCS § 547(b) was inapplicable since security interest was perfected contemporaneous with execution of finance agreement. In re Double Eagle Constr. Co. (1995, BC WD Mo) 188 BR 406, 27 BCD 1224.

Former Idaho Code Ann. § 49-510, its relation-back statute, did not control for determining date of perfection under defense of 11 USCS § 547(c)(3); while last necessary act for perfection might have been sufficient under Idaho law, it was too late for § 547(c)(3) because it occurred on 21st day; thus, ***preference*** was avoidable. In re Taylor (2008, BAP9) 390 BR 654 (criticized in Rodriguez v Drive Fin. Servs. LP (In re Trout) (2008, BC DC Colo) 392 BR 869) and (criticized in Rodriguez v DaimlerChrysler Fin. Servs. Americas, LLC (In re Bremer) (2008, BC DC Colo) 392 BR 873) and revd, remanded (2010, CA9) CCH Bankr L Rptr P 81695, op withdrawn, substituted op (2010, CA9) 599 F3d 880.

Unpublished Opinions

Unpublished: Transfer of security interest in asbestos insurance collateral was not avoidable in debtors' ***bankruptcy*** as ***preference*** under 11 USCS § 547(b), since interest was granted to collateral trustee outside ***preference*** period and, when claims were accepted within ***preference*** period, claimants only became beneficiaries of that interest; value for security interest was given within meaning of 6 Del. C. §§ 1-204(2), (4), 9-203(b)(1), and thus security interest attached, outside ***preference*** period when claimants agreed to settle their claims and to forego further litigation, regardless of fact that collateral trustee did not provide collateral. Congoleum Corp. v Pergament (In re Congoleum Corp.) (2006, BC DC NJ) 2006 Bankr LEXIS 4381.

Unpublished: Where debtor purported to transfer security interests in business equipment and vehicles to his mother, transfers met all elements for avoidance as preferential transfers under 11 USCS § 547(b), and assets were subject to turnover under 11 USCS § 542(a). Transfer of possession under Tenn. Code Ann. § 47-9-313 was ineffective. Williams v McDonald (In re McDonald) (2009, BC WD Tenn) 2009 Bankr LEXIS 5485.

92. --Agricultural products and livestock

Chapter 7 debtor's execution of form provided by federal government to secure payment of debtor's antecedent debt and to secure any future advances made by creditor for purchases of cattle feed under dairy termination program is transfer within meaning of 11 USCS § 547; since creditor failed properly to perfect its security interest created by such assignment under state law, § 547(e)(2)(C) operates to bring effective date of transfer to immediately before date of filing of petition and therefore trustee is entitled under state law to subordinate creditor's lien and may avoid such lien. In re Propst (1988, BC WD Va) 81 BR 406, 17 BCD 335, 5 UCCRS2d 1106.

Funds acquired by Chapter 7 trustee from sale of debtor's crops are not subject to security interest of creditor where filing of creditor's financing statement is preferential transfer under 11 USCS § 547 because it has occurred: (1) during ***preference*** period; and (2) more than 10 days after execution of security agreement. In re Silve (1988, BC DC Mont) 86 BR 230.

93. --Aircraft

Chapter 7 Trustee has not met burden of demonstrating that debtor's grant of security interest in helicopter occurred within ***preference*** period preceding ***bankruptcy*** petition under 11 USCS § 547(b)(4)(A) where security agreement was filed with FAA outside ***preference*** period, FAA did not record security agreement since it contained debtor's corporate name in addition to name under which helicopter was registered, and secured party resubmitted corrected security agreement; although corrected security agreement was filed within ***preference*** period, initial filing of security agreement created valid security interest in helicopter under Pennsylvania law, and FAA's requirement that debtor's corporate name be deleted from security agreement before it could be recorded did not affect validity of original security agreement. Solodky v Traub, Butz & Fogerty (In re Equipment Leassors) (1999, ED Pa) 235 BR 361, 38 UCCRS2d 1067.

94. --Individual retirement account

Transfer of debtors' interest in individual retirement account and managed account was not perfected until company filed security interest in accordance with State Uniform Commercial Code; earlier attempt to transfer account had not been successful because bailee had not accepted attempted assignment by debtor, and transfer was thus made within 90-day period. Richards v Rapid Funding, LLC (In re Richards) (2004, BC ED Va) 336 BR 722.

95. --Motor vehicle transactions

Transfer of security interest to creditor is not avoidable ***preference*** under 11 USCS § 547(b) where creditor's security was perfected on date debtors received possession of vehicle and executed security agreement, pursuant to state law which provides for relation back of perfection to date of execution of security agreement when lien entry form is presented to tax commission or it agent within 15 days after execution of lien entry form, and thus that date is date that creditor's security interest was perfected for purposes of 11 USCS § 547, even though lien entry form was delivered to commission on 15th day after execution of lien entry form, because it is date on which creditor on simple contract could not acquire judicial lien that is superior to secured creditor, and because date of perfection coincides with date on which security interest was granted, transfer of security interest was not for or on account of antecedent debt and also was perfected on or before 10 days after debtor received possession of property. Webb v GMAC (In re Hesser) (1993, CA10 Okla) 984 F2d 345, 23 BCD 1516, CCH Bankr L Rptr P 75094 (criticized in Fitzgerald v First Sec. Bank, N.A. (In re Walker) (1996, CA9 Idaho) 77 F3d 322, 96 CDOS 1214, 28 BCD 832, 35 CBC2d 580) and (criticized in Pongetti v GMAC (In re Locklin) (1996, CA5 Miss) 101 F3d 435, CCH Bankr L Rptr P 77212).

Kentucky Supreme Court responded to certified question that final perfection of vehicle lien did not occur until physical notation was made on title pursuant to Ky. Rev. Stat. Ann. § 186A.190, and perfection was not accomplished as and when required paperwork and fee were submitted to clerk; having received Kentucky Supreme Court's response to certified question regarding when vehicle lien became perfected under Kentucky law, court upheld ***bankruptcy*** appellate panel's conclusion that perfection of bank's lien did not occur until security interest was actually noted on certificate of title; because perfection did not occur within 20 days after debtor received possession of truck, enabling loan exception of 11 USCS § 547(c)(3) did not protect bank's interest from avoidance as preferential transfer. Brock v Branch Banking & Trust Co. (In re Johnson) (2010, CA6) 611 F3d 313, 64 CBC2d 479, CCH Bankr L Rptr P 81804, 2010 FED App 193P.

Transfer of security interest between credit company and debtor occurred on date original application for certificate of title was received by Georgia Department of Revenue rather than date when properly completed application for certificate of title was received; transfer was therefore not made within 90 days of date of ***bankruptcy*** petition and is not avoidable by trustee in ***bankruptcy*** since under Georgia law requirements to be met for issuance of certificate of title are more stringent than those required to perfect security interests and application may have enough information for applicant to have security interest perfected and yet not enough information for him to receive certificate of title. In re Smith (1981, MD Ga) 10 BR 883.

Notwithstanding that delay in perfection of security interest in motor vehicle by dealer was due to delay in dealer obtaining title from manufacturer, occurred in normal course of business and could not have been avoided by dealer, security interests perfected by dealer's application for certificate of title with dealer's lien noted, filed more than month after sale of vehicle, and within 90 days of debtor's filing of petition in ***bankruptcy***, constitutes voidable ***preference***. In re Kelley (1980, BC ED Tenn) 3 BR 651, 6 BCD 395, 2 CBC2d 15, CCH Bankr L Rptr P 67688.

Transfer of motor vehicle recorded more than 10 days after transfer became effective between parties is perfected at date of recording in Colorado. In re Martella (1982, BC DC Colo) 22 BR 649.

Where creditor failed to perfect security interest in automobiles outside of 90 day period before ***bankruptcy***, sheriff's levy was preferential and may be avoided. In re Fregosi (1982, BC ED Va) 23 BR 641, 35 UCCRS 659.

Grant of security interest in tractor by Chapter 7 debtors to daughter of debtor wife as consideration for loan, which occurred within 90 days of filing and which was not perfected, is preferential transfer avoidable under 11 USCS §§ 544 and 547. In re Hollinsed (1984, BC WD Wis) 54 BR 155.

Creditor's security interest in titled vehicles remained continuously perfected from initial perfection before ***preference*** period began, since under Missouri statute lien perfected under law of jurisdiction when it originally attached continues to be perfected in Missouri if name of lienholder is shown on existing certificate of title issued by that jurisdiction. In re Miller (1986, BC ED Mo) 3 BAMSL 3370.

Even if state provided 20-day grace period for filing purchase money security interest in motor vehicle, such grace period does not govern date of transfer for purposes of 11 USCS § 547(e)(2) but merely date of perfection under state law; court must still apply § 547(e)(2) to determine date of transfer because creditor can perfect its interest in collateral creating lien at any time, but if not perfected within 10-day window under 11 USCS § 547(e)(2), such lien is avoidable by trustee in ***bankruptcy*** as ***preference***. In re Holder (1988, BC MD NC) 94 BR 395, 18 BCD 917, affd (1988, MD NC) 94 BR 394, 18 BCD 920, affd (1989, CA4 NC) 892 F2d 29, 2 Fourth Cir & Dist Col Bankr Ct Rep 119, 21 CBC2d 1457, CCH Bankr L Rptr P 73105.

Trustee who avoided creditor's lien on Chapter 7 debtor's vehicle as preferential transfer may not recover postpetition payments paid to creditor pursuant to terms of original contract and reaffirmation agreement because trustee's avoidance of lien does not automatically create right of recovery of payments made under contract between debtor and lienholder; neither 11 USCS § 550 nor 11 USCS § 551 support recovery of these funds and trustee has failed to meet burden of establishing right to recover payments under 11 USCS § 549 or other Code provision which is independent of right of avoidance granted by 11 USCS § 547. In re Closson (1989, BC SD Ohio) 100 BR 345.

Chapter 7 trustee may not avoid lien on truck under 11 USCS § 547 where secured creditor perfected its security interest in truck by filing lien entry form in accordance with Oklahoma law 15 days after debtor's granting of security interest and lien related back under state law to date security interest was granted, and therefore perfection occurred within 10 days of transfer of security interest; § 547 does not require physical act of perfection to occur within 10 days, but merely that lien must be perfected within 10 days, including instances where state laws provide for relating back. In re Power (1991, BC ND Okla) 133 BR 242.

Lien was not subject to trustee's ***preference*** claim, where security interest was perfected on date automobile dealer filed application for title reflecting lien, since to require creditor to rely on date title was issued would cause creditor to unnecessarily assume risks of delay created by bureaucracy and defaults of debtor. Huennekens v Abruzzese (In re Abruzzese) (1999, BC ED Va) 252 BR 341.

Trustee failed in its action to avoid creditor's lien as ***preference***, where court determined relevant time that creditor perfected its lien under Oklahoma law and later under Kansas law after vehicle arrived in Kansas and found that creditor's lien had been timely and continuously perfected. Morris v GMAC (In re Ball) (2002, BC DC Kan) 281 BR 706, 48 UCCRS2d 709.

Where creditor refinanced debtor's purchase-money loan, creditor did not have continuing security interest because purchase-money creditor did not make assignment of its lien to creditor in accordance with Wis. Stat. § 342.21. Scaffidi v Kenosha City Credit Union (In re Moeri) (2003, BC ED Wis) 300 BR 326 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

Where debtor agreed to buy and took possession of car on Feb. 7 under contract, and secured creditor purchased contract from dealer on March 12, transfer of security interest to creditor was on account of antecedent debt and was avoided in ***bankruptcy*** by debtor's trustee under 11 USCS § 547(b); phrase "time transfer takes effect between transferor and transferee" as used in 11 USCS § 547(e)(2)(A) was intended to be synonymous with term "attachment" as used in UCC art. 9. In re Jeans (2005, BC WD Tenn) 326 BR 722, 54 CBC2d 1007.

State motor vehicle lien was only perfected after county clerk's office examined lien paperwork and finally entered lien into State's electronic Central Registry; thus, date of transfer was in ***preference*** period, and Trustee avoided transfer of lien pursuant to 11 USCS §§ 547(b) and 550(a)(1); perfection of security interest in motor vehicle could not be accomplished by means of "equitable lien." Peters v WFS Fin., Inc. (In re Glandon) (2006, BC DC Colo) 338 BR 103.

96. --Patents

Where creditor filed Uniform Commercial Code financing statements for Chapter 7 debtor's patent within ***90-day preference*** period, transfer was avoidable by trustee under 11 USCS § 547(b), and creditor did not obtain prior perfection by possession because patent right was incorporeal property, not susceptible of actual delivery or possession. Braunstein v Gateway Mgmt. Servs. (In re Coldwave Sys., LLC) (2007, BC DC Mass) 368 BR 91, 48 BCD 71.

97. --Real estate and mortgages

Transaction wherein lender received ***payment*** on pre-existing debt without giving new value to debtor is preferential transfer within 11 USCS § 547 where lender is only party which benefited from transaction, as it exchanged unsecured status for secured position by loaning money to debtor in exchange for mortgage with loan proceeds being used to pay pre-existing debt of lender and others; definition of new value excludes obligation substituted for existing obligation. In re Delaney (1986, BC WD Pa) 57 BR 167.

For purposes of determining whether creditor improved its position from unsecured to secured status during ***preference*** period under 11 USCS § 547(b), $ 168,000 note was not secured by previous real estate mortgage where note does not specifically state that it was secured by mortgage, as required by previous mortgage as condition to securing future advances; note was not secured until debtor executed consolidation note, within 90-day ***preference*** period, which expressly stated that note was secured by real estate mortgage; dragnet clause in

continuing guaranty referred only to mortgages that did not precede guaranty; relation-back doctrine does not apply in § 547 context to permit transfer to reach back to date of original mortgage and mortgage note outside 90-day period. In re Rude (1990, BC ED Wis) 122 BR 533 (criticized in Morton/Southwest Co. v Resolution Trust Corp. (1994, CA5 Tex) 1994 US App LEXIS 43281).

Creditor was entitled to relief from automatic stay, and its reinstated mortgage was held not to constitute avoidable ***preference***, where release of mortgage was by mistake and state court order held release void ab initio. Mfrs. & Traders Trust Co. v Walsh (In re Burkett) (2003, BC WD Pa) 295 BR 776.

Where debtors granted mortgage to creditor but mortgage was not recorded until 96 days later, transfer took place on date that mortgage was recorded, pursuant to 11 USCS § 547(e)(2)(B), not when debtors granted mortgage, because under applicable state law, Mich. Comp. Laws Ann. § 565.29, perfection occurred upon recording, and date of recordation was more than 10 days after debtors granted mortgage. Gold v Interstate Fin. Corp. (In re Schmiel) (2005, BC ED Mich) 319 BR 520 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

Creditor was granted summary judgment under Fed. R. ***Bankr.*** P. 7056 on trustee's adversary proceeding to avoid debtors' mortgage as ***preference*** because transfer was made on disbursement date, which was inside 30-day safe harbor provision of 11 USCS § 547(e)(2), rather than on closing date. Burks v Mortg. Elec. Registration Sys. (In re Pendergrass) (2007, BC SD Ohio) 365 BR 833.

Recording of mortgage was not preferential transfer under 11 USCS § 547(b)(4)(A); term "person" as found in Mich. Comp. Laws Serv. § 565.201a, and which applied to Mich. Comp. Laws Serv. § 565.201, included corporation; thus, mortgage was in recordable form when first submitted outside 90-day ***preference*** period. Lim v New Century Mortg. Corp. (In re Ammar) (2007, BC ED Mich) 368 BR 629.

Debtor executed security deed on December 30, 2004, and it was not recorded within 30 days thereafter; accordingly, under 11 USCS § 547(e)(2), date of transfer of security interest in property was deemed to be time of perfection, which, in accordance with § 547(e)(1)(A) and Georgia law, occurred on November 21, 2005 when bank filed deed for recordation; as debtor filed his ***bankruptcy*** petition on November 23, 2005, transfer of security interest occurred within 90 days prior to petition date. Goodman v Southern Horizon Bank (In re Norsworthy) (2007, BC ND Ga) 373 BR 194.

Because mortgage was not perfected, transfer was deemed to have occurred immediately before filing of ***bankruptcy*** petition, 11 USCS § 547(e)(2)(c); it was therefore avoidable under § 547(b). Lewis v Public Serv. Credit Union (In re Neal) (2009, BC ED Mich) 406 BR 288 (criticized in Richardson v Deutsche Bank Nat'l Trust Co. (In re Stephens) (2012, BC WD Mich) 2012 Bankr LEXIS 2498).

Second deed of trust which Chapter 11 debtors gave bank was avoidable under 11 USCS § 547(b) as preferential transfer because debtors gave deed to bank less than 90 days before they declared ***bankruptcy*** at time when they were insolvent; although debtors gave bank first deed of trust in 2004 to secure loan they obtained from bank, first deed was not valid because debtors did not obtain title to real property identified in deed until October 2006, and transfer did not occur until debtors executed second deed of trust after they obtained title to property. Huling v Bus. Bank (In re Huling) (2009, BC ED Mo) 418 BR 335.

Payment made by Chapter 11 debtor to transferee, debtor's landlord, was rental payment made in ordinary course of business and was made for contemporaneous consideration and therefore, could not be avoided pursuant to 11 USCS § 547(c)(1) and (2); payment was not termination payment as argued by trustee. McHale v Publix Super Mkts., Inc. (In re Luxury Ventures, LLC) (2010, BC MD Fla) 425 BR 680, 22 FLW Fed B 339.

Because affidavit recorded under Mich. Comp. Laws Serv. § 565.451a was ineffective to record or perfect unrecorded mortgage, mortgage itself remained unperfected, and, under 11 USCS § 547(e)(2)(C), transfer was deemed to have been made immediately before filing date of debtor's ***bankruptcy*** petition, which fell within 90-day statutory ***preference*** period. Simon v JP Morgan Chase Bank, N.A. (In re Lebbos) (2011, BC ED Mich) 455 BR 607.

In context of Puerto Rico law, in order for bona fide purchaser to acquire interest superior to bank's interest in these properties same had to present to Property Registrar for recordation deed prior to date in which bank presented its Mortgage Deeds, to wit, September 15, 2003; no such evidence existed in docket of this case; debtor had not established necessary elements of preferential transfer under 11 USCS § 547(b), (e)(1)(A). Hiraldo v Banco Popular de P.R. (In re Hiraldo) (2012, BC DC Puerto Rico) 471 BR 676.

For purposes of 11 USCS § 547, transfer of Chapter 11 debtor's real property interest occurred when mortgagee's assignee perfected its interest under state law by recording deed of trust, not at time of foreclosure sale. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

98. Termination of lease or surrender of option

Court order terminating lease and causing surrender to creditor lessees of option to purchase property worth $ 300,000 for $ 200,000 may be avoided under 11 USCS § 547 where: (1) order was entered 8 days before filing of petition; (2) lessees are both prepetition and postpetition creditors; (3) debtor was insolvent at time of lease termination; and (4) unsecured creditors would not receive 100 percent of their claims under Chapter 7; lessees' allowing debtor 3 weeks to vacate premises does not constitute new value under 11 USCS § 547(c)(1). In re Finelli Jewelry Co. (1987, BC DC RI) 79 BR 521, 17 CBC2d 1302.

Two individuals and business ("claimants") that filed claims against law firm's Chapter 11 ***bankruptcy*** estate did not have secured interests under 11 USCS § 506 in settlement proceeds that were paid to firm because firm commingled settlement proceeds with other money it held in trust account and exhausted funds that were in that account before it declared ***bankruptcy***; although law firm replenished trust account and subsequently transferred $ 441,145 to counsel who represented claimants, that transfer was preferential transfer under 11 USCS § 547, and funds became part of law firm's ***bankruptcy*** estate that were available for payment to all claimants that filed unsecured claims against firm's estate. In re Dreier LLP (2016, BC SD NY) 544 BR 760, 62 BCD 9.

99. Transfer of partnership property or interest

Transferred funds were interests of debtor in property because ***bankruptcy*** court did not err in concluding that limited partnership (LP) was entity controlled by debtor and that payments made to investor out of LP account were with funds from account wholly controlled by debtor and thus, constituted payments from debtor. Templeton v O'Cheskey (In re Am. Hous. Found.) (2015, CA5 Tex) 785 F3d 143, 61 BCD 1, 73 CBC2d 1033, CCH Bankr L Rptr P 82827.

In action to avoid transfer of Chapter 7 debtor's one-half interest in partnership, date of transfer, for purposes of 11 USCS § 547, is date when amended certificate of partnership was filed. In re Zyndorf (1987, BC ND Ohio) 80 BR 876.

Debtor was granted summary judgment in his adversary proceeding to avoid preferential transfer under 11 USCS § 547 because debtor's interest was transferred when funds came out of his account and went to insurance company to obtain supersedeas bond to stay enforcement of creditor's judgment; transfer of funds to non-creditor company was indirect transfer of debtor's property for benefit of creditor, whose ***payment*** of its judgment was assured by bond and who went from unsecured to secured and creditor submitted no evidence to rebut presumption that debtor was insolvent during ***90 days*** preceding ***bankruptcy*** filing; new value defense did not apply under 11 USCS § 547(a)(2) because creditor failed to prove that he extended equivalent new value to debtor in exchange for preferred status of secured creditor. ThermoView Indus. v Clemmens (In re ThermoView Indus.) (2007, BC WD Ky) 358 BR 330, reinstated, complaint dismd (2008, WD Ky) 2008 US Dist LEXIS 26832.

100. Transfer of promissory note

Where debtor transferred third-party promissory notes payable to it to bank by endorsement and delivery, for purposes of 11 USCS § 547(e)(2), transfer occurred at that time, not when third-party subsequently made ***payments*** on notes to bank. In re Duccilli Formal Wear (1982, BC SD Ohio) 8 BCD 1180.

101. Wages and garnishment

Garnishment of debtors' wages within ***90 days*** of when debtors filed ***bankruptcy*** petition, pursuant to garnishment order issued more than ***90 days*** before filing of petitions, does not constitute preferential transfer; under state law, debtors' rights in 10 percent of their future wages are irrevocably transferred once garnishment order has been entered by court. In re Coppie (1984, CA7 Ind) 728 F2d 951, 11 BCD 913, 10 CBC2d 503, CCH Bankr L Rptr P 69746, cert den (1985) 469 US 1105, 105 S Ct 777, 83 L Ed 2d 772 and (criticized in Deardorff v Ford Motor Credit Co. (In re Deardorff) (1996, BC WD Wis) 195 BR 904) and (criticized in In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325) and (criticized in Chavez v Mercury Fin. (In re Chavez) (2001, BC DC NM) 257 BR 341, 45 CBC2d 1290) and (criticized in In re White (2001, BC DC NJ) 258 BR 129, 37 BCD 73, 45 CBC2d 970) and (criticized in In re Earley (2004, BC ND Ill) 305 BR 837) and (criticized in Schott v First Pay Credit, Inc. (2013, MD La) 2013 US Dist LEXIS 113577).

Garnishor perfected its interest in Chapter 11 debtor garnishee's bank account for purposes of 11 USCS § 547 debtor's principal not when it served first writ of garnishment on debtor but when, following default judgment against debtor, it served writ of garnishment on debtor's banks to enforce its judgment. In re T.B. Westex Foods (1992, CA5 Tex) 950 F2d 1187, 26 CBC2d 682, CCH Bankr L Rptr P 74448.

11 USCS § 547(e)(3) applies to all transfers which are attacked as preferential, including judicial lien obtained by garnishment proceeding; however, transfer of debtor's wages to creditor may not occur until debtor becomes entitled to his wages since debtor simply has no right to wages which have not yet been earned but transfers of earned wages made within 90 days preceding filing of ***bankruptcy*** proceedings are avoidable preferential transfers. In re Eggleston (1982, BC MD Tenn) 19 BR 280, 9 BCD 44.

Because 11 USCS § 547(e)(3) provides that transfer is not made until debtor has acquired rights in property transferred, and since debtor does not acquire interest in his wages until he actually earns them, wages paid over to Internal Revenue Service (IRS) by debtor's employer within 90 day period preceding debtor's filing of ***bankruptcy*** petition are avoidable pursuant to 11 USCS § 547(b) notwithstanding that moneys were received by IRS pursuant to levy against debtor's wages made by IRS outside 90 day period. In re Tabita (1984, BC ED Pa) 38 BR 511, 12 BCD 41, 10 CBC2d 736, CCH Bankr L Rptr P 69807.

Under 11 USCS § 547(e)(3), transfer is not made until debtor has acquired rights in property transferred; since employee does not acquire rights to his wages until he has earned them, even though service of summons is generally critical point for dating transfer, critical point for dating transfer where debtor has not acquired rights to property is date those rights are acquired; accordingly, to extent that garnishment consisted of wages that debtor earned for work done during 90-day ***preference*** period, debtor is entitled to recover said amount under 11 USCS § 547. In re Morton (1984, BC ND Ga) 44 BR 750, 11 CBC2d 969, CCH Bankr L Rptr P 70171.

Acquisition by creditor of garnishment lien prior to 90 days before filing of debtor's Chapter 7 petition is transfer within meaning of 11 USCS § 547; lien was perfected at time of delivery of writ of fieri facias, which was outside 90-day period inasmuch as delivery creates lien and establishes its priority; all funds present in debtor's account on date summons was served and those deposited more then 90 days prior to date of filing are not avoidable but funds deposited within 90 days are ***preference*** and may be avoided. In re Jones (1985, BC ED Va) 47 BR 786, 12 BCD 1173, CCH Bankr L Rptr P 70365.

Garnishment of debtor's earned wages within 90 days of filing of his Chapter 7 petition is preferential transfer under 11 USCS § 547; fact that garnishor used portion of wages to pay its lawyer's contingency fee does not bring transfer within exception of 11 USCS § 547(c)(4) because no new value was given to or for benefit of debtor. In re Krumpe (1986, BC DC Md) 60 BR 575.

Transfer has occurred under 11 USCS § 547 where garnishee Chapter 7 debtor's attorney pays garnishment from debtor's trust fund, resulting in reduction of debtor's assets; transfer is not validated by reason of fact that garnishment order is against attorney and he is technically only exercising his right of indemnity against debtor. In re B-Way Constr. (1986, BC DC Or) 68 BR 651.

For purposes of 11 USCS § 547(b)(4)(A), "transfer" of garnished wages occurs only when Chapter 7 debtors have actually earned wages; thus, any sums paid to judgment creditors, pursuant to writ of garnishment, out of wages earned by debtors during ***preference*** period are preferential, even though writ was served outside ***preference*** period. In re Castleton (1988, BC DC Colo) 84 BR 743.

Transfer of funds occurred on December 22, 1988, at time of service of garnishment on bank, not when circuit court actually condemned Chapter 11 debtor's bank funds on March 20, 1988, well outside requisite ***90-day*** period and, therefore, did not constitute preferential ***payment*** subject to avoidance under 11 USCS § 547, where transfer was perfected on date of service of garnishment because on that date, no creditor on simple contract could acquire judicial lien that would be superior to interest of garnishor. Dura-Built Homes v Dobbins Forest Prods. (In re Dura-Built Homes) (1989, BC MD Ala) 170 BR 170.

Under 11 USCS § 547(e)(3), transfer occurs in wage garnishment, for purpose of determining whether avoidable ***preference*** has occurred under 11 USCS § 547(b), when wages have been earned and employer withholds statutory non-exempt percentage from debtor's wages, notwithstanding time of service of writ of garnishment and contrary state law provision providing that seizure takes place upon service of petition, citation, and garnishment; thus, even though employer obtained lien on debtor's wages under Louisiana law upon service of garnishment proceedings, transfer under 11 USCS § 547(b) could not occur until debtor earned wages. Chiasson v First Tenn. Bank Nat'l Ass'n (In re Kaufman) (1995, BC ED La) 187 BR 167.

Although Chapter 7 debtor was employed as salesman, and earnings he received were actually advances on commissions, employer's practice to make weekly advances, and clear out any amounts in "the red" at later date, indicated that, for purposes of preferential transfer action under 11 USCS § 547(b), transfers took place at time that employer withheld funds from debtor's checks. Chiasson v First Tenn. Bank Nat'l Ass'n (In re Kaufman) (1995, BC ED La) 187 BR 167.

Transfers by Chapter 7 debtor to bank, which trustee sought to have voided as fraudulent or preferential transfer made within one year of petition date, were made to or for benefit of creditor pursuant to 11 USCS § 547(b)(1) where bank benefited from payments by having outstanding loan balance reduced. Grant v Sun Bank/North Cent. Fla. (In re Thurman Constr.) (1995, BC MD Fla) 189 BR 1004, 9 FLW Fed B 237.

Transfer occurred under 11 USCS § 547 when portion of debtor's wages was withheld by his employer to be paid over pursuant to garnishment notwithstanding that garnishment issued at earlier time outside ***preference*** period. In a in re Johnson (1999, BC MD Ala) 239 BR 416.

Transfer date of garnished wages under 11 USCS § 547(b) is date on which it wages were earned by debtor, not date of payment to garnishing creditor. Baker v KAS Enters. (In re Baker) (2000, BC ED Mo) 246 BR 379, 43 CBC2d 1471.

Under Illinois Wage Deduction Act, 735 Ill. Comp. Stat. 5/12-801 et seq., continuing lien on subsequent wages attached to wages only when debtor had right to them; thus, debtor did not acquire rights in wages paid during ***preference*** period until he earned them, and therefore, amounts garnished during ***preference*** period were avoidable. Richardson v Ford Motor Credit Co. (In re Casias) (2005, BC CD Ill) 332 BR 357, 55 CBC2d 598.

Where wage garnishment order was entered more than 90 days prepetition, but wages were garnished from Chapter 7 debtor within 90-day period, transfer occurred when debtor's wages were deducted and not when wage garnishment order was entered because debtor had no right to her wages until she performed work required by her job. Ealy v Ford Motor Credit Co. (In re Ealy) (2006, BC ND Ill) 355 BR 685.

Where Trustee sought to avoid wage garnishments as transfers, garnishing of each paycheck was transfer because, with each paycheck garnished, portion of debtor's property was parted with; however, because wages earned outside ***90 days*** prior to petition date were protected by creditor's garnishment lien, unresolved fact issue regarding when wages were earned precluded summary judgment. Weinman v Alternative Revenue Sys. (In re Stevens) (2016, BC DC Colo) 552 BR 773.

102. Other transfers of personal property

Where under state law, transfer of ownership of beans to grain elevator debtor occurred on date of delivery, and not when price was set at future date, ***payments*** made to producer of beans by debtor within ***90 days*** of ***bankruptcy*** filing were for antecedent debt and avoidable by trustee as ***preferences***. In re Biniecki Bros. (1984, BC ED Mich) 38 BR 519.

Actual delivery of jewelry, not later execution of bill of sale, is effectively date of transfer, but where insider is involved, delivery within one year is preferential to extent of antecedent debt. In re Porter (1984, BC ND Tex) 40 BR 646.

Transfer of firearms and related equipment from debtor to transferee occurred on date of shipment, for purposes of 11 USCS §§ 547 and 549, even though debtor did not relinquish title to goods until they were received by transferee because, pursuant to 11 USCS § 101's definition of transfer, transfer includes transfer of possession, custody, or control, even if there is no transfer of title, because possession, custody, and control are interests in property. In re Omaha Midwest Wholesale Distributors, Inc. (1988, BC DC Neb) 94 BR 160.

Bankruptcy court erred when it found that pickup truck Chapter 7 debtor transferred to his father-in-law to repay debts debtor owed could be recovered for debtor's estate, pursuant to 11 USCS § 547, because father-in-law did not apply for title until April 2009, six days before debtor declared ***bankruptcy***; although Cal. Veh. Code § 5600 stated that title did not transfer until transferee obtained title under that section, father-in-law obtained equitable title to truck when he took possession of truck in January 2008, and there was no preferential transfer under § 547 because transfer that occurred in January 2008 satisfied definition of "transfer" found in § 547(e) and it occurred more than one year before debtor declared ***bankruptcy***. Green v Roberts (In re Stinson) (2010, BAP9) 443 BR 438.

103. Other transfers of real property

Trustee cannot avoid creditor's chattel mortgage interest in debtor's ski lodge recorded in 1982 because 11 USCS § 547(e)(1)(B) fixes time creditor perfected interest by filing financial statement in 1979; later, erroneous fixture filing in 1982 is irrelevant because trustee's interest is in debtor's ski lodge, not real estate owned by third party on which ski lodge sits. In re Trestle Valley Recreation Area, Inc. (1984, BC DC ND) 45 BR 458, 40 UCCRS 291.

Date of transfer of Chapter 13 debtor's interest in property to mortgagee, by way of mortgage deed, was date that mortgage was re-recorded, within 90 days of ***bankruptcy***, after mortgagee learned that mortgage had mistakenly been released, rather than date that mortgage was originally recorded, and thus transfer is avoidable under 11 USCS § 547. Rosenbaum v Mechanics Sav. Bank (1993, BC DC Conn) 151 BR 303, CCH Bankr L Rptr P 75168.

For purposes of 11 USCS § 547, transfer of Chapter 11 debtor's real property interest occurred when mortgagee's assignee perfected its interest under state law by recording deed of trust, not at time of foreclosure sale. In re Ehring (1988, BAP9 Cal) 91 BR 897, 18 BCD 668, 19 CBC2d 1030, affd (1990, CA9 Cal) 900 F2d 184, 20 BCD 603, CCH Bankr L Rptr P 73324 (criticized in Norwest Bank Minn., N.A. v Andrews (In re Andrews) (2001, BC MD Pa) 262 BR 299).

Transfer of real property to Chapter 7 debtor's former spouse occurred on date deed was recorded rather than at time of divorce, because under applicable state law perfection of deed of trust occurs upon recordation of document with county recorder; however, trial court's error with regard to date of transfer is harmless because former spouse is not insider, and thus ***preference*** period under 11 USCS § 547(b)(4)(A) is 90 days rather than one year. In re Schuman (1987, BAP9 Cal) 81 BR 583, 17 BCD 57.

Non-purchase money security interest perfected more than ten days after date of transfer was properly considered contemporaneous in fact, where parties clearly intended transfer to be contemporaneous, fourteen-day delay was not significantly more than ten-day window provided in 11 USCS § 547(e)(2), and there were unforeseen circumstances beyond control of creditor who was neither dilatory nor negligent. Dye v Rivera (In re Marino) (1996, BAP9 Cal) 193 BR 907, 96 Daily Journal DAR 13641, 35 CBC2d 757 (criticized in Pongetti v GMAC (In re Locklin) (1996, CA5 Miss) 101 F3d 435, CCH Bankr L Rptr P 77212) and affd (1997, CA9) 117 F3d 1425, reported in full (1997, CA9) 1997 US App LEXIS 16334 and (criticized in Collins v Greater Atl. Mortg. Corp. (In re Lazarus) (2007, CA1 Mass) 478 F3d 12, 57 CBC2d 400, CCH Bankr L Rptr P 80839).

Unpublished Opinions

Unpublished: For purposes of 11 USCS § 547, transfer occurred when decree of foreclosure was entered on June 28, 2010; additionally: (1) creditor perfected its interest in real property by notice of lis pendens on June 28, 2010 when decree of foreclosure was entered in its favor, (2) creditor, by assignment from original mortgagee, received interest in property on April 20, 2006, (3) therefore, since decree of foreclosure was entered more than 30 days after creation of creditor's interest, transfer was deemed to occur at entry of decree of foreclosure; thus, perfection occurred within ***90-day*** period preceding petition date, satisfying fourth element under 11 USCS § 547. Mason v Ocwen Loans Servicing, LLC (In re Votaw) (2012, BC ND Ohio) 2012 Bankr LEXIS 553.

104. Miscellaneous

Nursing homes had property interest in their monthly disbursements from state welfare department, regardless of offset procedure used in ***payment*** to homes, and disbursements constituted "transfer" under 11 USCS § 101, for purposes of "transfer of property" requirement of 11 USCS § 547(b). WJM, Inc. v Massachusetts Dep't of Pub. Welfare (1988, CA1 Mass) 840 F2d 996, 17 BCD 468, CCH Bankr L Rptr P 72203 (ovrld in part as stated in Mills v Maine (1997, CA1 Me) 118 F3d 37, 3 BNA WH Cas 2d 1802, 134 CCH LC P 33585) and (ovrld as stated in, questioned in Bozeman v DOR of Fl. (In re Bozeman) (2002, BC MD Ga) 278 BR 275).

Mortgage company's checks to earlier creditors cleared escrow account on December 12, 2003, so latest company perfected its interest under doctrine of equitable subrogation was December 12, 2003; company's loan to debtors closed on December 4, 2003; because delivery and closing occurred within 10 days of each other, transfer was "made" at closing for purposes of 11 USCS § 547(e)(2)(A)'s relation-back provision. Gordon v Novastar Mortg., Inc. (In re Hedrick) (2008, CA11 Ga) 524 F3d 1175, CCH Bankr L Rptr P 81211, 21 FLW Fed C 569, mod and reh den (2008, CA11 Ga) 529 F3d 1026, 21 FLW Fed C 764 and reh, en banc, den (2008, CA11) 285 Fed Appx 741 and reh, en banc, den (2008, CA11) 2008 US App LEXIS 27759 and cert den (2008) 555 US 1046, 129 S Ct 631, 172 L Ed 2d 610.

By virtue of 15 USCS § 78fff(b) of Securities Investors Protection Act (SIPA), when applying provisions of ***Bankruptcy*** Code in SIPA liquidation, references to date of filing of ***bankruptcy*** petition are deemed to be references to filing date of SEC application for customer protective decree in District Court and therefore date of filing of SEC complaint determines whether trustee should proceed under 11 USCS § 547 or 549 to avoid transfer of customer's property to customer as either avoidable prepetition or postpetition transfer. Hill v Spencer S&L Ass'n (In re Bevill, Bresler & Schulman, Inc.) (1988, DC NJ) 83 BR 880.

Transfer to certain creditors of ***payments*** received by debtor upon sale of debtor's assets were not made within 4 months [now ***90 days***] of debtor's filing, as required under former ***Bankruptcy*** Act, where, at time of closing, more than 4 months before filing, debtor authorized purchaser to disburse money due debtor to certain named creditors, and thereby gave up any interest in proceeds, even though purchaser's bank did not pay checks to creditors until within 4 months of filing date. In re Gold Star, Inc. (1979, BC DC NJ) 20 CBC 1022.

Debtor's receivables are acquired at time of contract execution, even though not yet earned by performance, so that where rights to payments were assigned 3 years prior to filing of petition receipt of payments during petition period do not constitute voidable transfers under 11 USCS § 547. In re E.P. Hayes, Inc. (1983, BC DC Conn) 29 BR 907, 10 BCD 779, 8 CBC2d 872.

For purposes of 11 USCS § 547(c)(4), transfer of $ 85,000 in payment of gas and electrical bill ultimately received by creditor occurred on date that sum was transferred by wire to creditor, not on date of debtor's check for larger amount, which check bounced. In re Chase & Sanborn Corp. (1985, BC SD Fla) 55 BR 86.

For purposes of 11 USCS § 547 ***preference*** action, transfer of property to creditor occurred on date which inventory transfer was actually made and on date cash payments were actually made, rather than date settlement agreement was reached pursuant to which transfers were made. In re Allegheny, Inc. (1988, BC WD Pa) 86 BR 466, 17 BCD 876.

Transfer for purposes of 11 USCS § 547(b) occurred not when IRS levied on Chapter 13 debtor's social security benefits but at earlier date when right to receive those benefits became subject to tax lien for unpaid income taxes so that, where IRS had valid tax lien against debtor's right to receive social security benefits for more than two years prior to petition date, debtor could not establish prima facie case of ***preference*** under 11 USCS § 547. Roberts v United States/IRS (In re Roberts) (1997, BC DC Or) 219 BR 573, 39 CBC2d 398, 97-2 USTC P 50843, 80 AFTR 2d 6244.

Under Florida law, date country club membership certificate was issued by Chapter 7 debtor is date transfer of ownership interest in membership was effective, not date transferee received proceeds from sale of membership, and transfer therefore falls outside 90-day period under 11 USCS § 547(b). Bakst v Levenson (In re Goldberg) (1998, BC SD Fla) 229 BR 877.

Bankruptcy court found that security deposit was property of debtor's estate based upon terms of lease agreement and this evidence precluded summary judgment in debtor's 11 USCS § 547 ***preference*** action in individual's favor. Hechinger Liquidation Trust v Parmod Monga (In re Hechinger Inv. Co. of Del., Inc.) (2003, BC DC Del) 299 BR 340.

Debtor was not entitled to any recovery from law firm under 11 USCS § 550(a)(1) because law firm did not have dominion or control over funds transferred to its trust account and, therefore, was not "initial transferee" within meaning of statute; furthermore, debtor was not entitled to any recovery from law firm as mediate or subsequent transferee under § 550(a)(2) because law firm was transferee for value, in good faith, and without knowledge of voidability of transfers. Lifecare Techs., Inc. v Berman Law Firm, P.A. (In re Lifecare Techs., Inc.) (2003, BC MD Fla) 305 BR 88, 17 FLW Fed B 35 (criticized in Stevenson v Genna (In re Jackson) (2010, BC ED Mich) 426 BR 701, 63 CBC2d 1025).

Where nonjudicial foreclosure sale of Chapter 13 debtor's home was orally cried out pre-petition, home became property of ***bankruptcy*** estate under 11 USCS § 541(a)(1), and debtor had ability to cure prepetition home mortgage default, because state statute of frauds, Tenn. Code Ann. § 29-2-101, was not complied with until substitute trustee's deed was executed after ***bankruptcy*** filing. Select Portfolio Servicing, Inc. v Love (In re Love) (2006, BC WD Tenn) 353 BR 216.

To extent expulsions of debtor from limited liability companies (LLCs) acted to terminate debtor's rights as member, they constituted "transfers" subject to avoidance provisions of ***Bankruptcy*** Code because debtor's membership interest would have constituted property of his ***bankruptcy*** estate had he not been removed. Garcia v Garcia (In re Garcia) (2013, BC ED NY) 494 BR 799, 58 BCD 84.

Unpublished Opinions

Unpublished: Summary judgment was warranted for trustee on claim for preferential transfer to creditor who was wife of president of debtor corporation because it was undisputed that creditor was insider, creditor received $ 43,780 in payments that was antecedent debt and was not salary, and payment was made during preferential period and at time when debtor was insolvent. McDonnell v Lasch (In re Gibraltar Granite & Marble Corp. Chptr. 7) (2009, BC DC NJ) 2009 Bankr LEXIS 2074.

C. Interest of Debtor in Property

1. In General

105. Generally

Both older subsec. (b) language ("property of the debtor") and current language ("interest of the debtor in property") are to be read as coextensive with "interests of the debtor in property" as that term is used in 11 USCS § 541(a)(1). Begier v IRS (1990) 496 US 53, 110 S Ct 2258, 110 L Ed 2d 46, 20 BCD 940, 22 CBC2d 1080, CCH Bankr L Rptr P 73403, 90-1 USTC P 50294, 65 AFTR 2d 1095 (criticized in Official Comm. of Unsecured Creditors v Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.) (2010, BC DC Del) 432 BR 135, 53 BCD 94).

Prepetition debtor acquires rights in property for 11 USCS § 547(b) purposes if, but for challenged transfer, its interest would have been property of estate under 11 USCS § 541 at filing of Chapter 7 petition. Ralar Distribs. v Rubbermaid (In re Ralar Distribs.) (1993, CA1 Mass) 4 F3d 62, 24 BCD 1099, 29 CBC2d 1234, CCH Bankr L Rptr P 75452.

In order to establish preferential transfer pursuant to 11 USCS § 547(b), trustee must establish threshold element that, under applicable state law, property transferred belonged to debtor. In re Tinnell Traffic Services, Inc. (1984, BC MD Tenn) 43 BR 277.

Ability of trustee to avoid preferential transfer under 11 USCS § 547 is limited to transfer of interest of debtor in property; therefore, claim for relief under § 547 must assert facts showing that debtors had interest in property exchanging hands. Angell v Day (In re Caremerica, Inc.) (2009, BC ED NC) 415 BR 200.

Complaint seeking to avoid alleged preferential transfers under 11 USCS § 547 failed to assert facts showing that debtor had interest in property transferred where exhibit included names of transferees but did not indicate that debtor was transferor. Beaman v Barth (In re AmerLink, Ltd.) (2011, BC ED NC) 65 CBC2d 868.

106. Applicable law

In determining if subject property of alleged preferential transfer is property of Chapter 7 debtor's estate as required by 11 USCS § 547(b), court will look to state law because "interest of debtor in property" is nowhere defined in Code. In re Kleckner (1988, ND Ill) 93 BR 143.

In considering if particular creditor sold furniture and equipment to debtor, as defined under 11 USCS § 101, or some other entity, state law determines identity of entity with whom creditor contracts; thus, where purchase orders, invoices and financing statement did not contain debtor's name, debtor's principal never indicated he signed any of these documents in representative capacity, and principal's signing next to word "by" on purchase orders was not sufficient to put creditor on notice that principal was acting as agent, creditor was not contracting with debtor as defined in 11 USCS § 101 and creditor's repossession of furniture and equipment within 90 days of filing of Chapter 11 petition is not preferential transfer within meaning of 11 USCS § 547. In re Austin Group, Inc. (1987, BC ND Ga) 80 BR 255.

Because 11 USCS § 547(b) phrase "interest of the debtor in property" is not defined in ***Bankruptcy*** Code, courts look to state law to determine whether property is asset of debtor. In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325.

Generally, state law is "applicable" law relied upon to make determinations of ownership interests. Weiner v A.G. Minzer Supply Corp. (In re UDI Corp.) (2003, BC DC Mass) 301 BR 104, 42 BCD 25.

Where chapter 11 trustee sought to avoid creditor bank's lien pursuant to 11 USCS §§ 544, 547, 548, and 550; court distinguished between commercial tort claims and payment intangibles arising under settlements of commercial tort claims, under N.Y. U.C.C. Law § 9-109, cmt. 15. Paloian v LaSalle Bank N.A. (In re Doctors Hosp. of Hyde Park, Inc.) (2012, BC ND Ill) 474 BR 576.

Where defendant transferred $ 40,000 to one of chapter 7 debtors, which they deposited in their single owner account, as defendant was not joint owner or depositor of that account, under Wash. Rev. Code § 30A.22.090(1), she had no interest in that account; therefore, debtors' pre-petition transfer of $ 40,000 from that account to her was transfer of interest of debtors under 11 USCS § 548 and this section. Ellis v Mirghanbari (In re Pittman) (2015, BC WD Wash) 540 BR 451, 74 CBC2d 473.

11 USCS § 548 and 11 USCS § 547(b)(4)(B) apply only if estate has interest in property beyond bare legal title; to determine whether valid trust exists so as to render these sections inapplicable, ***Bankruptcy*** Court must look to state law. In re Torrez (1986, BAP9 Cal) 63 BR 751, 14 BCD 957, affd (1987, CA9 Cal) 827 F2d 1299.

107. Definition of property or debtor's interest in property

Because property of estate under 11 USCS § 541 includes all legal or equitable interests of debtor in property, property of debtor as used in definition of voidable ***preference*** under former 11 USCS § 547(b) is equivalent to property of estate. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

Bankruptcy Code does not define "interest of the debtor in property" as used in 11 USCS § 547, and in absence of any controlling federal law, court looks to state law to determine whether certain asset constitutes property of debtor. Hansen v MacDonald Meat Co. (In re Kemp Pac. Fisheries) (1994, CA9 Wash) 16 F3d 313, 94 CDOS 841, 94 Daily Journal DAR 1411, 30 CBC2d 991, CCH Bankr L Rptr P 75694.

Supplier's reclamation of fabricated steel from debtor's construction site was held not to constitute preferential transfer where debtor and its contractor never paid for steel and steel was never property of debtor or contractor. Spradlin v Jarvis (In re Tri-City Turf Club, Inc.) (2003, CA6 Ky) 323 F3d 439, 41 BCD 19, CCH Bankr L Rptr P 78823, 2003 FED App 88P.

Payments made by debtors ***90 days*** before filing their Chapter 7 petition from one set of credit accounts to another set of credit card accounts were voidable, preferential transfers under 11 USCS § 547(b) because ***payments*** were discretionary use of borrowed funds to pay another debt; court took majority's view that debtor, even if never in actual possession of loaned proceeds, exercised dominion or control over proceeds as evidenced by ability to direct distribution and thus, ***payments*** constituted transfers of "an interest of debtor in property," and that transactions depleted estate. Parks v FIA Card Servs., N.A. (In re Marshall) (2008, CA10 Kan) 550 F3d 1251, 50 BCD 281, 60 CBC2d 1659, CCH Bankr L Rptr P 81383, cert den (2009) 557 US 937, 129 S Ct 2871, 174 L Ed 2d 579.

Because funds transferred by balance transfer check drawn on one of debtor's banks to former creditor, another bank, at direction of debtor were not earmarked funds and because transfer diminished ***bankruptcy*** estate, those funds were property in which debtor had interest, and transfer was preferential and voidable under 11 USCS § 547(b), with funds being recoverable under 11 USCS § 550. Yoppolo v MBNA Am. Bank, N.A. (In re Dilworth) (2009, CA6 Ohio) 560 F3d 562, 61 CBC2d 875, CCH Bankr L Rptr P 81451, 2009 FED App 118P, reh den, reh, en banc, den (2009, CA6) 2009 US App LEXIS 24183.

In determining if subject property of alleged preferential transfer is property of Chapter 7 debtor's estate as required by 11 USCS § 547(b), court will look to state law because "interest of debtor in property" is nowhere defined in Code. In re Kleckner (1988, ND Ill) 93 BR 143.

Code does not define "property" as used in 11 USCS § 547(b) but items constituting estate of debtor are enumerated in 11 USCS § 541; § 541's definition of property of estate is useful to determine what constitutes property of debts under § 547 because: (1) property of debtor is property of estate upon filing of petition except for § 522 exemptions; and (2) principle of § 547 is to avoid only those preferential transfers that result in depletion of debtor's estate and that do not fall within exceptions listed in 547(c). In re General Office Furniture Wholesalers, Inc. (1984, BC ED Va) 42 BR 232.

Although term "property" is not defined by ***Bankruptcy*** Code, transfer of property within scope of 11 USCS § 547(b) includes giving or conveying anything of value which has debt-paying or debt-securing power; even property

with intangible value may be subject of ***preference*** action. In re Trejo (1984, BC ED Cal) 44 BR 539, 12 BCD 568, CCH Bankr L Rptr P 70143.

Transfer to unsecured creditor of property over which debtor has possession, control, and dominion constitutes transfer of an interest of the debtor in property for purposes of 11 USCS § 547(b), regardless of whether debtor has equity in that property. Matson v Grease Monkey Int'l, Inc. (In re Bev, Inc.) (1998, BC ED Va) 237 BR 311.

Because 11 USCS § 547(b) phrase "interest of the debtor in property" is not defined in ***Bankruptcy*** Code, courts look to state law to determine whether property is asset of debtor. In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325.

Because title to inventory of goods that was sold to pair of Chapter 7 debtors in connection with their lease of convenience store owned by defendant passed to debtors pursuant to Okla. Stat. tit. 12, § 2-401(1) and (3) when agreement providing for its purchase was signed, defendant's entry into premises and his retaking of possession of inventory within 90 days of date on which debtors filed Chapter 7 ***bankruptcy*** in fact affected debtors' "property" within meaning of 11 USCS § 547; defendant thus was not entitled to summary judgment on trustee's adversary complaint to set aside transfer as ***preference***. Malloy v v.Brazeal (In re Callahan) (2007, BC ND Okla) 64 UCCRS2d 193, judgment entered (2008, BC ND Okla) 2008 Bankr LEXIS 1156.

Funds that were placed under the dominion and control of the debtor under P.R. Laws Ann. tit. 31, §§ 1111, 1114, were property of the debtor and were subject to avoidance when attached by a creditor bank during the 90 day ***preference*** reachback period of 11 USCS § 547(b), regardless of the bank's prior claim to the funds. Rentas v Banco Bilbao Vizcaya Argentaria PR (In re Velazquez) (2008, BC DC Puerto Rico) 397 BR 231, affd (2009, DC Puerto Rico) 2009 US Dist LEXIS 39393, affd (2010, CA1 Puerto Rico) 625 F3d 34, 53 BCD 243, 64 CBC2d 1252, CCH Bankr L Rptr P 81876.

Where debtor's real property was foreclosed upon and was subject to numerous liens, debtor's right of redemption likely had no value, so trustee's potential recovery for preferential transfer under 11 USCS § 547(b) or post-petition transfer under 11 USCS §§ 549(a), 550(d), and 551 was of no practical value to estate. Seaver v New Buffalo Auto Sales, LLC (In re Hecker) (2013, BC DC Minn) 488 BR 638.

Threshold requirement for maintaining avoidance actions under 11 USCS §§ 547 and 548 was transfer of interest of debtor in property, and trustee's rights as bona fide purchaser of real property were not "interest of debtor in property" for purposes of avoidance. Nor was property that trustee could potentially recover from transferee in connection with avoidance actions property that was includable in estate for purposes of 11 USCS §§ 547 and 548. Kelley v McCormack (In re Mitchell) (2016, BC MD Ga) 548 BR 862.

Unpublished Opinions

Unpublished: ***Bankruptcy*** Code does not define phrase "an interest of debtor in property" that appears in 11 USCS § 547; however, courts have concluded that term is equivalent to "property of estate" that is used in 11 USCS § 541, and courts turn to § 541 to determine scope of property interests that are recoverable under § 547. Forman v Deutsch Atkins, P.C. (In re Russ Cos.) (2013, BC DC NJ) 2013 Bankr LEXIS 3229.

Unpublished: ***Bankruptcy*** court did not err in granting partial summary judgment on preferential transfer claim because it determined that debtor's transfer of business assets to his mother constituted preferential transfer where mother did not present sufficient evidence to raise genuine factual issues as to contested elements for preferential transfer, including whether debtor had property interest in transferred business assets. Stout v Marshack (In re Stout) (2014, BAP9) 2014 Bankr LEXIS 1988.

Unpublished: ***Bankruptcy*** trustee's claim that mortgage Chapter 7 debtor executed was unenforceable under Wyoming law because bank assigned mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") without assigning note was precluded by Tenth Circuit case law, and trustee was not allowed under 11 USCS §§ 544 or 547 to avoid assignment MERS made to another bank because mortgage was properly perfected and debtor

did not retain property interest in her mortgage for purposes of § 547. Barney v Bank of America, N.A. (In re Gifford) (2015, BAP10) 2015 Bankr LEXIS 2437.

108. Diminution or depletion of estate

Purpose of avoidance of preferential transfers under 11 USCS § 547 and fraudulent transfers under 11 USCS § 548 is to prevent debtor from diminishing, to detriment of some or all creditors, funds that are generally available for distribution to creditors; consequently, any funds under control of debtor, regardless of source, are deemed property of debtor and cannot be transferred if such transfer diminishes estate. In re Chase & Sanborn Corp. (1987, CA11 Fla) 813 F2d 1177, CCH Bankr L Rptr P 71753 (criticized in Meoli v Huntington Nat'l Bank (In re Teleservices Group, Inc.) (2012, BC WD Mich) 469 BR 713).

Application of diminution of estate doctrine in context of determining whether payment by third party to creditor on behalf of debtor is voidable preferential transfer under 11 USCS § 547(b) when debtor grants security interest to third party in exchange for payment requires court to ask whether debtor controlled property given in payment by third party to extent that debtor owned it and, if so, what was value of assets, if any, which secured loan to debtor, in order to determine to what extent transfer diminished his estate. In re Hartley (1987, CA6 Ohio) 825 F2d 1067, CCH Bankr L Rptr P 71951.

Property belongs to debtor under 11 USCS § 547 if its transfer will deprive ***bankruptcy*** estate of something that could otherwise be used to satisfy claims of creditors. In re Bullion Reserve of N. Am. (1988, CA9 Cal) 836 F2d 1214, 17 BCD 402, CCH Bankr L Rptr P 72149, cert den (1988) 486 US 1056, 108 S Ct 2824, 100 L Ed 2d 925.

"Diminution of estate" doctrine has been developed to test whether debtor controlled transferred property to extent he owned it for purposes of 11 USCS § 547, and, essentially, transfer must diminish directly or indirectly fund to which creditors of same class can legally resort for payment of their debts, to such extent that it is impossible for other creditors of same class to obtain as great a percentage as favored one; exception to this general rule occurs when third party lends money to debtor for specific purpose of paying selected creditor; this exception, known as "earmarking doctrine" is justified by fact that in such case funds are neither controlled by nor belong to debtor; money never becomes part of debtor's assets, but, rather, transaction merely substitutes one creditor for another without diminishing value of ***bankruptcy*** estate; key inquiry in analysis of whether third-party transfer diminishes value of debtor's estate is source of control over new funds; if debtor controls disposition of funds and designates creditor to whom moneys will be paid independent of third party whose funds are being used in payment of debt, then payments made by debtor to creditor constitute preferential transfer. Hansen v MacDonald Meat Co. (In re Kemp Pac. Fisheries) (1994, CA9 Wash) 16 F3d 313, 94 CDOS 841, 94 Daily Journal DAR 1411, 30 CBC2d 991, CCH Bankr L Rptr P 75694.

Diminution of debtor's estate is not element of ***preference*** claim under 11 USCS § 547(b); whether transfer depletes debtor's estate is considered in context of determining whether threshold requirement has been met that transfer was of interest of debtor in property, and in context of transfers by third parties, "diminution of estate" doctrine asks whether debtor controlled property to extent that he owned it so that transfer diminished his estate. Truck Drivers Local No. 164, Int'l Bhd. of Teamsters v Allied Waste Sys. (2008, CA6 Mich) 512 F3d 211, 183 BNA LRRM 2420, 155 CCH LC P 10951, 2008 FED App 3P.

Debtors' transfer of credit card loan proceeds to second set of credit card accounts diminished ***bankruptcy*** estate because, although infusion of loan proceeds was totally offset by additional debt, that was not relevant test--loan proceeds were asset of estate for at least instant before they were preferentially transferred to other credit card accounts; preferential transfer look back was not time sensitive--issue was whether any asset, regardless of how fleeting its presence in bankrupt's estate during relevant period of time, should have been ratably apportioned among qualified creditors or permitted to benefit only preferred creditor, and answer was as clear as statute itself--all preferential transfers of estate assets during ninety-day look back were subject to recapture. Parks v FIA Card Servs., N.A. (In re Marshall) (2008, CA10 Kan) 550 F3d 1251, 50 BCD 281, 60 CBC2d 1659, CCH Bankr L Rptr P 81383, cert den (2009) 557 US 937, 129 S Ct 2871, 174 L Ed 2d 579.

In determining whether subject property of alleged preferential transfer is property of Chapter 7 debtor's estate for purposes of 11 USCS § 547, primary inquiry regards whether such transfer of property diminishes or depletes debtor's estate. In re Kleckner (1988, ND Ill) 93 BR 143.

Requirements of earmarking doctrine were not met and transfer was of an interest of debtor in property under 11 USCS § 547(b) where debtor paid unsecured debt with money obtained through secured loan which clearly resulted in diminution of estate. Official Comm. of Unsecured Creditors of Crystal Med. Prods, Inc. v Pedersen & Houpt (In re Crystal Med. Prods., Inc.) (1999, BC ND Ill) 240 BR 290.

In ***bankruptcy*** trustee's ***preference*** action under 11 USCS § 547(b), to extent that loan from debtor's father, which enabled debtor to pay judgment creditor, became encumbered by previously unencumbered property, payment to creditor was avoidable and recoverable; father's lien on stock supplanted that of another secured creditor who had possession of stock and then delivered stock to debtor's father to secure father's loan, and thus net diminution to debtor's estate, and amount recoverable by trustee from judgment creditor, was amount of payment to creditor minus amount that was owed to that other creditor who had previously been secured by stock. Mangan v Cadle Co. (In re Flanagan) (2003, BC DC Conn) 293 BR 102, 41 BCD 105, affd (2004, DC Conn) 316 BR 11, affd (2007, CA2 Conn) 503 F3d 171, 48 BCD 265, 58 CBC2d 1079, CCH Bankr L Rptr P 81030.

Where debtor borrowed funds to pay off his original mortgage, perfection by mortgagee of its security interest was not preferential transfer because funds were earmarked for paying off original loan and never became part of estate and because there was no diminution of estate available for distribution to creditors. Shapiro v Homecomings Fin. Network, Inc. (In re Davis) (2004, BC ED Mich) 318 BR 119.

Where creditor argued that avoiding debtors' mortgage to creditor would not benefit estate because mortgage itself had no value but, rather, it was promissory note which mortgage secured that held value, argument was rejected because, under 11 USCS § 551, once transfer was avoided, it was automatically preserved for benefit of estate and trustee could sell mortgaged property free and clear of mortgage, leaving creditor as holder of unsecured note. Gold v Interstate Fin. Corp. (In re Schmiel) (2005, BC ED Mich) 319 BR 520 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

Trustee was entitled to recover funds from preferential transfer pursuant to 11 USCS § 547(b) from creditor which was initial transferee under 11 USCS § 550 because earmarked doctrine was inapplicable due to fact that there was diminution of debtor's estate to extent of value of security interest, net proceeds of sale of property, and emergency loan by creditor was not made to debtor in ordinary course of business. Caillouet v First Bank & Trust (In re Entringer Bakeries) (2006, BC ED La) 347 BR 550, 46 BCD 206, affd (2007, ED La) 368 BR 520, affd in part and vacated in part (2008, CA5 La) 548 F3d 344, 50 BCD 221, 60 CBC2d 1793, CCH Bankr L Rptr P 81350.

Where corporation in which ***bankruptcy*** debtor's parent held all of stock transferred assets in satisfaction of judgment debt, ***bankruptcy*** trustee properly alleged avoidability of judgment as preferential based on allegations that parent as straw person held stock in resulting trust for debtor, that transfer of assets depleted value of stock, and that judgment within ***preference*** period was thus avoidable. Roeder v Carr (In re Watkins) (2008, BC WD Pa) 392 BR 173.

109. Property held in trust

Avoidance power of trustee only reaches interest of debtor in property (11 USCS § 547(b)); debtor does not own equitable interest in property he holds in trust (express or constructive) for another, such that interest is not property of estate (11 USCS § 541(d)). Poss v Morris (In re Morris) (2001, CA6 Ohio) 260 F3d 654, 46 CBC2d 1334, 2001 FED App 264P.

Chapter 7 trustee could not avoid transfer and recover funds transferred by debtor, payroll processing firm, to IRS in 90 days preceding filing of its ***bankruptcy*** petition because under Maryland law, debtor held tax funds in express trust and thus, lacked equitable interest in property. Commingling of funds before they were transferred to IRS was not so severe that it prevented funds from fulfilling purpose of trust, as funds could still be traced, and trustee failed to rebut presumption that funds were held in trust by proving that any funds transferred to IRS were debtor's own

property and not tax funds that it held in trust for benefit of its clients and IRS. Wolff v United States, IRS (In re FirstPay, Inc.) (2014, CA4 Md) 773 F3d 583, 60 BCD 107, 72 CBC2d 1264, CCH Bankr L Rptr P 82744, 2015-1 USTC P 50101, 114 AFTR 2d 6914, cert den (2015, US) 135 S Ct 2890, 192 L Ed 2d 948.

Voidable ***preference*** can be found only insofar as payment is made from property of debtor under 11 USCS § 547(b), which does not include assets held by debtor in trust for another pursuant to 11 USCS § 541(b). Drabkin v District of Columbia (1987, App DC) 263 US App DC 122, 824 F2d 1102, 16 BCD 515, 17 CBC2d 945, CCH Bankr L Rptr P 71915.

Preferential transfer defendants do not bear same burden of tracing funds as do plaintiffs seeking to impress trust under applicable non-***bankruptcy*** law; rather, legal source and unique posture of ***bankruptcy preference*** litigation substantially relieve defendant trust fund claimant of tracing burden, since it is reasonable to presume that in transferring funds to trust beneficiary, trustee is acting in responsible recognition of, and compliance with, its duties. Daly v Deptula (In re Carrozzella & Richardson) (2000, BC DC Conn) 255 BR 267, 36 BCD 224, 45 CBC2d 12, judgment entered, findings of fact/conclusions of law, request den (2001, BC DC Conn) 259 BR 239 and judgment entered (2001, BC DC Conn) 2001 Bankr LEXIS 1571, affd (2002, DC Conn) 286 BR 480, 49 CBC2d 1182 (criticized in Calvert v Radford (In re Consol. Meridian Funds) (2013, BC WD Wash) 487 BR 263, 57 BCD 142) and (Abrogated as stated in Calvert v Brown (In re Consol. Meridian Funds) (2013, BC WD Wash) 2013 Bankr LEXIS 675) and (criticized in Janvey v Brown (2014, CA5 Tex) 767 F3d 430) and (criticized in Rhiel v OhioHealth Corp. (In re Hunter) (2008, BC SD Ohio) 380 BR 753, 59 CBC2d 252, 43 EBC 2190) and (criticized in Stoebner v Consumers Energy Co. (In re LGI Energy Solutions, Inc.) (2011, BAP8) 460 BR 720, 55 BCD 235, 66 CBC2d 1329).

When distributions from pre-petition trust that debtor founded began, plaintiffs failed to obtain temporary restraining order to enjoin any future distributions where ***bankruptcy*** court found that plaintiffs: (1) were not official ***bankruptcy*** committee; (2) did not hold claims against estate; or (3) were not group of creditors, but were instead group of 17 law firms that specialized in representing asbestos litigants who contracted cancers, allegedly from exposure to asbestos; standards for issuance of temporary restraining order were not met where court found that it was not likely that action would succeed on merits of litigation. Pre-Petition Comm. of Select Asbestos Claimants v Combustion Eng'g, Inc. (In re Combustion Eng'g, Inc.) (2003, BC DC Del) 292 BR 515, 40 BCD 275.

In Chapter 7 ***bankruptcy*** case, where creditor received what appeared on their face to be preferential payments, and where, under Tex. Prop. Code Ann. § 162.001(a), creditor was entitled to have money for payments considered to have been held in trust for it by debtor, yet debtor commingled funds; thus, creditor could not trace its funds as trust funds, and debtor transferred interest of debtor in property for purposes of 11 USCS § 547(b). Cunningham v T & R Demolition, Inc. (In re ML & Assocs.) (2003, BC ND Tex) 301 BR 195, 42 BCD 53.

Unsecured creditor's action to avoid payments to subcontractors as preferential transfers under 11 USCS § 547 was denied because subcontractors satisfied requirements set forth under N.Y. Lien Law §§ 70 and 71 to show that trust had been establish and as such had shown that transfers were not interests in property of debtors under 11 USCS § 541 as required by 11 USCS § 547. Official Comm. of Unsecured Creditors of The IT Group, Inc. v Jointa Galusha, LLC (In re IT Group, Inc.) (2005, BC DC Del) 326 BR 270.

Bankruptcy trustee could not avoid, pursuant to 11 USCS §§ 547, 548, 549, and 550, transfers to its employee benefits carrier that constituted employee contributions, but was able to avoid portion that constituted employer-debtor's contributions; newly added claims did not relate back in time and were time-barred. Golden v The Guardian (In re Lenox Healthcare, Inc.) (2006, BC DC Del) 343 BR 96, 38 EBC 1505.

Where creditor of Chapter 7 debtor asserted that funds trustee sought to recover in ***preference*** action under 11 USCS § 547(b) were not property of debtor because funds it received from debtor had been impressed with trust under Texas' Construction Trust Fund statute, Tex. Prop. Code Ann. § 162.001 et seq., creditor failed to satisfy its burden on its motion for summary judgment of making out prima facie case for its defense, such as tracing claimed trust funds in debtor's commingled account. Rodriguez v Consol. Elec. Distribs., Inc. (In re Martin Wright Elec. Co.) (2008, BC WD Tex) 49 BCD 117.

Where client of ***bankruptcy*** debtor which provided payroll services paid amount to debtor which debtor failed to apply to client's payroll taxes, and debtor returned amount to client from which client paid taxes, funds paid to client were not shown to be funds held in trust rather than property of debtor for purposes of preferential transfer under 11 USCS § 547(b) since client was paid from debtor's general account; funds initially paid by client were commingled with other funds of debtor, and thus funds subsequently paid to client could not be traced to any particular source other than property of debtor. Bauman v Emerald Elec., Inc. (In re Pay + Plus Payroll Adm'rs, Inc.) (2008, BC MD Fla) 389 BR 796, 21 FLW Fed B 390.

Lenders who used company that serviced loans they made to borrowers were not entitled to summary judgment on Chapter 7 trustee's claims that payments company made to lenders could be recovered under 11 USCS §§ 544(b), 547, 548 and N.H. Rev. Stat. Ann § 545-A:4(I)(a) for company's ***bankruptcy*** estate, even though court found that company held funds in trust for lenders, because lenders had not attempted to trace payments they received to money company held in trust for their benefit; company had commingled lenders' funds with funds it received from other lenders. Notinger v Migliaccio (In re Fin. Res. Mortg., Inc.) (2012, BC DC NH) 2012 BNH 1, 468 BR 487.

Transfer of funds from ***bankruptcy*** debtor's account to members of debtor for purchase of members' interests in debtor was not avoidable as preferential transfer under 11 USCS § 547, since debtor did not own funds; debtor did not have equitable interest in funds which were deposited to debtor's account by purchaser as matter of banking efficiency, and debtor acted only as momentary conduit to facilitate transfer of funds between purchaser and members. Redmond v Rainstorm, Inc. (In re Lone Star Pub Operations, LLC) (2012, BC DC Kan) 465 BR 212, 55 BCD 286.

Applying lowest intermediate balance test demonstrated dissipation of creditor's trust fund before creditor's check was presented; bank records conclusively established that account balance was negative before transfer was made, destroying trust fund under lowest intermediate balance test; accordingly, transfer was made with property of debtor, and trustee established first element of avoidable preferential transfer. McDonald v Little Limestone, Inc. (In re Powers Lake Constr. Co.) (2012, BC ED Wis) 482 BR 803, 57 BCD 77.

11 USCS § 548 and 11 USCS § 547(b)(4)(B) apply only if estate has interest in property beyond bare legal title; to determine whether valid trust exists so as to render these sections inapplicable, ***Bankruptcy*** Court must look to state law. In re Torrez (1986, BAP9 Cal) 63 BR 751, 14 BCD 957, affd (1987, CA9 Cal) 827 F2d 1299.

Pre-petition payments from ***bankruptcy*** debtor to materials supplier were not shown to be traceable to building construction trust funds under Mich. Comp. Laws Ann. § 570.151, rather than property of debtor, for purposes of avoidance of preferential transfers under 11 USCS § 547(b), since debtor commingled trust funds with general funds of debtor and thus there were no identifiable trust funds. Meoli v Kendall Elec., Inc. (In re R.W. Leet Elec., Inc.) (2007, BAP6) 372 BR 846.

Payments to power utilities by ***bankruptcy*** debtor as billing agent for utility customers were potentially avoidable as preferential transfers under 11 USCS § 547 since debtor, contrary to debtor's contracts with customers, commingled customers' payments and payments which could not be traced to identifiable funds thus were interest of debtor in property. Stoebner v Consumers Energy Co. (In re LGI Energy Solutions, Inc.) (2011, BAP8) 460 BR 720, 55 BCD 235, 66 CBC2d 1329.

Unpublished Opinions

Unpublished: Determination of whether funds held in trust are property of estate is complicated when funds are commingled in trust; here, (1) funds here were commingled with commissions and later transferred to defendant to satisfy insurance premiums, (2) ***bankruptcy*** policy of equal distribution to creditors mandated that tracing should be required, and (3) funds in trust were property of estate and tracing was required. Kartzman v Peachtree Special Risk Brokers (In re John A. Rocco Co.) (2013, BC DC NJ) 2013 Bankr LEXIS 1922, affd in part and vacated in part, remanded (2014, DC NJ) 2014 US Dist LEXIS 178043.

2. Funds of Third Party

a. In General

110. Generally

When third party lends money to Chapter 7 debtor specifically to enable him to satisfy claim of designated creditor, general rule is that proceeds are not property of debtor because debtor does not have control over them, and therefore transfer of proceeds to creditor is not preferential under 11 USCS § 547; even where debtor transfers security interest in return for loan, payment is voidable ***preference*** only to extent transaction depleted debtor's estate by debtor giving up collateral and prejudicing general creditors. In re Hartley (1987, CA8) 17 CBC2d 550.

When third person lends money to debtor specifically to enable him to satisfy claim of designated creditor, general rule is that proceeds are not property of debtor, and therefore transfer of proceeds to creditor is not preferential transfer under 11 USCS § 547. In re Hartley (1987, CA6 Ohio) 825 F2d 1067, CCH Bankr L Rptr P 71951.

Transfers by debtor of borrowed funds constitute transfers of debtor's property for purposes of 11 USCS § 547. In re Smith (1992, CA7 Ind) 966 F2d 1527, 27 CBC2d 754, CCH Bankr L Rptr P 74750, 20 UCCRS2d 228, cert dismd (1992) 506 US 1030, 113 S Ct 683, 121 L Ed 2d 604 and (criticized in Parks v FIA Card Serv. (In re Marshall) (2008, DC Kan) 2008 US Dist LEXIS 15336).

As general rule, debtor's use of borrowed funds to discharge debt constitutes transfer of property of debtor for purposes of 11 USCS § 547(b). Truck Drivers Local No. 164, Int'l Bhd. of Teamsters v Allied Waste Sys. (2008, CA6 Mich) 512 F3d 211, 183 BNA LRRM 2420, 155 CCH LC P 10951, 2008 FED App 3P.

When creditor is paid from funds of third party, court must look to source of control over disposition of funds to determine whether payment is avoidable ***preference*** under 11 USCS § 547; if debtor determines disposition of funds and designates creditor to whom payment is made, it is clear that funds are asset of estate and available for payment to creditors. In re Howdeshell of Fort Myers (1985, BC MD Fla) 55 BR 470.

Transfer is avoidable as ***preference*** under 11 USCS § 547 only if property or interest in property transferred belongs to debtor; if transfer is made from money or property of third person to creditor of debtor, or to debtor with instructions to pay off another creditor, that is not avoidable ***preference***. In re Van Huffel Tube Corp. (1987, BC ND Ohio) 74 BR 579.

As general rule, under 11 USCS § 547(b), debtor's transfer of borrowed funds constitutes preferential transfer of debtor's property, assuming other elements of that section are met. Gonzales v Sun Life Ins. Co. (In re Furr's Supermarkets, Inc.) (2012, BC DC NM) 485 BR 672 (criticized in Friedman's Liquidating Trust v Roth Staffing Cos. LP (In re Friedman's Inc.) (2013, CA3 Del) 738 F3d 547, 58 BCD 239, 70 CBC2d 1241, CCH Bankr L Rptr P 82568).

111. Control of funds, generally

When debtor uses funds of third party to pay obligation of debtor, court must look to control over disposition of funds to determine whether ***preference*** exists under 11 USCS § 547; if funds of third party are available for general use by debtor--and not solely available for purpose of discharging particular debt to particular creditor--funds are asset of estate and payment thereof constitutes diminution of estate. In re Jaggers (1985, BC WD Tex) 48 BR 33.

Where funds of third party are under sole control of debtor and are generally available for payment to creditors of debtor's choosing, funds in question are asset of ***bankruptcy*** estate and preferential transfer of such funds may be avoided under 11 USCS §§ 547 and 522; thus, where Chapter 7 debtor withdrew funds from veterinary business which he owned and which he alone controlled in order to pay execution on judgment, funds paid are recoverable under 11 USCS § 522 where all other elements of ***preference*** are met. In re Schwartz (1985, BC WD Wis) 54 BR 321.

If debtor has such control over third party's funds that they are available for payment to debtor's creditors generally, funds become property of estate and can be preferentially transferred under 11 USCS § 547; if third party's funds

are available only to pay specific debt and funds are in fact so applied, there is no diminution of estate and no ***preference***. In re AOV Industries, Inc. (1986, BC DC Dist Col) 64 BR 933.

Whether or not transfer amounts to ***preference*** under 11 USCS § 547(b) largely depends on whether debtor had control over property that was transferred and also on whether transfer depleted estate; control or lack thereof over subject property may be demonstrated in different ways: (1) debtor lacks control if he had no control over third party's collateral during payment by third party to creditor, i.e., funds were restricted for payment to creditor; (2) debtor is not likely to have had control of funds if debtor never had physical control of funds; and (3) debtor controls third party's transfer to extent debtor gives value to third party; diminution of estate is often determined by amount of unencumbered assets that debtor transfers to third party; if debtor had control over transfers from third party, or if there was diminution in estate, then there has been preferential transfer because debtor has, in effect, determined that 1 creditor will receive greater payment than another. In re Network 90o, Inc. (1989, BC ND Ill) 98 BR 821, affd (1991, ND Ill) 126 BR 990 (criticized in Stingley v AlliedSignal, Inc. (In re Libby Int'l, Inc.) (2000, BAP8) 247 BR 463, 35 BCD 288).

In determining whether debtor has control over funds given by third parties, for purposes of determining whether transfer involves property of debtor under earmarking doctrine and is preferential, court considers whether third party placed any restriction on debtor's use of funds, whether debtor had physical control of funds, and whether debtor had ability to direct to whom funds should be paid; extension of earmarking doctrine beyond guarantor situation is both unwise and unwarranted, and would inevitably result in inequitable treatment of creditors. In re International Club Enterprises, Inc. (1990, BC DC RI) 109 BR 562, CCH Bankr L Rptr P 73236.

112. --Funds from creditors

Payment made to debtor's supplier by creditor which had guaranteed payment to supplier if debtor failed to pay within reasonable time is not recoverable as ***preference*** under 11 USCS § 547, where payment on guarantee was not conditioned upon debtor's permission but, rather, it was direct, unconditional promise by creditor to supplier to induce supplier to deliver board stock to debtor for direct benefit of creditor; debtor's letter which stated that it agreed to have creditor pay supplier costs of board sold to debtor to produce order for creditor does not show control on part of debtor. Remes v Schwarz Paper Co. (In re Middle Earth Graphics) (1994, WD Mich) 164 BR 557.

Where Chapter 11 debtor received proceeds of loan from creditor and became liable to pay principal and interest on loan, money becomes property of debtor for 11 USCS § 547(b) purposes even though creditor controlled specific use of funds in debtor's operation. In re Bellanca Aircraft Corp. (1985, BC DC Minn) 56 BR 339, 13 BCD 1172, affd in part and remanded in part on other grounds (1988, CA8 Minn) 850 F2d 1275, 20 CBC2d 19, 7 UCCRS2d 656, reh den, amd, remanded, in part (1988, CA8) 850 F2d 1275, CCH Bankr L Rptr P 72385 and ops combined at (1988, CA8 Minn) and (criticized in Johnson v Tomlinson (In re Tomlinson) (2006, BC ED Tenn) 347 BR 639, CCH Bankr L Rptr P 80641).

Where ***bankruptcy*** debtor received funds from sale of creditor's real property as qualified intermediary for creditor in like-kind exchange of real property, and made payments from such funds to builder which was improving other property to be conveyed to creditor, payments to builder constituted avoidable ***preference*** under 11 USCS § 547(b) since funds used to pay builder constituted property of debtor; parties expressly disclaimed any agency relationship, debtor exercised substantial control over funds, and debtor's commingling of funds with those of other clients constituted conversion of funds. Manty v Miller & Holmes, Inc. (In re Nation-Wide Exch. Servs.) (2003, BC DC Minn) 291 BR 131, 49 CBC2d 1557, 91 AFTR 2d 1850.

Creditors could not rely on "mere conduit" exception in preferential transfer case where creditors distributed funds in bank accounts as creditors saw fit; this showed that power over money rested with creditors, not third party. Morris v Sampson Travel Agency, Inc. (In re U.S. Interactive, Inc.) (2005, BC DC Del) 321 BR 388, 53 CBC2d 1691.

113. --Funds from family member's account

With respect to claim by debtor that payment to debtor's ex-wife in amount of $ 15,000 was preferential transfer that could be avoided under 11 USCS § 547(b), affidavit testimony created issue of fact as to whether property would

have been property of debtor's ***bankruptcy*** estate had it not been transferred, and, consequently, whether transfer was "interest of debtor in property" within meaning of 11 USCS § 547(b); money was from debtor's parents and it was not clear whether $ 15,000 was first transferred to debtor (as loan) and then paid to ex-wife, or whether debtor's father made direct payment of $ 15,000 to ex-wife without conveying any interest in funds to debtor. Comstock v Rodriguez (In re Rodriguez) (2012, BC DC NM) 465 BR 882.

Transfer of funds from ***bankruptcy*** debtor's parent to trust account of debtor's attorney specifically for payment to creditors of debtor was not avoidable as preferential transfer since debtor never received funds and was unable to direct use of funds, and thus funds were not interest of debtor in property. Hofmann v Drabner (In re Baldwin) (2014, BC DC Utah) 514 BR 646.

Transfer of funds from ***bankruptcy*** debtor's parent to trust account of debtor's attorney specifically for payment to creditors of debtor was not avoidable as preferential transfer since fact that funds were placed in trust account of debtor's attorney did not render funds property of debtor, funds were same as other monies in trust account that did not belong to debtor, and thus funds were not interest of debtor in property. Hofmann v Drabner (In re Baldwin) (2014, BC DC Utah) 514 BR 646.

Bankruptcy court did not err when it found that $ 20,000 Chapter 7 debtor paid to lumber company less than ***90 days*** before he declared ***bankruptcy*** was preferential transfer that could be recaptured for his ***bankruptcy*** estate, pursuant to 11 USCS § 547, even though ***payment*** was made using funds that were drawn from bank accounts that were titled in debtor's mother's name in trust for debtor's father; abundant evidence, including debtor's testimony, his mother's deposition testimony, circumstances of accounts' creation, and debtor's ability to withdraw funds to pay lumber company, supported ***bankruptcy*** court's conclusion that funds were legally, or equitably, debtor's funds. Riley v Nat'l Lumber Co. (In re Reale) (2008, BAP1) 393 BR 821, 50 BCD 117, 60 CBC2d 62, subsequent app (2009, CA1) 584 F3d 27, 62 CBC2d 895, CCH Bankr L Rptr P 81599.

114. --Funds from subsidiary

Preference claim brought by corporate Chapter 11 debtor under 11 USCS § 547(b) to recover funds that it had borrowed but which had been deposited in a subsidiary's account, then transferred to account of subsidiary of subsidiary, and then used to pay note dismissed as funds transferred from subsidiaries were not debtor's property regardless of debtor's ability to control subsidiaries. Regency Holdings (Cayman), Inc. v Microcap Fund, Inc. (In re Regency Holdings (Cayman), Inc.) (1998, BC SD NY) 216 BR 371, 31 BCD 1207 (criticized in Clyde Bergemann, Inc. v Babcock & Wilcox Co. (In re Babcock & Wilcox Co.) (2001, CA5 La) 250 F3d 955, 37 BCD 267, 46 CBC2d 381).

115. --Rebates

As debtor had "dominion and control" over rebates it received from its vendors, and commingled rebate ***payments*** from vendors with income from all other sources, its ***payment*** to its franchisee, less than ***90 days*** before filing ***bankruptcy***, of franchisee's share of rebates was from debtor's property and was ***preference***. Levine v Custom Carpet Shop, Inc. (In re Flooring Am., Inc.) (2003, BC ND Ga) 302 BR 394.

116. --Other particular circumstances

Bank which honored debtor's checks, even when debtor's account was overdrawn, did not exercise requisite control over funds or place any limits whatsoever on parties to whom debtor could present checks, and there is no indication that bank provided this service because presenter of check was instant creditor, who was recipient of preferential transfer, or in any way communicated to debtor that check would only be honored on condition that presenter was instant creditor, and, therefore, property transferred to creditor was property of debtor and transfer is avoidable under 11 USCS § 547. Hansen v MacDonald Meat Co. (In re Kemp Pac. Fisheries) (1994, CA9 Wash) 16 F3d 313, 94 CDOS 841, 94 Daily Journal DAR 1411, 30 CBC2d 991, CCH Bankr L Rptr P 75694.

Dismissal of trustee's 11 USCS § 547 ***preference*** claim was affirmed where, within ***90 days*** of filing of involuntary ***bankruptcy*** petition, creditor wired nearly $ 4,500,000 to debtor to pay creditor's carriers' invoices, and debtor

disbursed this amount to creditor's carriers; fact that ***payment*** agreement did not explicitly prohibit debtor from commingling creditor's funds, and fact that debtor did commingle funds, did not establish that funds that creditor wired to debtor for ***payment*** of carrier's invoices were part of debtor's estate; debtor was essentially bailee and had no property interest in funds. Lyon v Contech Const. Prods. (In re Computrex, Inc.) (2005, CA6 Ky) 403 F3d 807, 44 BCD 155, CCH Bankr L Rptr P 80266, 2005 FED App 177P, reh, en banc, den (2005, CA6) 2005 US App LEXIS 20863 and (criticized in Stoebner v Consumers Energy Co. (In re LGI Energy Solutions, Inc.) (2011, BAP8) 460 BR 720, 55 BCD 235, 66 CBC2d 1329).

Where Chapter 7 debtor borrowed money to pay judgment and filed for ***bankruptcy*** less than 90 days later, judgment creditors could not avail themselves of earmarking defense to ***preference*** action under 11 USCS § 547 because creditors identified no evidence that loan was conditioned on its being used to pay debt to them, no direct evidence of any agreement that funds be so used, and no evidence that debtor's use of and control over funds was in any way constrained. Metcalf v Golden (In re Adbox, Inc.) (2007, CA9 Cal) 488 F3d 836, 48 BCD 89, CCH Bankr L Rptr P 80960.

Where, pursuant to agreement of parties prior to ***preference*** period, creditor would receive all joint checks from Chapter 7 debtor's customers and all checks would be applied to debtor's current and past-due obligations to court, debtor was deprived of any control over joint checks and therefore, they never became property of debtor which could be preferentially transferred under 11 USCS § 547(b). In re Network 90o, Inc. (1989, BC ND Ill) 98 BR 821, affd (1991, ND Ill) 126 BR 990 (criticized in Stingley v AlliedSignal, Inc. (In re Libby Int'l, Inc.) (2000, BAP8) 247 BR 463, 35 BCD 288).

Where insurance company did not have dominion and control over funds in issue in creditors committee's ***bankruptcy*** adversary action against insurance company, insurance company was not initial transferee and no recovery was possible against it; insurance company was entitled to summary judgment. Official Comm. of Unsecured Creditors v Guardian Ins. 401 (In re Parcel Consultants, Inc.) (2002, BC DC NJ) 287 BR 41, 40 BCD 159, 49 CBC2d 937.

Escrow agreements executed by debtors and creditor during ***preference*** period did not shield payments made by debtors to creditor where escrows were never funded and debtors exercised control over funds owed to it by customer; because only change was change of address to which one of debtor's customer was to make its payments, debtors' property interests in receivable were not altered. Murphy v Arrow Elecs., Inc. (In re RISCmanagement, Inc.) (2004, BC DC Mass) 304 BR 566, 42 BCD 158.

Where Chapter 7 debtor's attorney, days before debtor filed ***bankruptcy***, was paid for services rendered out of trust of which debtor was trustee, transfer was interest of debtor in property under 11 USCS § 547(b) because debtor controlled disposition of trust funds and used funds to pay several creditors. Goss v Martin (In re Goss) (2007, BC ED Okla) 378 BR 320, affd (2008, ED Okla) 2008 US Dist LEXIS 42291.

Where Chapter 13 debtors as guarantors of their Chapter 7 corporate debtor's lease obligations made preferential payment from their credit card account to pay past due rent, their estate was entitled to return of transfer, not estate of Chapter 7 debtor, because only Chapter 13 debtors could show that transfer of interest of debtor in property for purposes of 11 USCS § 547(b) had occurred. Krommenhoek v ***Bankr.*** Estate of Pfankuch Food Servs., Inc. (In re Pfankuch) (2008, BC DC Idaho) 393 BR 18.

There was no evidence in record that "transfer" was made within definition of 11 USCS § 101(54); principally, there was no evidence that debtor subcontractor had any control over, or interest in, source of payment to sub-subcontractor; transfer which trustee sought to avoid pursuant to 11 USCS § 547(b) was payment made by general contractor to sub-subcontractor; payment did not constitute avoidable ***preference*** under 11 USCS § 547(b). Dubois v IMBR Crane (In re Scott Fabricating, Inc.) (2012, BC ND Ind) 478 BR 901, 57 BCD 17.

Debtor had interest in funds so that payment of debtor's insurance premium out of funds constituted avoidable ***preference*** pursuant to 11 USCS § 547 even though funds had been deposited in working capital account by controlling shareholder of debtor and had been transferred by controlling shareholder to law firm's clients' fund account since debtor exercised control over funds where law firm represented debtor at time of transfer, debtor paid

law firm's legal fees, debtor's controller determined amount of funds needed under working capital agreement, controller identified creditors to be paid from clients' fund account, transfer of funds from working capital account to clients' fund account was to avoid having bank take control of funds upon debtor's ***bankruptcy*** filing and to ensure debtor would have use of funds, and earmarking doctrine does not apply. Gray v Travelers Ins. Co. (In re Neponset River Paper Co.) (1999, BAP1 Mass) 231 BR 829, 34 BCD 146, 41 CBC2d 1069, CCH Bankr L Rptr P 77944.

Unpublished Opinions

Unpublished: Where client prepaid ***bankruptcy*** debtor to obtain advertising, and debtor prepaid advertiser for placement of advertisements, payments to advertiser were transfers of interests of debtor in property for purposes of preferential transfer under 11 USCS § 547(b); debtor's possession of funds created presumption of ownership, and advertiser's bare allegations, without evidentiary support, that agency or bailment existed were insufficient to rebut presumption. Maxwell v Penn Media (In re marchFirst, Inc.) (2010, BC ND Ill) 2010 Bankr LEXIS 3480.

Unpublished: Debtor was entitled to recoup credit card receipts although it held them under constructive bailment, where debtor established all elements of avoidable ***preference*** under 11 USCS § 547(b), and creditor failed to present evidence tracing specific assets to which it was entitled. Appalachian Oil Co. v Virginian Travel Plaza, Inc. (In re Appalachian Oil Co.) (2012, BC ED Tenn) 2012 Bankr LEXIS 1576.

117. Miscellaneous

Summary judgment ruling allowing Chapter 7 trustee to recover prepetition payment made be debtor to one bank using convenience checks made available to her by second bank was legally correct because transaction came within general rule that debtor's use of borrowed funds to discharge debt constituted transfer of debtor's property that was subject to recovery per 11 USCS § 547(b). Truck Drivers Local No. 164, Int'l Bhd. of Teamsters v Allied Waste Sys. (2008, CA6 Mich) 512 F3d 211, 183 BNA LRRM 2420, 155 CCH LC P 10951, 2008 FED App 3P.

Bankruptcy court concluded that certain gift funds became debtor's property through inter vivos transfers and entered judgment on trustee's claim that debtor's payment to appellant creditor was preferential transfer; ***bankruptcy*** court determined that debtor exercised sufficient control over funds, which were in account titled in name of his mother and listed his father as beneficiary and father's social security number, to demonstrate that they were interest of debtor in property; that conclusion and facts underlying it were supported by record, and reviewing court was not left with firm impression that ***bankruptcy*** court erred. Riley v Nat'l Lumber Co. (In re Reale) (2009, CA1) 584 F3d 27, 62 CBC2d 895, CCH Bankr L Rptr P 81599.

General contractor's payments to supplier of Chapter 11 debtor/subcontractor out of money due to subcontractor were not avoidable ***preferences*** since money was not property of debtor where payments were made in satisfaction of general contractor's independent obligation to supplier under Miller Act (40 USCS §§ 270 et seq.); fact that general contractor may have owed debtor money on two projects in which supplier was not involved was irrelevant. Gold v Alban Tractor Co. (1996, ED Mich) 202 BR 424, CCH Bankr L Rptr P 77164, affd (1998, CA6 Mich) 142 F3d 433, reported in full (1998, CA6 Mich) 1998 US App LEXIS 3951.

Payment to creditor with funds lent to Chapter 11 debtor by parent of Chapter 11 debtor is property of estate for purposes of 11 USCS § 547 where debtor had absolute control over designation of creditors to be paid and the loan was not conditioned on payment of particular creditor. In re Howdeshell of Fort Myers (1985, BC MD Fla) 55 BR 470.

Until such time as monies transferred by debtor to its affiliate are determined to be property of estate, payment to creditor by affiliate cannot be held to constitute "an interest of the debtor in property" at time of transfer for purposes of 11 USCS § 547(b) as they were made by third-party funds. Corporate Food Mgmt. v Suffolk Community College (In re Corporate Food Mgmt.) (1998, BC ED NY) 223 BR 635.

Transfer of funds from ***bankruptcy*** debtor's parent to trust account of debtor's attorney specifically for payment to creditors of debtor was not avoidable as preferential transfer since parent's transfer of funds was not gift of funds to debtor, funds were not delivered to debtor, and parent retained control of funds which would be returned to parent if

creditors were not paid, and thus funds were not interest of debtor in property. Hofmann v Drabner (In re Baldwin) (2014, BC DC Utah) 514 BR 646.

Because transfer may be avoided under 11 USCS § 547(b) only if it involves property of debtor and reduces amount of ***bankruptcy*** estate available for payment of other creditors, threshold finding in 11 USCS § 547(b) analysis is that property transferred was property of estate. Hall-Mark Elecs. Corp. v Sims (In re Lee) (1995, BAP9 Cal) 179 BR 149, 95 CDOS 2727, 27 BCD 1, 33 CBC2d 1360, 26 UCCRS2d 386, affd (1997, CA9) 108 F3d 239, 97 CDOS 1591, 97 Daily Journal DAR 3065, 30 BCD 628, 37 CBC2d 991, CCH Bankr L Rptr P 77289, 31 UCCRS2d 1044.

Where debtor and transferee had commingled funds that resulted when transferee "shared" credit card processing account with related entity that was acquired by debtor, although debtor never obtained legal title to funds deposited in reserve account that were generated by transferees credit card sales, transferee nevertheless received preferential transfer where funds that it received during ***preference*** period were not traceable to any of transferee's transactions. Ramette v Digital River, Inc. (In re Graphics Techs., Inc.) (2004, BAP8) 306 BR 630, 42 BCD 202, 51 CBC2d 1518, affd (2004, CA8 Minn) 113 Fed Appx 734.

Unpublished Opinions

Unpublished: Appellant trustee of individual debtor shareholder lacked standing to assert ***bankruptcy***-specific avoiding actions under 11 USCS §§ 547, 548, to recover for benefit of debtor shareholder's estate transfers made by nondebtor corporation, which was separate legal entity, and thus, trustee's avoidance claims against appellee, investor in corporation who received transfers from corporation, failed; under Nevada law, debtor had no interest in property transferred in that ***bankruptcy*** avoiding actions did not exist in absent ***bankruptcy*** and neither debtor nor corporation had choses in action that could be interests in property. Grimmett v Mccloskey (In re Wardle) (2006, BAP9) 2006 Bankr LEXIS 4817.

b. Earmarking Doctrine

118. Generally

In order for transaction to be considered nonavoidable ***preference*** under earmarking doctrine because no interest of debtor's has been transferred as required by 11 USCS § 547, following requirements must be met: (1) existence of agreement between new lender and debtor that new funds will be used to pay specified antecedent debt; (2) performance of that agreement according to its terms; and (3) transaction viewed as whole, including transfer in of new funds and transfer out to old creditor, does not result in any diminution of estate. In re Bohlen Enterprises, Ltd. (1988, CA8 Iowa) 859 F2d 561, 18 BCD 672, 19 CBC2d 986 (criticized in Wilson v Chamness (In re Green Valentine, Inc.) (2005, BAP6) 45 BCD 71, 54 CBC2d 1499) and (criticized in Parks v FIA Card Servs., N.A. (In re Marshall) (2007, BC DC Kan) 372 BR 511).

New funds provided by new creditor to or for benefit of debtor, for purpose of paying obligation owed to old creditor, are considered "earmarked" and not voidable as ***preference*** under 11 USCS § 547; to extent debtor transfers security interest in return for funds, they are not considered "earmarked." In re Muncrief (1990, CA8 Ark) 900 F2d 1220, 20 BCD 665, 23 CBC2d 427.

There is exception to general rule that use of borrowed funds to discharge debt constitutes transfer of property of debtor under 11 USCS § 547: where borrowed funds have been specifically earmarked by lender for payment to designated creditor, there is held to be no transfer of property of debtor even if funds pass through debtor's hands in getting to selected creditor. In re Montgomery (1993, CA6 Tenn) 983 F2d 1389, 23 BCD 1563, CCH Bankr L Rptr P 75075 (criticized in Parks v FIA Card Servs., N.A. (In re Marshall) (2007, BC DC Kan) 372 BR 511).

Earmarking doctrine, which exists as judicially created defense to ***preference*** actions, is typically applicable when third party makes loan to debtor specifically to enable debtor to satisfy debt of designated creditor, i.e., new creditor is substituted for old creditor. In re Interior Wood Prods. Co. (1993, CA8 Minn) 986 F2d 228, 23 BCD 1676, CCH Bankr L Rptr P 75154.

"Earmarking" doctrine is applied in same manner regardless of whether proceeds of loan are transferred directly by lender to creditor or paid to debtor with understanding that they will be paid to creditor in satisfaction of its claim, so long as proceeds are clearly "earmarked"; fact that debtor may have had power to divert loan after proceeds were deposited in its bank account did not amount to "control" of funds by debtor if funds were dispersed by bank pursuant to antecedent "earmarking" agreement. Adams v Anderson (In re Superior Stamp & Coin Co.) (2000, CA9 Cal) 223 F3d 1004, 2000 CDOS 7419, 2000 Daily Journal DAR 9841, 36 BCD 189, 44 CBC2d 1382, CCH Bankr L Rptr P 78258 (criticized in Williams v Mckesson Corp. (In re Quality Infusion Care, Inc.) (2013, BC SD Tex) 2013 Bankr LEXIS 5044).

Whether or not funds given to debtor are meant to pass through debtor to specific creditor, and therefore never become property of estate, is question purely of giver's intent; where loan guarantor took out personal loan and gave proceeds to debtor, who then paid creditor, but loan guarantor testifies that funds where given to debtor with "no strings," debtor's payment to creditor is preferential transfer under 11 USCS § 547(b), even though all outward appearances indicate payment was only to flow through debtor to relieve guarantor's personal liability. In re Telephone Stores of America, Inc. (1985, BC DC NM) 54 BR 25.

For earmarking doctrine to be defense to debtor's allegations that funds paid to creditor constitute avoidable ***preferences*** under 11 USCS § 547(b), it must be shown that debtor had lack of dispositive control over funds in question; where debtor has physical and theoretical control over funds and directed to whom funds would be paid, earmarking doctrine is not effective defense. In re Van Huffel Tube Corp. (1987, BC ND Ohio) 74 BR 579.

When third person advances funds or property to debtor, designating that it be used to pay specific creditors, such earmarking of funds or property does not involve funds or property of debtor's estate and, thus, other creditors are not harmed by payment in way leading to avoidable ***preference*** under 11 USCS § 547. In re Van Huffel Tube Corp. (1987, BC ND Ohio) 74 BR 579.

Earmarking doctrine can be applied to determine whether property transferred in allegedly preferential transfer was not property of estate only when nondebtor party directly satisfies claim of debtor's creditor with nondebtor party's own property or funds; any extension of doctrine to include situations in which third party lends money to debtor for agreed purpose of satisfying specified existing claim of debtor is contrary to plain meaning of 11 USCS § 547(b), and violates purposes and policies behind ***preference*** recoveries. In re Ludford Fruit Products, Inc. (1989, BC CD Cal) 99 BR 18.

Earmarking doctrine, as applied to element of 11 USCS § 547 which requires that transfer of interest of debtor in property has occurred, is not limited only to situations protecting guarantors or sureties; proper application of earmarking doctrine involves consideration of 4 elements: (1) existence of agreement between debtor and new creditor for repayment of antecedent debt; (2) performance of this agreement by which old creditor receives agreed consideration; (3) debtor's lack of dispositive control over transferred property; and (4) transfer's impact on estate, namely whether transfer depleted debtor's estate. In re Grabill Corp. (1991, BC ND Ill) 135 BR 101, 22 BCD 458, 25 CBC2d 1369.

Earmarking doctrine, in context of ***preference*** actions under 11 USCS § 547, is not limited to those situations where creditor infusing new money into debtor was itself also obligated to pay original debt, i.e., those situations where funds were provided by one who was surety, subsequent endorser, or guarantor on contract, but, rather, doctrine applies both in cases where money to pay debt comes from guarantor and where outside creditor is merely lender of substitute funds; earmarking doctrine may apply both in those situations where lender of new funds pays prior creditor directly or where funds are entrusted to debtor with understanding that debtor is to use money only to pay obligations to specific creditor designated by source of funds; in latter situation, debtor effectively holds money "in trust" for benefit of designated creditor, and thus debtor has no dispositive control over funds, and under this analysis, new money, although in possession of debtor, never becomes property of debtor because debtor has no control over how funds are ultimately distributed, and, thus, no voidable ***preference*** results. Tolz v Barnett Bank (In re Safe-T-Brake) (1993, BC SD Fla) 162 BR 359, 29 CBC2d 1446, CCH Bankr L Rptr P 75679 (criticized in Ragsdale v Bank South, N.A. (In re Whitacre Sunbelt) (1997, BC ND Ga) 206 BR 1010).

