DEFENDING BANKRUPTCY PREFERENCE CLAIMS

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Background and Purpose of Preference Law

The preference provisions contained in the current version of the federal bankruptcy law have their origins in England over 400 years ago. Preference provisions first appeared in American legislation in 1841. Although the law has undergone a number of changes over the years, the objectives of the law have not changed. The primary purposes of the preference law have been and remain twofold:

- To guard against the debtor favoring one creditor over another as it slides into bankruptcy, and to provide for a re-distribution of the transfers made to those creditors; and

- To discourage creditors from racing to the courthouse as the debtor's financial condition deteriorates.

In reality, the preference law may do little to discourage creditors from undertaking collection activity. Many would argue that while the stated purpose of re-distributing money paid to creditors that have been preferred is perhaps noble, the law is fatally flawed. In particular, those arguing against the law point out that it draws into its net creditors whose claims go beyond what the statute was intended to (or should) cover, it discourages creditors from working with debtors when the debtor gets into financial trouble, and it falls far short of equitably distributing avoided payments among the creditor body. As to this last point, there are many instances where creditors have been forced to pay back money received shortly before a bankruptcy filing to find out that that money will *not* be re-distributed so as to even out the distribution among the pre-petition creditors, but instead will be used solely for the purpose of paying the lawyers, accountants and other administrative claims in the case.

Overview of the Statute

In its simplest terms, the preference law allows a bankruptcy trustee (and other authorized individuals or entities) to recover for the benefit of the bankruptcy estate payments made to creditors shortly before a bankruptcy filing. The preference law is contained in section 547 of the Bankruptcy Code and is essentially divided into two parts – the elements of the claim that must be proven by the trustee, and the defenses that may be raised by the defending creditor. As will be discussed, most preference disputes focus on the defenses.

Who May Bring a Preference Claim

The preference statute gives the bankruptcy trustee the power to bring a preference claim. Pursuant to section 1107 of the Bankruptcy Code, however, debtors in possession in chapter 11 cases are granted most of the powers of a trustee, including the right to sue to recover preferences. Pursuant to a plan of reorganization or court order, other parties – such as a creditors' committee or a plan administrator – are sometimes granted the power to recover preferences on behalf of the estate. For the purposes of simplicity, these materials will refer to the party bringing the preference action or making the preference demand as the trustee.

The Elements of a Preference Claim

Pursuant to section 547(b) of the Bankruptcy Code, a trustee or debtor in possession may seek to recover from a creditor payments of money or other transfers of property made prior to a bankruptcy filing that have the following characteristics:

- The payment or transfer is on account of an antecedent (existing) debt.

- The payment or transfer occurs within 90 days prior to the filing of the bankruptcy petition or, if the payment has been made to an insider (officer, director, controlling shareholder or relative) of the debtor, within one year prior to the bankruptcy filing.

- The payment or transfer occurred while the debtor was insolvent.

- The payment or transfer allows the creditor to receive more than it would have received in a chapter 7 case.

What Transfers are Subject to Avoidance?

The vast majority of the time the "transfers" that we deal with in the preference context are nothing more than the payment of money. But, the definition of "transfer", which is contained in the general definitions in the Bankruptcy Code, is much broader. The definition, contained in section 101(54) is worth repeating here:

The term “transfer” means –

(A) the creation of a lien;

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

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

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –

(i) property; or

(ii) an interest in property.

A transfer can be of money or any other property. A transfer can constitute a change in ownership or of possession only (such as a loan of property). A physical transfer is not required, as long as the transferee obtains legal rights to the property. The granting of a security interest or other lien constitutes a transfer. A transfer may be voluntary or involuntary. Foreclosures, repossessions or other seizures of property constitute transfers for purposes of the preference statute.

When is a Transfer Made?

The date of transfer is relevant with regard to three of the four elements of a preference, i.e., whether a debt existed *at the time of* the transfer, whether the transfer was made *within 90 days* prior to the bankruptcy filing, and whether the debtor was insolvent *at the time of* the transfer. In many cases, the date of transfer will seem obvious. The following two common situations are not so obvious:

- Payment by check is deemed to have occurred *when the check clears the bank*, not when the check is mailed or received.