Earmarking doctrine is not strictly affirmative defense under 11 USCS § 547(c) as to which defendant has burden of proof but, rather, is argument arising out of language of § 547(b) which requires that, as element of trustee's proof, recovery be based upon transfer of interest of debtor; whether transfer of interest of debtor occurred is determined as of date of transfer rather than as of date of ***bankruptcy*** filing. International Ventures v Block Props. VII (In re International Ventures) (1997, BC ED Ark) 214 BR 590, 31 BCD 943, 38 CBC2d 1873.

Earmarking doctrine did not apply with respect to tardy filing by new creditor of its security interest during ***preference*** period. Scaffidi v Kenosha City Credit Union (In re Moeri) (2003, BC ED Wis) 300 BR 326 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

119. Security interest exception

Security interest exception to earmarking doctrine does not apply and Chapter 7 trustee is not entitled under 11 USCS § 547(b) to recover payment made to former employer in settlement of claim against debtor where debtor's parents loaned settlement amount to debtor but trustee did not meet burden of proving debtor gave valid security interest in pickup truck under Nebraska law even though certificate of title showed notation of lien in favor of debtor's father. Forker v Duenow Mgmt. Corp. (In re Calvert) (1998, BAP8 Iowa) 227 BR 153, 33 BCD 653, CCH Bankr L Rptr P 77847.

Unpublished Opinions

Unpublished: District court and ***bankruptcy*** court's conclusions that debtor's ***payments*** to creditor pursuant to parties' credit agreement during ***90-day*** period preceding debtor's Chapter 11 filing constituted ***preferences*** under 11 USCS § 547(b) because ***payments*** were properly found to be on account of antecedent debt under § 547(b)(2), and ordinary course of business and contemporaneous exchange for new value exceptions under § 547(c)(1), (c)(2) were not applicable. Placid Refining Co. v Oakridge Consulting, Inc. (In re JJSA Liquidation Trust) (2006, CA5 La) 203 Fed Appx 572.

120. Attorney client accounts

Earmarking doctrine does not apply to defeat equitable consideration of 11 USCS § 547 and payment of debtor's insurance premium out of law firm's clients' fund account constituted avoidable ***preference*** even though funds initially had been deposited in working capital account by controlling shareholder of debtor and subsequently had been transferred by controlling shareholder to law firm's clients' fund account since debtor controlled disposition of funds, payment resulted in diminution of debtor's estate, and controlling shareholder was not guarantor of debtor's obligation to insurer. Gray v Travelers Ins. Co. (In re Neponset River Paper Co.) (1999, BAP1 Mass) 231 BR 829, 34 BCD 146, 41 CBC2d 1069, CCH Bankr L Rptr P 77944.

121. Credit cards and balance transfers

"Earmark rule" as it affects 11 USCS § 547(b) ***preference*** claim made by trustee in ***bankruptcy*** requires that party making loan choose recipient of funds; thus, where borrowed funds have been specifically earmarked by lender thereof for payment to designated creditor of debtor, no transfer of property of debtor has been found for purposes of ***preference*** action under 11 USCS § 547(b) even if funds pass through debtor's hands in getting to selected creditor. Truck Drivers Local No. 164, Int'l Bhd. of Teamsters v Allied Waste Sys. (2008, CA6 Mich) 512 F3d 211, 183 BNA LRRM 2420, 155 CCH LC P 10951, 2008 FED App 3P.

Earmarking doctrine was incorrectly applied to find that payments from one set of credit accounts to another set of credit card accounts were not preferential transfers because doctrine only applied when lender required funds to be used to pay specific debt, and transferring creditor placed no conditions on debtors' use of funds, it only honored their instructions. Parks v FIA Card Servs., N.A. (In re Marshall) (2008, CA10 Kan) 550 F3d 1251, 50 BCD 281, 60 CBC2d 1659, CCH Bankr L Rptr P 81383, cert den (2009) 557 US 937, 129 S Ct 2871, 174 L Ed 2d 579.

Debtor's pre-***bankruptcy*** petition payment of debt owed to credit card company, using balance transfers, credit card advances drawn on other cards, and convenience checks issued by three other credit card account holders,

constituted property of debtor, so that transfers were voidable ***preferences*** under 11 USCS § 547(b); earmarking exception did not apply because funds were not issued to satisfy designated creditor. Bank of Am., N.A. v Mukamai (In re Egidi) (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922.

Debtor's pre-***bankruptcy*** petition payment of debt owed to credit card company, using balance transfers, credit card advances drawn on other cards, and convenience checks issued by three other credit card account holders, constituted property of debtor, so that transfers were voidable ***preferences*** under 11 USCS § 547(b); transfers were not "bank-to-bank" transfers because three creditors did not direct ***payment*** to company. Bank of Am., N.A. v Mukamai (In re Egidi) (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922.

Earmarking doctrine did not apply where Chapter 7 debtor had new credit card issuer transfer balances from debtor's other credit cards to new account within ***90 days*** prior to ***bankruptcy*** filing since debtor alone designated that credit on his new card be used in this manner. Lewis v Providian Bancorp (In re Getman) (1998, BC WD Mo) 218 BR 490, 32 BCD 501 (criticized in Parks v FIA Card Servs., N.A. (In re Marshall) (2007, BC DC Kan) 372 BR 511).

Earmarking doctrine does not apply and trustee may avoid transaction as ***preference*** since transfer was of interest of debtor in property within meaning of 11 USCS § 547(b) where debtor paid off antecedent credit card debt with balance transfer check from new lender, there was no agreement between new lender and debtor as to how funds would be applied, debtor determined whether and how to use checks, there was no performance of agreement as there was no agreement, and transfer negatively impacted equal distribution of assets among debtor's creditors. Growe v AT&T Universal Servs. (In re Adams) (1999, BC DC Me) 240 BR 807, 35 BCD 43, CCH Bankr L Rptr P 78043.

"Earmarking doctrine" was not defense to ***preference*** action to recover funds paid by bank from debtor's new credit card account to existing creditor because the debtor had dispositive control over the payment of the funds she received from the bank under the new credit card account. Reisz v Napus Fed. Credit Union (In re Anderson) (2002, BC WD Ky) 275 BR 264, 39 BCD 99 (criticized in Parks v FIA Card Serv. (In re Marshall) (2008, DC Kan) 2008 US Dist LEXIS 15336).

Where Chapter 7 debtors directed that balances on two credit card accounts be paid off with transfer of funds from available balances on two other credit card accounts, transfers were not preferential transfers under 11 USCS § 547(b) because transfer was not of interest of debtor in property. Parks v FIA Card Servs., N.A. (In re Marshall) (2007, BC DC Kan) 372 BR 511 (criticized in Parks v Boeing Wichita Credit Union (In re Fox) (2008, BC DC Kan) 382 BR 800) and (criticized in Meoli v MBNA Am. Bank, N.A. (In re Wells) (2008, BAP6) 382 BR 355, 59 CBC2d 513, CCH Bankr L Rptr P 81118) and affd (2008, DC Kan) 2008 US Dist LEXIS 15336, revd, remanded (2008, CA10 Kan) 550 F3d 1251, 50 BCD 281, 60 CBC2d 1659, CCH Bankr L Rptr P 81383, cert den (2009) 557 US 937, 129 S Ct 2871, 174 L Ed 2d 579.

Funds debtor used to make credit card balance transfers to bank were transfers of interest of debtor in property that trustee avoided as preferential transfers under 11 USCS § 547(b) because debtor controlled decision to pay and to whom payment was to be made and there was no suggestion that other credit card company directed debtor to pay bank, making earmarking doctrine applicable. Mukamal v Bank of Am. (In re Egidi) (2008, BC SD Fla) 386 BR 884, 59 CBC2d 1003, 21 FLW Fed B 278, affd (2009, CA11 Fla) 571 F3d 1156, 62 CBC2d 59, CCH Bankr L Rptr P 81507, 21 FLW Fed C 1922.

Chapter 7 trustee was properly granted summary judgment in adversary proceeding to avoid preferential transfer under 11 USCS § 547(b) because debtor exercised necessary dominion and control over credit extended by credit card company by using credit to preferentially pay creditor and her balance transfer from one credit card company to creditor, another credit card company, was transfer of interest of debtor in property. Yoppolo v MBNA America Bank, N.A. (In re Dilworth) (2008, BAP6) 59 CBC2d 553, affd (2009, CA6 Ohio) 560 F3d 562, 61 CBC2d 875, CCH Bankr L Rptr P 81451, 2009 FED App 118P, reh den, reh, en banc, den (2009, CA6) 2009 US App LEXIS 24183.

Unpublished Opinions

Unpublished: Debtors' use of available credit from credit card company to pay down their credit debt to credit union by use of balance transfer constituted transfer of interest of debtors in property that could be avoided by trustee as ***preference*** under 11 USCS § 547(b) and preserved for benefit of ***bankruptcy*** estate; indeed, earmarking doctrine did not apply because debtors had complete discretion in directing payment. Parks v Boeing Wichita Credit Union (In re Fox) (2008, BC DC Kan) 382 BR 800, judgment entered (2008, BC DC Kan) 382 BR 804, affd (2009, DC Kan) 2009 US Dist LEXIS 19078.

122. Escrowed funds

Chapter 11 Trustee has clearly demonstrated that earmarking doctrine does not apply to transfers of funds from escrow account to supplier so as to except transfer from avoidance pursuant to 11 USCS § 547(b) where supplier failed to perfect its security interest in escrow account outside ***preference*** period, funds were accounts receivable and not new funds, and there was no agreement between debtor and payor of funds that funds would be used to pay specified antecedent debt. Stingley v AlliedSignal, Inc. (In re Libby Int'l, Inc.) (1999, BC WD Mo) 240 BR 375, 35 BCD 28, affd (2000, BAP8) 247 BR 463, 35 BCD 288.

Earmarking doctrine did not apply to defeat avoidance of transfers pursuant to 11 USCS § 547(b) even though payments due debtor under contract were deposited into escrow account for benefit of creditor since only change to agreement between debtor and creditor was change in address to which one of debtor's sources of income was to send its checks, there was no substitution of creditors, and receipt of funds depleted estate in same manner as if debtor received funds and paid creditor itself. Stingley v AlliedSignal, Inc. (In re Libby Int'l, Inc.) (2000, BAP8) 247 BR 463, 35 BCD 288.

123. Funds from debtor's relatives

Where debtor's receipt of loan from his father was conditioned upon debtor's use of loan funds to pay creditors' judgment, earmarking doctrine protected payment to creditors from avoidance under 11 USCS § 547(b); however, payment was voidable to extent that debtor encumbered previously unencumbered property to enable payment. Cadle Co. v Mangan (In re Flanagan) (2007, CA2 Conn) 503 F3d 171, 48 BCD 265, 58 CBC2d 1079, CCH Bankr L Rptr P 81030.

Prepetition transfer of cash from Chapter 7 debtor's mother-in-law to debtor to pay off promissory note is not preferential transfer under 11 USCS § 547, because transfer of money by third person to creditor of debtor that does not issue from property of debtor is not ***preference***; here funds were earmarked to pay specific debt and were so applied and payment never became property of estate and did not diminish estate. In re Borgman (1985, BC WD Mo) 48 BR 666.

Transfer whereby Chapter 7 debtor's mother delivered to debtor cashier's check endorsed without qualification together with cash to pay third party with mother being repaid by proceeds of check issued for sale of debtor's property is not preferential transfer within 11 USCS § 547 because property was never that of estate since (1) assets were not specifically payable to debtor, (2) were not deposited into his account, (3) check was not endorsed prior to presentation to third party, and (4) monies were handled in strict accordance with parties' intent; opportunity to exercise sufficient control is not synonymous with exercise thereof sufficient to create interest of debtor's estate. In re Hearn (1985, BC WD Ky) 49 BR 143, 12 BCD 1363.

Unpublished Opinions

Unpublished: Funds used to pay student loan debt were borrowed from debtor's mother, who directed funds be used to pay creditor; funds were so paid and debtors' estate was not thereby decreased; as earmarked funds, transfer was not transfer of interest in property of debtors and therefore did not constitute ***preference***; trustee's recovery of transfer was therefore in error. In re Reep (2010, BC ND Ohio) 2010 Bankr LEXIS 2503.

124. Mortgages and mortgage refinancings

Bankruptcy trustee could avoid refinanced mortgage as preferential transfer under 11 USCS § 547(b) because when creditors did not perfect mortgage within ten days of transfer as required by 11 USCS § 547(e), date of transfer was date creditors perfected their security interest, and safe harbor provision would be meaningless if secured creditors could perfect their interest at any time and still be able to use earmarking doctrine; payment to original mortgagee and perfection of new security interest could not be viewed as single transaction, and therefore creditors were not provided escape from § 547(b) due to belatedly-perfected transfer of security interest. Encore Credit Corp. v Lim (2007, ED Mich) 373 BR 7.

Creditor who refinanced debtor's mortgage was properly denied relief from trustee's avoidance of its mortgage lien as preferential transfer because earmarking doctrine did not apply where creditor recorded its mortgage and perfected its interest one day before debtor filed for ***bankruptcy*** and, thus, outside 30-day safe harbor period of 11 USCS § 547(e)(2)(A). Am. Home Mortg. Inv. Corp. v Lim (In re Caurdy-Murphy) (2008, ED Mich) 391 BR 769.

Where debtor borrowed funds to pay off his original mortgage, perfection by mortgagee of its security interest was not preferential transfer because funds were earmarked for paying off original loan and never became part of estate and because there was no diminution of estate available for distribution to creditors. Shapiro v Homecomings Fin. Network, Inc. (In re Davis) (2004, BC ED Mich) 318 BR 119.

Beneficiary of earmarking doctrine is old creditor for whom funds were earmarked, not debtor or new creditor who provided funds; where creditor refinanced debtors' mortgage but new mortgage was not recorded until within 90 days of debtors' ***bankruptcy*** filing, and more than 10 days after debtors gave creditors mortgage, earmarking doctrine could not be applied to prevent trustee from avoiding transfer of mortgage lien because no funds were transferred to creditor that could be earmarked. Gold v Interstate Fin. Corp. (In re Schmiel) (2005, BC ED Mich) 319 BR 520 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

In proceeding to avoid transfer of mortgage given as part of refinancing, creditors could not assert earmarking doctrine as defense to avoidability because mortgage was not filed within 10-day limitation period set forth in 11 USCS § 547(e) and trustee had demonstrated that mortgage did result in diminution of value of estate. Baker v Mortg. Elec. Registration Sys. (In re King) (2007, BC ED Ky) 372 BR 337, affd (2008, BAP6) 397 BR 544, reported in full (2008, BAP6) 2008 Bankr LEXIS 2170.

Trustee was entitled to summary judgment seeking to avoid preferential transfer from debtors to bank because undisputed material facts established that debtors' granting of refinance mortgage to bank improved bank's position and provided it more than it would receive under liquidation; earmarking concept did not provide bank with escape from plain language of preferential transfer statute in this case of belatedly-perfected transfer of security interest. Collins v JPMorgan Chase Bank, N.A. (In re Flannery) (2014, BC DC Mass) 513 BR 1.

Trustee was unable to avoid payment made to creditor in ***preference*** period under 11 USCS § 547 because earmarking doctrine applied where debtor's sole shareholder mortgaged her residence in order to pay antecedent debt to creditor in response to creditor's legal action to recover money owed for car sale; fact that funds were temporarily deposited in debtor's account did not show control, and piercing corporate veil argument was not preserved for appellate review. Wilson v Chamness (In re Green Valentine, Inc.) (2005, BAP6) 45 BCD 71, 54 CBC2d 1499, reported at (2005, BAP6) 330 BR 880.

125. Parent and subsidiary corporation transactions

Since shares of stock issued by debtor Ponzi scheme funds were "securities" under securities laws, they were "securities" such that investors' redemption of their shares for money was settlement payment, which defeated trustee's preferential and fraudulent transfer claims against investors. Peterson v Somers Dublin Ltd. (2013, CA7 Ill) 729 F3d 741, 58 BCD 114, CCH Bankr L Rptr P 82548.

Debtor may not avoid under 11 USCS § 547(b) transfer of property from independent third party to parent corporation of debtor because property does not belong to debtor, even where parent corporation agreed to give debtor interest in property. In re Marketing Resources International Corp. (1984, BC ED Pa) 41 BR 580.

"Earmarking doctrine" does not apply to preclude avoidance under 11 USCS § 547 of transfers made from Chapter 11 debtor to its parent corporation where parent corporation, which is insider co-obligor, particularly dominates and completely controls debtor entity, which has no employees and no business office separate from parent corporation, and president and treasurer of parent corporation are same individuals that are president and treasurer of subsidiary. Official Bondholders' Committee v Eastern Utilities Assoc. (1992, BC DC NH) 147 BR 634.

Advertising funds paid over by Chapter 7 debtor bank holding company to advertising company were never property of debtor's estate and hence there was no preferential payment under 11 USCS § 547 where funds were paid to debtor by its subsidiaries specifically to fund obligations to narrowly defined group of creditors, suppliers of advertising, and related services; debtor did exactly what it was supposed to do in making payments to advertising company, and there was no profit element for debtor involved but, rather, it was straight pass-through of funds. Branch v Hill, Holliday, Connors, Cosmopoulos, Advertising (In re Bank of New Eng.) (1994, BC DC Mass) 165 BR 972.

Unpublished Opinions

Unpublished: ***Bankruptcy*** debtor's assignment of legal malpractice claims prior to ***bankruptcy*** petition constituted avoidable preferential transfer of property of debtor, even though debtor's settlement in underlying action was not yet approved, since claims accrued when debtor knew that substantial possibility existed that debtor suffered cognizable harm as consequence of its attorneys' negligent legal advice. McCracken v Arnot (In re Pac. Cargo Servs., LLC) (2015, BAP9) 2015 Bankr LEXIS 576.

126. Retirement funds

Where retirement plan that has been funded solely by Chapter 7 debtor's employer is traditional spendthrift trust as recognized under Missouri law and is excluded as property of estate under 11 USCS § 541(c)(2), trustee may not seek to recover portion of plan awarded to debtor's former spouse in divorce decree under either 11 USCS § 547 or 11 USCS § 548. In re Wallace (1986, BC ED Mo) 66 BR 834, 3 BAMSL 3153.

Chapter 13 debtor retired police officer acquired interest in retirement funds transferable by creditor's garnishment action, under 11 USCS § 547, where monthly payment arrangement was fully in place, no further contributions were required by either party, and funds were earmarked for debtor, payable until his death; transfer is not avoidable, where garnishment lien was perfected when served, 98 days prior to debtor's filing of ***bankruptcy***. In re Harrington (1987, BC SD Fla) 70 BR 301, 15 BCD 809.

127. Subcontractors or suppliers

Earmarking doctrine applied so that Chapter 7 debtor/homebuilders' prepetition transfer of second mortgage interest to bank would not be avoided where bank, rather than lending debtors money to complete construction of particular house, issued cashier's checks payable to specific subcontractors who provided goods or services to construct house and obtained second mortgage on house from debtors; because transfer of mortgage interest to bank merely replaced subcontractors' security interest, there was no transfer of debtors' property interest avoidable under 11 USCS § 547(b). Kaler v Community First Nat'l Bank (In re Heitkamp) (1998, CA8 ND) 137 F3d 1087, CCH Bankr L Rptr P 77648 (criticized in Vieira v Anna Nat'l Bank (In re Messamore) (2000, BC SD Ill) 250 BR 913, 36 BCD 114, 44 CBC2d 1002, CCH Bankr L Rptr P 78234) and (criticized in Shapiro v Chase Manhattan Mortg. Corp. (In re Lee) (2005, BC ED Mich) 326 BR 704, 54 CBC2d 897) and (criticized in Collins v Greater Atl. Mortg. Corp. (In re Lazarus) (2007, CA1 Mass) 478 F3d 12, 57 CBC2d 400, CCH Bankr L Rptr P 80839) and (criticized in Encore Credit Corp. v Lim (2007, ED Mich) 373 BR 7) and (criticized in Chase Manhattan Mortgage Corp. v Shapiro (In re Lee) (2008, CA6 Mich) 530 F3d 458, 50 BCD 47, 2008 FED App 223P).

Pursuant to earmarking doctrine, payments made by debtor to supplier, under agreement whereby all payments to debtor from its customers were made jointly payable to it and supplier, to whom payments were forwarded, endorsed, and negotiated under power of attorney, were not property of estate, and did not diminish estate for purposes of 11 USCS §§ 547 and 549; in order to be deemed earmarked, funds need not have been restricted by third-party lender, and presence of new creditor who loans debtor funds for purpose of reducing existing debt is not

necessary, but rather, dispositive issue is control over funds, and in present case, supplier had control over disposition of funds; fact that debtor may have enjoyed some degree of prospective control over funds at time it consented to agreement with supplier is irrelevant insofar as assessment of debtor's control when funds were actually received at later date--it is debtor's control at time of transfer that is crucial. In re Network 90 Degree, Inc. (1991, ND Ill) 126 BR 990 (criticized in Stingley v AlliedSignal, Inc. (In re Libby Int'l, Inc.) (2000, BAP8) 247 BR 463, 35 BCD 288).

Appellee supplier had perfected materialman's liens which placed the supplier in the category of a secured creditor, and the transfer of $ 200,000 from the bank to the supplier was a transfer from one secured creditor to another--which fell within the parameters of the earmarking doctrine; it was, thus, not an avoidable transfer as defined in 11 USCS § 547(b). Betty's Homes, Inc. v Cooper Homes, Inc. (2009, WD Ark) 411 BR 626.

Although debtor manufacturer had some degree of control over check issued jointly to debtor and debtor's supplier by purchaser, who guaranteed debtor's debt to supplier, form of transaction did not result in any diminution of estate compared to direct payment from purchaser to supplier, and thus transfer was not of debtor's property for preferential avoidance purposes under 11 USCS § 547; however, as to related purchaser who did not guarantee debtor's debt to supplier, earmarking doctrine is inapplicable because had second purchaser paid supplier directly, it would not have acquired right to contribution or reimbursement, as in case of first purchaser, because it would not have been paying in accordance with guarantor agreement. In re Trinity Plastics, Inc. (1992, BC SD Ohio) 138 BR 203, CCH Bankr L Rptr P 74597.

Advertising funds paid over by Chapter 7 debtor bank holding company to advertising company were never property of debtor's estate and hence there was no preferential payment under 11 USCS § 547 where funds were paid to debtor by its subsidiaries specifically to fund obligations to narrowly defined group of creditors, suppliers of advertising, and related services; debtor did exactly what it was supposed to do in making payments to advertising company, and there was no profit element for debtor involved but, rather, it was straight pass-through of funds. Branch v Hill, Holliday, Connors, Cosmopoulos, Advertising (In re Bank of New Eng.) (1994, BC DC Mass) 165 BR 972.

Earmarking doctrine (defense which is typically applicable when third party makes loan to debtor to satisfy debt of designated creditor) did not apply in case where United States, pursuant to termination contract settlement, paid Chapter 7 debtor-government contractor specified amount by check, debtor endorsed that check to order of subcontractor, and debtor sent check to subcontractor as settlement of subcontract, because debtor had complete prior control over funds, there was no substitution of new creditor for old one, and debtor's estate was diminished as result of debtor forwarding check to subcontractor. Novak v Cable USA (In re One Stop Indus.) (1995, BC DC Conn) 179 BR 769, 26 BCD 1122, 33 CBC2d 1031.

Chapter 11 Trustee has clearly demonstrated that earmarking doctrine does not apply to transfers of funds from escrow account to supplier so as to except transfer from avoidance pursuant to 11 USCS § 547(b) where supplier failed to perfect its security interest in escrow account outside ***preference*** period, funds were accounts receivable and not new funds, and there was no agreement between debtor and payor of funds that funds would be used to pay specified antecedent debt. Stingley v AlliedSignal, Inc. (In re Libby Int'l, Inc.) (1999, BC WD Mo) 240 BR 375, 35 BCD 28, affd (2000, BAP8) 247 BR 463, 35 BCD 288.

Funds that supplier sent to debtor that were intended as rebate to debtor's customers and which debtor held in "special account" were not property of debtor because debtor had no ownership interest in funds and debtor simply held property in resulting trust for benefit of its customers; accordingly, payments of rebates to customers were not preferential transfers. Weiner v A.G. Minzer Supply Corp. (In re UDI Corp.) (2003, BC DC Mass) 301 BR 104, 42 BCD 25.

Where creditor/subcontractor of Chapter 7 debtor/contractor asserted that funds trustee sought to recover in ***preference*** action under 11 USCS § 547(b) were not property of debtor because payments to creditor had been earmarked for creditor, creditor was not entitled to summary judgment because debtor had unfettered control over its operating account, all payments on all jobs were deposited into single account, and all disbursements on all jobs

came out of same account. Rodriguez v Consol. Elec. Distribs., Inc. (In re Martin Wright Elec. Co.) (2008, BC WD Tex) 49 BCD 117.

Bankruptcy debtor's payments to supplier by checks issued by general contractor and jointly payable to supplier and debtor as subcontractor were not avoidable as preferential transfers under 11 USCS § 547(b), since checks were intended solely to pay supplier and debtor by contract had no interest in checks which could be transferred. In re Steel Fab Inc. v CMC Joist & Deck (2013, BC DC Conn) 57 BCD 173.

128. Other particular payments

Secured loan obtained by debtor corporation shortly before it sought ***bankruptcy*** protection, which it used to repay unsecured bridge loan, was not avoidable ***preference*** under 11 USCS § 547(b); under equitable earmarking doctrine, debtor never controlled secured loan funds, and parties intended secured party to be substituted as creditor. Caillouet v First Bank & Trust (2007, ED La) 368 BR 520, affd in part and vacated in part on other grounds (2008, CA5 La) 548 F3d 344, 50 BCD 221, 60 CBC2d 1793, CCH Bankr L Rptr P 81350.

When debtor grants security interest in its property in exchange for loan to pay unsecured debt, earmarking defense fails in action to avoid payment as ***preference*** under 11 USCS § 547; voidable ***preference*** in instant case is equal to amount of loan which was used to pay unsecured creditor where amount of security taken by lender at time of transfer of loan funds was equal to amount of loan and therefore diminished Chapter 11 debtor's estate by that sum. Estate of Love v First Interstate Bank (In re Love) (1993, BC DC Mont) 155 BR 225.

Payment made by debtor to creditor with funds loaned to debtor by debtor's principals and guarantors is not avoidable ***preference*** under 11 USCS § 547 because, pursuant to earmarking doctrine, there was no transfer of interest of debtor in property as required under § 547, even though there was 3-day delay between time check to debtor was deposited at bank and time debtor's check to creditor was paid; although there was no corporate resolution or minutes regarding restrictions on use of funds, check which was issued to debtor in same amount as that owed on note indicates that it was written as business note payoff, there was express understanding, although verbal, that debtor would use funds solely to repay note to creditor, debtor's principals and guarantors had compelling reason to pay off note, to extinguish their personal liability, and although debtor could have theoretically done something different with money, reality is that principals had control of funds and could insure that they were used as intended. Dubis v Heritage Bank & Trust Co. (In re Kenosha Liquidation Corp.) (1993, BC ED Wis) 158 BR 774.

Where bank approved floor plan loan for Chapter 11 debtor/automobile dealer but paid loan proceeds directly to vehicle manufacturer's finance company so that they never came under debtor's control and bank official testified that debtor could not have received funds under any circumstances since bank would simply not have made loan had finance company not agreed to execute subordination agreement, transfer of loan proceeds from bank to finance company was not "transfer of an interest of the debtor in property" within meaning of 11 USCS § 547(b) and thus was not avoidable ***preference***. American Honda Fin. Corp. v A. Angelle, Inc. (In re A. Angelle, Inc.) (1998, BC WD La) 230 BR 287.

Where ***bankruptcy*** debtor received funds from sale of creditor's real property as qualified intermediary for creditor in like-kind exchange of real property, and made payments from such funds to builder which was improving other property to be conveyed to creditor, earmarking doctrine did not preclude payments from being avoidable ***preference*** under 11 USCS § 547(b); funds in debtor's possession were in fact property of debtor which passed out of debtor's possession and into real property asset as to which debtor was mere stakeholder, and debtor's estate was substantially reduced thereby. Manty v Miller & Holmes, Inc. (In re Nation-Wide Exch. Servs.) (2003, BC DC Minn) 291 BR 131, 49 CBC2d 1557, 91 AFTR 2d 1850.

Summary judgment was not proper because genuine issue of material fact existed as to validity of secured creditor's first assignment because if first bank accepted assignment, creditor and present assignee might be entitled to assert earmarking doctrine defense because assignee merely stepped in shoes of previous assignee; however, if first assignment was not valid, trustee was entitled to avoid present lien as preferential transfer under 11 USCS § 547(b). Rounds v First Sec. State Bank (2005, BC ND Iowa) 328 BR 132.

Trustee failed to meet his burden of proving under 11 USCS § 547(b) that there was transfer of interest of debtor in property where: (1) funds which were placed into certificate of deposit (CD) were specifically provided by lender for debtor to collateralize Letter of Credit in order to obtain New Bonds, (2) there was no diminution to debtor's estate because funds came solely from third party, (3) funds placed into CD were lender's funds that were simply pass-through in debtor's bank account, (4) even if funds could have been characterized as debtor's, they were debtor's only for specific purpose of putting them into CD, and (5) there was no preferential treatment in fact for this transfer because it did not benefit defendant surety out of estate assets to detriment of other creditors; surety demonstrated that it had complete earmarking defense. Campbell v Hanover Ins. Co. (In re Campbell) (2010, BC WD NC) 64 CBC2d 1465, affd (2011, WD NC) 457 BR 452, 66 CBC2d 825, affd (2013, CA4 NC) 709 F3d 388, 57 BCD 167, CCH Bankr L Rptr P 82430, cert den (2013, US) 134 S Ct 221, 187 L Ed 2d 144.

129. --Avoidable *preference*

Transfer which occurred when debtor paid creditor $ 121,345.11 via check by means of provisional credit granted to debtor by bank supported only by debtor's deposit of $ 125,000 bad check was transfer of interest of debtor in property, even though bank revoked provisional credit and charged back provisional credit to debtor's checking account 5 days later since funds were not conditioned on creditor being paid off, and thus were not earmarked and debtor exercised significant control over funds in choosing to pay off single creditor, and fact that debtor did not have statutory right to provisionally withdraw credit funds does not mean that he had no "interest in property"; although creditor asserts that bank simply assumed risk of provisional credit, ultimate liability for nonpayment is placed on customer who fails to make good on credit; furthermore, fact that debtor's loan, in form of provisional credit, may have been obtained through fraud or misrepresentation does not change its character as property. In re Smith (1992, CA7 Ind) 966 F2d 1527, 27 CBC2d 754, CCH Bankr L Rptr P 74750, 20 UCCRS2d 228, cert dismd (1992) 506 US 1030, 113 S Ct 683, 121 L Ed 2d 604 and (criticized in Parks v FIA Card Serv. (In re Marshall) (2008, DC Kan) 2008 US Dist LEXIS 15336).

Earmarking doctrine is inapplicable to purchaser's payment of debtor's debt to creditor as part of purchase price, and therefore transfer is a voidable ***preference*** under 11 USCS § 547(b) where purchaser did not make loan to debtor so that debtor could pay creditor, but rather, purchaser paid creditor on behalf of debtor and debtor was under no obligation to repay purchaser; transaction did not substitute new creditor for old one. In re Interior Wood Prods. Co. (1993, CA8 Minn) 986 F2d 228, 23 BCD 1676, CCH Bankr L Rptr P 75154.

Because there was no agreement between debtor, defendant bank creditor, and new lender that new loan funds would be used to pay bank, "earmarking" doctrine did not apply to plaintiff trustee's avoidance action under 11 USCS § 547(b). Caillouet v First Bank & Trust (In re Entringer Bakeries Inc.) (2008, CA5 La) 548 F3d 344, 50 BCD 221, 60 CBC2d 1793, CCH Bankr L Rptr P 81350.

Bankruptcy court properly held that, in reference to trustee's effort to avoid preferential transfer, earmarking defense was inapplicable under 11 USCS § 547(b), because loan at issue did not require debtor to pay off creditor. Shubert v Lucent Techs. Inc (In re Winstar Communs., Inc.) (2009, CA3 Del) 554 F3d 382, 51 BCD 45, CCH Bankr L Rptr P 81408 (Overruled in part as stated in In re USDigital, Inc. (2011, BC DC Del) 461 BR 276, 55 BCD 260) and (criticized in Gladstone v Schaefer (In re UC Lofts On 4th, LLC) (2015, BAP9) 2015 Bankr LEXIS 3009).

Because ***bankruptcy*** court was correct in determining that funds paid by debtor to creditor were his own, earmarking doctrine did not apply. Riley v Nat'l Lumber Co. (In re Reale) (2009, CA1) 584 F3d 27, 62 CBC2d 895, CCH Bankr L Rptr P 81599.

Where debtor received funds from lender, placed them in its own account, and only later deposited them with bank to secure defendant surety, earmarking defense was unavailable to surety in plaintiff trustee's ***preference*** action because debtor borrowed from lender, incurring new debt, and used it money to collateralize both existing obligations to surety and new bonds; critical element for earmarking was lacking: funds were not used to pay antecedent debt. Campbell v Hanover Ins. Co. (In re ESA Envtl. Specialists) (2013, CA4 NC) 709 F3d 388, 57 BCD 167, CCH Bankr L Rptr P 82430, cert den (2013, US) 134 S Ct 221, 187 L Ed 2d 144.

Chapter 7 trustee fails to show preferential transfer under 11 USCS § 547 where defendants withdrew money from bank account formally in debtor's name, because defendants overcame presumption that monies belonged to debtor where: (1) account was established as part of failed plan of defendants to purchase debtor by gradually paying off debtor's obligations in debtor's name; (2) neither debtor nor its agents had any authority to sign checks or had physical possession of account; (3) trustee presented no evidence that debtor ever made any deposits into account; and (4) trustee did not show any applications of funds taken from account. In re American Plastics Service, Inc. (1986, BC ED Pa) 68 BR 27.

Even under expanded version of earmarking doctrine, payments to creditor are not protected from being recovered as preferential under 11 USCS § 547(b) where monies paid to creditor were either advanced by senior creditor pursuant to financing arrangement with Chapter 11 debtor or were funds obtained by debtor in ordinary course of business in which senior creditor held security interest superior to that of transferee creditor, and thus funds were property of debtor. In re Ludford Fruit Products, Inc. (1989, BC CD Cal) 99 BR 18.

Where all funds paid at Chapter 11 debtor corporate buyout closing were raised by debtor's officer personally through bank loans and loans from relatives, friends and employees, no property of debtor was transferred for purposes of 11 USCS § 547 and thus earmarking doctrine is inappropriate. In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Funds given to corporate Chapter 11 debtor were not earmarked for payment to lender, such as would make transfer of funds to lender not transfer of funds of debtor subject to avoidance as preferential transfer under 11 USCS § 547(b), where funds were loaned to debtor without any restriction as to their use, were either given directly to debtor or its principals, or were so intended, and debtor had full authority to direct to whom funds should be paid. In re International Club Enterprises, Inc. (1990, BC DC RI) 109 BR 562, CCH Bankr L Rptr P 73236.

Transfers of funds by checks made payable to Chapter 11 debtors and creditor as co-payees are not excepted from avoidance under 11 USCS § 547 by earmarking doctrine where there is no evidence that payment was made to debtors solely on condition that those proceeds were to be used to pay creditor and it was debtors who requested that checks be made payable to both debtors and creditor. Amick v Hoff Cos. (In re Amick) (1994, BC DC Idaho) 163 BR 589.

Summary judgment was granted for committee of unsecured creditors for avoidance and recovery of $ 700,000 paid by third party to creditor on behalf of debtor pursuant to agreement within ninety-day ***preference*** period, which represented either accounts receivable or payments on contract not made pursuant to separate guaranty agreement or protected by earmarking doctrine, since third party was not new lender. Official Comm. of Unsecured Creditors v Sharp Elecs. Corp. (In re Phelps Techs., Inc.) (2000, BC WD Mo) 245 BR 858, 35 BCD 213, 43 CBC2d 1709.

Earmarking doctrine did not apply so that Chapter 7 debtor's payment to father-in-law was not ***preference*** where father-in-law lent debtor $ 80,000 to debtor to enable him to pay remainder of property settlement obligation to ex-wife and thus avoid being held in contempt because, when debtor repaid father-in-law, no other creditor was substituted in father-in-law's place so that obligation was paid in full and resulted in diminution of ***bankruptcy*** estate; debtor did, however, hold $ 80,000 loan in implied trust under Georgia law since loan was to be applied to particular purpose. Tidwell v Hendricks (In re McDowell) (2001, BC MD Ga) 258 BR 296, CCH Bankr L Rptr P 78354.

Fund administering post-confirmation Chapter 11 estate was granted summary judgment in action seeking to recover preferential payments made to creditor prior to filing where earmarking defense did not apply to unrestricted loan proceeds, ordinary course of business defense was precluded under law of case doctrine, and there was no dispute that case would not have returned 100 percent to unsecured creditors under 11 USCS § 547(b)(5). AmeriServe Food Distrib., Inc. v Transmed Foods, Inc. (In re AmeriServe Food Distrib., Inc.) (2004, BC DC Del) 315 BR 24, 43 BCD 190, 52 CBC2d 1201.

Although debtors had obtained home equity loan to raise necessary funds to pay settlement, earmarking doctrine did not apply in action under 11 USCS § 547 where there was no evidence of agreement between home-equity

lender and debtors regarding use of loan proceeds, and there was no evidence that debtors lost control over settlement funds at anytime prior to payment from their attorney's trust account. Morton v Commer. Loan Servs. (In re Henninger) (2005, BC ND Tex) 336 BR 733.

Earmarking doctrine did not apply to transfer of funds made from bank to one of debtor's unsecured creditors because bank was secured creditor, payment was made to unsecured creditor, and transfer of funds for payment of unsecured debt resulted in diminution of debtor's estate as it depleted funds from construction loan that were meant for seven building projects. Betty's Homes, Inc. v Cooper Homes, Inc. (In re Betty's Homes, Inc.) (2008, BC WD Ark) 393 BR 671, affd (2009, WD Ark) 411 BR 626.

In action where debtors sought avoidance of certain transfers to creditor investors as preferential payments under 11 USCS § 547(b), earmarking principle did not apply because there was neither agreement between debtors and lenders under lines of credit at issue to limit use of proceeds of loans to payment of commercial paper nor did debtors lack control over those funds. Enron Creditors Recovery Corp. v J.P. Morgan Sec. (In re Enron Creditors Recovery Corp.) (2009, BC SD NY) 407 BR 17, 51 BCD 240, Certificate of appealability granted (2009, SD NY) 2009 US Dist LEXIS 98611 and revd (2009, SD NY) 422 BR 423, affd (2011, CA2 NY) 651 F3d 329, 55 BCD 12, 65 CBC2d 1833 (criticized in FTI Consulting, Inc. v Merit Mgmt. Grp., LP (2015, ND Ill) CCH Bankr L Rptr P 82875) and (Reversal noted in Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.) (2011, BC SD NY) 453 BR 201, 55 BCD 60).

Certain payments made by Chapter 11 debtor, authorized seller of Tennessee lottery tickets, to operator of lottery were preferential payments under 11 USCS § 547(b) because, although parties' contract created trust in proceeds from lottery ticket sales, payments were made from one of debtor's general accounts, and operator failed to trace transferred funds to trust funds. Appalachian Oil Co. v Tenn. Educ. Lottery Corp. (In re Appalachian Oil Co.) (2012, BC ED Tenn) 471 BR 199.

Unpublished Opinions

Unpublished: Summary judgment was granted to bank and denied to trustee on action to avoid preferential transfer because trustee failed to establish that setoff of funds by bank to pay overdraft in debtor's checking account allowed bank to receive more than it would have received if transfer had not been made as required by 11 USCS § 547(b)(5), since funds were not property of estate in that they were funds which were earmarked for re-payment of overdraft in bank account and debtor did not have it within its control to direct those funds elsewhere. Macleod v First Nat'l Bank of Chatsworth (In re Sosebee Freight, Inc.) (2004, BC ND Ga) 2004 Bankr LEXIS 2201.

130. Miscellaneous

Voidable ***preference*** does not occur under 11 USCS § 547 where property transferred by Chapter 11 corporate debtor is not property over which debtor can exercise control; mere fact that property is deposited in debtor's account does not mean that it is in control of debtor where it is earmarked as security for loan, even where there is no proof that party depositing funds in debtor's account intended to restrict use of funds. Coral Petroleum, Inc. v Banque Paribas-London (1986, CA5 Tex) 797 F2d 1351, CCH Bankr L Rptr P 71434, reh den, en banc (1986, CA5 Tex) 801 F2d 398 and (criticized in Mukamal v Bank of Am. (In re Egidi) (2008, BC SD Fla) 386 BR 884, 59 CBC2d 1003, 21 FLW Fed B 278).

Bankruptcy court erred in holding that creditor waived earmarking defense because it failed to plead earmarking as affirmative defense given that earmarking doctrine is not affirmative defense, but rather challenge to trustee's claim that particular funds are part of ***bankruptcy*** estate; because trustee has burden of proving avoidability of transfer under 11 USCS § 547(b), trustee has burden of establishing that property is part of ***bankruptcy*** estate. Shubert v Lucent Techs. Inc (In re Winstar Communs., Inc.) (2009, CA3 Del) 554 F3d 382, 51 BCD 45, CCH Bankr L Rptr P 81408 (Overruled in part as stated in In re USDigital, Inc. (2011, BC DC Del) 461 BR 276, 55 BCD 260) and (criticized in Gladstone v Schaefer (In re UC Lofts On 4th, LLC) (2015, BAP9) 2015 Bankr LEXIS 3009).

Summary judgment is inappropriate in action to recover preferential transfer under 11 USCS § 547, since court has before it insufficient information to determine whether Chapter 13 estate was diminished by substitution of secured

creditor for unsecured creditor under earmarking doctrine where secured creditor is granted security interest in debtor's property; where one unsecured creditor is simply substituted for another unsecured creditor, "earmarking" doctrine is sound. In re Belme (1987, BC SD Ohio) 76 BR 121.

In preferential transfer case, although ***bankruptcy*** court found that creditor was secured and payment to it did not constitute preferential transfer, court nevertheless discussed other defenses that creditor raised and rejected creditor's claim that funds were earmarked for its painting services on real property that debtor leased; although debtor was required, pursuant to agreement with Department of Housing and Urban Development (HUD), to maintain "replacement reserve funds" subject to HUD regulations, there was no evidence that payment was to come from HUD and debtor's landlord had previously asked for and received permission for release of funds to pay for painting and, thus, debtor had obtained control over these released funds. Golfview Dev. Ctr., Inc. v All-Tech Decorating Co., (In re Golfview Dev. Ctr., Inc.) (2004, BC ND Ill) 309 BR 758, 43 BCD 20.

Net result of payments made by debtor to transferee was that there was diminution in value of debtor's estate for all of debtor's creditors, and earmarking doctrine was inapplicable under facts; transferee bore risk by failing to ensure that appropriate payment information was in effect with service compensators, and opted to instead place portion of its receivables in control of debtor; transferee now had to bear consequence of its business decision. Dewoskin v Imaging Advantage LLC (In re Visionary Imaging LLC) (2011, BC ED Mo) 450 BR 876, 54 BCD 196.

Funds unsecured creditor received from debtor's sale of property were not excepted from being recoverable as ***preference*** under earmarking doctrine because debtor voluntarily selected recipient of funds to detriment of all of his other unsecured creditors. Moser v Bank of Tyler (In re Loggins) (2014, BC ED Tex) 513 BR 682.

Unpublished Opinions

Unpublished: Debtor's transfers to creditor were of interest in debtor's property as defined by Kansas law, as required to recover preferential transfers, where debtor had dominion or control over funds that were transferred to creditor because automated clearing house requests that initiated transfers were made to creditor's sweep account that was in name of debtor. Creditor's reliance on earmarking doctrine was misplaced because this was not guarantor situation and, even if doctrine could be extended, necessary elements were not present, as there were not three parties to transaction. Redmond v GMAC Ins. Mgmt. Corp. (In re Brooke Corp.) (2015, BC DC Kan) 539 BR 605.

3. Particular Property or Interests

131. Assessments

Assessments collected by debtor cotton handler pursuant to Cotton Research and Promotion Act (7 USCS § 2101), are property of estate so that payment of overdue assessments constitutes preferential transfer under 11 USCS § 547 where: (1) debtor did not separate assessment funds from its general monies, but rather debtor was allowed to keep assessment until 10th day of month following month in which assessments were collected and no restrictions were placed on money's use prior to payment to Cotton Board; (2) debtor drew money for payments from its tender account to which it had legal title; (3) fact that debtor was 17 months delinquent in its payments and had to execute promissory note to cover overdue assessments suggests that debtor had spent assessment funds and used other funds it had received to pay for overdue assessments; and (4) debtor had such control over money as to make it part of debtor's estate. In re Commodity Exchange Services Co. (1986, ND Tex) 67 BR 313.

132. Cashier's and convenience checks

Where ***bankruptcy*** debtor wrote convenience checks from debtor's bank account against debtor's credit card debt, checks were avoidable preferential transfers under 11 USCS § 547(b) because checks constituted transfer of debtor's interest in debtor's property since debtor possessed sufficient control over funds. MBNA Am. Bank, N.A. v Meoli (In re Wells) (2009, CA6) 561 F3d 633, 61 CBC2d 1281, CCH Bankr L Rptr P 81459, 2009 FED App 145P, reh den, reh, en banc, den (2009, CA6) 2009 US App LEXIS 16031.

Since purchaser of cashier's check retains ownership interest in check until it is delivered to payee, cashier's check purchased by ***bankruptcy*** debtor is property of ***bankruptcy*** estate, for purposes of determining whether preferential transfer of interest of debtor in property under 11 USCS § 547(b) occurs when debtor's payee receives check. Hall-Mark Elecs. Corp. v Sims (In re Lee) (1995, BAP9 Cal) 179 BR 149, 95 CDOS 2727, 27 BCD 1, 33 CBC2d 1360, 26 UCCRS2d 386, affd (1997, CA9) 108 F3d 239, 97 CDOS 1591, 97 Daily Journal DAR 3065, 30 BCD 628, 37 CBC2d 991, CCH Bankr L Rptr P 77289, 31 UCCRS2d 1044.

133. Consigned goods

Return by debtor of consigned goods to creditor comes within purview of 11 USCS § 547 because, despite fact that consignment agreement maintained title to goods in creditor, consigned goods are property in which debtor has interest, since interest in property is anything of value which has debt-paying or debt-securing power, and consigned goods do have such power for debtor. In re Castle Tire Center, Inc. (1986, BC WD Pa) 56 BR 180, 42 UCCRS 862.

For purposes of Chapter 7 trustee's 11 USCS § 547 action against consignor, seeking to avoid as preferential payment of $ 10,971 made by debtor auctioneer, debtor had equitable interest in funds constituting payment, despite consignor's contention that consignor's continued ownership up to auction sale necessarily meant it owned sales proceeds, where contract imposed no obligation on debtor to segregate proceeds or hold them in trust, but merely required debtor to pay consignor net proceeds, less commission, within 14 business days following auction, thus establishing debtor-creditor relationship following auction rather than trustee-beneficiary relationship. Salem v Lawrence Lynch Corp. (In re Farrell & Howard Auctioneers) (1994, BC DC Mass) 172 BR 712, 26 BCD 146.

134. Construction payments or proceeds

Amounts paid by contractor-debtor to subcontractor prior to ***bankruptcy*** are not property of debtor within meaning of 11 USCS § 547 and do not constitute ***preference*** where payments were made from statutory trust for benefit of subcontractors. In re Casco Electric Corp. (1983, ED NY) 35 BR 731, CCH Bankr L Rptr P 69445.

Chapter 7 trustee may not avoid payments under 11 USCS § 547 that debtor made to materialmen on construction project from debtor's general checking account where payments were made from trust assets. Bethlehem Steel Corp. v Tidwell (1986, MD Ga) 66 BR 932 (criticized in Watts v Pride Util. Constr., Inc. (In re Sudco, Inc.) (2007, BC ND Ga) 2007 Bankr LEXIS 3730).

Payment by Chapter 11 debtor contractor to subcontractor was preferential under 11 USCS § 547, despite subcontractor's contention that monies transferred to it were in fact identifiable trust funds received by debtor from general contractor and earmarked for subcontractor, where it cannot be determined on what basis general contractor reached dollar amount of check forwarded to debtor so as to allow tracing of funds; absent actual proof of trust fund, such trust does not exist and there is no authority for imposing one within framework of ***Bankruptcy*** Code. In re Nami Bros., Inc. (1986, BC DC NJ) 63 BR 160.

Payments made to Chapter 7 general contractor for disbursal to subcontractors on hospital renovation project are not held in trust for subcontractors, because construction contract creates no express trust agreement, and constructive trust can only be imposed where contractor breached fiduciary relationship; there was no restriction placed on contractor in handling monies due subcontractors, and therefore payments made to subcontractor were from property of estate under 11 USCS §§ 541 and 547. In re H & A Constr. Co. (1986, BC DC Mass) 65 BR 213, 14 BCD 1215.

Funds paid by Chapter 11 debtor to insurance fund, pursuant to collective bargaining agreement, which were due as result of work performed by debtor's employees on various building construction projects on which debtor was subcontractor, are not recoverable as ***preferences*** under 11 USCS § 547 because sums owed to fund were trust funds pursuant to Michigan Builders Trust Fund Act and thus were not property of estate; trust funds need only be traceable when they are in custody of estate as of filing but strict tracing is not necessary when transfers have been completed prepetition. In re Imperial Tile & Carpet, Inc. (1988, BC WD Mich) 94 BR 97 (criticized in Lovett v

Homrich, Inc. (In re Philip Servs. Corp.) (2006, BC SD Tex) 359 BR 616, 47 BCD 152) and (criticized in Meoli v Kendall Elec., Inc. (In re R.W. Leet Elec., Inc.) (2007, BAP6) 372 BR 846).

Payments made by Chapter 7 debtor contractor to subcontractor are not recoverable as ***preference*** under 11 USCS § 547 where monies transferred, which were received from property owner for work performed, were part of trust established for benefit of subcontractors under New York law and were not property of debtor. In re Building Dynamics, Inc. (1992, BC WD NY) 134 BR 715, 22 BCD 708.

Payments made by Chapter 7 debtor contractor to materialman are not avoidable ***preferences*** under 11 USCS § 547 where property owner issued joint checks payable to debtor and materialman because funds were clearly earmarked for specific purpose of paying materialman and debtor was mere conduit of funds, which did not become property of debtor's estate; fact that check was deposited into debtor's account, which in turn issued its own check payable to materialman who was jointly named payee is of no consequence. Jensen v Pen Air Conditioning, Inc. (1993, BC MD Fla) 156 BR 98, 24 BCD 768, 7 FLW Fed B 190.

Payments made to contractor are not protected from avoidance under 11 USCS § 547 by earmarking doctrine, although debtor's principal, individually, was owner of property and borrower under lender's loan, and contractor asserts that both payments in question, made by debtor from its own checking account, came from loan proceeds disbursed to debtor's principal who in turn loaned them to debtor so it could make payments at issue, where there is no showing that payments in question represent proceeds of loans made by lender to principals and then by principal to lender, there is no indication that any advances which principal made to debtor were made on express condition that moneys be used to pay contractor, and there has been no substitution of creditors as principal has filed no claim in ***bankruptcy*** proceeding against debtor--to extent that lender's loan proceeds found their way from principal to debtor, principal has treated them as capital contributions rather than loans. Miller v Perini Corp. (In re A.J. Lane & Co.) (1994, BC DC Mass) 164 BR 409, 30 CBC2d 1475.

Funds received by Chapter 11 debtor from owner pursuant to installation contract and paid to debtor's subcontractor never became property of ***bankruptcy*** estate and may not be avoided by Trustee as preferential transfers under 11 USCS § 547(b) since funds were protected by trust arising under Michigan law. Greenwald v Square D Co. (In re Trans-End Tech.) (1998, BC ND Ohio) 228 BR 181, 33 BCD 760.

Payments by debtor to subcontractor were not avoidable as either ***preferences*** under 11 USCS § 547(b) or fraudulent transfers under 11 USCS § 548 because subcontractor did not receive transfer of interest of debtor in property since payments were made from property that was held in trust for subcontractor's benefit pursuant to 770 ILCS 60/21 .02 (2012). Lain v V3 Constr. Group, Ltd. (In re Erickson Ret. Cmtys., LLC) (2012, BC ND Tex) 475 BR 762.

Applying lowest intermediate balance test, court found that transfer by debtor to creditor was comprised of $ 191,631.13 of construction trust funds, which did not belong to debtor, and only $ 23,680.87 of funds that were "of interest of debtor in property." Lain v Universal Drywall LLC (In re Erickson Ret. Cmtys., LLC) (2013, BC ND Tex) 497 BR 504.

Agreement by which general contractor agreed to make payments for goods and services provided by subcontractor directly to subcontractor's supplier in exchange for which supplier refrained from recording materialmen's liens is not voidable transfer under 11 USCS § 547(b) because under these circumstances property is not property of debtor. In re Flooring Concepts, Inc. (1984, BAP9 Cal) 37 BR 957, 11 BCD 890, 10 CBC2d 883, CCH Bankr L Rptr P 69826.

135. Constructive trusts

Even though state law might impose constructive trust on Chapter 11 debtor who failed to perfect transfer of real property to creditors by filing warranty deed, and 11 USCS § 541(d) does exclude from estate property held in trust, transfers are still of "property of estate" under 11 USCS § 547(b) where (1) no actual state decision has imposed trust, (2) state law of constructive trust is not determinative in ***bankruptcy***, and (3) equities favor ratable distribution among all creditors; thus transfers are voidable ***preferences***. In re Lewis W. Shurtleff, Inc. (1985, CA9 Cal) 778

F2d 1416, 13 CBC2d 1400, CCH Bankr L Rptr P 70902 (criticized in Sierra Invs., LLC v SHC, Inc. (In re SHC, Inc.) (2005, BC DC Del) 329 BR 438, 45 BCD 98, 58 UCCRS2d 573).

No constructive trust can be imposed by original owners on payments due on note given to original owners by Chapter 7 debtor pizza franchisee for purchase of assets of franchise restaurants, and later assigned to subsequent purchaser, who makes payments to original owners, where payments are later found to be voidable ***preference*** and redirected to estate, because no unjust enrichment of estate has taken place; while some unfairness to original owners results, larger equitable purpose of equality among creditors is served. Sommers v Burton (1986, CA5 Tex) 806 F2d 610, CCH Bankr L Rptr P 71579 (criticized in Crafts Plus+ v Foothill Capital Corp. (In re Crafts Plus+) (1998, BC WD Tex) 220 BR 331, 32 BCD 701, 40 CBC2d 388).

First mortgage holders and taxing authorities, who have asserted that payments made to them are from funds held in constructive trust by Chapter 7 debtor mortgage investment companies and therefore not recoverable as ***preferences*** under 11 USCS § 547(b), may not recover where they have failed to trace trust funds through debtors' commingled accounts and this inability to trace and identify funds negates their argument that debtors' fraudulent activity barred trustee from recovering funds to which debtor allegedly had no right or title. First Federal of Michigan v Barrow (1989, CA6 Mich) 878 F2d 912, CCH Bankr L Rptr P 72985, 14 FR Serv 3d 899 (criticized in Tilley v TJX Cos. (2003, CA1 Mass) 345 F3d 34, 68 USPQ2d 1288, 56 FR Serv 3d 1252).

Once transferee established as matter of state law that grounds properly existed for imposing constructive trust over funds, it was up to debtor to prove that it would be inequitable as matter of federal ***bankruptcy*** law to impose constructive trust over those funds for purposes of 11 USCS § 547; debtor computer equipment broker failed to meet that burden where debtor erroneously instructed its client to send computer lease payments to debtor instead of to equipment lessor and debtor did not forward client's check to lessor but deposited it in its own account. Mitsui Mfrs. Bank v Unicom Computer Corp. (In re Unicom Computer Corp.) (1994, CA9) 13 F3d 321, 94 CDOS 141, 94 Daily Journal DAR 244, 25 BCD 152, 30 CBC2d 655, CCH Bankr L Rptr P 75708.

Avoidance power of trustee only reaches interest of debtor in property (11 USCS § 547(b)); debtor does not own equitable interest in property he holds in trust (express or constructive) for another, such that interest is not property of estate (11 USCS § 541(d)). Poss v Morris (In re Morris) (2001, CA6 Ohio) 260 F3d 654, 46 CBC2d 1334, 2001 FED App 264P.

Investors in corporate debtor, while tracing their investments to promissory notes, did not trace payments to funds entrusted with debtor but rather invested funds were commingled and transferred among general accounts; thus constructive trust will not be imposed on funds so as to remove repayments of funds from reach of trustee under 11 USCS § 547. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Chapter 7 debtor cannot use 11 USCS § 547(b)(2) to escape trustee's recovery of debtor's transfer of interest in home to debtor's children on theory that debtor's use of proceeds of sale of stock, allegedly held in constructive trust for children, to make house payments gave children present interest in property, thus making transfer of debtor's interest in property not one for antecedent debt, because (1) constructive trusts do not automatically take trust property out of debtor's estate, (2) state law only imposes constructive trusts in cases of fraud, and no allegation of fraud has been made by debtor's children, nor could it be, given debtor's testimony that transfer was "gift." In re Uhlmeyer (1986, BC DC Ariz) 67 BR 977, CCH Bankr L Rptr P 71596.

Imposition of constructive trust is not preferential transfer under 11 USCS § 547(b)(5) where trust in favor of insurer of Chapter 11 debtor owner of damaged vessel allowed it to recover amounts paid to debtor by Panama Canal Commission, but did not allow it to receive more than it would have received under Chapter 7. In re United States Lines, Inc. (1987, BC SD NY) 79 BR 542, 16 BCD 886.

Funds in escrow account representing monies earned by performance of subcontractor on contract were not estate property; therefore, no ***preference*** could occur; furthermore, no transfer occurred within 90 day ***preference*** period. Holmes Envtl., Inc. v Suntrust Banks, Inc. (In re Holmes Envtl., Inc.) (2002, BC ED Va) 287 BR 363.

Repayments were transfers of interests of debtors in property under 11 USCS § 547(b) because: (a) trustee established that "June advances" were property of debtors' estates and, therefore, that June repayments made from commingled settlement account were transfers of interests of debtors in property; (b) creditor did not establish that June advances were made pursuant to escrow or express, resulting, or constructive trust, and (c) creditor did not show that it could trace June repayments to June advances. Jacobs v Matrix Capital Bank (In re AppOnline.com, Inc.) (2004, BC ED NY) 315 BR 259, 43 BCD 210.

Where a creditor sought to impose a constructive trust against the debtor's personal residence, such an imposition would not constitute an avoidable ***preference*** under 11 USCS § 547, because the property held in trust was not property of the debtor's ***bankruptcy*** estate pursuant to 11 USCS § 541(d). Smithfield Trust Co. v Pitchford (In re Pitchford) (2009, BC WD Pa) 410 BR 416.

Where Chapter 7 debtor took cash advance on her bank credit card with no intent to repay debt and, feeling what she did was wrong, returned advance 18 days later, return was not avoidable under 11 USCS § 547(b) because debtor never obtained equitable interest in funds; instead, constructive trust arose at time of advance in favor of bank. Rajala v U.S. Bank (In re Christenson) (2012, BC DC Kan) 483 BR 743, 68 CBC2d 1319.

Creditor could defeat trustee's 11 USCS §§ 547 and 548 actions by proving that she could have successfully impressed constructive trust on property under Georgia law prior to debtor's transfer of his legal interest in that property to her. Kelley v McCormack (In re Mitchell) (2016, BC MD Ga) 548 BR 862.

Where defendant argued that payment by debtor to it was originally held by debtor in constructive trust for benefit of defendant, meaning that transfer was not avoidable, payment constituted property of estate because doctrine of constructive trust was not recognized in Louisiana. Rodney Tow Ch 7 Trustee v Exxon Mobil Corp. (In re ATP Oil & Gas Corp.) (2016, BC SD Tex) 553 BR 577.

In preferential transfer action where debtor and transferee had commingled funds, there was no basis to impose constructive trust under state law where debtor never held legal title to disputed property, no trust res was clearly identified in debtor's ***bankruptcy*** estate, and debtor did not engage in any inequitable conduct. Ramette v Digital River, Inc. (In re Graphics Techs., Inc.) (2004, BAP8) 306 BR 630, 42 BCD 202, 51 CBC2d 1518, affd (2004, CA8 Minn) 113 Fed Appx 734.

136. Crops or livestock

Where Ohio statute grants lien to grain depositors arising at time of grain's delivery to debtor storage facility, such grain is not property of debtor so that facility's payments to farmers were not avoidable as preferential transfers under 11 USCS § 547(b), notwithstanding that contract between facility and farmers provided that title to grain was in facility. Merchants Grain v Adkins (In re Merchants Grain) (1995, SD Ind) 184 BR 52, affd (1996, CA7 Ind) 93 F3d 1347, 29 BCD 877, 36 CBC2d 840, cert den (1997) 519 US 1111, 136 L Ed 2d 837, 117 S Ct 948.

Delivery and negotiation of debtor broker's check to seed seller in payment for seed purchased by third party is transfer of debtor's property for purposes of 11 USCS § 547 where debtor did not segregate any funds received by it from purchaser of seed in separate account, but rather funds paid to seller came from general account maintained by debtor in ordinary course of business, rendering debtor generally liable to seller on transaction; fact that debtor never took ownership of seed is irrelevant. In re Ramy Seed Co. (1985, BC DC Minn) 57 BR 425.

Conveyance of hogs by Chapter 7 debtors to debtor-husband's father in partial repayment of debt to him constitutes transfer for purposes of 11 USCS § 547(b); even if hogs actually belonged to father, debtors had exclusive right to possess, control, and dispose of animals and return of possession is transfer of property notwithstanding actual ownership thereof. In re Albers (1986, BC ND Ohio) 60 BR 206, dismd (1986, ND Ohio) 64 BR 154.

Planting of 1985 crop is transfer for purposes of determining whether creation of secured creditor's interest in crop pursuant to after-acquired property clause is preferential transfer under 11 USCS § 547. In re Lemley Estate Business Trust (1986, BC ND Tex) 65 BR 185.

137. Deposits made with court

Doctrine of custodia legis did not prevent ***Bankruptcy*** Court from determining that funds which Chapter 11 debtor had deposited with Clerk of District Court in lieu of supersedeas bond pending District Court's determination in breach of contract action of debtor's motion for judgment notwithstanding verdict and, if necessary, decision in its appeal were subject to recovery as ***preferences*** under 11 USCS § 547, even though doctrine would prevent ***Bankruptcy*** Court from attaching, garnishing, invading, or seizing funds. Pan Am. World Airways v Care Travel Co. (In re Pan Am Corp.) (1993, SD NY) 166 BR 538, 31 CBC2d 903, reconsideration den, remanded on other grounds (1994, SD NY) 1994 US Dist LEXIS 1557, appeal after remand, remanded (1995, SD NY) 1995 US Dist LEXIS 15069.

Neither debtor nor creditors who participate in municipal court trusteeship have any vested rights in subject property once it is deposited with court, debtor having no rights because any money paid to trustee can only be transferred to creditor or its agent during trusteeship as well as upon its termination, and creditors having no rights because they are precluded from instituting any actions to gain possession of such property and must await trustee's distributions. In re Hayes (1980, BC SD Ohio) 5 BR 676, 6 BCD 1069.

Depositing of bond required by state court to reopen premises closed down for prostitution is not a ***preference*** but an asset of estate to be included in schedules of debtor where bond was redeemable by debtor upon abatement of nuisance and was only subject to forfeiture if defendants chose to continue nuisance once property was utilized. In re Porter (1984, BC SD Tex) 42 BR 61.

138. Electronically transferred funds

Under 11 USCS § 547, funds which owners of club had electronically transferred to their account in order to cover debtor's share of joint marketing expenses are recoverable by trustee as ***preference*** because funds constituted "interest of debtor in property." In re Dayton Circuit Courts # 2 (1987, BC SD Ohio) 80 BR 434, 16 BCD 1219.

139. Funds or property transferred to debtor's relatives

Chapter 7 trustee is not entitled to recover, as fraudulent transfer or ***preference***, value of automobile given by debtors to their daughter 8 years earlier as graduation present since, although debtor father kept legal title to vehicle for insurance reasons, daughter was given equitable interest in automobile; father had no equitable interest in $ 3,000 trade-in allowance given daughter when she bought new car so that there was no property interest for trustee to recover; even if father had such equitable interest, true value of that interest would be closer to $ 500. First USA Bank v McCall (In re McCall) (1995, BC ED Ark) 188 BR 400, 28 BCD 128, CCH Bankr L Rptr P 76837.

Where defendant transferred $ 40,000 to her daughter, which she and her spouse deposited in their bank account, and, 92 days before filing for ***bankruptcy***, they transferred $ 40,000 to defendant, if initial transfer was loan, debtors' transfer to defendant was avoidable by chapter 7 trustee as ***preference*** since defendant was insider and debtors were insolvent at time they transferred funds. Ellis v Mirghanbari (In re Pittman) (2015, BC WD Wash) 540 BR 451, 74 CBC2d 473.

140. Grants

Court denies summary judgment on issue of whether debtor's fuel assistance grant applied prepetition by power company is preferential transfer under 11 USCS § 547 because, although fuel assistance grants have been held property of estate, power company must address § 547(b)'s 5 elements of ***preference***. In re Kennedy (1985, BC ED Pa) 45 BR 624, CCH Bankr L Rptr P 70206.

Unpublished Opinions

Unpublished: Guaranty did not result in insider preferential transfer as creditor was not insider, and debtor was not insolvent at time guaranty was executed; trustee did not show that creditor received more through guaranty than it

would have received in hypothetical Chapter 7 case had payment not occurred. Miller v BHC Interim Funding II, L.P. (In re Paradigm Int'l, Inc.) (2015, CA9 Cal) 635 Fed Appx 355.

141. Insurance payments, proceeds or premiums

Any payments made to insured under settlement agreement with insurance company arising from robbery loss would be held in trust for creditors to whom debtor assigned right to insurance proceeds and would not constitute property of estate under 11 USCS § 547, thus assignments may not be avoided as preferential transfer under 11 USCS § 547. In re Armando Gerstel, Inc. (1986, SD Fla) 65 BR 602, 2 UCCRS2d 615.

Payments made by corporate debtor to estate of deceased shareholder of life insurance proceeds held in business life insurance trust for purpose of stock repurchase is not transfer of property of debtor for purposes of 11 USCS § 547 because, once created, res of trust was not property of estate; shareholders intended to create present trust. In re Eljay Jrs., Inc. (1991, SD NY) 123 BR 961.

Funds paid by liability insurer to debtor for damages sustained in traffic accident are not subject to constructive trust in favor of company that performed repair work on debtor's truck since debtor had sole discretion over use of funds and need not have had his truck repaired; debtor's ***payment*** for truck repairs is therefore avoided as preferential transfer under 11 USCS § 547(b) where ***payment*** was made within ***90 days*** of debtor's ***bankruptcy*** petition. In re L.B. Smith, Inc. (1984, BC DC Md) 37 BR 460, CCH Bankr L Rptr P 69771.

Proceeds from insurance policy covering Chapter 11 debtor's officers and directors limited to indemnification for sums debtor was forced to pay on behalf of officers and directors are not property of estate, and therefore $ 10 million paid by insurer to plaintiffs in settlement of securities law violation litigation and $ 2.5 million paid in satisfaction of derivative claims is not avoidable ***preference***. Imperial Corp. of Am. v Milberg, Weiss, Bershad, Spechtrie & Lerach (In re Imperial Corp. of Am.) (1992, BC SD Cal) 144 BR 115, 23 BCD 511, CCH Fed Secur L Rep P 97012.

Unpublished Opinions

Unpublished: Where plaintiff Chapter 7 trustee sought to avoid pre-petition transfers of insurance premiums as ***preferences***, under 11 USCS § 547(b), or fraudulent transfers under 11 USCS § 548(a)(1), defendant insurers had to trace funds to identify statutory trust of insurance premiums consistent with Kan. Stat. Ann. § 40-247(a) (2011). In re Brooke Corp. (2012, BC DC Kan) 2012 Bankr LEXIS 2900.

142. Joint property

Trustee of Chapter 13 case involving one spouse has standing to set aside prepetition conveyance of entireties property as a ***preference*** under 11 USCS § 547 because interest of debtor in entireties property during joint lifetime of parties is within jurisdiction and control of ***Bankruptcy*** Court in ***bankruptcy*** proceeding filed by only one of parties during joint lifetime of spouses. In re Rotunda (1985, WD Pa) 55 BR 386.

Even if Chapter 11 debtor shared ownership interest in account from which payments were made to Cotton Board pursuant to debtor's cotton collecting-handler liabilities under Cotton Research and Promotion Act, 7 USCS § 2101, payments on note debtor executed in favor of board to satisfy past due amounts constitute preferential transfer under 11 USCS § 547 where funds in account were available to debtor's general creditors and debtor had exclusive control over disposition of funds. In re Commodity Exchange Services Co. (1986, BC ND Tex) 62 BR 868, affd (1986, ND Tex) 67 BR 313.

Chapter 7 Trustee satisfied burden of proof that transfers made to benefit of debtor's mother by payment of bank loan mother had taken for debtor and effected through checks payable to bank and drawn on joint checking account of debtor and wife were "of an interest of the debtor in property" under 11 USCS § 547(b) where evidence established joint checking account was held by debtor and wife as tenants by the entirety, both debtor and wife deposited wages into account, and, even though wife's interest in funds before they were transferred was protectable under state law, funds lost tenancy by the entirety character when wife and debtor voluntarily

transferred them to bank. Waldschmidt v Sanders (In re Sanders) (1997, BC MD Tenn) 213 BR 324, 31 BCD 569, CCH Bankr L Rptr P 77546.

Chapter 7 Trustee suffered prejudice and exemption was disallowed where debtor did not amend her schedule to claim exemption in real property held by entireties until 18 months after she filed her case and Trustee moved for summary judgment in adversary proceeding seeking to avoid mortgage on real property as preferential transfer; because debtor initially chose 11 USCS § 522(d)(1) exemption, only $ 11,000 of equity in property was exempt, property came into estate for benefit of all creditors, and mortgage was avoided as ***preference***. Shapiro v First Franklin Fin. Corp. (In re Rechis) (2006, BC ED Mich) 339 BR 643 (criticized in In re Iwasko (2006, BC ED Mich) 56 CBC2d 1404).

Prepetition transfer of interest of debtor in tenancy-by-the-entirety property is "transfer of property of debtor" within meaning of 11 USCS § 547; that is, phrase "legal or equitable interests of debtor in property of estate as of commencement of case" as used in 11 USCS § 541(a)(1) includes interest of debtor in property held as tenants-by-the-entirety. Ross v Dept. Business and Econ. Dev. (In re Ross) (2012, BC DC Dist Col) 475 BR 279.

143. Letters of credit

Creditor of Chapter 11 debtor who objects to finding by ***Bankruptcy*** Court that funds used by debtor to purchase certificate of deposit in which debtor gave bank security interest to secure issuance of letter of credit were property of estate, and not third party funds for which debtor has been mere conduit, cannot raise issue on appeal where it has not been raised below. In re Air Conditioning, Inc. (1988, CA11 Fla) 845 F2d 293, 17 BCD 1385, 18 CBC2d 973, CCH Bankr L Rptr P 72302, cert den (1988) 488 US 993, 109 S Ct 557, 102 L Ed 2d 584.

Department store's payments to bank, with whom it had letter of credit, were voidable ***preferences*** under 11 USCS § 547(b) not eligible for either new value or ordinary course of business exceptions of 11 USCS § 547(c); nor were payments otherwise voidable, where bank failed to perfect common law security interest in store's account within ninety day ***preference*** period. P.A. Bergner & Co. v Bank One, N.A. (In re P.A. Bergner & Co.) (1998, CA7 Wis) 140 F3d 1111, 32 BCD 536, CCH Bankr L Rptr P 77688, 35 UCCRS2d 373, cert den (1998) 525 US 964, 119 S Ct 409, 142 L Ed 2d 332.

Payment to Department of Energy by bank which had issued letter of credit to debtor for outstanding invoices, adjustments, and underbillings arising from contract to purchase federal royalty crude oil is not avoidable ***preference*** under 11 USCS § 547 since letter of credit is neither property of debtor nor estate and assets of bank, rather than those of estate, were depleted. Wooten v United States (1985, WD La) 56 BR 227.

Bankruptcy Court has no jurisdiction over trustee's action for voidable ***preferences*** under 11 USCS § 547, postpetition transfers under 11 USCS § 547, and turnover of property under 11 USCS § 542 against beneficiary who received monies under letters of credit secured by debtor's property because letter of credit is not property of estate within meaning of 11 USCS § 541. In re Illinois-California Express, Inc. (1985, BC DC Colo) 50 BR 232, 13 BCD 153, 13 CBC2d 324.

Prepetition transfers by debtor of proceeds to beneficiaries of letters of credit are not voidable ***preferences*** under 11 USCS § 547 because such proceeds are property of bank issuing letter, and not property of debtor. In re AOV Industries, Inc. (1986, BC DC Dist Col) 64 BR 933.

Transfer of certificate of deposit from parent corporation through Chapter 7 debtor subsidiary subcontractor to bank for letter of credit to benefit contractor by securing debtor's performance under construction contract, does not deprive debtor's estate of asset which would have been available for claims of other creditors, and thus contractor's draw on letter of credit was not avoidable ***preference*** under 11 USCS § 547 since no property of debtor was transferred; furthermore, delayed issuance of letter of credit does not establish antecedent debt--in fact contractor owed construction progress payments to debtor when letter of credit was issued. In re Ameritech Homes, Inc. (1988, BC SD Fla) 88 BR 432.

Draws upon letter of credit are not in and of themselves transfers of interest of debtor interest property within meaning of 11 USCS § 547, but rather transfer in connection with letter of credit is made when debtor pledges its assets in consideration of issuance of letter of credit; in present case, where debtor pledged its assets to letter of credit issuer in November, such date is relevant in determining ***preference*** issues, not later dates when creditor drew on letters of credit. Lease-A-Fleet, Inc. v Morse Operations, Inc. (1992, BC ED Pa) 141 BR 853, 27 CBC2d 134.

In secured letter of credit (LOC) transaction, transfer of debtor's property occurred when LOC was issued, not when issuer paid creditor landlord on LOC; landlord's draw on LOC was not avoidable ***preference*** in ***bankruptcy*** under 11 USCS § 547(b), and proceeds derived from draw were not property of debtor's estate for purposes of 11 USCS §§ 541, 547(b), because draw was transfer of issuing bank's property, not debtor's property. ITXS, Inc. v F & S Hayward, LLC (In re ITXS, Inc.) (2004, BC WD Pa) 318 BR 85, 44 BCD 6.

144. Mortgages and notes

Neither 11 USCS § 547 nor 548 afforded relief to contractor-debtor seeking to avoid foreclosure lien on property he sold previously to now-bankrupt defaulted purchaser, where debtor was record title holder at time of filing of foreclosure action due to error, since he held no legal or equitable interest in property on date when mortgage was properly recorded. JMJ Bldg. Co. v Bankers Trust Co. of California, N.A. (In re JMJ Bldg. Co.) (2000, BC MD Fla) 250 BR 437, 44 CBC2d 728, 13 FLW Fed B 262.

In Chapter 7 trustee's avoidance action under 11 USCS § 547, involving assignment of note and mortgage on debtor's property from one lender to another lender, trustee failed to state claim because transfers (assignments) of note and mortgage were not transfers of interest of debtor in property. Hamilton v CitiMortgage, Inc. (In re Lieurance) (2011, BC DC Kan) 458 BR 757.

145. Partnership interests

Chapter 13 debtors, who were partners in excavation company, have no interest in excavation company's contract rights; therefore trustee cannot use 11 USCS § 547(b) to avoid transfer of excavation contract payment from city to excavation company's indemnity bondholder. In re Jacobson (1985, BC DC Minn) 54 BR 72.

146. Ponzi schemes

Money Chapter 7 debtor acquired by Ponzi scheme and commingled in own bank accounts without using it to purchase bullion as promised to investors is property of debtor under 11 USCS § 547. In re Bullion Reserve of N. Am. (1988, CA9 Cal) 836 F2d 1214, 17 BCD 402, CCH Bankr L Rptr P 72149, cert den (1988) 486 US 1056, 108 S Ct 2824, 100 L Ed 2d 925.

Transfers to investor in limited partnerships of which Chapter 7 debtor was general partner were transfers of interest of debtor in property under 11 USCS § 547 where transfers were from checking account in name of debtor, and although debtor's interest was subject to defeasance by each investor in Ponzi scheme, it nevertheless was interest of debtor in property; although investor argues that result of limited partnership arrangement was that all funds deposited by investors in debtor's account were held by debtor, as general partner, in trust for limited partners, and that since funds in that account were commingled with other funds it is up to trustee to trace funds in order to prove that they were debtor's funds, where there is no express trust, and no resulting trust since fraud was intention in carrying out Ponzi scheme, and, thus, trust could only be constructive trust, under which circumstances it is up to party claiming existence of trust, not trustee, to trace these funds, and evidence is clear that these funds cannot be traced. Sender v Buchanan (In re Hedged-Investments Assocs.) (1994, BC DC Colo) 163 BR 841, subsequent app (1996, CA10 Colo) 84 F3d 1281 (criticized in Adelphia Communs. Corp. v Bank of Am., N.A. (In re Adelphia Communs. Corp.) (2007, BC SD NY) 365 BR 24) and subsequent app (1996, CA10 Colo) 84 F3d 1286, 35 CBC2d 1424 (criticized in Daly v Deptula (In re Carrozzella & Richardson) (2002, DC Conn) 286 BR 480, 49 CBC2d 1182) and (criticized in Janvey v Brown (2014, CA5 Tex) 767 F3d 430).

Existence vel non of Ponzi scheme is matter for Court to determine based on factual evidence presented. Floyd v Shindler (In re Rodriguez) (1995, BC SD Tex) 204 BR 510, decision reached on appeal by (1996, CA5 Tex) 95 F3d 54, reported in full (1996, CA5 Tex) 1996 US App LEXIS 43665.

Defendant who referred clients to debtors' fraudulent investment scheme for commissions which were "reinvested" for him failed to establish elements of 11 USCS § 547(c)(4), since he was not entitled to receive new value credit for dollars which he was never paid and which never really existed except in debtors' records, where he failed to assert that any money was paid to debtors, since mere execution of contract without related payment of money was not extension of credit. Floyd v Dunson (In re Rodriguez) (1997, BC SD Tex) 209 BR 424, 38 CBC2d 236.

Trustee of liquidating trust was allowed under 11 USCS § 547 to recover $ 767,741 in payments nonprofit entity ("debtor") made to individual and trust within one year before date it declared Chapter 11 ***bankruptcy*** because debtor was insolvent at time payments were made and individual who controlled debtor controlled account that was used to make payments; although debtor did not control account that was used to make payments, it was part of Ponzi scheme, and allowing individual who received payments to keep them would have allowed him to receive more than other creditors. O'Cheskey v Hous. for Texans Charitable Trust (In re American Hous. Found.) (2012, BC ND Tex) 68 CBC2d 1135.

Bankruptcy trustee was allowed under 11 USCS § 547(b) to recover $ 200,000 payment realty company made to LLP on behalf of investor shortly before company was placed into Chapter 11 ***bankruptcy***; payment was made as partial reimbursement for $ 300,000 loan investor made to realty company, and was recoverable even though investor claimed he suffered from dementia at time he made loan and was under influence of individual who was operating Ponzi scheme. Gonzales v Saul Ewing, LLP (In re Vaughan) (2012, BC DC NM) 471 BR 263.

Trustee set forth sufficient claims for actual fraud and preferential pre-petition transfers under 11 USCS §§ 547, 548, and Idaho Code Ann. §§ 55-913(1)(a) and 55-906, where broker-dealers were alleged to have participated in Ponzi scheme, although no postpetition transfers were alleged. Zazzali v AFA Fin. Group, LLC (In re DBSI, Inc.) (2012, BC DC Del) 477 BR 504, dismd, in part (2012, BC DC Del) 2012 Bankr LEXIS 4045.

Chapter 7 trustee's allegation that company that served as clearing broker for LLP facilitated LLP's president's ability to operate Ponzi scheme was sufficient to survive broker's motion to dismiss trustee's claims that he was allowed under 11 USCS §§ 547, 548, and 550 to recover $ 10,927,500 in transfers LLP made to broker before LLP was placed into ***bankruptcy***; however, trustee did not have standing under Wagoner Rule to pursue common law claims alleging that broker aided and abetted president's fraud, committed breach of fiduciary duty and breach of contract, and was negligent, in federal court. O'Connell v Pension Fin. Servs. (In re Arbco Capital Mgmt., LLP) (2013, BC SD NY) 498 BR 32, 58 BCD 158.

In law firm's involuntary Chapter 7 ***bankruptcy***, payments from client trust fund to clients upon their request were preferential transfers subject to avoidance, since clients, as beneficiaries of trust fund, could not trace their funds as they needed to do in order to maintain their priority over debtor's other unsecured creditors; nor were payments allowed under constructive trust theory or ordinary course of business exception. Daly v Radulesco (In re Carrozzella & Richardson) (2000, BAP2 Conn) 247 BR 595, 44 CBC2d 176.

147. Property acquired by fraud

Interest in property was transferred for purposes of 11 USCS § 547(b) in transaction by which debtor paid off unauthorized loans to bank as part of check kiting scheme where property consisted of cash equivalents deposited by debtor into his main funding account at bank for application against his negative balances, and fact that much of property was created illegally does not mean that it was not "property"; funds obtained by kiting checks at other banks constitute "an interest of the debtor in property" within meaning of § 547(b) where debtor did not preserve separate identity of funds obtained from any of banks at which checks were being kited, there is no contention that any trust, actual or constructive, arose, and debtor had sufficient control over funds represented by kited checks; although credits that debtor received upon deposit of checks in his main funding account were provisional, meaning that credits were subject to being revoked if checks were dishonored by bank or banks on which they were drawn, only 2 of relevant checks were dishonored and they were replaced with cashier's checks. In re Montgomery (1993,

CA6 Tenn) 983 F2d 1389, 23 BCD 1563, CCH Bankr L Rptr P 75075 (criticized in Parks v FIA Card Servs., N.A. (In re Marshall) (2007, BC DC Kan) 372 BR 511).

Under strict tracing standard applicable to ***bankruptcy*** cases involving commingled funds, party asserting constructive trust has burden of tracing alleged trust property "specifically and directly" back to illegal transfers giving rise to trust; burden was not met by transferee who contended that payment received was not property of estate for purposes of 11 USCS § 547(b) or 548(a) because debtor/transferor corporation had misappropriated funds from nondebtor subsidiary so that funds were held in constructive trust for benefit of creditors such as transferee where transferee made no showing that funds used to pay it were wrongfully diverted funds as opposed to funds that debtor/transferror had lawfully earned as compensation or commissions. Taylor Assocs. v Diamant (In re Advent Mgmt. Corp.) (1997, CA9) 104 F3d 293, 97 CDOS 216, 97 Daily Journal DAR 329, 30 BCD 198, CCH Bankr L Rptr P 77222.

When Chapter 11 debtor obtains money by fraud and mingles it with other money so as to preclude any tracing and when defrauded party does not timely avoid transaction but accepts benefits under his contract with debtor, money is property of debtor under 11 USCS §§ 547 and 548. Merrill v Abbott (In re Indep. Clearing House Co.) (1987, DC Utah) 77 BR 843 (criticized in Lustig v Weisz & Assocs., Inc. (In re Unified Commer. Capital, Inc.) (2001, BC WD NY) 260 BR 343, 37 BCD 180) and (criticized in Daly v Deptula (In re Carrozzella & Richardson) (2002, DC Conn) 286 BR 480, 49 CBC2d 1182) and (criticized in In re Sheel (2010, BC DC Kan) 2010 Bankr LEXIS 1499) and (criticized in Janvey v Brown (2014, CA5 Tex) 767 F3d 430).

Where property acquired by fraud is nevertheless property of debtor under state law, threshold requirement of ***preference***, that property belongs to debtor, is met. In re Tinnell Traffic Services, Inc. (1984, BC MD Tenn) 41 BR 1018 (criticized in State ex rel. Flowers v Tenn. Coordinated Care Network (2005, Tenn App) 2005 Tenn App LEXIS 114).

Assuming escrow fund held by debtor's attorney was acquired by fraud, money transferred into fund was never property of estate and therefore there was no avoidable preferential transfer under 11 USCS § 547. In re A.E.F.S., Inc. (1985, BC DC Minn) 51 BR 340, CCH Bankr L Rptr P 70694.

Where debtor has misappropriated or converted property belonging to another, question as to existence of debtor-creditor relationship is dependent upon election of owner of property: If owner elects to treat loss as debt, owner becomes creditor, thereby making any return of property subject to provisions of 11 USCS § 547, whereas if owner elects to stand on his rights as owner or to rescind transaction in which breach of trust was committed, then transfer of property would not be preferential and, in order to exercise his rights as owner or settlor, person must be able to trace or identify property in hands of debtor; this exception to ***preference*** rule is based upon principle that ***preference*** may only be found to exist when debtor has interest in property transferred and if debtor has no interest, then estate would not have inherited property and would not be diminished by prepetition transfer. In re Benson (1986, BC ND Ohio) 57 BR 226.

148. Property transferred by agent

Where there exists true agency relationship, transfer by agent of agency property to principal is not voidable ***preference*** pursuant to 11 USCS § 547 because transfer is not of property of debtor-agent, but of property of principal. In re Crouthamel Potato Chip Co. (1980, BC ED Pa) 6 BR 501, 30 UCCRS 346.

Transfer by agent of property belonging to principal cannot be avoided as ***preference*** under 11 USCS § 547. In re AOV Industries, Inc. (1986, BC DC Dist Col) 64 BR 933.

Where ***bankruptcy*** debtor and trustee sought to avoid transfer of stock by subsidiary of debtor, debtor and trustee properly alleged transfer of interest of debtor in property within meaning of 11 USCS § 547(b) based on alter ego theory since, by reverse piercing of corporate veil, debtor would have equitable interest in subsidiary's property at time of transfer. Searcy v Knight (In re Am. Int'l Refinery) (2008, BC WD La) 402 BR 728, motions ruled upon (2008, BC WD La) 2008 Bankr LEXIS 4956, findings of fact/conclusions of law, motion den, in part, as moot, complaint dismd, in part (2009, BC WD La) 2009 Bankr LEXIS 5586.

In action where debtors sought avoidance of certain transfers to creditor investors as preferential payments under 11 USCS § 547(b), trial was necessary to determine whether party that acquired debtors' commercial paper acted as principal or agent; if that party acted as agent, then any transfers to retire debt were not protected from avoidance by 11 USCS § 546(e) safe harbor. Enron Creditors Recovery Corp. v J.P. Morgan Sec. (In re Enron Creditors Recovery Corp.) (2009, BC SD NY) 407 BR 17, 51 BCD 240, Certificate of appealability granted (2009, SD NY) 2009 US Dist LEXIS 98611 and revd (2009, SD NY) 422 BR 423, affd (2011, CA2 NY) 651 F3d 329, 55 BCD 12, 65 CBC2d 1833 (criticized in FTI Consulting, Inc. v Merit Mgmt. Grp., LP (2015, ND Ill) CCH Bankr L Rptr P 82875) and (Reversal noted in Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.) (2011, BC SD NY) 453 BR 201, 55 BCD 60).

Payment by ***bankruptcy*** debtors to sales broker prior to ***bankruptcy*** petitions was not shown to be avoidable as preferential transfer made on account of antecedent debt, since it was unclear whether monthly retainers were base payment by debtors or voluntary pre-payments for future services, or whether payment covered prior unpaid retainers. AFA Inv. Inc. v Trade Source, Inc. (In re AFA Inv. Inc.) (2015, BC DC Del) 538 BR 237, 61 BCD 148.

149. Rent and storage fees

Fact that Chapter 7 debtor's roommate may have contributed to rent does not preclude avoidance of payment into rent escrow account as preferential transfer under 11 USCS § 547 where it was debtor who was obligated to landlord. In re Coco (1986, BC SD NY) 67 BR 365.

Chapter 11 debtor food processor's provision of storage services to creditors who sold debtor grapes on open account constitutes transfer of interest in property for ***preference*** purposes under 11 USCS § 547 since storage charges incurred by creditors created right of debtor to be paid for services, and thus creditor's crediting of charges for services performed during ***preference*** period against prior debt was preferential transfer. Glenshaw Glass Co. v Ontario Grape Growers Mktg Bd. (In re Keystone Foods) (1992, BC WD Pa) 145 BR 502.

150. Sale of property and proceeds thereof

Chapter 11 debtor's interest in land sale contract is "property" for purposes of meeting requirement in 11 USCS § 547(b) for avoidance of preferential transfer of property of debtor, because term property in section is to be interpreted as broadly as in 11 USCS § 541, and 11 USCS § 547(e)(1)(A) expressly includes interest in land sale contracts. In re Lewis W. Shurtleff, Inc. (1985, CA9 Cal) 778 F2d 1416, 13 CBC2d 1400, CCH Bankr L Rptr P 70902 (criticized in Sierra Invs., LLC v SHC, Inc. (In re SHC, Inc.) (2005, BC DC Del) 329 BR 438, 45 BCD 98, 58 UCCRS2d 573).

11 USCS § 547 ***preference*** action involving payment of proceeds to creditor following sale of airplanes by Chapter 11 debtor, which payments ***Bankruptcy*** Court concluded were not preferential because planes did not belong to debtors, is remanded where court did not make explicit finding that debtor sold planes as creditor's agent nor did it find that debtor segregated funds pending payment to creditor. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

Wire transfers by debtor to make good bounced check are preferential under 11 USCS § 547(b), despite argument by floor plan financer that proceeds from sale of mobile homes in which floor plan financer had security interest constituted property held in trust for floor plan financer by debtor, where argument was not made at trial level, has no relevant legal authority in support of it, and overlooks fact that this is nothing more than traditional debtor-creditor relationship in which indicia of trust are not present. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

Where two months before debtor filed ***bankruptcy*** buyer received debtor's assets free and clear of all liens, paid off debtor's under secured lender, and paid rest of consideration to 10 defendant unsecured creditors, those sales proceeds, being fully encumbered, were not property of ***bankruptcy*** estate under 11 USCS § 541(d) and trustee's 11 USCS § 547(b) ***preference*** action against 10 unsecured creditors failed. Cage v Wyo-Ben, Inc. (In re Ramba Inc.) (2006, CA5 Tex) 437 F3d 457, 45 BCD 267, 55 CBC2d 900, CCH Bankr L Rptr P 80454.

Prebankruptcy foreclosure sale at which buyer purchased property 20 days before filing of Chapter 13 petition can be set aside as preferential transfer under 11 USCS § 547; when property is debtor's house and cannot be equitably divided and is necessary to debtor's performance under Chapter 13 plan, and when creditor's interest in property can be adequately protected under terms of Chapter 13 plan, entire property should be brought into estate under 11 USCS § 542. In re Fountain (1983, BC WD Mo) 32 BR 965.

Chapter 7 debtor cannot use 11 USCS § 547(b)(2) to escape trustee's recovery of debtor's transfer of interest in home to debtor's children on theory that debtor's use of proceeds of sale of stock, allegedly held in constructive trust for children, to make house payments gave children present interest in property, thus making transfer of debtor's interest in property not one for antecedent debt, because (1) constructive trusts do not automatically take trust property out of debtor's estate, (2) state law only imposes constructive trusts in cases of fraud, and no allegation of fraud has been made by debtor's children, nor could it be, given debtor's testimony that transfer was "gift." In re Uhlmeyer (1986, BC DC Ariz) 67 BR 977, CCH Bankr L Rptr P 71596.

Sale of property is preferential transfer under 11 USCS § 547(b) where purchasers, in receiving land worth approximately $ 100,000 for $ 100,000 debt, received more than they would have under Chapter 7 liquidation. In re Brown Family Farms, Inc. (1987, BC ND Ohio) 80 BR 404.

Payment of $ 17,839 to creditor from proceeds of sale of collateral does not constitute voidable ***preference*** under 11 USCS § 547, where such transfer was made after debtor and creditor had effectively terminated executory contract for sale of cattle to debtor by creditor accepting return of cattle, since after termination of contract debtor had no interest in cattle or proceeds from sale of cattle, notwithstanding fact that payment satisfies each and every ***preference*** element. In re Wegner (1988, BC DC Mont) 83 BR 750.

Where Chapter 11 debtor in possession acquired property interest in building by land sale contract from person who himself held property as lessee under sale/leaseback agreement, there was no voidable ***preference*** under 11 USCS § 547 since, because no one could obtain legal title to property from debtor, there could be no bona fide purchaser so as to invoke 11 USCS § 547(e)(1)(A) which considers transfer "perfected" (so that transfer takes place under 11 USCS § 547(e)(2)(A)) when bona fide purchaser of property from debtor cannot acquire interest superior to interest of transferee in property; accordingly, recordation of mortgage given by debtor to aforementioned person was not avoidable ***preference***; since debtor acquired rights in property when it moved into building as vendee and no bona fide purchaser could, under state law, subsequently have obtained property interest superior to that of aforementioned person, transfer was made for purposes of § 547(e)(2)(A) more than ***90 days*** prepetition and could not be avoided as preferential. Health Science Prods. v Taylor (In re Health Science Prods.) (1995, BC ND Ala) 183 BR 903.

Chapter 7 debtor/restaurant had no legal or equitable interest in $ 50,000 ***payment*** made to debtor's lessor by third party which had purchased all of debtor's assets where ***payment*** was for assets purchased from lessor rather than being connected with purchase of debtor's assets so that payment was not avoidable as ***preference***; likewise personal property tax payments made by third party did not constitute ***preference*** since third party became responsible for taxes upon purchasing debtor's assets and taxes were no longer obligation of debtor. Crews v Shopping Ctr. Equities (In re Sneakers Sports Grill, Inc.) (1999, BC MD Fla) 228 BR 795, 33 BCD 937, 12 FLW Fed B 124.

Where directors of corporate ***bankruptcy*** debtor entered into agreement, on behalf of separate corporation, with undersecured creditor of debtor whereby separate corporation received portion of proceeds from sale of creditor's collateral, transfer of collateral was not ***preference*** since transfer did not involve property of debtor and did not deplete debtor's estate. Rafool v Goldfarb Corp. (In re Fleming Packaging Corp.) (2005, BC CD Ill) 2005 Bankr LEXIS 1740, adversary proceeding, motion den, findings of fact/conclusions of law (2006, BC CD Ill) 336 BR 398, motion to strike gr, in part, motion to strike den, in part, request den (2006, BC CD Ill) 351 BR 626 and (criticized in OHC Liquidation Trust v Credit Suisse First Boston (In re Oakwood Homes Corp.) (2006, BC DC Del) 340 BR 510).

Trustee was entitled to recover $ 70,863 from mortgagee as preferential transfer under 11 USCS § 547 where: (1) under Florida law, debtor had, at all relevant times up to time of sale, one-half interest in property, (2) considering totality of circumstances of transaction and uncontroverted testimony of debtor, intent of parties was that mortgage

should be limited to $ 100,000, and (3) it was clear that overall equities did not support granting mortgagee lien on proceeds of sale in excess of $ 100,000. Woodard v Synovus Bank of Tampa Bay (In re Alford) (2009, BC MD Fla) 21 FLW Fed B 665, judgment entered, costs/fees proceeding (2009, BC MD Fla) 403 BR 123, 21 FLW Fed B 665.

Funds unsecured creditor received from debtor's sale of property were not otherwise exempt under Tex. Prop. Code Ann. § 41.001(c) because there was never sale of debtor's homestead; debtor and his spouse never ceased living on homesteaded tract nor ever ceased claiming their home and surrounding 1.718 acres as their rural homestead. Moser v Bank of Tyler (In re Loggins) (2014, BC ED Tex) 513 BR 682.

Unpublished Opinions

Unpublished: Transfers to U.S. Post Office's agent for stamp sales were preferential and avoidable under 11 USCS § 547(b), where debtor grocery chain did not segregate stamp funds and did not hold stamps as consignee of Postal Service. Gonzales v Amplex Corp. (In re Furr's Supermarkets, Inc.) (2007, BAP10) 2007 Bankr LEXIS 4277.

Unpublished: At first blush, it was tempting to conclude that payment by company to creditors could not be avoided as preferential transfer in debtor's ***bankruptcy*** case because it was transfer of company's property, not debtor's property; however, company did not owe anything to creditors and hence, any payment from company to creditors was not made on account of its own obligation; rather, creditors seized sale proceeds because debtor and others owed them money. Gray v Assali (In re McGrath) (2008, BC ED Cal) 2008 Bankr LEXIS 984.

151. Sole proprietorship interests

Auto dealer was not partnership but sole proprietorship, and, as sole proprietorship, it was not separate legal entity and its inventory belonged to debtor as property of his estate, under 11 USCS § 541; thus, vehicles titled in name of dealer were assets of debtor's estate and subject to trustee's avoidance powers pursuant to § 547(b). Schlarman v Johns (In re Lewis) (2011, BC ED Ky) 461 BR 414 (Overruled as stated in In re Sires (2014, BC SD Ga) 511 BR 719, 71 CBC2d 1824).

152. Stocks and shares

Transfer of amount of excess value of stock pledged by minority shareholder to guaranty Chapter 11 debtor corporation's loan from bank occurring when stockholder liquidated collateral to pay off debtor's loans was not fraudulent under 11 USCS § 547 where stock did not belong to debtor, but was merely pledged to guaranty loans. In re N & D Properties, Inc. (1986, CA11 Ga) 799 F2d 726, 15 BCD 254, 15 CBC2d 726 (criticized in Riley v Tencara, LLC (In re Wolverine, Proctor & Schwartz, LLC) (2011, BC DC Mass) 447 BR 1) and (criticized in Gernsbacher v Campbell (In re Equip. Equity Holdings, Inc.) (2013, BC ND Tex) 2013 Bankr LEXIS 1266) and (criticized in Gernsbacher v Campbell (In re Equip. Equity Holdings, Inc.) (2013, BC ND Tex) 491 BR 792) and (criticized in, questioned in Duke and King Mo., LLC v Nath Cos., (In re Duke and King Acquisition Corp.) (2014, BC DC Minn) 508 BR 107).

Chapter 7 trustee failed to alleged sufficient facts to support his contention that the funds flowing through the immediate transferee, in which the debtors' principals were shareholders, originated with the debtors where there was no factual basis for the assertion that the debtors transferred their funds into bank accounts operated by the debtors' principals, and the list of the transferees, amounts, and dates of each transfer failed to indicate what entity initiated each transfer. Angell v BER Care, Inc. (In re Caremerica, Inc.) (2009, BC ED NC) 409 BR 737, 51 BCD 249 (criticized in TOUSA Homes, Inc. v Palm Beach Newspapers, Inc. (In re TOUSA, Inc.) (2010, BC SD Fla) 442 BR 852) and (criticized in Ransel v GE Commer. Distrib. Fin. Corp. (In re Pilgrim Int'l Inc.) (2011, BC ND Ind) 2011 Bankr LEXIS 3182) and partial summary judgment den, as moot, summary judgment gr (2013, BC ED NC) 2013 Bankr LEXIS 1791 and (criticized in Howell v Fulford (In re Southern Home & Ranch Supply, Inc.) (2013, BC ND Ga) 2013 Bankr LEXIS 5535).

153. Subsidiary and parent corporation interests

Transfers by Chapter 11 debtor to related entity, which transferred funds to its parent-entity, which, in turn, transferred funds back to debtor in order to avoid millage taxes are not avoidable preferential transfers under 11 USCS § 547 where even if transactions could be classified as transfers, they are not transfers of interest of debtor in property as required by § 547 because debtor lost no interest in property in these transactions as it received back from parent-entity exactly what it paid out to related entity. Morse Operations, Inc. v Goodway Graphics of Va., Inc. (In re Lease-A-Fleet, Inc.) (1993, BC ED Pa) 155 BR 666 (criticized in Dahar v Jackson (In re Jackson) (2004, BC DC NH) 2004 BNH 26, 318 BR 5) and (criticized in Holber v Dolchin Slotkin & Todd, P.C. (In re Am. Rehab & Physical Therapy, Inc.) (2006, BC ED Pa) 2006 Bankr LEXIS 1440).