- Transfers of title depend, in part, on rules contained in the Uniform Commercial Code as to when title passes. Title may pass when shipped by the debtor (or the debtor’s agent) or may pass when received by the creditor (or other transferee on behalf of the creditor).

What is an Antecedent Debt?

Antecedent debts are those debts that were in existence prior to the transfer. Payment would not be on account of an antecedent debt if payment were made in advance or if payment were made by cash, wire transfer or cashier’s check at the time of the transaction giving rise to the right to payment. COD payments made by regular check technically would give rise to a payment on an antecedent debt since the payment will be deemed to have occurred at the time the check clears the bank, not at the time of delivery of the check.[1]

When is a Transfer Deemed to Have Been Made Within 90 Days?

In analyzing preference claims, it is important to pay close attention to the date of payment or transfer. Checks written before the start of the 90-day preference period and even received before that date will constitute payments made within the preference period if the check clears the bank within the 90-day period. Holding onto checks, therefore, increases the chances that a payment will be deemed to have been made within the preference period and would be avoidable by the trustee.

In those cases where the transfer in question involves goods rather than money, creditors should be sensitive to the possibility that the transfer may have occurred prior to their receipt of the goods. Where the goods are actually received just after the start of the preference period, a successful argument that the transfer actually occurred prior to that date could mean the difference between being liable or not for the return of the goods or the payment of their value.

Insolvency

A debtor is insolvent when the fair value of its assets is less than the amount of its debts. It is presumed that the debtor was insolvent during the 90-day period prior to the filing of a bankruptcy petition. This means that the trustee or the debtor in possession, as the case may be, does not have to produce any evidence that the debtor was insolvent at the time of the transfer. The creditor, however, is permitted to introduce evidence that the presumption of insolvency is false and that the debtor, in fact, was solvent at the time of the transfer. It, of course, is a rare case where a debtor experiencing the level of financial difficulties that causes it to file a bankruptcy petition would not be insolvent shortly before the petition is filed. At the same time, since the Bankruptcy Code does not require that a debtor be insolvent in order to file a bankruptcy petition, there are cases where a debtor is solvent within the 90-day period prior to the bankruptcy filing and at the time of the filing of the petition itself.

[1] A COD payment by check may be defensible as a contemporaneous exchange for new value, discussed at page 6 of these materials

Receiving More Than in a Chapter 7 Case

Whenever the debtor is insolvent at the time of a transfer, it follows that in a chapter 7 case general unsecured creditors will not get paid in full. Absent other considerations (discussed below), payments received by a general unsecured creditor within the 90-day preference period usually allow the creditor to receive more than it would have received if a petition under chapter 7 of the Bankruptcy Code had been filed on that date.

Among the claims that might get paid in full in a chapter 7 case and, therefore, payment on which within the preference period might *not* constitute an avoidable preference are:

- Payments to creditors that are fully secured by their collateral, *i.e.*, the value of the collateral equals or exceeds the amount of their claims.

- Payments to priority creditors (*e.g.*, creditors with properly asserted claims under the Perishable Agricultural Commodities Act) to the extent there are sufficient assets to pay their claims.

- Payments to creditors with valid reclamation claims who received payment instead of the return of the goods.

- Payments to creditors whose claims arise out of executory contracts or leases and whose contracts or leases are assumed in the bankruptcy case.

Preference Defenses

Section 547(c) of the Bankruptcy Code sets forth eight defenses, the most common of which and the ones discussed herein being (1) the subsequent new value defense, (2) the contemporaneous exchange for new value defense, and (3) the ordinary course of business defense.

The Subsequent New Value Defense

Creditors are entitled to a credit against a preference claim for the amount of any new credit extended to the debtor *after* receiving an alleged preferential payment, but only if the creditor did not receive payment on the new credit extended.[2] It is important to keep in mind the fact that the credit was extended *after* the payment was received *and* that the creditor was not paid on the subsequent credit extended.

[2] If the payment made to the creditor is avoided as a preference, *e.g.*, because it was made outside of the ordinary course of business, the court will deem the payment as not having been made for purposes of the subsequent new value defense.