154. Tax payments and withheld funds

As moving party, trustee has burden of proving each element of 11 USCS § 547(b) preferential transfer and where trustee, in present case, presented affidavit that funds seized prepetition to pay FICA and employee withholding taxes were in commercial business account that did not contain any trust assets, burden shifted to government to establish issue of fact as to whether these funds could properly be characterized as trust assets; government failed to meet its burden where, in opposing memorandum, it merely alleged, with no specific facts, that account contained trust funds and it did not allege that account contained commingled assets or that tracing could establish that trust assets were seized, and it made no effort to rebut trustee's claim that seizure was made on general business account. United States v Daniel (In re R & T Roofing Structures & Commercial Framing) (1989, CA9 Nev) 887 F2d 981, 19 BCD 1546, CCH Bankr L Rptr P 73089, 89-2 USTC P 9607, 64 AFTR 2d 5835.

Funds used for timely payment of taxes need not be held in separate trust funds in order to avoid treatment as ***preference*** under 11 USCS § 547(b) since Congress by enactment of 11 USCS § 547(c) has not imposed any tracing requirements for tax payments that are made when no tax is due; in such cases, it appears that mere fact of timely payment would suffice to preclude recovery by trustee. Drabkin v District of Columbia (1987, App DC) 263 US App DC 122, 824 F2d 1102, 16 BCD 515, 17 CBC2d 945, CCH Bankr L Rptr P 71915.

When prepetition payment of taxes occurs after 45-day period specified in 11 USCS § 547(c)(2), it qualifies as voidable ***preference*** unless funds used are traceable to trust created, statutorily or otherwise, for such payment. Drabkin v District of Columbia (1987, App DC) 263 US App DC 122, 824 F2d 1102, 16 BCD 515, 17 CBC2d 945, CCH Bankr L Rptr P 71915.

Tax amounts paid by debtor prior to filing of ***bankruptcy*** petition which had been withheld from employees and deposited in debtor's general checking account do not constitute preferential transfers since there was no transfer of property of debtor where designation by debtor of payments as "taxes due" along with delivery to government protected funds just as if taxes had been set aside as separate fund. In re Razorback Ready-Mix Concrete Co. (1984, BC ED Ark) 45 BR 917, 12 BCD 356, 12 CBC2d 221.

Trustee cannot use 11 USCS § 547 to recover as ***preference*** debtor's payments of withholding taxes, even though debtor did not hold monies in special fund as required by 26 USCS § 7501(a), but instead paid out of commingled general account, because actual payment of taxes effects special fund and thus monies were not property of estate, but held in trust for government. In re Razorback Ready-Mix Concrete Co. (1984, BC ED Ark) 45 BR 917, 12 BCD 356, 12 CBC2d 221.

In adversarial proceeding brought by Chapter 7 trustee under 11 USCS § 547 to recover alleged preferential transfer to commonwealth for tax liabilities, state law provisions that sales and use taxes constitute trust fund do not exempt funds from property of debtor's estate, where parties stipulate that preferential payment was made from debtor's general funds and not from segregated funds. In re Rimmer Corp. (1987, BC ED Pa) 80 BR 337.

Taxes which are timely paid from any account of Chapter 11 debtor, including general account, can be exempted from property of debtor's estate, as res of tax trust and therefore cannot be avoided by trustee as ***preference*** under 11 USCS § 547(b). Baehr v IRS Ctr. (In re E & S Comfort) (1988, BC ED Pa) 92 BR 616, 89-1 USTC P 9120, 62 AFTR 2d 5909.

Chapter 11 debtor's limited and isolated additional deposits to and payments from account used to pay taxes for nontax expenses are not sufficient to poison fund's status as legitimate tax trust account for purposes of denying trustee's ***preference*** avoidance action under 11 USCS § 547(b) since account is not property of estate. Baehr v IRS Ctr. (In re E & S Comfort) (1988, BC ED Pa) 92 BR 616, 89-1 USTC P 9120, 62 AFTR 2d 5909.

Despite fact that Chapter 11 trustee could have convinced court with testimonial evidence and statutory authority that debtor's improprieties in paying taxing authorities with general account funds destroyed any potential of "tax trust" status of funds, therefore allowing trustee to avoid payments out of such fund as preferential under 11 USCS § 547(b), court will not look behind debtor's remittances to taxing authorities to find improprieties which destroy trust status unless such improprieties are manifested in record. Baehr v IRS Ctr. (In re E & S Comfort) (1988, BC ED Pa) 92 BR 616, 89-1 USTC P 9120, 62 AFTR 2d 5909.

Taxing authority is required to establish 3 separate elements to show that funds transferred from debtor's nonsegregated account, and therefore presumably debtor's property, were not debtor's property for purposes of 11 USCS § 547(b): (1) that debtor collected or withheld taxes thus creating trust in amount of those taxes collected or withheld; (2) that debtor made voluntary payment to taxing authority from its unencumbered assets; and (3) that reasonable nexus exists between these first and second steps--there is rebuttable presumption that reasonable nexus exists if debtor made voluntary payment; in present case, where debtor had aggregate negative balance in accounts into which sales tax funds were deposited and from which sales tax payments were made, no connection exists between sales tax collected and deposited in accounts prior to date of negative balance and subsequent voluntary payment of taxes to state taxing authorities because those tax collections appear to have been disbursed by date of negative balance, and, therefore, whatever sales tax debtor collected and deposited into account prior to negative balance date were debtor's property, except for monies actually present in debtor's separate accounts, and transfer is avoidable, but funds deposited into accounts after negative balance date and paid to state taxing authority were not debtor's but property of trust in favor of state, and, therefore, payments made to taxing authority after negative balance date are not recoverable as ***preferences***. In re Wendy's Food Systems, Inc. (1991, BC SD Ohio) 133 BR 917, 26 CBC2d 621 (criticized in Suwannee Swifty Stores, Inc. v Ga. Lottery Corp. (In re Suwannee Swifty Stores) (2001, BC MD Ga) 266 BR 544).

Placing of tax lien on Chapter 11 debtor's accounts receivable does not constitute avoidable ***preference*** under 11 USCS § 547 because although lien came into existence within ***90 days*** preceding ***bankruptcy***, trust fund taxes such as withholding and sales taxes at issue here which are withheld or collected postpetition do not constitute property of estate and thus cannot be subject of ***preference***. Front Office Assoc., Inc. v Clark (1992, BC DC RI) 142 BR 24, CCH Bankr L Rptr P 74714.

Chapter 11 debtor had property interest required for tax ***payments*** to be recoverable ***preference*** under 11 USCS § 547(b) in its matching share of social security taxes but not in income and social security tax withholdings that were trust fund taxes. Pullman Constr. Indus. v United States (In re Pullman Constr. Indus.) (1995, BC ND Ill) 186 BR 88, 76 AFTR 2d 6935, 95 TNT 209-21, amd, request den (1996, BC ND Ill) 190 BR 618, subsequent app (1997, ND Ill) 210 BR 302, 97-2 USTC P 50652, 79 AFTR 2d 3172.

Where Chapter 11 debtor sought to avoid, pursuant to 11 USCS § 547(b), payment to employee from salary deferral account, including amount paid to federal government as tax withholding, transfer of withheld funds was transfer of interest of debtor in property as matter of law because it was transfer to statutory trust, not transfer from statutory trust to federal government. Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 351 BR 305, 47 BCD 15.

Where Chapter 11 debtor sought to avoid pursuant to 11 USCS § 547(b) payment to employee from salary deferral account, including amount paid to federal government as tax withholding, transfer of withheld funds was transfer for benefit of employee as matter of law, within meaning of § 547(b)(1), because transfer was made in name of employee and federal withholdings constituted putative credit that could be applied to employee's tax liabilities or claimed if credit exceeded any such liabilities. Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 351 BR 305, 47 BCD 15.

In preferential transfer action under 11 USCS § 547 with respect to debtor's late payment of compensating use tax under Ark. Code Ann. § 26-53-123, trustee was denied summary judgment because fact that § 26-53-123 did not contain specific trust language was not determinative of issue of whether there had been transfer of interest in property of debtor, within meaning of 11 USCS § 547(b). Scully v State of Ark. Dep't of Fin. & Admin. (In re Valley Food Serv., LLC) (2008, BC WD Mo) 389 BR 685.

In preferential transfer action under 11 USCS § 547 with respect to debtor's late payment of soft drink tax under Ark. Code Ann. § 26-57-904, trustee was granted summary judgment because there was nothing in § 26-57-904 that provided any basis for recognition of express trust or imposition of constructive trust on funds debtor used to make soft drink tax payment. Scully v State of Ark. Dep't of Fin. & Admin. (In re Valley Food Serv., LLC) (2008, BC WD Mo) 389 BR 685.

In action by Chapter 7 trustee under 11 USCS § 547(b) to avoid transfer and recover certain funds levied upon by Illinois Department of Revenue, summary judgment in favor of state was precluded, as state failed to prove required nexus between funds it levied and taxes actually withheld by debtor and allegedly held in trust under 35 ILCS 5/705; further, state failed to show whether proper demand was made upon debtor under 35 ILCS 5/1109, which was also fact material to determination of whether debtor's rights in levied funds were extinguished by inaction. Eggman v Ill. Dept. of Rev. (In re PJM Enters. of Marion, Inc.) (2011, BC SD Ill) 54 BCD 64.

Unpublished Opinions

Unpublished: Chapter 7 trustee's adversary complaint against township per 11 USCS § 547 relating to funds handled by debtor, township's payroll contractor, survived motion to dismiss or for summary judgment because township did not establish conclusively that funds held by contractor were 26 USCS § 7501 trust funds that were excluded from property of debtor's estate under 11 USCS § 541. Forman v Florence Twp. (In re Ameripay, LLC) (2012, BC DC NJ) 2012 Bankr LEXIS 370.

155. --*Payments* to Internal Revenue Service

With respect to commercial airline's ***payments*** from its general accounts to IRS of certain Federal "trust-fund taxes", airline's ***payments*** for ***90 days*** prior to airline's filing of ***bankruptcy*** petition cannot be avoided by trustee under 11 USCS § 547(b) (later amended) as preferential transfers, because ***payments*** were not transfers of property of debtor within meaning of § 547(b), but were instead transfers of property held in trust for IRS. Begier v IRS (1990) 496 US 53, 110 S Ct 2258, 110 L Ed 2d 46, 20 BCD 940, 22 CBC2d 1080, CCH Bankr L Rptr P 73403, 90-1 USTC P 50294, 65 AFTR 2d 1095 (criticized in Official Comm. of Unsecured Creditors v Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.) (2010, BC DC Del) 432 BR 135, 53 BCD 94).

Payments of nonsegregated funds to Internal Revenue Service by debtor prepetition in satisfaction of debtor's tax withholding obligations are special fund in trust for government and not recoverable as preferential transfers of debtor's property under 11 USCS § 547; funds held in trust do not constitute property of debtor and therefore are not recoverable. Begier v United States IRS (1989, CA3 Pa) 878 F2d 762, 19 BCD 955, 21 CBC2d 358, CCH Bankr L Rptr P 73032A, 89-2 USTC P 9416, 64 AFTR 2d 5260, affd (1990) 496 US 53, 110 S Ct 2258, 110 L Ed 2d 46, 20 BCD 940, 22 CBC2d 1080, CCH Bankr L Rptr P 73403, 90-1 USTC P 50294, 65 AFTR 2d 1095 (criticized in Official Comm. of Unsecured Creditors v Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.) (2010, BC DC Del) 432 BR 135, 53 BCD 94).

Property held in trust is not property of estate under 11 USCS § 541(b) and therefore not subject to voidable ***preference*** rule of 11 USCS § 547(b); withheld FICA and employee taxes are impressed with statutory trust and should be excluded from ***bankruptcy*** estate. United States v Daniel (In re R & T Roofing Structures & Commercial Framing) (1989, CA9 Nev) 887 F2d 981, 19 BCD 1546, CCH Bankr L Rptr P 73089, 89-2 USTC P 9607, 64 AFTR 2d 5835.

Government may only assert that funds used or seized to pay FICA and employee withholding taxes were held in trust, for purposes of 11 USCS §§ 541 and 547, if prepetition payments or seizures pursuant to levy occur more than 45 days after due date of tax payment; as part of trust analysis, government is required to trace Chapter 7

debtor's assets to unpaid taxes. United States v Daniel (In re R & T Roofing Structures & Commercial Framing) (1989, CA9 Nev) 887 F2d 981, 19 BCD 1546, CCH Bankr L Rptr P 73089, 89-2 USTC P 9607, 64 AFTR 2d 5835.

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Payment by ***bankruptcy*** debtor to IRS which represented amounts withheld from paychecks of employees of client of debtor's payroll service for taxes was not avoidable as preferential transfer, since by statute debtor held funds in trust for IRS and thus transfer of funds did not constitute transfer of interest of debtor in property subject to avoidance as preferential transfer. Slobodian v United States IRS (In re Net Pay Solutions, Inc.) (2016, CA3 Pa) 822 F3d 144, 62 BCD 157, 2016-1 USTC P 50277, 117 AFTR 2d 1492.

Voluntary prepetition payment of trust fund taxes to IRS is not avoidable ***preference*** under 11 USCS § 547, and IRS need not demonstrate tracing to show that debtor actually had collected trust fund taxes if monies were paid in satisfaction of trust fund tax debt because whether monies paid had been commingled with trust fund monies or whether these monies were not trust fund taxes would not matter; however, IRS must establish connection between assets sought to be recovered and trust, and in this case, if debtor requested that monies be applied to trust fund debts, then payments cannot be recovered because court could reasonably assume that voluntary payments satisfy nexus requirement, but if funds were not designated for payment of trust fund taxes, then there is issue of fact as to nexus between funds sought and trust. United States v O'Rourke (In re L & S Concrete Servs.) (1991, ED Wash) 129 BR 208, 91-1 USTC P 50241, 71A AFTR 2d 3831.

Where creditor, that provided staffing and other services for debtor, received payment from debtor immediately prior to debtor's ***bankruptcy*** filing for services that it had previously rendered, that portion of payment that represented withholding taxes paid on behalf of debtor were not funds withheld in trust for IRS; thus, funds were not within scope of 26 USCS § 7501(a), but instead constituted preferential transfer of "interest of debtor." Authentic Fitness Corp. v Dobbs Temp. Help Servs., Inc. (In re Warnaco Group, Inc.) (2006, SD NY) 97 AFTR 2d 958.

IRS can allocate Chapter debtor's withholding and excise tax payments between those received from trust fund and those received from Chapter 11 debtor's general account however it wishes and thus eliminate prospect of avoidance of any additional preferential transfers under 11 USCS § 547. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Transfers made by Chapter 11 debtor to IRS from trust fund established specifically to pay withholding and excise taxes are not property of estate, and thus may not be avoided by trustee as preferential transfers under 11 USCS § 547(b); where tax fund is actually established by debtor and taxing authority is able to trace funds segregated by debtor in trust account established for purpose of paying taxes in question, such funds are not property of debtor's estate and thus exempt from characterization as preferential transfers. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Payments made by debtor to IRS for taxes were from property of debtor where there is no evidence that debtor actually withheld taxes for benefit of U.S., much less that funds actually paid to IRS can be traced as withheld taxes; rather, evidence shows that payments were made with debtor's general revenues, and therefore transfer may be avoided as ***preference*** under 11 USCS § 547 where all other elements of § 547(b) have been met. In re Malmart Mortg. Co. (1989, BC DC Mass) 109 BR 1.

Debtor's ***payment*** to IRS of employee withholding taxes may not be avoided as preferential under 11 USCS § 547 where debtor collected and held money as trust-fund taxes for IRS under 26 USCS § 7501, debtor made ***payment*** from its general operating accounts within ***90 days*** of filing, and in intervening period between collection and ***payment*** of trust-fund taxes debtor had virtually no funds in any of its bank accounts because where there has been voluntary prepetition ***payment*** made to IRS, designating ***payment*** as trust-fund taxes, such ***payment*** will be conclusively presumed to be from corpus of trust created under § 7501; debtor's act of voluntary ***payment*** which is

designated as trust-fund taxes conclusively establishes requisite nexus between creation of trust and actual dollars remitted to taxing authority such that funds are not property of estate, regardless of source of payment and regardless of any intervening balance in debtor's aggregate operating accounts; where there has been no voluntary payment, taxing authority is still required to establish some sort of nexus through use of traditional trust-fund tracing rules, such as "lowest intervening balance" rule. Wasden v Florida Dep't of Revenue (In re Wellington Foods) (1994, BC SD Ga) 165 BR 719, CCH Bankr L Rptr P 75816, CCH Bankr L Rptr P 75917, 94-2 USTC P 50307, 73 AFTR 2d 1664, 94 TNT 71-15.

Voluntary prepetition payment of trust fund taxes out of debtor's assets is not transfer of debtor's property for purposes of avoiding ***preference*** under 11 USCS § 547(b) and secured creditor's sale of collateral cannot give rise to claim of ***preference***; prepetition payment to IRS in satisfaction of Chapter 7 debtor's unpaid employment taxes was "voluntary" so as not to be transfer of debtor's property for ***preference*** avoidance purposes where proceeds of sale of collateral were transferred to IRS by secured creditor in exchange for release of federal tax liens against collateral sold to third party and no distraint, levy, or other legal proceeding was involved. Hoffman v United States, IRS (In re Jones & Lamson Waterbury Farrel Corp.) (1997, BC DC Conn) 208 BR 788, CCH Bankr L Rptr P 77322, 97-2 USTC P 50837, 79 AFTR 2d 1268.

Where former employee withheld sum transferred to him from his employer for income tax purposes in statutory trust for benefit of IRS, court rejected argument of administratrix of former employee's estate that transfer was not, as matter of law, "transfer of interest of debtor in property" under 11 USCS § 547. Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124.

In ***preference*** action under 11 USCS § 547, where debtor would deposit all of its clients' money into single fund, with occasional payments to IRS to satisfy or partially satisfy clients' outstanding tax obligations, debtor's payments to IRS were made for benefit of creditor and were made on account of antecedent debt owed by debtor. Wolff v United States (In re Firstpay, Inc.) (2008, BC DC Md) 101 AFTR 2d 1148.

156. Wages

For purposes of 11 USCS § 547(b), transfer of wages occurs when employee acquires rights in his wages, which occurs only when employee services are performed. In re Hughson (1987, BC WD Va) 74 BR 438.

157. Other particular property held in trust

Chapter 7 debtor technical school's deposits into trust fund account for federal student assistance programs as restitution for previous diversion of trust funds effectively became trust funds upon their deposit and were no longer property of estate for purposes of determining avoidability of transfer of funds in account to department of education pursuant to 11 USCS § 547, and because once debtor deposited funds into trust account, restored funds became trust funds, and they were no longer subject to tracing requirement; mere fact that funds transferred were reconstituted trust funds is not sufficient basis for finding transfer of funds in account to department of education preferential; however, original transfers of funds into account to restore diverted funds constitute preferential transfers to extent of deposits made within 90 days of ***bankruptcy*** because money paid into was property that could have been used to satisfy claims of debtor's other creditors, and therefore was property of estate, deposits were for benefit of department, and deposit was on account of antecedent debt arising from debtor's wrongful dissipation of trust funds, and therefore, portion of transfer of funds to department of education that had themselves been transferred to fund prior to commencement of ***preference*** period is not avoidable, but portion of transfer consisting of funds transferred into account during ***preference*** period is avoidable. In re California Trade Technical Schools, Inc. (1991, CA9 Cal) 923 F2d 641, 24 CBC2d 813, CCH Bankr L Rptr P 73784.

Property of debtor, for purposes of 11 USCS § 547, may be said to be that which would have been property of ***bankruptcy*** estate had transfer not taken place; something held in trust by debtor for another is neither property of ***bankruptcy*** estate under 11 USCS § 541 nor property of debtor for purposes of 11 USCS § 547(b). Mitsui Mfrs. Bank v Unicom Computer Corp. (In re Unicom Computer Corp.) (1994, CA9) 13 F3d 321, 94 CDOS 141, 94 Daily Journal DAR 244, 25 BCD 152, 30 CBC2d 655, CCH Bankr L Rptr P 75708.

Pursuant to terms of mortgage servicing contract, neither debtor nor bank with whom it contracted owned underlying mortgages and debtor, while having legal title to mortgage payments, net escrows, outstanding receivables and unearned fees, held those funds for benefit of those to whom money was owed and therefore had no equitable interest in funds transferred, so that transfer could not be avoided as ***preference*** or fraudulent conveyance. Jenkins v Chase Home Mortg. Corp. (In re Maple Mortg.) (1996, CA5 Tex) 81 F3d 592, 28 BCD 1276, CCH Bankr L Rptr P 76950.

Perfection by produce supplier of its interest in Perishable Agricultural Commodities Act trust under 7 USCS § 449(e)(c) is not ***preference*** subject to avoidance under 11 USCS § 547, because inventory and proceeds derived therefrom were impressed with trust upon delivery to debtor, and therefore, no transfer of beneficial interest took place. In re Fresh Approach, Inc. (1985, BC ND Tex) 51 BR 412, 13 BCD 478.

Chapter 7 Trustee can avoid payments made by debtor law firm to creditor who deposited funds with law firm pursuant to 11 USCS § 547(b) despite contention debtor did not have interest in transfers where creditor manifested no intention to create express trust when funds were placed with debtor, creditor failed to present facts with regard to tracing funds so as to warrant imposition of constructive trust, parties had banking relationship, and funds were deposited not for legal representation but to earn very good interest rate. Daly v Biafore (In re Carrozzella & Richardson) (1999, BC DC Conn) 237 BR 536, 34 BCD 1105, CCH Bankr L Rptr P 77989.

Chapter 7 Trustee failed to establish by preponderance of evidence that transfers consisted of interest of debtor in property as required by 11 USCS § 547(b) and transfers cannot form basis for ***preference*** avoidance where clients deposited funds from judicial award with debtor law firm, clients manifested intention to deposit funds into trust account, funds were subject of legal services on clients' behalf, it would be reasonable for clients to expect debtor to hold funds in trust, attorney sought to create impression funds were in trust and, even though funds were improperly commingled with other funds, it is unnecessary for clients to trace deposited since transfers made by debtor to clients effectively traced funds. Daly v Biafore (In re Carrozzella & Richardson) (1999, BC DC Conn) 237 BR 536, 34 BCD 1105, CCH Bankr L Rptr P 77989.

Allegedly preferential transfers by Chapter 7 debtor to its sole shareholder's mother and to a creditor were not property of estate or property in which debtor had interest for purposes of 11 USCS § 547(b) since sums in question had been paid to debtor in connection with improvement of various parcels of realty on which it was contractor so that sums were trust funds under New York state law; lien law trust beneficiaries might pursue transferees to enforce trust. Heilbronner v Nicosia (In re Valerino Constr., Inc.) (2000, BC WD NY) 250 BR 39, 36 BCD 88.

Where debtor, days prior to filing ***bankruptcy***, put money in trust with bank as trustee and directed bank to make payments to key employees, payments by bank to employees were transfers of interest of debtor in property for benefit of employees. Official Empl.-Related Issues Comm Of Enron Corp. v Arnold (In re Enron Corp.) (2004, BC SD Tex) 318 BR 655, 44 BCD 30, 53 CBC2d 999.

Although debtors, cruise ship operators, were potential trustees as "activity desk" under Haw. Rev. Stat. § 468M-1, intended beneficiaries of any trust were consumers who paid fees to debtors and not activity providers; thus, providers were not entitled to summary judgment in avoidance actions of debtor's plan administrator under 11 USCS § 547 because trust never came into existence under Haw. Rev. Stat. § 468M-9(b) where debtors paid alternative performance bond, as permitted under Haw. Rev. Stat. § 468M-10(b) as alternative to very creation of any trust; thus, fees paid by debtors to providers were not trust funds but became estate funds. American Classic Voyages, Co. v Kanoa, Inc. (In re Am. Classic Voyages, Co.) (2005, BC DC Del) 328 BR 686, 45 BCD 18.

Because New York lien law required that funds received by general contractor for improvement of real property be held in trust for benefit of subcontractors, transfers that debtors made to subcontractor and lessor of equipment were paid out of this trust; accordingly, these transfers could not be avoided under 11 USCS § 547(b) because payments did not constitute interest of debtors in property. IT Group, Inc. v Anderson Equip. Co. (In re IT Group, Inc.) (2005, BC DC Del) 332 BR 673, 45 BCD 191, 55 CBC2d 359.

Payments made to IRS by debtor, payroll services company engaged in Ponzi-like scheme, were not "property of debtor" for purposes of 11 USCS § 547(b) because, while nothing in applicable documents expressly mentioned

that debtor was to hold withdrawn client funds in trust, intention to create trust as to funds was irrefutable. Wolff v United States (In re Firstpay, Inc.) (2012, BC DC Md) 110 AFTR 2d 5815, affd (2014, CA4 Md) 773 F3d 583, 60 BCD 107, 72 CBC2d 1264, CCH Bankr L Rptr P 82744, 2015-1 USTC P 50101, 114 AFTR 2d 6914, cert den (2015, US) 135 S Ct 2890, 192 L Ed 2d 948 and (criticized in Slobodian v United States (2015, MD Pa) 533 BR 126, CCH Bankr L Rptr P 82843, 115 AFTR 2d 2302).

Certain payments made by Chapter 11 debtor, authorized seller of Tennessee lottery tickets, to operator of lottery were not preferential payments under 11 USCS § 547(b) because parties' contract created trust in proceeds from lottery ticket sales, and payments were made from debtor's lottery trust account. Appalachian Oil Co. v Tenn. Educ. Lottery Corp. (In re Appalachian Oil Co.) (2012, BC ED Tenn) 471 BR 199.

Bankruptcy debtor's pre-petition transfer of real property to parent was not avoidable as preferential transfer of interest of debtor in property under 11 USCS § 547(b), since debtor held title to property only as trustee of express oral trust for benefit of parent who paid all amounts to purchase and maintain property which parent occupied continuously as parent's residence. Burden v Richardson (In re Richardson) (2013, BC ED Ky) 69 CBC2d 1265.

Unpublished Opinions

Unpublished: Agreement between Chapter 7 debtor and creditor created express trust where creditor transferred funds into funding account for payment by debtor, as creditor's agent, of creditor's freight charges; money in funding account, including money deposited into account by debtor to repay misappropriated funds, therefore was not property of ***bankruptcy*** estate under 11 USCS § 541, and payment to creditor from funding account was not voidable ***preference*** under 11 USCS § 547(b). Flint Ink Corp. v Calascibetta (2007, DC NJ) 2007 US Dist LEXIS 66615.

158. Miscellaneous

Taking of mortgage by bank was for antecedent debt where record indicates that bank permitted overdrafts, but considered and approved mortgage only when bank examiners' investigation made it necessary to cover overdraft position, despite fact that mortgage had been negotiated and agreed upon, but not yet issued, when overdrafts were permitted. In re Meredosia Harbor & Fleeting Service, Inc. (1976, CA7 Ill) 545 F2d 583, cert den (1977) 430 US 967, 52 L Ed 2d 359, 97 S Ct 1649.

Chapter 7 debtor seller's return of machine purchaser's down payment was transfer of interest of debtor in property as required under 11 USCS § 547 where payment was not mere collateral or deposit but, rather, was purchaser's first payment for machines, and accordingly payment was not purchaser's property held in trust by debtor, but debtor's property which it was entitled--and expected--to deposit into its own bank account, and once debtor deposited payment check into its account, commingling it with its other funds, debtor had right to withdraw, transfer, or otherwise use payment funds in any way it wanted. Sigmon v Royal Cake Co. (In re Cybermech, Inc.) (1994, CA4 Va) 13 F3d 818, 6 Fourth Cir & Dist Col Bankr Ct Rep 301, 25 BCD 230, 30 CBC2d 696, CCH Bankr L Rptr P 75653.

When insider guarantor has bona fide basis to waive his indemnification rights against debtor in ***bankruptcy*** and takes no subsequent actions that would negate economic impact of that waiver, he is absolved of any ***preference*** liability to which he might otherwise have been subjected. Stahl v Simon (In re Adamson Apparel, Inc.) (2015, CA9 Cal) 785 F3d 1285, 61 BCD 2, CCH Bankr L Rptr P 82821.

Insider guarantor who personally guaranteed corporate debtor's loan was not subject to ***preference*** liability because he fully waived his right of indemnification against debtor and took no actions that would have negated waiver's economic impact; waiver was not sham given, inter alia, that insider paid debt without filing claim against estate and had no unilateral right to purchase note. Stahl v Simon (In re Adamson Apparel, Inc.) (2015, CA9 Cal) 785 F3d 1285, 61 BCD 2, CCH Bankr L Rptr P 82821.

Prepetition agreement by Chapter 7 debtor to reimburse county for interim general assistance while her claim for supplemental security income was pending, including authorization for reimbursement which transferred her right to

payment of benefits to county, is within concept of property under 11 USCS § 547. In re Trejo (1984, BC ED Cal) 44 BR 539, 12 BCD 568, CCH Bankr L Rptr P 70143.

Voluntary surrender by debtors of leased premises may not be avoided by trustee under 11 USCS § 547 or 548 where there could have been no equity in property as of date of ***bankruptcy*** which could have been recovered as ***preference*** or fraudulent transfer. In re Central States Press (1985, BC WD Mo) 57 BR 418.

In considering if particular creditor sold furniture and equipment to debtor, as defined under 11 USCS § 101, or some other entity, state law determines identity of entity with whom creditor contracts; thus, where purchase orders, invoices and financing statement did not contain debtor's name, debtor's principal never indicated he signed any of these documents in representative capacity, and principal's signing next to word "by" on purchase orders was not sufficient to put creditor on notice that principal was acting as agent, creditor was not contracting with debtor as defined in 11 USCS § 101 and creditor's repossession of furniture and equipment within ***90 days*** of filing of Chapter 11 petition is not preferential transfer within meaning of 11 USCS § 547. In re Austin Group, Inc. (1987, BC ND Ga) 80 BR 255.

Chapter 7 trustee cannot recover under 11 USCS § 547 postpetition ***payment*** made by debtor of Chapter 7 debtor to bank pursuant to prepetition state lien and turnover where (1) state proceeding creating lien, citation to discover assets, creates lien upon all personal property of defendant, whether tangible or intangible, and (2) upon issuance of turnover order, Chapter 7 debtor lost all interest in property belonging to third party owing debt to debtor. In re Dean (1987, BC CD Ill) 80 BR 932.

Chapter 7 debtor did not retain interest in proceeds of accounts receivable which would render transfer of proceeds to factors with security interest in proceeds avoidable under 11 USCS § 547 where factors held security interest in proceeds that was duly perfected under state law, factors were undersecured, and, as such, there was no surplus in value of accounts receivables over which debtor could exert control, all invoices directed to debtor's account debtors instructed them to forward payment to factors, and factoring agreement provided that any payment inadvertently forwarded to debtor by its account debtors would be held in trust for benefit of factors; because transferred funds were not under debtor's control, transfer did not cause depletion of estate. Tavormina v Capital Factors (In re Jarax Int'l) (1993, BC SD Fla) 164 BR 180.

Funds collected by sheriff and paid to judgment creditor during ninety days prior to filing of Chapter 13 petition are not avoidable under 11 USCS § 547(b), because debtor had no interest in funds when transfers were made; creditor's motion for summary judgment is granted. Sucre v MIC Leasing Corp. (In re Sucre) (1998, BC SD NY) 226 BR 340.

Where lenders agreed not to enforce promisor's obligation to pay amount to corporate ***bankruptcy*** debtor in connection with renegotiation of loan to debtor, release was transfer of property of debtor and subject to avoidance as preferential transfer even though debtor was not party to agreement, since agreement was for direct benefit of debtor and thus debtor was third-party beneficiary of agreement. Rafool v Goldfarb Corp. (In re Fleming Packaging Corp.) (2005, BC CD Ill) 2005 Bankr LEXIS 1740, adversary proceeding, motion den, findings of fact/conclusions of law (2006, BC CD Ill) 336 BR 398, motion to strike gr, in part, motion to strike den, in part, request den (2006, BC CD Ill) 351 BR 626 and (criticized in OHC Liquidation Trust v Credit Suisse First Boston (In re Oakwood Homes Corp.) (2006, BC DC Del) 340 BR 510).

Bankruptcy trustee's motion for joint prosecution of proceeding on behalf of estate to be prosecuted with debtor's former factoring company against third party company was denied because interests of trustee, to recover as much money as it could for estate, and of factoring company, to recover as much money as it could for itself from either estate or third party company, were in conflict. In re Terry Mfg. Co. (2005, BC MD Ala) 44 BCD 273.

Bankruptcy debtor's contract payments to transferee were not avoidable as preferential transfers by liquidating trustee since second contract incorporated prior contract, and debtor's assumption of integrated contract precluded any avoidance of payments which were properly made under contract. Weinman v Allison Payment Sys., LLC (In re Centrix Fin., LLC) (2010, BC DC Colo) 434 BR 880.

To extent that lien order may be read as transferring equitable lien to bank, this transfer did not implicate interest of debtors in property; alleged transfer involved assignment of interest of creditor of debtors to another of debtors' creditors, and, as matter of law, debtors could not allege facts that would have established that transfer they sought to avoid involved interest of debtors in property. D'Angelo v J.P. Morgan Chase Bank, N.A. (In re D'Angelo) (2014, BC ED Pa) 505 BR 650, 59 BCD 37, 71 CBC2d 916, affd (2015, ED Pa) 2015 US Dist LEXIS 43225.

Payments to former member of ***bankruptcy*** debtor which was limited liability company for redemption of membership interest upon member's withdrawal from debtor were not avoidable as preferential transfers, since payments were made by remaining member of debtor personally and debtor never possessed legal or equitable title to funds paid to member. Fluharty v Duet (In re Summit III, LLC) (2016, BC ND W Va) 75 CBC2d 678.

In 11 USCS § 547(b) action, in determining whether receivables were purchased or pledged, ***bankruptcy*** court properly looked at parties' contract and determined that original transaction was loan, not sale; agreement's recourse provision completely shifted risk of uncollectability of account to Chapter 7 debtor, despite agreement's characterization as "sale," and thus, perfection of security interest was transfer of interest in debtor's property. Lange v Inova Capital Funding, LLC (In re Qualia Clinical Serv.) (2011, BAP8) 441 BR 325, 54 BCD 46, 64 CBC2d 1679, CCH Bankr L Rptr P 81926, 73 UCCRS2d 380, affd (2011, CA8) 652 F3d 933, 55 BCD 91, 66 CBC2d 619, CCH Bankr L Rptr P 82058.

Unpublished Opinions

Unpublished: Debtors' transfers to appellants were avoidable pursuant to 11 USCS § 547(b) because (1) debtors were owners of installment contracts and debtors never transferred or assigned any such ownership interests to unlicensed appellants because appellants conceded that they did not qualify as authorized lenders or credit unions, and transaction in contravention of Tex. Fin. Code Ann. § 348.501(a) was void; (2) debtors had interest in proceeds from transaction that were transferred to appellants because at all times prior to consummation of transaction, debtors owned installment contracts; and (3) appellants were "creditors" of debtors because, shortly before commencement of debtors' ***bankruptcy*** cases, debtors transferred portion of transaction's proceeds to appellants in order to satisfy, at least in part, appellants' claims against them. Waite v Cage (In re Moye) (2012, CA5 Tex) 458 Fed Appx 385.

Unpublished: Fact issues as to whether debtor's wholly owned corporations were alter egos and interest in business assets transferred to mother were debtor's property precluded summary judgment in ***preference*** case since two loan agreements between mother and debtor, purchase agreement of corporation one's assets, assignment and assumption agreement, bill of sale and other documents showed that corporations, not debtor, owned business assets, and that corporations maintained separate records, filed separate tax returns and did not commingle funds; debtor was properly not denied discharge as court found that business assets were not debtor's property and that corporations were not alter egos. Stout v Marshack (In re Stout) (2016, CA9) 649 Fed Appx 621.

Unpublished: Summary judgment was granted to creditor in adversary proceeding pursuant to Fed. R. ***Bankr.*** P. 7056 and Fed. R. Civ. P. 56(c) because debtor failed to show by preponderance of evidence that preferential payments made to bank account of company with name similar to creditor were made to creditor or for benefit of creditor where creditor's affidavits showed that it received no such payment, that company was not wholly owned subsidiary or fictitious name of creditor, and that creditor had no bank account at bank to which funds were wired; thus, debtor failed to show preferential transfer under 11 USCS § 547(b) and failed to show genuine issue of material fact to preclude summary judgment. Antico Vacca Techs., Inc. v Steel Techs., Inc. (In re Gruppo Antico, Inc.) (2005, BC DC Del) 2005 Bankr LEXIS 70.

Unpublished: As part of asset sale, purchaser assumed consulting contract, liability in hands of debtor; value of assumption to debtor was value owed under contract, $ 287,000; if not for that assumption, debtor would have had right to additional consideration in amount of $ 287,000; this right, to receive consideration for sale of assets to purchaser, was interest of debtor in property and subject to treatment as preferential transfer. Lubetkin v Anthony Brusco Consulting (In re Astoria Graphics, Inc.) (2013, BC DC NJ) 2013 Bankr LEXIS 609.

D. To or For Benefit of Creditor

1. In General

159. Generally

Single payment by debtor to outside creditor which benefits insider is one transfer, rather than 2 transfers, i.e., one transfer from debtor to outside creditor in satisfaction of underlying obligation, and second from debtor to guarantor in satisfaction of guarantor's contingent liability, for purposes of 11 USCS § 547. Official Unsecured Creditors Comm. v United States Nat'l Bank (In re Suffola, Inc.) (1993, CA9 Or) 2 F3d 977, 93 CDOS 6249, 93 Daily Journal DAR 10795, 24 BCD 1011, 29 CBC2d 984, CCH Bankr L Rptr P 75396.

Contrary to noninsider transferee's argument that 11 USCS § 550(a), which permits recovery only to extent that transfer is avoided under 11 USCS § 547, means that each element of § 547 must be satisfied with respect to party from whom recovery is sought under 11 USCS § 550, availability is attribute of transfer, rather than of creditor. Official Unsecured Creditors Comm. v United States Nat'l Bank (In re Suffola, Inc.) (1993, CA9 Or) 2 F3d 977, 93 CDOS 6249, 93 Daily Journal DAR 10795, 24 BCD 1011, 29 CBC2d 984, CCH Bankr L Rptr P 75396.

First step in determining whether creditor has received preferential transfer under 11 USCS § 547(b) requires determination of secured status of creditor at time ***bankruptcy*** is declared and amount of any ***payments*** he has received during ***90-day*** period; court conducts 2 separate liquidation analyses: (1) real liquidation in which court looks at value of secured claim on date of ***bankruptcy***, plus transfer; and (2) hypothetical liquidation, in which court determines value of secured claim if transfers had not occurred. In re Auto-Train Corp. (1985, DC Dist Col) 49 BR 605, 13 BCD 324, CCH Bankr L Rptr P 70539, affd (1986, App DC) 255 US App DC 128, 800 F2d 1153, 15 BCD 335, 15 CBC2d 1368, CCH Bankr L Rptr P 71449.

Chapter 11 trustee cannot use 11 USCS § 547(b) to avoid $ 50,000 payment to bank by debtor in possession for loan owed by wholly owned subsidiary which also owed debtor in possession $ 350,000, because transfer is not "to or for benefit of creditor" of debtor in possession, or for antecedent debt "owed by" debtor in possession, in that debts of incorporated subsidiary are not automatically same as debts of parent in ***bankruptcy***. In re Chase & Sanborn Corp. (1986, BC SD Fla) 68 BR 530, affd (1988, CA11 Fla) 848 F2d 1196, CCH Bankr L Rptr P 72363 (criticized in Universal Serv. Admin. Co. v Post-Confirmation Comm. (In re Incomnet, Inc.) (2006, CA9) 463 F3d 1064, 47 BCD 23, CCH Bankr L Rptr P 80717) and (criticized in Alberts v HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp.) (2007, BC DC Dist Col) 365 BR 322) and (criticized in Schoenmann v BCCI Constr. Co. (In re NorthPoint Communs. Group, Inc.) (2007, BAP9) 2007 Bankr LEXIS 4931) and (criticized in Rigby v Mastro (In re Mastro) (2011, BC WD Wash) 465 BR 576) and (criticized in Meoli v Huntington Nat'l Bank (In re Teleservices Group, Inc.) (2012, BC WD Mich) 469 BR 713).

Prepetition transfer of debtor's interest in real property to lien creditor who purchases property at regularly conducted, non-collusive sheriff's sale, and who then sells property to third party for amount greater than amount of its lien, is not avoidable under 11 USCS § 547(b) as ***preference***; lien creditor does not "receive more" for purposes of 11 USCS § 547(b)(5) than it would receive in Chapter 7 liquidation. Chase Manhattan Bank v Pulcini (In re Pulcini) (2001, BC WD Pa) 261 BR 836, 46 CBC2d 470 (criticized in Rocco v J.P. Morgan Chase Bank (2006, WD Pa) 2006 US Dist LEXIS 12850) and (criticized in Canandaigua Land Dev., LLC v County of Ontario (In re Canandaigua Land Dev., LLC) (2014, BC WD NY) 521 BR 457, 60 BCD 81, 72 CBC2d 926).

Names of transferees and total amounts of transfers allegedly received by each transferee were facts which supported allegations that funds were transferred to defendants; however, trustee had to assert facts showing it was plausible that transferees were creditors of debtors; total amount of funds transferred and names of transferees were insufficient, without more, to satisfy plausibility standard for 11 USCS § 547 ***preference*** claims. Angell v Day (In re Caremerica, Inc.) (2009, BC ED NC) 415 BR 200.

Consent is not element of ***Bankruptcy*** Code definitions of "claim," "debt," and "creditor"; consent was relevant in cases relied upon by defendant because of unique circumstances of those cases. Redmond v CJD & Assocs., LLC (In re Brooke Corp.) (2015, BC DC Kan) 536 BR 896.

Unlike law governing preferential transfers, no applicable fraudulent transfer statute, state or federal, including ***Bankruptcy*** Code voidable transfer statute and Minnesota Uniform Fraudulent Transfer Act (MUFTA), required that defendant-transferee have been creditor. Kelley v Associated Bank (In re Petters Co.) (2016, BC DC Minn) 548 BR 551, 62 BCD 95.

2. Requisite Benefit

160. Generally

11 USCS § 547(b) plainly mandates that "benefit" inquiry under § 547(b)(1) be confined to transfers of debtor's property which are shown to have resulted in quantifiable monetary reduction in insider-creditor's contingent claim against debtor's Chapter 7 estate to detriment of other creditors of same class; delaying effect of allegedly preferential transfer, standing alone and without proof of any direct reduction in insider's exposure on guaranty, does not establish cognizable benefit within meaning of § 547(b)(1). In re Erin Food Services, Inc. (1992, CA1 Mass) 980 F2d 792, 23 BCD 1108, 27 CBC2d 1689, CCH Bankr L Rptr P 75013.

For purposes of 11 USCS § 547, creditor who receives payment on unsecured claim has always been preferred because he does not release any collateral to debtor, but creditor who receives payment on secured claim has not been preferred because he has merely realized value of his collateral earlier than he would have if he had waited until liquidation. In re Auto-Train Corp. (1985, DC Dist Col) 49 BR 605, 13 BCD 324, CCH Bankr L Rptr P 70539, affd (1986, App DC) 255 US App DC 128, 800 F2d 1153, 15 BCD 335, 15 CBC2d 1368, CCH Bankr L Rptr P 71449.

Where secured creditors returned payments to a Chapter 13 trustee because their claims were paid when the debtor refinanced her home, the debtor was not entitled to the funds returned; the trustee was required to distribute the funds to unsecured creditors under the plan and the debtor's discharge did not alter that fact because under 11 USCS § 524(e), although the creditors could not proceed against the debtor, that did not mean that they did not have any rights in the money that was returned to the trustee. In re Bacon (2002, BC DC Md) 274 BR 682, 39 BCD 71.

161. Unsecured creditors

Transfer of sheriff's deed conveying debtor's interest in parcel of real property is not voidable ***preference*** under 11 USCS § 547(b) where debtor failed to introduce any evidence indicating that creditor would have received lesser payment of debt through distributions under Chapter 7 if alleged preferential transfer had not been made. In re Sbraga (1982, BC MD Pa) 27 BR 199.

Trustee is entitled to recover as preferential transfer under 11 USCS § 547(b) prepetition payment by debtor corporation to second corporation for repair work on debtor's boilers, trustee having proved that creditor received more than it would have otherwise received in the case under Chapter 7, where ***Bankruptcy*** Court, by taking judicial notice of entire case in previous proceeding involving same debtor, concluded that in same case dividend to unsecured creditor will be less than 100 percent; and dividend less than 100 percent insures that unless transfer is avoided, creditor will receive more than it would receive if it were paid to extent provided by Code provisions. In re Saco Local Dev. Corp. (1983, BC DC Me) 30 BR 868.

Where actual unsecured claim after prepetition transfers exceeded amount of both principal and interest on debt had no transfer been within 90 days of filing less extent to which debt was secured by over $ 280,000, creditor bank clearly improved its position to extent that it reduced unsecured claim it would otherwise have had in absence of transfers. In re Property Leasing & Management, Inc. (1985, BC ED Tenn) 46 BR 903, 12 CBC2d 410.

Evidence that there are several hundred investors who are owed in excess of $ 6 million and that estate's assets are negligible compared to that amount is sufficient to satisfy requirement under 11 USCS § 547 that investors who received payments received more than they would have under liquidation. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Fact that unsecured creditor lost money overall after debtor transferred property to it was irrelevant to whether creditor benefited from transfer within meaning of 11 USCS § 547(b)(1); creditor did benefit where transfer meant it received greater distribution than it would receive when ***bankruptcy*** assets were distributed. Matson v Grease Monkey Int'l, Inc. (In re Bev, Inc.) (1998, BC ED Va) 237 BR 311.

Where debtor transferred inventory and other assets to unsecured, nonpriority creditor and 100 percent distribution was impossible in case, transfer enabled creditor to receive more than it otherwise would within meaning of 11 USCS § 547(b)(5). Matson v Grease Monkey Int'l, Inc. (In re Bev, Inc.) (1998, BC ED Va) 237 BR 311.

Debtor failed to establish that transfer of funds to unsecured creditor during ***90 days*** prior to debtor filing its Chapter 11 ***bankruptcy*** petition was preferential transfer because debtor failed to present any evidence that creditor received more funds via transfer than it would have in Chapter 7 liquidation of debtor. Betty's Homes, Inc. v Cooper Homes, Inc. (In re Betty's Homes, Inc.) (2008, BC WD Ark) 393 BR 671, affd (2009, WD Ark) 411 BR 626.

Unpublished Opinions

Unpublished: Assets purchase agreement (APA) expressly stated that ***payments*** to be made on assumed liabilities were part of purchase price; these payments, but for assumption of consulting contract would have been paid to debtor, whether in cash or over time, become part of estate upon debtor's subsequent ***bankruptcy*** filing, and been distributed to creditors per ***Bankruptcy*** Code's distribution scheme; instead: (1) payments were paid to consulting firm, general unsecured creditor of debtor, (2) as result of transfer, consulting firm was to receive 100 percent of amount owed by debtor, more than would be received under Chapter 7 liquidation of debtor's assets, and (3) as such, transfer of right to receive payment in connection with sale of assets to purchaser was for benefit of consulting firm, creditor of debtor. Lubetkin v Anthony Brusco Consulting (In re Astoria Graphics, Inc.) (2013, BC DC NJ) 2013 Bankr LEXIS 609.

162. Secured creditors

Although amounts recovered by agent for secured creditors of dissolved debtor in ***preference***-recovery actions against two ***preference***-recipients pursuant to 11 USCS § 547(b) went directly to secured creditors, potential to recover such funds was for estate's benefit under 11 USCS § 550(a) where that potential for recovery of such funds was given to secured creditors as compensation for risk of financing debtor while super-secured funds were raised and assets of debtor were sold to facilitate what appeared to be most productive course of action. Mellon Bank, N.A. v Dick Corp. (2003, CA7 Ind) 351 F3d 290, 42 BCD 68, CCH Bankr L Rptr P 80011, cert den (2004) 541 US 1037, 124 S Ct 2103, 158 L Ed 2d 723.

Trustee is not entitled to avoid as ***preference*** under 11 USCS § 547(b) transfer of property pursuant to which creditor, having obtained a judgment against debtor, delivered writ of execution on bank account to sheriff more than 90 days before filing of Chapter 11 petition, although bank account was seized within 90-day period, creditor not receiving more than it would be entitled to under hypothetical liquidation, where delivery of execution created certain interest in property under state law and was therefore lien under 11 USCS § 101, thus giving creditor secured status under 11 USCS § 506, and trustee has only demonstrated that no funds would be available to general unsecured creditors in liquidation. In re Cosmopolitan Aviation Corp. (1983, BC ED NY) 34 BR 592.

Where separate secured and unsecured loans were "rewritten" into one secured obligation within 90 days of filing Chapter 13 petition, rewrite of secured obligation represents no transfer avoidable under 11 USCS § 547 because creditor bank did not receive any more than if transaction had not occurred and release of first secured lien and perfection of superseding lien were, as intended by parties, simultaneous; portion of lien representing antecedent unsecured debt is avoidable, however, because parties did not intend contemporaneous exchange as to it. In re Brown (1985, BC SD Ohio) 46 BR 615.

Releases of 1982 World's Fair tickets, held by creditor bank as security for loan obtained to purchase tickets, in order to allow debtor to sell tickets and make loan ***payments***, within ***90 days*** of filing petition constitute preferential transfers avoidable under 11 USCS § 547 where, as result of releases, debtor's unsecured debt was reduced by over $ 250,000. In re Property Leasing & Management, Inc. (1985, BC ED Tenn) 46 BR 903, 12 CBC2d 410.

Where creditor had contractual general lien which granted it continuing lien on any goods in its possession, creditor was fully secured at time debtors made prepetition transfers to creditor. Accordingly, transfers were not preferential because creditor did not receive more, by virtue of such payments, than it would have received in Chapter 7 liquidation. Paul Harris Stores, Inc. v Expeditors Int'l Of Washington, Inc. (In re Paul Harris Stores, Inc) (2006, BC SD Ind) 342 BR 290, adversary proceeding, partial summary judgment gr, judgment entered (2006, BC SD Ind) 342 BR 285.

There was no merit to Chapter 11 debtors' claim that bank's attempt to have itself added to insurance policy debtors purchased to protect property they mortgaged to secure debts they owed to bank could be avoided as prefential transfer under 11 USCS § 547(b); while placement of bank's name as loss payee on policy prevented debtors from negotiating check in amount of $ 300,000 they received from insurer, it did not enable bank to receive more than it would have received if case had been brought under Chapter 7 of ***Bankruptcy*** Code. Mercantile Bank v Crews (In re Crews) (2011, BC MD Fla) 23 FLW Fed B 437, reh den (2011, BC MD Fla) 23 FLW Fed B 444.

Chapter 7 trustee's preferential transfer claims under 11 USCS § 547(b)(5) failed, as bank held valid perfected liens on debtor's assets and debtor received reasonably equivalent value for its repayment when bank released its liens in order that debtor could sell its inventory to buyer. Burtch v Conn. Cmty. Bank, N.A. (In re J. Silver Clothing, Inc.) (2011, BC DC Del) 453 BR 518, 54 BCD 180.

Execution lien which creditor obtained on Pennsylvania liquor license business held, which allowed it to sell Pennsylvania liquor license business held to satisfy judgment it obtained against debtor in state court, was not preferential transfer that could be avoided under 11 USCS § 547, even though it was obtained less than 90 days before business declared ***bankruptcy***; Chapter 7 trustee who sought ruling that lien was preferential transfer did not show that it was transfer of interest of business in property that enabled creditor to receive more than it would have received if case were case under Chapter 7 of ***Bankruptcy*** Code. Ciprian Ltd. v Oxford Dev. Co. Grant St., L.P. (In re Ciprian Ltd.) (2012, BC WD Pa) 473 BR 669.

163. Guarantors

Whatever unquantifiable benefit corporate Chapter 11 debtor's insider realized from debtor's prepetition installment interest payments of $ 2,089,059 to secured lenders in partial satisfaction of $ 61,700,000 debt guaranteed by insider, as consequence of resultant one-year delay in commencement of involuntary Chapter 11 proceedings against debtor, which, in turn, allegedly insulated insider from more immediate foreclosure proceedings against collateral pledged to support his nonrecourse personal guaranty of debtor's debt to secured lender, preserved his equity in pledged collateral, and "bought" valuable operating time in which debtor could try to work its way out of insolvency, it did not constitute "benefit" necessary to avoid installment interest payments made within one year of ***bankruptcy*** on debt guaranteed by insider since there is no quantifiable monetary reduction in insider's contingent claim; furthermore, although secured lenders received full benefit of $ 2.8 million received in interest payments, there was no reduction whatsoever in insider's liability on nonrecourse guaranty because insider's exposure on entire $ 19.5 million on collateral securing guaranty remained unaffected by payments. In re Erin Food Services, Inc. (1992, CA1 Mass) 980 F2d 792, 23 BCD 1108, 27 CBC2d 1689, CCH Bankr L Rptr P 75013.

If noninsider creditor holds collateral of debtor sufficient to secure antecedent debt in full at time of transfer, payment on primary debt produces no cognizable benefit to guarantor, for 11 USCS § 547(b)(1) purposes, whether or not an insider, since guarantor has no exposure on debt at time of transfer. In re Erin Food Services, Inc. (1992, CA1 Mass) 980 F2d 792, 23 BCD 1108, 27 CBC2d 1689, CCH Bankr L Rptr P 75013.

Insider guarantors fared better as result of partial payment to noninsider creditor, which at time of transfer was fully secured but which was undersecured at time of ***bankruptcy*** petition, than they would have in hypothetical liquidation as transfer to creditor decreased amount of indebtedness which in turn increased extent to which collateral could satisfy obligation and once collateral fell below value of outstanding obligation, reduction in obligation, which was caused by transfer, resulted in increase in amount of insider's potential secured claim and decrease in its potential unsecured claim; further, insider guarantors benefited from transfer since payment to creditor not only immediately mathematically reduced likelihood that insiders would be called upon to fulfill their

guarantee, but it also reduced insiders' actual exposure; insider guarantors received benefit even though they were insolvent at all relevant times. Official Unsecured Creditors Comm. v United States Nat'l Bank (In re Suffola, Inc.) (1993, CA9 Or) 2 F3d 977, 93 CDOS 6249, 93 Daily Journal DAR 10795, 24 BCD 1011, 29 CBC2d 984, CCH Bankr L Rptr P 75396.

Benefit requirement imposed by 11 USCS § 547(b)(1), (b)(4)(B) is clearly satisfied when insider creditor receives quantifiable monetary reduction in his financial liability to third party for which he would have had only ***bankruptcy*** estate to look to for reimbursement; thus, there can be no question that insider guarantor derives measurable economic benefit from payment on guaranteed debt to extent insider's contingent liability on guaranty is reduced. Lowrey v Manufacturers Hanover Leasing Corp. (In re Robinson Bros. Drilling) (1993, CA10 Okla) 6 F3d 701, 24 BCD 1183, 29 CBC2d 1399, CCH Bankr L Rptr P 75483, cert den (1994) 510 US 1214, 114 S Ct 1336, 127 L Ed 2d 684.

Hopeless insolvency of insider guarantor did not preclude him from gaining cognizable benefit from partial reduction of his liabilities by debtor's payment of underlying debt to creditor, for purposes of 11 USCS § 547(b). Lowrey v Manufacturers Hanover Leasing Corp. (In re Robinson Bros. Drilling) (1993, CA10 Okla) 6 F3d 701, 24 BCD 1183, 29 CBC2d 1399, CCH Bankr L Rptr P 75483, cert den (1994) 510 US 1214, 114 S Ct 1336, 127 L Ed 2d 684.

Reduction in insider guarantor's liability by $ 175,000 payment by debtor to creditor on underlying debt did not constitute such de minimis benefit in light of his enormous overall debt, $ 96 million, that transfer could not be avoided under 11 USCS § 547(b); absolute value of 6-figure cash sum in question alone should preclude its characterization as de minimis, regardless of its value relative to some other particular measure and if and when comparative evaluation might be useful in resolving truly arguable case, de minimis finding should not be dictated by unique financial position of preferred creditor, or any other entity whose idiosyncratic debt, or asset, structure skews appraisal. Lowrey v Manufacturers Hanover Leasing Corp. (In re Robinson Bros. Drilling) (1993, CA10 Okla) 6 F3d 701, 24 BCD 1183, 29 CBC2d 1399, CCH Bankr L Rptr P 75483, cert den (1994) 510 US 1214, 114 S Ct 1336, 127 L Ed 2d 684.

Fact that insider guarantor's reduction in his guaranty liability was subject to reinstatement if trustee prevailed on his preferential transfer claim did not preclude finding that insider guarantor benefited from debtor's payment to creditor on underlying debt for purposes of 11 USCS § 547(b); successful pursuit of avoidance action always nullifies underlying benefit discriminately bestowed by debtor on particular creditor. Lowrey v Manufacturers Hanover Leasing Corp. (In re Robinson Bros. Drilling) (1993, CA10 Okla) 6 F3d 701, 24 BCD 1183, 29 CBC2d 1399, CCH Bankr L Rptr P 75483, cert den (1994) 510 US 1214, 114 S Ct 1336, 127 L Ed 2d 684.

Insider guarantors of Chapter 7 debtors' debt benefited from payments to mortgagee due to reduction in their exposure on guarantees; reducing potential liability on guaranties financially benefited guarantors; although mortgagee argues that insiders did not benefit because they were insolvent and soon to enter ***bankruptcy*** themselves, whether transfer is made for benefit of creditor is determined at time of transfer, and at time of transfer, insiders were still liable on their guaranties; reduction in potential liability is benefit even if guarantor is hopelessly insolvent. Clark v Balcor Real Estate Fin. (In re Meridith Hoffman Partners) (1993, CA10 Colo) 12 F3d 1549, 30 CBC2d 615, CCH Bankr L Rptr P 75680, cert den (1994) 512 US 1206, 114 S Ct 2677, 129 L Ed 2d 812 and (criticized in Luper v Columbia Gas (In re Carled, Inc.) (1996, CA6 Ohio) 91 F3d 811, 29 BCD 601, 36 CBC2d 732, CCH Bankr L Rptr P 77123, 1996 FED App 249P) and (criticized in Arrow Elecs., Inc. v Justus (In re Kaypro) (2000, CA9) 218 F3d 1070, 2000 CDOS 5762, 2000 Daily Journal DAR 7689, 36 BCD 104, CCH Bankr L Rptr P 78224) and (criticized in Howard v Bangor Hydro Elec. Co. (In re Bangor & Arrostook R.R. Co.) (2005, BC DC Me) 324 BR 164) and (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

Payment of debt that is later set aside as avoidable transfer does not discharge guarantor of his obligation to repay that debt. Wallace Hardware Co. v Abrams (2000, CA6 Ky) 223 F3d 382, 2000 FED App 250P (criticized in Thomas v Compass Bank, Inc. (2009, WD Ky) 2009 US Dist LEXIS 92336) and (criticized in Sierra v Williamson (2013, WD Ky) 2013 US Dist LEXIS 95717) and (criticized in Wells Fargo Fin. Leasing, Inc. v Griffin (2013, WD Ky) 970 F Supp 2d 700).

Payments made to noninsiders for benefit of insider guarantors within one year of ***bankruptcy*** are not avoidable under 11 USCS § 547 if they do not reduce debt to point less than guaranty amount; term "benefit" in § 547(b) does not embrace potential benefit. In re Cannon Ball Indus. (1993, ND Ill) 155 BR 177, 24 BCD 604, 29 CBC2d 1155.

Guarantor of Chapter 7 debtor's note and junior lienholder received indirect ***preferences*** under 11 USCS § 547(b) because of transfers made for benefit of debtor's principal financing bank on account of antecedent debt while debtor was insolvent and within ***90 day*** of filing date, where guarantor benefited from transfers which both increased its collateral and reduced its indebtedness on guaranty; guarantor is liable only for amount transferred which reduced fund to which other creditors with unsecured claims resort for ***payment***. In re Prescott (1985, BC WD Wis) 51 BR 751, 41 UCCRS 1873.

Guarantor of debtor's obligations under promissory note was creditor under 11 USCS § 101(5) for purposes of 11 USCS § 547 and 11 USCS § 550 because guaranty agreements, which provided that guarantor's potential claim against debtor was waived if debtor's obligations remained unpaid, did not waive guarantor's rights of subrogation, which were only delayed until lender was paid in full. Scully v Danzig (In re Valley Food Servs., LLC) (2008, BC WD Mo) 51 BCD 10.

Release of creditor's guarantee by virtue of Chapter 7 debtor's repayment of its loan from bank did not constitute preferential transfer in favor of creditor; repayment produced no benefit to creditor because, as guarantor, he had no liability at time of repayment. Burtch v Conn. Cmty. Bank, N.A. (In re J. Silver Clothing, Inc.) (2011, BC DC Del) 453 BR 518, 54 BCD 180.

164. Miscellaneous

Trustee is entitled to contribution for one-half amount of mortgage payment by debtor to creditors under 11 USCS § 547 where payment was made pursuant to divorce decree and incorporated settlement agreement which relieved debtor's property of liened indebtedness, since such payment also relieved ex-wife's property of liened indebtedness and therefore, being joint debt, debtor's trustee is entitled to contribution for one-half amount paid; ex-wife was clearly benefited by transfer and falls within plain language of § 547. In re Pacileo (1988, BC WD Pa) 87 BR 380, CCH Bankr L Rptr P 72588.

Payment to lender was for benefit of lender, for purposes of 11 USCS § 547, even though amount of payment represented debts owed to various other creditors for goods and services provided to debtor, where goods and services would not have been furnished to debtor if not for lender's intervention and guarantee; furthermore, because lender asserted that these very expenses were debts owed to it, at time of settlement agreement in receivership action, it is now estopped from asserting that it has no right to payment and, hence, no interest in funds. In re International Club Enterprises, Inc. (1990, BC DC RI) 109 BR 562, CCH Bankr L Rptr P 73236.

Although when corporation makes payments on corporate debt guaranteed by corporate insider those payments are considered transfers for benefit of corporate insider as contingent creditor, same rule is inapplicable where insider purportedly benefiting is not corporate insider guarantor, but general partner of partnership who by operation of partnership is liable for all partnership debts if partnership assets are insufficient to satisfy those debts; in instant case, transfer of security deed to secure promissory note for legal fees, while reducing general partners' liability to transferee, did not benefit debtor's general partners because their liability for partnership debt remained same; if partners' potential claims against partnership debtor are not reduced by preferential payment of partnership debt, payment is not for benefit of insider creditor, and, absent transfer for benefit of insider, one-year reach back period is inapplicable. Unsecured Creditors' Committee of Seasons Properties v Miller & Martin (1992, BC ED Tenn) 141 BR 631.

Chapter 11 debtor's general partnership who guaranteed debtor's debt to creditor could not have benefited by fixing of creditor's judgment liens on debtor's property, and therefore fixing of liens cannot be avoided as preferential under 11 USCS § 547 because although insider guarantor of corporation will be benefited when debts insider has guaranteed are paid, because guarantor's exposure to lender is thereby reduced, when guarantors are all general partners of debtor partnership, no reduction of exposure will occur because general partners are always liable for debts of partnership, regardless of any guarantees they may give and, therefore, preferential payment of one of

partnership's debts will not reduce partners' net exposure on partnership obligations; if assets of partnership are insufficient to cover its debts, general partners cannot lessen their personal liability by directing preferential payments to some creditors because partners' exposure to remaining creditors will correspondingly increase. Broad St. Assocs. v United Cos. Life Ins. Co. (In re Broad St. Assocs.) (1993, BC ED Va) 163 BR 68, 6 Fourth Cir & Dist Col Bankr Ct Rep 246, 30 CBC2d 110.

Mailing of 10-day letter perfecting attorneys' fee claim under Georgia law constituted ***preference*** which was avoidable under 11 USCS § 547(b); "transfer" occurred upon mailing, letter came "on account of" underlying mortgage obligation and claim could, under 11 USCS § 1111(b) election, be asserted as if it were nonrecourse obligation so that creditor would recover more than it otherwise would receive in hypothetical Chapter 7 liquidation. Condor One v Homestead Partners (In re Homestead Partners) (1996, BC ND Ga) 201 BR 1014, 29 BCD 1193.

When debtor's employer retained $ 80 as fee for processing garnishment of debtor's wages, transfer of $ 80 was neither to nor for creditor's benefit, and debtor could avoid as ***preference*** only amount that was actually transferred to creditor. Sheppard v Speck (In re Sheppard) (2014, BC ED Mich) 521 BR 599.

3. Benefit to Particular Persons or Entities

165. Generally

It only makes sense that court-ordered restitution payment is "to or for benefit of (victim)/creditor," even if restitution payment's broader purpose is to further state's sentencing goals; in case at bar, to extent it was not clear that debtors' payment was "to or for benefit of" State Compensation Insurance Fund, California's statutory scheme for criminal restitution payments, specifically Cal. Penal Code § 1202.4, erased any doubt. State Compensation Ins. Fund v Zamora (In re Silverman) (2010, CA9 Cal) 616 F3d 1001, 53 BCD 146, CCH Bankr L Rptr P 81833, cert den (2011) 562 US 1287, 131 S Ct 1679, 179 L Ed 2d 616.

Payments that benefit society as whole (as payment to State Compensation Insurance Fund would) may also benefit specific creditor, which makes such payments "to or for benefit of creditor." State Compensation Ins. Fund v Zamora (In re Silverman) (2010, CA9 Cal) 616 F3d 1001, 53 BCD 146, CCH Bankr L Rptr P 81833, cert den (2011) 562 US 1287, 131 S Ct 1679, 179 L Ed 2d 616.

Revolving credit note and agreement between Chapter 7 debtor's creditor and third party, requiring creditor to deposit its customers' checks into special account, does not make third-party entity for whose benefit transfers between debtor and creditor were made, for purposes of 11 USCS §§ 550 and 547(b), because debtor did not transfer money directly to third party, but rather, transferred it to committee of creditors, which wrote checks to creditor, who then deposited funds in bank which transferred funds to third party; furthermore, party who receives money cannot be entity for whose benefit initial transfer was made; finally, since neither checks from debtor nor from committee named third party, initial transfer was not intended to benefit third party. In re Columbia Data Products, Inc. (1989, DC Md) 99 BR 682, affd (1989, CA4 Md) 892 F2d 26, 2 Fourth Cir & Dist Col Bankr Ct Rep 117, 19 BCD 1799, CCH Bankr L Rptr P 73106.

Transfer is not avoidable ***preference*** under 11 USCS § 547 where trustee does not carry his burden of showing either that defendant was creditor of debtor or that defendant received more than he would have otherwise received. In re Polar Chips International, Inc. (1984, BC SD Fla) 39 BR 864.

Transfers made by Chapter 11 debtor airline for benefit of another airline, through their mutual agent, are avoidable under 11 USCS § 547 and recoverable just as if they had been made directly to airline; transfers for purposes of 11 USCS § 547 include indirect dispositions of property and interests in property. In re Jet Florida System, Inc. (1986, BC SD Fla) 59 BR 886.

Chapter 11 debtors' transfer of stock is not preferential under 11 USCS § 547 where at time of transfer there was no creditor-debtor relationship between debtors and recipient of stock and thus no antecedent debt. In re Burkey (1986, BC MD Fla) 68 BR 270, 3 UCCRS2d 234.

For purposes of 11 USCS § 547, creditor for whose benefit transfer is made need not be party to whom transfer is made; where attorney was paid by debtor pursuant to employment agreement that provided debtor would reimburse employee for legal services, transfer for benefit of creditor was made; further, even if debt did not arise until legal services were performed, as opposed to when employment agreement was executed, payment was still on account of antecedent debt. In re Day Telecommunications, Inc. (1987, BC ED NC) 70 BR 904.

Bankruptcy Court will take judicial notice of previous lawsuit in which corporation admitted to being creditor of Chapter 11 debtor and obtained judgment as same for breach of contract; thus, corporation may not now deny debtor-creditor relationship for purposes of ***preference*** action under 11 USCS § 547. In re Allegheny, Inc. (1988, BC WD Pa) 86 BR 466, 17 BCD 876.

166. Attorney

Chapter 11 debtor's attorney was not secured creditor by virtue of charging lien, for purposes of determining whether payment to attorney was preferential under 11 USCS § 547 where funds paid to attorney were not procured by recovery of disbursement in litigation, but from liquidation of asset of debtor, i.e., sale of underlying collateral encumbered by mortgage lien held by debtor, and while attorney may have had charging lien which would attach to proceeds from foreclosure litigation if he had prevailed on litigation, attorney did not have charging lien on proceeds obtained from liquidation of debtor's interest in note and mortgage. Daddy's Money of Clearwater, Inc. v Winick (1993, BC MD Fla) 155 BR 788, 24 BCD 695, 7 FLW Fed B 1174.

IRS was not foreclosed from litigating issue of ***preference*** payment by its admission that payment it received on account of penalty was improper and should be returned, where penalty portion could easily be separated from tax portion of payment, and any recovery by trustee would be devoted not to benefit creditors but to satisfy his attorney's claim for fees, since trustee could not succeed in ***preference*** action conducted essentially for benefit of his attorney. Dakmak v United States (IRS) (In re Lutz) (1997, BC ED Mich) 212 BR 846, 97-2 USTC P 50611, 79 AFTR 2d 3065, vacated on other grounds, remanded (1998, ED Mich) 241 BR 172, 83 AFTR 2d 1733, reh den (1999, ED Mich) 241 BR 179, 83 AFTR 2d 1724.

In adversary proceeding, motion for summary judgment filed by attorney and affiliated law firms was denied because attorney and law firms potentially met definition of "insider" under 11 USCS § 101(31)(B) and there were issues remaining concerning whether or not payments made to attorney and law firms could be voided as preferential transfers under 11 USCS § 547(c)(2). Alexander v DeLong, Caldwell, Novotny, & Bridgers, LLC (In re Terry Mfg. Co.) (2006, BC MD Ala) 358 BR 429, 47 BCD 110.

Debtor failed to state claim for preferential transfer against judgment creditor's attorney as attorney was not creditor of debtor. Wilson v Heredia (In re Wilson) (2016, BC DC Puerto Rico) 62 BCD 57.

167. Consignor

Transfer of consigned tires from consignee debtor back to consignor creditor is transfer to or for benefit of creditor under 11 USCS § 547(b)(1) because, without return of tires, consignor would have been unpaid; consignor is creditor because debtor had obligation to pay for tires or return them. In re Castle Tire Center, Inc. (1986, BC WD Pa) 56 BR 180, 42 UCCRS 862.

168. Creditor's insured

Debtor's transfer of funds from its operating account to account maintained by debtor to pay claims of insureds of creditor insurance company constituted transfer for benefit of creditor within meaning of 11 USCS § 547(b)(1); although funds were not paid directly to creditor, payments to creditor's insureds provided quantifiable benefit to creditor by paying amounts creditor owed to insureds and eliminating creditor's liability to insureds. Hyman v Legion Ins. Co. (In re Scott Wetzel Servs.) (2002, BC MD Fla) 278 BR 613, 15 FLW Fed B 176.

169. Director, officer or shareholder

Shareholder who advanced money to debtor to cover debtor's payroll, thereby making debtor indebted to shareholder, is "creditor" for purpose of 11 USCS § 547. In re Fulghum Constr. Co. (1980, BC MD Tenn) 7 BR 629, affd (1981, MD Tenn) 14 BR 293, 32 UCCRS 798, affd in part and vacated in part on other grounds (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Shareholder is not creditor of corporation at time shareholder's stock is redeemed by corporation and accordingly transfer is not ***preference*** under 11 USCS § 547 since it is not for benefit of creditor. In re Corporate Jet Aviation, Inc. (1983, BC ND Ga) 27 BR 870.

Debtor's officers who executed agreement of guaranty and suretyship wherein they personally guaranteed repayment of loans made to debtor are creditors for purposes of 11 USCS § 547(b)(2), and they are insiders for purposes of § 547(b)(4)(B)(i). In re R.A. Beck Builder (1983, BC WD Pa) 34 BR 888.

Transfers from debtor to bank within 90 days of ***bankruptcy*** made for benefit of debtor's sole shareholder, who was creditor of debtor having filed proof of claim, are avoidable under 11 USCS § 547. In re Auto-Pak, Inc. (1985, BC DC Dist Col) 55 BR 403.

Transfer made by managing partner of debtor brokerage to his horse racing business partner is avoidable under 11 USCS § 547 where: (1) money transferred was debited from transferee's account with debtor and was received by transferee as result of identifiable debtor-creditor relationship that existed between debtor and transferee; and (2) transferee received 100 percent of his obligation as result of transfer that he would not have received under Chapter 7. In re Bell & Beckwith (1986, BC ND Ohio) 64 BR 620.

Transfer made to outside creditor on debt guaranteed by corporate Chapter 7 debtor's principals within one year of ***bankruptcy*** filing but more than ***90 days*** prior to ***bankruptcy*** filing is avoidable under 11 USCS § 547 because guarantors benefited as creditors by debtor's ***payment*** on notes, and subrogation provision included in guaranties, which provided guarantors were not entitled to subrogation until creditor was paid in full, was for protection of creditor, and merely because guarantors' right to subrogation was postponed does not deprive them of their status as creditors. In re Helen Gallagher Enterprises, Inc. (1991, BC CD Ill) 126 BR 997, 24 CBC2d 1787.

Transfer of proceeds from ***bankruptcy*** debtor's sale of real property in satisfaction of note and mortgage deed was transfer within ***preference*** period of 11 USCS § 547(b), since title to property was not conveyed until debtor executed deed of sale, which occurred within ***preference*** period, rather than when debtor contracted to sell property. Mender v Carrion (In re Martinez) (2006, BC DC Puerto Rico) 358 BR 529.

Chapter 7 trustee alleged sufficient facts against debtor's directors of debtor to survive dismissal of claims for alleged preferential transfers, under 11 USCS §§ 547 and 550, breaches of fiduciary duties, and aiding and abetting and civil conspiracy claims; Del. Code Ann. tit. 8, § 102(b)(7) did not exculpate directors. Miller v Greystone Bus. Credit II, L.L.C. (In re USA Detergents, Inc.) (2009, BC DC Del) 418 BR 533 (criticized in Ogier v Steele (In re Buckhead Oil Co.) (2011, BC ND Ga) 454 BR 242).

Chapter 7 trustee was not allowed under 11 USCS §§ 544, 547(b), or 548(a)(1)(B), or under N.Y. Debt. & Cred. Law §§ 273, 274, or 275, to recover salary increases and dividend payments "S" corporation made to officers and owners before it declared ***bankruptcy***, which officers and directors used to repay debts they incurred to acquire and expand corporation, because he did not meet his burden of proving that corporation did not receive fair consideration for payments; however, trustee was allowed under 11 USCS § 548(a)(1)(A) to recover dividends corporation paid officers and owners so they could pay income taxes they owed on profits corporation made because corporation did not receive value for those payments and payments were made at time when corporation was insolvent. Pryor v Tiffen (In re TC Liquidations LLC) (2011, BC ED NY) 463 BR 257.

Committee of unsecured creditors did not meet its burden of showing that brother and sister who owned several LLCs breached their fiduciary duties or made fraudulent transfers when they made financial decisions in attempt to save those LLCs, with one exception: payments in amount of $ 104,166 one LLC made on loan brother obtained when he purchased condominium were constructively fraudulent transfers under 11 USCS § 548, preferential

transfers under 11 USCS § 547, and fraudulent transfers under 740 ILCS 160/5 and 740 ILCS 160/6, and committee was allowed under 11 USCS § 550 to recover those payments for LLC's ***bankruptcy*** estate plus prejudgment interest from LLC and brother. Official Comm. of Unsecured Creditors v Fountainhead Grp., Inc. (In re Aerosol) (2015, BC ND Ill) 538 BR 477.

170. Drawee of check

Trustee has not established that transfers in form of checks to Chapter 7 debtor's committee of creditors, which transferred funds to debtor's creditor, who then transferred funds into special account for third party pursuant to revolving credit note and agreement, were made to or for benefit of creditor under 11 USCS § 547(b), because third party is not creditor of debtor. In re Columbia Data Products, Inc. (1989, DC Md) 99 BR 682, affd (1989, CA4 Md) 892 F2d 26, 2 Fourth Cir & Dist Col Bankr Ct Rep 117, 19 BCD 1799, CCH Bankr L Rptr P 73106.

Transfers into Chapter 11 debtor's bank account of bank-to-bank payments on checks previously deposited for collection could not be avoided as preferential transfers on account of antecedent debt under 11 USCS § 547(b), since bank was not beneficiary or transferee of funds, which simply replenished its depositor's account, and was in fact nothing more than "conduit" or agent receiving funds. Laws v United Mo. Bank of Kan. City, N.A. (1995, WD Mo) 188 BR 263, 29 UCCRS2d 266, affd (1996, CA8 Mo) 98 F3d 1047, 29 BCD 1148, CCH Bankr L Rptr P 77129, 30 UCCRS2d 1155, reh, en banc, den (1996, CA8) 1996 US App LEXIS 30754 and cert den (1997) 520 US 1168, 137 L Ed 2d 540, 117 S Ct 1432 and (criticized in Moseley v Arth (In re Vendsouth, Inc.) (2003, BC MD NC) 2003 Bankr LEXIS 1437).

Individual to whom debtor wrote bad check is creditor of debtor for purposes of 11 USCS § 547; because check is conditional payment, individual to whom check is written has claim or right to payment when check is presented to it and immediately becomes creditor of person writing check. In re Kirk (1984, BC DC Kan) 38 BR 257, 10 CBC2d 815.

Victim of Chapter 13 debtor's bad check passing was "creditor" of debtor for purposes of 11 USCS § 547 ***preference*** provisions, and therefore payments it received under state-court criminal restitution order from debtor are avoidable; under applicable state law, victim held claim against debtor based on dishonor of checks independent from any obligation created via criminal prosecution, and victim would have enforceable right to payment based on checks even if no grounds existed to charge debtor with crime. Zimmerman v Itano Farms, Inc. (1992, BC DC Idaho) 144 BR 490.

171. Government

County is creditor within meaning of 11 USCS § 547(b)(1), not merely agent of state, where county recovered monies from Chapter 7 debtor in judgment on promissory note which evidenced restitution obligation to county from welfare fraud conviction, since county was principal when recovery was made, promissory note was made payable to county, action to collect on note was prosecuted by county in its own name, and state court ordered debtor to make restitution to county. In re Hackney (1988, BC ND Cal) 83 BR 20, 16 BCD 1357, 18 CBC2d 688.

Payments made by Chapter 11 debtor to Department of Labor pursuant to settlement of litigation stemming from debtor's violation of minimum wage and overtime provisions of Fair Labor Standards Act were not made to or for benefit of Department, and therefore are not avoidable under 11 USCS § 547 where Department acted strictly on behalf of employees who were ultimately entitled to payment of back wages, Department did not assert any individual right to moneys and was at all times obligated to turn them over to actual employees as rightful recipients; since original "credit" has not been extended by Department, it cannot be debtor's creditor. Official Committee of Unsecured Creditors for Dairy Stores, Inc. v United States Dep't of Labor, Wage & Hour Div. (1992, BC DC NJ) 148 BR 6, 124 CCH LC P 35747.

172. Guarantor

Guarantor of Chapter 7 debtor's credit union loan is "creditor" as defined in 11 USCS § 101 and for purposes of 11 USCS § 547 by virtue of his right to reimbursement from debtor. In re Finn (1990, CA6 Mich) 909 F2d 903, 20 BCD

1319, CCH Bankr L Rptr P 73543 (superseded by statute as stated in Stanziale v Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC) (2014, BC DC Del) 518 BR 269).

Trustee may, pursuant to 11 USCS §§ 547 and 550, recover from outside creditor transfer made more than ***90 days*** but within one year of ***bankruptcy*** where transfer benefits insider guarantor. Official Unsecured Creditors Comm. v United States Nat'l Bank (In re Suffola, Inc.) (1993, CA9 Or) 2 F3d 977, 93 CDOS 6249, 93 Daily Journal DAR 10795, 24 BCD 1011, 29 CBC2d 984, CCH Bankr L Rptr P 75396.

Chapter 7 trustee failed to establish his entitlement under 11 USCS § 547(b)(4)(B) to avoidance of note and cash ***payments*** made by debtors more than ***90 days*** but less than one year before ***bankruptcy*** filing, made in return for dismissal of lawsuit pending against debtors and debtors' president, who guaranteed debtors' obligation to transferee, and who was insider when he co-made note, despite trustee's claim that president's alleged settlement benefit is specious, because he actually held no liability exposure in transferee's lawsuit, where trustee failed to present evidence sufficient to show that debtors' president was creditor; trustee must show that president lent his name to debtors on note given to transferee and did not receive direct personal benefit in return for note. ABB Vecto Gray v First Nat'l Bank (In re Robinson Bros. Drilling) (1993, CA10 Okla) 9 F3d 871, 24 BCD 1490, 30 CBC2d 134, CCH Bankr L Rptr P 75513, 22 UCCRS2d 291.

Payment made by Chapter 11 debtor pursuant to its guaranty of subsidiary's debt within one year of debtor's ***bankruptcy*** filing is not avoidable ***preference*** under 11 USCS § 547(b) where debtor's guaranty of subsidiary's debt to bank is source of antecedent debt that triggered alleged preferential transfer and subsidiary is not indebted to debtor in connection with guaranty, even though debtor is indebted to subsidiary on completely unrelated intercompany debt; since subsidiary has no contingent claim against debtor in connection with debt to bank, transfer to bank does not benefit subsidiary "as creditor" under § 547(b)(1). Southmark Corp. v Southmark Personal Storage (In re Southmark Corp.) (1993, CA5 Tex) 993 F2d 117, 24 BCD 625, 29 CBC2d 109, CCH Bankr L Rptr P 75308.

Under 11 USCS §§ 547(b) and 550(a)(1), transfer by Chapter 11 debtor to noninsider creditor for benefit of insider-guarantor during preferential period of 90 days to one year can be avoided and recovered by trustee. In re Robinson Bros. Drilling (1988, WD Okla) 97 BR 77, 21 CBC2d 1405, affd (1989, CA10) 892 F2d 850, reported at (1989, CA10 Okla) 21 CBC2d 1405, CCH Bankr L Rptr P 73090.

Where Chapter 7 debtor transferred personalty to corporation owned by cosigner of promissory note secured by such personalty, in response to bank's decision to proceed against cosigner instead of against personalty, transfer is voidable under 11 USCS § 547(b) in that debtor owed actual debt to corporation, or transfer is voidable as gratuity to one whom debtor owed nothing. In re Cauley (1985, BC MD Ala) 50 BR 458.

In determining whether transfer was to or for benefit of creditor for preferential transfer purposes under 11 USCS § 547(b), payment to primary creditor benefits guarantor of debt because it satisfies that portion of guarantor's contingent liability on claim. In re Aldridge (1988, BC WD Mo) 94 BR 589.

Insider guarantors of corporate Chapter 7 debtor waived all rights of indemnity, contribution, and exoneration, for purposes of determining whether insiders are creditors of debtor and thus whether preferential payments made to lender were made to or for benefit of creditor under 11 USCS § 547 and were within one-year time frame of 11 USCS § 547(b)(4)(B) where portion of guarantee states that guarantors irrevocably waive, disclaim, and relinquish all claims against debtor which they otherwise would have had by virtue of having executed guaranty; furthermore, while guarantors' right of subrogation constitutes "claim," guarantors waived any right of subrogation that they otherwise would have had where there is ample evidence that guarantors and lender intended complete waiver of all equitable rights of subrogation; use of "anti-Deprezio" waivers is not contrary to public policy. Hostmann v First Interstate Bank, N.A. (1993, BC DC Or) 156 BR 821.

Prepetition insider co-guarantors were "creditors" of each other for ***preference*** purposes at time they pledged stock to lender even though none of them had at that time paid more than aliquot share of sum guaranteed since whether one is creditor within meaning of ***Bankruptcy*** Code does not depend on whether one holds net claim against

debtor and since 11 USCS § 502(e)(1)(B) expressly recognizes possibility of duplicate claims of contribution. DG Creditor Corp. v American Express Bank (In re DG Acquisition Corp.) (1995, BC DC Del) 188 BR 918, 28 BCD 53.

Chapter 7 Trustee could recover alleged preferential transfer, pursuant to 11 USCS §§ 547(b) and 550(a), directly from guarantors of loan from bank to debtor even where guarantors never received any of funds, and bank was not required to be joined as party. Menniger v Attiyah (In re Midwest Mobile Techs., Inc.) (2003, BC SD Ohio) 304 BR 787, 41 BCD 198.

Guarantor suggested that because he would "never" attempt to collect anything from his mother, he should not be considered creditor of ***bankruptcy*** estate, but that fact alone did not alter outcome; it was contractual relationship of parties which determined whether he was creditor of estate, not statements or representations about whether he might actually exercise those contractual rights. Osberg v Halling (In re Halling) (2011, BC WD Wis) 449 BR 911.

Unpublished Opinions

Unpublished: Allegations by Chapter 11 trustee, that transfer of funds by debtors to creditors for interest payments on loans guaranteed by alleged insider of debtors was preferential transfer under 11 USCS § 547, were insufficient to sustain cause of action because insider's contingent liability on loan was not reduced Perkins v Arif (In re Innovation Fuels, Inc.) (2013, BC DC NJ) 2013 Bankr LEXIS 3041.

173. Insider

Insiders of corporate debtor were "creditors" of debtor where they transferred to debtor proceeds from bank loans with intention that debtor would repay loans; fixed periodic repayments each month to bank to discharge debtor's obligation to insiders suggest that insiders had debt rather than equity relationship with debtor, and fact that debtor did not list creditors as such on ***bankruptcy*** schedules, while resulting in failure of insiders to share in any distribution, is not dispositive of their status as creditors. In re C-L Cartage Co. (1990, CA6 Tenn) 899 F2d 1490, 20 BCD 599, 22 CBC2d 901, CCH Bankr L Rptr P 73323 (superseded by statute as stated in Blevins Elec. v First Am. Nat'l Bank (In re Blevins Elec.) (1995, BC ED Tenn) 185 BR 250, 27 BCD 815, 34 CBC2d 377).

Case law requires that relationship between debtor and non-statutory insider be not only close, but also at less than arm's length for purposes of 11 USCS § 547(b)(4)(B). Anstine v Carl Zeiss Meditec AG (In re U.S. Medical, Inc.) (2008, CA10) 531 F3d 1272, 50 BCD 57, 59 CBC2d 1900, CCH Bankr L Rptr P 81275.

Creditor's attachment of property transferred within 90-day ***preference*** period to debtor/corporation controlled by defendant transferor was not ***preference*** where only defendant's interest, and not debtor/corporation's interest, in transferred property was attached by creditor and court, under its constructive fraud and related findings, treated transfer as never having occurred so that transfer was not "to or for the benefit of a creditor" or "for or on account of an antecedent debt owed" by debtor/corporation as required for there to be ***preference*** under 11 USCS § 547(b)(1), (2). Chemical Bank v Dana (1999, DC Conn) 234 BR 585.

Where creditor was not director for debtor corporation during entire time he was affiliated with it and where he held position in which duties were limited to research, it was not clear whether creditor was insider under ***bankruptcy*** law; thus, trustee was not entitled to summary judgment in trustee's action for avoidance of transfers to creditor. Smith v Ruby (In re Pub. Access Technology.com, Inc.) (2004, ED Va) 307 BR 500, 42 BCD 247.

Bankruptcy court properly found that $ 200,000 settlement payment to member of limited liability company (LLC) was preferential transfer made to insider as defined by 11 USCS § 101(31) within one year of ***bankruptcy*** petition such that trustee could avoid and recover transfer pursuant to 11 USCS § 547(b)(4) because (1) member was insider under § 1010(31)(B) by virtue of his status as member of LLC pursuant to 8 Del. C. § 141 and 6 Del. C. § 18-402, and LLC agreement, and (2) at time of transfer, member held formal position on board, and although some of his rights were curtailed by majority consent, his position still placed him in such intimate association with debtor that he was appropriately considered per se insider for purposes of § 101(31)(B). Longview Aluminum, L.L.C. v Brandt (2010, ND Ill) 431 BR 193, CCH Bankr L Rptr P 81864, affd (2011, CA7 Ill) 657 F3d 507, 55 BCD 111, 66 CBC2d 577, CCH Bankr L Rptr P 82067.

Attachment of judgment liens to Chapter 7 debtor's property was "to or for the benefit of a creditor" within meaning of 11 USCS § 547(b) where insiders who were jointly and severally liable with debtor were creditors, because if they were forced to satisfy judgment themselves they would have claims for contribution over against debtor's estate and they received benefit because lien on debtor's property will tend to cause joint and several liability of all judgment debtors to be satisfied by debtor alone. Adams v Pugliese (1993, BC ND Okla) 151 BR 590, 23 BCD 1709, 28 CBC2d 839, CCH Bankr L Rptr P 75162.

Chapter 7 Trustee presented evidence which could support finding defendants were insiders at time of transfers for purposes of 11 USCS § 544 and 11 USCS § 547 where defendants were father and son; father made unsecured loan to debtors; agreement for second loan contained no specific loan amount, rate, or amortization period; parties maintained close relationship; parties may have been involved in joint venture or agreement to share profits; no formal agreement had been made with regard to value of one transfer; father had not received payment on outstanding loans for almost two years prior to ***bankruptcy*** and son had never received any payments; and defendants purchased debtors' mortgage at time debtors were insolvent and subject to substantial government fine. Schreiber v Stephenson (In re Emerson) (1999, BC DC NH) 1999 BNH 9, 235 BR 702, findings of fact/conclusions of law (1999, BC DC NH) 1999 BNH 37, 244 BR 1.

Bankruptcy court concluded that ***bankruptcy*** statute only prevented trustee from asserting claim to recover preferential payment from transferee that was not insider, not from insider-guarantor. Gordon v Sturm (In re M2Direct, Inc.) (2002, BC ND Ga) 282 BR 60, 39 BCD 270, 48 CBC2d 1733.

Where liquidating trust for ***bankruptcy*** debtors alleged that debtors' securities underwriters gradually became debtors' financial advisors, secured lenders, and powerful warrant holders, trust properly alleged insider status of underwriters for purposes of preferential transfers based on long-standing and multifaceted relationship that enabled underwriters to dominate and control debtors. OHC Liquidation Trust v Credit Suisse First Boston (In re Oakwood Homes Corp.) (2006, BC DC Del) 340 BR 510 (criticized in Trenwick Am. Litig. Trust v Ernst & Young, L.L.P. (2006, Del Ch Ct) 906 A2d 168).

Chapter 11 debtor's claim that judgment creditor who had placed lien on stock certificate belonging to debtor was "insider" as defined by 11 USCS § 101(31) and thus was subject to longer ***preference*** under 11 USCS § 547(b) was rejected by ***bankruptcy*** court because at no time was creditor general partner in any entity in which debtor was involved; moreover, because transfer of certificate was involuntary and resulted from vigorously contested litigation in which creditor and debtor were adverse parties, relationship did not require close scrutiny to ensure that transaction was conducted at arm's length. Cassidy v Advanced Imaging Ctr. of N. Ill. LP (In re Cassidy) (2006, BC MD Fla) 352 BR 511, 20 FLW Fed B 29.

Because defendant's position with debtor limited liability corporation as one of five members of its Board of Managers was like that of corporate director, he was insider as defined in 11 USCS § 101(31) at time of debtor's transfers to him; therefore, trustee could avoid transfers pursuant to 11 USCS §§ 547 and 550. Brandt v Tabet DiVito & Rothstein, LLC (In re Longview Aluminum, L.L.C.) (2009, BC ND Ill) 419 BR 351, 52 BCD 128, affd (2010, ND Ill) 431 BR 193, CCH Bankr L Rptr P 81864, affd (2011, CA7 Ill) 657 F3d 507, 55 BCD 111, 66 CBC2d 577, CCH Bankr L Rptr P 82067.

Chapter 7 trustee could object to proofs of claim under 11 USCS § 502(d) even if she was unable to seek affirmative relief under 11 USCS §§ 547 and 550; further, summary judgment in creditor's favor was precluded, as material question of fact existed regarding whether creditor was insider under 11 USCS § 101(31) and thus, whether trustee could avoid allegedly preferential payments under 11 USCS § 547. Wu v Stephen H. Swift Trust (In re Swift Instruments, Inc.) (2010, BC ND Cal) 54 BCD 11, 64 CBC2d 1895, affd (2012, BAP9) 2012 Bankr LEXIS 1000 (criticized in In re Orange County Nursery, Inc. (2012, BC CD Cal) 479 BR 863) and (criticized in Pensco Trust Co. v Tristar Esperanza Props., LLC (In re Tristar Esperanza Props., LLC) (2015, CA9) 782 F3d 492, 60 BCD 230, CCH Bankr L Rptr P 82794).

Where debtor granted mortgage to family trust to secure debt she incurred for misappropriating funds from trust, granting of mortgage was transfer of interest of debtor in property to and for benefit of insiders, and was therefore avoidable as preferential transfer under 11 USCS § 547(b); whether property was exempt was not cause to bar

avoidance of transfer under § 547(b), but remedy under 11 USCS § 550 was limited to avoidance of mortgage since trust had not extracted any value from mortgaged property. Agin v Chambers (In re Ruel) (2011, BC DC Mass) 457 BR 164.

Trustee met burden of establishing elements of preferential transfer because insider transferee failed to rebut presumption of debtor's insolvency, transfers at issue were made to transferee as creditor of debtors and, as matter of law, transferee's decision to deposit checks into account other than named individual account did not affect his standing as transferee. In re Affinity Health Care, Mgmt. (2013, BC DC Conn) 499 BR 246.

Although creditor was not entity explicitly defined as insider, nature of relationship between debtor and creditor, and various dealings between them, conclusively established that creditor acted as non-statutory insider of debtor. Level of control and influence exercised by creditor, and particularly its sole shareholder (debtor's father), over debtor was compelling evidence that transfers of vehicles from debtor to creditor, which Chapter 7 trustee sought to avoid and recover, were not done at arm's length, including that debtor remained in possession and control of vehicles and that debtor was tasked by his father with selling vehicles. Walters v Farmers Korner, Inc. (In re Smith) (2015, BC DC Colo) 535 BR 374.

Unpublished Opinions

Unpublished: Police pension plan was properly found to be insider of debtor pursuant to 11 USCS § 101(31)(C) because there was close relationship between principal of debtor and plan and its directors, transactions between plan and debtor were not at arm's length, and based on its long standing relationship with principal, plan was able to obtain preferential transfers that trustee successfully avoided under 11 USCS § 547(b). Miami Police Relief & Pension Fund v Tabas (In re The Fla. Fund of Coral Gables, Ltd.) (2005, CA11 Fla) 144 Fed Appx 72.

Unpublished: ***Bankruptcy*** court properly granted summary judgment in favor of franchiser in Chapter 11 debtor's action seeking to avoid transfer of two franchises back to franchiser as preferential transfers under 11 USCS § 547(b)(4)(B) and under Ohio Rev. Code Ann. § 1336.05(B); franchiser did not qualify as "insider" pursuant to 11 USCS § 101(31) and Ohio Rev. Code Ann. § 1336.01(G) because franchiser/franchisee relationship did not make franchiser affiliate and did not create sufficiently close relationship with debtor that would necessitate franchiser's conduct being subjected to closer scrutiny than anyone dealing at arm's length. Congrove v McDonald's Corp. (In re Congrove) (2007, CA6) 222 Fed Appx 450, 47 BCD 166, 2007 FED App 37N.

Unpublished: When chapter 7 debtor repaid creditor with whom he had close personal relationship for living expenses that had been paid by creditor, creditor was "insider" under 11 USCS § 547(b)(4)(B) because creditor was given preferential treatment arising from her status and relationship with debtor; transaction was not conducted at arm's length because there was no commercial reason for loans and there was no collateral or documentation to support loans. Marchand v King (In re Lopresti) (2006, BC DC NJ) 2006 Bankr LEXIS 2396.

Unpublished: Although defendant claimed he was employee of debtor, defendant potentially met definition of insider, pursuant to 11 USCS § 101(31)(B) based upon trustee's assertions that defendant owned 25 percent of company; trustee had adequately stated claim against defendant for avoidance of preferential transfers when defendant admitted that he had taken equipment and assets from debtor six months before petition was filed. Meisel v Naware (In re Promed Informatics, Inc.) (2007, BC DC NJ) 2007 Bankr LEXIS 459.

Unpublished: Where debtor made $ 1 million payment to secured creditor, and payment was shown to be benefit to debtor's co-investor by decreasing his potential liability by $ 1 million, and insider was thus liable as transferee of voidable transfer, under 11 USCS § 547(b)(1) and (5). Kotoshirodo v Hancock (In re Lull) (2009, BC DC Hawaii) 2009 Bankr LEXIS 2316.

174. --Creditor found not to be insider

It was legislative intent that person with relationship designated in 11 USCS § 101(31)(A) be treated as insider due to high potential for control inherent in those relationships, and that other persons might be found to be insiders in particular cases, based on specific facts; as such, debtor's title of "director emeritus" of bank did not make bank per

se insider of debtor under 11 USCS § 101(31)(A) for purposes of determining whether his pre-petition transfers of funds to bank were preferential under 11 USCS § 547(b) given that he made no decisions, had no office or staff, did not attend meetings, and simply received monthly honorarium. Rupp v United Sec. Bank (In re Kunz) (2007, CA10) 489 F3d 1072, 48 BCD 103, CCH Bankr L Rptr P 80958.

Creditor was not non-statutory insider for purposes of 11 USCS § 547(b)(4)(B) where trustee failed to prove that creditor and debtor did not operate at arm's length at time of challenged transactions; although creditor's chief executive officer served on debtor's board, he was sensitive to potential conflicts of interest and had operated at arm's length with debtor. Anstine v Carl Zeiss Meditec AG (In re U.S. Medical, Inc.) (2008, CA10) 531 F3d 1272, 50 BCD 57, 59 CBC2d 1900, CCH Bankr L Rptr P 81275.

Interim chapter 7 trustee's 11 USCS § 547(b) claim against debtor's former owner failed where allegations that owner continued to be employed by debtor, assisted in financial matters, and continued to interact with most significant client after entering transfer agreement did not raise genuine issue as to owner's status as insider under 11 USCS § 101(31)(E) and (F). Smith v Porter (2009, ED Va) 416 BR 264.

It is not enough that insider be creditor of debtor in general sense, but rather, insider must have claim against debtor attributable to specific debt he or she guaranteed in order to render transfers made by debtor on account of that debt to noninsider transferee avoidable under 11 USCS § 547(b), and absent such claim insider is not creditor and such transfer cannot have been made for benefit of creditor; in instant case where guarantor of debtor's debt expressly waived any claim against debtor in event he was required to meet his obligation under guaranty, guarantor has no claim against debtor, is not creditor of debtor, and transfer cannot have been to or for benefit of creditor, and therefore ***preference*** action to recover from noninsider transferee transfer that benefited guarantor cannot be maintained. Hendon v Associates Commercial Corp. (In re Fastrans, Inc.) (1992, BC ED Tenn) 142 BR 241, 27 CBC2d 401 (criticized in Russell v Jones (In re Pro Page Partners, LLC) (2003, BC ED Tenn) 292 BR 622).

Lis pendens filed by creditors against debtors' property was not avoidable as ***preference*** under 11 USCS § 547(b) where trustee failed to prove that creditors, who were friends of debtors, were insiders under 11 USCS § 101(31)(B). Fee v Eccles (In re Eccles) (2008, BC WD Mo) 393 BR 845, affd (2009, BAP8) 407 BR 338.

Where debtor's board's pre-petition approval and consummation of bridge loans to keep debtor afloat, done with assistance of debtor's law firm, did not constitute breach of fiduciary duty to creditors of debtor, law firm was not liable to trustee, where creditor that benefitted from transfer was not insider under 11 USCS §§ 547(b)(4)(B) and 101(31)(B). Hill v Gibson Dunn & Crutcher LLP (In re ms55, Inc.) (2009, BC DC Colo) 420 BR 806, affd (2011, DC Colo) 2011 US Dist LEXIS 34741.

175. Insurer

Although trustee argues that Blue Cross/Blue Shield is creditor of debtor for purposes of 11 USCS § 547 on third-party-beneficiary theory because it received health insurance premium payments from debtor as remitting agent for its employees, where policies in question were arranged for by debtor but entered into between Blue Cross/Blue Shield and individual employee subscribers, Blue Cross/Blue Shield is not third-party beneficiary, because, although relationship among parties was arranged for by debtor, it was clearly for benefit of debtor and primarily debtor's employees, not Blue Cross/Blue Shield; furthermore, it would be employees, not Blue Cross/Blue Shield, which would have rights against debtor for its nonpayment of health insurance premiums if debtor breached its agreement with them to pay premiums either as wage benefit or as remitting agent. American Envt'l Servs. Co. v Blue Cross/Blue Shield (In re American Envt'l Servs. Co.) (1994, BC WD NY) 164 BR 462.

Debtor's ***payments*** within ***90 days*** of its ***bankruptcy*** filing for continued insurance coverage was transfer for benefit of creditor and transferee insurer was creditor for this purpose because insurer was owed money for services rendered in continuing to provide debtor with insurance, and fact that insurer was creditor was confirmed by its filing of proof of claim in ***bankruptcy*** case. Giuliano v RPG Mgmt. (In re NWL Holdings, Inc.) (2013, BC DC Del) 69 CBC2d 1762.

176. Lessor

Lessor is creditor within meaning of 11 USCS § 101 and transfer to lessor by debtor in payment of taxes, insurance, and late charges due under lease was to it qua creditor, bringing transfer within 11 USCS § 547, despite lessor's contention that because lessor as vendor is required to pay tax to District of Columbia, the District is true creditor, since vendee is required to reimburse vendor for tax paid. In re Auto-Train Corp. (1985, BC DC Dist Col) 55 BR 69.

Lease of gift shop, which was executed by principals of corporate debtor prior to incorporation, was executed for benefit of debtor and, by accepting both benefit of possession and obligation of paying rent, debtor is rendered liable under lease and lessors are creditors with claim against debtor for purposes of 11 USCS § 547, even though there was no formal assignment of lease or subleasing of premises to debtor. In re Villa Roel, Inc. (1985, BC DC Dist Col) 57 BR 879, 14 CBC2d 523.

177. Partner

Chapter 7 trustee could not, pursuant to 11 USCS § 547(b), recover alleged preferential transfer from investor in fraudulent investment scheme where investor was not creditor of debtor/managing general partner of limited partnership set up as investment vehicle, since (1) equity investment in limited partnership did not render investor a creditor since limited partners' interests do not constitute "claims" under 11 USCS § 101(5), and (2) debtor was not shown to be independently liable for debts of limited partnership which guaranteed 15 percent return on investments. Sender v Johnson (In re Hedged-Investments Assocs.) (1996, CA10 Colo) 84 F3d 1267, 35 CBC2d 1431.

178. Secured creditor

Chapter 7 debtor has made transfer to or for benefit of creditor under 11 USCS § 547(b)(1) where he has granted bank issuing letter of credit security interest in certificate of deposit to secure promissory note given by debtor in exchange for letter of credit. In re Air Conditioning, Inc. (1988, CA11 Fla) 845 F2d 293, 17 BCD 1385, 18 CBC2d 973, CCH Bankr L Rptr P 72302, cert den (1988) 488 US 993, 109 S Ct 557, 102 L Ed 2d 584.

Secured creditor with interest in debtor's automobile is only partially secured since amount of claim against debtor exceeds value of collateral; thus, creditor who received installment ***payments*** from debtor within ***90-day preference*** period as described in 11 USCS § 547 is precluded by status as partially secured creditor from maintaining that as secured creditor it could not have been preferred since court assumes that ***payments*** it received from debtor were credited towards unsecured portion of debt and its receipt of ***payment*** is more than it would have received on pro rata basis with other unsecured creditors who have as yet received no dividends at all. In re McCormick (1980, BC ND Ohio) 5 BR 726, 6 BCD 889, 2 CBC2d 1145, 31 UCCRS 642.

Perfection of security interest is transfer to benefit of creditor where, as result of perfection, creditor status changed from secured to perfected secured party. In re Meritt (1980, BC WD Mo) 7 BR 876, 7 BCD 28, CCH Bankr L Rptr P 67883.

Under 11 USCS § 547, Chapter 7 trustee may avoid transfer of increased security interest in debtor's collateral by debtor to third person in return for repayment of bank loan to debtor; fact that security interest is unperfected does not require contrary determination. In re Royal Gulf Products Corp. (1987, BC ED Mich) 79 BR 695, 16 BCD 953.

Perfection of security interest in Chapter 11 debtor's property falls within broad definition of "transfer" under 11 USCS § 101 and therefore, at time of perfection, "transfer" occurs for ***preference*** purposes of 11 USCS § 547(b), benefiting creditor whose security interest was perfected. In re Four Winds Enterprises, Inc. (1988, BC SD Cal) 94 BR 694, 18 BCD 1032, CCH Bankr L Rptr P 72597, 8 UCCRS2d 556.

Debtors could not avoid creditor bank's attachment on their property that occurred within 90 days of their ***bankruptcy*** petition because they failed to prove all elements of preferential transfer subject to avoidance under 11 USCS § 547(b); debtors failed to show that attachment enabled bank to receive more than it would have if case were Chapter 7 liquidation. In re McLaughlin (2009, BC DC NH) 2009 BNH 23, 415 BR 23, motion gr, revd (2009, BC DC NH) 2009 Bankr LEXIS 3968, motion gr, revd (2009, BC DC NH) 2009 Bankr LEXIS 3969, motion gr, revd (2009, BC DC NH) 2009 Bankr LEXIS 3971.

179. Spouse

Debtor's former spouse met definition of creditor and transfer of property was made to or for benefit of spouse because spouse and debtor had entered into marital agreement for transfer of property, which constituted binding contract; spouse would have claim against debtor in ***bankruptcy*** proceedings. Prunty v Terry (In re Paschall) (2009, ED Va) 408 BR 79, affd (2010, CA4 Va) 388 Fed Appx 299, cert den (2011) 562 US 1257, 131 S Ct 1575, 179 L Ed 2d 475.

Chapter 7 debtor's former spouse is creditor of debtor's for purposes of determining whether debtor's payment to spouse made pursuant to state-court civil contempt order in lieu of serving jail sentence, which arose as result of debtor's violation of terms of domestic relations order which prohibited debtor from damaging spouse's property, is voidable ***preference*** under 11 USCS § 547, although contempt order did not give former spouse right to payment where she did have claim as result of damages to her personal property caused by debtor's acts; even if debtor's payment were in nature of restitution, such restitution constitutes debt; furthermore, there is no basis in § 547 to insulate restitution paid pursuant to civil contempt order from ***preference*** avoidance. Babitzke v Mantelli (1993, BAP9 Cal) 149 BR 154, 93 CDOS 793, 93 Daily Journal DAR 1524, CCH Bankr L Rptr P 75130.

180. Supplier

Supplier of steel to Chapter 11 debtor contractor had claim against debtor for delivered steel, that arose before debtor's petition was filed; thus supplier is creditor of debtor for purposes of 11 USCS § 547(b)(1). In re Georgia Steel, Inc. (1985, BC MD Ga) 56 BR 509, revd on other grounds (1986, MD Ga) 66 BR 932 (criticized in Watts v Pride Util. Constr., Inc. (In re Sudco, Inc.) (2007, BC ND Ga) 2007 Bankr LEXIS 3730) and (criticized in In re J.A. Jones (2007, BC WD NC) 361 BR 94).

Supplier of one-inch disk drives to Chapter 11 debtor is "creditor" for purposes of 11 USCS § 547 where ongoing business relationship existed whereby debtor would send orders to supplier, who would forward orders to d.b.a. of supplier that was exporter of parts, exporter would send orders to actual manufacturer of computer parts, and once manufactured, goods went back down line to exporter, supplier, and then debtor, to whom supplier sent invoices. Miniscribe Corp. v Keymarc, Inc. (In re Miniscribe Corp.) (1991, BC DC Colo) 123 BR 86, 8 Colo Bankr Ct Rep 49.

As transfer beneficiary, seller of accounts receivable from Chapter 7 debtor was proper party to trustee's avoidance action given that 11 USCS § 547(b)(1) permitted avoidance of transfer to or for benefit of creditor. Shapiro v Art Leather, Inc. (In re Connolly N. Am., LLC) (2006, BC ED Mich) 340 BR 829, 46 BCD 97, judgment entered, count dismd (2008, BC ED Mich) 398 BR 564, 51 BCD 6, 78 Fed Rules Evid Serv 286.

While there was no reason to disturb ***bankruptcy*** judge's decision to use average-lateness method to determine debtor's and supplier's dealings during historical period, rather than total-range method, judge's baseline appeared not only excessively narrow, but also arbitrary, and supplier's ***preference*** liability was limited to payments substantially outside appropriate baseline. Unsecured Creditors Comm. of Sparrer Sausage Co. v Jason's Foods, Inc. (2016, CA7 Ill) 826 F3d 388, 62 BCD 196, 75 CBC2d 1528, CCH Bankr L Rptr P 82971.

Supplier of debtor was entitled to reduction of its ***preference*** liability because, well after debtor paid at least some invoices for meat products which supplier provided during ***preference*** period, supplier provided new meat products to debtor, for which debtor never paid supplier, that constituted new value for benefit of debtor. Unsecured Creditors Comm. of Sparrer Sausage Co. v Jason's Foods, Inc. (2016, CA7 Ill) 826 F3d 388, 62 BCD 196, 75 CBC2d 1528, CCH Bankr L Rptr P 82971.

181. Tenants in common

Where debtor and his brother took title to property as tenants in common as beneficiaries of trust, and brother received more than his share of proceeds from sale of property pursuant to oral agreement, difference between what he received and what debtor received was not preferential transfer under 11 USCS § 547 because brother was not creditor of debtor. Braunstein v Akillian (In re Akillian) (2011, BC DC Mass) 448 BR 113, vacated, in part, remanded (2012, DC Mass) 2012 US Dist LEXIS 44617.

In avoidance action, Chapter 11 trustee satisfied his initial burden through defendant's admission that debtor was insolvent at time each transfer was received, and, under balance sheet test, debtor was insolvent for relevant years. Everett v Thomas Capital Invs. (In re Pac; thomas Corp.) (2015, BC ND Cal) 543 BR 7.

In avoidance action, Chapter 11 trustee satisfied his initial burden through defendant's admission that debtor was insolvent at time each transfer was received, and, under balance sheet test, debtor was insolvent for relevant years. Everett v Darrow Family Partners (In re Pac; thomas Corp.) (2015, BC ND Cal) 543 BR 627.

182. Trustee

Although indenture trustee has filed claim against Chapter 11 estate on behalf of debenture holders, trustee is not creditor of debtor thus is not proper party under 11 USCS § 547 to return preferential payment made by debtor to indenture trustee for transmittal to debenture holders where trustee no longer possesses custody or control of payment. In re FSC Corp. (1986, BC WD Pa) 64 BR 770.

If trustee of trusts, who was president of Chapter 7 debtor investment group, breached his fiduciary duty to trusts by paying funds to debtor, he is not creditor of debtor for purposes of 11 USCS § 547, because his liability to trusts is personal and is not same liability debtor had to trusts, and if he did not breach his fiduciary duty, he would have no liability to trusts and, therefore, would not be creditor of debtor since no other contractual or statutory source of trustee's liability to trusts has been shown; just because it is postulated that trustee would have paid debtor's debts to keep investors happy, and accountant for debtor signed affidavit saying that debtor would have repaid trustee, does not mean that trustee is entitled to be creditor of debtor; thus, preferential ***payments*** made more than ***90 days*** prior to ***bankruptcy*** but within one year of ***bankruptcy*** are not recoverable from trustee, because although he was insider, he was not creditor. Leitch v Marjorie M. Jelsema Ten Year Irrevocable Trust (In re Square Real Estate) (1994, BC WD Mich) 163 BR 108.

Chapter 7 trustee was granted summary judgment on complaint to avoid debtor's credit card ***payment*** to creditor as ***preference*** under 11 USCS § 547(b) because charge to card within ***90 days*** before his ***bankruptcy*** filing could not have been initiated and directed by debtor if he had no interest in funds and was made while he was insolvent. Flatau v Walman Optical Co. (In re Werner) (2007, BC MD Ga) 365 BR 283 (criticized in Parks v FIA Card Serv. (In re Marshall) (2008, DC Kan) 2008 US Dist LEXIS 15336).

Where ***bankruptcy*** debtor and debtor's spouse borrowed money from spouse's parents to purchase real property and, in contemplation of divorce, transferred property to trust of which parents were sole beneficiaries and one parent was trustee, transfer was to or for benefit of creditor for purposes of preferential transfer under 11 USCS § 547(b)(1); parents shared substantial identity of interests with trust and thus both parents and trust were creditors of debtor for whose benefit transfer was made. Boyd v Petrie (In re Tompkins) (2010, BC WD Mich) 430 BR 453.

183. Miscellaneous

Investor who had entrusted money to Chapter 7 debtor, which debtor did not use to purchase stock as he had represented, is creditor of debtor as defined in 11 USCS § 101 and for purposes of 11 USCS § 547(b), regardless of whether claims arise from breach of contract or fraud, and debtor's repayment of funds up to $ 2.3 million that creditor invested with him were for or on account of antecedent debt; however, payments received by investor over and above his investment are not subject to recovery as ***preferences*** because debtor was not personally liable to investor for profit if none resulted. In re Cohen (1989, CA5 Tex) 875 F2d 508, 19 BCD 883, 21 CBC2d 554, CCH Bankr L Rptr P 72962.

Asset transfers made to third parties in exchange for payment of debtors' antecedent debt are transfers to or for benefit of creditor under 11 USCS § 547(b)(1), such as in instant case where purchaser of debtors' assets assumed debtors' preexisting liability to creditor and made payment thereto. In re Food Catering & Housing, Inc. (1992, CA9 Wash) 971 F2d 396, 92 CDOS 6636, 92 Daily Journal DAR 10704, CCH Bankr L Rptr P 74811.

Purchaser of machines was Chapter 7 debtor seller's creditor for purposes of 11 USCS § 547, although purchaser alleges that it cannot be creditor because it suffered no damages from debtor's repudiation of sales contract and,

therefore, has no claim against debtor for damages, where purchaser had "claim" against debtor as of date when debtor received purchaser's down payment check and deposited it into its own account, and acceptance of payment gave rise to duty on debtor's part to either produce machines or to refund down payment while it gave purchaser right to demand either performance or refund; purchaser had either restitution right to payment or right to equitable remedy for breach of performance contingent upon debtor's failure to deliver machines. Sigmon v Royal Cake Co. (In re Cybermech, Inc.) (1994, CA4 Va) 13 F3d 818, 6 Fourth Cir & Dist Col Bankr Ct Rep 301, 25 BCD 230, 30 CBC2d 696, CCH Bankr L Rptr P 75653.

Transferee was "creditor" for purposes of former 11 USCS § 96, with respect to $ 5,000 which bankrupt paid transferee under following circumstances: bankrupt owed transferee more than $ 60,000; bankrupt requested additional loan; transferee delivered bearer bonds to bankrupt who delivered them on same day to bank for sale and who received loan from bank in amount of $ 10,000; 7 days later bank deposited $ 12,700.40 as proceeds from sale of bonds into account of bankrupt, at which time bankrupt advised transferee of sale and deposit; on next day, bankrupt executed note in favor of transferee for $ 7,700.40, which note transferee did not receive until some days later; 3 days later bankrupt repaid $ 10,000 loan to bank; 4 days thereafter bankrupt delivered check for $ 2,000 to transferee; on next day bankrupt delivered check for $ 3,000 to transferee; approximately 1 month later bankrupt filed ***bankruptcy*** petition; all that was necessary for creation of creditor status was that transferee gave bankrupt full control of proceeds of sale of bonds and estate was actually enriched; once transferee permitted bankrupt to retain its funds, proceeds became bankrupt's property and transferee relied on bankrupt's credit. Sharfman v Tharpe & Co. (1974, SD NY) 381 F Supp 1394.

Mortgagee, to whom property was transferred, is not creditor within meaning of 11 USCS § 547(b)(1) where mortgagee had taken mortgage from debtors' grantor, debtors did not assume mortgage, and debtors were not personally liable on mortgage; transfer, which occurred when mortgagee foreclosed, is not on account of antecedent debt; debtors therefore may not avoid transfer under 11 USCS § 522(h). Karagianis v G.F.C. Consumer Discount Co. (1983, ED Pa) 34 BR 108.

Transfer of proceeds of sheriff's sale of Chapter 7 debtors' hay to judgment creditor, who obtained writ of execution which led to execution and sale of hay, is preferential under 11 USCS § 547; fact that sheriff acted as agent for creditor does not render creditor good faith transferee under 11 USCS § 550. In re Cockreham (1988, DC Wyo) 84 BR 757.

Transfer is not avoidable ***preference*** under 11 USCS § 547 where trustee does not carry his burden of showing either that defendant was creditor of debtor or that defendant received more than he would have otherwise received; fact that individual improperly used debtor's money to purchase stock of corporation owned by defendant does not make debtor the purchaser; since debtor was not purchaser, there was never any debtor-creditor relationship between debtor and defendant. In re Polar Chips International, Inc. (1984, BC SD Fla) 39 BR 864.

To extent that accounting firm claims that reasonably equivalent value passed to debtor by virtue of debtor's extinguishment of its debt to its parent, there has been novation which substitutes accounting firm as creditor for parent, thus meeting "creditor" element of ***preference*** under 11 USCS § 547. In re Computer Universe, Inc. (1986, BC MD Fla) 58 BR 28, 14 CBC2d 403, CCH Bankr L Rptr P 71038.

Transfer by debtor freight forwarder to steamship agency acting on behalf of common carrier is not preferential transfer as to agency under 11 USCS § 547 because transfer was not in payment of any indebtedness, antecedent or otherwise, owed to agency, but rather indebtedness was due to carrier that performed services and fact that agency endorsed check from debtor without referring to its agency status does not entitle trustee to recover since action is not based on instrument itself; recovery cannot be had against agency under 11 USCS § 550 because entity that acts as mere conduit of funds is not initial transferee within ambit of statute and thus no recovery may be had from such entity. In re Black & Geddes, Inc. (1986, BC SD NY) 59 BR 873.

Payments made to seller of Chapter 11 debtor on promissory note involving real estate transaction with purchasers may not be avoided under 11 USCS § 547 where payments were made outside ***preference*** period and where seller was no longer insider of debtor, having sold his stock and resigned his positions; further, seller was not creditor of

either debtor or related corporation making payments, therefore 11 USCS § 547 is inapplicable. In re Coors of North Mississippi, Inc. (1986, BC ND Miss) 66 BR 845.

Organization that facilitates interline settlement of accounts between air carriers is not initial transferee under 11 USCS § 550 so that organization is not liable under 11 USCS § 547 for payments made by debtor airline carrier to satisfy its obligations to other carriers in particular settlement where: (1) funds necessary to meet obligations of one carrier to another are paid through clearing bank and funds do not inure to benefit of organization; (2) organization is not-for-profit corporation that has no right to enforce payment by participating carriers; (3) organization is merely mutual agent employed by carriers to effectuate settlement process; and (4) organization is mere conduit of funds. In re Jet Florida System, Inc. (1987, BC SD Fla) 69 BR 83.

Payments made by Chapter 11 debtor to travel agency for airline tickets were made for benefit of agency, not airline reporting corporation owned by airlines and established to facilitate transactions between airlines and agencies, where payments for tickets issued to debtor had been withdrawn by airline reporting corporation from agency's account well in advance of payment by debtor and agency had essentially extended credit to debtor. Fonda Group v Marcus Travel (In re Fonda Group) (1989, BC DC NJ) 108 BR 956.

Where creditor who had garnished Chapter 11 debtor's bank accounts prepetition admitted that $ 4,000 payment by debtor in attempt to partially satisfy creditor's judgment debt was preferential, it may be taken as admitted that subsequent $ 35,567 payment also made in satisfaction of judgment debt was to or for benefit of creditor under 11 USCS § 547(b)(1), since both payments went to same entity, it made be deemed admitted that $ 35,567 transfer was made for or on account of antecedent debt owed by debtor before transfer was made since both payments were made on same debt, and it may be assumed that if $ 4,000 transfer enabled creditor to receive more than it would receive if case were under Chapter 7 and transfer had not been made, then $ 35,567 payment enabled creditor to reap these benefits also. Official Comm. of Unsecured Creditors ex rel. S. Galeski Optical Co. v Estate of Galeski (In re S. Galeski Optical Co.) (1994, BC ED Va) 169 BR 360.

For purposes of 11 USCS § 547(b)(1), payments made by debtor directly to factor on bills of lading that factor had purchased from debtor's creditors, were payments for benefit of creditors, because purchase had been with recourse (i.e. factor could sell back any uncollected bills to creditors, leaving creditors then to look to debtor for payment). Sticka v Bestline, Inc. (In re Attaway, Inc.) (1995, BC DC Or) 180 BR 274, 27 BCD 66, CCH Bankr L Rptr P 74653.

Debtor's payments to corporation were not avoidable as ***preferences*** under 11 USCS § 547(b) because advance payments were meant to cover advances that were made by individual and thus, corporation was not creditor. Brown v Leslie Kitchenmaster & Kot, Inc. (In re Hertzler Halstead Hosp.) (2005, BC DC Kan) 334 BR 276, 45 BCD 197.

Pursuant to 11 USCS § 547(b), Chapter 7 trustee was not entitled to recover funds paid out of corporate bank account to debtor's brother where debtor had fraudulently transferred money to corporate account, and fact that trustee had been able to avoid transfer as to corporation did not alter fact that when transfers were made to brother, they were made to him by entity other than debtor. Gouveia v Cahillane (In re Cahillane) (2009, BC ND Ind) 408 BR 175.

Complaint seeking to avoid alleged preferential transfers under 11 USCS § 547 failed to assert facts showing that transfers were made to or for benefit of creditors where exhibit labeled some of transferees but failed to specify for whom benefit of other transfers were made. Beaman v Barth (In re AmerLink, Ltd.) (2011, BC ED NC) 65 CBC2d 868.

For purposes of determining preferential transfer claim, where debtors were in business of providing utility management and bill payment services to restaurants and other customers, utility provider was intended third party beneficiary of debtors' contracts with their customers, and those third-party beneficiary claims were direct claims, even though customers possessed concurrent claims, which arose at time debtors received funds from customers. Provider also had claims against debtor as beneficiary of trust, which arose at time debtors breached trust obligation by commingling customers' funds and allowing trust res to become lost. Stoebner v San Diego Gas &

Elec. Co. (In re LGI Energy Solutions, Inc.) (2012, BC DC Minn) 2012 Bankr LEXIS 6246, affd in part and revd in part (2012, BAP8) 482 BR 809, 57 BCD 57, CCH Bankr L Rptr P 82376, affd (2014, CA8) 746 F3d 350, 59 BCD 77, 71 CBC2d 474, CCH Bankr L Rptr P 82613.

In trustee's action to avoid preferential transfer, car dealer was creditor that had claim that arose before petition date, as debtor owed balance on vehicle, and creditor benefited from receipt of debtor's ***payment***. Suhar v Agree Auto Servs. (In re Blakely) (2013, BC ND Ohio) 497 BR 267.

Bankruptcy trustee had established prima facie elements of her claims under 11 USCS § 547(b) where undisputed facts showed that debtor had transferred funds to each investor during ***90-day preference*** period. Wagner v Fenton (In re Vaughan Co., Realtors) (2014, BC DC NM) 70 CBC2d 1619.

Although ***bankruptcy*** debtor granted security interests to county commission in connection with issuance of bonds, commission assigned security interests and thus financing statement filed by assignee was not avoidable as preferential transfer since rights retained by commission under assignment did not amount to claims against debtor, and commission was not creditor of debtor. Zucker v WesBanco Bank, Inc. (In re Fairmont Gen. Hosp., Inc.) (2016, BC ND W Va) 546 BR 659.

E. Antecedent Debt

1. In General

184. Generally

When creditor has claim against debtor--even if claim is unliquidated, unfixed, or contingent--debtor has incurred debt to creditor under 11 USCS § 547; Chapter 7 debtor's anticipatory repudiation of crude oil contract creates debt to creditor, even though creditor might not decide to pursue its remedy, given future rise or fall of crude oil market; debtor's payment to creditor after repudiation constitutes payment on antecedent debt. In re Energy Cooperative, Inc. (1987, CA7 Ill) 832 F2d 997, 16 BCD 1156, 17 CBC2d 1215, CCH Bankr L Rptr P 72027, 5 UCCRS2d 99.

Term "debt" used in 11 USCS § 547(b)(2) is to be construed broadly and expansively for purposes of ***Bankruptcy*** Code; debt is incurred when debtor becomes legally bound to pay. Alfa Mut. Fire Ins. Co. v Memory (In re Martin) (1995, MD Ala) 184 BR 985, 34 CBC2d 182, affd (1996, CA11 Ala) 101 F3d 708.

In view of U.S. District Court for Northern District of Georgia, Atlanta Division, lease termination fee, where lessee-debtor obtained nothing of value except for release from liability to pay future rent, is "a transfer for or on account of antecedent debt owed by debtor before such transfer was made" for purposes of 11 USCS § 547(b)(2); a broad interpretation of antecedent debt in lease termination context facilitates protection of other creditors that might get shortchanged by landlords that could insulate themselves from ***bankruptcy*** process. Midwest Holding # 7, LLC v Anderson (2008, ND Ga) 387 BR 892, 59 CBC2d 1191, affd (2009, CA11 Ga) 556 F3d 1194, 51 BCD 49, 61 CBC2d 127, CCH Bankr L Rptr P 81407, 21 FLW Fed C 1451.

Legislative history of 11 USCS § 101 indicates that terms "debt" and "claim" are coextensive and that debtor owes debt to creditor to extent that creditor has claim against debtor; therefore, transfers from debtor to shareholder will constitute transfers for or on account of antecedent debt owed by debtor, for purposes of 11 USCS § 547, where, because of advances made by shareholder to cover debtor's payroll, debtor was thereafter indebted to shareholder. In re Fulghum Constr. Co. (1980, BC MD Tenn) 7 BR 629, affd (1981, MD Tenn) 14 BR 293, 32 UCCRS 798, affd in part and vacated in part on other grounds (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Where creditor's perfection is transfer on account of antecedent debt, it does not fall within relation back rule of 11 USCS § 547(e)(2)(A) which says that transfer occurs when it takes effect between transferor and transferee, if such transfer is perfected at, or within 10 days after, such time; § 547(e)(2)(A) has effect of making recent (within 10 days) transfer a contemporaneous exchange, thereby preventing trustee from avoiding such transfer under § 547(b). In re South Atlantic Packers Asso. (1983, BC DC SC) 30 BR 836, 36 UCCRS 1040.

Even assuming that filing of financing statements is transfer, no case is established under 11 USCS § 547(b) where there is no antecedent debt. In re Marta Group, Inc. (1983, BC ED Pa) 33 BR 634, 37 UCCRS 451.

Chapter 11 debtors' transfer of stock is not preferential under 11 USCS § 547 where at time of transfer there was no creditor-debtor relationship between debtors and recipient of stock and thus no antecedent debt. In re Burkey (1986, BC MD Fla) 68 BR 270, 3 UCCRS2d 234.

Debt is "antecedent" for purposes of 11 USCS § 547 when debtor becomes legally bound to pay before transfer is made; in present case, Chapter 11 debtor's payment to travel agency was for antecedent debt where services were furnished prior to payment; payment was due and invoices were prepared when airline tickets were issued, but payment terms for commercial accounts were 30 days. Fonda Group v Marcus Travel (In re Fonda Group) (1989, BC DC NJ) 108 BR 956.

As debtor's payment to its franchisee was made to settle all claims between parties, it was payment on account of antecedent debt under 11 USCS § 547(b)(2). Levine v Custom Carpet Shop, Inc. (In re Flooring Am., Inc.) (2003, BC ND Ga) 302 BR 394.

11 USCS § 547(b) applies to transfers on account of debts which precede and are not contemporaneous with transfer, and for which debtor is liable, whether that liability is matured, contingent, disputed, et cetera. Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124.

In order to satisfy pleading requirements under Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), trustee was obligated to allege facts regarding nature and amount of antecedent debt which, if true, would make existence of antecedent debt plausible. Angell v Day (In re Caremerica, Inc.) (2009, BC ED NC) 415 BR 200.

185. Determination of date debt incurred

Debt is incurred for purposes of 11 USCS § 547 when debtor has ownership interest in consideration to be received; debts are incurred when services are rendered, not when invoice is sent or when party is billed; debts were antecedent where period of 50 days passed between date debtor incurred debts and time of debtor's payments. In re General Office Furniture Wholesalers, Inc. (1984, BC ED Va) 37 BR 180.

For purposes of 11 USCS § 547(b), which permits trustee avoidance of certain prepetition transfers, in determining whether payment was made on account of antecedent debt, ***bankruptcy*** court must first determine when debt was incurred; debt is incurred on date upon which debtor first becomes legally bound to pay. In re Wathen's Elevators, Inc. (1984, BC WD Ky) 37 BR 870.

Grain elevator debtor incurred debt to farmer when farmer delivered his grain to elevator and not when farmer cashed in his scale tickets; therefore, debt owed by grain elevator to farmer was antecedent debt which could be avoided by trustee under 11 USCS § 547(b) as preferential transfer. In re Wathen's Elevators, Inc. (1984, BC WD Ky) 37 BR 870.

For purposes of 11 USCS § 547(b)(2) debt on installment contract is incurred on date contract is executed and not on date when installment becomes due. In re Pippin (1984, BC WD La) 46 BR 281.

For purposes of 11 USCS § 547(b), debt arises at time of performance or when debtor becomes legally bound to pay as opposed to later invoicing. In re Transpacific Carriers Corp. (1985, BC SD NY) 50 BR 649, affd (1990, SD NY) 113 BR 139.

Chapter 7 debtors' obligation to investors in debtors' Ponzi scheme is incurred on date debtors sign promissory notes, not on date notes become due; thus debtors' prepetition paybacks to earlier investors are payments on antecedent debt and qualify for avoidance under 11 USCS § 547(b)(2). In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

For purposes of 11 USCS § 547(b), fact that investors in debtors could have or often did "roll-over" their investments rather than require payment when notes matured or interest was due is irrelevant since creditor always has option of waiving or postponing debtor's obligation to pay and this does not mean that obligation was not previously created, but merely that payment is not yet required. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Debt is incurred for purposes of 11 USCS § 547 when debtor first becomes obligated to pay, and this is true even though debt is at first unmatured or contingent; debtor's obligation to pay first arises whenever debtor obtains property interest in consideration exchanged giving rise to debt which occurs upon performance, delivery, or its equivalent and not when payment is due. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Lease payment obligations arise when they become due and payable because of lessor's possession, not when lease is signed, for purposes of determining whether ***payment*** arises on account of antecedent debt under 11 USCS § 547. In re Coco (1986, BC SD NY) 67 BR 365.

Debt to cotton farmer owed by Chapter 7 cotton marketing service is incurred when farmer delivers cotton to debtor, even though amount of debt is not known until later point in time when farmer "calls" his contract within ***90 days***, at which point farmer is paid difference between government loan value of cotton and market price, because debt is created at time farmer gained right to demand ***payment*** under 11 USCS § 101, which here was upon delivery; therefore, debtor's later ***payments*** to farmer are for antecedent debt and are voidable ***preferences*** under 11 USCS § 547. In re Brints Cotton Marketing, Inc. (1986, BC ND Tex) 68 BR 354.

Payments made by supplier of disk drives for Chapter 11 debtor were made on account of antecedent debt, for purposes of 11 USCS § 547, where debtor became legally obligated to pay for disks when supplier shipped them to debtor, at which time debtor obtained property interest in goods that gave rise to debt; thus, although debtor's payment terms were "net 30," obligation to pay arose upon shipment date, which occurred well before transfer of funds. Miniscribe Corp. v Keymarc, Inc. (In re Miniscribe Corp.) (1991, BC DC Colo) 123 BR 86, 8 Colo Bankr Ct Rep 49.

Motion for summary judgment by chapter 7 trustee against defendant-creditor to avoid defendant's security right in real estate sale proceeds as preferential transfer is granted to extent transfer of mortgage by debtor to defendant was for or on account of antecedent debt under 11 USCS § 547(b)(2), court holding pursuant to 11 USCS § 547(e)(2)(B) that "date of transfer" is date of perfection where mortgage was perfected more than 10 days after its delivery, and lien on advanced amounts reflected in note is avoided by trustee; furthermore, prior advances which exceeded note amount are not secured by mortgage. Mendelsohn v Louis Frey Co. (In re Moran) (1995, BC ED NY) 188 BR 492.

Debtor incurs debt on obligation once creditor would have claim against debtor's estate if debtor fails to pay for goods or services provided; therefore, because debtor's obligation to pay creditor arises as soon as it receives goods or service in question, debtor incurs "debt" to transferee for purposes of 11 USCS § 547(b)(2) when it receives goods or services, even if payment is not due until later date. Peltz v Gulfcoast Workstation Group, (In re Bridge Info. Sys.) (2004, BC ED Mo) 311 BR 774, 43 BCD 76, affd (2006, CA8 Mo) 447 F3d 1076, 46 BCD 133, 56 CBC2d 165, CCH Bankr L Rptr P 80603, reh den, reh, en banc, den (2006, CA8) 2006 US App LEXIS 19487 and affd (2006, CA8 Mo) 460 F3d 1041.

Where ***bankruptcy*** debtor agreed to make payment of certain expenses as part of agreement to purchase assets from another ***bankruptcy*** estate, debtor's payment of expenses prior to execution of agreement did not constitute preferential transfer since payment before debt was incurred was not made on account of antecedent debt. Burtch v Huston (In re USDigital, Inc.) (2011, BC DC Del) 443 BR 22.

186. Miscellaneous

Transfer of real property by debtors to son and daughter-in-law is not transfer on account of antecedent debt under 11 USCS § 547(b), even though recordation took place 16 months after sale and shortly before Chapter 7 petition,

because transferees took possession immediately upon sale, which perfected transfer at time of sale under state law. In re Gulino (1985, CA9 Cal) 779 F2d 546, 14 CBC2d 289, CCH Bankr L Rptr P 70907.

Given similarities between Minn. Stat. § 513.45(b) and 11 USCS § 547, "antecedent debt" in § 513.45(b) means nothing more than debt that exists before transfer; thus, it is not relevant whether or not debtor's own debts were "current" or "antecedent" at time insider paid them; only relevant question is whether debtor owed existing debt to insider at time that debtor made any particular transfer to insider. Elliot & Callan, Inc. v Crofton (2009, DC Minn) 613 F Supp 2d 963.

Provision of 10-day grace period pursuant to 11 USCS § 547(a)(3) and (e)(2) for perfection of security interest in order for transfer not to be on behalf of antecedent debt does not make state law's 20-day grace period for perfection irrelevant, as § 547 requires application of state law to determine when security interest is perfected, and under state law, security interest perfected within grace period is continuously perfected back to time of attachment; therefore, bank's security interest in truck is not transferred on behalf of antecedent debt where bank did not apply for certificate of title with lien noted on title within grace period. In re Burnette (1981, BC ED Tenn) 14 BR 795, 8 BCD 255, 5 CBC2d 1215, CCH Bankr L Rptr P 68423, 32 UCCRS 1227.

Although state law is appropriate for determining date of perfection, date of transfer is governed by 11 USCS § 547; transfer of motor vehicle took place on date on which transferee satisfied requirements for recording lien on certificate on title and this transfer, coming 18 days after creation of debt and at least 14 days after delivery of car, is outside relation back period and is therefore on account of antecedent debt. In re Murray (1983, BC MD Tenn) 27 BR 445.

Trustee cannot recover payments debtor corporation made to seller on account of individual buyer of goods, which were used by debtor, because 11 USCS § 547(b)(2) requires that preferential transfer be for debt owed by debtor, and where account was clearly in individual's name, and debtor corporation's account had previously been closed, debt was individual's debt where there is no evidence individual was in fact guarantor. In re Evans Potato Co. (1984, BC SD Ohio) 44 BR 191, 12 BCD 518.

Where court is unable to determine whether, at time of transfer of debtor brokerage's customer funds by managing partner to his horse racing business partner, there existed any outstanding debt to transferee, transfer may not be avoided under 11 USCS § 547(b). In re Bell & Beckwith (1986, BC ND Ohio) 64 BR 620.

Chapter 7 debtor's restitution obligation for welfare fraud conviction to county evidenced by promissory note is "debt" within meaning of 11 USCS §§ 547(a)(2) and 101 for avoidable ***preference*** purposes. In re Hackney (1988, BC ND Cal) 83 BR 20, 16 BCD 1357, 18 CBC2d 688.

Transfer of substantially all of corporate debtor's assets to limited liability company within one year of filing Chapter 7 petition was not avoidable as preferential transfer under 11 USCS § 547(b) because trustee had not shown that debtor's assets were transferred on account of antecedent debt. Menchise v Clark (In re Dealers Agency Servs.) (2007, BC MD Fla) 380 BR 608, 21 FLW Fed B 155.

Chapter 7 trustee failed to show that the transfers allegedly made to an immediate transferee and subsequent transferees were for or on account of an antecedent debt owed by the debtors, as required by 11 USCS § 547(b)(2), where he failed to allege facts regarding the nature and amount of the antecedent debt which, if true, would render plausible the assertion that a transfer was made for or on account of such antecedent debt. Angell v BER Care, Inc. (In re Caremerica, Inc.) (2009, BC ED NC) 409 BR 737, 51 BCD 249 (criticized in TOUSA Homes, Inc. v Palm Beach Newspapers, Inc. (In re TOUSA, Inc.) (2010, BC SD Fla) 442 BR 852) and (criticized in Ransel v GE Commer. Distrib. Fin. Corp. (In re Pilgrim Int'l Inc.) (2011, BC ND Ind) 2011 Bankr LEXIS 3182) and partial summary judgment den, as moot, summary judgment gr (2013, BC ED NC) 2013 Bankr LEXIS 1791 and (criticized in Howell v Fulford (In re Southern Home & Ranch Supply, Inc.) (2013, BC ND Ga) 2013 Bankr LEXIS 5535).

In seeking to avoid allegedly preferential transfers under 11 USCS § 547(b), Chapter 11 debtor, which had agreement to purchase towels from manufacturer, did not meet its burden of proving existence of antecedent debt when it argued that legal obligation was created when creditor began manufacturing towels, as it could have sought

damages for breach of contract if debtor had subsequently cancelled, and that this right to damages constituted unmatured right to payment generating claim within meaning of 11 USCS § 101(12) and thus, antecedent debt; however, debtor failed to establish which, if any contract would have been breached if debtor had refused payment on goods once they were delivered to warehouse. Ames Merch. Corp. v Revere Mills Inc. (In re Ames Dep't Stores, Inc.) (2010, BC SD NY) 53 BCD 93.

Although listing of names of transferees, dates, and amounts of each transfer was sufficient to assert that funds were in fact transferred, transferee's existence as creditor was contingent on existence of antecedent debt; trustee's mere conclusory statements that transfers were made on account of antecedent debt were insufficient to satisfy pleading requirements for preferential transfer cause of action under 11 USCS § 547. Beaman v Barth (In re AmerLink, Ltd.) (2011, BC ED NC) 65 CBC2d 868.

Because transfers of debtor's membership interests effected by his expulsion from limited liability companies (LLCs) did not reduce debtor's obligations to LLCs, transfers were not for or on account of antecedent debt within meaning of this section, and therefore transfers were not avoidable. Garcia v Garcia (In re Garcia) (2013, BC ED NY) 494 BR 799, 58 BCD 84.

For purposes of avoiding preferential transfer, ***Bankruptcy*** Code did not define term "antecedent debt," but based on definitions of "debt" and "claim" in Code, court determined that debt was antecedent if it was incurred before allegedly preferential transfers; further, debt arose when debtor received goods or services and was then legally bound to pay, not when creditor chose to invoice debtor for work or services. DOTS, LLC v Capstone Media (In re DOTS, LLC) (2015, BC DC NJ) 533 BR 432, 61 BCD 86.

Where debtor purchased corn from defendant for use at its ethanol facility, Chapter 7 trustee satisfied its prima facie case for ***preference*** action, including that transfer was made for antecedent debt because, had debtor not made transfers during ***preference*** period, defendant would have been able to assert claim against debtor's estate for repayment. Conti v Perdue BioEnergy, LLC (In re Clean Burn Fuels, LLC) (2015, BC MD NC) 540 BR 195, 61 BCD 181.

Unpublished Opinions

Unpublished: District court and ***bankruptcy*** court's conclusions that debtor's ***payments*** to creditor pursuant to parties' credit agreement during ***90-day*** period preceding debtor's Chapter 11 filing constituted ***preferences*** under 11 USCS § 547(b) because ***payments*** were properly found to be on account of antecedent debt under § 547(b)(2), and ordinary course of business and contemporaneous exchange for new value exceptions under § 547(c)(1), (c)(2) were not applicable. Placid Refining Co. v Oakridge Consulting, Inc. (In re JJSA Liquidation Trust) (2006, CA5 La) 203 Fed Appx 572.

Unpublished: Transfers to creditor were for benefit of creditor in payment of antecedent debt where agency agreement between debtor's subsidiary and creditor required subsidiary to pay collected insurance premiums to creditor, and system was created to fulfil this obligation that provided for transfer of collected premiums by subsidiary to debtor followed by payment by debtor to creditor from sweep account; it did not matter that creditor understood that its debtor-creditor relationship was with debtor's subsidiary, not debtor, as mutual consent was not required to establish debtor-creditor relationship for purpose of preferential transfer avoidance. Redmond v GMAC Ins. Mgmt. Corp. (In re Brooke Corp.) (2015, BC DC Kan) 539 BR 605.

2. Particular Debts and Payments as Antecedent

187. Advances

Where cattle dealers delivered cattle to ***bankruptcy*** debtors' feedlot for fattening, and debtors received nothing from subsequent sale of cattle since their preexisting debt to dealers exceeded proceeds of sale, there was no preferential setoff since dealers could not be held to owe debtors money that it had already paid to debtors in form of advances. MidWestOne Bank & Trust v Commercial Fed. Bank (2005, SD Iowa) 331 BR 802.

Chapter 11 trustee established that by making June advances, bank became "creditor" of debtors with "claim" for return of those funds or delivery of promissory note executed in connection with underlying mortgages; also, June advances gave rise to "claim" as defined by ***Bankruptcy*** Code and, thus, bank was "creditor" who was owed "antecedent debt" by debtors under 11 USCS § 547(b)(1), (b)(2). Jacobs v Matrix Capital Bank (In re AppOnline.com, Inc.) (2004, BC ED NY) 315 BR 259, 43 BCD 210.

Unpublished Opinions

Unpublished: Where client prepaid ***bankruptcy*** debtor to obtain advertising, and debtor prepaid advertiser for placement of advertisements, payments to advertiser were not made for or on account of antecedent debt as required for preferential transfer under 11 USCS § 547(b) since transfers were prepayments when no prior debt existed. Maxwell v Penn Media (In re marchFirst, Inc.) (2010, BC ND Ill) 2010 Bankr LEXIS 3480.

188. Agricultural products and livestock

Transfer of hogs from Chapter 7 debtors to debtor-husband's father was made on account of antecedent debt under 11 USCS § 547 where: (1) father has admitted to being creditor of debtor pursuant to oral arrangement whereby debtors took over hog farming operation; (2) father did not take security interest in debtors' property or file financing statement; (3) ledger indicates that obligation arose prior to time of transfer; and (4) debtors did not consistently pay rent as it became due and father was required to make continuous advances of money and material to maintain operation. In re Albers (1986, BC ND Ohio) 60 BR 206, dismd (1986, ND Ohio) 64 BR 154.

189. Assignments

Payments to creditor, within four months [now ***90 days***] preceding ***bankruptcy***, which were in form of assignment of income from freight revenues, which assignment was given as security for loan at time loan was taken out prior to beginning of four month period, were not transfers of property for antecedent debt, and did not constitute voidable ***preference***, because creditor had security interest in revenues when loan was made; thus where existing contract containing provision for ***payments*** by third party to debtor is collateral, debtor has rights in collateral, and secured interest has attached. Nunnemaker Transp. Co. v United California Bank (1972, CA9 Cal) 456 F2d 28, 10 UCCRS 468.

Transfers of nonproducing working interests in oil or gas wells were on account of antecedent debt under 11 USCS § 547, where Chapter 7 debtor had obligation to make assignments of interests which arose on date of participation agreement. In re Bethel Resources, Inc. (1987, BC SD Ohio) 79 BR 717.

Deposit of tax refund check by IRS with bank for amounts bank previously provided debtors as part of "refund anticipation" loan transactions is not preferential transfer under 11 USCS § 547(b) because transfer occurs prior to, or at least contemporaneous with, obtaining of loan from bank, at which time debtors execute irrevocable assignment of refund to bank, and therefore, deposit with bank is not in payment of antecedent debt. In re Swartz (1990, BC DC Idaho) 119 BR 219, 20 BCD 1609.

Written assignment of accounts receivable from debtor to creditor was made on account of antecedent debt for purposes of 11 USCS § 547(b) where creditor had claim against debtor under contract for provision of catering services as evidenced by proof of claim filed by creditor as well as by letter terminating debtor's provision of services due to its lack of response on account. Corporate Food Mgmt. v Suffolk Community College (In re Corporate Food Mgmt.) (1998, BC ED NY) 223 BR 635.

190. Checks

Payment by check, for 11 USCS § 547 purposes, is considered to be equivalent to cash payment if check is honored, but if check is not honored, transaction becomes credit transaction; payment for dishonored check is therefore payment on account of antecedent debt, at least when it is not made pursuant to court-ordered restitution based on criminal conviction; even if 11 USCS § 523(a)(7) could be applied in avoidance setting, to preclude avoidance of restitution payments, it could not be applied where payment in question is not part of criminal

sentence, as in present case where debtor chose to avoid possible conviction for passing worthless checks by making payment to district attorney and debtor was never prosecuted, convicted, or sentenced. In re Car Renovators (1991, CA11 Ala) 946 F2d 780, 25 CBC2d 1185, CCH Bankr L Rptr P 74341, cert den (1992) 504 US 913, 112 S Ct 1949, 118 L Ed 2d 553.

Bankrupt's delivery of certified checks to transferee in amount of $ 5,000 was transfer of its property on account of antecedent debt, where (1) more than two weeks before transferee had delivered to bankrupt bearer bonds which bankrupt delivered to bank, receiving loan from bank, (2) bank sold bonds and deposited proceeds into account of bankrupt, (3) bankrupt executed note in favor of transferee for portion of proceeds, and (4) $ 5,000 payment was balance between amount represented by note and amount received as proceeds on sale of bonds. Sharfman v Tharpe & Co. (1974, SD NY) 381 F Supp 1394.

Since check does not vest payee any title to or interest in funds but is merely order to bank to pay amount specified and conditional promise by drawer to pay such amount if bank refuses to do so, no debt arose where bankrupt did not cash or negotiate check before it was voided and, as matter of law, voiding and return of check to transferee cannot be on account of antecedent debt within meaning of former 11 USCS § 96 notwithstanding possession of check benefited bankrupt by postponing its demise. Klein v Tabatchnick (1978, SD NY) 459 F Supp 707.

Payment was for antecedent debt, where creditor-bank had taken over assets of bankrupt, and on authorization of bankrupt's shareholders issued check out of proceeds of sale of inventory over which bank exercised control in amount of arrearage of insurance coverage on assets for period of time during which bank had taken over debtor. In re Original Tire Co. (1975, BC SD Ohio) 1 BCD 1349, 6 CBC 206.

Cashier's check of $ 10,000 which was delivered on October 29, 1979 as ***payment*** by debtor on account of antecedent debt is legally tantamount or equivalent to currency and such transaction was complete even though check was not honored by bank until November 23, 1979 and such transfer occurred substantially outside of ***90 day*** protective period provided by 11 USCS § 547. In re Kimball (1981, BC MD Fla) 16 BR 201, CCH Bankr L Rptr P 68531, 33 UCCRS 627.

Checks issued in ***payment*** for gems months after they were sold and delivered to debtor are ***payments*** on account of antecedent debts under 11 USCS § 547. In re Candor Diamond Corp. (1986, BC SD NY) 68 BR 588.

Chapter 7 trustee can recover under 11 USCS § 547 postpetition transfer of $ 5,000 made by check by debtor where eventual result of check was to diminish ***bankruptcy*** estate by $ 3,500. In re Knight (1987, BC MD Ga) 76 BR 857, 16 BCD 390.

Payments made by check by Chapter 11 debtor for rental payments that were not yet due are not avoidable under 11 USCS § 547, although checks were cashed after due date, because they were not made on account of antecedent debt; even if date-of-honor rule were applicable, transfers were not made on account of antecedent debt because rental obligations were suspended until checks cleared; where payment precedes performance, such payment, even if by check, is not made on account of antecedent debt. Child World v Service Merchandise Co. (In re Child World) (1994, BC SD NY) 173 BR 473.

Amounts owed to supplier by Chapter 11 debtor at time of delivery of cashier's check constituted "antecedent debt" under 11 USCS § 547(b)(2) even though invoices were not past due. Tomlins v BRW Paper Co. (In re Tulsa Litho Co.) (1998, BC ND Okla) 232 BR 240, affd (1999, BAP10 Okla) 229 BR 806, 16 Colo Bankr Ct Rep 133, 33 BCD 1218 (superseded by statute as stated in Stanziale v Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC) (2014, BC DC Del) 518 BR 269).

In adversary proceeding in Chapter 11 ***bankruptcy*** case, wire transfer was not, under 11 USCS § 547(b)(2), for or on account of antecedent debt; although debtor had voided prior check to creditor, wire transfer was not applied to payment of prior invoice. Roberds, Inc. v Broyhill Furniture (In re Roberds, Inc.) (2004, BC SD Ohio) 315 BR 443, 43 BCD 200 (criticized in In re USA Labs, Inc. (2006, BC SD Fla) 19 FLW Fed B 389).

Trust seeking avoidance of transfer on behalf of debtors' estate was not entitled to summary judgment because genuine issue of material fact existed as to debtors' legal or equitable interest in transfer made to creditor where there was no evidence that disputed transfer diminished debtors' estate under 11 USCS § 541 in order to qualify as payment on account of antecedent debt under 11 USCS § 547(b)(2); check received by creditor bore name of company used by debtors within last six years, which was insufficient to show that ***payment*** diminished debtors' estate. HLI Creditor Trust v Hyundai Motor Co. (In re Hayes Lemmerz Int'l, Inc.) (2005, BC DC Del) 329 BR 136, 45 BCD 62.

Deposits made by insolvent Chapter 7 debtor into its bank account to cure largest ledger balance overdraft during ***90-day preference*** period were avoidable preferential transfers pursuant to 11 USCS § 547(b), subject to turnover by bank pursuant to 11 USCS § 550, because debt was created when bank issued series of cashier's checks to debtor in amount in excess of cash and deposits in account and solely upon debtor's promise to make deposits following day, and repayment of debt following day allowed bank to receive more than it would have received if case were case under Chapter 7. Feltman v City Nat'l Bank (In re Sophisticated Communs., Inc.) (2007, BC SD Fla) 369 BR 689, 48 BCD 175, 20 FLW Fed B 447, reh den, motion for new trial denied, motion to modify den (2007, BC SD Fla) 369 BR 689, 48 BCD 176, 20 FLW Fed B 507, judgment entered (2007, BC SD Fla) 2007 Bankr LEXIS 3744.

Bankruptcy court denied bank's motion for summary judgment on Chapter 7 trustee's claim that he was entitled under 11 USCS § 547(b) to recover $ 5,134,582 in overdrafts bank paid on behalf of food-processing corporation less than 90 days before corporation declared ***bankruptcy***; although court found that, in general, intraday overdrafts were not extensions of credit under Uniform Commercial Code, U.S. Court of Appeals for Eighth Circuit had noted in Laws v. United Missouri Bank of Kansas City, N.A., 98 F.3d 1047, 1996 U.S. App. LEXIS 27330, that it was possible for bank and customer to enter into special arrangement which created debtor-creditor relationship, and court could not determine on motion for summary judgment if bank and corporation had done so. Sarachek v Luana Savings Bank (In re Agriprocessors, Inc.) (2013, BC ND Iowa) 490 BR 852, adversary proceeding, findings of fact/conclusions of law (2015, BC ND Iowa) 2015 Bankr LEXIS 1366.

191. Downpayments, deposits and escrows

Chapter 7 debtor's forfeiture of down payment on hotel property upon failure to pay balance of contract price is not transfer for purposes of 11 USCS § 547 or 548; down payment is not avoidable as ***preference*** under 11 USCS § 547(b)(2) because there is no antecedent debt; forgiveness of debt on hotel by virtue of forfeiture of down payment is reasonably equivalent value, precluding claim of fraudulent transfer under 11 USCS § 548. In re Wey (1988, CA7 Ill) 854 F2d 196, 18 BCD 401, CCH Bankr L Rptr P 72436 (criticized in Brown v Job (In re Polo Builders, Inc.) (2010, BC ND Ill) 433 BR 700, 53 BCD 174).

Chapter 7 debtor seller's return of machine purchaser's down payment was made on account of antecedent debt as required under 11 USCS § 547 where purchaser obtained claim against debtor when debtor received and deposited purchaser's down payment, even though purchaser did not have cause of action against debtor until debtor repudiated contract and returned down payment, and debtor incurred debt on date down payment was received, and, thus, because debt was incurred prior to transfer, refund payment was made on account of antecedent debt. Sigmon v Royal Cake Co. (In re Cybermech, Inc.) (1994, CA4 Va) 13 F3d 818, 6 Fourth Cir & Dist Col Bankr Ct Rep 301, 25 BCD 230, 30 CBC2d 696, CCH Bankr L Rptr P 75653.

Where Chapter 11 corporate debtor transferred $ 3.3 million to minority shareholders' counsel to hold as escrow agent pending execution of settlement agreement whereby debtor would reimburse minority shareholders' group for proxy-related expenses, shareholders' demand for costs and fees prior to executing agreement was "claim" by shareholders and also "debt" of debtor so that $ 3.3 million transfer was on account of antecedent debt owed by debtor for purposes of 11 USCS § 547(b)(2). Southmark Corp. v Schulte Roth & Zabel (In re Southmark Corp.) (1996, CA5 Tex) 88 F3d 311, 29 BCD 451, 35 FR Serv 3d 1267, reh, en banc, den (1996, CA5 Tex) 95 F3d 56 and cert den (1997) 519 US 1057, 136 L Ed 2d 611, 117 S Ct 686 and (criticized in Cunningham v Team Harvest Constr., Inc. (In re ML & Assocs.) (2003, BC ND Tex) 51 CBC2d 571).

Debtor's repayment to creditor of advance payment on supplies pursuant to judgment obtained by creditor after debtor failed to deliver supplies is not ***preference*** within 11 USCS § 547 since creditor's deposit does not constitute loan and, at time it was paid, it was not considered antecedent debt. In re Riverside Supply, Inc. (1986, BC WD Pa) 58 BR 661, 14 BCD 263, 14 CBC2d 929.

Chapter 11 debtor's payment into escrow account pursuant to settlement of prepetition securities class action was made on account of antecedent debt and is avoidable under 11 USCS § 547 since transfer was made on account of antecedent debt to class action plaintiffs created by alleged actions that gave rise to securities litigation, even though debtor's liability on class action claims was disputed, contingent, and unliquidated; although defendants argue that portion of escrowed funds should be segregated because such advances were made on account of antecedent debts of debtor's former officers and directors, rather than antecedent debts of debtor, debtor's officers and directors would likely be entitled to indemnification and such risk was considered by debtor in reaching settlement agreement, and any such transfers would still be on account of antecedent debt owed by debtor. Bioplasty, Inc. v First Trust Nat'l Ass'n (1993, BC DC Minn) 155 BR 495, 24 BCD 591.

Written agreement which, after lengthy negotiations, established contract whereby certificates of deposit were to be placed in escrow to secure payment of "signing bonus" to be paid upon termination of employment of bank senior vice president, who was hired five months before, was substantially contemporaneous exchange, rather than antecedent debt, and thus not ***preference*** under 11 USCS § 547(b). Newman v Bank of New England Corp. (In re Bank of New England Corp.) (1995, BC DC Mass) 187 BR 405 (criticized in In re Interact Med. Techs. Corp. (2003, BC DC Mass) 2003 Bankr LEXIS 2276).

Trustee's claims under 11 USCS § 547, 11 USCS § 548, and 11 USCS § 544 to avoid debtor's preferential, fraudulent, and voidable transfers of insurance proceeds were properly dismissed because transfers were made after involuntary ***bankruptcy*** petition was filed. Rieser v Dinsmore & Shohl, LLP (In re Troutman Enters.) (2007, BAP6) 47 BCD 214.

Unpublished Opinions

Unpublished: Summary judgment for former wife in trustee's action to avoid alleged preferential transfer under 11 USCS § 547(b) of proceeds from sale of jointly-owned property into escrow during divorce proceedings between debtor and his wife was affirmed because, when divorce court directed wife and debtor to place property proceeds into escrow pursuant to N.H. Rev. Stat. Ann. § 458:16, it did so to protect their as yet undetermined equitable interests in proceeds rather than to secure right to payment that one spouse had against other; thus, wife was not "creditor" under 11 USCS § 101(10) since she did not have "claim" under 11 USCS § 101(5) against ***bankruptcy*** estate or debtor's interest in sale proceeds at time that they were transferred into escrow, and transfer of sale proceeds into escrow was not on account of debt, antecedent or otherwise. Ford v Skorich (2006, DC NH) 2006 DNH 100, affd (2007, CA1 NH) 482 F3d 21, 57 CBC2d 1481, CCH Bankr L Rptr P 80895.

192. Employee payments

Where debtor, days prior to filing ***bankruptcy***, put money in trust with bank as trustee and directed bank to make payments to key employees, court denied summary judgment on issue of whether transfers were made for or on account of antecedent debt owed by debtor before transfer was made because employees argued that memorandum agreement of debtor creating payment obligation made payments immediately payable upon execution of agreement. Official Empl.-Related Issues Comm Of Enron Corp. v Arnold (In re Enron Corp.) (2004, BC SD Tex) 318 BR 655, 44 BCD 30, 53 CBC2d 999.

193. Fees

Trustee seeking to avoid transfers of management fees and expenses pursuant to 11 USCS § 547(b) had proven five of six elements of ***preference*** with respect to five transfers in his motion, leaving all of elements of these ***preference*** claims except insolvency undisputed; payments were antecedent debts rather than prompt reimbursements of expenses. Kipperman v Onex Corp. (2009, ND Ga) 411 BR 805.

Chapter 11 debtor/motor carrier's payment of fee for freight classification and listing as required by Interstate Commerce Act was not payment on antecedent debt and thus was not recoverable ***preference*** where payment was made on invoice for listing in upcoming year, parties had no contract for continued listing or automatic renewal, and sole remedy of classification service upon debtor's nonpayment was to cancel listing. National Motor Freight Traffic Ass'n v Superior Fast Freight (In re Superior Fast Freight) (1996, BAP9) 202 BR 485, 97 CDOS 76, 96 Daily Journal DAR 14452, CCH Bankr L Rptr P 77209.

194. Food, clothing and household items

Chapter 7 debtor's pre-petition transfers to his wife for food, clothing, and other household items were not voidable under 11 USCS § 547(b) where there was no evidence that transfers were due to antecedent debt. Schilling v Montalvo (In re Montalvo) (2005, BC WD Ky) 333 BR 145.

195. Insurance

Payment by debtor of arrears on insurance policy, upon which insurer rescinded termination and renewed policy, is not payment to cure default on executory contract; payment was for antecedent debt because insurer simply demanded payment for services rendered. In re Dick Henley, Inc. (1985, BC MD La) 45 BR 693.

Premium payments made by debtor for workers' compensation insurance coverage under plan in which monthly premiums are calculated and paid retrospectively after review of debtor's payroll reports are payments made on account of antecedent debt within meaning of 11 USCS § 547(b)(2) since debtor's obligation to pay premium is incurred prior to its subsequent payment of monthly premiums. In re AOV Industries, Inc. (1988, BC DC Dist Col) 85 BR 183.

In determining whether debt is "antecedent debt," for purposes of 11 USCS § 547(b)(2), courts in Fourth Circuit look to whether creditor would be able to assert claim against estate if payment had not been made; accordingly, aviation insurance broker's payments of Chapter 7 debtor/airline's insurance premiums were not made on account of any antecedent debt and thus could not be avoided as ***preferences*** where payments were made pursuant to cash flow plan under which airline made periodic payments to broker in advance of broker's services on its behalf since broker would have no claim against debtor if payments in dispute had not been made because broker would not have not yet rendered services to debtor. Rosenberg v Rollins, Burdick, Hunter Co. (In re Presidential Airways, Inc.) (1999, BC ED Va) 228 BR 594, 11 Fourth Cir & Dist Col Bankr Ct Rep 276.

Under state law, grace period in insurance policy does not change due date for payment of premiums but merely extends life of insurance policy through grace period; thus, debtor became legally obligated to pay its premiums on first day of each month as required by its insurance policy and payments made during policy grace period were payments on antecedent debts for purposes of 11 USCS § 547(b). Peltz v United Health Care (In re Bridge Info. Sys.) (2003, BC ED Mo) 299 BR 567, 41 BCD 270.

Time period fixed by 11 USCS § 547(b)(4)(B) is essential and integral part of preferential transfer claim, and not subject to equitable tolling. Jensen v Eck (In re Steele) (2006, BC MD Fla) 352 BR 337, 20 FLW Fed B 23.

Trustee established six elements of ***preference*** claim under 11 USCS § 547 where (i) surety bond issuer was holder of contingent claim as result of bonds, and, therefore, transfer was made to or for benefit of creditor, (ii) liability on that contingent claim was debt that came into existence when issuer issued bonds, which was prior to date of transfer, and, thus, transfer was made for, or on account of, antecedent debt. Hutson v Greenwich Ins. Co. (In re E-Z Serve Convenience Stores, Inc.) (2007, BC MD NC) 377 BR 491, 48 BCD 272.

Value of anything insurer provided after petition was filed did not count as "new value" for purposes of 11 USCS § 547(c)(4) and each individual payment debtor made to insurer during ***preference*** period was ***preference***; each was made late and for antecedent debt. Gonzales v Sun Life Ins. Co. (In re Furr's Supermarkets, Inc.) (2012, BC DC NM) 485 BR 672 (criticized in Friedman's Liquidating Trust v Roth Staffing Cos. LP (In re Friedman's Inc.) (2013, CA3 Del) 738 F3d 547, 58 BCD 239, 70 CBC2d 1241, CCH Bankr L Rptr P 82568).

Payment of insurance premiums within ***90 days*** of ***bankruptcy*** filing was ***payment*** of antecedent debt because debtor did not pay insurance premiums on time, clear date of each check and wire transfer that make up these transfers established that ***payments*** were past due, and thus, failure to make those ***payments*** on time made them ***payment*** on account of antecedent debt. Giuliano v RPG Mgmt. (In re NWL Holdings, Inc.) (2013, BC DC Del) 69 CBC2d 1762.

Unpublished Opinions

Unpublished: Where ***bankruptcy*** court in adversary proceeding granted trustee's motion for summary judgment, and insurance broker asked whether court erred in holding that debtor's transfers were made on account of antecedent debt, because debtor paid outstanding premiums roughly six months after policies were bound, ***payments*** were made on account of existing and antecedent debts. Peachtree Special Risk Brokers, LLC v Kartzman (In re John A. Rocco Co.) (2014, DC NJ) 2014 US Dist LEXIS 178043.

Unpublished: Where within ***90 days*** preceding its ***bankruptcy*** filing, debtor made ***payments*** to reinstate insurance policies that benefitted third parties, transfers were avoidable as preferential because transfers were reimbursements on account of antecedent debt. Kartzman v Peachtree Special Risk Brokers (In re John A. Rocco Co.) (2013, BC DC NJ) 2013 Bankr LEXIS 5175, affd, in part (2014, DC NJ) 2014 US Dist LEXIS 178043.

196. Interest

For purposes of antecedent requirement under 11 USCS § 547, even if liability to pay interest is incurred each day as interest accrues, payment of interest due would nevertheless be on account of antecedent debt. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Interest payments on promissory note made prior to their due date were not payments made on account of antecedent debt under 11 USCS § 547; where debtor has option to pay principal of debt in full prior to expiration of note without penalty, as in present case, debtor is obligated to pay interest only for time it actually uses money, and under this theory, question of whether debt is antecedent is guided by terms of note creating legal obligation and by periods for which interest usage is due. In re David Jones Builder, Inc. (1991, BC SD Fla) 129 BR 682 (criticized in Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124).

197. Lis pendens

Filing lis pendens certainly did not create lien, but it was consequential action which 11 USCS § 547 permitted trustee to avoid, provided it occurred within requisite 90-day period; as such, although ***bankruptcy*** court did hold that lis pendens was not "transfer," its ultimate reliance on 11 USCS § 547 aligned itself well with underlying purposes of ***Bankruptcy*** Code and Virginia recording statute, Va. Code Ann. § 8.01-268. Wells Fargo Funding v Gold (2009, ED Va) 432 BR 216, 62 CBC2d 2035.

Lis pendens filed at commencement of marital dissolution action to secure eventual transfer of residence as property division under Connecticut law is not transfer on account of antecedent debt and is not avoidable as ***preference*** under 11 USCS § 547. In re Gawel (1986, BC DC Conn) 67 BR 662, CCH Bankr L Rptr P 71645.

Lis pendens filed less than 90 days prior to ***bankruptcy*** petition is not avoidable preferential transfer under 11 USCS § 547, where filing of lis pendens cannot be characterized under § 547(b) as transfer of debtor's property or as on account of antecedent debt, § 547 not being power to avoid particular instrument which perfects claim of ownership such as lis pendens. In re Gurs (1983, BAP9) 34 BR 755, 11 BCD 698, CCH Bankr L Rptr P 69515.

198. Loans, notes or payments thereof

$ 125,000 promissory note executed by 3 individual principals of debtor corporations was antecedent debt of debtor corporations, and debtors' deed of trust in favor of creditor is set aside as to $ 125,000 note as voidable ***preference*** under 11 USCS § 547(b). Clay v Traders Bank of Kansas City (1984, CA8 Mo) 737 F2d 765.

Markers that were issued by casino to individual, who was debtor in involuntary ***bankruptcy*** proceeding, were considered to be short term loan extended by casino because it offered to extend holding period from 14 to 30 days before it sought payment from debtor; therefore, payment of markers constituted payment of antecedent debt for purposes of 11 USCS § 547(b) and payment did not fall within one of § 547(c) exceptions. Harrah's Tunica Corp. v Meeks (In re Armstrong) (2002, CA8 Ark) 291 F3d 517, 48 CBC2d 427, CCH Bankr L Rptr P 78661, 47 UCCRS2d 1401.

Since creditor in ***preference*** action could have asserted claim against debtor for repayment of loan upon third party's default because debtor incurred contingent obligation to pay debt when he signed promissory note and mortgage as guarantor, payment by debtor's realty company to creditor was for or on account of antecedent debt, and since date on which debtor incurred contingent liability preceded date of $ 105,062 transfer, such transfer was made for or on account of antecedent debt under 11 USCS § 547(b)(2). Alfa Mut. Fire Ins. Co. v Memory (In re Martin) (1995, MD Ala) 184 BR 985, 34 CBC2d 182, affd (1996, CA11 Ala) 101 F3d 708.

Where ***bankruptcy*** debtor's parent company advanced debtor amount to purchase insurance, with requirement that debtor repay parent company, debtor's repayment of amount to parent company constituted improper preferential transfer of property of debtor on account of parent company's antecedent debt. Freeland v Enodis Corp. (In re Consol. Indus. Corp) (2002, ND Ind) 292 BR 354, revd, remanded (2008, CA7 Ind) 540 F3d 721, 50 BCD 134, 60 CBC2d 524, CCH Bankr L Rptr P 81315 (criticized in Chartier v Brabender Technologie, Inc. (2011, DC Mass) 2011 US Dist LEXIS 115033) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Transfer of $ 470,000 by Chapter 11 debtor bank to borrower in exchange for promissory note which was secured by unmatured investment certificates where were owing by debtor does not constitute preferential transfer under 11 USCS § 547(b) because transfer was not in payment of bank's existing antecedent debt under investment certificates but rather was in exchange for present consideration in form of promissory notes; borrower is not entitled to set off his liability on note against debtor's debt to him on investment certificates under 11 USCS § 553(a)(3) because he incurred load debt for purpose of obtaining right of setoff where note specifically purports to identify right of offset and borrower's testimony indicated he intended to use loan to offset. DuVoisin v Foster (In re Southern Indus. Banking Corp.) (1985, BC ED Tenn) 48 BR 306, 12 CBC2d 600, CCH Bankr L Rptr P 70351.

Upon execution of promissory notes made payable to investors in debtor, debtor incurred obligation to repay principal amount advanced together with fixed rate of interest and thus transfers made on account of those obligations are payments made on account of antecedent debt within 11 USCS § 547(b)(2); although antecedent debt is not defined in Code, it is pre-existing or prior debt so as to preclude avoidance of transfer made simultaneously with or prior to extension of credit or transfer of value of debtor. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Debtor's timely and early payments on installment note are not payments on antecedent debt for purposes of determining if such payments were preferential under 11 USCS § 547(b). In re Aldridge (1988, BC WD Mo) 94 BR 589.

Transfers by Chapter 7 debtor to bank, which trustee sought to have voided as fraudulent or preferential transfer made within one year of petition date, were made on account of antecedent debts pursuant to 11 USCS § 547(b)(2) where payments were made within one year of petition date and were payments made on loan taken out before petition date. Grant v Sun Bank/North Cent. Fla. (In re Thurman Constr.) (1995, BC MD Fla) 189 BR 1004, 9 FLW Fed B 237.

Car dealership did not timely perfect its security interest in automobile and was not entitled to preferential transfer, even though Memorial Day fell within 20-day window, since Rule 9006(a) could not be applied to extend window in light of 11 USCS § 547(c)(3)(B). Barnes v GMAC (In re Ross) (1996, BC WD Mo) 193 BR 902, 35 CBC2d 861.

Bankruptcy debtors and obligors on promissory note, who were deemed to have assumed merger contract for which note was consideration, could not avoid payment on note as ***preference*** under 11 USCS § 547(b)(5). Philip Servs. Corp. v Luntz (In re Philip Servs., Inc.) (2002, BC DC Del) 284 BR 541, affd (2003, DC Del) 303 BR 574.

Bankruptcy trustee was entitled to set aside setoff transfers made by bank to debtors' unsecured loans when payments were made two months before debtors petitioned for ***bankruptcy***; fact that debtors had originally asked funds to be transferred to two secured loans debtor had with bank did not render ***preference*** non-voidable and did not require funds to be transferred as originally requested. Davis v Wells Fargo & Co. (In re Haynes) (2004, BC DC Ariz) 309 BR 577, 43 BCD 32, 52 CBC2d 185.

In trustee's action to avoid preferential transfer, when creditor applied debtor's payment on new vehicle toward balance owed on her trade-in vehicle, then payment was on account of antecedent debt. Suhar v Agree Auto Servs. (In re Blakely) (2013, BC ND Ohio) 497 BR 267.

Transfer of funds of ***bankruptcy*** debtor at direction of parent corporation of debtor into account which secured debt of parent to bank, and parent's direction to apply funds to parent's debt prior to debtor's ***bankruptcy***, was transfer on account of antecedent debt since bank's collateral included all deposits made to account which gave bank right to collateralize parent's debt with property of debtor which were proceeds of parent's debt. Harrison v N.J. Cmty. Bank (In re Jesup & Lamont, Inc.) (2014, BC SD NY) 507 BR 452.

199. Mortgages

Chapter 11 debtor's execution and delivery of deed of trust to creditor to secure loan to debtor's parent corporation constituted voidable transfer under 11 USCS § 547(b), although creditor asserts that debt was not antecedent debt of debtor's, where loan to parent generated benefit for debtor by keeping wolves from door for period of time, debtor's deed of trust to creditor produced right to payment from debtor, and transfer depleted estate of asset which would otherwise be available for distribution to other creditors; debtor's liability on creditor's claim creates right to payment and therefore debt because in executing and delivering deed of trust, debtor incurred separate and independent obligation to be responsible for loan to parent, at least to extent of value of security. Gill v Winn (1992, CA10 Colo) 983 F2d 964, 23 BCD 1375, CCH Bankr L Rptr P 75063.

Mortgagee's interest is not avoidable under 11 USCS § 547(b) despite fact that mortgage was given within one year of filing of debtors' petition and mortgagee as brother of wife-debtor was insider as defined by 11 USCS § 101 because mortgage was given either for contemporaneous or future consideration and to be avoidable under 11 USCS § 547(b) mortgage must have been given for or on account of antecedent debt; even if mortgage were avoided judgment creditors would receive nothing since there remains only $ 12,623.51 from proceeds of house sale and debtors are entitled to exemption of $ 15,000 in their residence under 11 USCS § 522(d)(1). In re Hirsh (1981, BC ED Pa) 8 BR 234, 3 CBC2d 631.

Where mortgage was conveyed and perfected within 90 days of filing of petition in ***bankruptcy*** and mortgage was given to satisfy prepetition debt and would give to parents, receivers of mortgage, larger distribution than they would receive as unsecured creditors, conveyance of mortgage interest in property to parents is preferential transfer avoidable by trustee under 11 USCS § 547(f). In re Mazzetti (1982, BC ED Mich) 22 BR 538, 9 BCD 686.

Chapter 11 creditors' committee can avoid as ***preference*** under 11 USCS § 547(b)(2) debtor's transfer of mortgage to bank, despite fact that bank gave debtor loan of $ 250,000 in exchange for mortgage; "new" loan does not constitute "new value" since bank would not have made loan unless debtor agreed to permit bank to apply loan proceeds to antecedent debt owed bank on guaranty. In re Craig (1988, BC DC Neb) 92 BR 394, 18 BCD 611, 20 CBC2d 85.

Transfer made by Chapter 11 debtor to mortgagee was for or on account of antecedent debt, for purposes of 11 USCS § 547, although mortgagee argues that it was interest payment and as such was contemporaneous consideration for monthly use of borrowed principal, where loan agreement obligated debtor to pay principal and interest, and while interest may have been payable monthly, debtor became legally obligated to pay all obligations under note as of date loan agreement was entered into, which was prior to transfer. Pereira v Lehigh Sav. Bank, SLA (In re Artha Management) (1994, BC SD NY) 174 BR 671, 26 BCD 324, subsequent app, dismd (1995, SD NY) 1995 US Dist LEXIS 15151, affd sub nom Pereira v Sonia Holdings (In re Artha Mgmt.) (1996, CA2 NY) 91 F3d 326 (criticized in AT&T Mobility LLC v Yeager (2014, ED Cal) 2014 US Dist LEXIS 163523).

Where recordation of mortgage occurred later than ten days of its delivery, it was deemed to have occurred on date of perfection when it became effective as to third parties; therefore, it was transfer for antecedent debt. Bergquist v Fidelity Mortg. Decisions Corp. (In re Alexander) (1998, BC DC Minn) 219 BR 255, 32 BCD 389, 39 CBC2d 803.

Where deed to debtor partnership and debtor's mortgages to creditor bank were in name of "PAK Builders, Inc." instead of "PAK Builders, partnership," ***bankruptcy*** court reformed instruments to reflect debtor's true name, and thus trustee could not avoid deed or mortgage under 11 USCS § 544(a)(3), and could not avoid mortgage payments made to bank under 11 USCS § 547(b). Covey v Citizens Sav. Bank (In re Pak Builders) (2002, BC CD Ill) 284 BR 663, 49 CBC2d 1581.

200. Overpayments

Recovery by trustee of payments made to creditor could not be prevented on ground that payments were not for antecedent debts since ***payments***, to extent they exceeded value of shipment, were not ***payments*** for goods to be delivered in future; rather, any overpayment with respect to any shipment was intended to be applied to existing debt of debtor, and was in fact so applied. In re Advance Glove Mfg. Co. (1984, BC ED Mich) 42 BR 489, 12 BCD 476.

In preferential transfer action under 11 USCS § 547, where transfers were all made outside of ***90-day preference*** period, Official Committee of Unsecured Creditors failed to show that creditor had any controlling interest in, i.e., was non-statutory insider of, debtor; instead opposite was true: all of directors of creditor were interested in debtor, whereas small minority of directors of debtor were interested in creditor, which arguably caused creditor to make low or no profit loan which resulted in fantastic deal for debtor with no risk. Official Comm. of Unsecured Creditors of Controlled Power Corp. v Caroman Fin. Account, Inc. (In re Controlled Power Corp.) (2006, BC ND Ohio) 351 BR 470.

Bankruptcy court denied trustee's motion for summary judgment on her claim that part of ***payment*** Chapter 7 debtor made to bank less than ***90 days*** before he declared ***bankruptcy*** was voidable under 11 USCS § 547(b); although mortgage debtor and his father signed when debtor obtained loan for his corporation stated that it was limited to $ 100,000 and intangible taxes, hypothecation agreement debtor and his father signed at same time did not contain same limitation, and there were genuine issues of fact concerning trustee's claim that $ 70,863 out of $ 170,863 ***payment*** debtor made to bank was antecedent, unsecured debt. Woodard v Synovus Bank (In re Alford) (2007, BC MD Fla) 381 BR 336.

201. Ponzi schemes

Chapter 7 debtor's debt to investor in Ponzi scheme arose at time debtor received money from investor for purposes of antecedent debt provisions of 11 USCS § 547(b). In re Bullion Reserve of N. Am. (1988, CA9 Cal) 836 F2d 1214, 17 BCD 402, CCH Bankr L Rptr P 72149, cert den (1988) 486 US 1056, 108 S Ct 2824, 100 L Ed 2d 925.

Chapter 7 debtors' obligation to investors in debtors' Ponzi scheme is incurred on date debtors sign promissory notes, not on date notes become due; thus debtors' prepetition paybacks to earlier investors are payments on antecedent debt and qualify for avoidance under 11 USCS § 547(b)(2). In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

For ***preference*** purposes under 11 USCS § 547(b)(4), transfer of insurance proceeds assigned by Chapter 7 debtor to creditors occurred, at latest, on date of entry of agreed final judgment in interpleader proceedings filed by insurer even though checks were not issued to ***preference*** defendants until sometime later; assignment of rights was effective when assignment by judgment was made so that debtor did not transfer interest in property within ***preference*** period where judgment was entered more than ***90 days*** before ***bankruptcy*** filing but checks were issued within ***90-day*** period. Ebert v Blackmax Downhole Tools (In re Gibraltar Resources) (1996, BC ND Tex) 197 BR 246, 36 CBC2d 238, affd (1996, ND Tex) 1996 US Dist LEXIS 20997, reported in full (1996, ND Tex) 202 BR 586.

202. Professional fees and costs

Payment of attorney's fees by debtor prepetition in insurance case is not preferential transfer and voidable under 11 USCS § 547(b) where attorneys had equitable lien on recovery in case prior to filing of ***bankruptcy***. In re Brass Kettle Restaurant, Inc. (1986, CA7 Ill) 790 F2d 574, CCH Bankr L Rptr P 71138.

Where lien fixed on grain at time of its delivery to storage facility, facility did not hold property interest that would permit trustee to avoid transfers of grain proceeds to farmers within ninety-day period preceding ***bankruptcy*** under 11 USCS § 547(b), where transfers were payments on secured debt. In re Merchants Grain by & Through Mahern (1996, CA7 Ind) 93 F3d 1347, 29 BCD 877, 36 CBC2d 840, cert den (1997) 519 US 1111, 136 L Ed 2d 837, 117 S Ct 948.

District Court erred in concluding that Chapter 11 debtor's transfer of stock to law firm on day it filed petition was not ***preference*** pursuant to 11 USCS § 547(b) on basis payment was made before debt was actually past due since law firm's claim arose when it provided legal services, payment of stock was to settle debt owed by debtor for past legal services, and statute does not support position that debt is not owed until payment is past due. United States Trustee v First Jersey Sec., Inc. (In re First Jersey Sec., Inc.) (1999, CA3 NJ) 180 F3d 504, 34 BCD 638, CCH Bankr L Rptr P 77940.

No antecedent debt existed and therefore no preferential transfer occurred for purposes of 11 USCS § 547(b) in regard to contingency fee paid to Chapter 7 debtor's attorney where fee agreement provided 50 percent contingency fee be deducted from proceeds of any recovery, and therefore equitable assignment existed at time of signing agreement and debtor had no right to possess those funds at any time. In re Kleckner (1988, ND Ill) 93 BR 143.

Payment by debtor for legal services rendered by creditor for over 4 months was for or on account of antecedent debt, despite fact that creditor may not have expected payment until its services were billed, since creditor would not have performed services for over 4 months on assumption that such services were rendered with no obligation by debtor until they were billed, and it is well settled that date of debt as incurred is not when it is billed but when services giving rise to it are performed. In re John Carl's, Inc. (1986, BC ED Mo) 3 BAMSL 3048.

Accounting firm which received computer equipment from debtor in payment of debt of debtor's parent corporation cannot claim that it is insulated from 11 USCS § 548 because transfer was not repayment of debt, nor from 11 USCS § 547 because it was not in repayment of debt; thus transfer, which depleted debtor's estate in favor of accounting firm to detriment of debtor's general creditors, if not without consideration, is ***preference***. In re Computer Universe, Inc. (1986, BC MD Fla) 58 BR 28, 14 CBC2d 403, CCH Bankr L Rptr P 71038.

For purposes of 11 USCS § 547, creditor for whose benefit transfer is made need not be party to whom transfer is made; where attorney was paid by debtor pursuant to employment agreement that provided debtor would reimburse employee for legal services, transfer for benefit of creditor was made; further, even if debt did not arise until legal services were performed, as opposed to when employment agreement was executed, payment was still on account of antecedent debt. In re Day Telecommunications, Inc. (1987, BC ED NC) 70 BR 904.

Chapter 7 debtor's payment to attorneys for costs advanced in litigation where attorneys would not continue to represent debtor unless it brought its costs current was not exchange for new value under 11 USCS § 547(b) since amount paid was clearly for past debt. In re M.B.K., Inc. (1987, BC CD Cal) 92 BR 429, 19 CBC2d 1243.

Liquidation trust's claim that retainer payments to several law firms for their representation of four corporate officers were avoidable as preferential transfers survived motion to dismiss because, if officers were entitled to indemnification form debtor company, such indemnification was contingent debt owed to officers and incurred on date company filed its charter with Delaware, and as such, retainer payments would have been paid on account of antecedent debt. Boles v Filipowski (In re Enivid, Inc.) (2006, BC DC Mass) 345 BR 426, 46 BCD 202.

Where ***bankruptcy*** trustee asserted that transferee of funds from ***bankruptcy*** debtor was insider as close friend of debtor, and that one-year ***preference*** period of 11 USCS § 547(b)(4)(B) was thus applicable, definition of insider

set out in 11 USCS § 101(31) could not be expanded to include friend as insider. Jensen v Eck (In re Steele) (2006, BC MD Fla) 352 BR 337, 20 FLW Fed B 23.

Even though debtor made transfer to former employee one day before obligation matured, transfer was made for or on account of antecedent debt owed by debtor before transfer was made within meaning of 11 USCS § 547(b) because former employee clearly had unmatured right to ***payment*** that preceded transfer where "debt" was created at time agreement between debtor and former employee was signed. Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124.

Where litigation attorney for Chapter 7 debtor, within ***90 days*** before debtor filed ***bankruptcy***, was paid for services rendered in form of cash and execution of $ 30,000 mortgage, cash transfer was made on account of antecedent debt owed by debtor before ***payment***, and mortgage transfer was made on account of antecedent debt in amount of $ 20,913.75, which was amount owed to attorney at time of execution of mortgage. Goss v Martin (In re Goss) (2007, BC ED Okla) 378 BR 320, affd (2008, ED Okla) 2008 US Dist LEXIS 42291.

203. Redemption of preferred stock

Redemption of preferred stock by corporate Chapter 7 debtor's president, which was issued to him for services to corporation, was not preferential under 11 USCS § 547 because payment was not on account of antecedent debt, but transfer may be recoverable under fraudulent transfer theory. Stoumbos v Kilimnik (1993, CA9 Wash) 988 F2d 949, 93 CDOS 1707, CCH Bankr L Rptr P 75183, 20 UCCRS2d 333, cert den (1993) 510 US 867, 114 S Ct 190, 126 L Ed 2d 148.

204. Rents and leases

Payment by debtor to lessee, as consideration for its termination of future options to renew lease which parties had negotiated, was held not to be payment on antecedent debt, and therefore did not constitute avoidable transfer under 11 USCS § 547(b). Peltz v Edward Vancil, Inc. (In re Bridge Info. Sys.) (2007, CA8) 474 F3d 1063, 47 BCD 155.

Debt was incurred upon signing of lease and thus was antecedent to $ 87,172.50 transfer (i.e., debtor and plaintiff executed lease termination agreement whereby debtor agreed to pay $ 87,172.50 in exchange for plaintiff's releasing debtor from any further obligations under lease), 11 USCS § 547(b)(2); fact that debtor's liability matured only periodically as each month's rent became due and payable did not mean that debt was not incurred upon execution of lease. Midwest Holding # 7, LLC v Anderson (In re Tanner Family, LLC) (2009, CA11 Ga) 556 F3d 1194, 51 BCD 49, 61 CBC2d 127, CCH Bankr L Rptr P 81407, 21 FLW Fed C 1451.

Where under lease agreement covering mining equipment, parties agreed to collect and pay rent for equipment only if coal was mined, there is no antecedent debt since debt was conditioned upon mining coal; therefore, withholding of funds for coal mine was not preferential transfer within meaning of 11 USCS § 547(b). Sunset Enterprises, Inc. v B & B Coal Co. (1984, WD Va) 38 BR 712, 39 UCCRS 40.

Lease termination fee, where debtor obtained nothing of value except for release from liability to pay future rent, was "a transfer for or on account of antecedent debt owed by debtor before such transfer was made" for purposes of 11 USCS § 547(b)(2); the obligation to make future payments, rental or otherwise, was unquestionably "debt;" just because debt, which arose on date that parties entered into lease agreement, was contingent or unmatured, or not yet collectible on date that parties signed agreement, did not mean that it was not "debt." Midwest Holding # 7, LLC v Anderson (2008, ND Ga) 387 BR 892, 59 CBC2d 1191, affd (2009, CA11 Ga) 556 F3d 1194, 51 BCD 49, 61 CBC2d 127, CCH Bankr L Rptr P 81407, 21 FLW Fed C 1451.

Transaction by which debtor, who was behind on rental payments for copying machine, agreed to pay late monthly payments, late charge, and purchase price of machine, for which he received title to machine, does not constitute ***preference*** under 11 USCS § 547, since transaction was not made for or on account of antecedent debt; rather, debtor paid to obtain title to machine, and true nature of transaction was sale of machine for fair value. In re Repro-Technics, Inc. (1981, BC DC Me) 8 BR 225, CCH Bankr L Rptr P 67799.

While lessor is entitled to invoke 11 USCS § 547(c)(2) exception for avoidability of preferential transfer for current rent payments made just prior to filing, trustee can avoid part of last month's rent payment under 11 USCS § 547(b) when debtor ceased doing business and another retailer assumed store lease in middle of month; that portion of debtor's rent would have been applied to debtor's prior arrearages. In re Clothes, Inc. (1984, BC DC ND) 45 BR 419.

Lease payment obligations arise when they become due and payable because of lessor's possession, not when lease is signed, for purposes of determining whether payment arises on account of antecedent debt under 11 USCS § 547. In re Coco (1986, BC SD NY) 67 BR 365.

Payments made by check by Chapter 11 debtor for rental payments that were not yet due are not avoidable under 11 USCS § 547, although checks were cashed after due date, because they were not made on account of antecedent debt; even if date-of-honor rule were applicable, transfers were not made on account of antecedent debt because rental obligations were suspended until checks cleared; where payment precedes performance, such payment, even if by check, is not made on account of antecedent debt. Child World v Service Merchandise Co. (In re Child World) (1994, BC SD NY) 173 BR 473.

Transfer of accounts receivable to landlord was on account of antecedent debt, and not on account of debt to be incurred in future, for purposes of 11 USCS § 547, despite fact that part of consideration for transfer of accounts receivable may have been landlord's agreement to assume control of Chapter 11 debtor's nursing home property, where that consideration was not exclusive, and where, according to plain language of agreement, part of landlord's consideration to debtor for transfer of accounts receivable was release of debtor's debt for lease arrearage. First Trust Nat'l Ass'n v American Nat'l Bank & Trust Co. (In re Adventist Living Ctrs.) (1994, BC ND Ill) 174 BR 505.

Prepetition levy by IRS on funds in debtor's bank account was transfer of interest of debtor in property and was therefore avoidable as ***preference*** under 11 USCS § 547(b), although funds representing employment taxes withheld but unpaid were held in trust under 26 USCS § 7501, since without voluntary payment there was no nexus between trust and assets in debtor's bank account, and funds could have been due another creditor. United States v Borock (In re Ruggeri Elec. Contr.) (1996, BC ED Mich) 199 BR 903, CCH Bankr L Rptr P 77103, 80 AFTR 2d 8035, affd (1997, ED Mich) 214 BR 481, 97-2 USTC P 50998, 80 AFTR 2d 7926.

Rent payments made and security agreement obtained within ninety days of ***bankruptcy*** were transfers for "antecedent debt" incurred under long-term leases well before ninety-day ***preference*** period. Aerfi Group P.L.C. v Barstow (In re Markair, Inc.) (1999, BC DC Alaska) 240 BR 581.

Transfer of $ 38,532.36 made on November 20, 1990 by Chapter 11 debtor/art gallery to lessor shopping center as lease termination fee is avoidable as preferential transfer under 11 USCS § 547(b)(2), despite contention that transfer was not made on account of antecedent debt, since obligation to pay rent arises on date it is due, where transfer was not quid pro quo for concurrent possession, but, rather, debtor gave up future possession along with transfer, and only consideration for payment was cancellation and settlement of lease obligation or debt which arose April 29, 1988, and since transfer extinguished debt which arose on April 29, 1988, it is on account of antecedent debt; fact that debt would have extended into future but for settlement does not change antecedent nature of debt. Upstairs Gallery v Macklowe W. Dev. Co., L.P. (In re Upstairs Gallery) (1994, BAP9 Cal) 167 BR 915, 94 CDOS 4917, 94 Daily Journal DAR 8980, 25 BCD 1216, 31 CBC2d 649, CCH Bankr L Rptr P 76032.

Because pre-***bankruptcy*** payment of $ 46,176.77 by debtor to purchase tenant's options to renew its lease was paid in settlement of dispute over value of tenant's options and not on account of antecedent debt, 11 USCS § 547(b) was not applicable; ***bankruptcy*** court erred when it failed to look behind settlement to discern that dispute was negotiation over value of tenant's options and when it incorrectly based its holding on doctrine of anticipatory breach of contract. Peltz v Edward C. Vancil, Inc. (In re Bridge Info. Sys.) (2005, BAP8) 327 BR 382, 44 BCD 268, affd (2007, CA8) 474 F3d 1063, 47 BCD 155.

205. Restitution

Because appellate court could not determine whether transferred funds that holder received from sale of farm's cattle were interest of debtor in property as required to support trustee's ***preference*** action, judgment was remanded for further proceedings. In re Miss. Valley Livestock, Inc. (2014, CA7 Ill) 745 F3d 299, 59 BCD 54, CCH Bankr L Rptr P 82610.

Payments made by Chapter 7 debtor to former employer under restitution agreement in which employer pledges not to sue debtor or disclose reason for debtor's termination are payments made to creditor on antecedent debt and may be ***preferences*** if other elements of 11 USCS § 547 are satisfied. In re Henderson (1989, BC ED Pa) 96 BR 820 (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

206. Retirement accounts

Debtor's assignment of individual retirement and managed account to creditor was voided as preferential transfer pursuant to 11 USCS § 547 because transfer was made for benefit of creditor to satisfy antecedent debt, debtors were insolvent when transfer was made, and transfer was found to have occurred within 90-day period because security interest was perfected within that 90-day period and earlier attempts to assign or transfer had not been successful. Richards v Rapid Funding, LLC (In re Richards) (2004, BC ED Va) 336 BR 722.

207. Security interests

Security interest was for or on account of antecedent debt under former 11 USCS § 96, where security agreement itself provided that debtor's inventory and equipment were to secure all debts, not just future or contemporaneous ones, and where all money advanced to debtor after execution of security agreement was advanced for benefit of creditor, which had foreclosed on debtor's accounts receivable, and was advancing debtor amount of such accounts receivable in form of loan for purpose of preserving and increasing creditor's recovery at expense of general unsecured creditors. In re American Lumber Co. (1980, DC Minn) 5 BR 470.

Transfer of security interest is made for antecedent debt under 11 USCS §§ 547(e)(2)(B) and 547(b) when creditor and debtor agreed to exchange on January 6 and actual transfer of security agreement took place more than 10 days later on January 17, despite fact that creditor advanced $ 100,000 on January 12, because agreement itself was exchange of value in respective rights. In re Air Vermont, Inc. (1984, DC Vt) 45 BR 817, 39 UCCRS 1534.

Perfection of security interest is transfer on account of antecedent debt, where only consideration received by debtor was received at time of actual execution of transfer, and no other consideration was received between that time and time security interest was perfected. In re Meritt (1980, BC WD Mo) 7 BR 876, 7 BCD 28, CCH Bankr L Rptr P 67883.

Long intervening time of almost 6 months between creation of creditor's security interest and its perfection compels conclusion that transfer (perfection) was on account of antecedent debt within meaning of 11 USCS § 547(b)(2). In re South Atlantic Packers Asso. (1983, BC DC SC) 30 BR 836, 36 UCCRS 1040.

Lapse of 48 days between creation of security interest and perfection by filing certificate of title satisfies element of ***preference*** that transfer "be on account of an antecedent debt." In re Harley (1984, BC ND Ga) 41 BR 276.

Where separate secured and unsecured loans were "rewritten" into one secured obligation within 90 days of filing Chapter 13 petition, rewrite of secured obligation represents no transfer avoidable under 11 USCS § 547 because creditor bank did not receive any more than if transaction had not occurred and release of first secured lien and perfection of superseding lien were, as intended by parties, simultaneous; portion of lien representing antecedent unsecured debt is avoidable, however, because parties did not intend contemporaneous exchange as to it. In re Brown (1985, BC SD Ohio) 46 BR 615.

Under 11 USCS § 547(b), debtor in possession may avoid transfer of security interest made to creditor on account of antecedent unsecured debt within 90 days of filing petition because (1) debtor is presumed insolvent at time of transfer and (2) since estate's assets are outstripped by priority, secured, and administrative claims, leaving nothing

to pay unsecured claims, creditor received more by pre-petition transfer that it would under Chapter 7 proceeding had transfer not been made. In re Pant Heating & Air Conditioning, Inc. (1985, BC ND Ohio) 49 BR 957.

Creation of security interest in property of Chapter 7 debtor or perfection of security interest against property of debtor are transfers of property that may be avoided under 11 USCS § 547(b); interest in property that is transferred must involve property that would, in absence of transfer, have been included in debtor's estate; where obligation of debtor is satisfied with property of third party, or where obligation that is satisfied is not owed by debtor, there is no transfer that is subject to recovery. In re Taco Ed's, Inc. (1986, BC ND Ohio) 63 BR 913, 2 UCCRS2d 209.

Where debt was incurred prior to perfection of security interest, creditor's subsequent perfection of security interest constitutes transfer on account of antecedent debt for ***preference*** purposes under 11 USCS § 547(b). In re Four Winds Enterprises, Inc. (1988, BC SD Cal) 94 BR 694, 18 BCD 1032, CCH Bankr L Rptr P 72597, 8 UCCRS2d 556.

Credit union's perfection of purchase money security interest in debtor's vehicle was made on account of antecedent debt for 11 USCS § 547 purposes where debtor executed promissory note and security agreement, and obtained possession of vehicle on October 24 and credit union executed and filed lien entry form on November 24, 1992, on which date security interest was perfected. Spears v Oklahoma Highway Credit Union (In re Barragree) (1993, BC WD Okla) 159 BR 43.

Although bank involved in check-kiting scheme became creditor with claim against debtors each time they made draws or advances against "provisional credit," bank's transfer to itself of debtor's deposits to make itself whole was not voidable ***preference***, since it had security interest in deposits; nor, for same reason, could trustee recover monies as set-off under 11 USCS § 553(b); nor would ***bankruptcy*** court sanction use of 11 USCS § 105 as fallback measure to failed ***preference*** attack where bank's conduct was not inequitable, despite losses in excess of $ 1,000,000 to other bank victimized. Howell v Bank of Newnan (In re Summit Fin. Servs.) (1999, BC ND Ga) 240 BR 105, 35 BCD 6, 42 CBC2d 2030, 42 UCCRS2d 770.

Bankruptcy debtor did not preferentially transfer security interest in property which debtor obtained through purchases of property from another ***bankruptcy*** estate, since debtor assumed secured debt against property in same asset purchase agreement through which debtor acquired property, and thus security interest was not granted on account of antecedent debt. Burtch v Huston (In re USDigital, Inc.) (2011, BC DC Del) 443 BR 22.

208. Settlement agreement obligations

Transfer by debtor contractor in settlement of state court action against him for specific performance of contract to construct home was not made for or on account of antecedent debt so as to be avoidable under 11 USCS § 547(b) because amount paid was in exchange for purchasers' undertaking to terminate lawsuit and so to remove lis pendens from property index, and therefore, what debtor received was not freedom from liability on antecedent debt, but freedom from risk of litigation, together with rise in value of property which resulted when lis pendens was lifted; furthermore, exchange was intended to be, and in fact was, contemporaneous exchange for new value; finally, even if transfer had been for antecedent debt, it would have been in satisfaction of equitable lien, which also would have defeated trustee's avoidance power because it would not have been transfer which enabled purchasers to receive more than they would have in Chapter 7, as purchasers would not have joined other unsecured creditors but would have been paid first in satisfaction of lien from proceeds of sale of property, as trustee could not have avoided lien under 11 USCS § 544. Lewis v Diethorn (1990, CA3 Pa) 893 F2d 648, 19 BCD 1976, CCH Bankr L Rptr P 73194, cert den (1990) 498 US 950, 111 S Ct 369, 112 L Ed 2d 332 and (criticized in Hays v DMAC Invs., Inc. (In re RDM Sports Group, Inc.) (2000, BC ND Ga) 250 BR 805, 36 BCD 135) and (criticized in Wilcox v CSX Corp. (2003) 2003 UT 21, 70 P3d 85, 473 Utah Adv Rep 25) and (criticized in Peltz v Edward C. Vancil, Inc. (In re Bridge Info. Sys.) (2003, BC ED Mo) 302 BR 41, 42 BCD 64) and (criticized in Phoenix Rest. Group, Inc. v Fuller, Fuller & Assocs., P.A. (In re Phoenix Rest. Group, Inc.) (2004, BC MD Tenn) 316 BR 671, 43 BCD 256) and (criticized in Baker Hughes Oilfield Operations, Inc. v Cage (In re Ramba, Inc.) (2005, CA5 Tex) 416 F3d 394, 44

BCD 266, CCH Bankr L Rptr P 80318) and (criticized in Creditors' Liquidation Trust v Haskins (In re Git-N-Go, Inc.) (2007, BC ND Okla) 2007 Bankr LEXIS 3303).

Chapter 11 debtor-in-possession may not recover prepetition payment to former employee where employee's termination occurred simultaneously with execution of settlement agreement, and where former employee received payment simultaneously with his termination; transfer was simultaneous debt, not antecedent debt within meaning of 11 USCS § 547(b). Southmark Corp. v Marley (In re Southmark Corp.) (1995, CA5 Tex) 62 F3d 104, 27 BCD 790, reh den (1995, CA5 Tex) 1995 US App LEXIS 27973 and cert den (1996) 516 US 1093, 116 S Ct 815, 133 L Ed 2d 760 and (criticized in Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124).

Payment made by debtors pursuant to settlement by them of action against them for copyright infringement, unfair trade practices, and unfair competition is ***payment*** on antecedent debt within meaning of 11 USCS § 547(b)(2) and is therefore voidable where made within ***90 days*** of ***bankruptcy*** petition. In re Vasu Fabrics, Inc. (1984, BC SD NY) 39 BR 513.

Payment by debtor of part of settlement of prepetition contract action is preferential transfer under 11 USCS § 547(b)(2) because settlement was of antecedent debt, incurred when contract obligation to pay was breached, 10 months prior to ***payment***; thus, all exceptions for contemporaneous exchange under § 547(c) do not apply. In re Bob Grissett Golf Shoppes, Inc. (1984, BC ED Va) 44 BR 156.

Debt and transferee's claim arose at time of debtor's allegedly fraudulent conduct which gave rise to prepetition litigation, and thus subsequent ***payment*** by debtor to transferee in settlement of litigation constituted ***payment*** for antecedent debt which was voidable by trustee as preferential transfer under 11 USCS § 547(b). Peltz v New Age Consulting Servs. (In re USN Communs., Inc.) (2002, BC DC Del) 279 BR 99, 48 CBC2d 1313.

Where debtor, as part of settlement agreement with plaintiffs in disability discrimination lawsuit filed against it, paid plaintiffs' attorney fees less than ***90 days*** prior to converting involuntary Chapter 7 case into voluntary Chapter 11 case, attorney fees were avoidable as paid to creditor for or on account of antecedent debt because plaintiffs claimed right to ***payment*** and other remedies from debtor, including attorney fees, well in advance of settlement of litigation. Phoenix Rest. Group, Inc. v Fuller, Fuller & Assocs., P.A. (In re Phoenix Rest. Group, Inc.) (2004, BC MD Tenn) 316 BR 671, 43 BCD 256.