The first thing to look for in performing a subsequent new value analysis is for those invoices that remain unpaid. The second is to apply those unpaid invoices against any alleged preferential transfers. This second step must be performed on a transaction-by-transaction basis; one cannot simply net out the payments against the credit. To illustrate, consider the following example:

Date	Payment	New Value
Day 1	$1,000	--
Day 2	--	$1,500
Day 3	$500	--
Totals	**$1,500**	**$1,500**

Even though the total payments received and the new value given both equal $1,500, the total amount of *subsequent* new value is only $1,000, leaving the creditor exposed in the amount of $500 of liability. Using the foregoing example, the following chart illustrates in more detail the concept:

Date	Payment	Total New Value	New Value Applied	Net Preference After New Value	Amt of New Value Lost
Day 1	$1,000	--	--	$1,000	--
Day 2	--	$1,500	$1,000	$0	$500
Day 3	$500	--	--	$500	--
Totals	**$1,500**	**$1,500**	**$1,000**	**$500**	**$500**

Contemporaneous Exchange for New Value

Payments or other transfers to a creditor are not avoidable if they were intended by both parties to be a contemporaneous exchange for new value and if the payment or other transfer was, in fact, substantially contemporaneous with the new value. This defense would apply in the following scenarios:

- A COD payment by check is technically a payment on account of an antecedent debt, but it is not recoverable as a preference because the payment is a contemporaneous exchange with the goods delivered.

- It is arguable that a payment that the debtor mails on the day that the creditor ships goods in reliance on the debtor’s assurance that the check has been mailed would be considered to be a contemporaneous exchange for new value.

- Payment in exchange for the promise not to assert a statutory lien not otherwise avoidable as a preference arguably would come within the contemporaneous exchange for new value.

Ordinary Course of Business Defense

The ordinary course of business defense remains the most amorphous of all of the preference defenses and the one most commonly raised. A creditor wanting to take advantage of this defense must demonstrate first that the debt was incurred in the ordinary business of both the debtor and the creditor. It then must show either that (1) the debt was repaid within terms that are ordinary as between the parties, *or* (2) the repayment was made within industry norms.[3]

<u>*Incurred in Ordinary Business*</u>: This requirement normally is not in issue in preference cases. In the typical case, goods are sold on credit by an entity engaged in that business to an entity that bought those goods in the ordinary course of its business. Similarly, services may be rendered by an entity engaged in that business to an entity that is using those services to further its business objectives. Occasionally, goods or services may be provided by an entity not normally engaged in that business, in which case that entity could not take advantage of the ordinary course of business defense.

<u>*Debt Repaid Within Terms Ordinary as Between the Parties*</u>: This is the most difficult of the concepts to grasp and will be discussed in a separate section of these materials.

<u>*Industry Norms*</u>: Payments made “according to ordinary business terms” are exempt from preference liability. The statute does not use the word “industry”, yet it is the standard within the industry that the courts will apply. To do this, the industry against which the payments will be measured must first be identified. Even within some industries, there may be variations among sub-industries. For example, within the food industry sales of fresh produce may be accompanied by shorter payment terms than sales of canned goods. Expert testimony may be required in order to prove the industry norm.

Determining the Ordinary Dealings of the Parties

By far, the greatest area for disagreement in the preference arena is the determination of what payments are deemed to be ordinary as between the parties. In making this determination, the payment terms agreed to by the parties, either verbally or in writing, are of only minor significance. What governs is the course of dealing between the parties. Yet, the Bankruptcy Code and the court decisions give little guidance as to how to divine what is ordinary from that course of dealing.

What the court decisions bear out is that what is ordinary depends on virtually any factor that the imagination can conjure up in dealing with a commercial transaction and might include:

[3] Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, creditors claiming payments were made in the ordinary course of business had to show both that both of the above requirements were met. The new law requires that the creditor prove one or the other, but not both.

- A calculation of what may have been ordinary based on a number of statistics, including the average number of days past invoice, the median number of days past invoice, the weighted average of days past invoice and a range of days past invoice based on a standard deviation analysis.

- Whether the manner of payment was ordinary. Wire transfers shortly before a bankruptcy filing are suspicious where payments were always made by check. Invoices lumped together as a single payment might not be ordinary if invoices were paid separately in the past. Partial payments may not be ordinary if the debtor consistently made payments in full prior to its financial difficulties.

- Whether the creditor had added late charges or interest to the account.

- Whether suit had been filed.

- Whether oral or written demand had been made.