Defendant law firm was not liable, under 11 USCS § 550(a), for recovery of preferential transfer by plaintiff liquidating trust where funds were in partial satisfaction of personal injury client's claim, funds had been held pursuant to Ohio Rev. Code Ann. § 4705.09, and firm was not initial transferee. SKK Liquidation Trust v Green & Green, LPA (In re Spinnaker Indus., Inc.) (2005, BC SD Ohio) 328 BR 755 (criticized in Stevenson v Genna (In re Jackson) (2010, BC ED Mich) 426 BR 701, 63 CBC2d 1025).

Agreement between debtor and natural gas provider entered into to provide adequate assurance of future performance qualified as forward contract with forward contract merchant and was settlement agreement under ***Bankruptcy*** Code, so it qualified for 11 USCS § 546(e) protection and was not avoidable under 11 USCS §§ 547 and 550. BCP Liquidating LLC v Bridgeline Gas Mktg., LLC (In re Borden Chems. & Plastics Operating Ltd. P'shp) (2006, BC DC Del) 336 BR 214, 45 BCD 251.

209. Stock purchases

Investor who had entrusted money to Chapter 7 debtor, which debtor did not use to purchase stock as he had represented, is creditor of debtor as defined in 11 USCS § 101 and for purposes of 11 USCS § 547(b), regardless of whether claims arise from breach of contract or fraud, and debtor's repayment of funds up to $ 2.3 million that creditor invested with him were for or on account of antecedent debt; however, payments received by investor over and above his investment are not subject to recovery as ***preferences*** because debtor was not personally liable to investor for profit if none resulted. In re Cohen (1989, CA5 Tex) 875 F2d 508, 19 BCD 883, 21 CBC2d 554, CCH Bankr L Rptr P 72962.

Debtor's transfer of loan proceeds to creditor pursuant to stock purchase and loan agreements, under which debtor was obligated to reduce its debt to creditor, is transfer on account of antecedent debt. In re F & S Cent. Mfg. Corp. (1985, BC ED NY) 53 BR 842, 13 BCD 823, 13 CBC2d 805, CCH Bankr L Rptr P 70819 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

210. Taxes

Assumptions that debtor would have made voluntary payment of employee taxes to IRS but for freeze it placed on debtor's operating account, that based on single payment, IRS would have voluntarily applied non-designated payment entirely to trust-fund obligation, and that commingled trust-fund taxes generated debtor's accounts receivable which he eventually deposited into his operating account were too tenuous to establish nexus between funds in debtor's operating account and funds it withheld for payment of employee taxes, where he made no voluntary pre-petition payment to IRS. United States v Borock (In re Ruggeri Elec. Contr.) (1997, ED Mich) 214 BR 481, 97-2 USTC P 50998, 80 AFTR 2d 7926.

Where ***bankruptcy*** debtor used affiliate's good credit to purchase fuel, purchase price was invoiced to affiliate, including state taxes and fees, and debtor would then pay affiliate for amounts invoiced to affiliate, preferential transfers from debtor to affiliate for payments under 11 USCS § 547(b) included amounts paid for taxes and fees; regardless of which party was legally responsible for taxes and fees or when taxes and fees were imposed by state, debtor incurred debt to affiliate under parties' arrangement upon each purchase; thus, payments were in satisfaction of antecedent debt. In re Lambert Oil Co. (2006, WD Va) 347 BR 173.

Debtor's payments to IRS were made for benefit of creditor and were made on account of antecedent debt owed by debtor, such that summary judgment in favor of U.S. as to payments made within ninety days prior to filing of petition was not appropriate; while it was true that debtor owed no debt of its own to IRS, "antecedent debt" referred to in 11 USCS § 547(b)(2) could be located in debtor's debts to its taxpayer clients; as debtor/creditor relationship existed as between debtor and its clients, payments made to IRS by debtor were made on account of debtor's antecedent debts to its own clients. Wolff v United States (2007, DC Md) 372 BR 244, 100 AFTR 2d 5436, summary judgment gr, judgment entered (2007, BC DC Md) 2007 Bankr LEXIS 4583 and (criticized in Furr v United States Dep't of Treasury (In re Pharm. Distrib. Servs.) (2011, BC SD Fla) 455 BR 817, 55 BCD 88, 23 FLW Fed B 127).

Withholding tax debts are incurred, for purposes of determining whether payment is preferential transfer under 11 USCS § 547, on date that penalty is imposed, which occurs if payment is not made within three business days of taxpayer's payroll, rather than on date returns for that tax were due; therefore, January and February 1984 withholding taxes, incurred prior to Chapter 11 debtor's March opening of IRS trust account as depository for payments of future withholding and excise tax liabilities, were antecedent debts pursuant to 11 USCS § 547(b)(2), and thus, payments made to IRS from that account could not be allocated to January and February withholding taxes. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Tax obligations of Chapter 11 debtor for January 1984 and February 1984 are "antecedent debts" pursuant to 11 USCS § 547(b)(2) where returns for all taxes from January 1984 and February 1984 were due prior to their payments to IRS. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Tax debt is incurred for ***preference*** purposes under 11 USCS § 547(a)(4) when penalty is applicable regardless of date tax return is required to be filed; where Chapter 11 debtor sent three tax payments directly to IRS after dates penalties on payments were incurred, tax payments were made on account of antecedent debt for ***preference*** purposes under § 547. Pullman Constr. Indus. v United States (In re Pullman Constr. Indus.) (1996, BC ND Ill) 190 BR 618, subsequent app (1997, ND Ill) 210 BR 302, 97-2 USTC P 50652, 79 AFTR 2d 3172.

Since federal income tax obligation did not arise until end of taxable year, debtor's election to apply overpayment to her next year's taxes was not transfer on antecedent debt; therefore, trustee could not avoid debtor's election as preferential transfer. Traina v Orrill (In re Orrill) (1997, BC ED La) 226 BR 563, 80 AFTR 2d 6576.

Where debtor sent check and tax return in exact amount of check to IRS, simultaneous transfer of these instruments established that amount represented funds held in trust for U.S., and transfer was not preferential under ***bankruptcy*** law. Stevenson v IRS (In re Diamond Dismantling, Inc.) (2003, BC ED Mich) 305 BR 453, 2003-2 USTC P 50534, 91 AFTR 2d 2599.

Trustee established that general unsecured claims would not have been paid in full in chapter 7 liquidation, and this was sufficient to satisfy "more-than" test, if creditor would have been limited to general unsecured claim. Schoenmann v BCCI Constr. Co. (In re Northpoint Communs. Group, Inc.) (2007, BC ND Cal) 361 BR 149, affd (2007, BAP9) 2007 Bankr LEXIS 4931.

Chapter 7 trustee could not recover under 11 USCS § 547 for estate amount that debtors had paid pre-petition, in March 2005, in anticipation of tax liability that would become due at end of 2005 because debt could not be considered preferential transfer when there was no antecedent debt. In re Middendorf (2008, BC DC Kan) 381 BR 774, 101 AFTR 2d 818.

For purposes of avoiding prepetition tax payment as ***preference*** under 11 USCS § 547(b), transfer is not "for or on account of antecedent debt" if transfer is made prior to date on which debtor would have been subject to penalty. Pryor v N.Y. State Dep't of Taxation & Fin. (In re Waring) (2013, BC ED NY) 491 BR 324 (criticized in KH Funding Co. v Escobar (In re KH Funding Co.) (2015, BC DC Md) 541 BR 308, 61 BCD 223).

Because debtors made payment to state tax authority on August 2, 2011, during extension period granted to debtors, and without incurring penalty, payment was not for or on account of antecedent debt, and trustee could not recover payment as ***preference*** under 11 USCS § 547(b). Pryor v N.Y. State Dep't of Taxation & Fin. (In re Waring) (2013, BC ED NY) 491 BR 324 (criticized in KH Funding Co. v Escobar (In re KH Funding Co.) (2015, BC DC Md) 541 BR 308, 61 BCD 223).

211. Transactions involving contractors

Transfer by debtor contractor in settlement of state court action against him for specific performance of contract to construct home was not made for or on account of antecedent debt so as to be avoidable under 11 USCS § 547(b) because amount paid was in exchange for purchasers' undertaking to terminate lawsuit and so to remove lis pendens from property index, and therefore, what debtor received was not freedom from liability on antecedent debt, but freedom from risk of litigation, together with rise in value of property which resulted when lis pendens was lifted; furthermore, exchange was intended to be, and in fact was, contemporaneous exchange for new value; finally, even if transfer had been for antecedent debt, it would have been in satisfaction of equitable lien, which also would have defeated trustee's avoidance power because it would not have been transfer which enabled purchasers to receive more than they would have in Chapter 7, as purchasers would not have joined other unsecured creditors but would have been paid first in satisfaction of lien from proceeds of sale of property, as trustee could not have avoided lien under 11 USCS § 544. Lewis v Diethorn (1990, CA3 Pa) 893 F2d 648, 19 BCD 1976, CCH Bankr L Rptr P 73194, cert den (1990) 498 US 950, 111 S Ct 369, 112 L Ed 2d 332 and (criticized in Hays v DMAC Invs., Inc. (In re RDM Sports Group, Inc.) (2000, BC ND Ga) 250 BR 805, 36 BCD 135) and (criticized in Wilcox v CSX Corp. (2003) 2003 UT 21, 70 P3d 85, 473 Utah Adv Rep 25) and (criticized in Peltz v Edward C. Vancil, Inc. (In re Bridge Info. Sys.) (2003, BC ED Mo) 302 BR 41, 42 BCD 64) and (criticized in Phoenix Rest. Group, Inc. v Fuller, Fuller & Assocs., P.A. (In re Phoenix Rest. Group, Inc.) (2004, BC MD Tenn) 316 BR 671, 43 BCD 256) and (criticized in Baker Hughes Oilfield Operations, Inc. v Cage (In re Ramba, Inc.) (2005, CA5 Tex) 416 F3d 394, 44 BCD 266, CCH Bankr L Rptr P 80318) and (criticized in Creditors' Liquidation Trust v Haskins (In re Git-N-Go, Inc.) (2007, BC ND Okla) 2007 Bankr LEXIS 3303).

Transfer of certificate of deposit from parent corporation through Chapter 7 debtor subsidiary subcontractor to bank for letter of credit to benefit contractor by securing debtor's performance under construction contract, does not deprive debtor's estate of asset which would have been available for claims of other creditors, and thus contractor's draw on letter of credit was not avoidable ***preference*** under 11 USCS § 547 since no property of debtor was transferred; furthermore, delayed issuance of letter of credit does not establish antecedent debt--in fact contractor

owed construction progress payments to debtor when letter of credit was issued. In re Ameritech Homes, Inc. (1988, BC SD Fla) 88 BR 432.

Where ***bankruptcy*** debtor received funds from sale of creditor's real property as qualified intermediary for creditor in like-kind exchange of real property, and made payments from such funds to builder which was improving other property to be conveyed to creditor, payments to builder constituted avoidable ***preference*** since payments were made on account of antecedent debt within meaning of 11 USCS § 547(b)(2); although creditor's right to compel debtor to make payments to it or for its benefit did not mature until value was infused into property by builder, status of right as unmatured did not prevent right from being claim. Manty v Miller & Holmes, Inc. (In re Nation-Wide Exch. Servs.) (2003, BC DC Minn) 291 BR 131, 49 CBC2d 1557, 91 AFTR 2d 1850.

For purposes of 11 USCS § 547(b), Chapter 11 debtor's weekly payments to software developer under amendment to master services agreement were not for antecedent debt where debt arose when software developer provided services it had contracted to provide, rather than at time software developer issued its weekly invoices. Vanguard Airlines, Inc. v Airline Automation, Inc. (In re Vanguard Airlines, Inc.) (2003, BC WD Mo) 295 BR 329.

Bankruptcy court denied cross-motions for summary judgment by ***bankruptcy*** trustee and subcontractor of debtor on issue of whether particular payment by debtor to subcontractor constituted avoidable ***preference*** where debtor's surety would have held secured claim had it made payment, which presented fact issue that had not been resolved. Field v Insituform East, Inc. (In re Abatement Envtl. Res., Inc.) (2004, BC DC Md) 307 BR 491, 42 BCD 252.

Payments made from general contractor to laborers of subcontractor which entered ***bankruptcy*** do not constitute voidable ***preference*** inasmuch as it was not for antecedent debt owed by general contractor to subcontractor. In re Flooring Concepts, Inc. (1984, BAP9 Cal) 37 BR 957, 11 BCD 890, 10 CBC2d 883, CCH Bankr L Rptr P 69826.

212. Transactions involving insiders

Where subsidiaries of parent corporation voluntarily guaranteed each other's loans, one subsidiary subsequently became bankrupt within ***90 days*** of its ***payment*** of supplier's invoice, and other affiliate's loan default triggered guarantees of affiliates--rendering corporation family Chapter 11 debtor--corporation as debtor in possession given powers of trustee under 11 USCS § 1107(a) may set aside ***payments*** to supplier as ***preferences*** voidable under 11 USCS § 547(b), because subsidiary was insolvent when ***payments*** were made, pursuant to 11 USCS § 101(31)(A) [now 101(32)(A)], and other conditions of 11 USCS § 547(b) had been met. In re Xonics Photochemical, Inc. (1988, CA7 Ill) 841 F2d 198, 17 BCD 606, 18 CBC2d 711, CCH Bankr L Rptr P 72211 (criticized in Official Comm. of Unsecured Creditors of Cybergenics Corp. v Chinery (In re Cybergenics Corp.) (2002, CA3 NJ) 304 F3d 316, 40 BCD 53, CCH Bankr L Rptr P 78729).

Payments made by debtors to creditor who lent money to debtors and received promissory note and assignment of collateral from limited partnership of which one debtor was general partner were on account of antecedent debt to debtors, even though debtors were not obligated under note, where loan proceeds were made immediately available to debtors, none of parties involved intended that loan be made to limited partnership, which received none of proceeds, limited partnership was not looked to for repayment, and debtor, rather than limited partnership, repaid loan; although creditor contends that parol evidence rule bars consideration of essentially any evidence other than promissory note signed by limited partnership, obligation of limited partnership on note is not disputed, but rather trustee argues that, independently of promissory note, debtors incurred obligation to repay loan as result of negotiations between debtors' principal and creditor and of tender of loan proceeds from creditor to debtor. In re Virginia-Carolina Financial Corp. (1992, CA4 Va) 954 F2d 193, 4 Fourth Cir & Dist Col Bankr Ct Rep 168, 22 BCD 783, 26 CBC2d 279, CCH Bankr L Rptr P 74402.

Payment by chief financial officer of debtor corporation to individual who was both investor in corporation and creditor of chief financial officer personally is payment on antecedent debt voidable under 11 USCS § 547(b) where payment from corporation to creditor is from corporate moneys and advance allegedly made from creditor to financial officer was used to pay corporate debt. In re United Food Cos. (1983, BC SD Fla) 33 BR 217.

Questions of whether payment of $ 50,000 to Chapter 11 debtor's former president for purchase of stock was actually payment of antecedent debt and whether former president's son, who purchased stock, was acting in individual or corporate capacity as secretary-treasurer of debtor preclude summary judgment in action to have transfer declared preferential under 11 USCS § 547 or to have transfer avoided under 11 USCS § 548. In re H & H Beverage Distributors, Inc. (1986, BC ED Pa) 65 BR 243.

Chapter 7 debtor cannot use 11 USCS § 547(b)(2) to escape trustee's recovery of debtor's transfer of interest in home to debtor's children on theory that debtor's use of proceeds of sale of stock, allegedly held in constructive trust for children, to make house payments gave children present interest in property, thus making transfer of debtor's interest in property not one for antecedent debt, because (1) constructive trusts do not automatically take trust property out of debtor's estate, (2) state law only imposes constructive trusts in cases of fraud, and no allegation of fraud has been made by debtor's children, nor could it be, given debtor's testimony that transfer was "gift." In re Uhlmeyer (1986, BC DC Ariz) 67 BR 977, CCH Bankr L Rptr P 71596.

Chapter 11 trustee cannot use 11 USCS § 547(b) to avoid $ 50,000 payment to bank by debtor in possession for loan owed by wholly owned subsidiary which also owed debtor in possession $ 350,000, because transfer is not "to or for benefit of creditor" of debtor in possession, or for antecedent debt "owed by" debtor in possession, in that debts of incorporated subsidiary are not automatically same as debts of parent in ***bankruptcy***. In re Chase & Sanborn Corp. (1986, BC SD Fla) 68 BR 530, affd (1988, CA11 Fla) 848 F2d 1196, CCH Bankr L Rptr P 72363 (criticized in Universal Serv. Admin. Co. v Post-Confirmation Comm. (In re Incomnet, Inc.) (2006, CA9) 463 F3d 1064, 47 BCD 23, CCH Bankr L Rptr P 80717) and (criticized in Alberts v HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp.) (2007, BC DC Dist Col) 365 BR 322) and (criticized in Schoenmann v BCCI Constr. Co. (In re NorthPoint Communs. Group, Inc.) (2007, BAP9) 2007 Bankr LEXIS 4931) and (criticized in Rigby v Mastro (In re Mastro) (2011, BC WD Wash) 465 BR 576) and (criticized in Meoli v Huntington Nat'l Bank (In re Teleservices Group, Inc.) (2012, BC WD Mich) 469 BR 713).

Although initiation of divorce proceedings calls into being various claims and contentions between parties as to distribution of assets and ongoing support obligations, no final creation or determination of such inchoate obligations occurs until final settlement and/or trial of divorce proceeding; therefore transfer of property to former spouse during pendency of divorce action may not be set aside as preferential transfer because no "antecedent debt" within meaning of 11 USCS § 547 is involved. In re Sorlucco (1986, BC DC NH) 68 BR 748 (criticized in Corzin v Fordu (In re Fordu) (1999, CA6) 201 F3d 693, 43 CBC2d 453, 1999 FED App 425P).

Lender's contingent claim against corporate Chapter 7 debtor guarantor arose when debtor executed guaranty agreement as debtor incurred debt to lender by virtue of agreement; debt is antecedent because it arose before transfer--in form of collection of debtor's accounts receivable--occurred, for purposes of determining whether transfer--which was for benefit of insiders who were liable on underlying note--was ***preference*** under 11 USCS § 547. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

Chapter 11 debtor parent corporation's payment to bank pursuant to guaranty of subsidiary's debt to bank was not on account of antecedent debt because although debtor's debt to subsidiary arises from intercompany transfer, debtor's debt to bank arises from its guaranty of subsidiary's debt to bank; debtor had liability to bank on its guaranty claim but debtor had no liability to subsidiary on guaranty, and therefore debtor's transfer to bank was not made for or on account of its liability to subsidiary on subsidiary's claim. Southmark Corp. v Southmark Personal Storage, Inc. (1992, BC ND Tex) 138 BR 831, affd (1993, CA5 Tex) 993 F2d 117, 24 BCD 625, 29 CBC2d 109, CCH Bankr L Rptr P 75308.

Trustee was granted summary judgment on claim to avoid alleged preferential transfers to officer of debtor under 11 USCS § 547(b) and fraudulent under 11 USCS § 548 and Mich. Comp. Laws §§ 566.35(1), (2), 566.34(1), pursuant to retention agreement in event debtor's assets were sold because payments were made on account of antecedent debt and were not made in course of ordinary business under Mich. Comp. Laws § 566.38(6)(b). McClarty v Colletta (In re D.C.T. Inc.) (2003, BC ED Mich) 295 BR 236.

In claim under 11 USCS § 547, creditor was not insider of debtor; creditor did not obtain settlement payment because of its affinity with debtor; to contrary, course of dealing escalated from differences between companies to

negotiations through counsel; further, relationship was not simply creditor and borrower; note entitled creditor to convert all or some of outstanding obligations under note into shares of common stock at pre-determined conversion price, and creditor was also entitled to have representative attend board of directors' meetings in non-voting observer capacity (although neither right was ever exercised); this was still business relationship, one in which each side sought commercial gain and which was governed by note and related loan documents. MCA Fin. Group, Ltd. v Hewlett-Packard (In re Fourthstage Techs., Inc.) (2006, BC DC Ariz) 355 BR 155, 57 CBC2d 205.

Debtor's transfer of his interest in certain real property to business associate was avoidable as preferential transfer under 11 USCS § 547(b) because transfer was made to insider within year of petition date; while business associate claimed that he had lien due to improvements made to property, by express language of statute, lien under 11 USCS § 550(e)(1) must arise from improvements made after avoided transfer and here improvements were made before transfer. Braunstein v Crawford (In re Crawford) (2011, BC DC Mass) 454 BR 262.

Where debtor was accused of fraudulently shifting his salary from his solely-owned business to his wife, trustee's preferential transfer claim was dismissed because trustee had not alleged any facts indicating that debtor owed antecedent debt to his wife. Butler v Wojtkun (In re Wojtkun) (2015, BC DC Mass) 534 BR 435.

Unpublished Opinions

Unpublished: ***Bankruptcy*** court denied Chapter 7 trustee's motion for summary judgment on his claims that money husband and wife paid to husband's father and stepmother one month before they declared ***bankruptcy*** were fraudulent conveyances that could be recovered under N.Y law, and 11 USCS § 548, or were ***preferences*** that could be recovered under 11 USCS § 547; genuine issue of material fact existed as to whether husband received fair consideration for $ 45,000 wife transferred under agreement she entered that provided for equitable distribution of marital property before her divorce, and there was no evidence that state court had approved division of marital assets. Thaler v Gamaldi (In re Gamaldi) (2009, BC ED NY) 2009 Bankr LEXIS 960.

Unpublished: Where Chapter 7 trustee alleged that debtor fraudulently transferred his interest in marital property to his wife as part of divorce judgment, complaint failed to state plausible claim for relief under 11 USCS § 547(b)(2) because there was no antecedent debt owing by debtor to his wife at time wife acquired debtor's interest in property, Hahn v Leong (In re Llamas) (2010, BC CD Cal) 2010 Bankr LEXIS 5011.

Unpublished: Allegations by Chapter 11 trustee that transfer of funds by debtor to director of debtor was preferential transfer under 11 USCS § 547 were insufficient to sustain cause of action because complaint was void of facts to raise above speculative level that ***payments*** were on account of antecedent debt as opposed to contemporaneous and in ordinary course of business. Perkins v Arif (In re Innovation Fuels, Inc.) (2013, BC DC NJ) 2013 Bankr LEXIS 3041.

213. Transactions involving purchasers

Voidable, indirect transfer under 11 USCS § 547(b) occurs where Chapter 7 debtor pizza franchisee, within ***90 days*** of petition, executed sale of assets in which purchasers also assumed obligations and made ***payments*** on preexisting note to original owners of franchises, because debtors in effect transferred to original owners debtor's right to receive so much of sales price as needed to satisfy note, and thus purchaser made ***payments*** to original owners of debt owed by debtor. Sommers v Burton (1986, CA5 Tex) 806 F2d 610, CCH Bankr L Rptr P 71579 (criticized in Crafts Plus+ v Foothill Capital Corp. (In re Crafts Plus+) (1998, BC WD Tex) 220 BR 331, 32 BCD 701, 40 CBC2d 388).

Payments by purchasers to bank pursuant to real estate contracts, which were assigned by Chapter 11 debtor to bank to secure loan but which assignment was never recorded, are interests of debtor on account of antecedent debt and were made while debtor was insolvent within ***90 days*** of filing of petition and therefore are avoidable ***preferences*** under 11 USCS § 547 and are ordered turned over to debtor under 11 USCS § 542. In re Simpson (1986, BC DC NM) 56 BR 586, 42 UCCRS 1437.

Unpublished Opinions

Unpublished: Where lease back transaction with identified prospective purchaser of debtor nonprofit community hospital was terminated at debtor's insistence, prospective purchaser was released from conditional pledge of funds to debtor, and no fraud was shown as required under N.J. Stat. Ann. §§ 25:2-25 and 27, 11 USCS § 547(b)(4)(A), as debtor received reasonably equivalent value. Bayonne Med. Ctr. v Bayonne/Omni Dev., LLC (In re Bayonne Med. Ctr.) (2011, BC DC NJ) 2011 Bankr LEXIS 4748.

Unpublished: Transferred interest was right to receive consideration under asset purchase agreement for sale of assets to purchaser, which was clearly on account of antecedent debt; in particular: (1) debtor owed consulting firm monthly payments under consulting contract, (2) those payments represented antecedent debt, and (3) assumption of contract by purchaser effectively transferred right to receive payments for sale of assets to consulting firm, and away from debtor's estate, in satisfaction of what was owed to consulting firm by debtor under consulting contract; this was clearly on account of antecedent debt. Lubetkin v Anthony Brusco Consulting (In re Astoria Graphics, Inc.) (2013, BC DC NJ) 2013 Bankr LEXIS 609.

214. Vehicle interest

Where debtor owned one-half interest in vehicle that was sold, and debtor received less than one-half of sale proceeds, overpayment to vehicle's co-owner qualified as transfer of interest of debtor in property; however, transfer was not avoidable under 11 USCS § 547 because trustee provided no evidence that ***payment*** received by co-owner was transfer for or on account of antecedent debt which debtor owed, at time, to co-owner. Mann v Steele (In re Steele) (2011, BC DC Ariz) 65 CBC2d 1098.

215. Wages or salary

Transfer of $ 21,000 was recoverable as ***preference*** by trustee in ***bankruptcy*** where sums were paid by debtor corporation as salary to insider of corporation, transfers were within ***90 days*** of commencement of ***bankruptcy*** proceedings, and transfers were made at times when uncontradicted evidence demonstrated that debtor corporation was insolvent, under 11 USCS § 547; separately and independently, same $ 21,000 is recoverable as transfer made while insolvent and for inadequate consideration within meaning of 11 USCS § 548(a)(2); further, when these amounts were transferred without any obligation of debtor corporation to pay them, while debtor corporation was insolvent, within year of date of commencement of ***bankruptcy*** proceedings, to insider of corporation and at time when corporate fortunes were on decline, confluence of so many badges of fraud warrants conclusion that transfers were also with actual intent to hinder, delay, or to fraud creditors within meaning of 11 USCS § 548(a). In re Commercial Candy Co. (1982, BC WD Mo) 20 BR 292.

Lien for priority wages due debtor's employees under 11 USCS § 507(a)(3) may not be avoided under 11 USCS § 547 because payments, if applied on wages currently earned, are not made on account of past due debt, but for present consideration. In re Apache Coal Co. (1986, BC WD Va) 68 BR 314.

Chapter 7 trustee failed to establish that payments corporation made to two officers who were hired to run corporation after corporation's chief executive officer died were preferential transfers under 11 USCS § 547; payments were either appropriate payments for services rendered or they were fraudulent transfers, and characterizing payments as preferential transfers assumed that they were received for legitimate, though antecedent, debts. Hedback v Tenney (In re Sec. Asset Capital Corp.) (2008, BC DC Minn) 396 BR 35, 50 BCD 230.

216. Wire transfers

Payments represented by wire transfers to make good bounced check to floor plan financer were on account of antecedent debt under 11 USCS § 547(b), where security agreement between debtor and floor plan financer stated that debtor undertook legal obligation to repay floor plan financer each time it accepted advance for purchase of mobile home; fact that debtor typically did not repay advance until it sold relevant mobile home in no way precludes finding that transfers were on account of antecedent debt. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

In trustee's action to recover debtor's wire transfer of $ 4 million to bank as alleged preferential transfer under 11 USCS § 547(b), existence of antecedent debt would be determined by debtor's account under clearing house rules rather than by ledger balance for debtor's account; accordingly, fact that ledger account was positive during relevant timeframe did not preclude finding that wire transfer was made on account of antecedent debt. Laws v United Mo. Bank of Kan. City, N.A. (1995, WD Mo) 188 BR 263, 29 UCCRS2d 266, affd (1996, CA8 Mo) 98 F3d 1047, 29 BCD 1148, CCH Bankr L Rptr P 77129, 30 UCCRS2d 1155, reh, en banc, den (1996, CA8) 1996 US App LEXIS 30754 and cert den (1997) 520 US 1168, 137 L Ed 2d 540, 117 S Ct 1432 and (criticized in Moseley v Arth (In re Vendsouth, Inc.) (2003, BC MD NC) 2003 Bankr LEXIS 1437).

Wire transfers made to creditor were not avoidable by Chapter 11 debtor pursuant to 11 USCS § 547(b) because under agreement in effect during ***preference*** period, debtor and creditor had no obligations to purchase and sell any objectively verifiable quantity of merchandise; there was no legal obligation on part of debtor to pay creditor, such that debtor could claim that it was paying antecedent debt when it transferred wire payments to creditor. Ames Merch. Corp. v Revere Mills Inc. (In re Ames Dep't Stores, Inc.) (2010, BC SD NY) 53 BCD 93.

217. Miscellaneous

First mortgage holders and taxing authorities, who have asserted that payments made to them are from funds held in constructive trust by Chapter 7 debtor mortgage investment companies and therefore not recoverable as ***preferences*** under 11 USCS § 547(b), may not recover where they have failed to trace trust funds through debtors' commingled accounts and this inability to trace and identify funds negates their argument that debtors' fraudulent activity barred trustee from recovering funds to which debtor allegedly had no right or title. First Federal of Michigan v Barrow (1989, CA6 Mich) 878 F2d 912, CCH Bankr L Rptr P 72985, 14 FR Serv 3d 899 (criticized in Tilley v TJX Cos. (2003, CA1 Mass) 345 F3d 34, 68 USPQ2d 1288, 56 FR Serv 3d 1252).

Transfer that occurs by forfeiture under contract for purchase of hotel upon which debtors have paid $ 520,000 is not on account of antecedent debt under 11 USCS § 547(b)(2), where debtors had no legal obligation to vendors until forfeiture occurred, i.e., no obligation existed at time down payment was made. In re Wey (1987, CD Ill) 78 BR 892, affd (1988, CA7 Ill) 854 F2d 196, 18 BCD 401, CCH Bankr L Rptr P 72436 (criticized in Brown v Job (In re Polo Builders, Inc.) (2010, BC ND Ill) 433 BR 700, 53 BCD 174).

Debtor's payment to hospital for medical services provided to wife and baby prior to provision of such services is not transfer made on account of antecedent debt and trustee may therefore not avoid transfer as ***preference*** under 11 USCS § 547. In re Mobley (1981, BC SD Ohio) 15 BR 573, 5 CBC2d 750.

There is no payment of antecedent debt with respect to lien asserted for freight charges on stopped shipment where lien was acquired by carrier at moment it accepted debtor's goods for shipment; carrier was fully secured creditor from time it took possession of merchandise and it did not receive more than creditors of same class; assertion of this lien does not constitute preferential transfer under 11 USCS § 547(b). In re KDT Industries, Inc. (1983, BC SD NY) 31 BR 61.

Trustee is not entitled to recover alleged preferential transfer of debtor's property pursuant to 11 USCS § 547(b), where, based on evidence presented, ***bankruptcy*** court determines that payments made by debtor to third party, with whom debtor had buy back agreement in which debtor sold her jewelry to third party with option to repurchase property at later date, were not for or on account of an antecedent debt owed by debtor before such transfer was made, but rather, such ***payments*** were consecutive bilateral agreements in which debtor tendered certain sum of money in exchange for option to repurchase jewelry; therefore, ***payments*** were part of contemporaneous exchange for new value given to debtor and not preferential transfers. In re Hytha (1984, BC SD Fla) 39 BR 196.

Debtor in possession may recover ***preference*** under 11 USCS § 547(b) where debtor sent creditor 500 ounces of gold within ***90 days*** of filing of ***bankruptcy*** petition in satisfaction of antecedent debt created by earlier shipment of gold to debtor. In re P.M.R.C. Corp. (1984, BC ED NY) 39 BR 912.

Money paid to agent of corporate debtor by third party and retained by agent as satisfaction of debts owed agent by debtor is voidable ***preference*** under 11 USCS § 547(b); agent holds ***payments*** in trust for benefit of debtor and

retention of money without knowledge or consent of debtor constitutes transfer on account of antecedent debt notwithstanding fact that debtor never personally received funds in question. In re Triple A Coal Co. (1984, BC SD Ohio) 41 BR 641.

Transfer of tires from consignee debtor back to consignor is transfer on account of antecedent debt under 11 USCS § 547(b)(2) because (1) debtor had obligation to pay for or return tires and (2) upon consignor's repossession, consignor issued credit memos to debtor, clearly indicating existence of debt. In re Castle Tire Center, Inc. (1986, BC WD Pa) 56 BR 180, 42 UCCRS 862.

Where trustee has relied on position that transferee of customer funds from debtor brokerage's managing partner is liable to debtor's estate on "account" and evidence quantifiably suggests such liability, there was no antecedent debt on account of which transfers were made, and transfers are not avoidable under 11 USCS § 547. In re Bell & Beckwith (1986, BC ND Ohio) 64 BR 620.

Trustee is entitled to recover amounts debtor paid by check to casino to redeem gambling markers that extended credit to debtor as ***payments*** were on an antecedent debt for benefit of creditor under 11 USCS § 547(b) and there was no dispute debtor was insolvent or that transfers were made within ***90 days*** of ***bankruptcy***, and trustee testified that there would be no dividend to unsecured creditors such that casino received more than it would have in Chapter 7 liquidation. Meeks v Greenville Casino Partners, L.P. (In re Armstrong) (1998, BC ED Ark) 217 BR 569, amd, motion gr, in part, motion den, in part (1998, BC ED Ark) 1998 Bankr LEXIS 221.

Where Chapter 11 debtor made ***payment*** to seller after it received goods but before payment was due, payment was on account of antecedent debt under 11 USCS § 547(b)(2). Peltz v Gulfcoast Workstation Group, (In re Bridge Info. Sys.) (2004, BC ED Mo) 311 BR 774, 43 BCD 76, affd (2006, CA8 Mo) 447 F3d 1076, 46 BCD 133, 56 CBC2d 165, CCH Bankr L Rptr P 80603, reh den, reh, en banc, den (2006, CA8) 2006 US App LEXIS 19487 and affd (2006, CA8 Mo) 460 F3d 1041.

Nothing in Neuger v. United States (In re Tenna Corp.), 801 F.2d 819, bars consideration of postpetition assumption of executory contract in deciding whether prepetition payments on that contract may be recovered as ***preferences***. Alberts v Humana Health Plan, Inc. (In re Greater Southeast Cmty. Hosp. Corp.) (2005, BC DC Dist Col) 327 BR 26, 45 BCD 3, 54 CBC2d 984.

Bankruptcy debtor's involuntary expulsion from limited liability companies (LLCs) after debtor took excessive distributions from LLCs was not avoidable as preferential transfer, since transfer of debtor's interests in LLCs was not made on account of antecedent debt and did not reduce debt to LLCs from excessive distributions. Garcia v Garcia (In re Garcia) (2014, BC ED NY) 507 BR 434, 59 BCD 28.

As it was evident from course of dealings between parties that majority of work would only be performed by creditor upon pre-payment by debtors, then transfers at issue were not tendered on account of antecedent debts and thus, were not avoidable preferential transfers. DOTS, LLC v Capstone Media (In re DOTS, LLC) (2015, BC DC NJ) 533 BR 432, 61 BCD 86.

Unpublished Opinions

Unpublished: Clearly, when creditor shipped goods to debtor, and debtor received those goods, debtor then had obligation to pay for them; this created debt which did pre-dated transfers, so debt was antecedent to transfers. Flower Factory, Inc. v Magic Creations, Inc. (In re Flower Factory, Inc.) (2014, BC ND Ohio) 2014 Bankr LEXIS 296.

F. Insolvent Debtor

1. In General

218. Generally

It is no longer necessary to put creditor on notice of insolvency at time of transfer, as was true under prior law, and showing of insolvency is sufficient where debtor was hopelessly insolvent at time petition was filed, and there is no showing that debtor's financial circumstance materially changed from date of judicial levy constituting transfer to date of petition. In re Thomas (1980, BC WD Va) 7 BR 389, 30 UCCRS 750.

In order for transfer to be considered preferential under 11 USCS § 547(b), transfer had to be made while debtor was insolvent; insolvency as determined by ***bankruptcy*** code exists when sum of debtor's debts is greater than sum of debtor's assets; debtor is, however, aided in proving this element by presumption set out in 11 USCS § 547(f) which states that debtor is presumed to have been insolvent on and during 90 days preceding date of filing its petition in ***bankruptcy***; this presumption causes party against whom presumption exists to come forward with some evidence to rebut presumption, but burden of proof remains on party in whose favor presumption exists. In re Rocky Mountain Ethanol Systems, Inc. (1981, BC DC NM) 21 BR 707.

Where Chapter 11 debtor's assets clearly outweighed total debts, debtor was not insolvent and therefore judgment lien obtained within 90 days of filing of petition is not preferential transfer under 11 USCS § 547. In re Fred's Dollar Store, Inc. (1984, BC ND Miss) 44 BR 491.

Financial difficulties, cash flow problems, or even inability to pay debts as they mature, are not same as insolvency under 11 USCS § 547 but rather insolvency means debtor's liabilities exceed value of its assets. In re A. Fassnacht & Sons, Inc. (1986, BC ED Tenn) 57 BR 174.

Foreclosure sale of Chapter 13 debtors' residence 13 days prior to filing of ***bankruptcy*** cannot be set aside as preferential transfer under 11 USCS § 547 where debtor was not insolvent at time of sale and sale did not render him insolvent. In re Quinn (1986, BC WD Tenn) 69 BR 776.

Plaintiff has burden to prove Chapter 7 debtor's insolvency at time of transfer alleged to be preferential under 11 USCS § 547, or fraudulent under 11 USCS § 548, and in determining whether debtor was insolvent court will apply balance sheet test pursuant to 11 USCS § 101, giving weight to uncontroverted testimony of plaintiff's expert witness as to conservative valuation of debtor's assets rather than unreliable values stated in personal balance sheets prepared by debtor for purpose of borrowing money; in making such determination of debtor's insolvency, court is not bound by prior finding that debtor had failed to prove his insolvency in action brought by him to avoid his personal guarantees of debts of his business entities. In re Duque Rodriguez (1987, BC SD Fla) 75 BR 829.

Chapter 7 trustee can avoid as preferential transfers under 11 USCS § 547 payments to insider made during one-year period preceding debtor's filing where debtor was insolvent during that time and insider has reasonable cause to believe debtor was insolvent. In re F.H.L., Inc. (1988, BC DC NJ) 91 BR 288.

219. Date of determination and retrojection

Bankruptcy court's findings of fact for purposes of 11 USCS § 547(b) that debtor was insolvent at time of March and April transfers to sole stockholder are not clearly erroneous where court finds that debtor's balance sheet for April overstated value of debtor's inventory and court uses retrojection to infer insolvency in March as well, given slow state of debtor's business; companion finding that transferee knew of insolvency also stands given fact that transferee was sole operating officer of debtor and responsible for preparing all of debtor's financial information. Briden v Foley (1985, CA1 Mass) 776 F2d 379, CCH Bankr L Rptr P 70863.

Preference is determined by insolvency at date of transfer, not insolvency or solvency of debtor at time of sale; under 11 USCS § 547(f) insolvency of debtor is presumed on and during 90 days immediately preceding date of filing of petition. In re Fabric Buys of Jericho, Inc. (1982, BC SD NY) 22 BR 1013.

Since insolvency at given point in time is difficult to demonstrate by direct proof, courts permit trustee to show that debtor was insolvent at one point in time and then prove that same condition existed at time of subject transfer; such method of proof has been labeled "retrojection"; when trustee chooses to use this method of proof it is essential that trustee be able to show absence of any substantial or radical changes in assets or liabilities of bankrupt between retrojection dates; in action where trustee does not offer any evidence that would permit court to

retroject debtor's condition from time when petition was filed back to time of transfer, creditor has not sustained burden of proving debtor's insolvency. In re R. Purbeck & Associates, Ltd. (1983, BC DC Conn) 27 BR 953.

Where debtor is shown to be insolvent at date later than date of questioned transfer, and it is shown that debtor's financial condition did not change during interim period, insolvency at prior time may be inferred from actual insolvency at later date; where debtor did not submit balance sheet for any period in March to show that debtor's financial condition was different from April and it was admitted that circumstances surrounding debtor's financial condition did not change from beginning to end of April, it is appropriate to retroject April 4 insolvency back to dates ***payments*** were made to president and sole shareholder on antecedent debt. In re Arrowhead Gardens, Inc. (1983, BC DC Mass) 32 BR 296 (criticized in Rajala v Mann (In re Mann) (2013, BC DC Kan) 2013 Bankr LEXIS 3018).

In determining whether debtor was insolvent during entire ***90-day*** period preceding commencement of case, court is not bound to accept erroneous valuation of assets appearing on debtor's records at that time; court may consider information originating subsequent to transfer date if it tends to shed light on fair and accurate assessment of asset as of transfer date. In re Chemical Separations Corp. (1984, BC ED Tenn) 38 BR 890.

Balance sheet which does not indicate how debtor's assets were valued has no probative weight for determining insolvency under 11 USCS § 547; fair value under 11 USCS § 101 is determined by estimating what debtor's assets would realize if sold in prudent manner in current market condition and asset values carried on balance sheet, even if derived in accordance with generally accepted accounting principles, do not necessarily reflect fair value. In re F & S Cent. Mfg. Corp. (1985, BC ED NY) 53 BR 842, 13 BCD 823, 13 CBC2d 805, CCH Bankr L Rptr P 70819 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

For purposes of determining Chapter 7 debtors' insolvency at time of second transfer of mobile home to same creditor, fact that debtors were found to have been insolvent at time of previously avoided transfer, which occurred shortly before second transfer, is indicative of their continued insolvency at time of second transfer; further evidence of insolvency for purposes of 11 USCS § 547 includes fact that majority of debtors' obligations were incurred prior to either transfer and there appears not to have been any acquisition of property subsequent to conveyances. In re Albers (1986, BC ND Ohio) 67 BR 530.

Trustee has conclusively established Chapter 11 debtor industrial loan and thrift company's insolvency during ***preference*** period of 11 USCS § 547 where debtor was insolvent by not less than $ 11,638,028 and there was no improvement in financial condition, but rather it deteriorated rapidly. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

Evidence of insolvency on date significantly distant in time from date of preferential transfer, without more evidence, is insufficient to support finding of insolvency on date of transfer; however, court will consider retrojection (inferring insolvency over period of time from proven date of insolvency) if evidence of insolvency on certain date is accompanied by evidence that debtor's financial condition did not change during pendency period between time of transfer and date of proven insolvency. Washington Bancorporation v Hodges (In re Washington Bancorporation) (1995, BC DC Dist Col) 180 BR 330, 7 Fourth Cir & Dist Col Bankr Ct Rep 376.

Even if ***Bankruptcy*** Court could take judicial notice of Chapter 7 debtor's ***bankruptcy*** schedules to determine insolvency, insolvency on petition date did not mean that debtor was insolvent at time of allegedly preferential loan repayment and, absent other evidence, trustee failed to establish insolvency element of ***preference*** required by 11 USCS § 547(b)(3). Matson v Strickland (In re Strickland) (1999, BC ED Va) 230 BR 276, 11 Fourth Cir & Dist Col Bankr Ct Rep 264, 33 BCD 1199, 41 CBC2d 941.

220. Knowledge of insolvency

Lack of knowledge of question concerning whether debtor was insolvent at time transfer was made does not constitute evidence of solvency sufficient to overcome presumption of insolvency contained in former 11 USCS § 547(f). In re Valles Mechanical Industries, Inc. (1982, BC ND Ga) 20 BR 350, 9 BCD 334, 6 CBC2d 859.

Fact that recipient of preferential transfer had no knowledge of debtor's insolvency at time of payments has no relevance in light of explicit presumption of insolvency provided by 11 USCS § 547(f). In re Fabric Buys of Jericho, Inc. (1982, BC SD NY) 22 BR 1010.

Creditor does not have reasonable cause to believe that debtor was insolvent at time of transfer by debtor of security interest in its oil and gas properties to creditor so as to make transfer voidable under former 11 USCS § 547(b)(4)(B)(ii) where: financial statement tendered to creditor showed debtor's net wealth to be $ 101,500; various loans were apparently made without reviewing debtor's financial condition; balance sheet offered by ***bankruptcy*** trustee established debtor's total equity to be $ 656,223.36; and oil and gas engineering report used by debtor in preparing ***bankruptcy*** schedules showed reserve values of some million. In re Schick Oil & Gas, Inc. (1983, BC WD Okla) 35 BR 282.

Reasonable cause to believe debtor is insolvent for purposes of former 11 USCS § 547 does not mean actual knowledge of insolvency but rather it means that creditor had knowledge of facts sufficient to indicate to reasonable person that debtor was insolvent or that creditor had knowledge of facts that should have led it to inquire, and reasonable inquiry would have revealed insolvency. In re A. Fassnacht & Sons, Inc. (1986, BC ED Tenn) 57 BR 174.

Trustee of Chapter 11 debtor may recover as preferential transfer under 11 USCS § 547 amounts paid to former secretary and corporate director of debtor who must have known of debtor's insolvency at time of payments because he had access at all times to debtor's books and was experienced in financial affairs. In re M.D.I., Inc. (1986, BC ND Miss) 66 BR 497.

Bankruptcy court denied, in part, motions to dismiss claims Committee of Unsecured Creditors filed against corporation's former officers and directors, members of their families, and trusts they owned or controlled, seeking recovery of transfers corporation made to its officers and directors, members of their families, and trusts; Committee stated valid claims alleging that transfers were preferential and/or fraudulent under 11 USCS §§ 544, 547, and 548, and N.H. Rev. Stat. Ann. §§ 545-A:4 and 545-A:5, by alleging that transfers were made for less than value received and with knowledge that corporation was insolvent. Official Comm. of Unsecured Creditors v Foss (In re Felt Mfg. Co.) (2007, BC DC NH) 2007 BNH 27, 371 BR 589 (criticized in In re Brown Publ. Co. (2015, BC ED NY) 2015 Bankr LEXIS 667).

Trustee proved that two ***payments*** within ***90 days*** of debtor's ***bankruptcy*** comprised avoidable ***preferences*** in meaning of 11 USCS § 547(b) where: (i) creditor was paid 100 percent of its prepetition unsecured claim, (ii) debtor was liquidated and other prepetition unsecured creditors were not paid in full, (iii) therefore, because of ***payments***, creditor received more that it would have received in case under Chapter 7. Buckley v Carrier Corp. (In re Globe Holdings, Inc.) (2007, BC ND Ala) 366 BR 286.

Unpublished Opinions

Unpublished: Prior versions of 11 USCS § 547 applied year-long period for insiders only if insider had reasonable cause to believe debtor was insolvent at time of such transfer; this qualification was removed from statutory language; thus, trustee was not required to prove that defendants had reasonable cause to believe debtor was insolvent at time of transfer. Levey v Cummins (In re BoxMagic Media Corp.) (2012, BC ND Ill) 2012 Bankr LEXIS 659.

221. Determination of liabilities

Creditor which received allegedly preferential transfer failed to rebut presumption of insolvency under 11 USCS § 547(f) with exhibit which listed debtor's total assets as greater than its total liabilities, excluding contingent or unliquidated claims, because when contingent and unliquidated liabilities are included, liabilities exceed assets. In re Transit Homes, Inc. (1985, BC DC SC) 57 BR 40.

Chapter 11 debtor's pension obligation should be considered as liability on debtor's balance sheet for purposes of insolvency determination under 11 USCS § 547. In re Art Shirt, Ltd. (1986, BC ED Pa) 68 BR 316, affd (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

Debtor was insolvent under 11 USCS § 547 at time of transfer to insider where, although debtor's assets exceeded her liquidated and noncontingent debts at time of transfer, contingent debt resulting from automobile accident, even if discounted by 99 percent, exceeded debtor's assets. In re Kucharek (1987, BC ED Wis) 79 BR 393.

Debtor's financial statements, made under Generally Accepted Accounting Principles, were insufficient to rebut presumption of insolvency and, since creditor presented no expert witnesses and its financial officer's testimony made no meaningful assessment of debtor's liabilities, debtor was insolvent under 11 USCS § 547(b)(3). Homeplace of Am., Inc. v Salton, Inc. (In re Waccamaw's Homeplace) (2005, BC DC Del) 325 BR 524, 44 BCD 227.

Creditor's filing of judgment lien was made while ***bankruptcy*** debtor was insolvent since filing of lien was triggering event for transfer during ***preference*** period, rather than creditor's actual acquisition of debtor's assets at some future date, and non-contingent judgment against debtor was included in debtor's liabilities to establish debtor's insolvency. Imagine Fulfillment Servs., LLC v DC Media Capital, LLC (In re Imagine Fulfillment Servs., LLC) (2013, BC CD Cal) 57 BCD 183, summary judgment gr, in part, summary judgment den, in part,, amd (2013, BC CD Cal) 489 BR 136, affd (2014, BAP9) 2014 Bankr LEXIS 3369.

State court money judgment against debtor was not contingent debt and had to be included in solvency calculation under 11 USCS § 547(b)(3) because events giving rise to judgment occurred pre-petition, and prior to each of alleged preferential transfers at issue, and was not contingent as of any of transfers. Imagine Fulfillment Servs., LLC v DC Media Capital, LLC (In re Imagine Fulfillment Servs., LLC) (2013, BC CD Cal) 489 BR 136, affd (2014, BAP9) 2014 Bankr LEXIS 3369.

Contingent and disputed liabilities of Chapter 11 debtor are included in determining total indebtedness for purposes of determining debtor's insolvency for ***preference*** purposes of 11 USCS § 547(b), but such contingent liabilities must be reduced to their present or expected amount by discounting them by probability that contingency will occur and such liability will become real. In re Sierra Steel, Inc. (1989, BAP9 Nev) 96 BR 275, 19 BCD 269.

Unpublished Opinions

Unpublished: When judgment creditor and trustee disagreed as to whether debtor was insolvent on date of transfer under 11 USCS § 547(b)(3), neither party was entitled to summary judgment; trustee, in reaching his conclusion of solvency, included pre-petition claim yet failed to show that he examined claim to determine whether it was allowable as required by 11 USCS § 704(a)(5), and creditor, in determining solvency, asked court to disallow that claim but failed to file proper objection under Fed. R. ***Bankr.*** P. 3007. Liebert v Nisselson (In re Levine) (2008, BC SD NY) 2008 Bankr LEXIS 2639.

Unpublished: Unstayed state court judgment against debtor was not contingent debt for purposes of determining if debtor was insolvent when judgment lien was filed and thus, entitled to avoid judgment lien as ***preference***, as debtor's liability did not rely on some future extrinsic event to trigger liability. With respect to insolvency analysis, GAAP were not controlling, as they did not report liabilities in accordance with right to payment standard under ***Bankruptcy*** Code. DC Media Capital, LLC v Imagine Fulfillment Servs., LLC (In re Imagine Fulfillment Servs., LLC) (2014, BAP9) 2014 Bankr LEXIS 3369.

222. Miscellaneous

Estate representative did not establish that Chapter 11 debtor was "insolvent" at time of allegedly preferential transfers, made over 5 months before debtor filed ***bankruptcy*** petition, for purposes of 11 USCS § 547, despite fact that certified public accountant testified that as of date debtor's fiscal year ended, company's preliminary unaudited financial statements and its general ledger showed excess of liabilities over assets of $ 216,000, and that company had suffered loss of over $ 2 million during preceding fiscal year, where representative presented no evidence of

fair market value of debtor's property, and where accountant had no information as to value of debtor's equipment, and where there was neither testimony nor financial record from which court could determine what either book value or fair value of equipment was on date ending debtor's fiscal year; if fair value of equipment exceeded book value of equipment by more than $ 216,000, debtor was solvent when allegedly preferential transfers were made. Orix Credit Alliance v Harvey ex rel. Lamar Haddox Contractor (In re Lamar Haddox Contractor) (1994, CA5 La) 40 F3d 118, 26 BCD 458, CCH Bankr L Rptr P 76301.

Chapter 7 trustee was erroneously granted summary judgment on preferential and fraudulent transfer claims under 11 USCS §§ 547(b) and 548(a) arising from debtor's transfers to parent corporation in connection with sale of debtor; district court improperly weighed evidence in concluding that debtor was insolvent at time of transaction and received no value as result of transaction. Freeland v Enodis Corp. (2008, CA7 Ind) 540 F3d 721, 50 BCD 134, 60 CBC2d 524, CCH Bankr L Rptr P 81315 (criticized in Chartier v Brabender Technologie, Inc. (2011, DC Mass) 2011 US Dist LEXIS 115033).

Sale, lease-back and option to repurchase agreements executed between debtors--operators of seed and grain sales and storage business--and farm partnership did not constitute preferential transfer, where, under 11 USCS § 547(b)(3), evidence showed that debtors' net worth left them solvent on date of transfer. In re Hemphill (1982, BC SD Iowa) 18 BR 38.

Bank, seeking to rebut presumption that Chapter 7 debtor was insolvent as defined by 11 USCS § 101 during ***90 days*** before filing of ***bankruptcy*** petition, fails to rebut presumption that debtor was insolvent at time it made ***payment*** to bank and ***payment*** is therefore preferential transfer under 11 USCS § 547(b) where debtor's liabilities exceeded its assets when debtor's ***bankruptcy*** petition was filed, record is devoid of any events resulting in rapid deterioration of debts between date of transfer and date of petition, evidence of "going concern" value is insufficient to overcome presumption under § 547(f), evidence being self-serving statements by debtor's president and bank, and debtor's president testified there was no appreciable change in financial condition during period. In re Tuggle Pontiac-Buick-GMC, Inc. (1983, BC ED Tenn) 31 BR 49.

Debtor corporation was insolvent on date that payments were made to its president and sole shareholder on antecedent debt, even though debtor's balance sheet presents picture of solvency, since balance sheet was not accurate portrayal of debtor's financial condition as it contains several erroneous asset evaluations and omits certain liabilities; payments are preferential transfers recoverable by trustee under 11 USCS § 547(a). In re Arrowhead Gardens, Inc. (1983, BC DC Mass) 32 BR 296 (criticized in Rajala v Mann (In re Mann) (2013, BC DC Kan) 2013 Bankr LEXIS 3018).

Chapter 11 debtor was insolvent at time of transfer for purposes of 11 USCS § 547(f), presumption of insolvency being unrebutted, where during period of alleged preferential transfers, (1) debtor had no net equity; (2) debtor never made profit and was in dire need of additional financing in order to survive; and (3) judicial notice is taken of petition showing assets of $ 2,437,600 and debts of $ 3,867,035.17. In re Precision Masters, Inc. (1984, BC SD Ind) 51 BR 258.

Return by debtor of consigned tires to creditor meets criteria of 11 USCS § 547(b)(3) because (1) debtor was in fact insolvent, and (2) creditor repossessed all goods consigned to debtor because debtor could not pay for goods upon creditor's demand; thus creditor had good cause to suspect insolvency. In re Castle Tire Center, Inc. (1986, BC WD Pa) 56 BR 180, 42 UCCRS 862.

Transfers of property to Cotton Board by Chapter 11 debtor in payment of 17-months' worth of assessments debtor owed board pursuant to its cotton collecting-handler liabilities under Cotton Research and Promotion Act 7 USCS § 2101, were made to or for benefit of creditor for antecedent debt for purposes of 11 USCS § 547 and transfers were made at time debtor was insolvent where debtor was unable to pay assessments when due and that, as result of transfer, debtor was forced in ***bankruptcy***. In re Commodity Exchange Services Co. (1986, BC ND Tex) 62 BR 868, affd (1986, ND Tex) 67 BR 313.

Debtor was insolvent for purposes of 11 USCS § 547 at time it executed mortgages in favor of bank, where debtor's stock was worth not more than 10 cents per share, rather than $ 1.00 face value or $ 4.75 market value as alleged

by debtor, and residence listed by debtor on his financial statement was exempt. In re Davenport (1986, BC MD Fla) 64 BR 411.

For purposes of 11 USCS § 547, creation of security interest in crops pursuant to after-acquired property clause was made while Chapter 11 debtor was insolvent as established by appraisal and other testimony presented at hearing, and by failure to rebut presumption of insolvency under 11 USCS § 547(f). In re Lemley Estate Business Trust (1986, BC ND Tex) 65 BR 185.

For purposes of determining whether Department of Public Welfare's deductions from prepetition reimbursements to Chapter 11 debtor nursing home operators to satisfy overpayments made by department to other related nursing homes may be set aside as preferential transfers under 11 USCS § 547, department has failed to establish that debtors would be solvent if corporate veils were pierced to include real estate interests held in trust as property of debtor's estate. In re WJM, Inc. (1986, BC DC Mass) 65 BR 531, affd (1986, DC Mass) 84 BR 268.

Trustee has failed to prove that Chapter 7 debtor was insolvent on date she paid her son $ 10,000 to reimburse him for money he had advanced to her, within one-year insider ***preference*** period, and therefore payment is not avoidable under 11 USCS § 547 where debtor's debt of over $ 61,0000 did not exceed valuation of all her property at time of payment; trustee who repeatedly overlooked nonliquid assets merely established that debtor was experiencing cash-flow difficulty, which is insufficient to show insolvency. In re Mangold (1992, BC ND Ohio) 145 BR 16.

Chapter 11 debtor/law firm's future rents could not be properly included as liabilities in determining debtor's insolvency for purposes of ***preference*** avoidance since such calculation would miscategorize future rent liability as obligation presently due in full when, in fact, rent would have been paid in installment payments had debtor remained going concern and since this approach would permit categorization of any projectable future expense as presently due in full with result that any business with substantial projectable future expenses would be artificially deemed insolvent. Official Comm. of Former Partners v Brennan (In re LaBrum & Doak, LLP) (1998, BC ED Pa) 227 BR 383, 33 BCD 598.

In ***preference*** action brought by Chapter 11 debtor seeking to avoid transfer of rents to mortgagee, debtor has not established element of insolvency required by 11 USCS § 547(b) in light of stipulation that assets of debtor's general partners are sufficient to pay any deficiency asserted by mortgagee. In re Venice-Oxford Assocs. (1999, BC MD Fla) 236 BR 820, 12 FLW Fed B 305.

Under 11 USCS § 101(32)(A), property that has been previously transferred as part of preferential transfer is included in debtor's estate for purposes of determining solvency under 11 USCS § 547, but not 11 USCS § 548; thus, since debtor was not insolvent at time of foreclosure sale under 11 USCS § 547(b)(3), and creditor did not under terms of § 547(b)(5) receive more than it would have been entitled to in Chapter 7, foreclosure sale did not constitute ***preference***. In re Dawson (1999, BC WD Va) 244 BR 92, 43 CBC2d 616, 84 AFTR 2d 7426.

Unpublished Opinions

Unpublished: There was no evidence in record indicating that debtors were insolvent prepetition, and therefore ***bankruptcy*** court did not err in crediting parties' assertions that debtors were solvent at time of their ***bankruptcy*** filings; in light of debtors' solvency at that time, ***bankruptcy*** court correctly and properly inferred that debtors' counsel could not have been beneficiary of "facially plausible" ***preference***. Coleman v Hecker (In re Dexter Distrib. Corp.) (2010, BAP9) 2010 Bankr LEXIS 5043.

2. Evidence of Insolvency

223. Generally

In general, whether particular debtor is insolvent for purposes of 11 USCS § 547 or 11 USCS § 548 is question of fact. It calls for fact-intensive determination requiring review of debtor's financial records and status at time of transfers. Schnittjer v Nazbro Inc. (In re Hung) (2008, BC ND Iowa) 387 BR 766.

224. Accounting and financial records

Where defendant-lienholder has failed to introduce any testimony bearing on insolvency as defined in ***Bankruptcy*** Code which would require plaintiff-debtor to come forward with rebutting evidence and exhibits offered showed that assets of debtor were about $ 126,000 less the liabilities, debtor has established that it was insolvent at time of preferential transfer under 11 USCS § 547 and may void as preferential attachment lien against real estate of plaintiff-lienholder. In re Earth Services, Inc. (1982, BC DC Vt) 25 BR 399.

Trustee has presented substantial evidence establishing insolvency, for purposes of ***preference*** action under 11 USCS § 547, in form of accounting records and testimony of debtor's executive personnel despite creditor's contention that existence of financial statement showing solvency, which was reflected in debtor's schedules and statement of affairs, precludes trustee from showing insolvency. In re Olympic Foundry Co. (1985, BC WD Wash) 51 BR 428.

Debtors were not entitled to summary judgment with respect to whether certain transfers were avoidable as preferential under 11 USCS § 547(b) because financial figures disclosed by debtors at time of their petition raised genuine issue regarding whether debtors were insolvent at time of transfer. Miller v FDIC (In re Miller) (2010, BC ND Ohio) 428 BR 437, CCH Bankr L Rptr P 81832.

225. --Financial reports

Bankruptcy Court cannot base its finding of insolvency for purposes of 11 USCS § 547 ***preference*** action upon financial report prepared by Chapter 11 trustee's experts which was excluded from record, since court must rely solely on record before it. In re Art Shirt, Ltd. (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

Presumption of insolvency at time of allegedly preferential transfer under 11 USCS § 547(f) is not rebutted by financial statement prepared 1 year and 4 months prior to transfer or by ***bankruptcy*** schedules showing that debtor's only asset is accounts receivable where there is no evidence as to value of accounts. In re Rose (1988, BC WD Mo) 86 BR 193.

Debtors were solvent for purposes of alleged preferential transfers that occurred on May 25, 2000 as part of major financial restructuring; in so finding, court considered evidence in addition to balance sheet analysis--inter alia, debtors' did not report significant losses for five fiscal years 1996 through 2000 (large part of their loss coming from two nonrecurring items), their financial statements reported positive net worth for fiscal years 1996 through 2000 (including net worth of $ 518,412,000 for three months ending May 31, 2000), and debtors were not without cash to meet operating and debt servicing needs at May 25. Heilig-Meyers Co. v Wachovia Bank, N.A. (In re Heilig-Meyers Co.) (2004, BC ED Va) 319 BR 447, affd (2005, ED Va) 328 BR 471.

226. Testimony

Evidence, including testimony of Chapter 11 debtor's former president that debtor's original schedules were not accurate and that debtor's liabilities actually exceeded its assets at time of filing, is sufficient to establish debtor's insolvency at time of payment to steel supplier for purposes of 11 USCS § 547, in absence of any evidence from supplier regarding debtor's financial condition. In re Georgia Steel, Inc. (1985, BC MD Ga) 56 BR 509, revd on other grounds (1986, MD Ga) 66 BR 932 (criticized in Watts v Pride Util. Constr., Inc. (In re Sudco, Inc.) (2007, BC ND Ga) 2007 Bankr LEXIS 3730) and (criticized in In re J.A. Jones (2007, BC WD NC) 361 BR 94).

Opinion testimony of expert business consultant which established zero-valuation of asset in view of attendant loan defaults, zero-valuation of Chapter 11 debtor's subsidiary based upon its substantial losses, coupled with 32 percent collection delinquency rate and undue inflation of subsidiary's assets is evidence of debtor's insolvency at time of transfer for purposes of 11 USCS § 547 and is evidence that no material change in debtor's financial status occurred during pertinent time periods. In re Ace Finance Co. (1986, BC ND Ohio) 64 BR 688.

Transferees' attempt to rebut presumption of Chapter 7 debtor corporation's insolvency under 11 USCS § 547(f), in order to prohibit trustee from avoiding such preferential transfers, fails where transferees offered testimony by

debtor's president and vice president that nothing was owed to them, since mere assumption of solvency does not overcome presumption of insolvency, and fair value of debtor's assets did not exceed liabilities on date of transfers. In re M.B.K., Inc. (1987, BC CD Cal) 92 BR 429, 19 CBC2d 1243.

Trustee failed to prove all elements for preferential transfer under 11 USCS § 547(b); although he provided evidence that one creditor corporation and its owner were insiders under 11 USCS § 101(31)(B) and that creditors received more as result of transfer than they would have through liquidation, no determination could be made concerning solvency or insolvency of debtor when trustee presented no expert witness testimony concerning fair valuation of debtor's property. Killips v Schropp (In re Prime Realty, Inc.) (2007, BC DC Neb) 376 BR 274, 48 BCD 194, affd (2007, BAP8) 380 BR 529, 49 BCD 71.

227. --Accountant

Voidable preferential transfer exists under 11 USCS § 547, despite State Department of Public Welfare's contentions that debtors were not insolvent at filing of their petition and that court improperly shifted burden of proof of debtors' financial condition onto Department, because court specifically found that debtors submitted sufficient evidence of insolvency, especially from testimony of debtors' accountant that debtors' liabilities exceeded assets at time of filing. In re WJM, Inc. (1986, DC Mass) 84 BR 268.

228. --Debtor

For purposes of 11 USCS § 547, Chapter 7 debtors' insolvency is established by testimony of debtor husband and uncontradicted financial statements; further, that debtors had unreasonably small capital to continue farming business is established by fact that debtors told transferees at time of quitclaim transfer of farm that debtors would have to cease their farming operation. In re Zeman (1986, BC ND Iowa) 60 BR 764.

Unpublished Opinions

Unpublished: ***Bankruptcy*** court refused to preclude Chapter 11 debtor and company that bought equipment and inventory from debtor from offering testimony on issue of whether debtor was insolvent when it sold property in January 2006, less than 90 days before it declared ***bankruptcy*** on April 14, 2006; issue of whether debtor was insolvent was central to debtor's claims that buyer was not entitled to setoff under 11 USCS § 553, and that transfer was preferential transfer that could be avoided under 11 USCS § 547, and because debtor's expert and buyer's expert used different methods to determine if debtor was insolvent and reached different conclusions, their testimony had to be evaluated in court and subjected to cross-examination. MRWind Down Co. v Rock-Tenn Converting Co. (In re Markson Rosenthal & Co.) (2009, BC DC NJ) 2009 Bankr LEXIS 3901.

229. Miscellaneous

While Chapter 11 debtor's insolvency does not have to be established through documentary evidence, such evidence would have helped Court of Appeals to determine fair market value of debtor's assets. Orix Credit Alliance v Harvey ex rel. Lamar Haddox Contractor (In re Lamar Haddox Contractor) (1994, CA5 La) 40 F3d 118, 26 BCD 458, CCH Bankr L Rptr P 76301.

Creditor failed to raise genuine issue of material fact concerning debtor's insolvency in avoidance action under 11 USCS § 547(b), and grant of summary judgment in favor of trustee is affirmed, where trustee submitted evidence of insolvency through affirmance of certified public accountant showing deficit on debtor's balance sheet at time of payment to creditor, creditor's evidence of debtor's going-concern value does not raise genuine issue of material fact concerning whether creditor rebutted presumption of insolvency, and creditor's evidence is speculative and does not address debtor's insolvency on date of transfer. Gasmark Ltd. Liquidating Trust v Louis Dreyfus Natural Gas Corp. (1998, CA5 Tex) 158 F3d 312.

Findings of FDIC made after special examination of Chapter 11 debtor industrial loan and thrift company's assets, although not conclusive of debtor's insolvency for purposes of 11 USCS § 547, clearly support ultimate finding that debtor was insolvent during ***preference*** period where abusive practice of lending unbelievable sums to insiders,

their friends and associates, insider dealings and other illegal and questionable transactions are not only clearly and succinctly documented in report but enforced by other persuasive evidence; examination of reports of related banks reveals that many of debtor's borrowers also had large commercial loans from related banks and that these loans were adversely classified by FDIC during and even prior to ***preference*** period, and thus reports reveal that many of debtor's borrowers were not creditworthy during and prior to ***preference*** period and that loans to them had little or no value. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

Fraudulent transfers of real property by Chapter 7 debtor to debtor's mother were avoided as ***preferences***, under 11 USCS § 547(b)(5), on motion for summary judgment, where debtor's schedules in two ***bankruptcies*** showed debtor's insolvency, as did debtor's attorney's statement to that effect, and unsecured creditors would not receive 100 percent dividend. Sims v Nelson (In re Nelson) (2003, BC ND Cal) 301 BR 565.

Claims asserted under 11 USCS § 547 or 11 USCS § 548 by statutory committee of unsecured creditors against Chapter 11 debtor, whose global satellite telephone network failed less than year after it was launched by debtor in tandem with transferee to which debtor had paid more than $ 3 billion in development costs, to recover some or all of $ 3 billion were dismissed because committee failed to prove that debtor was either "insolvent" under balance sheet test utilized in 11 USCS § 101(32)(A) or had unreasonably small amount of capital; because such showing was required to pursue claim under either 11 USCS § 547 or 11 USCS § 548, failure to prove insolvency or unreasonably small amount of capital meant that committee could not pursue claims under either statute. Iridium IP LLC v Motorola, Inc. (In re Iridium Operating LLC) (2007, BC SD NY) 373 BR 283.

Chapter 7 trustee failed to show that the alleged transfers were made while the debtors were insolvent, as required by 11 USCS §§ 101(32)(A) and 547(b)(3), where there were no factual assertions supporting the debtors' insolvency. Angell v BER Care, Inc. (In re Caremerica, Inc.) (2009, BC ED NC) 409 BR 737, 51 BCD 249 (criticized in TOUSA Homes, Inc. v Palm Beach Newspapers, Inc. (In re TOUSA, Inc.) (2010, BC SD Fla) 442 BR 852) and (criticized in Ransel v GE Commer. Distrib. Fin. Corp. (In re Pilgrim Int'l Inc.) (2011, BC ND Ind) 2011 Bankr LEXIS 3182) and partial summary judgment den, as moot, summary judgment gr (2013, BC ED NC) 2013 Bankr LEXIS 1791 and (criticized in Howell v Fulford (In re Southern Home & Ranch Supply, Inc.) (2013, BC ND Ga) 2013 Bankr LEXIS 5535).

Bankruptcy debtor was insolvent at time of transfer of real property for purposes of preferential transfer under 11 USCS § 547(b)(3), even though no evidence was presented concerning debtor's actual assets and liabilities at time of transfer, since documents from debtor's divorce decree, which was issued two days after transfer, were sufficient to establish that debtor was likely insolvent when transfer was made. Boyd v Petrie (In re Tompkins) (2010, BC WD Mich) 430 BR 453.

Plaintiff, chapter 11 trustee, alleged sufficient facts to state claims for fraud, constructive fraud, and preferential transfers against defendants, insiders who received cash transfers, under 11 USCS §§ 544, 547 and 548; to extent he sought recovery under Idaho Code Ann. § 99-514(2), complaint was time-barred and was dismissed. Zazzali v Mott (In re DBSI, Inc.) (2011, BC DC Del) 445 BR 344, 54 BCD 50.

Bankruptcy court's judgment that Chapter 11 trustee did not meet his burden of proving that transfers corporation made to another corporation and two individuals before it declared ***bankruptcy*** were avoidable under 11 USCS §§ 547(b) or 548(a)(1)(B) was not clearly erroneous; court properly rejected trustee's claim that debtor was insolvent at time it made transfers because claim was based on analysis trustee conducted almost two years after transfers occurred and trustee was not financial expert. Killips v Schropp (In re Prime Realty, Inc.) (2007, BAP8) 380 BR 529, 49 BCD 71.

Unpublished Opinions

Unpublished: It was not clearly erroneous for ***bankruptcy*** court to have concluded that book value, along with other evidence cited by appellant creditor in its brief--which consisted of nothing more than statements by appellee debtor's executives about their expectations for company once it exited Chapter 11 ***bankruptcy***--was insufficient to support reasonable finding of debtor's solvency at time of transfers to overcome presumption of insolvency for

purposes of avoidability under 11 USCS § 547. Cellmark Paper Inc. v Ames Merchandising Corp. (In re Ames Dep't Stores, Inc.) (2012, CA2 NY) 506 Fed Appx 70, cert den (2013, US) 134 S Ct 65, 187 L Ed 2d 28.

3. Test for Insolvency

230. Generally

Prior preferential payments, even if voluntarily returned to trustee, cannot be counted as debtor's assets to dispute insolvency, since money paid out in transfer not avoidable by other creditors is unavailable for payment of debts. In re A. Fassnacht & Sons, Inc. (1984, BC ED Tenn) 45 BR 209, CCH Bankr L Rptr P 70217.

Financial difficulties, cash flow problems, or even inability to pay debts as they mature, are not same as insolvency under 11 USCS § 547 but rather insolvency means debtor's liabilities exceed value of its assets. In re A. Fassnacht & Sons, Inc. (1986, BC ED Tenn) 57 BR 174.

Bankruptcy trustee can avoid creditor's perfected security interest in debtor's pickup truck under 11 USCS § 547(b) where (1) under 11 USCS § 101 excluding exempt assets from computation of total assets does not require that debt due on exempt asset should likewise be excluded from liability computation in determination of debtor's solvency, and (2) debtors were not proven to be solvent at the time of vehicle's purchase. In re Wommack (1987, BC ND Fla) 74 BR 638, amd (1987, BC ND Fla) 1987 Bankr LEXIS 1669.

When measuring insolvency under 11 USCS § 101(32)(A), for purposes of avoidance of preferential transfer under 11 USCS § 547, property interest allegedly transferred as ***preference*** is to be included on asset side of calculation. Babiker v Citizens Contracting Co. (In re Babiker) (1995, BC ED Va) 180 BR 458, 7 Fourth Cir & Dist Col Bankr Ct Rep 472.

Granting of liquidating trustee's motion for summary judgment was proper where, for purposes of determining whether debtor was insolvent under 11 USCS § 547, liabilities of debtor must be valued at face value. Hanna v Crenshaw (In re ORBCOMM Global L.P.) (2003, BC DC Del) 41 BCD 127.

Transferee asserted that, after sales of real estate, debtors had substantial "liquidity" at time of transfer; however, liquidity was not same as solvency, and debtors were insolvent at time of transfer. O'Neal v Arnold (In re Gray) (2006, BC WD Mo) 355 BR 777.

In making solvency determinations for purposes of 11 USCS § 547, "Generally Accepted Accounting Principles" are relevant but they are not controlling; judges should make solvency determinations and may consider subsequent events such as actual collection rate for receivables in valuing assets and determining liabilities. In re Sierra Steel, Inc. (1989, BAP9 Nev) 96 BR 275, 19 BCD 269.

231. Balance sheet test, generally

Test for insolvency under 11 USCS § 547(b)(4)(B) is balance sheet standard, i.e., whether company's liabilities exceeded its assets, and fact that company was not paying its debts and had net operating losses, standing alone, does not indicate insolvency. In re A. Fassnacht & Sons, Inc. (1987, CA6 Tenn) 826 F2d 458, 16 BCD 622, 17 CBC2d 821.

Balance sheet solvency determines whether payments to creditors were voidable ***preferences*** under 11 USCS § 547. In re Taxman Clothing Co. (1990, CA7 Ill) 905 F2d 166, 20 BCD 1097, CCH Bankr L Rptr P 73509, reh den, en banc (1990, CA7) 1990 US App LEXIS 13764.

Under ***Bankruptcy*** Code, insolvency continues to be determined by "balance sheet" test, and debtor is insolvent when his liabilities exceed his assets. In re National Buy-Rite, Inc. (1980, BC ND Ga) 7 BR 407, 3 CBC2d 431, CCH Bankr L Rptr P 67954.

Bankruptcy Code retains so called "balance sheet test" of prior ***Bankruptcy*** Act, and fair value of debtor's property may be established from balance sheets, financial statements, appraisals, expert testimony, and other affirmative

evidence, with reduction in face value of debtor's assets appropriate if they are not susceptible to liquidation and thus cannot be made available for payment of debts within reasonable time; ***Bankruptcy*** Court will not consider debtor's equity in unfinished jobs, to which various items of overhead and other expenses have been allocated, as asset of debtor where it does not appear willing purchaser would have been willing to offer any price at all for such asset. In re Fulghum Constr. Co. (1980, BC MD Tenn) 7 BR 629, affd (1981, MD Tenn) 14 BR 293, 32 UCCRS 798, affd in part and vacated in part on other grounds (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Insolvency is determined by traditional balance sheet test; for purposes of determining fair evaluation, it may be appropriate to reduce or eliminate value of assets which can be made available for payment of debts within reasonable time; thus, inventory is not valued at cost or book value, but its value is based on its age, liquidity, and conditions in trade; value of accounts receivable must be discounted for uncollectible and disputed debts. In re Arrowhead Gardens, Inc. (1983, BC DC Mass) 32 BR 296 (criticized in Rajala v Mann (In re Mann) (2013, BC DC Kan) 2013 Bankr LEXIS 3018).

For purposes of avoiding preferential transfer under 11 USCS § 547(b), finding of insolvency must be based on finding that both asset subject to exemption and amount of indebtedness owed by debtor and secured by that asset are excluded from balance sheet; consequently, where debtor was, on day that judgment creditors levied against debtor, insolvent with value of his homestead excluded and amount of indebtedness owed by debtor and secured by homestead included as liability, creditors' levy on debtor's property created preferential transfer that may be avoided. In re Pereau (1984, BC MD Fla) 37 BR 902.

Proper method for determining insolvency for purposes of preferential transfers under 11 USCS § 547 is by using balance sheet test of 11 USCS § 101(29) [now 101(32)(A)] to determine whether debts are greater than assets, excepting exempt property; where trustee proved debtor was insolvent at time of transfer to judgment creditor under balance sheet test, transfer is preferential. In re Espinoza (1985, BC DC NM) 51 BR 170, CCH Bankr L Rptr P 70658.

Balance sheet test which indicates that debtor was insolvent on date of filing petition is insufficient to establish insolvency on 105th day before filing for purposes of 11 USCS § 547. In re Auto-Pak, Inc. (1985, BC DC Dist Col) 55 BR 403.

Where balancing test is used to determine insolvency under 11 USCS § 547, available credit may not be considered as asset when, by fact of its availability, equal and offsetting debt is created. In re Hartwig Poultry, Inc. (1985, BC ND Ohio) 56 BR 320.

Insolvency for purposes of 11 USCS § 547 is essentially balance sheet test, i.e., debtor is insolvent when his liabilities exceed his assets, excluding value of ***preferences***, fraudulent conveyances, and exemptions; insolvency is factual determination for which ultimate burden of persuasion rests with plaintiff. In re Foreman Industries, Inc. (1986, BC SD Ohio) 59 BR 145, CCH Bankr L Rptr P 71058.

To properly reflect Chapter 11 debtor industrial loan and thrift company's net worth, for purposes of determining solvency under 11 USCS § 547, reduction of at least $ 1,640,960 must be made from its balance sheets due to underreporting of recognizable loan losses resulting in overstating of net worth; reduction must also be made due to improper accounting methods as to unearned insurance commissions which falsely inflated debtor's income. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

"Rule of anticipation" is not proper method for reporting Chapter 11 debtor industrial loan and thrift company's income from interest on installment loans for purposes of determining debtor's insolvency under 11 USCS § 547; reduction of debtor's net worth represented on balance sheets is required where debtor's bookkeeper was instructed to increase arbitrarily interest income reported on general ledger of debtor's installment loans. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

For transfer to be avoidable under 11 USCS § 547 it must be made while debtor is insolvent, which is determined by "balance sheet" test; debtor is insolvent when its liabilities exceed its assets at fair valuation. In re Joe Flynn Rare Coins, Inc. (1988, BC DC Kan) 81 BR 1009.

Unpublished Opinions

Unpublished: Repayment of loan was not preferential transfer to creditors since debtor's assets exceed liabilities and thus debtor was solvent on date of transfer, even though debtor became insolvent shortly thereafter. Stadtmueller v Fitzgerald (In re Epic Cycle Interactive, Inc.) (2014, BC SD Cal) 2014 Bankr LEXIS 2622.

232. --Particular circumstances

Debtor's challenge to ***bankruptcy*** court's order that voided various asset transfers as preferential under 11 USCS § 547(b), was rejected where debtor failed to carry its burden of proving insolvency utilizing balance sheet test under "fair valuation" standard of 11 USCS § 101(32) because debtor's expert improperly based his valuation on liquidation values that ran counter to requirement to treat debtor as going concern. Heilig-Meyers Co. v Wachovia Bank, N.A. (In re Heilig-Meyers Co.) (2005, ED Va) 328 BR 471.

Reduction in Chapter 11 debtor industrial loan and thrift company's net worth must be made on account of transaction which was fictitious increase in debtor's net worth as funds used to purchase stock came from debtor; net worth must also be reduced by million dollar stock purchase by employee stock ownership plan where transaction was never consummated. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

Debtors were not insolvent for purposes of alleged preferential transfers that occurred as part of major financial restructuring; in finding that debtors were solvent on date of transfers, court applied balance sheet test because debtors were operating as going concern on date of transfers and, after subtracting total liabilities from total assets, result was positive shareholders' equity. Heilig-Meyers Co. v Wachovia Bank, N.A. (In re Heilig-Meyers Co.) (2004, BC ED Va) 319 BR 447, affd (2005, ED Va) 328 BR 471.

Where Chapter 7 trustee claimed that debtor's former owner received preferential transfer under 11 USCS § 547(b) when he obtained contracts that were debtor's primary source of income, transfer was made at time when debtor was insolvent because after transfer debtor's liabilities far exceeded its assets. Shearer v Tepsic (In re Emergency Monitoring Techs., Inc.) (2007, BC WD Pa) 366 BR 476, 48 BCD 63.

Where trustee sought avoidance of trustee's deed conveying debtor's condominium to defendant as preferential transfer, complaint contained sufficient allegations, including inference to be drawn from presumption of insolvency, that debtor's total liabilities exceeded her total nonexempt assets on date condominium was transferred to defendant, and defendant's challenges to calculation were not sufficient to rebut presumption of insolvency. Callaway v Cimarron Homeowners Ass'n (In re Roszkowski) (2013, BC ED NC) 494 BR 671.

233. Consideration of insider insolvency, assets and liabilities

In assessing insolvency of debtor nursing homes at time of claimed preferential transfer under 11 USCS § 547(b)(3), ***Bankruptcy*** Court properly refused to pierce corporate veil and include value of real estate occupied by nursing homes, because real estate was owned by real estate trusts separate from nursing home corporations, and fact that 2 individuals effectively owned and controlled both trusts and corporations did not compel inclusion of real estate value in debtor's assets because there was neither fraudulent and injurious consequence of intercorporate relationship nor confused intermingling of activity of 2 corporations, as required under state law for disregarding corporate form. WJM, Inc. v Massachusetts Dep't of Pub. Welfare (1988, CA1 Mass) 840 F2d 996, 17 BCD 468, CCH Bankr L Rptr P 72203 (ovrld in part as stated in Mills v Maine (1997, CA1 Me) 118 F3d 37, 3 BNA WH Cas 2d 1802, 134 CCH LC P 33585) and (ovrld as stated in, questioned in Bozeman v DOR of Fl. (In re Bozeman) (2002, BC MD Ga) 278 BR 275).

Payment within ***90 days*** of ***bankruptcy*** is not ***preference*** under 11 USCS § 547 where debtor was itself solvent as of date of transfer even though related entities were insolvent. In re Perry, Adams & Lewis Secur., Inc. (1983, BC WD Mo) 34 BR 155.

For purposes of determining whether Chapter 11 debtor is insolvent for purposes of 11 USCS § 547, creditor failed to show that debt owed to corporation should be discounted from total of debtor's liabilities on ground that corporation and debtor should be considered single entity where creditor did not show similarity in ownership or management of corporations, mutuality of assets and liabilities, or fraudulent nature of transactions between corporations. In re Hartwig Poultry, Inc. (1985, BC ND Ohio) 56 BR 320.

Transfers allegedly made by Chapter 7 debtor to its affiliates with intent to hinder, delay, or defraud creditors need not be added back into assets side of balance sheet insolvency test; furthermore, even if alter ego theory may be used defensively in ***preference*** action to pierce debtor's corporate veil to reach assets of affiliated companies, creditor did not plead such theory or meet requisite burden of proof to establish it, and creditor did not show that upon piercing corporate veil, additional assets were sufficient to prove that debtor was solvent at time of garnishment. OEM Industrial Corp. v Birmingham Square (1992, BC WD Pa) 148 BR 436, 23 BCD 1415.

In action to avoid transfer where there was no dispute that debtor was insider and transfer occurred outside 90-day prepetition period, liquidating trustee failed to prove that debtor was insolvent at time transfer of monies occurred as required under 11 USCS § 547(b)(4)(B), and judgment must enter for debtor. Beckman v Von Christierson (In re CSI Enters.) (1998, BC DC Colo) 220 BR 687, 15 Colo Bankr Ct Rep 354, 32 BCD 775, adversary proceeding, exception to discharge denied, without op (2000, CA10 Colo) 203 F3d 834, reported in full (2000, CA10 Colo) 17 Colo Bankr Ct Rep 39, 2000 Colo J C A R 522.

234. Partnership test

To calculate whether partnership is insolvent, aggregate assets are compared with partnership's debts to determine whether debts exceed value of assets; in making this calculation, net nonpartnership assets of each general partner are taken into account, together with all of partnership's assets; partners' assets are included, regardless of whether partnership debts are recourse or nonrecourse; accordingly, debtor has not established insolvency elements required by 11 USCS § 547(b) where it has stipulated that general partners' assets are sufficient to pay any deficiency. Villamont-Oxford Assoc. Ltd. Pshp. v Multifamily Mort.g Trust (In re Villamont-Oxford Assocs.) (1999, BC MD Fla) 236 BR 467, 42 CBC2d 935, 12 FLW Fed B 286.

Where Chapter 11 debtor/contractor made preferential payment to subcontractor, funds transferred to subcontractor enabled it to receive more from estate than it would have received if case were case under Chapter 7 because, although in all likelihood subcontractor would have been made whole by client even had debtor not made transfer, inquiry was what would subcontractor have received from debtor's estate if debtor were to liquidate under Chapter 7 of ***Bankruptcy*** Code, not what subcontractor would have received from third party. Lovett v Homrich, Inc. (In re Philip Servs. Corp.) (2006, BC SD Tex) 359 BR 616, 47 BCD 152.

235. Miscellaneous

Debtors were found to be insolvent when transfer occurred based upon court's own asset and liabilities calculation and joint trial exhibits presented by parties. Richards v Rapid Funding, LLC (In re Richards) (2004, BC ED Va) 336 BR 722.

4. Presumption of Insolvency

236. Generally

11 USCS § 547(f), which provides that debtor is presumed to have been insolvent on and during 90 days immediately preceding date of filing of petition, is constitutional since only legal effect of this presumption is to require creditor to produce some evidence to contrary; it does not deny creditor of debtor due process because its

operation is only to supply inference of insolvency in absence of evidence contradicting inference. In re Economy Milling Co. (1983, DC SC) 37 BR 914.

Debtor is presumed insolvent for avoidance purposes under 11 USCS § 547 when transfer is made within 90 days of ***bankruptcy*** petition; presumption does not apply where avoidance is sought for transfer made within 1 year of filing, but prior to 90-day period before filing. Dent v Martin (1988, SD Fla) 86 BR 290.

Pursuant to 11 USCS § 547, debtor is presumed to have been insolvent 90 days immediately preceding filing of ***bankruptcy*** petition and, although trustee has burden of proof on issue of insolvency, presumption requires party against whom presumption exists to come forward with evidence of solvency to rebut presumption. In re National Buy-Rite, Inc. (1980, BC ND Ga) 7 BR 407, 3 CBC2d 431, CCH Bankr L Rptr P 67954.

Presumption of insolvency set forth in 11 USCS § 547(f) relieves trustee of burden of presenting evidence of issue of insolvency unless defendant creditor first comes forward with some evidence of solvency. In re Burnham (1981, BC ND Ga) 12 BR 286.

Essence of 11 USCS § 547(f) is that where transfer is within proscribed period, it is transferee of debtor's property who must come forward to over come presumption running in favor of trustee, although latter still carries burden of ultimate persuasion as to all elements of 11 USCS § 547(b). In re Lucasa International, Ltd. (1981, BC SD NY) 14 BR 980, 8 BCD 444, CCH Bankr L Rptr P 68432.

Preference is determined by insolvency at date of transfer, not insolvency or solvency of debtor at time of sale; under 11 USCS § 547(f) insolvency of debtor is presumed on and during 90 days immediately preceding date of filing of petition. In re Fabric Buys of Jericho, Inc. (1982, BC SD NY) 22 BR 1013.

11 USCS § 547(f) creates presumption of debtor's insolvency during 90 days immediately preceding filing date of petition for relief. In re Pippin (1984, BC WD La) 46 BR 281.

Legal effect of presumption of insolvency under 11 USCS § 547(f) is to require creditor to produce some evidence of debtor's insolvency during 90-day period; if such evidence is presented, presumption is rebutted and proponent then has burden of proving its insolvency as element of case. In re Transit Homes, Inc. (1985, BC DC SC) 57 BR 40.

Debtor is presumed to be insolvent during 90 days preceding filing of petition for ***preference*** purposes under 11 USCS § 547(f), however, presumption is rebuttable and party against whom presumption is raised must come forward with evidence of debtor's solvency to meet or rebut presumption, but burden of proof does not shift. In re Almarc Mfg., Inc. (1986, BC ND Ill) 60 BR 584, 14 BCD 466.

In order to overcome presumption of insolvency under 11 USCS § 547(f), party must introduce some evidence showing that debtor was solvent at time of alleged preferential transfer and where alleged transferee has presented no such evidence, summary judgment will be granted in favor of trustee on issue of insolvency. In re Day Telecommunications, Inc. (1987, BC ED NC) 70 BR 904.

Plaintiff seeking recovery of preferential transfer is entitled to prevail on issue of Chapter 7 debtor's insolvency, where plaintiff relies on statutory presumption of insolvency under 11 USCS § 547(f) and defendant fails to produce any evidence tending to show that debtor was solvent within 90 days of filing of petition. In re Lawrence (1988, BC MD Ga) 82 BR 157, 17 BCD 108.

Where Chapter 7 trustee seeks to avoid alleged preferential transfer to insider under 11 USCS § 547(b) that occurred more than 90 days before filing of petition, presumption of insolvency under § 547(f) does not apply and trustee must establish requisite insolvency on dates transfers in question were made. In re F.H.L., Inc. (1988, BC DC NJ) 91 BR 288.

Transfers which occurred within one year of ***bankruptcy*** may not be avoided where trustee has failed to prove that debtors were insolvent; 11 USCS § 547 presumption of insolvency does not help trustee in this case because

transfers occurred more than ***90 days*** before debtors' ***bankruptcy*** filing. Sosne v Woods (In re Cochard) (1993, BC ED Mo) 157 BR 449.

Presumption of insolvency pursuant to 11 USCS § 547(f) was applicable given that ***payments*** in question were effected by wire transfer during ***90 days*** immediately preceding date of filing of petition for ***bankruptcy*** protection. Katz v Wells (In re Wallace Bookstores, Inc.) (2004, BC ED Ky) 51 CBC2d 1454.

Purpose of 11 USCS § 547 is to discourage creditors from racing to dismember debtor that is sliding into ***bankruptcy*** and to promote equality of distribution to creditors in ***bankruptcy*** and, aided by 11 USCS § 547(f), which provides rebuttable presumption of insolvency under 11 USCS § 547(g), debtor-in-possession has burden of proof regarding elements for preferential transfer. Hoffinger Indus., Inc. v Bunch (In re Hoffinger Indus., Inc.) (2004, BC ED Ark) 313 BR 812, 43 BCD 153, 52 CBC2d 1263.

Transfer of proceeds from ***bankruptcy*** debtor's sale of real property in satisfaction of note and mortgage deed was transfer of interest of debtor in property within meaning of 11 USCS § 547(b), since title to property was not conveyed until debtor executed deed of sale, rather than when debtor contracted to sell property, and thus, ***payment*** to transferee was from debtor rather than purchaser of property under contract. Mender v Carrion (In re Martinez) (2006, BC DC Puerto Rico) 358 BR 529.

Complaint asserting presumption of insolvency under 11 USCS § 547(f) for transfers made during ***90-day*** period prior to petition date must specify dates on which transfers were made. Angell v Day (In re Caremerica, Inc.) (2009, BC ED NC) 415 BR 200.

237. Burden of proof or persuasion, generally

Ultimate burden of persuasion is not shifted by existence of presumption of 11 USCS § 547(f). Clay v Traders Bank of Kansas City (1983, CA8 Mo) 708 F2d 1347, 10 BCD 1317, CCH Bankr L Rptr P 69296.

Defendant transferees in preferential transfer action under 11 USCS § 547 had burden of producing evidence that debtor was solvent on date of ***bankruptcy*** filing, but once that burden was satisfied, trustee had burden of persuading trier of fact that debtor was insolvent on that date. In re Taxman Clothing Co. (1990, CA7 Ill) 905 F2d 166, 20 BCD 1097, CCH Bankr L Rptr P 73509, reh den, en banc (1990, CA7) 1990 US App LEXIS 13764.

Presumption of insolvency under 11 USCS § 547(f) requires party against whom presumption is directed to come forward with some evidence to rebut presumption, but burden of proof always remains on party assailing transfer; presumption remains where debtor, by its schedules, does not prove insolvency when its petition was filed, and creditor does not prove solvency by balance sheet. In re J-B Enterprises, Inc. (1980, BC ED Mo) 1 BAMSL 163.

Although 11 USCS § 547 provides presumption of insolvency during 90 days prior to debtor's filing, trustee still has ultimate burden of persuasion, presumption merely requiring that party against whom it exists come forward with some evidence to rebut it. In re Fulghum Constr. Co. (1980, BC MD Tenn) 7 BR 629, affd (1981, MD Tenn) 14 BR 293, 32 UCCRS 798, affd in part and vacated in part on other grounds (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Transferee of preferential transfer must come forward with some evidence to rebut presumption of 11 USCS § 547, while burden of ultimate persuasion remains on party seeking to void transfer. In re Fabric Buys of Jericho, Inc. (1982, BC SD NY) 22 BR 1013.

Burden is on defendant creditor to rebut presumption of 11 USCS § 547(f) that, for purposes of preferential transfer, debtor is presumed to have been insolvent on and during 90 days immediately preceding date of filing of petition. In re Walker Industrial Auctioneers, Inc. (1983, BC DC Or) 38 BR 8.

Presumption of insolvency under 11 USCS § 547 does not shift burden of proof, but merely allocates to creditor burden of going forward; creditor's general denial of insolvency in its amended answer is inadequate to rebut

debtor's allegation of insolvency. In re Alithochrome Corp. (1985, BC SD NY) 53 BR 906 (criticized in CEPA Consulting v New York Nat'l Bank (In re Wedtech Corp.) (1995, SD NY) 187 BR 105).

Trustee retains burden of proving debtor's insolvency where case was filed prior to 1984 insider amendment extending presumption of insolvency under 11 USCS § 547(b)(4)(b). In re Auto-Pak, Inc. (1985, BC DC Dist Col) 55 BR 403.

Debtor is presumed to be insolvent during 90 days preceding filing of petition for ***preference*** purposes under 11 USCS § 547(f), however, presumption is rebuttable and party against whom presumption is raised must come forward with evidence of debtor's solvency to meet or rebut presumption, but burden of proof does not shift. In re Almarc Mfg., Inc. (1986, BC ND Ill) 60 BR 584, 14 BCD 466.

Under 11 USCS § 547, burden of persuasion is upon party seeking to avoid preferential transfer to prove insolvency by clear and convincing evidence. In re Ace Finance Co. (1986, BC ND Ohio) 64 BR 688.

Although Chapter 7 trustee seeking to avoid postpetition ***preference*** under 11 USCS § 547 may virtually rely on presumption of insolvency under § 547(f) to establish requirements of § 547(b)(3), and while such presumption shifts burden of going forward, it does not shift burden of proof, since party against whom presumption operates must come forward with evidence to rebut presumption; thus, burden of proof remains on trustee, as it does with other elements of ***preference***, to show insolvency at time of transfer. In re Dola International Corp. (1988, BC DC Minn) 88 BR 950.

Creditor has burden of overcoming 11 USCS § 547(f) presumption of insolvency. Bova v St. Vincent De Paul Corp. (In re Bova) (2002, BC DC NH) 2002 BNH 3, 272 BR 49, 38 BCD 264, 47 CBC2d 1129, affd (2002, BAP1) 276 BR 726, affd (2003, CA1) 326 F3d 300, 41 BCD 61, CCH Bankr L Rptr P 78835.

To prove insolvency of debtor for purposes of 11 USCS § 547(f), proponent of claim must demonstrate, as required by 11 USCS § 101(32)(A), that sum of debtor's obligations exceeded value of its assets, at fair valuation, during cited period of time; under flexible approach to insolvency analysis, U.S. Court of Appeals for Second Circuit rejects rigid approach to fair valuation of company within context of solvency analysis and endorses "totality of circumstances" test under which expert appraisals and valuations should be considered when possible but are not dispositive. Iridium IP LLC v Motorola, Inc. (In re Iridium Operating LLC) (2007, BC SD NY) 373 BR 283.

Although under 11 USCS § 547(c), Chapter 11 debtor must establish transfer was made while debtor was insolvent to prevail on ***preference*** claim, presumption under 11 USCS § 547(f) that debtor has been insolvent for 90 days preceding filing of ***bankruptcy*** does not shift this ultimate burden of proof, but rather merely shifts initial burden of going forward with evidence; once transferee produces substantial evidence of solvency, presumption vanishes and debtor must come forward with sufficient evidence to meet its burden of proving insolvency. In re Sierra Steel, Inc. (1989, BAP9 Nev) 96 BR 275, 19 BCD 269.

238. --Particular circumstances

Estate representative has burden of proving insolvency by preponderance of evidence, without benefit of presumption, for purposes of 11 USCS § 547, where alleged preferential payments were made over 5 months before debtor filed Chapter 11 petition. Orix Credit Alliance v Harvey ex rel. Lamar Haddox Contractor (In re Lamar Haddox Contractor) (1994, CA5 La) 40 F3d 118, 26 BCD 458, CCH Bankr L Rptr P 76301.

Trustee failed to carry his burden to prove that either fraudulent conveyances, 11 USCS § 548(a)(1), or preferential transfers, 11 USCS § 547(b), had occurred, where schedules and statements of financial affairs filed with ***bankruptcy*** petition which showed liabilities in excess of assets as of date of filing did not, without more, constitute prima facie evidence of insolvency, and SEC Form 10-KSB and press release showed solvency prior to petition date. Burdick v Lee (2001, DC Mass) 256 BR 837, 45 CBC2d 1283.

There is presumption that debtor is insolvent for 90 days preceding filing of debtor's petition; burden of going forward with evidence of debtor's solvency is on creditor who had supplied property to debtor and who was accused

of receiving preferential transfer from debtor; failure to overcome presumption results in finding that debtor was insolvent at time of transfer of property to creditor. In re A. J. Nichols, Ltd. (1982, BC ND Ga) 21 BR 612, 34 UCCRS 501.

Because trustee has burden of establishing elements of preferential transfer in 11 USCS § 547(b), effect of statutory presumption of insolvency is to impose on transferee burden of going forward with evidence of solvency, but ultimate burden of persuasion remains with trustee; trustee has carried that burden where testimony of debtor's former president indicates that debtor's original schedules, which indicate that debtor's assets exceeded liabilities, were not accurate but rather debtor's liabilities actually exceeded its assets and that debtor's financial condition did not change between date of transfers to insurance company and filing of schedules. In re Georgia Steel, Inc. (1984, BC MD Ga) 58 BR 153.

Unpublished Opinions

Unpublished: Trustee who is prosecuting adversary action against creditor to recover "***preference***" within meaning of 11 USCS § 547 is entitled to rely, at trial, upon presumption that debtor was insolvent on and during 90 days immediately preceding date of filing of petition. Connolly v Fiber Instrument Sales, Inc. (In re Western Integrated Networks, LLC) (2006, BAP10) 350 BR 628, reported in full (2006, BAP10) 46 BCD 281.

239. Rebuttal

11 USCS § 547 sets forth presumption of insolvency during 90-day period prior to date of filing of debtor's petition, which requires party against whom presumption exists to come forward with some evidence to rebut presumption; debtor establishes that ***preference*** has occurred where creditor who received transfer within 90 days places no testimony or evidence in record either to rebut presumption of insolvency, or to rebut testimony of debtor's principal that, if debtor were liquidated under Chapter 7, there would be insufficient assets to make distribution beyond claims of administrative and priority creditors, thereby establishing insolvency of debtor's business, as well as establishing that creditor received greater recovery than creditor would under Chapter 7. In re Thrifty-Supermarket, Inc. (1980, BC SD Fla) 6 BCD 214, 1 CBC2d 823.

In proceeding to set aside preferential transfer, 11 USCS § 547(f) creates presumption of insolvency on and during 90 days immediately preceding date of filing of petition and issue of insolvency will be resolved in favor of trustee unless creditor transferee comes forward with evidence to rebut presumption; § 547(f) shifts burden of going forward so as to require party against whom presumption operates to come forward with some evidence to rebut presumption. In re Belize Airways, Ltd. (1982, BC SD Fla) 18 BR 485, 8 BCD 1177.

Although burden of persuasion as to all elements of 11 USCS § 547(b) remains with trustee, 11 USCS § 547(f) creates presumption that debtor was insolvent during 90 days preceding filing of petition and if transferee is to prevail on issue of insolvency, transferee must come forward with some evidence to rebut this presumption. In re Thomas Farm Systems, Inc. (1982, BC ED Pa) 18 BR 543.

Because of presumption of 11 USCS § 547(f), it is unnecessary for trustee to present evidence of debtor's insolvency where creditor has not come forward with evidence of solvency. In re Kennesaw Mint, Inc. (1983, BC ND Ga) 32 BR 799.

11 USCS § 547(b)(3) is satisfied where at no time did creditor adduce evidence to challenge rebuttable presumption of insolvency during 90 days immediately preceding filing of petition. In re Balducci Oil Co. (1983, BC DC Colo) 33 BR 843.

In absence of evidence to meet or rebut presumption of insolvency under 11 USCS § 547(f), debtor is entitled to rely on presumption of insolvency. Keydata Corp. v Boston Edison Co. (1983, BC DC Mass) 37 BR 324, CCH Bankr L Rptr P 69749.

Statutory presumption of insolvency in 11 USCS § 547(f) cannot be rebutted merely by negative implication of stipulation of fact where intent of parties is unclear. In re Jones (1985, BC ED Va) 47 BR 786, 12 BCD 1173, CCH Bankr L Rptr P 70365.

Debtor is presumed to be insolvent during 90 days preceding filing of petition for ***preference*** purposes under 11 USCS § 547(f), however, presumption is rebuttable and party against whom presumption is raised must come forward with evidence of debtor's solvency to meet or rebut presumption, but burden of proof does not shift. In re Almarc Mfg., Inc. (1986, BC ND Ill) 60 BR 584, 14 BCD 466.

Party against whom presumption of insolvency operates under 11 USCS § 547(f) must come forward with some evidence to rebut presumption, but burden of proof remains upon trustee. In re WJM, Inc. (1986, BC DC Mass) 65 BR 531, affd (1986, DC Mass) 84 BR 268.

There are genuine issues of fact whether Chapter 11 debtor was solvent at time of garnishment of debtor's bank account precluding summary judgment for garnish or in debtor's complaint to recover preferential payment, where values assigned by debtor to assets for balance sheet or other purposes, are not determinative of their fair valuation so that debtor may still rebut presumption of insolvency under 11 USCS § 547(f). In re Lawrence & Erausquin, Inc. (1987, BC ND Ohio) 80 BR 402.

Creditor opposing avoidance of alleged preferential transfer under 11 USCS § 547 must present competent evidence that demonstrates solvency through balance sheet test at time of transfer; shorter the time between transfer and ***bankruptcy***, greater the proof required to rebut presumption. In re Rose (1988, BC WD Mo) 86 BR 193.

Creditor has burden of overcoming 11 USCS § 547(f) presumption of insolvency. Bova v St. Vincent De Paul Corp. (In re Bova) (2002, BC DC NH) 2002 BNH 3, 272 BR 49, 38 BCD 264, 47 CBC2d 1129, affd (2002, BAP1) 276 BR 726, affd (2003, CA1) 326 F3d 300, 41 BCD 61, CCH Bankr L Rptr P 78835.

Creditor's mere speculation could not rebut 11 USCS § 547(f) presumption of insolvency during ***preference*** period. Scharffenberger v United Creditors Alliance Corp. (In re Allegheny Health, Educ. & Research Found.) (2003, BC WD Pa) 292 BR 68, affd (2005, CA3 Pa) 127 Fed Appx 27, 44 BCD 100.

For purposes of 11 USCS § 547(f), creditor may rebut presumption of insolvency by introducing some evidence that debtor was not in fact insolvent at time of transfer; if creditor introduces such evidence, then proponent of claim based on proof of insolvency must satisfy its burden of proof by preponderance of evidence. Iridium IP LLC v Motorola, Inc. (In re Iridium Operating LLC) (2007, BC SD NY) 373 BR 283.

Chapter 7 Trustee was entitled to recover $ 500,000 debtor paid to bank as preferential transfer because bank did not rebut presumption of insolvency or prove any defense to initial transferee liability. Sklar v Susquehanna Bank (In re Global Prot. USA, Inc.) (2016, BC DC NJ) 546 BR 586.

For purpose of avoiding preferential transfer, debtor failed to rebut presumption of insolvency because balance sheets were dated well before 90-day ***preference*** period and even longer before date of transfer, balance sheets were consolidated balance sheets of debtor and its subsidiaries, and many assets shown on balance sheets reflected book value of assets rather than market value. Madden v Morelli (In re Energy Conversion Devices, Inc.) (2016, BC ED Mich) 548 BR 208.

Unpublished Opinions

Unpublished: When judgment creditor and trustee disagreed as to whether debtor was insolvent on date of transfer under 11 USCS § 547(b)(3), trustee argued that debtor was presumed to be insolvent during 90-day period immediately preceding filing of petition; while ***Bankruptcy*** Code provided for presumption of insolvency, presumption was rebuttable under Fed. R. Evid. 301, creating existence of material issue of fact. Liebert v Nisselson (In re Levine) (2008, BC SD NY) 2008 Bankr LEXIS 2639.

240. --Expert opinion

Presumption of insolvency under 11 USCS § 547(f) was not rebutted where (1) debtor's financial statements were not per se sufficient to rebut presumption, and (2) only other evidence creditor offered on this issue was also insufficient to rebut presumption pursuant to Fed. R. Evid. 301, given that evidence (testimony of two experts) was excluded because opinions were not considered reliable; thus, because elements of preferential transfer were met, liquidating supervisor was entitled to summary judgment concerning this issue. Katz v Wells (In re Wallace Bookstores, Inc.) (2004, BC ED Ky) 51 CBC2d 1454.

Creditor had not provided sufficient evidence of reliability of two experts' reports under Fed. R. Evid. 702 for purposes of 11 USCS § 547(f) because factual basis for experts' opinions was so speculative that opinions could not be said to be supported by good grounds; thus, court excluded reports and presumption under § 547(f) was not rebutted. Katz v Wells (In re Wallace Bookstores, Inc.) (2004, BC ED Ky) 51 CBC2d 1454.

Creditor's evidence was legally insufficient to rebut statutory presumption of insolvency. Creditor provided no evidence that book value reflected fair value of debtor's assets and liabilities, and Chapter 11 liquidating trustee's expert specifically testified that book value was not same as fair value. Lain v Universal Drywall LLC (In re Erickson Ret. Cmtys., LLC) (2013, BC ND Tex) 497 BR 504.

241. --Declarations or assertion of solvency

Trustee cannot avoid ***payments*** made within ***90 day*** period, when debtor is only witness called by trustee and testifies to his solvency and that cause of ***bankruptcy*** was sudden onset of wife's serious illness and consequent ***payment*** of high medical bills, where trustee failed to seek discovery or to present hard evidence of cash amounts on hand and relevant dates; nor can trustee complain that his own witness failed to provide sufficient detail to sustain burden of proof after testimony destroyed presumption of insolvency. In re Brooks (1984, BC SD Ohio) 44 BR 963, CCH Bankr L Rptr P 70180.

Where transferee of alleged preferential transfer made only bare allegation of debtor's solvency at time of transactions and presented no evidence that debtor's assets exceeded its liabilities, presumption of insolvency has not been rebutted under 11 USCS § 547(f) and debtor is entitled to summary judgment; although burden of persuasion regarding insolvency remains with debtor, transferee must come forward with evidence to rebut it. In re Demetralis (1986, BC ND Ill) 57 BR 278, CCH Bankr L Rptr P 70980.

In light of 11 USCS § 547(f), bare allegation of Chapter 11 debtor's solvency is insufficient to rebut presumption of insolvency. In re Art Shirt, Ltd. (1986, BC ED Pa) 68 BR 316, affd (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

Chapter 11 debtor was insolvent on date of payments to disk drive supplier, for purposes of 11 USCS § 547, where liabilities exceeded assets by $ 218 million and supplier offered no evidence to rebut presumption of insolvency other than bare assertion that debtor was not insolvent--such bald assertions do not rebut presumption of insolvency and do not compel debtor to present any further evidence. Miniscribe Corp. v Keymarc, Inc. (In re Miniscribe Corp.) (1991, BC DC Colo) 123 BR 86, 8 Colo Bankr Ct Rep 49.

Creditor wishing to overcome presumption of insolvency in 11 USCS § 547(f) must provide court with evidence sufficient to cast into doubt statutory presumption of insolvency; mere assertion that debtor is solvent will not suffice; declaration by creditor's credit manager that, in his opinion, debtor was solvent at time of transfer is inadequate to rebut presumption. In re World Financial Services Center, Inc. (1987, BAP9 Cal) 78 BR 239, 4 UCCRS2d 943, affd without op (1988, CA9) 860 F2d 1089 and affd (1988, CA9) 860 F2d 1090, reported in full (1988, CA9) 1988 US App LEXIS 22483.

242. --Financial statement or regulatory filing

Debtor car dealership was insolvent, for purposes of 11 USCS § 547, during 90 days prior to ***bankruptcy*** even though monthly financial statements submitted by debtor to lender during this period show that total assets exceeded liabilities, because these financial statements were misleading as they included personal assets, as well as personal liabilities, of debtor's owners, and if financial statements were adjusted to reflect only debtor's corporate

assets, debtor's liabilities exceeded its assets for each month during ***preference*** period; insolvency is further supported by debtor's tax returns which show net loss of $ 95,000. Bluegrass Ford-Mercury, Inc. v Farmers Nat'l Bank (1991, CA6 Ky) 942 F2d 381, CCH Bankr L Rptr P 74202, 15 UCCRS2d 369 (superseded by statute as stated in Tibble v Consumers Credit Union (In re Koshar) (2005, BC WD Mich) 334 BR 889).

Creditor has failed to overcome presumption of insolvency under 11 USCS § 547(f) where, although evidence introduced may permit inference of solvency, it is equally consistent with insolvency; court will consider subsequently discovered error and omissions in financial statement and balance sheet since court is not required to accept erroneous valuation appearing on debtor's record if error taints record. In re Howdeshell of Fort Myers (1985, BC MD Fla) 55 BR 470.

Creditor has produced sufficient evidence to rebut presumption of insolvency under 11 USCS § 547(f) where it has presented financial statement showing that Chapter 11 debtor had significant positive net worth some 60 days prior to transfer to creditor and trustee's evidence, consisting of testimony by accountant that receivables and inventory are substantially overstated, does little to show that debtor was, in fact, insolvent as of date of transfer because no indication was given as to extent assets were overstated. In re Almarc Mfg., Inc. (1986, BC ND Ill) 60 BR 584, 14 BCD 466.

Unaudited financial statements are insufficient to meet or rebut presumption of insolvency under 11 USCS § 547(f) where: (1) statements cover period predating transfers by 5 1/2 to 9 months; (2) actual examination of inventory or communication with account debtors was not made, notwithstanding fact that accounts receivable and inventory are lion's part of debtor's assets; and (3) much of information contained in statements was obtained from individual who allegedly defrauded estate. In re Candor Diamond Corp. (1986, BC SD NY) 68 BR 588.

Financial statements submitted to state department of insurance along with application to renew Chapter 11 debtor industrial loan and thrift company's certificate to do business is insufficient evidence to rebut overwhelming proof that debtor was insolvent during ***preference*** period under 11 USCS § 547 where information was from debtor's books and records, was unaudited, and was not intended to be representation of fair valuation of debtor's assets. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

Fact that Securities and Exchange Commission form filed by debtor one month before debtor filed ***bankruptcy*** stated that debtor had generally been meeting new obligations in ordinary course of business did not rebut 11 USCS § 547(f) insolvency presumption; form did not state that assets exceeded liabilities. Peltz v Worldnet Corp. (In re USN Communs., Inc.) (2002, BC DC Del) 280 BR 573 (criticized in Morris v Zelch (In re Reg'l Diagnostics, LLC) (2007, BC ND Ohio) 372 BR 3, 48 BCD 99).

Presumption of insolvency under 11 USCS § 547(f) was not rebutted where (1) debtor's financial statements were not per se sufficient to rebut presumption, and (2) only other evidence creditor offered on this issue was also insufficient to rebut presumption pursuant to Fed. R. Evid. 301, given that evidence (testimony of two experts) was excluded because opinions were not considered reliable; thus, because elements of preferential transfer were met, liquidating supervisor was entitled to summary judgment concerning this issue. Katz v Wells (In re Wallace Bookstores, Inc.) (2004, BC ED Ky) 51 CBC2d 1454.

Debtor's financial statements, made under Generally Accepted Accounting Principles, were insufficient to rebut 11 USCS § 547(f)'s presumption of insolvency in preferential transfer case. Homeplace of Am., Inc. v Salton, Inc. (In re Waccamaw's Homeplace) (2005, BC DC Del) 325 BR 524, 44 BCD 227.

243. --Other calculations

Owner's estimate as to correct value of debtor's assets, which stems from unsuccessful attempt of owners to sell their concern, is not proper basis for gauging actual value of debtor's assets; therefore, presumption of insolvency of 11 USCS § 547(f) is not rebutted. In re Economy Milling Co. (1983, DC SC) 37 BR 914.

Controlling individual and debtor's suppliers failed to rebut 11 USCS § 547(f) presumption of insolvency where there was no evidence that book value of debtor's total assets as shown on calculation reflected fair value of those

assets, solvency calculation by individual and suppliers was overstated as it included cash in safe deposit box that had been legally transferred to another entity, and individual's testimony as to fair value of certain client notes was not credible. Faulkner v Kornman (In re Heritage Org., L.L.C.) (2009, BC ND Tex) 413 BR 438, 103 AFTR 2d 2243.

244. --Other testimony

Creditor which received allegedly preferential transfer under 11 USCS § 547 failed to rebut presumption of insolvency where testimony of its witness was inconclusive and unpersuasive, since it was premised on going-concern valuation of business which was not operating and assigned valuation to account receivable which was neither received nor available at time in issue, but rather testimony established that, as of date petition was filed, company was unable to pay its current obligations, its checks were being returned for insufficient funds, it owed $ 2 million in delinquent taxes, its prior lending sources and remaining line of credit had been exhausted, and its assets did not exceed its liabilities. In re Foreman Industries, Inc. (1986, BC SD Ohio) 59 BR 145, CCH Bankr L Rptr P 71058.

Presumption of insolvency pursuant to 11 USCS § 547(f) is not rebutted by generalized "in court" statements of former officers of debtor which are not supported by financial statements or records. In re Wellington Constr. Corp. (1987, BC ND Miss) 82 BR 424.

Although ultimate burden of proof as to insolvency remained with debtor-in-possession, presumption of 11 USCS § 547(f) required creditor to come forward with some evidence to rebut presumption and, where debtor's president testified that debtor had suffered blow, but was viable operating concern current in its payments to all creditors, and creditor's cross examination of debtor's accountant was sufficient to raise fact questions concerning his liability assumptions, burden was shifted and burden of proof and persuasion remained with debtor-in-possession; creditor presented sufficient evidence to rebut presumption. Hoffinger Indus., Inc. v Bunch (In re Hoffinger Indus., Inc.) (2004, BC ED Ark) 313 BR 812, 43 BCD 153, 52 CBC2d 1263.

Payments of invoices to creditor were ***preferences*** for purposes of 11 USCS § 547(b); as to 11 USCS § 547(b)(3), creditor offered no credible evidence at trial to rebut presumption that debtor was insolvent when payment was received by creditor; testimony by creditor's credit manager that he was not aware of debtor's insolvency when payment was received does not suffice. Official Comm. of Unsecured Creditors of J. Allen Steel Co. v Winner Steel Servs. (In re J. Allan Steel Co.) (2005, BC WD Pa) 321 BR 764, 44 BCD 129.

245. --Other particular evidence of rebuttal

Evidence offered by creditor, which at most indicates potential error in accounting methods relied upon by trustee, does not constitute any evidence sufficient to cast into doubt statutory presumption of insolvency pursuant to 11 USCS § 547(f). In re Emerald Oil Co. (1983, CA5 La) 695 F2d 833, 10 BCD 132, 9 CBC2d 809, CCH Bankr L Rptr P 69014.

Bankruptcy Court erred in granting summary judgment under ***Bankruptcy*** Rule 7056 to debtors in action to avoid ***preference*** where transferee did more than simply question debtors' accounting methods in challenging presumption of insolvency under 11 USCS § 547(f), he showed by debtors' own schedules that debts may not have been greater than assets. In re Koubourlis (1989, CA9) 869 F2d 1319, 19 BCD 367, CCH Bankr L Rptr P 72720.

In preferential transfer action, transferee's evidence of book value of debtor's assets was insufficient to rebut presumption that debtor was insolvent at time of transfer; book value did not establish fair market value of assets. Cellmark Paper, Inc. v Ames Merchandising Copr. (In re Ames Dep't Stores, Inc.) (2012, SD NY) 470 BR 280, affd (2012, CA2 NY) 506 Fed Appx 70, cert den (2013, US) 134 S Ct 65, 187 L Ed 2d 28.

In proceeding to avoid preferential transfer made during 90-day period preceding filing of petition, presumption of insolvency created by 11 USCS § 547(f) is overcome by documentary evidence in form of letter from president of corporate debtor wherein he expresses optimism about returning to business again and indicates that debtor does not consider itself to be insolvent. In re Thomas Farm Systems, Inc. (1982, BC ED Pa) 18 BR 541.

Purchase statement prepared and signed by Chapter 11 debtors more than 5 months prior to filing is insufficient to rebut presumption of insolvency. In re Pippin (1984, BC WD La) 46 BR 281.

Creditor investors in Chapter 7 debtors' Ponzi scheme who received preferential transfers fail to rebut presumption of insolvency in 11 USCS § 547(f) where trustee put on evidence of insolvency, and creditors merely claim vague undervaluing of assets, thus insolvency element of 11 USCS § 547(b)(3) is established. In re Western World Funding, Inc. (1985, BC DC Nev) 54 BR 470, CCH Bankr L Rptr P 70828.

Letter from corporate debtor's president to creditor is insufficient to overcome 11 USCS § 547(f) presumption of insolvency where letter makes no representations of solvency, but only speaks of current financial difficulties and expresses confidence that resolution of check problem is imminent. In re All American of Ashburn, Inc. (1986, BC ND Ga) 65 BR 303.

Even though ultimate burden of persuasion remains on party seeking to avoid transfer under 11 USCS § 547, it is incumbent upon transferee to come forward to rebut presumption of insolvency; where transferees have presented no evidence on issue of Chapter 7 debtor's insolvency, trustee is entitled to rest on presumption. In re Coco (1986, BC SD NY) 67 BR 365.

Presumption of insolvency under former 11 USCS § 547 remains intact even though values given by Chapter 7 debtor's schedules do not conform to prices received for properties upon their sale during administration of ***bankruptcy*** case, because if remaining scheduled properties are sold at prices similar in difference to values listed on schedules, then debtor would have been insolvent during 90-day prepetition period. In re W.L. Mead, Inc. (1986, BC ND Ohio) 70 BR 651.

Where no evidence was submitted to rebut presumption of insolvency in 11 USCS § 547(f), requirement of insolvency is satisfied. Fonda Group v Marcus Travel (In re Fonda Group) (1989, BC DC NJ) 108 BR 956.

Bank had not presented evidence to contest or otherwise disputed statutory presumption as to debtors' insolvency at time that certain repayments were made; under these circumstances, where transferee offered no evidence regarding solvency, trustee could rely upon statutory presumption. Jacobs v Matrix Capital Bank (In re AppOnline.com, Inc.) (2004, BC ED NY) 315 BR 259, 43 BCD 210.

Where debtor, days prior to filing ***bankruptcy***, put money in trust with bank as trustee and directed bank to make payments to key employees, evidence regarding value of debtor that was provided by employees rebutted presumption of insolvency under 11 USCS § 547(f), but evidence also established that there were genuine issues of material fact regarding insolvency of debtor on transfer dates. Official Empl.-Related Issues Comm Of Enron Corp. v Arnold (In re Enron Corp.) (2004, BC SD Tex) 318 BR 655, 44 BCD 30, 53 CBC2d 999.

In action under 11 USCS § 547, company had not rebutted presumption of insolvency of debtors because newspaper articles related to debtors were inadmissible hearsay and debtors' own schedules submitted in ***bankruptcy*** proceedings did not provide accurate assessment of debtors' solvency during relevant period. Maxwell v Progressive Techs., Inc. (In re marchFirst, Inc.) (2008, BC ND Ill) 388 BR 858.

Preferential transfers to secured lender were made while debtor was presumptively insolvent, and lender could not rebut presumption by claiming that value of various ***bankruptcy*** avoidance actions had be included in insolvency analysis because such claims belonged to estate, not prepetition debtor. Jahn v Genesis Merchant Partners, LP (In re U.S. Ins. Group, LLC) (2011, BC ED Tenn) 451 BR 437, 55 BCD 9.

Unpublished Opinions

Unpublished: Summary judgment for debtor in its action to avoid preferential transfer was affirmed; there was no genuine issue as to debtor's insolvency as group of banks asserted deficiency claim in underlying ***bankruptcy*** proceeding in excess of $ 70 million, which would have rendered debtor insolvent at time of transfer. Philips BTS v Matthews Studio Equip. Group (In re Matthews Studio Equip. Group) (2005, CA9 Cal) 129 Fed Appx 374.

Unpublished: Summary judgment for debtor in its action to avoid preferential transfer was affirmed where debtor's representation in asset purchase agreement (dated January 21, 2000) that it was solvent did not overcome presumption that debtor was insolvent on March 2, 2000 (date of transfer in question). Philips BTS v Matthews Studio Equip. Group (In re Matthews Studio Equip. Group) (2005, CA9 Cal) 129 Fed Appx 374.

246. Miscellaneous

Genuine dispute over valuation of commercial loan assets of debtor state industrial loan and thrift company is sufficient to preclude summary judgment for plaintiff, under ***Bankruptcy*** Rule 7056, in ***preference*** proceeding notwithstanding statutory presumption of insolvency under 11 USCS § 547(f). In re Southern Indus. Banking Corp. (1986, BC ED Tenn) 72 BR 183.

Mortgage given to parents of Chapter 7 debtor by debtors is preferential transfer where mortgage was transfer of interest in debtors property for benefit of mortgagors on account of antecedent debt; because transfer was made within 90 days before petition was filed, under 11 USCS § 547(f), trustee has benefit of presumption that debtors were insolvent at time of transfer. Eide v Mason (In re Mason) (1995, BC ND Iowa) 189 BR 932, CCH Bankr L Rptr P 76759.

For purposes of determining ***preferences***, 11 USCS § 547(f) provides for presumption of insolvency, as defined under 11 USCS § 101(32), on and during 90 days immediately preceding date of filing of petition, and where trial evidence, including debtor's petition and schedules, demonstrated that debtor was insolvent at time of banks' lis pendens filings and recording of quitclaim deeds and where no evidence rebutting presumption of insolvency was produced, debtor was found insolvent for purposes of trustee's preferential transfer action. Rice v First Ark. Valley Bank (In re May) (2004, BC ED Ark) 310 BR 405.

Unpublished Opinions

Unpublished: Where debtor filed its petition for ***bankruptcy*** protection under Chapter 11 on April 6, 2000, 90-day period during which debtor was presumed to have been insolvent began on January 7, 2000. Philips BTS v Matthews Studio Equip. Group (In re Matthews Studio Equip. Group) (2005, CA9 Cal) 129 Fed Appx 374.

5. Valuation

247. Generally

For purposes of determining whether Chapter 11 debtor is insolvent under 11 USCS § 547, fair market value of property is not determined by asking how fast or by how much property has depreciated on corporate books, but by estimating what debtor's assets would realize if sold in prudent manner in current market conditions. Orix Credit Alliance v Harvey ex rel. Lamar Haddox Contractor (In re Lamar Haddox Contractor) (1994, CA5 La) 40 F3d 118, 26 BCD 458, CCH Bankr L Rptr P 76301.

Unless business is on its death bed, "fair value" of its assets, within meaning and purview of 11 USCS § 547(b) is going concern value or fair market value. In re Utility Stationery Stores, Inc. (1981, BC ND Ill) 12 BR 170.

Fair value for purposes of 11 USCS § 547(b)(3) is amount of money debtor could raise from its property in short period of time, but not so short as to approximate forced sale, if debtor operated as reasonably prudent and diligent businessman with his interests in mind, especially proper concern for payment of his debts. In re Joe Flynn Rare Coins, Inc. (1988, BC DC Kan) 81 BR 1009.

Proper standard of valuation to be applied in determination of solvency in 11 USCS § 547(b) proceeding is value of business as going concern, not liquidation value of its assets less its liabilities; liquidation value is appropriate, however, if at time in question business is so close to shutting its doors that going concern standard is unrealistic. In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

248. Going concern value

Party seeking to avoid ***preference*** under 11 USCS § 547 must establish fair valuation of Chapter 11 debtor's assets pursuant to 11 USCS § 101(26) [now 101(32)(A)], normally through "going concern" value or fair market value, but if debtor company is "on its deathbed" or is nominally in existence, application of "going concern" value is not appropriate. In re Art Shirt, Ltd. (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

"Going concern valuation" under 11 USCS § 101(26) [now 101(32)(A)] is not applicable to value Chapter 11 debtor corporation for purposes of ***preference*** action brought pursuant to 11 USCS § 547 where: (1) debtor was in very unstable financial condition with dubious future at time of transfers; (2) debtor's receivables had to be written down by $ 417,000 due to high improbability of collection; and (3) debtor's inventory had to be written down by $ 249,000 and physical assets written down by $ 57,000; to treat such corporation as going concern would misrepresent debtor's financial position at time of transfers. In re Art Shirt, Ltd. (1988, ED Pa) 93 BR 333, 26 Fed Rules Evid Serv 1178.

Bankruptcy court properly found that debtor was not insolvent, as it was valued at approximately $ 400 million on going-concern basis just prior to transfer, and ***bankruptcy*** court properly included certain proceeds and excluded certain bridge loans, In re Flashcom, Inc. v Communs Ventures III, LP (In re Flashcom, Inc.) (2013, CD Cal) 503 BR 99.

Although quite weak after its closing, Chapter 11 debtor was able to continue its business operation following buyout with aid of ***Bankruptcy*** Court for 6 months, and it has been operating under umbrella of Chapter 11 ever since; therefore, going concern valuation is appropriate to determine solvency under 11 USCS § 547, with adjustment to reflect transfers made and obligations incurred for which debtor received no consideration; traditional method for determining going concern value is by capitalizing net profit pursuant to which net profit figure is selected which represents current annual earning capacity, usually based upon recent earnings history, with weighing to reflect current trends or other factors, and this sum is then multiplied by factor which represents appropriate multiple of earnings in light of ratio of stock prices to earnings in that type of business; where evidence on issue of insolvency is in equipoise, with neither party giving court sufficient information to resolve issue, debtor has failed to meet its burden of proof under 11 USCS § 547(g). In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Valuing of corporate Chapter 11 debtor's business as going concern is inappropriate, for purposes of determining debtor's insolvency under 11 USCS § 547, where debtor's business operations lasted at most for only 6 weeks, going concern value had not been established, and at time transfers were made, corporation was already in receivership; debtor was insolvent at time of transfers where its liabilities exceeded its assets by more than $ 100,000. In re International Club Enterprises, Inc. (1990, BC DC RI) 109 BR 562, CCH Bankr L Rptr P 73236.

Fair market value or going concern value, for purposes of determining Chapter 11 debtor's solvency under 11 USCS § 547(b), although presumed to be determined free of impermissible hindsight, is not determined in vacuum--free of external stimuli, but rather, fair market value presumes that all relevant information is known by buyer and seller; in instant case, party purchasing debtor's assets at time of alleged preferential transfer would be aware of all relevant factors, which would include knowledge of massive business-wide fraud and environmental contamination; in sum, fair market valuation entails hypothetical sale, not hypothetical company. Coated Sales, Inc. v First Eastern Bank, N.A. (1992, BC SD NY) 144 BR 663.

Bankruptcy court determined that when Chapter 11 debtor filed ***bankruptcy*** petition it was both solvent and going concern, and court then analyzed financial experts' reports, which used comparable company approach, and determined at what point in time that debtor became insolvent. Silverman Consulting, Inc. v Hitachi Power Tools, U.S.A., Ltd. (In re Payless Cashways, Inc.) (2003, BC WD Mo) 290 BR 689, 50 CBC2d 82.

In ***bankruptcy preference*** action ***bankruptcy*** court found, in addressing solvency, that commercial enterprise was going concern if it was actively engaged in business with expectation of indefinite continuance. Silverman Consulting, Inc. v Hitachi Power Tools, U.S.A., Ltd. (In re Payless Cashways, Inc.) (2003, BC WD Mo) 290 BR 689, 50 CBC2d 82.

Chapter 11 debtor was insolvent at time of alleged preferential transfers, even though its ***bankruptcy*** schedules indicated that its assets exceeded its liabilities, because schedules were prepared utilizing book value rather than fair market or going concern value; because book value is not probative of issue of fair market valuation, schedules were insufficient to rebut statutory presumption of insolvency. Intercontinental Polymers, Inc. v Equistar Chems., LP (In re Intercontinental Polymers, Inc.) (2005, BC ED Tenn) 359 BR 868, 44 BCD 183, 54 CBC2d 710.

Unpublished Opinions

Unpublished: ***Bankruptcy*** debtor was valued as going concern for purposes of determining solvency at time of alleged preferential transfer since debtor had several lucrative contracts which were not in default, was generating substantial gross revenues, and continued to operate as debtor in possession for over year after filing ***bankruptcy*** petition. Stadtmueller v Fitzgerald (In re Epic Cycle Interactive, Inc.) (2014, BC SD Cal) 2014 Bankr LEXIS 2622.

249. Valuation of particular assets

There is sufficient evidence establishing debtor corporations' insolvency on date of transfer of deed of trust; balance sheet treatment of water bonds as assets and of related debt arising from purchase of water bonds should be consistent; either bonds are worthless as assets and debt is excluded from liability or alternatively bonds are valued at par and full amount of debt is included as liability; ***bankruptcy*** court's valuation of water bonds at par and exclusion of debt is unjustified. Clay v Traders Bank of Kansas City (1983, CA8 Mo) 708 F2d 1347, 10 BCD 1317, CCH Bankr L Rptr P 69296.

For purposes of determining Chapter 11 debtor's insolvency under 11 USCS § 547, debtor's manufacturing contract rights are worthless where they restrict debtor's right to assign by requiring consent of other parties to contract. In re Bellanca Aircraft Corp. (1988, CA8 Minn) 850 F2d 1275, CCH Bankr L Rptr P 72385.

In determining corporate debtor car dealership's solvency for purposes of 11 USCS § 547, ***Bankruptcy*** Court properly valued leasehold interest in real property based on price received at public auction rather than at price paid by debtor's owner when he purchased dealership, because contract price paid for dealership included all of debtor's property, not just real property on which dealership was located. Bluegrass Ford-Mercury, Inc. v Farmers Nat'l Bank (1991, CA6 Ky) 942 F2d 381, CCH Bankr L Rptr P 74202, 15 UCCRS2d 369 (superseded by statute as stated in Tibble v Consumers Credit Union (In re Koshar) (2005, BC WD Mich) 334 BR 889).

General issue of material fact does not exist precluding summary judgment under ***Bankruptcy*** Rule 7056 on issue of corporate Chapter 11 debtor's solvency for ***preference*** purposes under 11 USCS § 547 although debtor's principal, who received preferential transfer, asserts that trustee, in determining debtor's insolvency, did not take into account claim that debtor may have against principal's brother for value of stolen furniture and equipment, where principal's affidavit does not set forth specific facts indicating that this asset is worth significant amount of money. In re Melon Produce (1992, CA1 Mass) 976 F2d 71, 23 BCD 825, CCH Bankr L Rptr P 74967, 19 UCCRS2d 300.

Trustee, in determining debtor's insolvency, need not give any value to disputed claim of debtor against insurer for insurers failure to defend debtor against personal injury action resulting in judgment and lien against debtor. In re Pacific Rim, Inc. (1979, BC DC Hawaii) 21 CBC 48.

Bankruptcy Court will not consider debtor's equity in unfinished jobs, to which various items of overhead and other expenses have been allocated, as asset of debtor where it does not appear willing purchaser would have been willing to offer any price at all for such asset. In re Fulghum Constr. Co. (1980, BC MD Tenn) 7 BR 629, affd (1981, MD Tenn) 14 BR 293, 32 UCCRS 798, affd in part and vacated in part on other grounds (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Chapter 7 debtors are insolvent for purposes of 11 USCS § 547 even though their schedules reported debts totaling $ 135,704.45 and assets valued at $ 145,304.13 because schedules value specific property at $ 140,000, $ 46,000

more than postpetition sale price, and there is no proof suggesting that value of property was greater prepetition than at time of trustee's sale. In re Ressler (1986, BC ED Tenn) 61 BR 403.

Using 11 USCS § 101 definition of insolvency, neither forged nor fictitious loans can be considered as assets of Chapter 11 debtor industrial loan and thrift company, for purposes of determining insolvency under 11 USCS § 547; even if true signatories of fraudulent loans can be identified and proceeds traced to them, value of any cause of action against such individuals is zero or nominal at best where there is no evidence regarding who actually signed notes nor prospect of any recovery against such persons. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

Value of Chapter 11 debtor's chemical equipment at time it granted creditor security interest in its property was nowhere near book value of $ 20 million as listed in March 1989, and thus debtor was insolvent under 11 USCS § 101(32) for 11 USCS § 547 ***preference*** purposes even though debtor's schedules indicate that debtor was solvent since asset total in those schedules is based on chemical equipment value of $ 20 million; events from March 1989 to date of sale of debtor's property in March 1990 could not have caused value of chemical equipment to drop from $ 20 million to $ 500,000 sale price; for court to conclude that debtor was actually insolvent at end of 1988, court need not subtract any specific amount from book value of property as shown in financial statement since exactness is not required, and court can conclude that debtor was vastly insolvent at end of 1988 because chemical equipment had value closer to $ 500,000 than to $ 2 million; although evidence shows that debtor was vastly insolvent on December 31, 1988 and on April 10, 1989 when it filed ***bankruptcy*** petition, and grant of security interest occurred on March 13, 1989, court does not need evidence that debtor's financial condition was same at end of 1988 to March 13, 1989, or from April 10, 1989 back to March 13 because court can assume that debtor did not suddenly and miraculously become solvent on March 13, 1989. Brown v Shell Can. (In re Tennessee Chem. Co.) (1992, BC ED Tenn) 143 BR 468, 23 BCD 455, affd (1997, CA6 Tenn) 112 F3d 234, 30 BCD 942, CCH Bankr L Rptr P 77368, 32 UCCRS2d 881, 1997 FED App 142P, reh den (1997, CA6 Ky) 1997 US App LEXIS 13653 and reh, en banc, den (1997, CA6) 1997 US App LEXIS 13651.

Elements of misuse of control and resultant harm or loss must be present in order to pierce corporate veil under alter ego doctrine so that Chapter 7 debtor was not, for ***preference*** purposes, alter ego of corporation whose obligation he had guaranteed where there was no evidence corporation had been set up as subterfuge, debtor owned and was chief executive of corporation, debtor operated this and other businesses from same address but maintained bank accounts separate from corporation, and debtor filed tax returns separate from corporation. Memory v Alfa Mut. Fire Ins. Co. (In re Martin) (1993, BC MD Ala) 205 BR 646.

Trustee in involuntary Chapter 7 ***bankruptcy*** seeking to recover alleged preferential loan payments which debtor grain company had paid to bank did not prove debtor's insolvency, where accountant failed to consider individual partners' assets, whether partnership had other assets besides elevator, and whether fair market value of grain elevator exceeded its value at cost minus depreciation. Barber v First Midwest Bank/Western Ill., N.A. (In re Oneida Grain Co.) (1996, BC CD Ill) 202 BR 606.

Chapter 11 debtor was insolvent at time of alleged preferential transfers, despite transferee's claim that debtor's scheduled assets failed to include potential substantial claim by debtor against its parent companies, because claim was sold for far less than value asserted by transferee, and there was no evidence before court as to effect that asset had on debtor's overall balance sheet and whether it was of sufficient value to have rendered debtor otherwise solvent at time of preferential transfer. Intercontinental Polymers, Inc. v Equistar Chems., LP (In re Intercontinental Polymers, Inc.) (2005, BC ED Tenn) 359 BR 868, 44 BCD 183, 54 CBC2d 710.

Creditor was not entitled to summary judgment with respect to whether certain transfers were avoidable as preferential under 11 USCS § 547(b) because, while creditor argued that statutory value threshold under 11 USCS § 547(c)(9) was not met because its financing statement pertaining to one of its claims was less than threshold, issue was aggregate value of property transferred, not amount of claim; there was insufficient evidence in record to establish aggregate value of property transferred. Miller v FDIC (In re Miller) (2010, BC ND Ohio) 428 BR 437, CCH Bankr L Rptr P 81832.

Where ***bankruptcy*** court held that debtor was insolvent under 11 USCS § 547(b) during period that member of debtor received fund transfers from debtor, ***bankruptcy*** court's finding that debtor's account receivable assets were overstated by $ 9 million due to uncollectible accounts was not clearly erroneous because evidence in record supported higher figure. Jagow v Grunwald (In re Allied Carriers' Exch., Inc.) (2007, BAP10) 375 BR 610, 48 BCD 214.

250. Miscellaneous

In period of general market decline, debtor trucking supplier's "fair value" is not value of assets at forced sale, but value if debtor took reasonable time to sell; but when trustee offers balance sheet showing excess of liabilities and debtor's testimony of its valuation methods is vague and confusing, and shows routine overvaluation, court will presume trustee is correct for purposes of establishing insolvency in 90-day period prior to filing. In re A. Fassnacht & Sons, Inc. (1984, BC ED Tenn) 45 BR 209, CCH Bankr L Rptr P 70217.

Chapter 11 debtor industrial loan and thrift company's income tax returns are not reliable evidence of valuation of assets for purposes of determining insolvency under 11 USCS § 547 where: (1) no audit or independent investigation was performed by tax preparer to determine fair valuation of assets; (2) returns and balance sheets do not report assets at fair valuation but rather report historical cost or basis; (3) fair valuation of debtor's assets was not investigated; (4) tax returns were prepared from debtor's books and records which court has already found to be untrustworthy; and (5) duty of trustee is limited to filing tax returns from debtor's books and records and such information as is available; regardless of whether trustee was under duty to amend tax returns under Internal Revenue Code, such failure could in no way affect solvency or insolvency of debtor during ***preference*** period. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1987, BC ED Tenn) 71 BR 351.

G. 90 Day *Preference* Period

1. In General

251. Generally

Any transfer of property of debtor during 90 day ***preference*** period may be voidable ***preference*** no matter when debtor acquires interest in property; it need not be shown that funds transferred within ***90 day*** period prior to filing were also earned within this ***90 day*** period. In re Conner (1982, BC ND Ga) 21 BR 616.

Transfer of funds from debtors to creditors made within ***90 days*** before date of filing of ***bankruptcy*** petition give creditors more than they would have gotten in Chapter 7 proceeding and are ***preferences*** which are avoidable pursuant to 11 USCS § 547. In re Chavez (1982, BC DC NM) 25 BR 142.

Prepetition ***payments*** to creditor made within ***90 days*** before ***bankruptcy*** petition was filed are avoidable ***preferences*** under 11 USCS § 547(b) where creditor received disproportionate return on his debt as compared to other creditors; transfers were simple ***preferences*** rather than ordinary course of business dealings. In re Kennesaw Mint, Inc. (1983, BC ND Ga) 32 BR 799.

Trustee could not rely on 11 USCS § 547(b) to recover postpetition transfers since under that section transfer must take place prior to filing of ***bankruptcy*** petition. In re Klein's Dep't Store, Inc. (1984, BC ED Mich) 42 BR 393, 12 BCD 425.

Since bank's payment of check issued by Chapter 7 debtor did not occur until after ***bankruptcy*** petition was filed, 11 USCS § 547 is not applicable. In re W & T Enterprises, Inc. (1988, BC MD Fla) 84 BR 838, 17 BCD 692.

Where it was impossible from evidence presented to determine as of date of each alleged preferential transfer whether bank was fully secured, partially secured, or totally unsecured, and where trustee had not established that transfers in question enabled bank to recover more than it would have received in chapter 7 liquidation as required by statute, bank was entitled to judgment dismissing trustee' complaint as to alleged preferential transfer occurring

within 90-day statutory period. Dowden v First Sec. Bank (In re Mid-South Auto Brokers, Inc.) (2003, BC ED Ark) 290 BR 658, 41 BCD 22, 49 CBC2d 1544.

Because application of tax refund occurred outside ***90-day*** window prescribed at 11 USCS § 547(b)(4)(A), debtor's § 547 claim failed. Nase v GNC Cmty. Fed. Credit Union (In re Nase) (2003, BC WD Pa) 297 BR 12, 41 BCD 185, 50 CBC2d 1242, 92 AFTR 2d 5944.

"Transfer" time for purposes of determining whether ***payment*** period was made inside or outside of ***90 day*** period, is not necessarily time of "transfer" for all purposes under 11 USCS § 547. In re Gold Coast Seed Co. (1983, BAP9 Cal) 30 BR 551, 10 BCD 1049, CCH Bankr L Rptr P 69305.

252. Effect of former *Bankruptcy* Act

Trustee can avoid under 11 USCS § 547(b) preferential ***payment*** made within ***90 days*** of petition to creditor supplier after 1978 Act was passed but before its effective date, because Code expressly applies to cases filed after October 1, 1979, and debtor's case was filed after that date, even though transfer took place before. In re Caro Products, Inc. (1984, CA6 Mich) 746 F2d 349, 12 BCD 599, CCH Bankr L Rptr P 70076.

Omission from present ***Bankruptcy*** Code of section comparable to former 11 USCS § 54 has no significance with respect to how 90 day period prescribed by 11 USCS § 547 is to be computed, since former § 54 was omitted as constituting surplusage, having already been superseded under ***Bankruptcy*** Act by Rule 906, which continues under ***Bankruptcy*** Code, and provides rule of time computation to be applied under ***Bankruptcy*** Code; under Rule 906, for purpose of determining whether act occurred within 90 day period prescribed by 11 USCS § 547, day on which such act occurred should be excluded, and last day of period included, so that lien by attachment obtained by creditor on August 7, 1979 would fall within 90 day period when debtor's petition was filed on November 5, 1979. Grimaldi v John A. Ruell, Inc. (In re Grimaldi) (1980, BC DC Conn) 3 BR 533, 6 BCD 241, 1 CBC2d 901 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

253. Debts guaranteed by insiders

"Such creditor" as used in 11 USCS § 547(b)(4)(B) refers only to previous mention of creditor in § 547(b), which says that ***preference*** must be "to or for the benefit of a creditor, and therefore one-year ***preference*** period may apply only if transfers were made for benefit of insider creditor. Clark v Balcor Real Estate Fin. (In re Meridith Hoffman Partners) (1993, CA10 Colo) 12 F3d 1549, 30 CBC2d 615, CCH Bankr L Rptr P 75680, cert den (1994) 512 US 1206, 114 S Ct 2677, 129 L Ed 2d 812 and (criticized in Luper v Columbia Gas (In re Carled, Inc.) (1996, CA6 Ohio) 91 F3d 811, 29 BCD 601, 36 CBC2d 732, CCH Bankr L Rptr P 77123, 1996 FED App 249P) and (criticized in Arrow Elecs., Inc. v Justus (In re Kaypro) (2000, CA9) 218 F3d 1070, 2000 CDOS 5762, 2000 Daily Journal DAR 7689, 36 BCD 104, CCH Bankr L Rptr P 78224) and (criticized in Howard v Bangor Hydro Elec. Co. (In re Bangor & Arrostook R.R. Co.) (2005, BC DC Me) 324 BR 164) and (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

Insider reach-back period of 11 USCS § 547 applies to noninsider creditor who received payment from debtor on loan guaranteed by insiders, and payment may be recovered from noninsider initial transferee pursuant to 11 USCS § 550. In re Diversified Contract Servs. (1993, ND Cal) 158 BR 169.

Transfer for antecedent debt made to non-inside creditor may be avoided under extended one-year ***preference*** period if debt is secured by inside guarantor. H & C Partnership v Virginia Serv. Merchandisers (1994, WD Va) 164 BR 527, 6 Fourth Cir & Dist Col Bankr Ct Rep 478, 25 BCD 569.

Chapter 11 debtor's repayment of bank loans more than ***90 days*** before filing of petition which served to reduce liability of debtor's "insiders" was not avoidable ***preference*** and was not recoverable under 11 USCS § 547(b)(4)(B) and 11 USCS § 550(a). CEPA Consulting v New York Nat'l Bank (In re Wedtech Corp.) (1995, SD NY) 187 BR 105.

Deprizio decision that 11 USCS § 547's extended ***preference*** avoidance period for insiders applies to outside creditor when ***payment*** to outside creditor produces benefit for inside creditor, including insider guarantor, applies to pre-Reform Act transfer, notwithstanding legislative history to subsequent amendment to § 550 indicating Congress's intent to preclude recovery based on Deprizio line of cases, since Congress chose not to make amendment retroactive and court's application of it would in essence allow legislation to be given retroactive application. Crampton v First Union Nat'l Bank (In re Conner Home Sales Corp.) (1995, ED NC) 190 BR 255, app dismd, remanded (1997, CA4 NC) 110 F3d 59, reported in full (1997, CA4 NC) 9 Fourth Cir & Dist Col Bankr Ct Rep 262.

Bankruptcy court's retroactive application of § 1213 of the ***Bankruptcy*** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, to foreclose an adversary claim asserted by an unsecured creditors committee to avoid, as preferential per 11 USCS § 547(b), a lien granted to a non-insider lender that also held corporate guarantees executed by debtor's subsidiaries, considered "insiders" under 11 USCS § 101(31), was upheld on review; committee's claim that retroactive application of § 1213 violated the Due Process and Takings clauses of the Fifth Amendment to the U.S. Constitution was rejected because the ***bankruptcy*** court had articulated at least two rational bases for the challenged law and because the estate lacked a vested property interest within the meaning of 11 USCS § 541(a)(3) sufficient to trigger the Takings Clause. Official Comm. of Unsecured Creditors of ABC-NACO, Inc. ex rel. ABC-NACO, Inc. v Bank of Am. N.A. (2009, ND Ill) 402 BR 816, 61 CBC2d 596.

Noninsider transferee, who received ***payment*** in satisfaction of debt owed by debtor and guaranteed by insiders, is not insider, and transferee is not subject to liability under 11 USCS § 547(b)(4) for transfers made to it more than ***90 days*** prior to filing of ***bankruptcy*** petition; but insiders are ostensibly liable under § 547(b) and may be liable under 11 USCS § 550(a)(2) as mediate transferees although immediate transferee is not subject to liability. In re Mercon Indus. (1984, BC ED Pa) 37 BR 549, CCH Bankr L Rptr P 69729.

Payments made by purchaser of Chapter 11 debtor to seller of debtor, outside ***90-day preference*** period, that were applied by bank to debtor's indebtedness may not be avoided under 11 USCS § 547 where neither seller nor bank are insiders of debtor. In re Coors of North Mississippi, Inc. (1986, BC ND Miss) 66 BR 845.

One-year ***preference*** period of 11 USCS § 547 applies to transfer made to noninsider creditor when insider guarantor of loans is creditor of debtor and noninsider creditor may assert § 547(c) defenses to transfer; if transfer is avoidable under § 547, then 11 USCS § 550(a) allows trustee to recover transfer from noninsider creditor who is initial transferee. Mosier v Irvine Co. (1992, BC CD Cal) 138 BR 595.

Payments made to debtor's creditor within one year of ***bankruptcy***, which served to reduce extent of insiders' guarantee of debtor's obligation, constitute preferential transfers under 11 USCS § 547(b), and such transfers are recoverable from noninsider creditor under 11 USCS § 550; since debtor's payments to creditor had effect of benefiting insider-guarantors, longer reachback period for avoidance, coupled with powers of § 550(a), permits trustee to recover those payments from transferee creditor; "two-transfer" approach fails to acknowledge that by virtue of § 547(b)(1), transfer may be avoided when made not just "to" creditor, but also when made "for the benefit of" creditor; § 547(d) does not render meaning of § 550(a)(1) ambiguous because fact that there may be some statutory redundancy is not sufficient to undermine plain and coherent statutory text, and reading of § 550(a)(1) to allow recovery of noninsider transferees does not render defenses of § 547(c) unavailing. Miller v Steinberg (1992, BC ED Pa) 141 BR 587, 27 CBC2d 156.

One-year ***preference*** period is inapplicable to instant transfer where transfer was not made to insider but rather was made by insider; while § 547(b)(4)(B) might support recovery from insider who obtained benefit, § 547(b) does not provide for extension of ***preference*** period when payment was made to noninsider. Grove Peacock Plaza, Ltd. v Resolution Trust Corp. (1992, BC SD Fla) 142 BR 506, 27 CBC2d 516 (criticized in Stevenson v Genna (In re Jackson) (2010, BC ED Mich) 426 BR 701, 63 CBC2d 1025).

11 USCS §§ 547(b)(4)(B) and 550 do not subject noninsider arm's-length creditor to one-year preferential-transfer recovery, notwithstanding fact that creditor received transfer from debtor with regard to debt guaranteed by debtor's insider. Weiskopf v New York Job Dev. Authority (1992, BC ND NY) 145 BR 3.

One-year preferential period under 11 USCS § 547 is not applicable where transferee, who is wife of vice-president of Chapter 11 debtor's primary banking institution, is not insider as defined under 11 USCS § 101; regardless of length of relationship between transferee and debtor, definition of "insider" does not encompass individual who is merely a friend or associate of a debtor nor an officer of debtor's banking institution nor spouse of an officer at debtor's bank; vice-president of debtor's bank who is husband of transferee is not an insider of debtor where he held no control over debtor. Torcise v Cunigan (1992, BC SD Fla) 146 BR 303, 23 BCD 922.

Phrase "such creditor" in 11 USCS § 547(b)(4)(B) refers directly back to phrase "to or for benefit of creditor" in § 547(b)(1); therefore, plain and clear language of § 547(b)(4)(B) provides that transfer up to one year before petition to or for benefit of creditor is ***preference*** when creditor is insider. Hovis v Powers Constr. Co. (In re Hoffman Assocs.) (1995, BC DC SC) 179 BR 797, 7 Fourth Cir & Dist Col Bankr Ct Rep 444, judgment entered (1995, BC DC SC) 194 BR 943 and (criticized in Crampton v First Union Nat'l Bank (In re Conner Home Sales Corp.) (1995, BC ED NC) 1995 Bankr LEXIS 860).

Parties may "draft around" Deprizio result whereby year-long ***preference*** period of 11 USCS § 547(b)(4)(B) applies to debtor's payment on antecedent debt to non-insider creditor which benefits insider-guarantors; accordingly, Deprizio doctrine is inapplicable to guaranty expressly waiving all rights of subrogation, however, doctrine does apply to guaranty which merely delays subrogation until full payment, from whatever source, of non-insiders' obligations and which merely tracks language of 11 USCS § 509(c); insider/guarantor benefited from debtor's payment on antecedent debt to non-insider creditor so as to make year-long ***preference*** period of 11 USCS § 547(b)(4)(B) applicable under Deprizio doctrine where payments reduced guarantor's exposure dollar for dollar, notwithstanding contention that guarantor's claims will never emerge from subordination because estate is not solvent and creditor will never be paid in full. O'Neil v Orix Credit Alliance (In re Northeastern Contr. Co.) (1995, BC DC Conn) 187 BR 420, 27 BCD 1176.

Where trustee failed to allege that bank was insider and cited no legal authority in support of argument that bank was liable for transfers it received more than 90 days prior to petition date, bank was entitled to judgment dismissed trustee's complaint as to allegation of ***preferences*** occurring prior to 90-day statutory period. Dowden v First Sec. Bank (In re Mid-South Auto Brokers, Inc.) (2003, BC ED Ark) 290 BR 658, 41 BCD 22, 49 CBC2d 1544.

254. --Avoidable *preference*

Bankruptcy Court mistakenly viewed transfer to mortgagee of proceeds from sale of mortgaged property as transaction separate and apart from underlying mortgage granted to bank of which debtor husband was director/insider at time mortgage was granted, where bank received sale proceeds solely because it held preferential mortgage securing debtors' antecedent debt; furthermore, court erred in concluding that avoiding preferential mortgage transaction would be futile because real estate had been sold to good-faith purchaser for value, since court could, and should, have ordered bank to return portion of sale proceeds equaling value of preferential mortgage under 11 USCS § 550. In re Willaert (1991, CA8 Minn) 944 F2d 463, 22 BCD 162.

Trustee could avoid, pursuant to 11 USCS § 547(b), preferential payments made to mortgagee during one year preceding ***bankruptcy*** filing where payments were for benefit of insiders who guaranteed debt to mortgagee and who received more on their contingent claims than they would have otherwise received. Clark v Balcor Real Estate Fin. (In re Meridith Hoffman Partners) (1993, CA10 Colo) 12 F3d 1549, 30 CBC2d 615, CCH Bankr L Rptr P 75680, cert den (1994) 512 US 1206, 114 S Ct 2677, 129 L Ed 2d 812 and (criticized in Luper v Columbia Gas (In re Carled, Inc.) (1996, CA6 Ohio) 91 F3d 811, 29 BCD 601, 36 CBC2d 732, CCH Bankr L Rptr P 77123, 1996 FED App 249P) and (criticized in Arrow Elecs., Inc. v Justus (In re Kaypro) (2000, CA9) 218 F3d 1070, 2000 CDOS 5762, 2000 Daily Journal DAR 7689, 36 BCD 104, CCH Bankr L Rptr P 78224) and (criticized in Howard v Bangor Hydro Elec. Co. (In re Bangor & Arrostook R.R. Co.) (2005, BC DC Me) 324 BR 164) and (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

Although Congress intended extended ***preference*** period to prevent unequal distribution motivated by benefit to insiders, 11 USCS § 547 does not require any proof that debtor actually did favor insider or initial transferee; statute only requires proof that insider received more on his claim than he would have received otherwise; even if debtor

had no intention of favoring insider, ***payments*** to unsecured insider that are not in ordinary course of business will be avoided up to one year before ***bankruptcy*** while similar ***payments*** to other creditors will be avoided only up to ***90 days***; it does not matter whether debtors in instant case actually favored creditor; all that matters is whether transfers that benefited insider guarantors enable them to receive more on their contingent claims than they would have received in ***bankruptcy*** without transfers. Clark v Balcor Real Estate Fin. (In re Meridith Hoffman Partners) (1993, CA10 Colo) 12 F3d 1549, 30 CBC2d 615, CCH Bankr L Rptr P 75680, cert den (1994) 512 US 1206, 114 S Ct 2677, 129 L Ed 2d 812 and (criticized in Luper v Columbia Gas (In re Carled, Inc.) (1996, CA6 Ohio) 91 F3d 811, 29 BCD 601, 36 CBC2d 732, CCH Bankr L Rptr P 77123, 1996 FED App 249P) and (criticized in Arrow Elecs., Inc. v Justus (In re Kaypro) (2000, CA9) 218 F3d 1070, 2000 CDOS 5762, 2000 Daily Journal DAR 7689, 36 BCD 104, CCH Bankr L Rptr P 78224) and (criticized in Howard v Bangor Hydro Elec. Co. (In re Bangor & Arrostook R.R. Co.) (2005, BC DC Me) 324 BR 164) and (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

Transfer to mortgagee which benefited insider guarantors did not actually involve 2 transfers, i.e., payment to mortgagee and resulting reduction in exposure to insiders, with only latter being avoidable; "two-transfer" theory incorrectly defines transfer as benefit received instead of property disposed, and it mistakenly assumes that benefits to creditors rather than transfers are avoidable; theory implies that only reason for ***preference*** section is to punish culpable creditors, rather than to recover money that may have been unfairly paid out by debtor, but both text of 11 USCS § 547 and its underlying purposes favor extending recovery period for initial transferees if transfers preferred insider guarantor. Clark v Balcor Real Estate Fin. (In re Meridith Hoffman Partners) (1993, CA10 Colo) 12 F3d 1549, 30 CBC2d 615, CCH Bankr L Rptr P 75680, cert den (1994) 512 US 1206, 114 S Ct 2677, 129 L Ed 2d 812 and (criticized in Luper v Columbia Gas (In re Carled, Inc.) (1996, CA6 Ohio) 91 F3d 811, 29 BCD 601, 36 CBC2d 732, CCH Bankr L Rptr P 77123, 1996 FED App 249P) and (criticized in Arrow Elecs., Inc. v Justus (In re Kaypro) (2000, CA9) 218 F3d 1070, 2000 CDOS 5762, 2000 Daily Journal DAR 7689, 36 BCD 104, CCH Bankr L Rptr P 78224) and (criticized in Howard v Bangor Hydro Elec. Co. (In re Bangor & Arrostook R.R. Co.) (2005, BC DC Me) 324 BR 164) and (criticized in Webster v Mgmt. Network Group, Inc. (In re NeTtel Corp.) (2006, BC DC Dist Col) 364 BR 433).

Where debtor made preferential ***payments*** on installment note to secured creditor bank that benefited debtor's grandparents who were insider-guarantors of note, trustee should recover ***payment*** from insider-guarantors, not from noninsider, nonpreferred creditor. In re Aldridge (1988, BC WD Mo) 94 BR 589.

Transfers to creditors made outside ***90-day*** prepetition period but within 1 year of ***bankruptcy*** petition filing are avoidable as ***preferences*** under 11 USCS § 547(b) only if recipient is "insider" of debtor at time of such transfer; insider of corporate debtor is defined to include officer or director or one in "control" of debtor, although term "control" is undefined under 11 USCS § 101(30) [now 101(31)]. In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Avoidable preferential transfer which occurs outside ***90-day preference*** period but within one year of ***bankruptcy*** filing is recoverable from noninsider transferee bank where antecedent debt was guaranteed by Chapter 7 debtor's insider who benefited from transfer; insider, as guarantor, holds contingent claim against debtor and is creditor for purposes of 11 USCS § 547(b), and ***payments*** to noninsider bank are for benefit of insider/guarantors because ***payments*** to noninsider bank reduces exposure of guarantors on their guaranties. Murphy v Wainwright Bank & Trust Co. (1992, BC DC Mass) 147 BR 822, 23 BCD 1200.

Modification Agreement failed to operate such that creditor possessed mortgage interest in debtor's undivided interest in realty; because Agreement was not perfected until at point well within ***90 days*** prior to commencement of debtor's ***bankruptcy***, such Agreement, even if it were construed such that it operated to grant to creditor such mortgage interest, would have constituted avoidable preferential transfer pursuant to 11 USCS § 547(b). Shearer v ABN AMRO Mortg. Group, Inc. (In re Kostelnik) (2007, BC WD Pa) 362 BR 215 (criticized in Deutsche Bank Nat'l Trust Co. v Evans (2009, WD Pa) 421 BR 193).

Payment made by debtor to noninsider creditor, outside ***90-day preference*** period but within one year of ***bankruptcy***, arising from restructuring agreement involving film distribution rights, could be recoverable as

preference under 11 USCS § 547 pursuant to Deprizio doctrine where ***payment*** benefited insider, even though insider which received benefit was co-obligor, not guarantor. Zenith Prods. v AEG Acquisition Corp. (In re AEG Acquisition Corp.) (1993, BAP9 Cal) 161 BR 50, 93 CDOS 8873, 93 Daily Journal DAR 15113, 24 BCD 1605, 30 CBC2d 242 (ovrld by Aerocon Eng'g, Inc., v Silicon Valley Bank (In re World Aux. Power Co.) (2002, CA9 Cal) 303 F3d 1120, 2002 CDOS 9355, 2002 Daily Journal DAR 10507, 40 BCD 36, 49 CBC2d 518, 64 USPQ2d 1433, 48 UCCRS2d 447).

255. Miscellaneous

In case commenced prior to amendment of 11 USCS § 547 by 11 USCS § 550, which provides explicitly that trustee could not recover from non-insider creditor outside of ***90-day*** period, case must be remanded for determination of when creditor's security interest attached to alleged ***preference payments*** and what type of security interest it claimed. O'Neil v Orix Credit Alliance, Inc. (In re Northeastern Contr. Co.) (1998, DC Conn) 233 BR 15, 42 CBC2d 248.

Complaint failed to establish that debtor made any ***payments*** to defendant "on or within ***90 days*** before filing of petition" in case, so it failed to adequately state claim. Zazzali v Hirschler Fleischer, P.C. (2012, DC Del) 482 BR 495 (criticized in Zazzali v Eide Bailly LLP (2013, DC Idaho) 2013 US Dist LEXIS 163135).

Trustee should not blindly seek to recover minimal installment ***payments*** on purchase money secured obligations made within ***90 day preference*** period. In re Kennel (1982, BC ED Mo) 1 BAMSL 868.

Amounts paid within ***90 days*** preceding and on date of filing of ***bankruptcy*** petition made to fully secured creditor and used against secured claims do not prejudice unsecured creditors, and therefore are not ***preferences*** voidable by co-trustee. In re Lackow Bros., Inc. (1982, BC SD Fla) 19 BR 601, 8 BCD 1367, affd (1985, CA11 Fla) 752 F2d 1529, 12 BCD 1099, CCH Bankr L Rptr P 70256.

Chapter 11 liquidating trustee may maintain ***preference*** action against debtor's investment security holders who received preferential ***payment*** under 11 USCS § 547 within ***90 days*** of ***bankruptcy*** even if debtor perpetrated fraud against investment security holders. DuVoisin v Anderson (In re Southern Indus. Banking Corp.) (1986, BC ED Tenn) 66 BR 349, 15 BCD 249.

11 USCS § 547(b) does not support trustee's argument that bank never perfected its lien on account receivable and therefore, since transfer of funds during ***90-day preference*** period would have been ***preference*** as ***payment*** to unsecured creditor, transfer was still ***preference*** when it occurred after filing of petition. In re Dean (1987, BC CD Ill) 80 BR 932.

Filing date of liquidation proceeding instituted under SIPA, for purposes of 11 USCS § 547, is when application for protective decree is filed, unless proceeding has been commenced under Title 11 or receiver, trustee, or liquidator has been appointed prior to application; in instant case, filing date is date on which District Court appointed receiver. In re Bell & Beckwith (1992, BC ND Ohio) 140 BR 448.

Because court found that Chapter 11 debtor was insolvent at all relevant times, security interest granted to creditor within 90 days of petition date was avoidable pursuant to 11 USCS § 547. Lids Corp. v Marathon Inv. Partners, L.P. (In re Lids Corp.) (2002, BC DC Del) 281 BR 535 (criticized in Waller v Pidgeon (2008, ND Tex) 2008 US Dist LEXIS 44238).

Because transfers were made postpetition, they could not, as matter of law, be avoided as ***preferences*** under 11 USCS § 547(b). Rieser v Dinsmore & Shohl, LLP (In re Troutman Enters.) (2005, BC SD Ohio) 343 BR 590, affd in part and revd in part, remanded (2007, BAP6) 356 BR 786, reported in full (2007, BAP6) 47 BCD 214.

Chapter 7 trustee's claims against contractor who temporarily took over debtor's business under written agreement failed, where preferential transfers were within new value exception of 11 USCS § 547(c)(1), and no breach of fiduciary duty or conversion was found to have occurred. Richardson v Bullock (In re Bullock Garages, Inc.) (2006, BC CD Ill) 338 BR 784.

Debtor's payment of gambling debts ("markers") with gambling chips was preferential transfer under 11 USCS § 547; payment was not contemporaneous exchange for new value protected from avoidance by 11 USCS § 547(c)(1) because debtor's receipt of marker when he paid debt was not money or money's worth in goods, services, or new credit. Homann v R.I.H. Acquisitions IN, LLC (In re Lewinski) (2008, BC ND Ind) 410 BR 828, 60 CBC2d 1388.

Preference period receivables were not avoidable preferential transfers within plain meaning of statute because creditor did not receive transfer of them on or within 90 days before date of filing of debtor's petition; however, prepetition receivables were avoidable as impermissible setoffs against estate, as insufficiency on date of each challenged setoff was less than insufficiency that existed 90 days prior to filing of petition. Tusa-Expo Holdings, Inc. v Knoll, Inc. (2013, BC ND Tex) 496 BR 388, affd (2015, ND Tex) 2015 US Dist LEXIS 26468.

Because transaction was disguised loan rather than true sale, perfection of security interest was transfer of interest in Chapter 7 debtor's property, and interest was perfected within 90-day period under Cal. Com. Code §§ 9301, 9307(e), 9308, and 9310(a); because debtor was organized in Nevada, Nebraska filing was ineffective, but creditor's interest was perfected with it filed its second financing statement with Nevada Secretary of State within 90 days of debtor's ***bankruptcy*** filing. Lange v Inova Capital Funding, LLC (In re Qualia Clinical Serv.) (2011, BAP8) 441 BR 325, 54 BCD 46, 64 CBC2d 1679, CCH Bankr L Rptr P 81926, 73 UCCRS2d 380, affd (2011, CA8) 652 F3d 933, 55 BCD 91, 66 CBC2d 619, CCH Bankr L Rptr P 82058.

2. Computation of Period

256. Generally

Ninety-day avoidance period in 11 USCS § 547(b) is to be calculated by counting backward 90 days from filing ***bankruptcy*** petition rather than by counting forward from date of event sought to be avoided. In re Nelson (1992, CA3 Pa) 959 F2d 1260, 26 CBC2d 979, CCH Bankr L Rptr P 74518, 117 ALR Fed 751 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

In computing preferential transfer period of 11 USCS § 547, 90-day period is calculated by counting backward from date of ***bankruptcy*** petition, rather than by counting forward from date of transfer; in present case, counting forward from date of transfer, 90th day would be Sunday, thereby extending 90-day period to Monday on which debtor filed ***bankruptcy***, whereas counting backward from date of petition, 90th day is on Tuesday, one day after subject transfer. Nelson Co. v Amquip Corp. (1991, ED Pa) 128 BR 930, affd (1992, CA3 Pa) 959 F2d 1260, 26 CBC2d 979, CCH Bankr L Rptr P 74518, 117 ALR Fed 751 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211) and (criticized in Wilcox v CSX Corp. (2003) 2003 UT 21, 70 P3d 85, 473 Utah Adv Rep 25).

In calculating 90-day period for purposes of 11 USCS § 547(b)(4)(A), one of terminal dates of statutory period is to be excluded (that is, date of "act" or "event" from which designated 90-day period begins to run) and other terminal date is to be included; thus, real estate attachment obtained by creditor is not avoidable as ***preference*** under § 547(b)(4)(A), where attachment was perfected on 91st day before date involuntary petition was filed. In re Wolf (1981, BC DC Mass) 13 BR 167, 7 BCD 1286, 4 CBC2d 1229.

For purposes of determining when "transfer" of certificate of deposit by means of creditor's garnishment of certificate took place so as to determine whether the transfer is voidable under 11 USCS § 547(b)(4)(A), as one within 90 days of filing of petition in ***bankruptcy***, court will adopt method which counts day transfer was made but excludes day petition was filed. In re Hogg (1983, BC DC SD) 35 BR 292.

Bankruptcy Rule 9006 is applicable when computing 90 day period of 11 USCS § 547(b)(4)(A) concerning avoidance of transfers, and under Rule 9006, date of transfer is excluded, but date of petition is included. Wilmington Nursery Co. v Burkert (In re Wilmington Nursery Co.) (1984, BC ED NC) 36 BR 813 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

Fraud inducing Chapter 11 debtor to dismiss original reorganization proceeding with result that by time second proceeding is instituted period for avoidance of preferential transfers under 11 USCS § 547 has expired is not established where, although creditor entered into agreement with debtor including provision for extension of line of credit, and further loans were in fact not extended by creditor, agreement made clear that further loans were discretionary on part of creditor, and allegations of fraudulent oral representations on part of creditor were unsupported by substantive evidence. In re Belco, Inc. (1984, BC WD Okla) 38 BR 525, 11 BCD 829.

Reinstatement of Chapter 13 proceeding, granted by ***bankruptcy*** court purely as matter of grace and not of right, cannot be regarded as commencement of proceeding for purpose of setting aside allegedly fraudulent transfer under 11 USCS § 548 or voidable ***preference*** under 11 USCS § 547 in case where foreclosure proceeding which debtor seeks to set aside was instituted after dismissal of Chapter 13 petition for failure of debtors to cure all defaults as required by ***bankruptcy*** court, which dismissal terminated automatic stay blocking foreclosure. In re Bluford (1984, BC WD Mo) 40 BR 640, 12 BCD 19.

Debtor cannot avoid judgment lien granted 91 days before filing petition on Monday, despite ***Bankruptcy*** Rule 9006(b)'s direction not to count Sunday in computation when end of period falls on Sunday, because 90 day period of 11 USCS § 547(b)(4) is computed backward from filing, not forward from date of judgment. Schneider v Philipps AG Chemical Co. (1984, BC WD Wis) 44 BR 961, CCH Bankr L Rptr P 70195.

Phrase "on or within 90 days before the date of the filing of the . . . petition" as used in 11 USCS § 547(b)(4)(A) means 90 calendar days before day on which petition was filed; accordingly, 90 days before petition was filed on March 18, 1985 began at 12 a.m., December 18, 1984 which eliminates splitting day at beginning of ***preference*** period, but makes it 90 days plus part of day of filing. In re White (1986, BC ED Tenn) 64 BR 843.

For ***preference*** purposes of 11 USCS § 547(b), 90-day period is determined by using date of filing of petition as operative date and counting backwards 90 days from that date. Johnson v Keller (In re Antweil) (1988, BC DC NM) 97 BR 63, 19 BCD 75, CCH Bankr L Rptr P 72737, dismd (1989, BC DC NM) 97 BR 69, 19 BCD 76, affd (1990, DC NM) 111 BR 337, CCH Bankr L Rptr P 73251, revd, remanded on other grounds (1991, CA10 NM) 931 F2d 689, 21 BCD 1069, 24 CBC2d 1772, CCH Bankr L Rptr P 73928, 16 UCCRS2d 400, affd (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

In determining when 90-day period of 11 USCS § 547 commences, count is backward from date of filing, rather than forward from date of transfer, and where that date is Saturday, as in present case, preceding Friday is commencement date, pursuant to ***Bankruptcy*** Rule 9006. Pineo v Charley Bros. Co. (In re J.A.S. Markets, Inc.) (1990, BC WD Pa) 113 BR 193, 20 BCD 708, 23 CBC2d 116 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

90-day ***preference*** period of 11 USCS § 547 is to be computed by counting backwards from date ***bankruptcy*** case was commenced, not by counting forward from date of transfer. In re Nelson Co. (1990, BC ED Pa) 117 BR 813, 20 BCD 1486, affd (1991, ED Pa) 128 BR 930, affd (1992, CA3 Pa) 959 F2d 1260, 26 CBC2d 979, CCH Bankr L Rptr P 74518, 117 ALR Fed 751 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211) and (criticized in Wilcox v CSX Corp. (2003) 2003 UT 21, 70 P3d 85, 473 Utah Adv Rep 25).

Ninety-day ***preference*** period of 11 USCS § 547 is computed by counting backwards from date ***bankruptcy*** petition was filed rather than forward from date of transfer. In re Carl Subler Trucking, Inc. (1990, BC SD Ohio) 122 BR 318, 21 BCD 273, CCH Bankr L Rptr P 73749.

Neither cases adopting majority view of counting backwards from petition date to determine 90-day preferential period of 11 USCS § 547, nor those cases favoring counting forward from transfer date include both transfer date and petition date, as there is only one terminal date regardless of which approach is taken; in present case, judgment lien became lien on debtor's real estate when judgment was docketed with court clerk, which occurred on November 15, 1990, 90 days before February 13, 1991 petition filing date. In re Levinson (1991, BC SD NY) 128

BR 365 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

Summary judgment was proper for creditor who properly perfected its security interest in debtor's mobile home before ninety-day ***preference*** period of 11 USCS § 547(b), where date of perfection was not date of issuance of certificate of title but was date application for certificate of title was filed, since notation on certificate of title related back to date title was applied for. Roberts v Green Tree Fin. Corp. (In re Cassady) (1996, BC ED Tenn) 197 BR 846.

Only dates, not precise times, mark 90-day ***preference*** period under 11 USCS § 547(b)(4)(A), thus creditor must return garnishment to Chapter 7 trustee, even though actual elapsed time between garnishment and filing is 90 days, 10 minutes. In re Kramer (1986, BAP9 Or) 64 BR 531.

257. Involuntary cases

Where parties involved stipulate to dismissal of involuntary ***bankruptcy*** in order that debtor may file voluntary petition but no notice or hearing is held and debtor files only asset and liability schedules rather than actual petition, involuntary proceeding continues and therefore date involuntary petition was filed remains date from which 90 day period for preferential transfers under 11 USCS § 547 must be calculated. Greene v Glazer (1981, SD NY) 10 BR 1013, 7 BCD 764, 4 CBC2d 627, CCH Bankr L Rptr P 67977.

Filing date for determining 90-day ***preference*** period in 11 USCS § 547(b)(4)(A) is date involuntary Chapter 7 petition was filed rather than on date debtor filed voluntary Chapter 11 petition; where parties convert pending case from one chapter to another, 11 USCS § 348 provides that date of filing of petition shall not change. In re Workmans Forest Products, Inc. (1988, BC DC Or) 82 BR 551.

Where complaints seeking to recover preferential transfers under 11 USCS § 547 and postpetition transfers under 11 USCS § 549 merely state that transfers occurred during ***preference*** period, they allow for possibility that transfers occurred during 23-day overlap period; thus it is irrelevant whether court uses date of filing of involuntary petition or date case was converted as starting point for calculating ***preference*** period and complaints will not be dismissed under FRCP 12(b)(6), made applicable by ***Bankruptcy*** Rule 7012. In re Manson Billard, Inc. (1988, BC ED Pa) 82 BR 769.

Where debtor has effected conversion of its pending involuntary Chapter 7 case to voluntary Chapter 11 case under 11 USCS § 706, date of original Chapter 7 petition is date Chapter 11 case is deemed to have been commenced, pursuant to 11 USCS § 348; thus transfer made after date of original involuntary filing but before date of conversion is not ***preference*** under 11 USCS § 547 but unavoidable postpetition transfer under 11 USCS § 549(b). In re Omaha Midwest Wholesale Distributors, Inc. (1988, BC DC Neb) 94 BR 157.

11 USCS § 547 ***preference*** period is measured from date involuntary petition is filed, not date order for relief is entered; in computing 90-day period, day of event is not included, but last day of period is included. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

258. Consolidated cases

In determining whether bank received preferential transfers, under 11 USCS § 547, operative date for computing 90-day ***preference*** period is date on which corporation filed ***bankruptcy*** not date when individual debtor's case was substantively consolidated with corporate case where bank treated debtors as one entity, as funds were taken from corporate accounts to satisfy individual debtor's debt. In re Baker & Getty Financial Services, Inc. (1992, CA6 Ohio) 974 F2d 712, 27 CBC2d 1112, CCH Bankr L Rptr P 74813, 20 UCCRS2d 1008 (criticized in Walton v Post-Confirmation Comm. of Unsecured Creditors of GC Cos. (In re GC Cos.) (2003, DC Del) 298 BR 226).

Sixth Circuit Court of Appeals declines to adopt District of Columbia Circuit's Auto-Train holding that before ordering nunc pro tunc consolidation, ***Bankruptcy*** Court must use balancing test to ensure that relation-back of nunc pro tunc consolidation order yields benefits offsetting harm it inflicts, for purposes of determining operative date for

computing 90-day ***preference*** period. In re Baker & Getty Financial Services, Inc. (1992, CA6 Ohio) 974 F2d 712, 27 CBC2d 1112, CCH Bankr L Rptr P 74813, 20 UCCRS2d 1008 (criticized in Walton v Post-Confirmation Comm. of Unsecured Creditors of GC Cos. (In re GC Cos.) (2003, DC Del) 298 BR 226).

Entry of nunc pro tunc order following consolidation of estates of two separate corporations, only one of which filed in ***bankruptcy*** in Chapter 11, but both of which were operated internally as one corporation, is invalid, because, while facts support consolidation, substantial prejudice arises to creditors of non-filing corporation who will be subject to ***preference*** actions under 11 USCS § 547(b)(4)(A) from 90 days of date of original filing; to allow nunc pro tunc orders in consolidation cases: trustee must show order confers some benefit or avoids some harm; (2) potential holder of ***preference*** from consolidated corporation must be unable to show that holder relied on corporation's separate credit; and (3) holder must fail to prove harm by shift in ***preference*** dates. In re Auto-Train Corp. (1987, App DC) 258 US App DC 151, 810 F2d 270, CCH Bankr L Rptr P 71618 (criticized in Alexander v Compton (In re Bonham) (2000, CA9 Alaska) 229 F3d 750, 2000 CDOS 8193, 2000 Daily Journal DAR 10895) and (criticized in Lisanti v Lubetkin (In re Lisanti Foods, Inc.) (2006, DC NJ) 2006 US Dist LEXIS 76844) and (criticized in In re Pearlman (2012, BC MD Fla) 462 BR 849, 55 BCD 275, 66 CBC2d 1522, CCH Bankr L Rptr P 82157, 23 FLW Fed B 209) and (criticized in In re Bauman (2015, BC CD Ill) 535 BR 289, 61 BCD 122, 74 CBC2d 8).

Where Chapter 7 debtor issued checks to defendants for payment of commodities that had already been delivered and checks bounced, necessitating issuance of replacement checks, which did not bounce, defendants could invoke contemporaneous-exchange-for-new-value exception, due to fact that payments released security interests attached to commodities, on basis that debtor received new value at time he issued replacement checks because those checks--and only those checks--extinguished banks' liens on commodities. Velde v Reinhardt (2007, DC Minn) 366 BR 894, 57 CBC2d 739, decision reached on appeal by (2008, CA8 Minn) 294 Fed Appx 242.

For purposes of determining whether payments made to lienholder fall within ***preference*** period of 11 USCS § 547, date of filing of petition of individual debtor, which was later amended to include corporation with individual debtor late filing separate petition, may be used by both individual and corporation since both cases subsequently were consolidated, permitting use of original filing date. In re Evans Temple Church of God in Christ & Community Center, Inc. (1986, BC ND Ohio) 55 BR 976.

Chapter 11 plan of reorganization confirmation order that substantively consolidated four debtors' estates did not apply retroactively to allow ***preference*** defendant to use new value defense without regard to which debtor received new value. Nickless v Avnet, Inc. (In re Century Elecs. Mfg.) (2004, BC DC Mass) 310 BR 485, 43 BCD 52, 52 CBC2d 313.

259. Converted cases

Payments within ***90 day*** period preceding filing of ***bankruptcy*** petition fall within requisite time period of 11 USCS § 547(b)(4)(A) even though case was later converted; conversion of case from one chapter to another does not change date of filing of petition for relief. In re General Office Furniture Wholesalers, Inc. (1984, BC ED Va) 37 BR 180.

Although debtor's Chapter 13 case was later converted to one under Chapter 7, conversion does not affect relevant petition date for purposes of 11 USCS § 547, which is date Chapter 13 petition was filed. In re Coco (1986, BC SD NY) 67 BR 365.

Commencement of ***preference*** period under 11 USCS § 547 in Chapter 7 case that has been converted from Chapter 11 is date of conversion with respect to property not included in Chapter 11 plan transferred after confirmation of plan to nonplan creditors. In re Hoggarth (1987, BC DC ND) 78 BR 1000, 16 BCD 931, 17 CBC2d 933.

Where complaints seeking to recover preferential transfers under 11 USCS § 547 and postpetition transfers under 11 USCS § 549 merely state that transfers occurred during ***preference*** period, they allow for possibility that transfers occurred during 23-day overlap period; thus it is irrelevant whether court uses date of filing of involuntary petition or date case was converted as starting point for calculating ***preference*** period and complaints will not be

dismissed under FRCP 12(b)(6), made applicable by ***Bankruptcy*** Rule 7012. In re Manson Billard, Inc. (1988, BC ED Pa) 82 BR 769.

260. Miscellaneous

Judgment in interpleader action constituted transfer within ***90-day preference*** period of 11 USCS § 547(e)(1)(B), where involuntary bank petition was filed against insurer within ***90 days*** of distribution of proceeds but in excess of ***90 days*** from entry of judgment, since transfer occurred on date contractual right of ***payment*** was assigned, not on date ***payment*** was actually made or collected. Ebert v Dailey Directional Servs. (In re Gibraltar Resources) (1996, ND Tex) 202 BR 586.

Otherwise preferential ***payment*** by Chapter 11 debtor/contractor to subcontractor was not improper because ***payment***, made in exchange for release of construction lien that subcontractor had placed on client's property, was substantially contemporaneous exchange for new value to debtor under 11 USCS § 547(c)(1) because lien release enabled debtor to receive retainage funds from client. Lovett v Homrich, Inc. (In re Philip Servs. Corp.) (2006, BC SD Tex) 359 BR 616, 47 BCD 152.

In order to plead facts in support of timing element of ***preference*** claim, trustee must allege specific dates corresponding with each transfer; trustee's complaint failed to specify dates for each transfer and therefore could not satisfy heightened pleading standard for ***preference*** claims; additionally, trustee must address whether transferee is insider of debtors when alleging preferential transfers between 90 days and one year prior to petition date. Angell v Day (In re Caremerica, Inc.) (2009, BC ED NC) 415 BR 200.

Transfer from ***bankruptcy*** debtor occurred during ***90-day preference*** period prior to ***bankruptcy*** petition date since, counting backwards from petition date, period ended on Saturday and thus was deemed to end on prior Friday when transfer occurred. Harrison v N.J. Cmty. Bank (In re Jesup & Lamont, Inc.) (2014, BC SD NY) 507 BR 452.

3. Particular Transfers

261. Assignments

As a matter of law, transfer of right to ***payment*** takes place at time of assignment; thus, in finding transfer to have taken place within ***90-day preference*** period, ***Bankruptcy*** Court incorrectly looked to underlying loan agreements, without properly considering plain language in applicable federal statutes, under which assignment was valid and was perfected from time of assignment. Desmond v State Bank of Long Island (In re Computer Eng'g Assocs.) (2002, DC Mass) 278 BR 665, subsequent app (2003, CA1 Mass) 337 F3d 38, 41 BCD 175, CCH Bankr L Rptr P 78885.

In action by Chapter 11 debtor-in-possession to recover alleged preferential transfers made by plaintiff to defendant, rental ***payments*** made by debtor to assignee are transfers which can be avoided as ***preferences*** under 11 USCS § 547, although assignment of those ***payments*** took place outside of ***90-day preference*** period, where actual ***payments*** were made within ***90 days*** of filing of Chapter 11 petition, as transfers were not considered complete until time rents accrued within ***90-day*** period under leased terms. In re Diversified World Invest., Ltd. (1981, BC SD Tex) 12 BR 517, 8 BCD 28.

Except within ***bankruptcy***, general deed of assignment for benefit of creditors, or in situation of fraud or bad faith, corporate officers may make ***preferences*** among creditors; since time during which other creditors were paid while United States and state were not paid is outside period during which such preferential ***payments*** would be recoverable under 11 USCS § 547 of ***bankruptcy*** code, other creditors were not "***preferenced***." In re Tanner's Transfer & Storage, Inc. (1982, BC ED Va) 22 BR 24.

Preferential transfer claim fails against bank for cashing certificates of deposit (CD) within ***90-day*** period because transfer of CD took place years before by way of assignment and perfection. In re Nutting (1984, BC DC Vt) 44 BR 233, 39 UCCRS 1857.

Where Chapter 7 debtor (1) assigned note and mortgage payable to debtor to credit union, (2) as security for note consolidating debtor's pre-existing indebtedness except for car loan, (3) assignment had effect of depleting debtor's estate, (4) assignment occurred within ***90 days*** of filling petition, and (5) assignment enabled credit union to receive more than it would have in liquidation, assignment is avoidable under 11 USCS § 547 despite dragnet clause contained in car loan which attempted to secure all liabilities owed by debtor. In re Fitzgerald (1985, BC DC Mass) 49 BR 62, CCH Bankr L Rptr P 70552.

Transfer of ***payment*** of balance on excavation contract from city to excavation company's indemnity bondholder, who succeeded to excavation company's contract rights, occurs when contract rights are assigned under indemnity agreement, not when actual transfer of funds takes place; when assignment takes place one year before filing of Chapter 13 petitions by company's individual partners, trustee cannot avoid transfer under 11 USCS § 547(b)(4) even though funds were transferred within ***90 days*** of petitions. In re Jacobson (1985, BC DC Minn) 54 BR 72.

Payment to creditor pursuant to assignment of proceeds from Chapter 7 debtor's contract with school district within ***90 days*** before debtor's Chapter 7 petition for relief was filed, at time when debtor was insolvent and on account of antecedent debt, evidenced by previously executed note, is preferential transfer under 11 USCS § 547(b); inasmuch as promissory note was given on July 15 and ***payment*** thereof was made on September 6, transaction is not substantially contemporaneous within exception to preferential transfers under 11 USCS § 547(c)(1). In re Slater (1985, BC DC SC) 54 BR 186.

Where debtor received possession car and manufacturer was assigned purchase money security interest in vehicle within ***90 days*** of ***bankruptcy*** petition under 11 USCS § 547(e)(2), creditor's interest can be avoided by trustee pursuant to 11 USCS § 547(b), because perfection of security interest in auto was not made in accordance with 11 USCS § 547(c)(3) where tax collector's office did not receive notice of lien within 10 days after debtor received possession of property. In re Scoviac (1987, BC ND Fla) 74 BR 635.

Trustee may not avoid under 11 USCS §§ 547 or 548 deed of trust, its assignment, and debtor's note to assignee where all were executed more than 1 year prior to filing of petition. In re Turner (1987, BC ED Tenn) 78 BR 166.

Chapter 7 debtor's execution of form provided by federal government to secure payment of debtor's antecedent debt and to secure any future advances made by creditor for purchases of cattle feed under dairy termination program is transfer within meaning of 11 USCS § 547; since creditor failed properly to perfect its security interest created by such assignment under state law, § 547(e)(2)(C) operates to bring effective date of transfer to immediately before date of filing of petition and therefore trustee is entitled under state law to subordinate creditor's lien and may avoid such lien. In re Propst (1988, BC WD Va) 81 BR 406, 17 BCD 335, 5 UCCRS2d 1106.

For ***preference*** purposes under 11 USCS § 547(b)(4), transfer of insurance proceeds assigned by Chapter 7 debtor to creditors occurred, at latest, on date of entry of agreed final judgment in interpleader proceedings filed by insurer even though checks were not issued to ***preference*** defendants until sometime later; assignment of rights was effective when assignment by judgment was made so that debtor did not transfer interest in property within ***preference*** period where judgment was entered more than 90 days before ***bankruptcy*** filing but checks were issued within 90-day period. Ebert v Blackmax Downhole Tools (In re Gibraltar Resources) (1996, BC ND Tex) 197 BR 246, 36 CBC2d 238, affd (1996, ND Tex) 1996 US Dist LEXIS 20997, reported in full (1996, ND Tex) 202 BR 586.

To determine whether ***preference*** period transfer to creditor that is secured on ***bankruptcy*** filing date is preferential, court must look at actual status of creditor on date of filing; hypothetical status is not constructed; creditor which was fully secured prior to ***payment*** cannot be ***preferenced*** in having received ***payment***; in determining secured status of company which financed Chapter 11 debtor's insurance premium for purposes of determining whether debtor's ***payments*** to company during ***90-day preference*** period were recoverable as ***preferences*** (which is separate issue from valuation of collateral), court will not follow "add-back" approach under which ***payments*** made during ***preference*** period are added back to indebtedness at time of petition and then measured by amount of collateral (unearned premiums) then available; correct approach is to (1) determine secured status of creditor company at time of petition. (2) assess whether each ***payment*** was accompanied by release of equivalent amount of collateral, and (3) compare amount of periodic decrease in value of collateral and

amount of payments alleged to constitute ***preference***. Schwinn Plan Comm. v Transamerica Ins. Fin. Corp. (In re Schwinn Bicycle Co.) (1996, BC ND Ill) 200 BR 980, motions ruled upon (1997, BC ND Ill) 204 BR 13, findings of fact/conclusions of law (1997, BC ND Ill) 205 BR 557, request gr, claim disallowed (1997, BC ND Ill) 210 BR 764 and (criticized in Intercontinental Polymers, Inc. v Equistar Chems., LP (In re Intercontinental Polymers, Inc.) (2005, BC ED Tenn) 359 BR 868, 44 BCD 183, 54 CBC2d 710) and (criticized in Falcon Creditor Trust v First Ins. Funding (In re Falcon Prods.) (2008, BAP8) 381 BR 543, 49 BCD 112, 59 CBC2d 222) and (criticized in Giuliano v RPG Mgmt. (In re NWL Holdings, Inc.) (2013, BC DC Del) 69 CBC2d 1762).

Where settlement agreement, letter, and stipulation did not contain language of express assignment, but used such language as "will be paid," "will receive," and "will be delivered," such instruments demonstrated sufficient intent and relinquishment of control to effect equitable absolute assignment before start of ***90-day preference*** period. Ebert v Black Max Downhole Tools (In re Gibraltar Resources) (1997, BC ND Tex) 211 BR 216, 31 BCD 261.

Where ***bankruptcy*** debtor assigned proceeds of letter of credit to creditors and trustee contended that creditors received only contractual right to ***payment*** which vested when creditors received ***payment*** within ***preference*** period of 11 USCS § 547(e)(3), assignments were not ***preferences*** since transfers occurred when proceeds were assigned which was not within ***preference*** period; although debtor had to perform all duties and present confirming documents in order to obtain payment from bank, its right to letter of credit proceeds came into play prior to that time, and thus debtor already acquired contract right to proceeds at time it made assignments. Floyd v Am. Block Roland Niles Int'l, Inc. (In re Cooper Mfg. Corp.) (2006, BC SD Tex) 344 BR 496, 46 BCD 117, 60 UCCRS2d 143.

262. Attachments and levies

Trustee of Chapter 11 debtor, manufacturer of wind turbine generators, cannot avoid customer's attachment lien as preferential transfer under 11 USCS § 547 where customer obtained temporary protective order covering debtor's assets prior to onset of ***90-day preference*** period and levied upon debtor's properties during ***90-day preference*** period preceding filing of debtor's ***bankruptcy*** petition, because under California law, creation of attachment lien by levy relates back to date on which customer obtained protective order. In re Wind Power Systems, Inc. (1988, CA9 Cal) 841 F2d 288, 17 BCD 621, CCH Bankr L Rptr P 72217.

Payment by third party to creditor of Chapter 11 debtor of funds owed to debtor is not voidable ***preference*** under 11 USCS § 547 where: (1) funds were subject of levy by creditor against third party; and (2) execution lien allowing levy was perfected, and transfer thus occurred, outside ***90-day preference*** period. In re Momentum Computer Systems International (1986, ND Cal) 66 BR 512.

Attachment is not ***preference*** under 11 USCS § 547 where it is judicial lien created more than 90 days prior to ***bankruptcy***; to be avoided beyond 90 days, lien must be that of insider who had reasonable cause to believe debtor was insolvent; although lien is valid under 11 USCS § 547, it may be avoided under 11 USCS § 522 to extent that it impairs exemption. In re Bradford (1980, BC DC Nev) 5 BR 18, 6 BCD 75, 1 CBC2d 952, affd (1980, DC Nev) 6 BR 741, 3 CBC2d 39.

Debtor may not defeat judgment which was docketed more than 90 days prior to debtor's filing of Chapter 13 petition, although actual levy upon judgment was made in 90 day period, where, under state law, docketed judgment constitutes lien on debtor's real estate from date of entry, and where, in any event, levy relates back to date writ of execution was delivered to sheriff, rather than actual date levy was made. In re Jordan (1980, BC DC NJ) 5 BR 59, 6 BCD 630, 2 CBC2d 635.

Transfer for purposes of ***preference*** voidable under 11 USCS § 547(b) occurs when proceeds yielded from bulk sale were given up to sheriff on account of unsatisfied judgment which creditor held, within 90 days before Chapter 7 petition was filed. In re Lucasa International, Ltd. (1981, BC SD NY) 14 BR 980, 8 BCD 444, CCH Bankr L Rptr P 68432.

Enforcement of judgment lien, insulated where it occurred more than 90 days before petition for relief, is not transfer voidable under 11 USCS § 547. In re Camacho (1982, BC DC Neb) 18 BR 967.

Creditor receives transfer of interest in debtor's property in contravention of 11 USCS § 547(b) where attachments representing transfer were recorded within 90 days of filing of petition even though attachments relate back to commencement of state court actions more than 90 days prior to filing where relation back theory covered in 11 USCS § 546(b), which concerns only trustee's § 544, § 545 and § 549 avoiding powers lends no support for defending against trustee's ***preference*** action brought pursuant to § 547(b). In re Minton Group, Inc. (1983, BC SD NY) 28 BR 789, CCH Bankr L Rptr P 69325 (criticized in In re Bennett Funding Group, Inc. (1997, BC ND NY) 1997 Bankr LEXIS 2359) and (criticized in In re Bennett Funding Group, Inc. (1998, BC ND NY) 1998 Bankr LEXIS 1940).

Debtors can withstand creditor's motion to dismiss on complaint that sheriff's levy and sale violated 11 USCS § 547(b) where execution took place 90 days prior to filing petition. In re Betinsky (1984, BC ED Pa) 45 BR 244.

Judicial lien attached to funds held by state court clerk issued order of disbursement after conclusion of previous suit for which funds were being held, which was nearly 6 months after debtors filed for relief; thus transfer is avoidable preferential transfer under 11 USCS § 547(b). In re Albuquerque Western Solar Industries, Inc. (1985, BC DC NM) 54 BR 174.

Under 11 USCS § 547(e)(1)(A), levy of prejudgment writ of attachment outside of 90-day period perfects creditor's lien against Chapter 11 debtor building contractor, even though judgment itself is obtained within 30 days of debtor's petition, because under state law once writ is recorded, attaching creditor has priority over any subsequent bona fide purchaser or creditor; thus debtor cannot avoid attachment as ***preference*** because transfer occurred outside of 90-day period. In re J.H. Welsh & Son Contracting Co. (1986, BC DC Ariz) 68 BR 520.

Oversecured creditor's receipt of $ 96.08 in late charges as part of its distribution of proceeds of sheriff's sale did not render entire transfer preferential so as to excuse debtor's inability to prove that creditor was neither unsecured or undersecured as required by 11 USCS § 547(b)(5) to show that creditor would have received more under Chapter 7; even had debtor established that late fees were improper, his remedy would have been to ask state court to correct errors in default judgment. O'Neill v Dell (In re O'Neill) (1997, BC ED Pa) 204 BR 881.

Because sheriff served notice of levy upon bank more than ninety days prior to ***bankruptcy*** filing and, under New York law, took possession of bank account prior to acquisition by any party who could assert priority of interest, transfer occurred beyond ***preference*** period of 11 USCS § 547(b)(4)(A) even though bank issued check to sheriff within ***preference*** period. Dorey v Perfetti Builder's Hardware, Inc. (In re New Life Builders, Inc.) (1999, BC WD NY) 241 BR 507, 43 CBC2d 362.

263. Checks

Debtor cannot recover as ***preference*** under 11 USCS § 547(b) funds paid by check to creditors prior to ***90-day*** period, even if checks were cashed within ***90-day*** period, as long as checks were presented to bank within reasonable time. In re Kenitra, Inc. (1986, CA9 Or) 797 F2d 790, CCH Bankr L Rptr P 71421, cert den (1987) 479 US 1054, 107 S Ct 928, 93 L Ed 2d 980.

Debtor's ***payment*** by check on existing debt, presented to bank within reasonable time and honored by bank, is deemed made, for purposes of 11 USCS § 547, at time debtor gave check to creditor. In re Kenitra, Inc. (1986, CA9 Or) 797 F2d 790, CCH Bankr L Rptr P 71421, cert den (1987) 479 US 1054, 107 S Ct 928, 93 L Ed 2d 980.

Any ***payment*** to unsecured creditor within ***90-day preference*** period to make good bounced check is avoidable ***preference*** provided that requirements for avoidable ***preference*** under 11 USCS § 547(b) are otherwise satisfied. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

Equities do not mandate nonavoidability of wire transfers made by debtor to floor plan financier to make good or bad checks, where floor plan financier voluntarily released its security interest in mobile homes without waiting to see if debtor's check cleared; furthermore, rule that payment made within ***preference*** period designed to make good dishonored check delivered prior to ***preference*** period removes need for case-specific examination of

dishonored checks made good within ***preference*** period. In re Barefoot (1991, CA4 NC) 952 F2d 795, 4 Fourth Cir & Dist Col Bankr Ct Rep 67, 22 BCD 717, 25 CBC2d 1719, CCH Bankr L Rptr P 74401, 16 UCCRS2d 417.

Drawee bank's issuance of cashier's check drawn on itself in exchange for check drawn on it by its customer is equivalent of ***payment*** in cash for purpose of "transfer of an interest in property of the debtor" element of 11 USCS § 547(b); where depositor withdrew funds from debtor industrial trust and credit company within ***90 days*** before latter's ***bankruptcy*** filing and was given check drawn on bank with instructions to exchange it at drawee bank for cashier's check, transaction involved transfer of property of debtor which could be found preferential under 11 USCS § 547. DuVoisin v Coker (In re Southern Indus. Banking Corp.) (1992, ED Tenn) 189 BR 697.

Trustee may not use 11 USCS § 547(b)(4) to avoid transfer of check delivered to creditor 91 days before filing but honored 85 day before filing, because, under Iowa law, check is effective as instrument when delivered, and, in any event, 11 USCS § 547(e)(2)(A) provides for relation back to delivery date if perfection is made within 10 days, which occurred here when check was honored; further, legislative history of 11 USCS §§ 547(c)(1) and (2) indicates that Congress regarded delivery date of check as time of ***payment***. In re Advance Industries, Inc. (1986, BC ND Iowa) 63 BR 677, 14 BCD 982, CCH Bankr L Rptr P 71413.

264. --Honor date as transfer date

In determining whether transfer occurred within ***90-day preference*** period of 11 USCS § 547(b)(4)(A), transfer made by check is deemed to occur on date drawee bank honors check. Barnhill v Johnson (1992) 503 US 393, 112 S Ct 1386, 118 L Ed 2d 39, 92 CDOS 2523, 92 Daily Journal DAR 4011, 22 BCD 1218, 26 CBC2d 323, CCH Bankr L Rptr P 74501, 17 UCCRS2d 1, 6 FLW Fed S 127.

Although Congress intended for date of delivery of check to control in applying exceptions under 11 USCS § 547(c)(1) and (c)(2), it did not intend for date of delivery of check to control in determining whether transfer falls within ***preference*** period under 11 USCS § 547(b); accordingly, transfer occurs for purposes of § 547(b) on date check is honored by drawee bank for purposes of computing 90 days ***preference*** period. In re Georgia Steel, Inc. (1984, BC MD Ga) 38 BR 829, 11 BCD 1163, CCH Bankr L Rptr P 69797 (criticized in In re Lids Corp. (2001, BC DC Del) 260 BR 680) and (criticized in Beasley Forest Products Inc. v Durango Ga. Paper Co.(In re Durango Ga. Paper Co.) (2003, BC SD Ga) 297 BR 326, 50 CBC2d 1649) and (criticized in In re USA Labs, Inc. (2006, BC SD Fla) 19 FLW Fed B 389) and (criticized in Southern Polymer, Inc. v TI Acquisition, LLC (In re TI Acquisition, LLC) (2009, BC ND Ga) 410 BR 742, CCH Bankr L Rptr P 81690) and (criticized in In re Circuit City Stores, Inc. (2010, BC ED Va) 426 BR 560, CCH Bankr L Rptr P 81667) and (criticized in In re Energy Conversion Devices, Inc. (2013, BC ED Mich) 486 BR 872, 57 BCD 164, 69 CBC2d 55).

For purposes of 11 USCS § 547(b)(4), date of honor of check is date on which alleged preferential transfer occurred because (1) prior to this date, third party creditors may prevent collection of check through garnishment of bank account or payer may stop ***payment*** of check; and (2) there may be insufficient funds to cover ***payment*** of check. In re Fasano/Harriss Pie Co. (1984, BC WD Mich) 43 BR 871, CCH Bankr L Rptr P 70108, 40 UCCRS 538, affd (1987, WD Mich) 71 BR 287.

Chapter 11 debtor may avoid under 11 USCS § 547 transfer to creditor by check honored by bank within ***90-day*** period where ***payment*** was made on account of antecedent debt, inasmuch as check was made in exact amount of invoice and was paid 1 1/2 months after debt was incurred, and creditor thus received 100 percent of what it was owed, whereas in liquidation general unsecured creditors would have received only 10 percent distribution. In re Hartwig Poultry, Inc. (1985, BC ND Ohio) 56 BR 330.

Payment of $ 20,000 by check is avoidable ***preference*** under 11 USCS § 547(b)(4) where, under Georgia law, transfer occurs when drawee bank honors check, which occurred within ***90-day*** period, and creditor received more than it would have received under Chapter 7. In re Sweetapple Plastics, Inc. (1987, BC MD Ga) 77 BR 304, 5 UCCRS2d 1294.

Transfer of property by way of check is made only when Chapter 7 debtor's bank ultimately honors check; if such transfer is made by debtor within ***90 days*** prior to filing of petition, trustee is entitled to utilize provisions of 11 USCS

§ 547(b) to void transfer and to recover proceeds of check. In re Propst (1988, BC WD Va) 81 BR 406, 17 BCD 335, 5 UCCRS2d 1106.

Since bank's ***payment*** of check issued by Chapter 7 debtor did not occur until after ***bankruptcy*** petition was filed, 11 USCS § 547 is not applicable. In re W & T Enterprises, Inc. (1988, BC MD Fla) 84 BR 838, 17 BCD 692.

"Transfer" by Chapter 11 debtor to transferee by check is effective on date bank honors check for purposes of determining "transfer date" for ***preference*** period under 11 USCS § 547(b)(4)(A); therefore, where debtor's check was delivered to transferee 92 days prepetition but was not honored until 83 days before filing date, payment constitutes preferential transfer and can be avoided by debtor. In re AMWC, Inc. (1988, BC ND Tex) 94 BR 428, 20 CBC2d 1317.

For ***preference*** purposes of 11 USCS § 547, "transfer" of check does not occur upon delivery of check, but rather occurs when check is honored by bank. In re Sims Office Supply, Inc. (1988, BC MD Fla) 94 BR 744, 18 BCD 1006.

Payment of invoices by Chapter 11 debtor were avoidable ***preferences*** under 11 USCS § 547(b) where court finds, for purposes of ***90 day preference*** period, date of transfer is not date check is delivered, but date check is honored by paying bank. Anderson-Smith & Assocs. v Xyplex (In re Anderson-Smith & Assocs.) (1995, BC ND Ala) 188 BR 679, 28 BCD 189.

Two ***payments*** by debtor to supplier fell within ***90-day preference*** period because, although one check was issued outside ***90-day preference*** period, date check was honored, which was within ***90-day preference*** period, controlled whether or not transfer occurred within ***preference*** period. Goodman v Triple "C" Marine Salvage, Inc. (In re Gulf Fleet Holdings, Inc.) (2013, BC WD La) 485 BR 329, judgment entered (2013, BC WD La) 69 CBC2d 353.

Transfer is preferential under 11 USCS § 547(a) where check was received and honored within ***90 day*** period. In re Gold Coast Seed Co. (1983, BAP9 Cal) 30 BR 551, 10 BCD 1049, CCH Bankr L Rptr P 69305.

Check sent by Chapter 11 debtor to creditor 91 days before debtor filed his petition was ***preference*** under 11 USCS § 547(b) since transfer of ***payment*** by check does not occur when check is mailed, but rather on date check is delivered or date check was honored, which both occurred within ***90 days*** of filing of petition. In re Nucorp Energy, Inc. (1988, BAP9) 92 BR 416, 18 BCD 550, 19 CBC2d 851, CCH Bankr L Rptr P 72499.

Transfer for purposes of 11 USCS § 547(b)(4)(A) occurs on date when drawee bank honors check, not on date of delivery of check which applies to § 547(c), since such rule requires calculation of only one, easily identifiable date, and ***payment*** is not actually parted with until bank honors check and releases funds. In re Nucorp Energy, Inc. (1988, BAP9) 92 BR 416, 18 BCD 550, 19 CBC2d 851, CCH Bankr L Rptr P 72499.

265. Electronic transfers

Debtor's financial statements were not per se sufficient to rebut statutory presumption of insolvency, as payments in question were effected by wire transfer on December 1, 2000, January 16, 2001, and January 22, 2001 and debtor's ***bankruptcy*** petition was filed on February 28, 2001, and only other evidence that creditor offered in that regard was opinion testimony of two experts, which court excluded from evidence in accordance with its obligation to act as "gatekeeper" to assure reliability of expert testimony as experts' opinions were so speculative that it could not be said that they were supported by good grounds; therefore, presumption was sufficient as matter of law to establish debtor's insolvency at times of transfers to creditor. Katz v Wells (In re Wallace Bookstores, Inc.) (2004, BC ED Ky) 316 BR 254, summary judgment gr, motion gr, judgment entered, count dismd (2004, BC ED Ky) 51 CBC2d 1454.

266. Judgments and liens

Because transfer of debtor's bank account in state turnover proceeding occurred less than 90 days before debtor filed for ***bankruptcy*** and because transfer met all other requirements for preferential transfer, transfer was avoidable by trustee. Flooring Sys. v Chow (In re Poston) (2014, CA5 Tex) 765 F3d 518, 59 BCD 256.

Judicial liens attached under Florida law when writs of execution were delivered to sheriff and therefore when writs were delivered within 90 days preceding ***bankruptcy*** petition, liens constitute ***preferences*** and are avoidable under 11 USCS § 547(b). In re Vero Cooling & Heating, Inc. (1981, BC SD Fla) 11 BR 359, CCH Bankr L Rptr P 68074.

Trustee may avoid judicial liens which became such within 90-day period under 11 USCS § 547. In re Fair (1983, BC MD Ala) 28 BR 160.

Fixing of judicial lien upon property of debtor affected by legal or equitable proceeding within ***90 days*** of filing of petition constitutes transfer voidable under 11 USCS § 547. In re Antinarelli Enterprises, Inc. (1985, BC DC Mass) 49 BR 412.

Under either Maryland or District of Columbia law, union's lien attached to funds owing to Chapter 11 debtor within ***90-day preference*** period of 11 USCS § 547(b)(4)(A) on date on which union obtained unimpeachable right to those specific funds under local law; therefore ***payment*** to union by corporation owing money to debtor is ***preference***. In re La Boucherie Bernard, Ltd. (1985, BC DC Dist Col) 55 BR 22.

Judicial liens which become fixed on properties of estate within ***90 days*** of ***bankruptcy*** filing are subject to preferential attack by trustee 11 USCS § 547(b) and liens must fail if all other operating elements of § 547(b) are present. In re Industrial Distribution Services, Inc. (1988, BC MD Fla) 94 BR 760.

State court judgment that held 70 percent of recovered treasure did not belong to debtor is not voidable by trustee as ***preference*** under 11 USCS § 547(b) since judgment did not transfer any property of debtor but rather judgment only determined property interest; such judgment determining property interests is not voidable as ***preference*** merely because it was entered within 90-day ***preference*** period. In re Wilson (1989, BC SD Fla) 95 BR 841.

Transfer of funds as result of judgment in interpleader action was made on date final decree was entered by state court, not on date funds were deposited with court or that funds were disbursed by clerk; hence, alleged avoidable ***preference*** occurred within 90 days of filing of ***bankruptcy*** petition. In re Professional Coatings (N.A.) (1997, BC ED Va) 210 BR 66, 9 Fourth Cir & Dist Col Bankr Ct Rep 346.

Debt on loan which was to be secured by tobacco crop debtor agreed to plant in coming year was nondischargeable under 11 USCS § 523(a)(2)(A) where debtor ceased farming within 12 days after obtaining loan and notified numerous landlords he would not be leasing their tobacco allotment and land in forthcoming year. Planters & Growers Golden Leaf Warehouse v Baird (In re Baird) (1997, BC DC SC) 229 BR 361.

Claim Nos. 12 and 13 were reduced to judgment on August 15, 2005, which was time period within two weeks of debtor's ***bankruptcy*** filing; to extent any such judgments operated as lien against any assets of debtor, or to extent entry of judgments operated to erase any contractual rights or defenses of debtor, judgments were avoidable under preferential transfer provisions of ***Bankruptcy*** Code, 11 USCS § 547. Benninger v First Colony Life Ins. Co. (In re Benninger) (2006, BC WD Pa) 357 BR 337.

Bankruptcy court avoided liens Chapter 11 debtor and its subsidiaries gave to bank and other lenders on $ 207.3 million tax refund debtor received from U.S. Government, and ordered bank and other lenders to disgorge all funds they were paid from tax refund together with interest; liens were preferential transfer under 11 USCS § 547(b) because debtor acquired right to refund less than 90 days before it declared ***bankruptcy***, they were made for benefit of bank and other lenders, and they enabled bank and other lenders to obtain more from debtor's ***bankruptcy*** estate than they would have obtained if debtor had filed ***bankruptcy*** under Chapter 7 of ***Bankruptcy*** Code. Official Comm. of Unsecured Creditors of Tousa, Inc. v Citicorp N. Am., Inc. (In re Tousa, Inc.) (2009, BC SD Fla) 52 BCD 66, substituted op (2009, BC SD Fla) 422 BR 783, quashed, app dismd, in part, judgment entered (2011, SD Fla) 444 BR 613, revd, remanded (2012, CA11 Fla) 680 F3d 1298, 56 BCD 135, 67 CBC2d 1035, CCH

Bankr L Rptr P 82276, 23 FLW Fed C 1042 and (criticized in Meoli v Huntington Nat'l Bank (In re Teleservices Group, Inc.) (2011, BC WD Mich) 444 BR 767, 54 BCD 129).

Lien Order caused perfection of equitable lien; lien order therefore fixed timing of transfer as being "made" within ***90-day preference*** period. D'Angelo v J.P. Morgan Chase Bank, N.A. (In re D'Angelo) (2014, BC ED Pa) 505 BR 650, 59 BCD 37, 71 CBC2d 916, affd (2015, ED Pa) 2015 US Dist LEXIS 43225.

Unpublished Opinions

Unpublished: Chapter 13 debtor was entitled to summary judgment on her claims that three transfers realty company she owned made to law firm and arbitrator to satisfy state court judgment, and two additional ***payments*** she made when she transferred checks that were issued to defunct company she owned to law firm and arbitrator, were avoidable under 11 USCS § 547; ***preference*** period for transfers from realty company began when state court docketed consent order which allowed defendants to garnish future income debtor received from company, not when court issued prior order which awarded arbitrator attorney fees and costs, and all five transfers were made within ***90 days*** of date debtor declared ***bankruptcy***, at time when debtor was insolvent. Rzasa-Ormes v Arturi, D'Argenio, Guaglardi & Meliti, LLP (2010, BC DC NJ) 2010 Bankr LEXIS 3747.

267. --Garnishment lien

Where trustee is seeking to avoid transfer made within 90 days of filing of petition under 11 USCS § 547(b), state law determines time at which transfer is made; where under state law judicial lien created by writ of garnishment comes into being upon entering of judgment, "perfected transfer" within scope of 11 USCS § 547(e)(1)(B) occurred within 90 day period and is avoidable. In re McCoy (1984, BC DC Ariz) 46 BR 9.

Judgment creditor's garnishment liens on checking account and limited partnership interest may not be avoided as preferential transfers under 11 USCS § 547(b)(4)(A) where transfers occurred for ***preference*** purposes when liens were perfected, which was more than ninety days before commencement of Chapter 7 case; however, garnishment liens on debtor's IRA and simplified employee pension are avoided as preferential transfers because writs of execution were improperly served and were not perfected until date when objections to improper service were waived, and waivers occurred within ninety-day period. Pennsylvania Capital Bank v Glosser (In re Allen) (1998, BC WD Pa) 228 BR 115 (criticized in Korman Commer. Props. v Furniture.com, LLC (2013) 2013 PA Super 295, 81 A3d 97).

Although lien that created garnishment of debtor's wages was levied more than 90 days prior to date of his ***bankruptcy*** filing, garnishing lien attached when wages became payable to debtor, which was within 90 day ***preference*** period. Guzik v Ford Motor Credit Co., LLC (In re Guzik) (2016, BC DC Md) 75 CBC2d 394.

268. --Lien on personal property

Creditor's judgment lien is avoidable under 11 USCS § 547(b)(4) where creditor obtained judgment on debtor's personal property within 90 days before date of debtor's filing ***bankruptcy***, judgment lien was based on antecedent debt owed by debtor to creditor, transfer benefited creditor, was made while debtor was insolvent, and enabled the creditor to receive more than it would have received if transfer had not been made; fact that sheriff had received writ of execution before date debtor filed ***bankruptcy*** but failed to levy upon debtor's property until after filing is irrelevant. In re Dutt (1981, BC DC SD) 8 BR 655.

Trustee may recover proceeds of execution sale of debtor's personal property where executions on which sheriff's sale was held were within 90 days of filing of ***bankruptcy*** and amounts received from the sale thus constituted preferential transfers under 11 USCS § 547(b); however, trustee may not recover sale proceeds held by state agencies because statutory liens held by these agencies may not be avoided under 11 USCS §§ 545(1)(F) and 547(c)(6) since execution was levied at insistence of creditor other than state agencies. In re B.H.B., Inc. (1985, BC WD Pa) 52 BR 20.

Secured creditor's acceptance of motor vehicle as substitute collateral on earlier note and security agreement, without timely perfection of its lien as required by ***Bankruptcy*** Code and state law, was voidable ***preference*** under 11 USCS § 547(b). Strauss v Chrysler Fin. Co., L.L.C. (In re Prindle) (2001, BC WD Mo) 270 BR 743, 38 BCD 213.

Bank's lien was properly perfected upon filing and endorsement of application for duplicate title that reflected bank's lien; because that date was outside 90 day ***preference*** window, debtor's ***preference*** action to avoid lien against car failed. North v Desert Hills Bank (In re North) (2004, BC DC Ariz) 310 BR 152, 53 UCCRS2d 635, subsequent app (2006, CA9 Ariz) 212 Fed Appx 626.

269. --Lien on real property

Recording of judgments against debtors' real property constitutes preferential transfer under 11 USCS § 547(b) where judgment was recorded exactly 90 days before petition was filed. In re Bates (1983, BC DC SC) 35 BR 5.

Creditor has valid lien against property fraudulently conveyed by Chapter 7 debtors and lien is not avoidable by trustee where (1) creditor filed suit naming debtors, fraudulent transferees and property, (2) he filed notice of lien lis pendens, (3) his lien was perfected outside 90-day limit for avoiding ***preferences*** under 11 USCS § 547 and (4) trustee's rights under 11 USCS § 544 do not permit avoidance of lien because filing of notice of liens lis pendens gave creditor rights even as against subsequent bona fide purchaser for value. In re Bell (1985, BC MD Tenn) 55 BR 246.

For purposes of 11 USCS § 547, entry of judgment within 90-day period in creditor's state court wrongful conveyance action relates back to pre-***90-day*** period, prejudgment attachment of proceeds from sale of Chapter 13 debtor's farm; thus creditor has perfected judicial lien. In re Coston (1986, BC DC NM) 14 BCD 1228.

Transfer of $ 1,800 to judgment creditor at real estate closing in order to convey debtor's property free and clear of liens is avoidable ***preference*** under 11 USCS § 547, where (1)both entry of judgment and ***payment*** occurred during ***90-day preference*** period, were for creditor's benefit on account of antecedent debt, and were made while debtor was solvent, and (2) $ 1,800 came directly from proceeds received by debtor at closing and was thus property in which debtor had interest, having been "earmarked" for creditor only in sense that creditor's avoidable judgment had to be paid to convey clear title, as purchasers insisted. In re Joseph M. Eaton Builders, Inc. (1988, BC WD Pa) 82 BR 775, 17 BCD 345.

Obtaining judgment lien within 90 days of ***bankruptcy*** did not have preferential effect, and requirement of 11 USCS § 547(b)(5) is not met, despite fact that judgment creditors received additional transfer of interest in subject property within 90 days of ***bankruptcy*** at time judgment was entered in state court setting aside conveyance, where setting aside conveyance from debtor to his parents did not enable creditors to receive more than they would have received in Chapter 7 case absent entry of judgment; judgment lien is redundant of liens already held by creditors by virtue of commencement of fraudulent conveyance action and filing of lis pendens notice, and therefore judgment lien did not enable creditors to receive more than they would have received without judgment lien. Butler v Grimminger (In re Carlson) (1995, BC DC Neb) 177 BR 645.

Under case-by-case approach to determining "contemporaneity" of transfers under 11 USCS § 547(c)(1), bank failed to meet its burden of proof in establishing that exception to avoidance of mobile home refinancing lien as ***preference*** existed, in absence of any showing that its delay in perfecting was reasonable or occasioned by factors beyond its control. Vieira v Anna Nat'l Bank (In re Messamore) (2000, BC SD Ill) 250 BR 913, 36 BCD 114, 44 CBC2d 1002, CCH Bankr L Rptr P 78234 (criticized in Collins v Greater Atl. Mort. Corp. (In re Lazarus) (2005, BC DC Mass) 334 BR 542).

Chapter 13 debtors failed to assert colorable claim under 11 USCS § 547 against secured lender that foreclosed on their property pre-petition because transfer took place well outside ninety-day ***preference*** period. Stewart v JPMorgan Chase Bank, N.A. (In re Stewart) (2012, BC WD Pa) 473 BR 612, app den, affd (2013, WD Pa) 2013 US Dist LEXIS 111516.

Lis pendens filed by debtor on disputed properties, taken along with ex-husband's motion for declaration that properties were his separate property, did not constitute preferential transfer that could be avoided by trustee because any transfer occurred upon filing of lis pendens, which was filed several years prior to petition date. Angell v Faison (In re Faison) (2014, BC ED NC) 518 BR 849.

Unpublished Opinions

Unpublished: Judgment liens against ***bankruptcy*** debtors' properties were avoidable under 11 USCS § 547(b) as preferential transfers which occurred during 90-day ***preference*** period where judgments only granted money damages and denied equitable liens, and thus judgment liens did not relate back to date of lis pendens which preserved only property interests. Coyote Growth Mgmt, LLC v McBroom (In re 12 Percent Fund I, LLC) (2010, BC DC Ariz) 2010 Bankr LEXIS 77, affd, app dismd, in part (2012, CA9 Ariz) 472 Fed Appx 808.

270. --Lien on proceeds of action

Lien upon proceeds of debtor's action for damages against third party cannot be avoided as ***preference*** under 11 USCS § 547(b) since no transfer occurred within 90 days of ***bankruptcy*** filing. In re Janssen (1984, BC ED Va) 42 BR 294, CCH Bankr L Rptr P 70030.

Hospital lien on debtor's recovery in damages action is not avoidable under 11 USCS § 547(b) since hospital was not "insider" and whether date of transfer is considered to be date when debtor brought action for damages against alleged tortfeasor, triggering statute giving rise to lien a later date when hospital effectuated its lien by filing notice thereof, transfer long preceded 90-day prepetition date. In re Janssen (1984, BC ED Va) 42 BR 294, CCH Bankr L Rptr P 70030.

271. Prior agreements

Stipulation between debtor and creditor in state court action, not endorsed by court and executed prior to any court action but alleged to be in lieu of state court injunction, which proposes to create escrow account to be funded from proceeds of future sale, is insufficient to create lien on sale proceeds; funds came into existence within 90 days of ***bankruptcy*** as did transfer to creditor by means of escrow account and no funds existed prior to 90-day period in which creditor had perfected interest; thus, automatic stay is to continue and either escrow or sale was transfer within 90 days and is voidable ***preference*** under 11 USCS § 547. In re SLL, Inc. (1985, BC DC Mass) 55 BR 223.

Even though attorneys for bank carefully structured sale of Chapter 7 debtor liquor store so that transfer of debtor's assets by various assumptions of loans occurred on certain date, where bank waits to record assumptions and reassignments of loans until one month later, after it actually received monies from buyers of debtor's business, and within 90 days of involuntary petition, transfer has occurred within 90-day period and is avoidable under 11 USCS § 547. In re Express Liquors, Inc. (1986, BC DC Md) 65 BR 952.

To extent that recording of well-operating agreements within 90 days of Chapter 11 filing adds enforceability to operator's lien contained in agreements, it is ***preference*** and is avoidable under 11 USCS § 547; recording of agreement postpetition, to extent it asserts operator's lien, is violation of automatic stay. In re Wilson (1987, BC ND Tex) 69 BR 960.

Perfection of lien as part of refinancing of existing car loan within 90 days of ***bankruptcy*** did not create avoidable performance where refinancing did not diminish estate. Gregory v Community Credit Co. (In re Biggers) (2000, BC MD Tenn) 249 BR 873.

Where ***bankruptcy*** debtor sold building to contractor which performed work on debtor's real estate development and provided contractor credit against sale price based on amount due to contractor from debtor, credit which contractor received was effective on date of closing rather date of sale contract, and thus transfer of credit was within ***preference*** period and avoidable by ***bankruptcy*** trustee under 11 USCS § 547(b). Brown v Job (In re Polo Builders, Inc.) (2010, BC ND Ill) 433 BR 700, 53 BCD 174.

272. Real estate transactions, generally

Under 11 USCS § 547(e)(2)(B), state law controls determination of date of transfer of interest in real property; where notice makes transfer of real property good against third parties, Chapter 11 debtor who filed warranty deed within 90 days of petition perfected transfer upon filing deed, not on prior date when financial exchange between creditors and debtor took place, and thus transfer meets requirement of 11 USCS § 547(b)(4)(A) and is voidable. In re Lewis W. Shurtleff, Inc. (1985, CA9 Cal) 778 F2d 1416, 13 CBC2d 1400, CCH Bankr L Rptr P 70902 (criticized in Sierra Invs., LLC v SHC, Inc. (In re SHC, Inc.) (2005, BC DC Del) 329 BR 438, 45 BCD 98, 58 UCCRS2d 573).

Date of recordation of deed is not date of transfer under 11 USCS § 547(b), even though recordation is 16 months after Chapter 7 debtors sold residence to son and daughter-in-law, because transferees immediately took possession and resided in property, perfecting transfer at time of sale under state law and thus transfer cannot be avoided. In re Gulino (1985, CA9 Cal) 779 F2d 546, 14 CBC2d 289, CCH Bankr L Rptr P 70907.

Transfer, as defined in 11 USCS § 101, includes conditional, involuntary parting of interest in property, and pursuant to 11 USCS § 547(e)(1)(A) and 547(e)(2), for purposes of avoiding preferential transfers, transfer of real property occurs when transfer is perfected, and perfection occurs when bona fide purchaser of such property cannot acquire interest superior to that of transferee; thus, trustee cannot avoid attachment against real property as ***preference*** under § 547, where attachment was transfer that took place outside of 90-day ***preference*** period, notwithstanding that final judgment was rendered in state court action within period. In re Mills (1983, BC DC Me) 32 BR 507, 83 ALR Fed 523.

Given that under Ohio Revised Code § 5301.25 lien on real estate is accomplished by recording lien with proper Recorder's Office, and given that pursuant to 11 USCS § 547(e)(1)(A) transfer occurs when this recording is complete, lien recorded within 90 days of debtor's filing of ***bankruptcy*** petition is voidable transfer within meaning of 11 USCS § 547 notwithstanding that instrument was actually executed more than year previously. In re Marston (1983, BC ND Ohio) 33 BR 597.

Transfer of real property by husband and wife debtors to debtor husband's parents for $ 1,500 in satisfaction of antecedent debt of $ 38,000, incurred in purchasing property, within 30 days of filing petition is preferential transfer under 11 USCS § 547(b). In re Vedaa (1985, BC DC ND) 49 BR 409.

Creditor banks' foreclosure lis pendens filings were avoided ***preferences*** and did not preclude trustee from attaining bona fide purchaser status under 11 USCS § 544(a)(3), where, although banks relied on debtor's assertion that she owned properties at issue, banks' mortgages were not properly recorded against entities which possessed legal interests in properties. Rice v First Ark. Valley Bank (In re May) (2004, BC ED Ark) 310 BR 405.

The debtor's assignment of two real estate purchase contracts to his former lender were not fraudulent or disguised transactions as matter of factual law under Colo. Rev. Stat. § 38-10-120, and transactions were not avoidable by trustee under 11 USCS § 544 or 547. Farinash v Tuscany 2 Residential, LLC (In re Martin) (2009, BC ED Tenn) 419 BR 772.

In case where tax sale certificate holder sought to continue with sale of debtors' principal residence, acquired through tax foreclosure proceeding under New Jersey law, property transfer could not be avoided as preferential transfer because transfer occurred outside of 90-day ***preference*** period, but debtors could pursue fraudulent conveyance in adversary action. In re Varquez (2013, BC DC NJ) 502 BR 186.

Transfer by Chapter 7 debtor of certain proceeds from sale of family residence pursuant to post-dissolution orders by state court issued within 90 days of debtor's ***bankruptcy*** filing did not result in recoverable transfer of interest of debtor in property and constitute avoidable ***preference*** under 11 USCS § 547(b), where state court entered its final judgment of dissolution over one year prior to commencement of ***bankruptcy*** proceedings and reserved continuing jurisdiction to oversee, approve, and adjust distribution of sale proceeds between spouses, thereby putting proceeds beyond reach of debtor and alienation by creditors and eliminating them as part of ***bankruptcy*** estate. Keller v Keller (In re Keller) (1995, BAP9 Cal) 185 BR 796, 95 CDOS 7990, 95 Daily Journal DAR 12327, 34 CBC2d 160, CCH Bankr L Rptr P 76654.

Unpublished Opinions

Unpublished: Payment of $ 50,000 made by debtor to creditor within ***preference*** period to induce creditor to release unsecured lien against debtor's and his wife's real property, constituted preferential transfer and was avoidable under 11 USCS § 547(b), and was not subject to exemption under 11 USCS § 547(c). Obuchowski v Entis (In re Robert) (2007, BC DC Vt) 2007 Bankr LEXIS 2852.

273. --Mortgages

Under 11 USCS § 547(b), third mortgage upon debtor's real estate given to seller of stock by stock buyers under stock purchase agreement is not voidable, where trustee failed to establish by fair preponderance of evidence that debtor was insolvent or that seller of stock had reasonable cause to believe so at time of transfer. In re Sooner Truck & Tractor, Inc. (1982, BC WD Okla) 17 BR 740.

Mortgage was properly perfected pursuant to 11 USCS § 547(e) as of date Ohio passed statute creating presumption of proper execution of mortgage and could not be avoided under 11 USCS § 544(a)(3), where statute's prospective application concerned relationship between holder of recorded mortgage and subsequent bona fide purchaser, not mortgagor and mortgagee, and even defective recordation served as constructive notice to trustee as hypothetical bona fide purchaser. Logan v Citifinancial, Inc. (In re Stewart) (2000, BC SD Ohio) 256 BR 259, 45 CBC2d 582.

Debtor failed to state cause of action where, although debtor's amended complaint pleaded some of elements of 11 USCS § 547, it did not allege that transfer resulted in creditor receiving more than it would have in Chapter 7 or that transfer was to or for creditor's benefit. Davis v SunTrust Mortg., Inc. (In re Davis) (2002, BC WD Pa) 281 BR 626, 39 BCD 258, 48 CBC2d 1540.

Debtor in possession was entitled to avoid creditor's mortgage interest in leasehold property when creditor held mortgage for number of years but did not file notice of its security interest, as required under state law, until 90-day look back period was in effect because of debtor's ***bankruptcy*** proceeding; fact that creditor filed security interest for debtor's fixtures was insufficient to provide hypothetical purchaser of leasehold interest with notice of mortgage on leasehold property. Day-By-Day Enters. v Franchise Mortg. Acceptance Corp. (In re Day-By-Day Enters.) (2005, BC DC Kan) 44 BCD 97.

Trustee was not entitled to recover proceeds of loans Chapter 7 debtor sold to mortgage broker before debtor declared ***bankruptcy***, even though broker had not recorded mortgages that secured loans; although broker would have been required to perfect its interest in loans if it had acted as lender, it was not required to do so because it purchased loans from debtor, and loans were not property of debtor's estate that could be recovered under 11 USCS § 544, or ***preferences*** that could be avoided under 11 USCS § 547. Stalford v Lion Fin., LLC (In re Lancaster Mortg. Bankers, LLC) (2008, BC DC NJ) 388 BR 106, op replaced, summary judgment gr (2008, BC DC NJ) 391 BR 714, 50 BCD 62, 59 CBC2d 1696.

Creditor was entitled to summary judgment on trustee's claim to set aside deed of trust under 11 USCS § 547 because creditor had valid deed of trust before ***preference*** period and change made during ***preference*** period was made to correct inconsequential defect in legal description and was not "transfer" as required under § 547. Rouse v Ben. Mortg. Co. (In re Carruth) (2008, BC WD Mo) 393 BR 841.

Unpublished Opinions

Unpublished: Chapter 7 trustee was not entitled to avoid mortgage when its perfection did not occur within 90 days of filing of ***bankruptcy*** petition as required by 11 USCS § 547(b)(4). Helbling v Zabor (In re Zabor) (2009, BC ND Ohio) 2009 Bankr LEXIS 2299.

Unpublished: Preferential transfer was established because mortgage was not perfected at commencement of case, as transfer of mortgage to assignee was deemed made immediately before date of filing of ***bankruptcy*** petition and fell within 90-day period; mortgage was not perfected because it was perfected by lis pendens on date

of entry of decree of foreclosure and decree of foreclosure was subsequently vacated. Mason v Ocwen Loan Servicing, LLC (In re Votaw) (2013, BC ND Ohio) 2013 Bankr LEXIS 3265.

274. ----Avoidable *preference*

Debtors' assignments of contracts for deeds to parcels of realty constitute preferential transfers under 11 USCS § 547 where (1) transfers were made to creditor because intent of parties had been that debtors would repay daughter for monthly ***payments*** she provided, (2) transfer was on account of antecedent debt owed by debtors to daughter and was not contemporaneous exchange for new value given by her, (3) transfer was made while debtors were insolvent since it occurred within ***90 days*** preceding filing of ***bankruptcy*** petition and debtors presented no evidence rebutting presumption of insolvency. In re Amato (1981, BC SD Fla) 10 BR 120, 7 BCD 488.

Perfection of creditor's security interest within 3 months of debtors' petition constitutes voidable ***preference*** under 11 USCS § 547(b) where creditor filed its mortgage with county clerk in timely manner, but did not file it with county registrar or cause interest to be noted on certificate of title, as required by state law, until shortly before debtors filed their ***bankruptcy*** petition. In re Russell (1983, BC ED NY) 29 BR 332.

Rerecordation of bank's deed of trust constitutes preferential transfer under 11 USCS § 547(b) and is avoidable by trustee where transfer preceded filing of involuntary petition by only 24 days and where transfer would permit bank to recover more than it would through ***payment*** against its claim in chapter 7 liquidation. In re Airport-81 Nursing Care, Inc. (1983, BC ED Tenn) 29 BR 501.

Recordation of real estate deeds of trust within ***90 days*** of filing of Chapter 7 petition is "transfer" avoidable by debtors under 11 USCS § 547 where § 547(e)(2)(B) specifies that transfer occurs upon perfection of security interest and under state law deed of trust recorded more than 10 days after execution is deemed to be perfected upon recordation. In re Strom (1985, BC ED NC) 46 BR 144.

Assignees of mortgages from Chapter 11 debtor licensed mortgage broker did not receive constructive possession of mortgages outside 90-day ***preference*** period for preferential transfers under 11 USCS § 547 where neither endorsement nor delivery of underlying promissory notes occurred outside 90-day period, despite parties' intention that possession be transferred by physical delivery of notes. In re Diamond Mortg. Corp. (1987, BC ND Ill) 78 BR 196.

Doctrine of equitable subordination was inapplicable to lender who failed to perfect its mortgage, taken within ninety-days of filing for ***bankruptcy***, within twenty-day enabling loan provision of 11 USCS § 547(c)(3)(B), and, thus, lender received voidable ***preference*** under 11 USCS § 547(b); in absence of strong showing of equity on part of potential subrogee, ***bankruptcy*** court must not allow state subrogation principles to override equitable purposes of ***bankruptcy*** law. Vieira v Pearce (In re Pearce) (1999, BC SD Ill) 236 BR 261, 34 BCD 909.

Although creditor's conduct established excusable neglect to set aside default judgment where creditor erroneously retained two attorneys in connection with proceeding and that there was some apparent confusion between those two attorneys as to which should defend adversary action, default judgment was ultimately not set aside because creditor had no meritorious defense; creditor failed to record its mortgage within 10 days after loan was funded and, thus, failed to meet ten-day requirement of 11 USCS § 547(e)(2), and 20-day "grace period" in 11 USCS § 547(c)(3) did not apply because debtors already owned real estate and, thus, loan was not made to enable debtor to acquire collateral. Palmer v Key Bank USA (In re Conley) (2004, BC ED Ky) 318 BR 812.

275. Security interests, generally

Since transfer of security interests from debtor to creditors occurred after filing of debtor's Chapter 11 petition, Chapter 7 trustee may not later avoid those transfers under 11 USCS § 547 because transfer was not made on or within 90 days before filing of petition, and thus, is not ***preference***. Vogel v Russell Transfer, Inc. (1988, CA4 Va) 852 F2d 797, 18 BCD 125, 19 CBC2d 1203, CCH Bankr L Rptr P 72411.

Grant of security interest is transfer within definition of 11 USCS § 547 and trustee may avoid it if it is not perfected in time. Vogel v Russell Transfer, Inc. (1988, CA4 Va) 852 F2d 797, 18 BCD 125, 19 CBC2d 1203, CCH Bankr L Rptr P 72411.

Creation of perfected security interest in property during ***90-day preference*** period is itself preferential transfer if it meets other requirements of 11 USCS § 547. Grella v Salem Five Cent Sav. Bank (1994, CA1 Mass) 42 F3d 26, 26 BCD 402, 32 CBC2d 1303, CCH Bankr L Rptr P 76225.

Payments by Chapter 7 debtor were not preferential transfers because contemporaneous-exchange-for-new-value exception of 11 USCS § 547(c)(1) applied; ***payments*** were for commodities sold to debtor and subject to security interests held by banks, with new value being release of security interests. Velde v Reinhardt (2007, DC Minn) 366 BR 894, 57 CBC2d 739, decision reached on appeal by (2008, CA8 Minn) 294 Fed Appx 242.

Mere substitution of new security in place of security for old debt does not ordinarily create ***preference*** because there is no diminution of debtor's estate whereby creditors may be injured; however, when transaction actually results in depletion of debtor's assets, where new security is of greater value than old, 11 USCS § 542 voidable ***preference*** exists for difference in value between the 2 securities. In re Cloyd (1982, BC ED Tenn) 23 BR 51.

Transfer of funds to secured party made pursuant to agreement within 90-day preferential period does not create voidable ***preference*** under 11 USCS § 547(b)(5) where execution of agreement does not enable secured creditor to receive more than it would have if case were under Chapter 7 and agreement had not been made. In re Southern Equipment Sales Co. (1982, BC DC NJ) 24 BR 788, 35 UCCRS 1017.

Where (1) creditor failed to perfect its security interest under state law, (2) judgment on its claim and subsequent execution occurred within 90 days prior to filing of Chapter 11 petition, and (3) creditor failed to rebut presumption of debtor's insolvency, execution on judicial lien is avoidable under 11 USCS § 547(b). In re Group Dev. Corp. (1984, BC MD Fla) 43 BR 665.

276. --Rejected or delayed creditor filings

Transfer "made" outside of 90 day period is not avoidable ***preference*** pursuant to 11 USCS § 547(e) where transfer was perfected under state law day after it was made and for purposes of ***Bankruptcy*** Code it takes effect on day it was made. Harbor Nat'l Bank v Sid Kumins, Inc. (1982, CA1 Mass) 696 F2d 9, 9 BCD 1423, CCH Bankr L Rptr P 68909 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

Where bank's original application for certificate of title in debtors' name was rejected by state's motor vehicle division more than 90 days before ***bankruptcy*** but where bank fails to return application so that it was received by division within 90 days of ***bankruptcy***, since lien is not perfected until properly completed and duly approved application is received by motor vehicle division, bank holds security interest in debtor's property within 90 days before ***bankruptcy*** and thereby receives preferential transfer which trustee can avoid under 11 USCS § 547. In re Poteet (1980, BC ED Tenn) 5 BR 631.

Creditor's interest in motor vehicle is valid and takes precedence over trustee in ***bankruptcy*** where creditor perfected security interest, as required by state law, by delivering to state commissioner of motor vehicles application for certificate of title containing name and address of holder of security interest, date of security interest, and required fee, more than 90 days before debtor filed petition in ***bankruptcy***, which was sufficient to create valid security interest notwithstanding that application was rejected because of defect and not remedied until after debtor filed the petition. In re Smith (1980, BC MD Ga) 7 BR 574, affd (1981, MD Ga) 10 BR 883.

For purposes of 11 USCS § 547(b), transfer occurs when security interest is perfected, not when security agreement is entered into, except when security interest is perfected at or within ten days after security agreement is made; thus, creditor perfected his security agreement on date he took possession of collateral, not on date on which parties entered into agreement, where creditor failed to file its security interest both centrally and locally, so

that transfer was ***preference*** within ninety-day period of 11 USCS § 547(b). Hunter v Snap-On Credit Corp. (In re Fox) (1998, BC ND Ohio) 229 BR 160, 41 CBC2d 602, 37 UCCRS2d 517.

Where car dealer assigned to creditor bank promissory note and security interest taken by dealer at time of sale of car to debtors but failed to perfect security interest within 20 days of debtors receiving car, under 11 USCS §§ 547(b), 550, trustee could avoid and recover creditor assignee bank's security interest, regardless of any state relation back laws; 11 USCS § 547(c)(3)(B) created uniform 20-day federal perfection period immune to alteration by state laws permitting relation back. Luper v United Bank, Inc. (In re Owens) (2003, BC SD Ohio) 294 BR 289, 50 CBC2d 690.

District of Columbia's Uniform Commercial Code retained common law rule of first in time, first in right and where car's certificate of title was issued noting security interest more than 20 days after debtor took possession and debtor's ***bankruptcy*** was filed less than 90 days later, creditor was secured under D.C. Code Ann. § 50-1202; Chapter 7 trustee's ***preference*** action against creditor under 11 USCS § 547(b) failed. McCarthy v BMW Bank of N. Am. (In re Dorton) (2005, BC DC Dist Col) 327 BR 14, affd (2006, DC Dist Col) 346 BR 271, CCH Bankr L Rptr P 80709, 60 UCCRS2d 701, revd, remanded (2007, App DC) 379 US App DC 1, 509 F3d 528, 64 UCCRS2d 549, costs/fees proceeding, request gr (2008, App DC) 2008 US App LEXIS 390.

Unpublished Opinions

Unpublished: Where creditor did not perfect its interest in debtor's vehicle pursuant to N.H. Rev. Stat. Ann. § 261:24 (2005) until after debtor filed ***bankruptcy***, lien was avoided; any ***payments*** creditor received during ***90 days*** prior to ***bankruptcy*** filing were preferential under 11 U.S.C. § 547. Obuchowski v Union Bank (In re Cottrell) (2005, BC DC Vt) 2005 Bankr LEXIS 1519.

277. --Particular circumstances

11 USCS § 348 provides that conversion from Chapter 11 to Chapter 7 does not effect change in date of filing of petition; therefore, relevant date for determination of ***preferences*** under 11 USCS § 547, where debtor granted security interests to creditors after purchase of tractors and trailers while under Chapter 11 and case was subsequently converted to Chapter 7, is date of filing of Chapter 11 petition, notwithstanding intervening confirmation of Chapter 11 plan and intervening conversion to Chapter 7. Vogel v Russell Transfer, Inc. (1988, CA4 Va) 852 F2d 797, 18 BCD 125, 19 CBC2d 1203, CCH Bankr L Rptr P 72411.

Creditor was entitled to summary judgment in ***bankruptcy*** trustee's action to recover sums debtor paid to creditor before filing for ***bankruptcy*** because creditor had only received interest in debtor's sale of certain leases, which it properly perfected, and transfer occurred more than 90 days before debtor filed for ***bankruptcy***, even though debtor continued to occupy leased premises until less than 90 days before its ***bankruptcy*** petition was filed and, as such, trustee could not avoid transfer under 11 USCS § 547(b). Biase v Congress Fin. Corp. (In re Tops Appliance City, Inc.) (2004, CA3 NJ) 372 F3d 510, 43 BCD 47, CCH Bankr L Rptr P 80117, 54 UCCRS2d 68.

Chapter 7 debtor's grant of security interest in subsidiaries' inventory and accounts receivables to lender, and subsequent filing of financing statements to perfect interest, do not constitute avoidable transfer of interest under 11 USCS § 547 under strong arm clause of 11 USCS § 544, where lender is entitled to conventional subrogation based on parties' express or implied agreement that lender would receive same first-priority perfected security interest in subsidiaries' inventory and accounts receivable as was held by previous creditor, in exchange for lender's refinance of previous creditor's debt, and because lender was equitably subordinated to position of previous creditor at time it paid creditor's debt, it received its security interest well outside ***preference*** period. Rinn v First Union Nat'l Bank (1995, DC Md) 176 BR 401, 7 Fourth Cir & Dist Col Bankr Ct Rep 224, 25 UCCRS2d 1057.

Trustee does not meet requirements of 11 USCS § 547(b)(5) in proving preferential transfer where creditor had valid perfected security interest in tax refund as general intangible, and thus was entitled to amount of tax refund and debtor had transferable right in income tax refunds prior to commencement of 90-day prepetition period. In re Jefferson Mortg. Co. (1982, BC DC NJ) 25 BR 963.

Granting of security interest in racehorses is not voidable ***preference*** where transfers occurred more than 90 days prior to date petition was filed. In re Bob Schwermer & Associates, Inc. (1983, BC ND Ill) 27 BR 304, 36 UCCRS 1400.

Creditors' committee meets its burden to establish that security documents executed to purportedly secure transactions involving advance of additional sum to debtor, renewal of existing obligations and combination of all obligations, constitute preferential transfers under 11 USCS § 547(b) where committee shows that property of debtor was transferred for benefit of creditor, on account of antecedent debt, made while debtor was insolvent, on or within ***90 days*** before filing of ***bankruptcy*** petition, and that enables creditor to receive more than it would if case was liquidated and transfer had not been made. In re Jones (1984, BC ND Tex) 37 BR 969, 10 CBC2d 1016.

Where bank had perfected security interest by garnishment before commencement of ***preference*** period, but released that interest in exchange for assignment of ***payments*** due to debtor and perfected security interest in those ***payments*** within ***preference*** period, then new security interest was voidable by trustee as ***preference*** under 11 USCS § 547(b). In re Ryder (1987, BC SD Fla) 73 BR 116.

Subsequent lender whose funds retired initial lender's debt but who filed financing statements during ***preference*** period and who then sued Chapter 7 trustee for turnover of funds held by him after sale of debtor's tangible assets, and for declaratory judgment that lender holds perfected, first priority security interest in funds as proceeds of debtor's collateral by reason of doctrine of equitable subordination, could not have its security interests avoided as ***preferences*** under 11 USCS § 547, where subsequent lender is subrogated to initial lender's fully secured claim which was properly perfected years before filing of debtor's ***bankruptcy*** petitions, since subsequent lender purposely paid balance due initial lender in order to protect its own interest in collateral under terms of loan, rather than as volunteer. First Am. Bank v Rinn (In re Advance Insulation & Supply) (1994, BC DC Md) 176 BR 390, 7 Fourth Cir & Dist Col Bankr Ct Rep 201, 32 CBC2d 815, affd sub nom Rinn v First Union Nat'l Bank (1995, DC Md) 176 BR 401, 7 Fourth Cir & Dist Col Bankr Ct Rep 224, 25 UCCRS2d 1057.

Finance company did not hold security interest in money purportedly held in "reserve fund" which existed separately only on paper, and its security interest in account was subject to avoidance under 11 USCS § 547(b), where it filed its financing statement during ***preference*** period, so that trustee acquired its rights as holder of perfected security interest; in this capacity, trustee was assignee, and its interest was subject to finance company's contractual claims, including right to set-off or recoupment, which trustee's powers as hypothetical judicial or execution lien creditor under 11 USCS § 544(a)(2) could not defeat. Frank v ITT Commer. Fin. Corp. (In re Thompson Boat Co.) (1995, BC ED Mich) 230 BR 815, 38 UCCRS2d 575.

Because bank agreed it would not enforce its setoff rights against $ 1,000,000 deposited by debtor with bank in course of refinancing loan, subsequent agreement made within 90 days of ***bankruptcy*** filing requiring debtor to grant bank security interest in $ 1,000,000 elevated bank's claim from unsecured to partially secured, enabling bank to receive more than it would in Chapter 7 distribution, and security interest granted to bank is avoided under 11 USCS § 547(b). Hirsch v Union Trust Co. (In re Colonial Realty Co.) (1999, BC DC Conn) 229 BR 567, 33 BCD 1077.

Unpublished Opinions

Unpublished: In case in which Chapter 7 trustee sought to avoid two security deeds debtor gave to mortgage company on ground that security interests were made within 90 days of filing of debtor's ***bankruptcy*** case and were therefore avoidable under 11 USCS § 547(b)(4)(A), trustee failed; mortgage company's security deeds were perfected from July 14, 2004, date hypothetical bona fide purchaser would have had such notice, as set forth in O.C.G.A. § 23-1-17, and date of perfection was within 10 days of date of transfer of property; accordingly, transfer was made before 90-day reachback period commenced on July 20, 2004, and trustee could not avoid deeds under § 547(b)(4)(A). Watts v Argent Mortg. Co., LLC (In re Hunt) (2008, CA11 Ga) 306 Fed Appx 455.

278. ----Crops

To grant lender with lien on 1984 crop any portion of 1985 crop based on after-acquired property clause in security agreement would constitute ***preference*** forbidden under 11 USCS § 547 since lender could not have realized anything at all from 1985 crop on 90th day prior to Chapter 11 petition because crop did not exist at that time. In re Lemley Estate Business Trust (1986, BC ND Tex) 65 BR 185.

Pre-petition transfer of security interest in growing crops constituted avoidable ***preference*** under 11 USCS § 547 where crops were planted after ***90 day preference*** period began. Siemers v AG Servs. of Am., Inc. (In re Siemers) (2000, BC DC Neb) 249 BR 205, 36 BCD 62, CCH Bankr L Rptr P 78209.

Although debtor made partial ***payment*** at time of contracting in order to secure subsequent shipment of cattle, they were under no obligation to pay until such time as specific cattle were delivered, identified, and accepted by debtor; based upon particular facts of transaction, date of delivery was controlling and not date of Purchase Contracts. Knauer v Krantz (In re Eastern Livestock Co., LLC) (2015, BC SD Ind) 544 BR 640.

279. ----Vehicles

Creditor with perfected security interest in debtor's pickup truck is avoided where (1) debtor purchased vehicle and creditor obtained security interest in vehicle within 90-day ***preference*** period under 11 USCS § 547(b), (2) creditor did not sufficiently rebut statutory presumption that debtor was insolvent at time of purchase, and (3) debtor rightly exempted property under 11 USCS § 522(b)(2)(A), although state had opted out. In re Wommack (1987, BC ND Fla) 74 BR 638, amd (1987, BC ND Fla) 1987 Bankr LEXIS 1669.

Trustee who failed to establish value of vehicle failed to meet his burden of proof that creditor was unsecured or undersecured as required to avoid loan payments made during ninety-day ***preference*** period. Bruinsma v Citizens Banking Corp. (In re Fleming) (1998, BC WD Mich) 226 BR 3, 36 UCCRS2d 940.

Although prima facie elements of preferential transfer were established by debtor's purchase of truck within ninety day ***preference*** period, bank satisfied elements of enabling loan exception by perfecting its security interest within twenty days provided for in 11 USCS § 547(c)(3)(B) pursuant to West Virginia law, since that interest was deemed perfected on date creditor filed its lien application. Fluharty v Citizens National Bank (In re Horner) (2000, BC ND W Va) 248 BR 516.

Trustee established that debtor's transfer of security interest in his vehicle was avoidable as ***preference*** because all elements under this section were met and, because interest was perfected at least 32 days after debtor received possession of vehicle, new value defense was unavailable. Reynard v Bank of Am., N.A. (In re Resler) (2016, BC DC Idaho) 551 BR 835.

280. Wages and salaries

Debtor could not avoid as preferential transfer ***payments*** to sheriff after sheriff 's issuance of income execution where debtor failed to offer evidence establishing that he could exempt such ***payments*** under blanket exemption of 11 USCS § 522(d)(5), even though trustee of debtor's estate was authorized to avoid transfer under 11 USCS § 547(b). In re Lawrence (1982, BC ED NY) 18 BR 360, 8 BCD 1099.

Transfer is avoidable ***preference*** under 11 USCS § 547 where sale occurred within ***90-day preference*** period, creditor was clearly preferred as transfer of station-sale-deprived debtor of assets with which to pay other creditors while paying buyer third of debt owed her. In re Southeast Community Media, Inc. (1983, BC ED Tenn) 27 BR 834.

Chapter 7 trustee was allowed under 11 USCS §§ 547(b) and 550 to recover $ 62,500 in ***payments*** aircraft company made to its former president under separation agreement parties concluded when company terminated president's employment, that were made within 90-period before company declared ***bankruptcy***, because ***payments*** were preferential transfers; however, trustee was not allowed to recover ***payments*** company made to former president more than ***90 days*** but less than two years before company declared ***bankruptcy*** because former president was not insider. Weinman v Walker (In re Adam Aircraft Indus.) (2013, BC DC Colo) 493 BR 834, 69

CBC2d 1625, affd (2014, BAP10) 510 BR 342, 59 BCD 142, 71 CBC2d 1015, affd, motion gr (2015, CA10) 805 F3d 888, 61 BCD 196.

Postpetition ***payments*** made by debtors to creditor on automobile loan were not ***preferences*** under 11 USCS § 547(b)(4)(A) because they occurred after, not during, ***90 days*** before ***bankruptcy*** was filed; they were not avoidable postpetition ***payments*** because sources of ***payments***, debtors' postpetition earnings from services, were not property of estate under 11 USCS § 541(a)(6), and one of elements of avoiding postpetition transfers under 11 USCS § 549 was that transfer had to be made of property of estate. In re Taylor (2008, BAP9) 390 BR 654 (criticized in Rodriguez v Drive Fin. Servs. LP (In re Trout) (2008, BC DC Colo) 392 BR 869) and (criticized in Rodriguez v DaimlerChrysler Fin. Servs. Americas, LLC (In re Bremer) (2008, BC DC Colo) 392 BR 873) and revd, remanded (2010, CA9) CCH Bankr L Rptr P 81695, op withdrawn, substituted op (2010, CA9) 599 F3d 880.

281. --Garnishment

Garnishment of debtors' wages within 90 days of when debtors filed ***bankruptcy*** petition, pursuant to garnishment order issued more than 90 days before filing of petitions, does not constitute preferential transfer; under state law, debtors' rights in 10 percent of their future wages are irrevocably transferred once garnishment order has been entered by court. In re Coppie (1984, CA7 Ind) 728 F2d 951, 11 BCD 913, 10 CBC2d 503, CCH Bankr L Rptr P 69746, cert den (1985) 469 US 1105, 105 S Ct 777, 83 L Ed 2d 772 and (criticized in Deardorff v Ford Motor Credit Co. (In re Deardorff) (1996, BC WD Wis) 195 BR 904) and (criticized in In re Mays (2000, BC DC NJ) 256 BR 555, 37 BCD 30, CCH Bankr L Rptr P 78325) and (criticized in Chavez v Mercury Fin. (In re Chavez) (2001, BC DC NM) 257 BR 341, 45 CBC2d 1290) and (criticized in In re White (2001, BC DC NJ) 258 BR 129, 37 BCD 73, 45 CBC2d 970) and (criticized in In re Earley (2004, BC ND Ill) 305 BR 837) and (criticized in Schott v First Pay Credit, Inc. (2013, MD La) 2013 US Dist LEXIS 113577).

Chapter 11 trustee is not entitled to return of garnished funds under 11 USCS § 547(b)(4), despite trustee's argument that transfer occurred 88 days before filing when clerk's office received funds, where, under state law, "transfer" of garnished funds to creditor was perfected upon service of garnishment order and notice on garnishee bank by clerk's office, which occurred more than 90 days before debtor filed petition in ***bankruptcy***. Battery One-Stop v Atari Corp. (In re Battery One-Stop) (1994, CA6 Ohio) 36 F3d 493, 31 CBC2d 1547, CCH Bankr L Rptr P 76102, 1994 FED App 336P.

Money garnished from debtor's wages by debtor's former wife and served within 90 days prior to debtor's filing ***bankruptcy*** is preferential transfer and is voidable under 11 USCS § 547(b), entitling recovery under 11 USCS § 550; but debtor may claim exemption in fund pursuant to 11 USCS § 522(g) inasmuch as voidable transfer is involuntary transfer which was not concealed by debtor. In re Stenborg (1981, BC ED Mo) 1 BAMSL 579.

Debtor may recover wages garnished by creditor in satisfaction of judgment, where: (1) debtor's filing of homestead deed with clerk of state court, which listed wages as part of homestead, insulated that asset from creditors, (2) writ of fieri facias issued against debtor and summons and garnishment issued against debtor's employer are judicial liens under 11 USCS § 101 and are avoidable under § 522(f) as to debtor's exemption wages, and (3) issuance of writ, summons, and turnover of funds by employer to state court, and then to creditor all occurred within 90 days of debtor's filing of Chapter 7 petition, and avoidable ***preference*** under § 547(b). In re Baum (1981, BC ED Va) 15 BR 538, 5 CBC2d 745, CCH Bankr L Rptr P 68454.

Garnishment of debtor's wages was preferential transfer voidable within provisions of 11 USCS § 547(b) in case of wages earned within 90 days before date of filing of petition even though debtor's employer was served with copy of garnishment order more than 90 days prior to filing of petition where federal and state law both indicate that transfer of debtor's wages did not occur until after debtor had earned wages. In re Walden (1982, BC ED Tenn) 19 BR 901, CCH Bankr L Rptr P 68678.

Trustee may avoid garnishment of debtor's wages and recover them so that debtor may exempt them; 11 USCS § 547(c)(5) was intended to protect consensual liens in inventory and receivables not garnishment liens which are not created by agreements; since garnishments cause involuntary transfers, and debtor did not conceal property, transfers may be avoided and recovery made of the funds because ***payments*** made within ***90 days*** before

bankruptcy petition filing are voidable as preferential transfer where all elements of 11 USCS § 547(e) are present. In re Larson (1982, BC DC Utah) 21 BR 264.

Service of garnishment summons by creditor upon bank creates lien, if bank has no valid setoff against debtor's funds, which is transfer within purview of 11 USCS § 547(b) and in this case is avoidable as ***preference*** where transfer was to creditor of debtor, on account of antecedent debt, made within ***90 days*** before filing of petition, or debtor is presumed to have been insolvent. In re Tonyan Constr. Co. (1983, BC ND Ill) 28 BR 714.

Payments received by creditor are preferential transfers avoidable by debtors pursuant to 11 USCS § 522(h) where, even though garnishment of wages was issued 120 days before date of ***bankruptcy*** petition, withholding of wages w as received within ***90 day*** period preceding filing of petition; any transfer pursuant to garnishment, for purposes of 11 USCS § 547, could not have occurred until debtor had acquired rights in his wages. In re Button (1983, BC ED Tenn) 29 BR 118, 10 BCD 563, 8 CBC2d 475, CCH Bankr L Rptr P 69147.

Wage execution executed prior to 90 days before ***bankruptcy*** filing is not ***preference*** under 11 USCS § 547(b) in that wages are garnished within 90 day period since, under state law, wage execution is continuing levy and debtor no longer had any interest in subject funds after her employer was presented with wage execution, outside 90 day period. In re Certain (1983, BC DC Conn) 30 BR 379, 10 BCD 846.

Garnishment lien obtained by defendant on earnings of debtors that accrued prior to filing of petition, and any transfers of funds pursuant to this lien are avoidable as preferential transfers under 11 USCS § 547(b) since defendant was holder of antecedent debt prior to imposition of garnishment liens, debtors have no assets subject to administration, lien is created when debtor earns funds and has right to receive them and all withholdings occurred well within 90-day period immediately preceding filing for relief, liens were for benefit of defendant and since there was no evidence to rebut presumption of debtor's insolvency under 11 USCS § 547(c)(4), insolvency requirement is met. In re Crump (1984, BC ED Mo) 42 BR 636, 3 BAMSL 1324.

Under 11 USCS § 1306(a), wages earned by debtor both before and after filing of petition are property of estate; lien created by prepetition garnishment of debtor's wages is ineffective as to amounts received by creditor from garnishment 90 days preceding filing as constituting a ***preference*** under 11 USCS § 547, as well as being ineffective against debtor's postpetition wages. In re Mack (1985, BC ED Pa) 46 BR 652.

Where, under Virginia law, lien on wages attaches upon delivery of writ of execution to sheriff charged with serving it, any wages earned by debtor within ***preference*** period commencing upon delivery of writ to sheriff and which are otherwise subject to such lien are avoidable by trustee under 11 USCS § 547(b), notwithstanding fact that notice of garnishment is obtained outside ***preference*** period. In re Hughson (1987, BC WD Va) 74 BR 438.

Wages earned, withheld, and paid to garnishing creditor within 90-day ***preference*** period, pursuant to writ of garnishment served prior to ***preference*** period, are avoidable under 11 USCS § 547(b). Chiasson v First Tenn. Bank Nat'l Ass'n (In re Kaufman) (1995, BC ED La) 187 BR 167.

Time at which transfer is perfected for purposes of ***preference*** avoidance pursuant to 11 USCS § 547 is governed by state law; thus, where default judgment, service of garnishment summons, and removal of funds from debtor's checking account occurred outside ***90-day preference*** period but creditor received garnished funds within ***preference*** period, there was no avoidable ***preference*** since, under Georgia law, perfection of transfer by garnishment occurs upon service of garnishment summons; analogy to U.S. Supreme Court precedent under which ***preference*** occurs on date check is honored rather than received is inapplicable since garnishment transfer is fundamentally different from ***payment*** by check. Jankowski v Dixie Power Sys. (In re Rose Marine, Inc.) (1996, BC SD Ga) 203 BR 511.

Nine periodic garnishment ***payments*** made within ***90-day preference*** period were avoidable under 11 USCS § 547(b) despite fact writ of garnishment was served outside that period. Guernsey v Old Kent Bank (In re Guernsey) (1996, BC WD Mich) 204 BR 199, 37 CBC2d 445.

Wage garnishments deducted during ninety days before ***bankruptcy*** are recoverable by debtor as voidable ***preferences*** under 11 USCS §§ 547 and 522(h) and (i). Arway v Mt. St. Mary's Hosp.(In re Arway) (1998, BC WD NY) 227 BR 216, 33 BCD 581, 41 CBC 141, 41 CBC2d 141 (criticized in Mangan v Hong Kong Shanghai Banking Corp. (In re Flanagan) (2003, BC DC Conn) 296 BR 293, 41 BCD 189, 50 CBC2d 1031, 50 CBC2d 1445).

Under straightforward reading of 11 USCS § 547(e)(3), transfer of wages subject to garnishment cannot occur until wages have been earned; ***payment*** of wages to garnishing creditor within ***90-day*** prepetition ***preference*** period pursuant to writ of garnishment served outside ***90-day*** period would be preferential, assuming other requirements of § 547 are met. Chavez v Mercury Fin. (In re Chavez) (2001, BC DC NM) 257 BR 341, 45 CBC2d 1290.

Funds garnished from Chapter 7 debtor's wages during ***preference*** period, and pursuant to garnishment order issued before ***preference*** period began, constituted voidable ***preference*** under 11 USCS § 547(b) to extent that other ***preference*** requirements were satisfied; while no "transfer" from debtor's property could occur until debtor first acquired right to wages by earning them, requirement of § 547(b)(4)(A) that there be transfer of interest of debtor in property within ***90 days*** of petition date was satisfied as to wages earned and seized under garnishment during that period. In re White (2001, BC DC NJ) 258 BR 129, 37 BCD 73, 45 CBC2d 970.

282. Other *payments*

Payments to commercial paper purchaser within ***90 days*** prior to ***bankruptcy*** may be preferential transfers under 11 USCS § 547(b). Union Bank v Wolas (1991) 502 US 151, 112 S Ct 527, 116 L Ed 2d 514, 91 Daily Journal DAR 15145, 22 BCD 574, 25 CBC2d 1011, CCH Bankr L Rptr P 74296A, on remand, remanded on other grounds (1994, CA9) 40 F3d 317, 94 CDOS 8880, 94 Daily Journal DAR 16511.

Although debtor's ***payment*** of $ 134 into municipal court trusteeship constitutes transfer of property of debtor within ***90-day*** period prior to debtor's filing petition in ***bankruptcy*** pursuant to 11 USCS § 547, since ***payment*** did not enable participating creditors to receive more than they would receive from Chapter 7 estate had that ***payment*** not been made to them, such transfer is not avoidable ***preference***. In re Hayes (1980, BC SD Ohio) 5 BR 676, 6 BCD 1069.

Payment of secured claim within ***90 days*** of debtor's filing of ***bankruptcy*** petition is not ***preference*** if such ***payment*** is accompanied by release of equivalent value to estate; factors to be considered in determining whether ***payment*** of secured claim is ***preference*** include value of collateral, amount of debt, amount of periodic decrease in value of collateral and amount of ***payments*** alleged to be ***preference*** and as long as combination of these factors do not result in depletion of debtor's estate, no ***preference*** exists. In re Zuni (1980, BC DC NM) 6 BR 449, 6 BCD 1222, CCH Bankr L Rptr P 68097.

Payments totaling $ 439.17 made by debtor within ***90 days*** of filing for ***bankruptcy*** to creditor whose claim of $ 4,015.91 was secured by automobile allegedly valued at $ 3,500.00 do not constitute ***preference*** where trustee fails to establish what actual value of car was on date of debtor's filing of petition. In re Conn (1981, BC ND Ohio) 9 BR 431, CCH Bankr L Rptr P 67909.

Payment of $ 30,000 by debtor within ***90 days*** of filing of ***bankruptcy*** petition constitutes preferential transfer despite fact that ***payments*** were received pursuant to default judgment against debtor recorded 8 months before debtor's filing. In re Hawkins Mfg., Inc. (1981, BC DC Colo) 11 BR 512, 7 BCD 939.

Payments on bid account are ***payments*** on account of antecedent debts owed by debtors before such ***payments*** were made where such ***payments*** are made within ***90-days*** before date of filing of ***bankruptcy*** petition; ***payments*** are not contemporaneous exchange for new value given to debtor since availability of credit from line of credit previously agreed upon does not constitute new value; until debtors actually avail themselves of credit line by purchases or credit advances subsequent to ***payment***, new credit is not extended; availability of credit is not synonymous with extension of credit; similarly, obligation to make credit available which may be reinstated by substitution of available credit each time debtor makes ***payment*** towards account is obligation substituted for existing obligation and is expressly excluded from definition of new value under 11 USCS § 547(a)(2). In re Rustia (1982, BC SD NY) 20 BR 131, 9 BCD 6, 6 CBC2d 917.

Trustee may recover preferential transfers under 11 USCS § 547(b) where ***payments*** occurred within ***90 days*** before filing of ***bankruptcy*** petition, debtors were insolvent at this time, checks represented transfers for or on account of antecedent debt, and where transfers enabled oil company and its agent to receive more than they would have under Chapter 7; trustee may recover value of preferential transfers from oil company, who was party that gained benefit of transfers. In re Blanton Smith Corp. (1984, BC MD Tenn) 37 BR 303, 10 CBC2d 299, CCH Bankr L Rptr P 69814.

Trustee is not entitled to recover amount of installment ***payments*** which is attributable to interest but is entitled to recover principal ***payments*** as preferential transfer under 11 USCS § 547(b) when ***payments*** were made in ***90 days*** immediately preceding ***bankruptcy*** but not more than 45 days after installments are due since debt for interest is incurred on date when interest accrues. In re Faller (1984, BC ND Ohio) 42 BR 593, 11 CBC2d 585.

Utility company is subject to provisions of 11 USCS § 547(b) and therefore Chapter 11 debtor's complaint seeking recovery of preferential transfer from utility will not be dismissed for failure to state claim under ***Bankruptcy*** Rule 7012(b). In re Windsor Communications Group, Inc. (1985, BC ED Pa) 63 BR 126, 14 BCD 682.

Payments made to creditor within ***90-day*** period preceding filing of ***bankruptcy*** for services rendered more than 45 days prior to ***payment*** by insolvent debtor which enabled creditor to receive substantially more than it would have under Chapter 7 liquidation are avoidable under 11 USCS § 547; because there are questions of material fact regarding both contemporaneous exchange defense and business expense defense, creditor is not entitled to summary judgment. In re Hartwig Poultry, Inc. (1986, BC ND Ohio) 57 BR 549.

Chapter 7 debtor's $ 1,500 payment on unsecured note 79 days prior to petition filing constitutes ***preference*** under 11 USCS § 547; creditor may, pursuant to 11 USCS § 547(c)(4), properly offset against that amount $ 1,447.92 unsecured loan that was advanced after date of preferential transfer on which no payment has been made. In re Jespersen (1986, BC DC SD) 67 BR 415.

Issue of whether ***payments*** by Chapter 13 debtor former tenant to former landlord, from bank account in which debtor deposited rentals during pendency of appeal from judgment in favor of landlord, was preferential transfer under 11 USCS § 547 is not barred by res judicata due to District Court's determination in appeal from ***Bankruptcy*** Court order granting landlord relief from stay, that because settlement agreement occurred more than ***90 days*** prior to filing, there was no preferential transfer to be set aside; collateral estoppel is not bar to raising issue because issue involved in relief from stay action was date of termination not date of transfer of rental ***payments***. In re Mason (1987, BC ED Pa) 69 BR 876.

Payments made by debtor to creditor within ***90 days*** before filing of petition are preferential under 11 USCS § 547(b) and these preferential ***payments*** are not in ordinary course of business under 11 USCS § 547(c)(2) where ***payments*** by check of debtor to creditor for bookkeeping and accounting services were made more than 45 days after debts were incurred, and creditor wrote checks for debtor and actually wrote checks to itself in ***payment*** of invoices. In re Excel Enterprises, Inc. (1988, BC WD La) 83 BR 427.

Payment made by Chapter 7 debtor to employer from distribution by employer to debtor from ERISA-qualified profit sharing plan, on account of antecedent debt to employer, is avoidable ***preference*** under 11 USCS § 547 where funds were distributed to debtor, debtor had 60-day rollover period beginning on November 30, 1992 and ending on January 29, 1993 to either rollover funds into another qualified fund and retain their protected status under 11 USCS § 541(c)(2) and IRC or retain money, debtor made 2 separate elections, neither of which have effect of rollover because debtor, within 60 days prior to ***bankruptcy*** filing elected to transfer portion of funds to employer for sole purpose of fulfilling obligation for antecedent and she elected to retain remaining portion for her personal use, at point debtor made ***payment*** to employer, election became final and option to rollover within 60 days was terminated, she did not intend by November 30, 1992 transfer date to rollover portion of funds tendered to employer, and as result of debtor's election, November 20, 1992 transfer was made within ***90 days*** preceding debtor's ***bankruptcy*** filing on January 19, 1993. Yoppolo v Fifth Third Bank (In re Bostic) (1994, BC ND Ohio) 171 BR 270, 31 CBC2d 1004.

Payments made within ***90 days*** of ***bankruptcy*** which terminal and stevedore services operator made to county which operated port were avoidable, where assurances by port that it would grant operating permit to debtor were legally insufficient to rise to level of "new value;" ***payments*** were avoidable, even where transferred funds were not actually controlled by debtor, ***payments*** were condition of purchase of debtor's assets required by purchaser, and buyer may have paid more for assets because designating use of escrowed proceeds was important to buyer. Feltman v Board of County Comm'rs (In re S.E.L. Maduro (Fla.)) (1997, BC SD Fla) 205 BR 987, 30 BCD 469, 37 CBC2d 1048, 10 FLW Fed B 227.

Payment in amount of $ 107,042.49, fell outside of ***90 day preference*** period provided by 11 USCS § 547(b)(4)(A); ***90th day*** fell on April 8, 2003; date of April 8, 2003, was determined by counting backward from date of petition, excluding date of petition and including date of transfer. Alexander v Southern Mills, Inc. (In re Terry Mfg. Co.) (2005, BC MD Ala) 325 BR 638.

Bankruptcy court properly concluded that creditor failed to establish that Chapter 7 debtor remitted ***preference payments*** in ordinary course of business under 11 USCS § 547(c)(2) where (1) its determination that creditor's witness was not credible was clearly within its purview, (2) documentary evidence showed that tardiness of debtor's payments became substantially more significant during ***preference*** period, (3) payments for which no invoice was provided were properly ignored, (4) creditor's mere provision of dates of debtor's payments did not establish baseline of dealings between parties, (5) two of ***preference*** payments were made in response to heightened collection efforts, and (6) creditor failed to establish general range of terms prevailing within industry. Shodeen v Airline Software, Inc. (In re Accessair, Inc.) (2004, BAP8) 314 BR 386, 43 BCD 176, 53 CBC2d 765 (criticized in Nat'l Gas Distribs. v Branch Banking & Trust Co. (In re Nat'l Gas Distribs.) (2006, BC ED NC) 346 BR 394, 46 BCD 239, 56 CBC2d 678, CCH Bankr L Rptr P 80681) and (criticized in US Bank Nat'l Ass'n v Petro Commer. Servs. (In re Interstate Bakeries Corp.) (2013, BC WD Mo) 499 BR 376).

Bankruptcy court properly held that creditor did not provide subsequent new value to Chapter 7 debtor after receiving at least some of ***preference*** payments where it failed to present credible evidence that it installed software and hardware per later agreement with debtor. Shodeen v Airline Software, Inc. (In re Accessair, Inc.) (2004, BAP8) 314 BR 386, 43 BCD 176, 53 CBC2d 765 (criticized in Nat'l Gas Distribs. v Branch Banking & Trust Co. (In re Nat'l Gas Distribs.) (2006, BC ED NC) 346 BR 394, 46 BCD 239, 56 CBC2d 678, CCH Bankr L Rptr P 80681) and (criticized in US Bank Nat'l Ass'n v Petro Commer. Servs. (In re Interstate Bakeries Corp.) (2013, BC WD Mo) 499 BR 376).

283. --Payment to advertiser

Payments made by debtor to defendant for advertising services were protected by ordinary course of business exception from recovery as preferential transfers since payment history between parties showed that payments were always made beyond "net 10 days" terms, payments were not unusually large, postdated checks were routinely made by debtor, payments were not made as result of collection measures, and defendant routinely accepted late payments over years and never charged interest or late fees. Grant v Cosec Int'l (In re L. Bee Furniture Co.) (1997, BC MD Fla) 206 BR 989, CCH Bankr L Rptr P 77353, 10 FLW Fed B 285, judgment entered (1999, BC MD Fla) 230 BR 185, 33 BCD 1107.

284. --*Payment* to attorney

District court erred in authorizing law firm's retention as debtor's counsel without determining whether debtor's ***payment*** of fees to law firm ***90 days*** before ***bankruptcy*** may have constituted avoidable ***preference*** under 11 USCS § 547(b), and, thus, would require law firm's disqualification. Staiano v Pillowtex, Inc. (In re Pillowtex, Inc.) (2002, CA3 Del) 304 F3d 246, 40 BCD 62, CCH Bankr L Rptr P 78744, appeal after remand, remanded (2003, CA3 Del) 349 F3d 711, 42 BCD 45, 52 UCCRS2d 18 and (criticized in Movitz v Baker (In re Triple Star Welding, Inc.) (2005, BAP9) 324 BR 778, 44 BCD 213).

Payment to Chapter 7 debtors' attorney for nonbankruptcy work made within ***90-day*** period prior to filing is ***preference*** under 11 USCS § 547 because it is ***payment*** for antecedent debt made while debtors were insolvent

which enabled attorney to receive more than other unsecured claimants in case under Chapter 7. In re Barr (1985, BC WD NY) 54 BR 894.

285. --*Payment* to bank

Payment by third party to bank to reduce debtor's overdraft is preferential and may be avoided under 11 USCS § 547 where: (1) property was obtained in exchange for debtor's property, (2) it was transferred for benefit of creditor on account of antecedent debt within ***90 days***, (3) bank offered no evidence to rebut presumption of insolvency, and (4) ***payments*** were not made in ordinary course of business. In re Hartley (1985, BC ND Ohio) 55 BR 770.

Where committee of unsecured creditors (committee) filed adversarial complaint in Chapter 11 ***bankruptcy*** against, inter alia, bank alleging that debtor had made preferential and fraudulent transfers to bank, committee made no allegations that bank's receipt of some form of security for exchange of its old notes was for less than reasonably equivalent value, and thus these transfers were not fraudulent, but payments that debtor made to bank within relevant ***preference*** periods may have been avoidable, and further, given bank's pre-existing lender relationship and ***bankruptcy*** court's finding that there was no fraudulent transfer, committee's request that bank's claims be equitably subordinated was rejected. Official Comm. of Unsecured Creditors v ASEA Brown Boveri, Inc. (In re Grand Eagle Cos.) (2003, BC ND Ohio) 288 BR 484, 49 CBC2d 900 (criticized in Official Comm. of Unsecured Creditors v Clark (In re Nat'l Forge Co.) (2006, WD Pa) 344 BR 340) and (criticized in Contemporary Indus. Corp. v Frost (In re Contemporary Indus. Corp.) (2007, BC DC Neb) 2007 Bankr LEXIS 4609) and (criticized in QSI Holdings, Inc. v Alford (2007, WD Mich) 382 BR 731).

Bankruptcy court denied bank's motion to dismiss liquidating trustee's claim that transfers two businesses made to bank less than ***90 days*** before they declared Chapter 11 ***bankruptcy*** were preferential transfers that could be recovered for businesses' ***bankruptcy*** estate under 11 USCS § 547; deposits businesses made after they instructed indenture trustee to retire industrial revenue bonds were not "settlement ***payments***" under 11 USCS § 741(8) that were made in connection with securities contract, and were not protected from avoidance under 11 USCS § 546(e), and trustee disputed bank's claim that transfers could not be avoided under 11 USCS § 547(b)(5) because it was fully secured creditor. EPLG I, LLC v Citibank, N.A. (In re Qimonda Richmond, LLC) (2012, BC DC Del) 467 BR 318, 56 BCD 70.

286. --Payment to insurer

Trustee may recover insurance premiums when policy expressly provides that premiums are due on first day of month; insurer cannot use state statutory grace period to extend due date so that debtor's late premium payments become nonrecoverable as transfers within 45 days of filing under former 11 USCS § 547(c)(2), nor can insurer extend date by arguing that premiums were really only due after complete rendering of monthly coverage since policy expressly required payments in advance. In re Advance Glove Mfg. Co. (1985, CA6 Mich) 761 F2d 249, CCH Bankr L Rptr P 70505.

Debtor's liquidating agent could not recover ***payments*** which debtor made to insurer as monthly premiums for health insurance benefits for debtor's employees, since debtor was unable to establish that defendant was creditor or that ***payments*** made during ***preference*** period were made on account of antecedent debt. Cox v Jefferson-Pilot Life Ins., Inc. (In re Environmental Waste Reductions, Inc.) (1999, BC ND Ga) 241 BR 918, 35 BCD 87.

Payment of insurance premiums was within ***90 days*** of ***bankruptcy*** filing because clear date of all of checks was within this time period. Giuliano v RPG Mgmt. (In re NWL Holdings, Inc.) (2013, BC DC Del) 69 CBC2d 1762.

287. --*Payment* to supplier

Debtor's ***payment*** to supplier of materials and supplier's simultaneous release of its materialmen's lien on debtor's well, which occurred within ***90-day preference*** period, represents contemporaneous exchange for new value within meaning of 11 USCS § 547(c)(1), even though well may have been valueless at time of ***preference*** action, because § 547(c)(1) does not require valuation of property transferred. In re George Rodman, Inc. (1986, CA10 Okla) 792 F2d 125, 14 CBC2d 1230, CCH Bankr L Rptr P 71169.

Payments made by Chapter 11 debtor construction company to materials supplier are preferential under 11 USCS § 547 where supplier failed to file timely materialman's lien under state law and each ***payment*** occurred within ***90 days*** of filing of ***bankruptcy***. In re Alkap, Inc. (1984, BC DC NJ) 54 BR 151.

Debtor furniture retailer's ***payments*** to wholesale furniture distributor within preferential period were made in ordinary course of business and therefore precluded from being avoided by trustee; since course of dealing between parties remained same before and during ***preference*** period, defendant did not make unusually large ***payments*** during ***preference*** period, late ***payments*** were in ordinary course of parties' 20-year business relationship, and distributor made no threats to stop furniture shipments to debtor or take legal action against it. Grant v Swindal-Powell Co. (In re L. Bee Furniture Co.) (1997, BC MD Fla) 206 BR 981, 30 BCD 329, 10 FLW Fed B 212.

Debtor's payment to contractor within one month before petition was filed was preferential transfer because ***payment*** was made for antecedent debt, at time when debtor was insolvent, and creditor would have received more than it would have received in Chapter 7 proceeding. McHale v Reliable Home Servs. (In re Cape Haze Windward Partners, Inc.) (2008, BC MD Fla) 391 BR 887, 21 FLW Fed B 413.

In adversary proceeding in which liquidating trustee sought to avoid debtor's ***90-day*** transfers pursuant to 11 USCS § 547, to recover all avoided ***90-day*** transfers pursuant to 11 USCS § 550, and disallow any claims of supplier's pursuant to 11 USCS § 502(d) until all avoided ninety-day transfers had been paid, and five suppliers moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. ***Bankr.*** P. 7012, arguing that trustee's claims failed as matter of law since, pursuant to Packers and Stockyards Act of 1921 (PASA), 7 USCS §§ 181 et seq., identified payments were not property of estate, ***bankruptcy*** court was unable to determine whether PASA applied; trustee's complaints were silent on whether transactions were cash sales or whether PASA's notice requirements were satisfied, and suppliers did not specify whether transactions were cash sales, as defined by PASA, nor did they specify whether PASA's notice requirements were fulfilled. Stanziale v Rite Way Meat Packers, Inc. (In re CFP Liquidating Estate) (2009, BC DC Del) 405 BR 694.

Three ***payments*** merchandising corporation made to paper company that supplied paper to corporation so it could publish advertising circulars were preferential transfers under 11 USCS § 547 that could be recovered from paper company under 11 USCS § 550; ***payments*** were made less than ***90 days*** before corporation and its affiliates declared Chapter 11 ***bankruptcy***, and corporation was insolvent at time ***payments*** were made; although there was no evidence that paper company placed undue pressure on corporation to make ***payments***, there was evidence that paper company issued special invoice so it would receive one of ***payments*** and that merchandising corporation was overriding software it used to pay its creditors so that specific creditors, including paper company, would be paid. Ames Merch. Corp. v Cellmark Paper Inc. (Ames Dep't Stores, Inc.) (2011, BC SD NY) 450 BR 24, 54 BCD 191, affd (2012, SD NY) 470 BR 280, affd (2012, CA2 NY) 506 Fed Appx 70, cert den (2013, US) 134 S Ct 65, 187 L Ed 2d 28.

Chapter 7 trustee's claim that transfers corporate debtor made to purchase fuel from supplier within ***90 days*** of date debtor declared ***bankruptcy*** were preferential transfers that could be recovered for debtor's ***bankruptcy*** estate under 11 USCS § 547 was sufficient to survive supplier's motion to dismiss, and because trustee's claims seeking order under 11 USCS § 550 which required supplier to return ***payments***, ruling under 11 USCS § 502 which disallowed claim supplier filed against debtor's ***bankruptcy*** estate, and attorney's fees were related to trustee's claim under § 547, court denied supplier's motion to dismiss those claims; however, there was no evidence supporting trustee's claims that transfers were fraudulent under 11 USCS §§ 548, 544, or Pennsylvania Uniform Fraudulent Transfer Act, or were made in violation of 11 USCS § 549 after debtor declared ***bankruptcy***, and court dismissed those claims without prejudice but gave trustee leave to file amended complaint. Goldstein v BRT, Inc. (In re Universal Mktg.) (2011, BC ED Pa) 460 BR 828.

Bankruptcy judge's decision to truncate historical period until debtor's financial distress began, rather than use stipulated period, was not clear error because judge offered reasoned explanation for decision, and judge's reasons were grounded in debtor's ***payment*** history and supported by record. Unsecured Creditors Comm. of Sparrer

Sausage Co. v Jason's Foods, Inc. (2016, CA7 Ill) 826 F3d 388, 62 BCD 196, 75 CBC2d 1528, CCH Bankr L Rptr P 82971.

Unpublished Opinions

Unpublished: ***Payments*** made to unsecured vendor on Chapter 11 debtor's open account during ***90 days*** before date of filing of ***bankruptcy*** petition and at time when debtor was insolvent were preferential transfers of property of debtor's estate, and except to extent precluded by affirmative defense, ***payments*** were avoidable pursuant to 11 USCS § 547(b). Reynolds v Quality Timber Prods. (In re Git-N-Go, Inc.) (2007, BC ND Okla) 2007 Bankr LEXIS 3763.

288. --Tax *payments*

Case must be remanded for ***bankruptcy*** court to construct hypothetical liquidation to determine whether IRS received more than it would have under Chapter 7, in which case payment was ***preference***. Dakmak v United States (In re Lutz) (1998, ED Mich) 241 BR 172, 83 AFTR 2d 1733, reh den (1999, ED Mich) 241 BR 179, 83 AFTR 2d 1724.

Defendant clients of debtor payroll services business received avoidable ***preferences***, where debtor had contracted to oversee payment of payroll taxes for clients, including defendants, but when debtor experienced financial trouble, it fell behind in payment of clients' payroll taxes, where defendants received deficiency notices from IRS and arranged for payment through debtor, and where payments were made from debtor's funds when debtor was insolvent. Morin v Frontier Bus. Techs. (2003, WD NY) 288 BR 663, 50 CBC2d 244, 91 AFTR 2d 1074.

Transfers made by Chapter 11 debtor to IRS from general accounts for 1982, 1983, and first quarter taxes are preferential payments under 11 USCS § 547(b) which trustee may avoid, because payments were made within ***preference*** period and were not made from trust fund segregated for purpose of paying taxes. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Withholding tax debts are incurred, for purposes of determining whether payment is preferential transfer under 11 USCS § 547, on date that penalty is imposed, which occurs if payment is not made within three business days of taxpayer's payroll, rather than on date returns for that tax are due; therefore, payments made by Chapter 11 debtor towards January 1984 and February 1984 tax obligations were not made within 45 days of date when debts were incurred, per 11 USCS § 547(a)(4), where payments were made on April 30, 1984, and thus, trustee may recover payments as preferential transfers. In re American International Airways, Inc. (1988, BC ED Pa) 83 BR 324.

Chapter 11 debtor's payment of sales taxes during ***preference*** period is avoidable ***preference*** under 11 USCS § 547(b), even though sales taxes are "trust fund taxes," where payments came from debtor's general bank account, were for delinquent sales taxes due from prior quarters and not current obligations, and, as result of payments, state received more than it would receive in Chapter 7, as debtor's assets would be insufficient to satisfy several large outstanding tax debts to other taxing authorities. In re Kannry & Morton, Inc. (1988, BC ND Cal) 91 BR 93.

Trustee could avoid under 11 USCS § 547 payments which third-party payroll services provider made to IRS on behalf of provider's clients within ninety-day ***preference*** period, even though provider acted as agent for clients, where there was no "connection" between Section 7501 Trust and funds paid, trustee was not seeking any recovery from taxing authorities, and there were Ponzi scheme complications, since to hold otherwise would unnecessarily undermine ***Bankruptcy*** Code's policy of equality of distribution and substantially prejudice many clients of payroll services provider. Morin v Elmira Water Bd. (In re Aapex Sys.) (2002, BC WD NY) 273 BR 35, CCH Bankr L Rptr P 78587, 2002-1 USTC P 50234, 89 AFTR 2d 836, affd (2003, WD NY) 288 BR 663, 50 CBC2d 244, 91 AFTR 2d 1074.

289. Miscellaneous

Transfer by state court receiver to creditor within 90 days of filing ***bankruptcy*** is voidable ***preference*** under 11 USCS § 547 where state court complaint filed by creditor more than 90 days before debtor's filing of ***bankruptcy***

setting forth statutory requirements for appointment of receiver but not describing specific property to be reached by creditor, cannot be viewed as statutory "reach and apply" action or "creditor's bill" under Massachusetts law so as to instantaneously create lien against debtor's property; further, later course of conduct in state court collection proceeding does not indicate that action was in fact "reach and apply" action or "creditor's bill" because, for purposes of determining whether lien arose at time of filing state court complaint, it is complaint itself, not later proceedings which control, and because course of events occurring within ***90-day preference*** period does not both create lien and make that lien relate back to date outside ***90-day*** period. E. I. Du Pont de Nemours & Co. v Cullen (1986, CA1 Mass) 791 F2d 5, 14 CBC2d 1219.

Deductions from partial interim ***payments 90 days*** prior to filing of Chapter 11 petition does not violate preferential transfer proscriptions of 11 USCS § 547(b)(4)(A) and 11 USCS § 553(a) where deductions constituted recoupments rather than setoffs; distinction between recoupment and setoff is that recoupment, unlike setoff, does not involve concept of mutuality of obligations and arises out of single transaction between creditor and debtor. In re Yonkers Hamilton Sanitarium, Inc. (1983, SD NY) 34 BR 385.

Trustee cannot avoid contingency fee paid to Chapter 7 debtor's attorney as prepetition preferential transfer under 11 USCS § 547(b) where language of contingent fee agreement between attorney and debtor provided fees were directly imposed on res of settlement fund and thus such res was never property of debtor. In re Kleckner (1988, ND Ill) 93 BR 143.

Pre-petition recoupments by Social Security Administration are ***preferences*** recoverable under 11 USCS § 547(b) where they occur within 90-day period; ***bankruptcy*** code provides presumption of insolvency during 90 days prior to ***bankruptcy***. In re Lee (1982, BC ED Pa) 25 BR 135.

Trustee may not void transfer of debtor's treasury bond to creditor by asserting 11 USCS § 547(d) where default judgment that was dissolved by bond would not have been avoidable under 11 USCS § 547(b)(4)(A). In re M.J. Sales & Distributing Co. (1982, BC SD NY) 25 BR 608, 9 BCD 1342, 7 CBC2d 884.

Debtors' transfer of deposit money to vendor is not preferential transfer for being delivered within 90 days under 11 USCS § 547(b)(4), even though judgment of court ordering deposit occurred within 90 days, where, under state law, deposit had ceased to be debtors' property and debtors no longer had interest in deposit at time of adjudication where vendor had declared default under agreement earlier than 90 day period and, under original agreement, was entitled to deposit, which was in escrow. In re Wolfarth (1983, BC SD Fla) 27 BR 746.

Deposit by creditor-cargo carrier of funds due debtor-corporation for shipment and delivery of cargo into creditor's own account constitutes transfer by debtor within meaning of 11 USCS § 547(b) since 11 USCS § 101 defines transfer to include involuntary disposal of property; sums retained by such creditor within 90 days of filing are ***preferences*** since they were retained on account of antecedent debts due and owing by debtor and creditor received more on its claim than it would have under Chapter 7 distribution. In re Moran Air Cargo, Inc. (1983, BC DC RI) 30 BR 406.

For purposes of determining whether giving of ship mortgage is voidable pursuant to 11 USCS § 547(b), ship mortgages become perfected upon recordation by Coast Guard; ship mortgage executed prior to 90 days of filing petition but not recorded by Coast Guard until within 90 day period may be avoided. In re Gottschalk (1985, BC MD Fla) 46 BR 49.

Ninety-day period of 11 USCS § 547(b)(4)(A) has not been satisfied where transfer occurred either when third party received citation to discover assets, which was outside 90-day period, or when funds were actually transferred from third party, which owed debt to Chapter 7 debtor, to creditor postpetition. In re Dean (1987, BC CD Ill) 80 BR 932.

Turnover order, which ordered that amounts coming "due hereafter" to Chapter 11 debtor be paid to group of judgment creditors in satisfaction of their judgment, constitutes preferential transfer subject to avoidance by trustee under 11 USCS § 547(b), where court's order directing turnover of property constitutes additional transfer of property of debtor and does not merely effect ***payment*** on preexisting secured claim, transfer enables group, as unsecured creditors, to receive more than they would have received otherwise in debtor's liquidation, and transfer

occurred within ***90 days*** of ***bankruptcy*** on date of turnover order. Prior v Farm Bureau Oil Co. (In re Prior) (1995, BC SD Ill) 176 BR 485 (criticized in Dominick's Finer Foods v Makula (1998, ND Ill) 217 BR 550) and (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211) and (Overruled in part as stated in In re Johnson (2014, BC SD Ill) 513 BR 333).

Transfers to banks within ninety day ***preference*** period were protected from avoidance attack by secured positions enjoyed by depository and collecting banks; to extent of transfers of $ 60,000 to banks resulting from deposits of loan from debtor's uncle, such transfers were of earmarked funds that were not property of debtor. Emerson v Federal Sav. Bank (In re Brown) (1997, BC WD Tenn) 209 BR 874, 30 BCD 1275, 33 UCCRS2d 181.

Funds which debtor withdrew from ERISA-qualified 401k plan and deposited into her checking account from which she repaid marital debt to her former in-laws within ninety-day ***preference*** period lost their exempt status upon withdrawal, and thus, trustee could avoid her payment to them as pre-petition preferential transfer. Casarow v Chomenko (In re Cobb) (1999, BC DC NJ) 231 BR 236.

Where Chapter 7 debtor/farmers, who suffered drought loss, had right to ***payments*** under Crop Loss Disaster Assistance Program (CLDAP) the moment it became effective and had given lender security interest in all existing or subsequently-acquired government ***payments***, lender's security interest in government disaster ***payments*** attached on date program became effective and was unavoidable as ***preference*** since that date was outside ***90-day preference*** period of 11 USCS § 547(b)(4)(A). Drewes v Lesmeister (In re Lesmeister) (1999, BC DC ND) 242 BR 920, 43 CBC2d 954, 41 UCCRS2d 681.

Due to fact that state appeals court order nullified original transfer of property from former spouse to debtor, former spouse's pensions were never property of estate; thus, without some interest in property as required by 11 USCS § 101(54), transfer was not voidable ***preference*** under 11 USCS § 547(b). Cox v Cox (In re Cox) (2000, BC DC Mass) 247 BR 556.

Banks that received alleged preferential transfers from cruise ship debtors successfully rebutted presumption of 11 USCS § 547(f) that debtors were insolvent at time of transfer, where debtors were operating as going businesses on transfer date, one month prior September 11, 2001. Am. Classic Voyages Co. v JP Morgan Chase Bank (In re Am. Classic Voyages Co.) (2007, BC DC Del) 367 BR 500, 48 BCD 53, 57 CBC2d 1542, decision reached on appeal by (2008, DC Del) 384 BR 62.

Creditor that financed debtor's insurance premiums had perfected security interest in unearned premiums when policies were cancelled under Mich. Comp. Laws § 500.1512, that was perfected before start of 90 day ***preference*** period of 11 USCS § 547(b)(4)(A). St. James Inc. v Cananwill, Inc. (In re St. James, Inc.) (2009, BC ED Mich) 402 BR 209, 51 BCD 96.

Debtor was insolvent under 11 USCS § 547(b)(3) at time it repaid loan made by its president; transfer to president, insider, occurred within one year before debtor filed its petition; president did not cite any cases to support his position that because it was business as usual for debtor to operate in red, debtor was not insolvent at time loan was repaid. In re Prevalence Health, LLC (2012, BC SD Miss) 68 CBC2d 1074.

Where creditor did not have lien of record against debtor's manufactured residence, under Ky. Rev. Stat. Ann. § 186A.297, until within 90 days of debtor's chapter 13 filing, debtor could properly avoid lien under 11 U.S.C. § 547, because lien was not effective until creditor obtained in rem judgment of foreclosure. Countrywide Home Loans v Dickson (In re Dickson) (2010, BAP6) 427 BR 399, affd (2011, CA6) 655 F3d 585, 66 CBC2d 527, CCH Bankr L Rptr P 82059, 2011 FED App 242P.

H. One Year *Preference* Period for Transfers to Insiders

1. In General

290. Generally

Claim for recovery of allegedly preferential transfer under 11 USCS § 547(b)(4)(B) is denied for lack of evidence where it is not shown that transferees were insiders and where there is no evidence regarding debtor's solvency or insolvency at time of transfer. In re Rose (1982, BC ED Mo) 1 BAMSL 778, corrected (1982, BC ED Mo) 1 BAMSL 952 and app den (1982, ED Mo) 25 BR 744, 1 BAMSL 945, 8 CBC2d 594.

Although term "insider" as used in 11 USCS § 547(b) should be applied flexibly to include broad range of parties who have close relationship with debtor, burden of proving that individual is "insider" remains squarely with debtor. In re Orsa Associates (1989, BC ED Pa) 99 BR 609.

Transfers to creditors made outside 90-day prepetition period but within 1 year of ***bankruptcy*** petition filing are avoidable as ***preferences*** under 11 USCS § 547(b) only if recipient is "insider" of debtor at time of such transfer; insider of corporate debtor is defined to include officer or director or one in "control" of debtor, although term "control" is undefined under 11 USCS § 101(30) [now 101(31)]. In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Transfers to insiders are subject to particular scrutiny via 11 USCS § 547(b)(4)(B)'s longer look-back period because of perception that insiders have special influence over debtors and are more likely to receive unfairly advantageous distributions; section 547 is intended to remedy that advantage and level playing field among creditors; when debtor and creditor are as closely related as cousins, debtor is likely to be influenced by family, thereby creating advantage. O'Neal v Arnold (In re Gray) (2006, BC WD Mo) 355 BR 777.

Statutory definition of "insider" in 11 USCS § 547 is not exhaustive, and defendant who does not have per se insider relationship with debtor may still be treated as insider if trustee shows that defendant had sufficiently close relationship with debtor so that his conduct is subject to closer scrutiny than those dealing at arm's length; to identify insider is to identify people with high potential to gain advantage through relationship with debtor; insider's control or influence over debtor may be attributable to affinity rather than to parties' course of business dealings. Seitter v Wedow (In re Tankersley) (2008, BC DC Kan) 382 BR 522.

Mere labeling of transferees as insiders is not enough to establish reasonable inference of insider status; 11 USCS § 547 ***preference*** claim alleging insider status must include basis for asserting that defendant qualifies as insider under 11 USCS § 101(31) and facts showing that alleged relationship is plausible. Angell v Day (In re Caremerica, Inc.) (2009, BC ED NC) 415 BR 200.

"Control" that is relevant to determining "insider" status for purposes of 11 USCS § 547 can only correctly be interpreted as something short of actual, legal control over debtor's business because "actual control" would subject creditor to statutory category of "person in control of debtor" under 11 USCS § 101(31); that is, any interpretation of "control" within non-statutory-insider context as anything like ability to order, organize or direct debtor's operations is simply incorrect. Wilen v Pamparo Sav. Bank, S.L.A. (In re Bayonne Med. Ctr.) (2010, BC DC NJ) 429 BR 152.

Because trustee alleged that transfers were made by insiders and subject to one-year ***preference*** period, he had to provide facts of debtor's insolvency beyond 90-day presumption; conclusory statements that transfers were made while debtor was insolvent failed to satisfy pleading requirements for preferential transfer cause of action under 11 USCS § 547. Beaman v Barth (In re AmerLink, Ltd.) (2011, BC ED NC) 65 CBC2d 868.

291. Date insider relationship is determined

Creditor, who is insider at time transfer of debtor's property is arranged, is insider at time of transfer for purposes of 11 USCS § 547 even though creditor is no longer insider on very day of transfer. In re F & S Cent. Mfg. Corp. (1985, BC ED NY) 53 BR 842, 13 BCD 823, 13 CBC2d 805, CCH Bankr L Rptr P 70819 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Creditor who is insider at time assignment of debtor's property to her is executed is insider under 11 USCS § 547 even if she is not insider at time assignment is perfected, completing transfer. In re Trans Air, Inc. (1987, BC SD Fla) 79 BR 947 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and

(criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Language of 11 USCS § 547(b)(4)(B) clearly states that insider relationship is to be determined on exact date of challenged transfer; individuals who were directors, officers or both of corporate Chapter 7 debtor on date of transfer by debtor, who was guarantor on note on which individuals were personally liable, are insiders; individuals who were not officers, directors, or general or limited partners of debtor, and who were not shareholders and did not control debtor, on date of transfer are not insiders. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

Insider is no longer insider for 11 USCS § 547 purposes when transfer is no longer function of or result of that entity's or person's insider status; one who, like corporate officer in instant case, uses insider position to put in motion step-transaction, such as golden parachute severance package or stock-buyout agreement, cannot become noninsider for purposes of that transaction by resigning. In re EECO, Inc. (1992, BC CD Cal) 138 BR 260, 22 BCD 1213 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Stanley v U.S. Bank, N.A. (2008, SD Tex) 2008 US Dist LEXIS 112429) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Payments made to insider creditor within one year of filing of ***bankruptcy*** petition were recoverable by trustee, since application of liquidation test established creditor's claim was unsecured due to his subordination to another creditor. Seitz v Yudin (In re Cavalier Indus.) (2002, BC ED Pa) 49 CBC2d 42.

Former officer of debtor, who received severance payments after he was terminated without cause, was not insider of debtor for purposes of 11 USCS § 547(b)(4)(B), even though he was insider when severance obligation arose, because transferee had to constitute insider at time transfer was made, and it was not enough that transferee was insider at time transfer was arranged. Jahn v Char (In re Incentium, LLC) (2012, BC ED Tenn) 473 BR 264.

Transfer was not avoidable as ***preference*** where defendant, who was debtor's former president and CEO, had been terminated before transfer was made and thus, was no longer insider, and where transfer was made well outside 90-day ***preference*** period. Madden v Morelli (In re Energy Conversion Devices, Inc.) (2016, BC ED Mich) 548 BR 208.

Unpublished Opinions

Unpublished: There is split of authority on precise meaning of phrase "at time of such transfer" as used in 11 USCS § 547(b)(4)(B); while one line of cases holds that creditor who is insider at time transfer of debtor's property is arranged is insider at time of transfer, U.S. ***Bankruptcy*** Court for Western District of Missouri has adopted position that existence of insider relationship is to be determined on actual date of challenged transfer, finding that contrary view is inconsistent with plain meaning of statute and that it does not further any of policies which are designed to be supported by extended reachback period for insiders. Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656.

292. Miscellaneous

In determining whether plaintiff Chapter 7 trustee stated claims for preferential transfers, issue remained whether applicable look-back period for transfers to defendant insider should be 90 days or one year, under 11 USCS § 547(b)(4)(B). Wallach v Rothstein (In re Nanodynamics, Inc.) (2012, BC WD NY) 474 BR 422, 56 BCD 215.

2. Who Constitutes Insider

293. Generally

Insider within meaning of 11 USCS § 101(25) [now 101(31)] generally is entity whose close relationship with debtor subjects any transaction made between debtor and such entity to heavy scrutiny and such creditor must be insider

at time of transfer in order for trustee to avoid transfer under 11 USCS § 547; who will qualify as insider must be held as question of fact. In re Taylor (1983, WD Ky) 29 BR 5.

Creditor is not insider within definition set forth in 11 USCS § 101 where he had never been engaged in any business activity where he was officer, director, stockholder, partner or joint venturer with debtor and prior to transfer creditor was creditor of debtor but held no secured interest in realty in question, and further even if granting of power of attorney to creditor is sufficient to establish insider status necessary for preferential transfer under 11 USCS § 547 actions of individual in charge of auction sale in refusing power of attorney is fatal as it is not only existence of insider status which is necessary but actions taken pursuant to status which must be proven before transfer may be voided. In re Taylor (1983, WD Ky) 29 BR 5.

For purposes of 11 USCS § 547(b), insider is entity or person with sufficiently close relationship with debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with debtor; if debtor is corporation, insiders may include directors, officers, persons in control of debtor, or others enumerated in 11 USCS § 101; "insider" is not susceptible of precise specification and whether individual or entity is insider must be decided on case-by-case basis; thus, even though specifically related corporation may not fall within examples set forth in statute, it may still be insider. In re Acme-Dunham, Inc. (1985, DC Me) 50 BR 734.

In determining trustee's ability to avoid transfer to insider under 11 USCS § 547(b)(4)(B), term "insider," in case when debtor is individual, is not limited to enumeration's in 11 USCS § 101(31)(A), since creditor can also be insider of debtor if creditor had sufficient influence or control over debtor's operations and such control is more than that attendant to usual financial control inherent in debtor-creditor relationship. Damir v Trans-Pacific Nat'l Bank (In re Kong) (1996, ND Cal) 196 BR 167.

Creditor who does not deal at arm's length with debtor, but who has special relationship with debtor through which it can compel payment of its debt, has sufficient control over debtor to be deemed insider under 11 USCS § 547; debtor's parent corporation which would reacquire full legal control of debtor if debtor failed to make transfer pursuant to stock purchase agreement has requisite control over debtor to be insider. In re F & S Cent. Mfg. Corp. (1985, BC ED NY) 53 BR 842, 13 BCD 823, 13 CBC2d 805, CCH Bankr L Rptr P 70819 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

For purposes of 11 USCS § 547, insider is one who does not deal at arm's length with debtor; in order for transfer to be set aside as preferential because of insider status of transferee, insider relationship must exist on date of transfer. In re Tennessee Wheel & Rubber Co. (1986, BC MD Tenn) 62 BR 1002, CCH Bankr L Rptr P 71288.

For purposes of 11 USCS § 547, "insider" is entity or person with sufficiently close relationship with debtor that his conduct is made subject to closer scrutiny than those dealing with debtor; determination of insider status is question of fact which must be decided on case-by-case basis; exercise of financial control over debtor incident to creditor/debtor relationship does not make creditor insider even though creditor may obtain some concessions from debtor based on relationship as debtor could find another lending institution, pay off loan and terminate relationship at any time. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

Trustee may avoid, pursuant to 11 USCS § 547(b), transfer of interest of debtor in property within one year of filing of petition if transfer was to insider; where debtor is corporation, insider is defined either as director or officer of debtor, person in control of debtor, or relative thereof; sufficient control to be deemed insider has been found where creditor does not deal at arm's length with debtor, but rather, has special relationship with debtor through which it can compel payment of its debt. In re International Club Enterprises, Inc. (1990, BC DC RI) 109 BR 562, CCH Bankr L Rptr P 73236.

Phrase "such creditor" in 11 USCS § 547(b)(4)(B) refers directly back to phrase "to or for benefit of creditor" in § 547(b)(1); therefore, plain and clear language of § 547(b)(4)(B) provides that transfer up to one year before petition to or for benefit of creditor is ***preference*** when creditor is insider. Hovis v Powers Constr. Co. (In re Hoffman Assocs.) (1995, BC DC SC) 179 BR 797, 7 Fourth Cir & Dist Col Bankr Ct Rep 444, judgment entered (1995, BC

DC SC) 194 BR 943 and (criticized in Crampton v First Union Nat'l Bank (In re Conner Home Sales Corp.) (1995, BC ED NC) 1995 Bankr LEXIS 860).

Question of whether particular creditor is insider within meaning of 11 USCS § 101(31)(B) and case law, to whom one-year ***preference*** recovery period under 11 USCS § 547(b)(4)(B) was intended to apply, requires fact-intensive, case-by-case analysis, and existence or not of personal guarantees by insiders, whose personal liability may be reduced by payments to creditor from corporate debtor, is relevant part of factual matrix. Hirsch v Va. Tarricone (In re A. Tarricone, Inc.) (2002, BC SD NY) 286 BR 256.

Debtor corporation's examiner was entitled to judgment on claims against creditor who was insider within meaning of 11 USCS § 101 and was not entitled to ***preference*** under 11 USCS § 547 for loan repaid by debtor corporation, where creditor's loan, personally guaranteed by debtor corporation's president was not commercially-motivated, arm's length transaction, transfers were made on account of antecedent debt and within one year before date of Chapter 11 filing, corporation was insolvent when it made payments to creditor, and only real (and intended) consequence of personal guarantees was to make creditor functional equivalent of insider, since debtor corporation's two most influential statutory insiders had corporation pay to avoid their own personal liability. Hirsch v Va. Tarricone (In re A. Tarricone, Inc.) (2002, BC SD NY) 286 BR 256.

Investment banking firm was entitled to keep payment of $ 25,000 made to it by debtors to extent that firm could establish that debtors received new value and services after payment was made; summary judgment could not be had on proceedings filed by trustee for return of $ 25,000, because parties had not provided evidence of value of services that debtors received after payment was made. Mukamal v Libra Secs., LLC (In re Far & Wide Corp.) (2007, BC SD Fla) 57 CBC2d 767, 20 FLW Fed B 432.

294. Attorneys

Attorney who represented debtor in prepetition foreclosure action against creditor was "insider" as matter of law so as to render ***preference*** avoidable under 11 USCS § 547(b) where client had no control over funds at issue and no arms-length transaction could reasonably be deemed to have taken place where attorney, who deposited proceeds of sale into trust account opened in his name after check for proceeds was endorsed over to him by client, controlled most aspects of funds received from sale and disbursed funds from account, since client was not making his own decision but following lead of attorney. Winick v Daddy's Money (In re Daddy's Money) (1995, MD Fla) 187 BR 750, 9 FLW Fed D 409, reh den (1996, MD Fla) 9 FLW Fed D 684.

Mere showing that person has been attorney of debtor was not intended by Congress to automatically trigger insider provisions of 11 USCS § 547(b)(4)(B). In re Durkay (1981, BC ND Ohio) 9 BR 58, 3 CBC2d 941.

Attorney who represented debtor individually as well as debtor's corporation is not insider for ***preference*** purposes under 11 USCS § 547 where attorney has been involved in protracted bitter litigation with debtor and corporation and his interest is not aligned with interest of debtor and against general interest of creditors. Oliver v Kolody (1992, BC MD Fla) 142 BR 486, 6 FLW Fed B 169.

Law firm that, within one year of client's filing of Chapter 7, had been was reimbursed for advances that it made to client to help him defray his living expenses while personal injury case that firm had filed for him was pending, was not "insider" for purposes of nor subject to preferential transfer rules in 11 USCS § 547 because such conduct was generally accepted under local practice, as demonstrated by La. Rev. Stat. Ann. § 37:218(A), and because there was nothing in record that indicated that particular relationship between this firm and this client was anything other than typical attorney-client relationship. Stathopoulos v Maritime Law Ctr. for Personal Injury (In re Arana) (2008, BC MD Fla) 387 BR 868, 21 FLW Fed B 307.

Unpublished Opinions

Unpublished: Attorney who received mortgage from New Jersey limited liability company (LLC) less than year before LLC declared ***bankruptcy*** was not "insider," as that term was defined by 11 USCS § 101(31), and mortgage was not avoidable under 11 USCS § 547 as preferential transfer; attorney received mortgage to secure a loan he

made to LLC in transaction where parties acted at "arm's length," and fact that attorney was friends with person who owned LLC and provided that person with legal advice that pertained to issues involving LLC did not make him insider. Stanger v Miller (In re Miller Homes, LLC) (2009, BC DC NJ) 2009 Bankr LEXIS 3907.

295. Banks and lenders

Bank was not "insider" for purpose of determining governing Chapter 7 trustee's ability to avoid debtors' transfers under 11 USCS § 547(b)(4)(B), even though bank had pressured debtors to cover overdrafts that resulted from debtors' check kiting, where pressure exerted by bank on debtors was in connection with debtor-creditor relationship and was done solely in its role as creditor, and bank had no authority to make business decisions for debtors or even to help them make such decisions. Damir v Trans-Pacific Nat'l Bank (In re Kong) (1996, ND Cal) 196 BR 167.

Even though bank may have obtained some concessions from debtor based on loan transactions between them, no evidence exists which raise these concessions to level of special relationship which would characterize bank as insider for purposes of 11 USCS § 547; simply because bank has financial power over debtor does not make bank insider where type of control is incident of debtor-creditor relationship. In re Schick Oil & Gas, Inc. (1983, BC WD Okla) 35 BR 282.

Chapter 7 trustee cannot avoid debtor's pledge of bank stock for loan from same bank to finance purchase of that bank on basis that bank is insider under 11 USCS § 547(b)(4)(B)(i), because 11 USCS § 101(28)(A)(iv) [now 101(31)(A)(iv)] requirement of "control" is not met merely by bank's being influenced by debtor who was large shareholder; rather, bank must have been nearly alter ego of debtor, and bank's insistence that debtor pledge stock for further loans indicates debtor had no such control. In re Hartley (1985, BC ND Ohio) 52 BR 679.

Bank which is principal creditor of debtor is not insider so as to extend ***preference*** period from ***90 days*** to 1 year under 11 USCS § 547, where dealings between bank and debtor were properly negotiated loans, notwithstanding that bank president was debtor's closest friend and that bank, as major creditor, exercised some supervision over debtor's business. In re Huizar (1987, BC WD Tex) 71 BR 826.

Trustee of corporate Chapter 7 debtor has failed to establish that ***payments*** to lender based on debtor's guarantee of individual insiders' promissory note were preferential where ***payments*** were not made within ***90-day*** period and lender was not insider, even though lender required debtor to submit frequent periodic reports on debtor's accounts receivable, endorsed customer checks on behalf of debtor and deposited checks to debtor's account, where it has not been shown that lender exercised any managerial control over debtor or required that debtor obtain its advice or consent before exercising managerial decisions, and debtor was not required to obtain prior approval from lender for decisions made in ordinary course of business. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

For purposes of avoiding debtor's guaranty and second mortgage as ***preference*** under 11 USCS § 547(b), trustee has failed to establish that mortgagee bank had such financial control over debtor that it could be considered "insider" as to whom one-year limitation period would apply--trustee's allegation that bank would have shut down debtor's operations if debtor had not granted mortgage and guaranty, and his allegation that debtor could find any alternative financing of its obligations to bank, merely demonstrate that bank could compel payment of its debt, but do not demonstrate that bank was in position to make operating or managerial decisions; however, trustee has alleged facts demonstrating that transfer benefited insider-related corporation, which sufficiently states cause of action under Deprizio, which held that if transfer benefits insider creditor, initial transferee could be liable for ***preference*** up to one year before filing of ***bankruptcy*** case. In re Octagon Roofing (1991, BC ND Ill) 124 BR 522 (criticized in Morton/Southwest Co. v Resolution Trust Corp. (1994, CA5 Tex) 1994 US App LEXIS 43281) and (criticized in Brandt v American Nat'l Bank & Trust Co. (In re Foos) (1995, BC ND Ill) 188 BR 239).

Lender bank is not "insider" for 11 USCS § 547(b) purposes unless it is able to exercise actual managerial control over debtor or has some special affinity with debtor that extends beyond business relationship; such control is not indicated merely by financial leverage or ability to exercise contractual rights; such affinity is more than mere existence of long-term course of business dealings between lender and borrower; requisite control is, rather,

sufficient authority over debtor so as to unqualifiedly dictate corporate policy and disposition of corporate assets; elements of control or affinity required to establish insider status apply with equal force in cases of individual and corporate debtors if none of statutorily enumerated examples of "insiders" apply. Lynn v Continental Bank, N.A. (1993, BC ND Tex) 154 BR 909, 24 BCD 482.

Bank which had no day-to-day control over Chapter 7 debtor's decision-making was not "insider" for ***preference*** purposes even though, after realizing that debtor was kiting checks, it determined which deposits would receive immediate credit, held checks, and placed debtor on "good fund" policy which required him to have funds on deposit before checks would be paid. Meeks v Bank of Rison (In re Armstrong) (1999, BC ED Ark) 231 BR 746, 41 CBC2d 837.

Where committee of unsecured creditors of ***bankruptcy*** debtors asserted that prepetition interest payment by debtors to lenders constituted preferential transfer, payment was not within ***preference*** period since lenders were not insiders of debtor for purposes of applying one-year ***preference*** period of 11 USCS § 547(b)(4)(B); any influence lenders exerted on debtors was indirect and arose from legitimate covenants and other provisions which lenders contracted for in loan agreement. Radnor Holdings Corp. v Tennenbaum Capital Ptnrs (2006, BC DC Del) 353 BR 820.

Bank that held security interest in all business assets that were owned by corporation and LLC ("debtors") that declared Chapter 7 ***bankruptcy***, including money debtors had on deposit with bank, was awarded summary judgment on Chapter 7 trustee's claim that he was allowed under 11 USCS § 547 to recover ***payment*** in amount of $ 685,678 which debtors made to bank after they settled malpractice action they filed against LPA; ***payment*** was made more than ***90 days*** before debtors declared ***bankruptcy***, and evidence did not support trustee's claim that ***preference*** period was one year because bank exercised control over debtors and was "insider" as that term was defined in 11 USCS § 101. Graham v Huntington Nat'l Bank (In re Medcorp, Inc.) (2014, BC ND Ohio) 521 BR 259.

296. Co-tenants

Neither bare legal relations of co-tenancy nor business relationship is enough to make co-tenant insider of Chapter 7 debtor from ***preference*** purposes under 11 USCS § 547; however, co-tenant's long-term homosexual relationship with debtor and cohabitation with her is sufficient to render her insider where relationship was intended by both parties to approximate marital situation and marked ceremoniously for that purpose and their dealing after debtor moved out were not on arm's length business basis. Wiswall v Tanner (1992, BC WD Wash) 145 BR 672.

297. Creditors

Trustee cannot avoid prepetition transfer to Farmer's Home Administration on basis of 11 USCS § 547(b)(4)(B) voidability of insider transfers because mere fact that large creditor can compel payment of debt does not make creditor insider without great involvement in day-to-day operation of debtor. In re Newcomb (1984, CA8 Mo) 744 F2d 621, CCH Bankr L Rptr P 70040.

Debtor cannot use 11 USCS § 547(b) to avoid payments creditor made to itself while creditor had control of debtor grocery store's checking account because creditor does not fit definition of "insider" or "in control" in § 101(25)(B)(iii) [now 101(31)(B)(iii)] since creditor took over account on condition for not calling in note and debtor had complete discretion in operation of store, including control over amount placed in checking account. Gray v Giant Wholesale Corp. (1985, CA4 NC) 758 F2d 1000, CCH Bankr L Rptr P 70390, 40 UCCRS 1480.

Creditor's insider status under 11 USCS § 101(31) has not been established which would enable debtor's release of claims against creditor within one year of ***bankruptcy*** to be subject to avoidance under 11 USCS § 547 where it is merely alleged that creditor's employees hold "significant portion" of debtor's stock but ownership of stock cannot be attributed to creditor, creditor does not fall within enumerated categories of § 101(31), and trustee's complaint does not set forth single allegation regarding special relationship or control over debtor by creditor. Balaber-Strauss v GTE Supply (1993, SD NY) 153 BR 135, CCH Bankr L Rptr P 75206, findings of fact/conclusions of law (1996, BC SD NY) 203 BR 184.

Creditor by act of seizing assets of Chapter 13 and Chapter 11 debtors in purported execution of remedy to which it is entitled upon debtors' default does not become "insider" of debtor for purposes of 11 USCS § 547; "operation" of business or assets of debtor referenced in 11 USCS § 101(2)(D) contemplates activity done with consent of debtor, rather than hostile takeover of business and assets of adversary. In re Orsa Associates (1989, BC ED Pa) 99 BR 609.

Creditor was not "person in control of debtor," as defined in 11 USCS § 101(31), and hence not insider of Chapter 7 debtor for purposes of one-year preferential transfer period under 11 USCS § 547, although loan agreement gave creditor warrants to purchase stock and option to elect board of directors and set officers' compensation where loan agreement was independently negotiated transaction and provisions of loan agreement that might have led to control of debtor were never implemented or threatened to be implemented. Germain v RFE Inv. Partners IV, L.P. (1992, BC DC Conn) 148 BR 161, 23 BCD 1341, CCH Bankr L Rptr P 75061.

In claim under 11 USCS § 547, creditor was not insider of debtor merely because it was in superior bargaining position as lender in relationship; parties had business relationship which was not "close" as evidenced by debtor's merger with company that was reseller for products made by creditor's competitor. MCA Fin. Group, Ltd. v Hewlett-Packard (In re Fourthstage Techs., Inc.) (2006, BC DC Ariz) 355 BR 155, 57 CBC2d 205.

Where Chapter 7 trustee claimed that debtor's former owner received preferential transfer under 11 USCS § 547(b) when he obtained contracts that were debtor's primary source of income, former owner was insider at time of transfer because, pursuant to pledge agreement and proxy, he directly held power to vote 100 percent of stock of debtor. Shearer v Tepsic (In re Emergency Monitoring Techs., Inc.) (2007, BC WD Pa) 366 BR 476, 48 BCD 63.

Transfers which corporation made to LLC less than year before it declared Chapter 11 ***bankruptcy*** were preferential transfers that were avoidable 11 USCS § 547 because they were made to satisfy antecedent debt and gave LLC advantage over other creditors, and court ordered LLC and its owner to return $ 185,865 plus interest to corporation; LLC and owner were "insiders" for purposes of § 547 because they shared close relationship with corporation, including sharing same building and employees, and they were both liable under 11 USCS § 550 for returning money corporation transferred. Bruno Mach. Corp. v Troy Die Cutting Co. (In re Bruno Mach. Corp.) (2010, BC ND NY) 435 BR 819.

Creditor was not shown to be non-statutory insider of ***bankruptcy*** debtors for purposes of extending period for avoidance of allegedly preferential transfers from debtors since ongoing business relationship of creditor and debtors did not show that creditor could exert control over debtors or that transfers were not arms' length transactions. Gugino v Rowley (In re Floyd) (2015, BC DC Idaho) 540 BR 747, 88 UCCRS2d 125.

Bankruptcy court did not err in finding that investor, who had prior social relationship with individual debtor, demanded ***payment*** on note and received check from corporate debtor, and endorsed check to individual in exchange for personal note and lien, was not insider of either debtor because he did exerted no control over them and had only debtor-creditor relationship with them; thus, ***bankruptcy*** trustee could not avoid transfers as preferential under 11 USCS § 547 because each occurred more than ***90 days*** before petitions. Stalnaker v Gratton (In re Rosen Auto Leasing, Inc.) (2006, BAP8) 346 BR 798, 46 BCD 235.

Bankruptcy court erred when it categorized creditor as non-statutory insider for purposes of setting aside as preferential ***payments*** that debtor made to creditor during one-year look back period; although debtor and creditor enjoyed long business relationship for number of years, with some personal involvement between companies, there was no evidence that course of dealing of relationship strayed from conventional, arm's length transactions of similar nature. Carl Zeiss Meditec AG v Anstine (In re U.S. Med., Inc.) (2007, BAP10) 370 BR 340, affd (2008, CA10) 531 F3d 1272, 50 BCD 57, 59 CBC2d 1900, CCH Bankr L Rptr P 81275.

Unpublished Opinions

Unpublished: 11 USCS § 547(c)(2)(B) looks only to ordinary course of business between debtor and transferee and does not mandate comparison between debtor and other creditors. AboveNet, Inc. v Lucent Techs., Inc. (In re Metromedia Fiber Network, Inc.) (2005, BC SD NY) 2005 Bankr LEXIS 3168.

Unpublished: 11 USCS § 547(c)(2)requires courts to focus on transfer which is being challenged as ***preference***; moreover, § 547(c)(2)(B) requires courts to examine "the ordinary course of business or financial affairs" as between "the debtor and transferee," not between debtor/transferee as compared or contrasted with debtor's relationships with other creditors; that is not to say that debtor's comparable or contrasting treatment of other creditors would never be relevant under § 547(c)(2)(B), but focus of inquiry under statutory language is on ordinary course of business as between debtor and transferee. AboveNet, Inc. v Lucent Techs., Inc. (In re Metromedia Fiber Network, Inc.) (2005, BC SD NY) 2005 Bankr LEXIS 3168.

Unpublished: Granting of mortgage or other lien or issuance of subsidiary guarantee unique in relationship of obligor and its creditor clearly would not be within ordinary course of business within meaning of 11 USCS § 547(c)(2)(B); however, in absence of coercion or other unusual circumstances evidencing preferential treatment of creditor, partial or deferred payment on antecedent trade debt generally would not be deemed out of ordinary course of business, since payment of trade debts either timely or tardily is usually norm, not exception. AboveNet, Inc. v Lucent Techs., Inc. (In re Metromedia Fiber Network, Inc.) (2005, BC SD NY) 2005 Bankr LEXIS 3168.

Unpublished: Chapter 7 trustee failed to prove that creditors were insiders of debtors even though they exerted considerable control over debtors, as this control never extended beyond that of secured lender-to-borrower relationship, and trustee cited no authority for proposition that California's partnership by estoppel had any application in insider analysis under ***Bankruptcy*** Code; thus, ***payments*** were not avoidable as preferential transfers, as ***90-day preference*** period applied, not extended period for transfers to insiders. Gladstone v McHaffie (In re UC Lofts on 4th, LLC) (2014, BC SD Cal) 2014 Bankr LEXIS 1404.

298. Directors or officers

In preferential transfer action brought by litigation trustee for Chapter 11 debtors, alleged insider was not insider merely because he was not, and never had been, officer, director, partner, shareholder, or relative of neither for debtors, because lack of title was not conclusive as to insider status; insider/outsider status was question of control. Lugo-Mender v Gov't Communs. Inc. (In re El Comandante Mgmt. Co.) (2008, DC Puerto Rico) 404 BR 47.

Request by trustee to require officer-director of corporate debtor to repay debtor's estate an unspecified portion of $ 11,250 paid by debtor to another officer-director because, after payments were made, both officers pooled their money and flew to Las Vegas where they spent and gambled away most of money was dismissed where evidence did not support findings on theory of voidable ***preference*** under 11 USCS § 547(b) or conversion of trust fund created in equity for benefit of general unsecured creditors, where there was no evidence to show that debtor repaid its debt to officer and there was no evidence to suggest that funds repaid to one officer-director were part of same transaction designed to benefit other officer-director, and where there was no evidence that officer-director did not convert funds she received from debtor prior to Las Vegas trip. In re IMI, Inc. (1982, BC ED Wis) 24 BR 442.

Insider is no longer insider for 11 USCS § 547 purposes when transfer is no longer function of or result of that entity's or person's insider status; one who, like corporate officer in instant case, uses insider position to put in motion step-transaction, such as golden parachute severance package or stock-buyout agreement, cannot become noninsider for purposes of that transaction by resigning. In re EECO, Inc. (1992, BC CD Cal) 138 BR 260, 22 BCD 1213 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Stanley v U.S. Bank, N.A. (2008, SD Tex) 2008 US Dist LEXIS 112429) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Former mid-level management employee of Chapter 11 corporate debtor engaged in providing technical expertise regarding computer network systems both to government and to private companies, was not "insider" of debtor, or one in position of undue influence giving him advantage as creditor when debtor-company decided what creditors to pay, for purposes of avoiding bonus payments to employee as preferential transfers under 11 USCS § 547(b)(4)(B), where although employee's title was vice president, his function was to manage sales unit of company, doing personal consulting work himself as well as supervising other employees performing consulting work, and what influence he enjoyed in debtor-company was not because of his title of vice president but was as valuable

employee enjoying leverage like other valuable employees because he could leave if not paid; accordingly, his advantage was as creditor of particular type (valuable employee), not as someone with inside position of influence. NMI Sys. v Pillard (In re NMI Sys.) (1995, BC DC Dist Col) 179 BR 357, 7 Fourth Cir & Dist Col Bankr Ct Rep 358 (criticized in In re Foothills Tex., Inc. (2009, BC DC Del) 408 BR 573, 62 CBC2d 212, CCH Bankr L Rptr P 81589).

Former mid-level management employee of Chapter 11 corporate debtor engaged in providing technical expertise regarding computer network systems both to government and to private companies, was not "officer" of debtor within meaning of definition of "insider" under 11 USCS § 101, for purposes of avoiding bonus payments to employee as preferential transfers under 11 USCS § 547(b)(4)(B), where although employee's title was vice president, his middle management responsibilities of running company's consulting division did not suffice to make him officer since he did not enjoy elements of being officer that would per se put him in position of advantage as against other creditors; employee's title of vice president merely accorded him status for purposes of marketing and as boss of unit he managed, but his position was not one in inner circle making company's critical financial decisions; additionally, he had not been elected officer, and thus did not enjoy that prestigious affinity existing among elected officers which in appropriate circumstances may per se threaten preferential treatment vis a vis other creditors. NMI Sys. v Pillard (In re NMI Sys.) (1995, BC DC Dist Col) 179 BR 357, 7 Fourth Cir & Dist Col Bankr Ct Rep 358 (criticized in In re Foothills Tex., Inc. (2009, BC DC Del) 408 BR 573, 62 CBC2d 212, CCH Bankr L Rptr P 81589).

In determining whether former employee of Chapter 11 corporate debtor bearing title of vice president is "officer" of debtor within meaning of definition of "insider" under 11 USCS § 101, for purposes of avoiding bonus payments to employee as preferential transfers under 11 USCS § 547(b)(4)(B), appropriate test is whether employee occupied high position within corporation making him active in setting overall corporate policy or performing other important executive duties of such character that it is likely that he would be accorded less than arms-length treatment in payment of his antecedent claim against debtor; in this connection, term "officer" obviously includes any one holding position in which that person controls decision whether to pay antecedent claim, but term "officer" is also broader and includes, for example, those in collective group exercising overall authority regarding debtor's corporate decisions who, as members of that insider group, are in position to exert undue influence over corporate decisions regarding payment of their claims in tight financial times, including those who are privy to critical information regarding debtor's financial stability and able to act to their advantage on basis of such information. NMI Sys. v Pillard (In re NMI Sys.) (1995, BC DC Dist Col) 179 BR 357, 7 Fourth Cir & Dist Col Bankr Ct Rep 358 (criticized in In re Foothills Tex., Inc. (2009, BC DC Del) 408 BR 573, 62 CBC2d 212, CCH Bankr L Rptr P 81589).

Chapter 11 debtor corporation is not entitled to summary judgment avoiding its allegedly preferential payments to purported insider transferee since insider status was not established as matter of law by fact that management agreement gave transferee "total operational and financial control" of debtor where there was evidence this control was never exercised. ABC Elec. Servs. v Rondout Elec. (In re ABC Elec. Servs.) (1995, BC MD Fla) 190 BR 672, CCH Bankr L Rptr P 76844, 9 FLW Fed B 305.

Payment made by Chapter 7 debtor to employer within ten months of ***bankruptcy*** filing was made pursuant to illegal contract and even if agreement was legally enforceable contract, employer was an insider with respect to debtor and payment was preferential transfer that is avoidable under 11 USCS § 547(b); employer is estopped from asserting employee was neither director nor officer at time of transfer because it clothed employee with title of "Managing Director". Wolkowitz v Soll, Rowe, Price, Raffel & Browne (In re Fink) (1997, BC CD Cal) 217 BR 614.

Motion to dismiss was denied because agent claimed that transfers were made to vice president while debtor company was insolvent and within one year of petition date; therefore, agent stated claim for preferential and fraudulent transfers under 11 USCS §§ 547 and 548. Neilson v Cor Karaffa (In re Webvan Group, Inc.) (2004, BC DC Del) 42 BCD 198.

Summary judgment was not warranted for creditor corporation who received payments of commission from debtor for one-year period prior to debtor's ***bankruptcy*** petition, in part, because court could not determine from evidence of record whether or not creditor was insider based upon fact that creditor and debtor shared same corporate

president, but creditor claimed that president did not influence decisions made by debtor. Tomsic v Sales Consultants of Boston, Inc. (In re Salience Assocs.) (2007, BC DC Mass) 371 BR 578, 48 BCD 136.

Liquidating supervisor's claim alleging that payment bank made to its former CEO was avoidable under 11 USCS § 547 was dismissed without prejudice because it did not allege facts that plausibly supported supervisor's claim that CEO was insider at time he received payment, and that payment was made less than year before bank declared ***bankruptcy***; complaint alleged that payment was made "on or about" date that was just under year before bank declared ***bankruptcy*** and did not allege facts which supported plausible claim that CEO was insider at time he received ***payment***. Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334.

Transfers of severance pay to former officer of debtor were not avoidable as preferential transfers pursuant to 11 USCS § 547 because officer was not insider at times severance ***payments*** were made, and ***payments*** were not made during ***90-day*** period preceding commencement of debtor's ***bankruptcy*** case. Jahn v Char (In re Incentium, LLC) (2012, BC ED Tenn) 473 BR 264.

In preferential transfer action, although defendants were not insiders, dismissal of claims was not warranted because allegations of close relationship between debtor and director, who controlled defendants, and excessive ***payments*** to defendants were sufficient to warrant closer scrutiny of claims. Stanziale v Khan (In re Evergreen Energy, Inc.) (2016, BC DC Del) 546 BR 549.

As director emeritus, debtor had no decision-making power. Determining whether bank, which received transfers trustee alleged were avoidable as ***preference*** under 11 USCS § 547(b)(4)(B), was insider required weighing facts, which was not permissible on summary judgment. Rupp v United Sec. Bank (In re Kunz) (2005, BAP10) 45 BCD 214, subsequent app, remanded (2007, CA10) 489 F3d 1072, 48 BCD 103, CCH Bankr L Rptr P 80958.

Bankruptcy court did not err when it found that ***bankruptcy*** trustee was not allowed under 11 USCS §§ 547 and 548 to avoid ***payments*** aircraft company made to its former president more than ***90 days*** before company declared Chapter 7 ***bankruptcy*** because former president was not "insider" at time ***payments*** were made; although trustee was allowed to avoid $ 62,500 in ***payments*** company made to its former president within ***90 days*** of date it declared ***bankruptcy***, ***bankruptcy*** court did not err when it gave former president 30 days under 11 USCS § 502 to make that ***payment*** as condition to maintaining claim he filed against company's ***bankruptcy*** estate. Weinman v Walker (In re Adam Aircraft Indus., Inc.) (2014, BAP10) 510 BR 342, 59 BCD 142, 71 CBC2d 1015, affd, motion gr (2015, CA10) 805 F3d 888, 61 BCD 196.

299. --Insider status found

Where several common facts supported that transfer to defendant former officer was both preferential under 11 USCS § 547(b) and fraudulent under 11 USCS § 548, and district court rejected ***bankruptcy*** court's finding of preferential transfer due to legal conclusion that officer had to be insider at time of actual payment, but for § 548, court held it was enough that insider status existed at time obligation arose, those conclusions did not impugn validity of attendant findings of fact that supported both theories; district court's judgment for plaintiff trustee was not defective for having made irreconcilable findings of fact. Stanley v US Bank Nat'l Ass'n (In re TransTexas Gas Corp.) (2010, CA5 Tex) 597 F3d 298, 52 BCD 199, CCH Bankr L Rptr P 81684 (criticized in Burks v XL Specialty Ins. Co. (2015, Tex App Houston (14th Dist)) 2015 Tex App LEXIS 9638) and (criticized in Burks v XL Specialty Ins. Co. (2015, Tex App Houston (14th Dist)) 2015 Tex App LEXIS 11610).

Transfers of money and title may be set aside under 11 USCS § 547(b) as voidable ***preference*** to an insider and trustee is entitled to recover possession where debtor's chief executive officer and person in control of corporation had reasonable cause to believe that debtor was insolvent at time of transfer; since sale proceeds of car were not deposited to corporate accounts or appeared in any form on debtor's books and records, and retention of funds transferred on date between ***90 days*** and one year before filing of debtor's petition, constitute ***payment*** on antecedent debt which is an impermissible ***preference*** and voidable by trustee. In re Waites Co. (1982, BC ED Tenn) 21 BR 105.

Transfers made from Chapter 7 debtor corporation to its sole stockholder, president, and sole director and his wife are preferential under 11 USCS § 547 where (1) transfers occurred within either ***90 days*** or at least one year preceding commencement of corporate ***bankruptcy***, (2) recipients of transfers are insiders, and (3) transferee's evidence fails to overcome presumption of insolvency; trustee may also recover under 11 USCS § 548 because there is no evidence supporting transferee's contention that transfers were loans or advances and no fair and adequate consideration was given. In re Craft Plumbing Service (1985, BC MD Fla) 53 BR 654.

Transferee who received $ 30,000 from Chapter 11 debtor in repayment of loan is insider for purposes of 11 USCS § 547 where: (1) he was president of debtor and acted in this capacity in internal affairs of debtor corporation and in its external dealing with banks, suppliers and customers; and (2) he had access to special information about debtor that was available only to inner circle of managers at debtor corporation and he controlled flow of that information to those outsiders who dealt with debtor. In re Tennessee Wheel & Rubber Co. (1986, BC MD Tenn) 62 BR 1002, CCH Bankr L Rptr P 71288.

President/insider of Chapter 11 debtor corporation was aware of debtor's insolvency at time of payment made to him in repayment of loan, thus rendering transfer voidable ***preference*** under 11 USCS § 547, where: (1) he knew at time of his loan that debtor had no cash to meet its payroll and other expenses of operation; (2) he knew that nearly half million dollars of fake accounts receivable had been added to debtor's books and falsely represented to be assets of company in loan documents presented to bank; (3) he knew false information had not been revealed to bank or to auditors who were examining debtor's books; (4) he knew that financial statements, balance sheets and other financial information generated by company were altered and unreliable; and (5) he knew that debtor was experiencing great difficulty producing products and making deliveries to customers, yet at same time he was aware of financial statements purporting to report glowing sales and revenues. In re Tennessee Wheel & Rubber Co. (1986, BC MD Tenn) 62 BR 1002, CCH Bankr L Rptr P 71288.

For purposes of determining avoidability of transfer under 11 USCS § 547, debtor was insider of bank which was granted mortgage, even though debtor resigned as member of board of directors some weeks before execution of mortgages, where agreement to execute mortgages was made prior to debtor's resignation and debtor did not resign as vice president in charge of development until following year. In re Davenport (1986, BC MD Fla) 64 BR 411.

Under 11 USCS §§ 547(b)(4)(B) and 101(30)(B) [now 101(31)(B)], individual is corporate insider where he is Chapter 7 debtor's sole shareholder, director, vice-president, creditor, and guarantor of debtor's debts to senior secured creditor. In re Vermont Toy Works, Inc. (1987, BC DC Vt) 82 BR 258, revd on other grounds (1991, DC Vt) 135 BR 762.

90-day ***preference*** period applies, rather than one-year ***preference*** period, in suit by corporate Chapter 11 debtor to recover alleged ***preference*** under 11 USCS § 547, where nothing in record indicates that transferee was insider, despite various titles of director, vice president, secretary and treasurer, transferee held while in employ of debtor. In re Sims Office Supply, Inc. (1988, BC MD Fla) 94 BR 744, 18 BCD 1006.

Individuals were insiders of corporate Chapter 11 debtor at time of alleged preferential buyout under 11 USCS § 547 where: (1) they were still officers and directors at closing, even though they had signed written resignations prior thereto, where resignations were held in escrow in order not to be effective until completion of closing; and (2) they were in control by reason of their 80 percent stock interest and offices which they held, and that control continued with respect to small expense reimbursements made thereafter, even though resignations were then effective and stock sales had been completed, because ***payments*** received after closing were made pursuant to written agreement made when individuals were still in control; ***payments*** made after technical control ceases, but committed to while it exists, present same potential for abuse posed by ***payments*** to parties then in control. In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Transfers to creditors made outside ***90-day*** prepetition period but within 1 year of ***bankruptcy*** petition filing are avoidable as ***preferences*** under 11 USCS § 547(b) only if recipient is "insider" of debtor at time of such transfer; insider of corporate debtor is defined to include officer or director or one in "control" of debtor, although term

"control" is undefined under 11 USCS § 101(31). In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Language of 11 USCS § 547(b)(4)(B) clearly states that insider relationship is to be determined on exact date of challenged transfer; individuals who were directors, officers or both of corporate Chapter 7 debtor on date of transfer by debtor, who was guarantor on note on which individuals were personally liable, are insiders; individuals who were not officers, directors, or general or limited partners of debtor, and who were not shareholders and did not control debtor, on date of transfer are not insiders. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

Title was not everything, but it certainly was evidence that bank, individual concerned, and debtor intended for him to have status of officer of debtor; officer was insider without need to establish separately that he was person in control, and, officer did not have to be president, or have full powers of president, in order to be officer. Lassman v Hollis Meddings Group, Inc. (In re Charles River Press Litho., Inc.) (2008, BC DC Mass) 381 BR 421, 49 BCD 113.

300. Former spouses

Debtor's former spouse was considered insider when trustee sought to set aside transfer under 11 USCS § 547 because at time of transfer of property spouse and debtor were not legally divorced. Prunty v Terry (In re Paschall) (2009, ED Va) 408 BR 79, affd (2010, CA4 Va) 388 Fed Appx 299, cert den (2011) 562 US 1257, 131 S Ct 1575, 179 L Ed 2d 475.

Persons such as former spouses may be subject to "insider" definition of 11 USCS § 101(31), even though their relationship with debtor is not specifically included within list in 11 USCS § 547(b)(4)(B); however, trustee's reliance on divorce agreement's provision that couple continue to live in same house and share expenses was insufficient to prove insider status; trustee met his burden of proof on debtor's insolvency as to transfers occurring during ninety-day period, where former spouse failed to introduce any evidence of solvency; however, as to transfer occurring outside ninety-day period, trustee's statement of his good faith belief in debtor's insolvency was insufficient under 11 USCS § 547(b)(3). Hunter v Dupuis (In re Dupuis) (2001, BC ND Ohio) 265 BR 878, 46 CBC2d 571.

Chapter 7 trustee was allowed to avoid interests in two parcels of real property debtor transferred to trust for benefit of his wife as part of divorce settlement, as preferential transfers to insider under 11 USCS § 547, and to recover both parcels from debtor's ex-wife under 11 USCS § 550 for debtor's ***bankruptcy*** estate; however, court denied trustee's motion for summary judgment on his claim seeking order allowing him to sell property under 11 USCS § 363(h) because debtor's ex-wife retained interest in both parcels as tenant in common with debtor and trustee had not shown that he met all requirements imposed by § 363(h) for selling debtor's interest and ex-wife's interest. Terry v Paschall (In re Paschall) (2009, BC ED Va) 403 BR 366, affd (2009, ED Va) 408 BR 79, affd (2010, CA4 Va) 388 Fed Appx 299, cert den (2011) 562 US 1257, 131 S Ct 1575, 179 L Ed 2d 475.

Former spouse of ***bankruptcy*** debtor was not insider of debtor for purposes of one-year period for avoidance of preferential transfers at time debtor transferred interests in real property to spouse in divorce settlement since debtor and spouse separated four years prior to ***bankruptcy*** petition, maintained limited contact, did not support each other financially, divided most of marital assets after separation, and negotiated divorce settlement at arm's length. Doeling v O'Neill (In re O'Neill) (2016, BC DC ND) 550 BR 482.

301. Friends

Friend of debtor is insider under 11 USCS § 547 where friend and debtor have carried out numerous legal and financial transactions over several years without need for documentation and only time need for written agreement between parties is where it became apparent that debtor might be liable for damages arising from automobile accident. In re Kucharek (1987, BC ED Wis) 79 BR 393.

Chapter 7 debtor's girlfriend and future fiancee is not "insider" within meaning of 11 USCS § 547(b); with only these facts, court is unable to make factual determination that relationship of parties was of such nature as to make girlfriend insider as defined in 11 USCS § 101. In re Hollar (1989, BC ND Ohio) 100 BR 892.

Chapter 7 debtor's live-in girlfriend is insider for purposes of extended ***preference*** recovery under 11 USCS § 547, where parties had both personal and financial relationship similar to marital relationship, girlfriend trusted debtor enough to loan him money for his business operations and his personal expenses and to finance his corporation's investment in condominium, debtor trusted her enough to name her director of corporation, girlfriend allowed him to use her credit cards, debtor has demonstrated his care of her by executing holographic will in order to insure that she will be repaid, and they both trusted each other and cared enough about each other to live with one another for over 2 years--relationship between parties would cause girlfriend to be able to gain advantage similar to one arising from affinity. Freund v Heath (In re McIver) (1995, BC ND Fla) 177 BR 366, CCH Bankr L Rptr P 76410, 8 FLW Fed B 337.

Unmarried cohabitant with whom Chapter 7 debtor shared condominium was "insider" for purposes of 11 USCS § 547 given fact couple were not dealing at arms length but had special relationship which had lasted in excess of 16 years and which led cohabitant to advance half of purchase price of condominium on behalf of debtor when he was unable to fund his one-half of price. Gennet v Docktor (In re Levy) (1995, BC SD Fla) 185 BR 378, 9 FLW Fed B 67.

Debtor's friend, who was also creditor, and whose relationship with debtor had soured, was not an "insider" as defined by 11 USCS § 101(31), and trustee's adversary proceeding against friend to avoid judgment lien as ***preference*** under 11 USCS § 547 ended with court granting friend's motion for summary judgment. Yoppolo v Lindecamp (In re Fox) (2002, BC ND Ohio) 277 BR 740.

Where creditor purchased vehicle which creditor then sold to ***bankruptcy*** debtor, at time when debtor and creditor were friends, and debtor made regular monthly payments to creditor up to date of debtor's ***bankruptcy***, at which time debtor and creditor were married, payments were avoidable as preferential transfers but one-year ***preference*** period under 11 USCS § 547(b)(4) for transfers to insiders did not apply; uncertain time line of blossoming relationship of debtor and creditor failed to show extent to which creditor might have exercised influence over debtor to establish insider status. Rainsdon v Farson (In re Farson) (2008, BC DC Idaho) 387 BR 784.

302. Government

Government and Blue Cross are not "persons in control of debtor" for purpose of meeting "insider test" under 11 USCS § 547(b)(4); to avoid insider ***preference*** during 90-day period, trustee must establish that transferee was "insider" at time of transfer and that insider had reasonable cause to believe that debtor was insolvent at time of transfer; debtor's dependence upon Medicare funds is not type of "control" envisioned under 11 USCS § 101(25)(B) [now 101(31)(B)] with respect to debtor corporations. In re Yonkers Hamilton Sanitarium, Inc. (1982, BC SD NY) 22 BR 427, 9 BCD 505, affd (1983, SD NY) 34 BR 385.

Where State as regulator of wagering on horse racing had authority to inspect, supervise, and audit ***bankruptcy*** debtor's operations and, in case of violation, revoke its license, State was not insider of debtor for purposes of preferential transfer since State's financial oversight of debtor did not involve exerting day-to day control of debtor, and State's dealings with debtor were at arm's length in effort to allow debtor to continue in business. PW Enters. v North Dakota (In re Racing Servs.) (2012, BC DC ND) 482 BR 276.

303. Limited liability companies

Where parent of ***bankruptcy*** debtor was managing member of limited liability company (LLC) which obtained judgment liens against co-debtors who were members of LLC and were terminated from employment by LLC, LLC was not non-statutory insider of co-debtors; despite relationship between LLC and co-debtors, LLC did not control debtors, and adversarial litigation between LLC and debtors which resulted in judgments precluded finding that debtors and LLC did not deal at arms length; definition of insider cannot be expanded to include limited liability company by analogy to insider status of corporation under 11 USCS § 101(31)(A)(iv). Elsaesser v Cougar Crest Lodge, L.L.C. (In re Weddle) (2006, BC DC Idaho) 353 BR 892, 56 CBC2d 1691 (criticized in Brandt v Tabet DiVito & Rothstein, LLC (In re Longview Aluminum, L.L.C.) (2009, BC ND Ill) 419 BR 351, 52 BCD 128) and (criticized in Redmond v CJD & Assocs., LLC (In re Brooke Corp.) (2014, BC DC Kan) 506 BR 560, 59 BCD 84, 71 CBC2d 1032).

304. Partners

General partner in limited partnership in which corporate debtor was limited partner was not "insider" such that alleged preferential partial payment on purchase of partner's partnership interest made 112 days prior to ***bankruptcy*** could be avoided under 11 USCS § 547, where partner's relationship with debtor was almost adversarial, partner enjoyed merely negotiated position of strength vis-a-vis debtor, and any advantage partner ultimately derived from original partnership agreement and amendments thereto was result of arm's-length transactions. In re Pittsburgh Cut Flower Co. (1991, BC WD Pa) 124 BR 451.

305. Relatives of debtor or debtor's insiders

To fulfill former 11 USCS § 547(c)(2)(A), first-time debt must be "ordinary" in relation to particular debtor's and particular creditor's past practices when dealing with other, similarly situated parties; only if party has never engaged in similar transactions would United States Court of Appeals for Ninth Circuit consider more generally whether debt is similar to what it would expect of similarly situated parties, where debtor is not sliding into ***bankruptcy***; in such latter instance, fact that debt is first of its kind for party will be relevant but not dispositive. Wood v Stratos Prod. Dev., LLC (In re Ahaza Sys.) (2007, CA9) 482 F3d 1118, 48 BCD 24, CCH Bankr L Rptr P 80897 (superseded by statute as stated in Stanziale v Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC) (2014, BC DC Del) 518 BR 269).

Where debtor, who elected federal exemptions under 11 USCS § 522(d) and transferred his interest in tenancy of entireties to facilitate his divorce, whether transaction was avoidable as ***preference*** under 11 USCS § 547(b) and recoverable under 11 USCS § 550, required factual determination of whether creditor received advantage and whether debtor was insolvent at time of transfer. Boyd v Petrie (In re Tompkins) (2010, WD Mich) 428 BR 713.

Trustee fails to establish that creditor, as relative of officer of debtor and statutory insider, had reasonable cause to believe debtor was insolvent at time of transfer where creditor never received any records or financial statements pertaining to debtor's financial health, therefore, granting of security interests and subsequent perfection by creditor does not constitute transfer voidable under 11 USCS § 547(b). In re Gruber Bottling Works, Inc. (1982, BC ED Pa) 16 BR 348.

Chapter 7 debtor and his in-laws are not related by consanguinity within meaning of 11 USCS § 101(28) [now (31)] for purposes of determining in-laws' insider status under 11 USCS § 547 because they are without common ancestor. In re Ribcke (1986, BC DC Md) 64 BR 663.

Chapter 7 debtor's brother, acting in his capacity as personal representative of probate estate of mother and probate estate itself, was not insider of debtor when lien attached, and, therefore, transfer which occurred more than 90 days but less than one year prior to ***bankruptcy*** cannot be avoided under 11 USCS § 547, since brother was acting in representative capacity, and therefore, defendant is actually probate estate itself, probate estate is not per se insider, there was adversarial relationship between debtor and probate estate, and estate did not exercise sufficient control over affairs of debtor so as to render it insider. Sticka v Anderson (In re Anderson) (1994, BC DC Or) 165 BR 482, 25 BCD 691 (criticized in Boyd v Petrie (In re Tompkins) (2010, BC WD Mich) 430 BR 453).

Chapter 7 debtor's former spouse was not related to debtor by affinity, and was not relative, even before parties' divorce judgment became final, and, therefore, she was not insider for purposes of extended ***preference*** period under 11 USCS § 547; in any event Congress did not have in mind type of marital relationship that exists after divorce judgment issues but before it become absolute; nor was spouse nonrelative insider because at time of transfers in questions her relationship with debtor neither encouraged debtor to look kindly upon her nor permitted her to exercise significant influence over debtor as parties' divorce could not have been more acrimonious. Barnhill v Vaudreuil (In re Busconi) (1995, BC DC Mass) 177 BR 153, 26 BCD 815, CCH Bankr L Rptr P 76369 (criticized in West v Christensen (In re Christensen) (2014, BC DC Utah) 2014 Bankr LEXIS 2066).

Pursuant to 11 USCS § 547, Chapter 7 trustee could recover certain ***preference*** payments made by debtor law firm to wife of one of debtor's owners where debtor was insolvent at time such payments were made. Daly v Richardson (In re Carrozzella & Richardson) (2003, BC DC Conn) 302 BR 415, 42 BCD 58.

Where parent of ***bankruptcy*** debtor was managing member of limited liability company (LLC) which obtained judgment liens against co-debtors who were members of LLC and were terminated from employment by LLC, LLC was not alter ego of parent, and thus insider as relative under 11 USCS § 101(31)(A)(i); no lack of business formalities was established by parent's unilateral actions since operating agreement lawfully granted parent exclusive management rights, and lesser distribution to unsecured creditors from recognition of liens as non-preferential transfers under ***preference*** period of 11 USCS § 547(b)(4)(A) did not by itself render parent's actions inherently inequitable. Elsaesser v Cougar Crest Lodge, L.L.C. (In re Weddle) (2006, BC DC Idaho) 353 BR 892, 56 CBC2d 1691 (criticized in Brandt v Tabet DiVito & Rothstein, LLC (In re Longview Aluminum, L.L.C.) (2009, BC ND Ill) 419 BR 351, 52 BCD 128) and (criticized in Redmond v CJD & Assocs., LLC (In re Brooke Corp.) (2014, BC DC Kan) 506 BR 560, 59 BCD 84, 71 CBC2d 1032).

In state, applying canon law, as opposed to civil law approach (which would have placed even first cousins outside of definition of "insider"), better conformed with 11 USCS § 547's purpose; accordingly, because court interpreted 11 USCS § 101(45)'s reference to "common law" to mean canon law method for determining consanguinity, transferee, cousin, was "relative" and "insider" of male debtor. O'Neal v Arnold (In re Gray) (2006, BC WD Mo) 355 BR 777.

Home loan repayments to debtor's father were made within one year of date debtor and her husband (debtors) filed for ***bankruptcy*** and thus were avoidable under 11 USCS § 547; debts were not incurred in debtors' ordinary financial affairs as debts were incurred for specific purpose of buying home, and debtors were not in business of buying homes. Strauss v Hollis (In re Matlock) (2007, BC WD Mo) 361 BR 879.

Ostensible "repayment," by debtor, of "loan" from his sister, which repayment occurred within year prior to date on which he filed his Chapter 7, was avoided as 11 USCS § 547 ***preference*** by trustee because all of elements of ***preference*** had been shown, including that longer ***preference*** period applied based on sister's status as "insider" within meaning of 11 USCS § 101(31)(A)(i), and because sister failed to adduce any evidence to support her claim that payment was excepted from ***preference*** treatment as contemporaneous exchange for new value under § 547(c)(1). Riske v Hesterberg (In re Priester) (2011, BC ED Mo) 446 BR 333, adversary proceeding, summary judgment gr, judgment entered (2011, BC ED Mo) 2011 Bankr LEXIS 2053.

Unpublished Opinions

Unpublished: In context of 11 USCS § 547(c)(2) (amended 2005), materiality was judged under two different but related criteria: (i) one was whether or not particular difference or uniqueness was such that it had any material significance; (ii) second and related criterion was whether particular uniqueness or difference implicated policy underlying ***preference*** avoidance objective of § 547; closely related to this question was whether preferred creditor could be said to have extracted preferential treatment by exercise of some exigent leverage or pressure not available to or exercised by other creditors. AboveNet, Inc. v Lucent Techs., Inc. (In re Metromedia Fiber Network, Inc.) (2005, BC SD NY) 2005 Bankr LEXIS 3168.

Unpublished: ***Bankruptcy*** court denied Chapter 7 debtor's mother's motion seeking reconsideration of court's judgment that Chapter 7 trustee was entitled to summary judgment on his claim that debtor made preferential transfer of real property to her mother that could be recovered for debtor's ***bankruptcy*** estate; there was no basis for imposing constructive trust that gave debtor's mother equitable interest in property because mother had not initiated legal action against her daughter, nor did she hold cognizable beneficial interest in property, and it would have been futile to allow debtor's mother to amend answer she filed to trustee's complaint to assert claim that she was entitled to equitable lien on property. Mason v Clark (In re Book) (2013, BC ND Ohio) 2013 Bankr LEXIS 3912, affd (2014, ND Ohio) 2014 US Dist LEXIS 45793.

306. --Insider status found

Mortgagee's interest is not avoidable under 11 USCS § 547(b) despite fact that mortgage was given within one year of filing of debtors' petition and mortgagee as brother of wife-debtor was insider as defined by 11 USCS § 101 because mortgage was given either for contemporaneous or future consideration and to be avoidable under 11 USCS § 547(b) mortgage must have been given for or on account of antecedent debt; even if mortgage were

avoided judgment creditors would receive nothing since there remains only $ 12,623.51 from proceeds of house sale and debtors are entitled to exemption of $ 15,000 in their residence under 11 USCS § 522(d)(1). In re Hirsh (1981, BC ED Pa) 8 BR 234, 3 CBC2d 631.

Trustee, pursuant to 11 USCS § 547(b), may avoid as ***preferences payments*** made by debtor corporation to wife of debtor's sole shareholder, where ***payments*** made to wife by debtor, as repayments for her loans to debtor, were made for her benefit on account of antecedent debt owed to her by debtor before transfer was made, repayments were made while debtor's liabilities exceeded its assets, 2 repayments were made within ***90 days*** before ***bankruptcy***, while remainder were made within one year before ***bankruptcy*** to her, as insider, who had reasonable cause to believe debtor was insolvent at time of transfer, and wife received more than she would have received after ***bankruptcy*** had the transfer not been made. In re Camden Nursery, Inc. (1982, BC DC SC) 31 BR 1.

Transfers made from Chapter 7 debtor corporation to its sole stockholder, president, and sole director and his wife are preferential under 11 USCS § 547 where (1) transfers occurred within either 90 days or at least one year preceding commencement of corporate ***bankruptcy***, (2) recipients of transfers are insiders, and (3) transferee's evidence fails to overcome presumption of insolvency; trustee may also recover under 11 USCS § 548 because there is no evidence supporting transferee's contention that transfers were loans or advances and no fair and adequate consideration was given. In re Craft Plumbing Service (1985, BC MD Fla) 53 BR 654.

Chapter 7 debtor-husband's father, an insider by virtue of parent-child relationship, received more by transfer of hogs from debtor than he would have had transfer not been made and estate had been administered under Chapter 7 where, as result of transfer, father received 50 percent of obligation that was owed, whereas under Chapter 7 he would have received only 30 percent of his obligation; therefore, requirements of 11 USCS § 547(b)(5) have been met. In re Albers (1986, BC ND Ohio) 60 BR 206, dismd (1986, ND Ohio) 64 BR 154.

Death of Chapter 7 debtor's wife did not terminate relationship of affinity, as defined by 11 USCS § 101(28) [now (31)], between wife's parents and debtor because child of debtor's marriage survived, and wife's parents are insiders of debtor for purposes of 11 USCS § 547; even if there were no relationship by affinity, there would still be question of whether wife's parents were insiders in fact, precluding summary judgment in action to avoid transfer to parents as preferential. In re Ribcke (1986, BC DC Md) 64 BR 663.

Brother of one of 2 shareholders of Chapter 7 debtor is insider within meaning of 11 USCS § 101 and 11 USCS § 547 where he is sole stockholder and officer of corporation that is debtor's alter ego. In re Landbank Equity Corp. (1986, BC ED Va) 66 BR 949, affd in part and remanded in part on other grounds (1987, ED Va) 83 BR 362.

Transfer of mobile home from Chapter 7 debtor to creditor father is preferential under 11 USCS § 547 where evidence in prior adversary proceeding to avoid previous preferential transfer to father established that: (1) father was creditor of debtor on debt that existed prior to filing of debtor's petition; (2) debtor was insolvent; and (3) father was insider; and where evidence in instant proceeding establishes that: (1) there was transfer to father on account of antecedent debt; (2) transfer was made within 1 year prior to debtor's petition; (3) debtor was insolvent at time of present transfer; and (4) transfer further satisfied father's obligation to extent greater than it would have had transfer not been made. In re Albers (1986, BC ND Ohio) 67 BR 530.

Wife of officer of Chapter 7 corporate debtor is insider under 11 USCS § 547(b) where officer is solely responsible for day-to-day operations of debtor; transfer to wife may be avoided as ***preference*** even where it occurred more than 90 days before filing of petition. In re Trans Air, Inc. (1987, BC SD Fla) 78 BR 351, 16 BCD 791.

Grandparents of debtor, who were guarantors of note, were "insiders" for ***preference*** purposes of 11 USCS § 547(b) despite lack of evidence to show that insider-guarantor exerted control over debtor or diverted debtor's resources to themselves, since all that is necessary to find ***preference*** is that all elements have been met, and policy requiring control is not incorporated into elements of § 547(b). In re Aldridge (1988, BC WD Mo) 94 BR 589.

Trustee did not meet his burden of showing that $ 128,500 from sale of debtor's dental practice which he had conveyed to his reconciled wife was preferential transfer, since wife was "insider" and one-year reach-back period

of 11 USCS § 547(b)(4)(B) applied, payment was in nature of gift, and wife never actually controlled funds but used them to confer economic benefit upon husband. Tidwell v Galbreath (In re Galbreath) (1997, BC MD Ga) 207 BR 309.

Where ***bankruptcy*** debtor and debtor's spouse borrowed money from spouse's parents to purchase real property and, in contemplation of divorce, transferred property to trust of which parents were sole beneficiaries and one parent was trustee, transfer was to or for benefit of insider for purposes of extended ***preference*** period under 11 USCS § 547(b)(4)(B); parents shared substantial identity of interests with trust, both parents and trust were creditors of debtor for whose benefit transfer was made, and status of parents as insiders of debtor by affinity was imputed to trust. Boyd v Petrie (In re Tompkins) (2010, BC WD Mich) 430 BR 453.

Complaint seeking to avoid alleged preferential transfers under 11 USCS § 547 sufficiently alleged that transferees were insiders as defined by 11 USCS § 101(31) where it stated that corporate transferees were owned and/or controlled by individual transferee, who was insider of debtor himself, as he chaired board of directors of debtor. Beaman v Barth (In re AmerLink, Ltd.) (2011, BC ED NC) 65 CBC2d 868.

Debtor could not hold herself out as good faith proponent of her motion to dismiss her Chapter 7 case, under 11 USCS § 707(a), after having benefitted from automatic stay, where her mortgage securing antecedent debt to insider and other transactions were subject to close scrutiny by trustee, under 11 USCS § 547 and N.J.S.A. 25:2-27(b). In re Jong Hee Kang (2012, BC DC NJ) 467 BR 327, 67 CBC2d 550.

Company that was in business of originating, acquiring, and servicing loans met its burden of showing that $ 134,717 in payments it made to owner's wife during twelve-month period that preceded date it declared Chapter 11 ***bankruptcy*** were preferential transfers that could be recovered for its ***bankruptcy*** estate pursuant to 11 USCS § 547; ***preference*** period was twelve months because owner's wife was "insider" for purposes of § 547, and wife was liable under 11 USCS § 550 for returning all payments she received, even though she claimed she used part of funds she received to pay workers who performed work on properties company owned, because she did not meet her burden of showing that payments were made in ordinary course of business. KH Funding Co. v Escobar (In re KH Funding Co.) (2015, BC DC Md) 541 BR 308, 61 BCD 223.

Bankruptcy court erred in avoiding security interest under 11 USCS § 547(b)(4)(B) by finding that corporation that was owned by wife of insider of debtor corporation was also per se insider of debtor; ***bankruptcy*** court's reasoning that: (1) husband was insider of debtor; (2) pursuant to 11 USCS § 101(31)(B)(vi), wife was also insider of debtor; and (3) wife and her corporation were one and same, so wife's corporation was also insider of debtor, improperly expanded statutory list of per se insiders in 11 USCS § 101(31) to include corporations that were solely owned by persons who qualified as per se insiders. Miller Ave. Prof'l & Promotional Servs. v Brady (In re Enter. Acquisition Partners, Inc.) (2004, BAP9) 319 BR 626, 44 BCD 46 (criticized in Brandt v Tabet DiVito & Rothstein, LLC (In re Longview Aluminum, L.L.C.) (2009, BC ND Ill) 419 BR 351, 52 BCD 128) and (criticized in Redmond v CJD & Assocs., LLC (In re Brooke Corp.) (2014, BC DC Kan) 506 BR 560, 59 BCD 84, 71 CBC2d 1032).

307. Sellers

Payments made to seller of Chapter 11 debtor on promissory note involving real estate transaction with purchasers may not be avoided under 11 USCS § 547 where payments were made outside ***preference*** period and where seller was no longer insider of debtor, having sold his stock and resigned his positions; further, seller was not creditor of either debtor or related corporation making payments, therefore 11 USCS § 547 is inapplicable. In re Coors of North Mississippi, Inc. (1986, BC ND Miss) 66 BR 845.

For purposes of determining time period within which transfers to former principal shareholder-seller of debtor may be avoided under 11 USCS § 547, seller was not insider of debtor, subsequent to his transfer of stock to purchasers, where he was not officer or director of Chapter 11 debtor, he owned no stock in debtor, and he possessed no information other than what was public knowledge. In re Coors of North Mississippi, Inc. (1986, BC ND Miss) 66 BR 845.

Where supplier and contractor with common principal arranged for contractor to pay ***bankruptcy*** debtor for services and for debtor to simultaneously pay supplier same amount, and supplier contended that prepetition transfers to supplier were not avoidable as ***preferences*** because they were made in ordinary course of business within meaning of 11 USCS § 547(c)(2), ordinary-course defense did not apply since check-swap was extraordinary collection arrangement and not ordinary business term. Richardson v Pana Limestone Quarry Co. (In re Leprechaun Trucking, Inc.) (2007, BC CD Ill) 356 BR 190.

Defendant established that all but $ 607 of alleged preferential payments were made "according to ordinary business terms" where: (i) it was not unusual for financially troubled company in telecommunications industry to make payments on large contract by wire transfer or by check drawn on payroll account, (ii) it was not unusual for construction company to send with its invoice notice that it would exercise its mechanics lien rights if not timely paid, especially as project was completed and mechanics lien rights must be promptly asserted or lost, (iii) it was not unusual for payments on construction contract to be made 95 days after invoice, and (iv) it was not unusual for lessee to make payments on tenant-improvement contract immediately after invoice, where project was substantially complete, lessee intended to assign its leasehold, and lessee would default under lease by causing mechanics lien to be filed against property. Schoenmann v BCCI Constr. Co. (In re Northpoint Communs. Group, Inc.) (2007, BC ND Cal) 361 BR 149, affd (2007, BAP9) 2007 Bankr LEXIS 4931.

General sense of what was going on in industry of creditor's witness did not meet burden required by 11 USCS § 547(c)(2)(C) (amended 2005); among other things, his general sense of what was going on was not consistent with creditor's own accounting department's records. Buckley v Carrier Corp. (In re Globe Holdings, Inc.) (2007, BC ND Ala) 366 BR 286.

308. Shareholders

Where individual who sold automobile dealership to debtor became insider of debtor when he exercised option to purchase stock in debtor and then subsequently relinquished his stock, which resulted in termination of insider status, transfers thereafter made by debtor could not be avoided as preferential transfer to insider within one year of ***bankruptcy*** filing pursuant to 11 USCS § 547(b)(4)(B), since transfer by check is single event occurring at definite moment in time rather than related sequence of events, so that transfer occurred after individual ceased to be insider, and since expanding statutory definition of insider would lead to unduly "litigious" result. Butler v David Shaw, Inc. (1996, CA4 NC) 72 F3d 437, 8 Fourth Cir & Dist Col Bankr Ct Rep 626, 28 BCD 441, CCH Bankr L Rptr P 76749 (criticized in Ogier v Johnson (In re Healing Touch, Inc.) (2005, BC ND Ga) 2005 Bankr LEXIS 1399) and (criticized in Shubert v Lucent Techs. Inc (In re Winstar Communs., Inc.) (2009, CA3 Del) 554 F3d 382, 51 BCD 45, CCH Bankr L Rptr P 81408).

Although interest ***payments*** were made to minority shareholder and guarantor of Chapter 7 corporate debtor between ***90 days*** and one year before date of filing ***bankruptcy***, shareholder is not insider; thus transfers cannot be avoided under 11 USCS § 547(b)(4)(B). In re N & D Properties (1985, ND Ga) 54 BR 590.

Partnership which is sole shareholder in debtor corporation, and general partners who are officers and directors of debtor corporation, are insiders for purpose of 11 USCS § 547; transfers by debtor to them, made between 90 days and one year before debtor's filing, were ***preferences*** where they had reasonable cause to believe debtor was insolvent, because one partner not only was aware of debtor's financial condition, but rigidly controlled all its financial transactions, and, as accountant, must be charged with knowledge that "equity in jobs" included in debtor's balance sheet was not viable asset for insolvency purposes. In re Fulghum Constr. Co. (1980, BC MD Tenn) 7 BR 629, affd (1981, MD Tenn) 14 BR 293, 32 UCCRS 798, affd in part and vacated in part on other grounds (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Transfer between minority stockholder and debtor, whereby stockholder surrendered interest in debtor in exchange for debtor's $ 10,000 note and subsequently stockholder, as creditor, recorded note, thereby acquiring perfected lien on property of debtor, was not preferential transfer under 11 USCS § 547(b)(4)(B) on ground that stockholder-creditor was "insider," where, although transfer was on account of antecedent debt and occurred within one year

prior to debtor's filing of ***bankruptcy*** petition, time of transfer under 11 USCS § 547(e)(1) is judged to be at time creditor perfects lien such that no one can acquire an interest superior to interest of creditor, and thus stockholder-creditor could not be considered "insider" when lien was perfected, stockholder-creditor having previously severed relationship with debtor by surrendering interest in debtor even though insider status may have existed at some prior time, § 547(b)(4)(B) requiring that insider relationship be determined on exact date of challenged transfer. In re Camp Rockhill, Inc. (1981, BC ED Pa) 12 BR 829, 7 BCD 1134, 4 CBC2d 1059, CCH Bankr L Rptr P 68294.

Judgment lien in favor of owners of 33 percent of issued and outstanding stock of debtor corporation is preferential transfer that may be avoided by debtor in possession under 11 USCS § 547 as these owners were affiliates of debtor and were therefore insiders, and recordation of summary final judgment constituted transfer of property. In re Captain's Paradise, Inc. (1983, BC SD Fla) 29 BR 516.

Officer and member of board of directors who was also 30 percent shareholder qualified as "insider" as defined by 11 USCS § 101(25)(B)(i), (ii). In re Big Three Transp. (1983, BC WD Ark) 41 BR 16, 11 CBC2d 142.

Although persons to whom property of debtor was allegedly preferentially transferred are affiliates of debtor within meaning of 11 USCS § 101(2)(A) by virtue of their ownership together of 30 percent of debtor's voting stock, and, as affiliates, transferees are also "insiders" of debtor under 11 USCS § 101(25)(E) [now 101(31)(E)], nevertheless, because transferees did not have reasonable cause to believe that debtor was insolvent, transfers made outside of 90 day period immediately preceding ***bankruptcy*** would not be preferential as to them according to 11 USCS § 547(b)(4)(B). Wilmington Nursery Co. v Burkert (In re Wilmington Nursery Co.) (1984, BC ED NC) 36 BR 813 (criticized in MBNA America v Locke (In re Greene) (2000, CA9 Cal) 223 F3d 1064, 2000 CDOS 5731, 2000 Daily Journal DAR 7627, 36 BCD 102, 44 CBC2d 717, CCH Bankr L Rptr P 78211).

Execution of security agreement and filing of financial statements constituted preferential transfer under 11 USCS § 547 when purchasers of 30 percent of debtor's common stock, who became secured creditors by exchanging stock for debt, were "affiliates" of debtor within meaning of 11 USCS § 101(2) since through their stock ownership and in accordance with terms of shareholders' agreement they possessed opportunity to control debtor and were also insiders on date they obtained security interest because their change of status from insider to creditor occurred in very transaction which was also preferential. In re Hostellerie d'Argenteuil, Inc. (1984, BC SD Fla) 42 BR 292 (criticized in Pummill v McGivern (In re Am. Eagle Coatings) (2006, BC WD Mo) 353 BR 656) and (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Transfers made from Chapter 7 debtor corporation to its sole stockholder, president, and sole director and his wife are preferential under 11 USCS § 547 where (1) transfers occurred within either 90 days or at least one year preceding commencement of corporate ***bankruptcy***, (2) recipients of transfers are insiders, and (3) transferee's evidence fails to overcome presumption of insolvency; trustee may also recover under 11 USCS § 548 because there is no evidence supporting transferee's contention that transfers were loans or advances and no fair and adequate consideration was given. In re Craft Plumbing Service (1985, BC MD Fla) 53 BR 654.

Under 11 USCS §§ 547(b)(4)(B) and 101(30)(B) [now 101(31)(B)], individual is corporate insider where he is Chapter 7 debtor's sole shareholder, director, vice-president, creditor, and guarantor of debtor's debts to senior secured creditor. In re Vermont Toy Works, Inc. (1987, BC DC Vt) 82 BR 258, revd on other grounds (1991, DC Vt) 135 BR 762.

Individuals were insiders of corporate Chapter 11 debtor at time of alleged preferential buyout under 11 USCS § 547 where: (1) they were still officers and directors at closing, even though they had signed written resignations prior thereto, where resignations were held in escrow in order not to be effective until completion of closing; and (2) they were in control by reason of their 80 percent stock interest and offices which they held, and that control continued with respect to small expense reimbursements made thereafter, even though resignations were then effective and stock sales had been completed, because payments received after closing were made pursuant to written agreement made when individuals were still in control; payments made after technical control ceases, but committed to while it exists, present same potential for abuse posed by payments to parties then in control. In re Vadnais Lumber Supply, Inc. (1989, BC DC Mass) 100 BR 127, 19 BCD 451, 21 CBC2d 19, CCH Bankr L Rptr P 72904.

Language of 11 USCS § 547(b)(4)(B) clearly states that insider relationship is to be determined on exact date of challenged transfer; individuals who were directors, officers or both of corporate Chapter 7 debtor on date of transfer by debtor, who was guarantor on note on which individuals were personally liable, are insiders; individuals who were not officers, directors, or general or limited partners of debtor, and who were not shareholders and did not control debtor, on date of transfer are not insiders. In re Cavalier Homes of Georgia, Inc. (1989, BC MD Ga) 102 BR 878.

Lender of funds to Chapter 11 debtor corporation is insider for purposes of 11 USCS § 547 where it owned 50 percent of debtor's stock, and its control over debtor is demonstrated by its firing of former employees and/or principals, bringing in of new management as well as "consultant," and total control of corporate checkbook to exclusion of debtor's principals. In re International Club Enterprises, Inc. (1990, BC DC RI) 109 BR 562, CCH Bankr L Rptr P 73236.

Former shareholders who agreed to sell their shares under contract permitting them, upon default, to rescind sale or sell shares at public sale remained in effective control of whether payments were made and remained "insiders" for ***preference*** purposes even though they had given up their role in daily operation of business. Le Cafe Creme, Ltd. v Le Roux (In re Le Cafe Creme, Ltd.) (2000, BC SD NY) 244 BR 221 (criticized in Shearer v Tepsic (In re Emergency Monitoring Techs., Inc.) (2007, BC WD Pa) 366 BR 476, 48 BCD 63) and (criticized in Andrew Velez Constr., Inc. v Consol. Edison Co. of N.Y., Inc. (In re Andrew Velez Constr., Inc.) (2007, BC SD NY) 373 BR 262) and (criticized in Gold v Winget (In re NM Holdings Co., LLC) (2009, BC ED Mich) 407 BR 232).

309. Suppliers

Bankruptcy court did not err in finding that creditor was non-statutory insider under 11 USCS § 547(b) for purposes of extending time for recovery of preferential payments under 11 USCS § 550(a) because actual control was not required for such finding and there was extensive evidence that debtor's and creditor's transactions were not conducted at arm's length. Shubert v Lucent Techs. Inc (In re Winstar Communs., Inc.) (2009, CA3 Del) 554 F3d 382, 51 BCD 45, CCH Bankr L Rptr P 81408 (Overruled in part as stated in In re USDigital, Inc. (2011, BC DC Del) 461 BR 276, 55 BCD 260) and (criticized in Gladstone v Schaefer (In re UC Lofts On 4th, LLC) (2015, BAP9) 2015 Bankr LEXIS 3009).

Supplier of fabric to Chapter 7 debtors who manufactured medical scrubs for employees of nursing homes, did not have such close relationship to debtors so as to be considered "insider" for purposes of 11 USCS § 547(b) which authorizes trustee to avoid transfer of debtor's property to "insider" made within one year of ***bankruptcy*** filing, where although parties discussed joint business venture, such venture never materialized, supplier also was not relative of debtor, debtor had ability to end relationship with supplier at any time, and debtor did terminate relationship with supplier about ten months prior to ***bankruptcy*** filing by chaining door to plant in order to keep supplier from entering premises. Mather v Tailored Fabrics (In re Himes) (1995, BC ED Okla) 179 BR 279.

In determining whether payment was in ordinary course of business between parties, trial court should consider, in addition to factors identified in Sulmeyer v. Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728 (9th Cir. 1994), (i) any other facts that shed light on whether or not transfer in question resulted from pressure by transferee or from debtor's desire to prefer transferee over other creditors, and (ii) furthermore, court should examine facts not only to determine extent to which transfer outwardly conforms with past practices between parties, but also to determine whether transfer was product of either of proscribed purposes noted above. Schoenmann v BCCI Constr. Co. (In re Northpoint Communs. Group, Inc.) (2007, BC ND Cal) 361 BR 149, affd (2007, BAP9) 2007 Bankr LEXIS 4931.

310. Trustees

Trustee of general trust was insider of debtors under 11 USCS § 101(31) and for purposes of 11 USCS § 547(b) where trustee drafted agreement calling for establishment of trust; settlor and settlor's spouse, though separated, were statutory insiders; trustee utilized settlor as agent; trustee ceded control over trust to settlor; settlor was officer and director of debtors and person in control of debtors; trustee permitted settlor to use employee of debtor to

receive and disburse funds that trust received; and post-confirmation loan from trust to debtors was not arms length transaction. Grossman v Charmoy (In re Craig Sys. Corp.) (2000, BC DC Mass) 244 BR 529.

Where supplier and contractor with common principal arranged for contractor to pay ***bankruptcy*** debtor for services and for debtor to simultaneously pay supplier same amount, and supplier contended that prepetition transfers to supplier were not avoidable as ***preferences*** because they were made in ordinary course of business within meaning of 11 USCS § 547(c)(2), ordinary-course defense did not apply since transfers were not in ordinary course of dealings between debtor and supplier; parties did business for several years before check-swap arrangement began, which was after debtor experienced financial difficulties, none of supplier's other customers was subject to such arrangement, and arrangement differed from past practices and constituted unusual payment or collection activity. Richardson v Pana Limestone Quarry Co. (In re Leprechaun Trucking, Inc.) (2007, BC CD Ill) 356 BR 190.

Although payments departed from past practices between parties, defendant satisfied requirement that payments be "made in ordinary course of business or financial affairs of debtor and transferee" because facts and circumstances showed that debtor made payments in furtherance of its business plan, and not as result of pressure by defendant or debtor's desire to prefer defendant over other creditors. Schoenmann v BCCI Constr. Co. (In re Northpoint Communs. Group, Inc.) (2007, BC ND Cal) 361 BR 149, affd (2007, BAP9) 2007 Bankr LEXIS 4931.

Creditor failed to meet its burden of proof under 11 USCS § 547(c)(2)(B) under circumstances where there was no evidence of long-term relationship between debtor and creditor, or of ongoing history of invoicing and payments that could be reviewed and compared to disputed transactions; rather, dispute arose from one contract for major capital improvement; contract scheduled four payments to be made by debtor at various stages of job, payments in dispute were paid outside terms of contract, and limited history of payments did not evidence that parties effectively modified their originally negotiated terms. Buckley v Carrier Corp. (In re Globe Holdings, Inc.) (2007, BC ND Ala) 366 BR 286.

Creditor's one-time five-day hold on one of debtors' checks was outside parties' ordinary course of business and that ***payment*** was not excepted from avoidance by 11 USCS § 547(c)(2); as for other ***payments***, no material change occurred in character or frequency of debtors' ***payments*** during ***90 days*** before filing. Liquidating Supervisor for Riverside Healthcare, Inc. v Sysco Food Servs. of San Antonio, LP (In re Riverside Healthcare, Inc.) (2008, BC MD La) 393 BR 422.

311. Miscellaneous

Creditor which, by insinuating its agent into management position with debtor, establishes special relationship with debtor by which creditor can compel ***payment*** of its debt is "insider" for purpose of extended ***preference*** period of 11 USCS § 547(b). In re Rubin Bros. Footwear, Inc. (1987, SD NY) 73 BR 346.

Bankruptcy Court did not err in holding that affiliate corporation, which was alter ego of insider relative to debtor corporation, is insider under 11 USCS § 101, for purposes of permitting trustee to avoid loan repayments made by debtor corporation to affiliate under 11 USCS § 547(b)(4)(B). In re Landbank Equity Corp. (1987, ED Va) 83 BR 362.

Trustee for debtor who had sought Chapter 7 ***bankruptcy*** relief could not show that owner of consulting company that purchased assets from debtor shortly before debtor filed for ***bankruptcy*** was insider such as to allow avoidance of sale as preferential transfer under 11 USCS § 547(b)(4)(B) because owner had resigned as CEO and director of debtor at time of actual sale and was, thus, not insider. Mann v GTCR Golder Rauner,L.L.C. (2006, DC Ariz) 351 BR 714, 56 CBC2d 784.

In preferential transfer action brought by litigation trustee for Chapter 11 debtors, trustee was not judicially estopped from asserting that individual was insider of debtors, on grounds that debtors failed to disclose alleged insider in their Statement of Financial Affairs, because trustee was not asserting cause of action belonging to debtors but asserting action in representative capacity for general unsecured creditors. Lugo-Mender v Gov't Communs. Inc. (In re El Comandante Mgmt. Co.) (2008, DC Puerto Rico) 404 BR 47.

Lessor of vehicles to debtor, who later became judgment creditor, is not "insider" for purposes of 11 USCS § 547 and bare allegation by creditor that lessor might possibly be insider does not constitute material issue of fact so as to preclude summary judgment in favor of lessor in action to avoid assignment of debtor's right to proceeds of lawsuit. In re Roy Young, Inc. (1986, BC WD La) 66 BR 16.

Corporation controlled, owned, and operated by 2 individuals who also owned debtor corporation from formation sale and held debtor's stock in escrow, which was major customer and creditor of debtor, took physical possession of debtor's assets, and made substantial contributions to debtor, is insider within definitions of 11 USCS §§ 101 and 547. In re Apollo Hollow Metal & Hardware Co. (1987, BC WD Mo) 71 BR 179.

Former employer of Chapter 7 debtor to whom debtor is making restitution payments is not insider under 11 USCS § 547 or 101(30)(A) [now 101(31)(A)], even though employer has power to institute criminal proceedings against debtor if payments are not made. In re Henderson (1989, BC ED Pa) 96 BR 820 (criticized in Zucker v Freeman (In re Netbank, Inc.) (2010, BC MD Fla) 424 BR 568, 52 BCD 260, 22 FLW Fed B 334).

Creditor whose loan was repaid by corporate Chapter 7 debtor within one year prior to ***bankruptcy*** was "insider" as defined by 11 USCS § 101, and therefore transfer may be avoided pursuant to 11 USCS § 547 even though it occurred outside 90-day period; although creditor was not relative of one of debtor's officers and directors at time of transfer because he had divorced debtor's president's sister, and, although general manager of debtor was not "managing agent" of debtor, he did have close relationship with debtor and transaction was not at arm's length where he had been debtor's general manager for years, he considered debtor's president to be "family," he made unsecured $ 25,000 loan relying strictly on debtor's president's word, he was in midst of arranging purchase of significant portion of debtor's operations, he borrowed one of debtor's trade names in naming his new corporation, loan was made due to his close relationship with president, and president repaid loan because of relationship between parties and because he had promised that he would repay creditor if debtor did not. In re Standard Stores, Inc. (1991, BC CD Cal) 124 BR 318, 91 Daily Journal DAR 2748, 21 BCD 615.

Profit-sharing trust established by corporation of which individual debtor was officer and director, and of which debtor was beneficiary, may be "insider" as defined in 11 USCS § 101(30) and for purposes of trustee's avoidance powers under 11 USCS § 547(b), because although trust and debtor are not partners or relatives, and debtor was not officer, director, or controlling person of trust, it may be established that trust is "managing agent" of debtor or entity with sufficiently close relationship with debtor that its conduct is subject to closer scrutiny than if arm's-length transaction were involved; evidence on matters such as debtor's rights, access, and dominion or control, if any, over trust, or over debtor's interest in trust, are probative on question of insider status. In re Polk (1991, BC DC Colo) 125 BR 293, 8 Colo Bankr Ct Rep 80, 21 BCD 1005.

Payment made by Chapter 7 debtor mortgage broker, operating in secondary mortgage market, to non-insider investor is not avoidable as preferential transfer under 11 USCS § 547 because transfer occurred more than ***90 days*** prior to petition date, despite trustee's argument that ***preference*** period should be extended to one year because insider guaranteed ***payments*** to investor, where rationale for extending ***preference*** period beyond ***90 days*** no longer exists in this case, since insider guaranteed virtually all debts owed by debtor, and therefore there can be no allegation that insider made ***payments*** in attempt to pay down some debts versus others, depending upon whether or not he was personally liable pursuant to guarantee; since all creditors of debtor are similarly situated by virtue of obtaining same guarantee, insider had no incentive to pay off one creditor over another. Ryan v Zinker (In re Sprint Mortgage Bankers Corp.) (1994, BC ED NY) 164 BR 224, 25 BCD 408, 30 CBC2d 1594, CCH Bankr L Rptr P 75743, affd (1995, ED NY) 177 BR 4, 25 UCCRS2d 1267.

Chapter 7 trustee failed to show that the alleged transferees were insiders under 11 USCS §§ 101(31) and 547(b) where the complaint merely labeled them as insiders, but provided few details regarding the relationship between the debtors and the transferees and did not address in what capacity the transferees were insiders of the debtors. Angell v BER Care, Inc. (In re Caremerica, Inc.) (2009, BC ED NC) 409 BR 737, 51 BCD 249 (criticized in TOUSA Homes, Inc. v Palm Beach Newspapers, Inc. (In re TOUSA, Inc.) (2010, BC SD Fla) 442 BR 852) and (criticized in Ransel v GE Commer. Distrib. Fin. Corp. (In re Pilgrim Int'l Inc.) (2011, BC ND Ind) 2011 Bankr LEXIS 3182) and partial summary judgment den, as moot, summary judgment gr (2013, BC ED NC) 2013 Bankr LEXIS 1791 and

(criticized in Howell v Fulford (In re Southern Home & Ranch Supply, Inc.) (2013, BC ND Ga) 2013 Bankr LEXIS 5535).

After performing insider/affiliate analysis, as those terms were defined in 11 USCS § 101(2) and (31), and determining that insider chain connected debtor to corporation, then to limited liability company, and finally to creditor, court determined that creditor was insider of debtor and therefore, Chapter 7 trustee was entitled to use extended reach-back period in 11 USCS § 547(b)(4)(A). Kotoshirodo v Brennan (In re Lull) (2011, BC DC Hawaii) 65 CBC2d 1073, adversary proceeding, remanded (2011, DC Hawaii) 2011 US Dist LEXIS 150286.

Chapter 7 trustee's preferential transfer claim was unable to withstand motion to dismiss because it purported to state ***preference*** claim against professional firms for advances made beyond 90-day reach-back period for non-insiders as set forth in 11 USCS § 547(b)(2), even though firms were not alleged to be insiders of debtor. Neilson v Agnew (In re Harris Agency, LLC) (2011, BC ED Pa) 465 BR 410, adversary proceeding, motion gr, in part, motion den, in part, claim dismissed, without prejudice (2011, BC ED Pa) 2011 Bankr LEXIS 5336, motion gr, in part, motion den, in part, claim dismissed, without prejudice, in part (2012, BC ED Pa) 477 BR 590.

Trustee was not entitled to partial summary judgment on preferential transfer claim against defendant because there were genuine issues of fact regarding whether defendant was insider under 11 USCS § 101(31)(B)(vi). Whether financing relationship between debtor and defendant exceeded permissible boundaries so as to make defendant insider was in genuine dispute. Sarachek v Twin City Poultry (In re Agriprocessors, Inc.) (2013, BC ND Iowa) 69 CBC2d 579, reconsideration den, judgment entered (2013, BC ND Iowa) 2013 Bankr LEXIS 4401.

As transfer at issue occurred outside of 90-day reach back period, Chapter 7 trustee had to prove that transfer was to insider. Trustee failed to state preferential transfer claim, as transfer was to debtor's accountant, which was not one of named insiders in ***Bankruptcy*** Code, and trustee failed to allege how accountant's relationship with debtor allowed him to exert control or influence over debtor. Rentas v Olavarria (In re Editorial Flash, Inc.) (2016, BC DC Puerto Rico) 62 BCD 210.

Unpublished Opinions

Unpublished: Where debtor, restaurant franchisee, conveyed all of his restaurant assets to franchisor as part of franchise termination agreement, franchisor was not insider as debtor did not operate franchisor's business, and debtor presented no evidence of day-to-day, extra-contractual control of his business by franchisor; record contained no indication that relationship between debtor and franchisor went beyond arm's-length franchisor-franchisee relationship. Congrove v McDonald's Corp. (In re Congrove) (2005, BAP6) 45 BCD 59, reported at (2005, BAP6) 330 BR 880 and affd (2007, CA6) 222 Fed Appx 450, 47 BCD 166, 2007 FED App 37N.

Unpublished: Where debtor conveyed real property to transferee, and property was resold to third party, trustee's preferential transfer claim failed because, although payment was on account of antecedent debt, transferee was not insider of debtor since there was no evidence that relationship between parties was anything other than one time business transaction. Ellis v Estate Rescue, LLC (In re Schmidt) (2008, BC WD Wash) 2008 Bankr LEXIS 4658.

Unpublished: Transferee was insider for purposes of avoiding preferential transfers where he had authority to sign debtor's name to checks and to sign checks on behalf of debtor's business. Jacobson v Jacobson (In re Lev) (2009, BC DC NJ) 2009 Bankr LEXIS 5689, judgment entered (2009, BC DC NJ) 2009 Bankr LEXIS 2669.

I. Relative Benefit to Preferred Creditor

1. In General

312. Generally

11 USCS § 547(b)(5) is directed at transfers which enable creditors to receive more than they would have received had estate been liquidated and disputed transfer not been made; as long as transfers diminish estate available for distribution, creditors who are allowed to keep transfers would be enabled to receive more than their share. Barash

v Public Fin. Corp. (1981, CA7 Ill) 658 F2d 504, 7 BCD 1438, 4 CBC2d 1548, CCH Bankr L Rptr P 68297 (criticized in Official Comm. of Unsecured Creditors of Enron Corp. v Whalen (In re Enron Corp.) (2006, BC SD NY) 357 BR 32, 47 BCD 124).

Under 11 USCS § 547(b)(5), court must focus not on whether creditor may have recovered all monies owed by debtor from any source whatsoever, but instead upon whether creditor would have received less than 100 percent payout in Chapter 7 liquidation, which reflects notion that creditor need not return sum received from debtor prepetition if creditor is no better off vis-a-vis other creditor than he or she would have been had creditor waited for liquidation and distributions of assets of estate. In re Virginia-Carolina Financial Corp. (1992, CA4 Va) 954 F2d 193, 4 Fourth Cir & Dist Col Bankr Ct Rep 168, 22 BCD 783, 26 CBC2d 279, CCH Bankr L Rptr P 74402.

Bankruptcy Court is required under 11 USCS § 547(b)(5) to compare monetary benefit creditor in fact received from alleged preferential transfer with projected amount of any distribution to same creditor in event there was order for relief under Chapter 7 and preferential transfer had never occurred. In re Erin Food Services, Inc. (1992, CA1 Mass) 980 F2d 792, 23 BCD 1108, 27 CBC2d 1689, CCH Bankr L Rptr P 75013.

Preferential transfer occurs when creditor receives, under sanctions of 11 USCS § 547(b), payment of larger percentage of its claim than it would otherwise have received had it participated in ***bankruptcy*** distribution with rest of Chapter 7 debtors' creditors; if preferential payment has taken place, law regards transaction as nullity, requiring that it be returned to debtors' estate. In re Cockreham (1988, DC Wyo) 84 BR 757.

Transfer constitutes ***preference***, if all other conditions are met, where creditor receives more money than it would receive in liquidation, and it is not necessary that other creditors be deprived by creditor receiving ***preference***. In re Pierce (1980, BC ND Ill) 6 BR 18, 2 CBC2d 148.

Purpose of 11 USCS § 547(b) is to provide ratable distribution among creditors; distribution to creditor under which creditor receives more from estate than it would under Chapter 7 Liquidation is voidable ***preference*** even though no nondischargeable debt may be paid outside of estate after ***bankruptcy*** since that fact does not create priority which in effect is inconsistent with and contrary to scheme of ratable distribution of estate. In re Kayajanian (1983, BC SD Fla) 27 BR 711.

Transfer is preferential under 11 USCS § 547(b)(5), despite possibility of payment by third party under order shipment bond because it is effect on estate, not payment to creditor, that determines whether transfer causes larger payment to creditor than others in same class. In re Hillcrest Foods, Inc. (1984, BC DC Me) 40 BR 360, 38 UCCRS 1195.

When Chapter 11 debtor is insolvent and creditor is not fully secured, recipient of postpetition transfer generally will receive more through alleged ***preference*** than he would receive through distributions in Chapter 7 proceeding had transfer not been made; transfer is therefore voidable ***preference*** under 11 USCS § 547(b)(5). In re American Insulator Co. (1986, BC ED Pa) 60 BR 752, CCH Bankr L Rptr P 71160.

Where creditor shares in distribution equally with other members of its class, it does not receive more than it would have under Chapter 7 case and transfer does not meet requirement of 11 USCS § 547(b)(5) to be classified as ***preference***. In re Sin-Ko, Inc. (1987, BC ND Ohio) 72 BR 651.

Inquiry under "insider" provision in 11 USCS § 547 is not whether debtor had influence over defendant to obtain more favorable terms; focus is defendant's influence, through relationship with debtor, to obtain more favorable repayment of debt at expense of debtor's other creditors; former is debtor taking advantage while latter is insider taking advantage, which is what 11 USCS § 547 is meant to remedy. Seitter v Wedow (In re Tankersley) (2008, BC DC Kan) 382 BR 522.

Approach taken in Schwinn Plan Committee v. Transamerica Insurance Finance Corp. (In re Schwinn Bicycle Co.), 200 B.R. 980 (***Bankr.*** N.D. Ill. 1996), is appropriate method for analyzing ***preference*** actions in cases involving insurance premium financing; this method does not betray plain language of 11 USCS § 547 and also supports policies behind prevention of preferential transfers. Rocin Liquidation Estate v UPAC (In re Rocor Int'l, Inc.) (2007,

BAP10) 380 BR 567, 49 BCD 72 (criticized in Falcon Creditor Trust v First Ins. Funding (In re Falcon Prods.) (2008, BAP8) 381 BR 543, 49 BCD 112, 59 CBC2d 222).

313. Greater amount test

For purposes of 11 USCS § 547(b)(5), whether or not creditors who received transfer of real property from Chapter 11 debtor received more than in theoretical Chapter 7 proceeding is determined by "greater amount test," which is computed by reference to end of ***bankruptcy*** process, but in land transfer value creditors received cannot be compared to value of interest in real property plus value of any unsecured claims against debtor; rather, value of land received in transfer is compared with value of breach of contract claim in Chapter 7 if transfer is avoided, because initial transfer was not payment on account, but complete transaction. In re Lewis W. Shurtleff, Inc. (1985, CA9 Cal) 778 F2d 1416, 13 CBC2d 1400, CCH Bankr L Rptr P 70902 (criticized in Sierra Invs., LLC v SHC, Inc. (In re SHC, Inc.) (2005, BC DC Del) 329 BR 438, 45 BCD 98, 58 UCCRS2d 573).

Payment is avoidable as ***preference*** only if payment improved creditor's position as compared to other creditors in same class; 11 USCS § 547(b)(5), sometimes referred to as "greater amount" test, requires court to construct hypothetical Chapter 7 case and determine what creditor would have received if case had proceeded under Chapter 7; starting point in "greater amount" analysis is identification of class to which creditor belongs. Alvarado v Walsh (In re LCO Enters.) (1993, CA9) 12 F3d 938, 94 CDOS 10, 94 Daily Journal DAR 17, 25 BCD 136, 30 CBC2d 624, CCH Bankr L Rptr P 75648 (criticized in DeGiacomo v Raymond C. Green, Inc. (In re Inofin Inc.) (2014, BC DC Mass) 512 BR 19).

Payment of proceeds of foreclosure sale of Chapter 7 debtors' residence constituted preferential transfer which trustee could avoid under 11 USCS § 547(b); trustee established that payment enabled mortgagee to receive more than it would have received under Chapter 7 since mortgagee conceded its security interest was unperfected and Chapter 7 distribution would permit mortgagee to recover only its proportionate share of proceeds along with other creditors. Boberschmidt v Society Nat'l Bank (In re Jones) (2000, CA7 Ind) 226 F3d 917, 44 CBC2d 1444.

Bankruptcy and district courts erred in holding that "tracing" principles that would have determined creditor's perfected security interest at time of alleged ***preference*** payments from commingled funds of automobile dealership pursuant to "floor plan" financing arrangement were relevant to ***bankruptcy*** trustee's claims under 11 USCS § 547(b)(5); proper formula for determining creditor's security interest was set forth in Va. Code Ann. § 8.9-306(4)(d) (repealed 2001), which did not depend on tracing proceeds of collateral, and not by applying § 8.9-306(2). Hall v Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.) (2005, CA4 Va) 412 F3d 545, 44 BCD 256, CCH Bankr L Rptr P 80312, on remand, findings of fact/conclusions of law, judgment entered (2007, BC ED Va) 2007 Bankr LEXIS 424.

Transfers of debtors' property to single creditor constitute voidable ***preferences*** under 11 USCS § 547(b) where trustee met burden of proof under greater percentage test by showing that it was highly unlikely that other assets would come into debtors' estate to pay other creditors in same class as preferred creditor same amount preferred creditor received from debtor. In re Gastaldo (1981, BC ND Ohio) 13 BR 808, CCH Bankr L Rptr P 68328.

Standard for determining, under 11 USCS § 547(b)(5), whether defendant in turnover action received more than he would have been entitled to under Chapter 7 distribution is whether defendant, as general unsecured creditor, would receive less than 100 percent recovery on his claim--the "greater percentage" analysis; ***Bankruptcy*** Court may take judicial notice of debtor's ***bankruptcy*** case as whole, including debtor's schedules and lists of creditors in order to determine values used in greater percentage test. In re Meinhardt Mechanical Service Co. (1987, BC WD Pa) 72 BR 548.

Determination whether transfer is preferential under 11 USCS § 547(b)(5) for allowing creditor to receive more than it would have pursuant to distribution under ***bankruptcy*** code does not actually require full-blown reconstruction of estate and liquidation analysis; instead, trustee need only prove that as result of transfer creditor received greater percentage of its debt than it would have received otherwise; rationale behind "Greater Percentage Test" is simple in that creditor who received payment prepetition de facto received 100 percent of its debt whereas same creditor would not receive 100 percent in liquidation. Krafsur v Scurlock Permian Corp. (In re El Paso Refinery, L.P.) (1995, BC WD Tex) 178 BR 426, revd on other grounds (1999, CA5 Tex) 171 F3d 249, 34 BCD 106, 38 UCCRS2d 631.

Prepetition transfer of debtor's interest in real property to lien creditor who purchases property at regularly conducted, non-collusive sheriff's sale, and who then sells property to third party for amount greater than amount of its lien, is not avoidable under 11 USCS § 547(b) as ***preference***; lien creditor does not "receive more" for purposes of 11 USCS § 547(b)(5) than it would receive in Chapter 7 liquidation. Chase Manhattan Bank v Pulcini (In re Pulcini) (2001, BC WD Pa) 261 BR 836, 46 CBC2d 470 (criticized in Rocco v J.P. Morgan Chase Bank (2006, WD Pa) 2006 US Dist LEXIS 12850) and (criticized in Canandaigua Land Dev., LLC v County of Ontario (In re Canandaigua Land Dev., LLC) (2014, BC WD NY) 521 BR 457, 60 BCD 81, 72 CBC2d 926).

Where distribution to creditors would be less than 100 percent, under 11 USCS § 547(b)(5) alleged preferential payments to creditor would allow creditor to receive more than it would in liquidation had payments not been made. Scharffenberger v United Creditors Alliance Corp. (In re Allegheny Health, Educ. & Research Found.) (2003, BC WD Pa) 292 BR 68, affd (2005, CA3 Pa) 127 Fed Appx 27, 44 BCD 100.

Chapter 11 trustee established that June repayments enabled bank to receive more than it would have received from debtors in Chapter 7 liquidation, in accordance with 11 USCS § 547(b)(5), where bank did not dispute that June repayments constituted payment in full of June advances, nor did it dispute that, as trustee stated, there was no prospect whatsoever that unsecured creditors would be paid in full. Jacobs v Matrix Capital Bank (In re AppOnline.com, Inc.) (2004, BC ED NY) 315 BR 259, 43 BCD 210.

In adversary proceeding arising from ***bankruptcy*** case, debtor was unable to show that release of debtor's cause of action was unavoidable under 11 USCS § 547 based on fact that debtor allegedly received less from transfer than would have been received in Chapter 7 liquidation; debtor's status as secured creditor was under attack, and if trustee was successful in recharacterizing secured claim as equity, debtor's argument would have been meritless. e2 Creditors' Trust v Farris (In re e2 Commun's, Inc.) (2004, BC ND Tex) 320 BR 849, 43 BCD 277.

Creditor (insurance company) was not entitled to partial summary judgment in Chapter 11 adversary proceeding in which plan administrator sought to avoid as preferential transfers 19 payments that debtor made to creditor where there were disputed issues of material fact as to whether creditor received more in transfers than it would have received in hypothetical Chapter 7 liquidation as required by 11 USCS § 547(b)(5). Peltz v Hartford Life Ins. Co. (In re Bridge Info. Sys.) (2005, BC ED Mo) 321 BR 247, 44 BCD 107.

By its plain language, test set forth in 11 USCS § 547(b)(5) is meant to determine what creditor would receive in hypothetical Chapter 7 case of debtor, and whether such amount is more than what was actually received by creditor through alleged preferential transfer; here, transferee had not alleged that it was secured by property of debtor's estate, and since there was no dispute that anticipated recovery of unsecured creditors under plan would be less than 100 cents on dollar, it clearly recovered from debtor more than it would have in hypothetical Chapter 7 liquidation, and transfer remained subject to avoidance under § 547. Buchwald Capital Advisors LLC v Metl-Span I., Ltd. (In re Pameco Corp.) (2006, BC SD NY) 356 BR 327, 47 BCD 128.

Chapter 7 trustee was denied summary judgment, pursuant to 11 USCS § 547(b)(5), on complaint to recover ***preferences*** made by debtor during 90 days prior to ***bankruptcy*** filing because trustee provided no factual basis to support his conclusory allegation that transfers caused unsecured creditors to receive more than they would have received in hypothetical liquidation had transfers not been made and court would not speculate that unsecured creditors would not be paid in full. Tidwell v Sheffield (In re Houston Steel Fabricators, LLC) (2006, BC MD Ga) 357 BR 680.

Chapter 7 trustee established fifth element of avoidable ***preference*** by showing that creditor received 100 percent of what it was owed for each transfer at issue and that it would receive far less than that in Chapter 7 liquidation. Burtch v Prudential Real Estate & Relocation Servs. (In re AE Liquidation, Inc.) (2013, BC DC Del) 69 CBC2d 1467, magistrate's recommendation (2014, DC Del) 2014 US Dist LEXIS 142190 and magistrate's recommendation (2014, DC Del) 2014 US Dist LEXIS 142983 and affd in part and remanded in part (2015, DC Del) CCH Bankr L Rptr P 82868.

Payments relating to prepetition invoices made by debtor to creditor during ***preference*** period were not avoidable under 11 USCS § 547(b)(5) whether court used El Paso Refinery analysis or constructed complete hypothetical

Chapter 7 liquidation. Tusa-Expo Holdings, Inc. v Knoll, Inc. (2013, BC ND Tex) 496 BR 388, affd (2015, ND Tex) 2015 US Dist LEXIS 26468.

Unpublished Opinions

Unpublished: Trustee's showing that transfer enabled creditor to receive more than it would have received under Chapter 7 distribution had transfer not been made constituted prima facie showing that 11 USCS § 547(b)(5) applied. Webster v Scott & Reid Gen. Contrs., Inc. (In re NETtel Corp.) (2008, BC DC Dist Col) 2008 Bankr LEXIS 4309.

314. Net result rule

Judicial interposition of net result rule into 11 USCS § 547(b)(5) vitiates congressional intent clearly reflected on both face of 11 USCS § 547 and legislative history of enactment. In re Fulghum Constr. Corp. (1983, CA6 Tenn) 706 F2d 171, 10 BCD 702, 8 CBC2d 644, CCH Bankr L Rptr P 69201, cert den (1983) 464 US 935, 104 S Ct 342, 104 S Ct 343, 78 L Ed 2d 310.

Transferee was erroneously awarded summary judgment in preferential transfer action brought under former 11 USCS § 547 (amended 2005), as there were fact issues as to whether payments made by Chapter 11 debtor to transferee were in ordinary course of business under § 547(c)(2); it was unclear whether payments were timely under terms of parties' agreement, and there also were questions as to whether transferee exerted pressure on debtor. Nat'l Steel Corp. v BSI Alloys, Inc. (2006, ND Ill) 351 BR 906.

Net result rule, stating that preferential transfer will not be voided if net result is that debtor's financial interest benefited from preferential transfer, is not incorporated into 11 USCS § 547(b)(5) and (c)(4). In re Thomas W. Garland, Inc. (1982, BC ED Mo) 19 BR 920, 1 BAMSL 784, 8 BCD 1357, 6 CBC2d 1259.

Although payments were made beyond 30 day due date noted on invoice and were later than payments involved in earlier transactions between debtor and creditor, payments nevertheless qualified for ordinary course of business exception under 11 USCS § 547(c)(2); nothing suggested that payment within that period was in fact contractual term, nothing suggested that there was any sort of penalty for payment beyond billing due date, and there was no evidence that any form of collection activity was undertaken by creditor prior to receipt of payments. McGranahan v Fisher Nut Co. (In re Cent. Valley Processing, Inc.) (2007, BC ED Cal) 360 BR 676.

Net result rule, under which creditor who extends new credit within ***preference*** period should be able to offset its new credit against ***preference*** so they would only have to return to trustee net result of advances in payments made within ***preference*** period, has no application under 11 USCS § 547 and ***Bankruptcy*** Code. In re Gold Coast Seed Co. (1983, BAP9 Cal) 30 BR 551, 10 BCD 1049, CCH Bankr L Rptr P 69305.

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