To determine what the historical timing and manner of payment was, it is advisable to look at a year to two years worth of billing and payment history between the parties, ending at the date that is 90 days before the bankruptcy filing and comparing that data with the course of dealings between the parties during the preference period. As an example, assume that a bankruptcy petition is filed on March 2, 2009. The payments that would be subject to possible avoidance would be those that are deemed to have been made on or after December 2, 2008. You would want to analyze data going back to at least December 2, 2007 and perhaps as far back as December 2, 2006.

Analyzing the Billing and Payment Data

It is best to analyze the billing and payment history using an Excel spreadsheet. A suggested layout of the data would include the following:

Column Heading	**Explanation**
Invoice Date	The date showing on the invoice. If the date the credit is extended is different, you should use that date.
Ship Date	Include if the ship date is different from the invoice date.
Invoice Number	This is worth using for reference purposes and, if necessary, to try to match up data with data supplied by the trustee.
Invoice Amount	The dollar amount of the invoice.

Column Heading	Explanation
Payment Date	Creditors usually track payments by the receipt date. For the purposes of this analysis it is perfectly acceptable to use that date.
Total Payment	This is the total amount of the payment, whether it applies to one or many invoices. This column is used mostly for tracking purposes.
Payment Amount Applied to Invoice	This is the amount of the payment that is applied to the particular invoice listed on the same line to the left.
Number of Days Past Invoice	This can be calculated automatically in Excel by inserting a formula that subtracts the invoice date from the payment date. Note that you may want to use a reference date other than the invoice date if the debt does not arise when the invoice is issued or if there is another event that triggers off the time period for paying the invoice.
Comments	This column should include information about what might make the payment ordinary or, on the other hand out of the ordinary. A payment made by wire transfer should be noted here. Explanations as to why a payment may have been made late or early should also be noted.

The payments should be matched to the invoices. Where an invoice has been paid with more than one check or wire transfer the invoice should be listed more than once, with the payment applied to that invoice noted in the appropriate column to the right. Likewise, where a check or wire transfer pays more than one invoice, the payment should be listed the appropriate amount of times. Invoices that remain unpaid as of the bankruptcy filing should be accompanied by blanks in the payment fields. Finally, a line should be drawn marking the beginning of the preference period.

Once the data has been set up, it is time to analyze it. While trustees may argue that the average of the days past invoice is the most appropriate measure, that statistic fails to recognize the reality that businesses normally pay their bills within a range of days past invoice. A standard deviation analysis comes closest to determining a normal spread, but should be used cautiously since it is at best only an indicator as to what is normal. Some trustees will deem the inclusion of all of the data to be inappropriate and will seek to disqualify certain historical payments, such as those that are unusually far outside the norm. Preference defendants may want to find a reason to exclude payments that were made unusually quickly. The Comments column is helpful in this part of the analysis.

Once the ordinary range is determined, it may then be helpful to set up three additional columns to the right of the data during the preference period. These columns are as follows:

Column Heading	**Explanation**
Ordinary?	You will signify in this column whether the payment during the preference period comes within the ordinary range that you calculated for the pre-preference period. You should note either “yes” or “no”, or if you want more detail “ordinary”, “early” or “late”.
New Value	Where the line shows an unpaid invoice you should put the amount remaining unpaid here.
Net Preference	This is a running total of the potential preference exposure, determined by inserting the payment amount when payment is not ordinary and subtracting new value when a number appears in the New Value column, being careful, in any event **not** to let the number in the Net Preference column fall below zero.

The Benefits of the Alternative Test for Ordinary Course

With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the law gives the creditor a choice – it can prove that the payments were ordinary as between the parties *or* that they complied with industry norms. Moreover, there is nothing in the law that requires that the creditor choose one method of calculating ordinary course over another. As written,[4] a creditor could theoretically apply the industry norm to one payment while applying the course of dealing analysis to another payment. Two examples of how this alternative test could benefit creditors are:

- A creditor might have extended very liberal repayment terms to a debtor that fell outside of the industry norm, yet were ordinary as between the parties. Those payments would not be avoidable as a preference.

[4] There is certainly a possibility that one or more judges will require the creditor to choose a single test to be applied to all payments.

- A creditor that was accepting long payment terms might, upon learning of its customer's financial difficulties, decide to shorten the payment terms. If those terms are within industry norms, it does not matter that the payments were made more quickly than occurred in the past between the parties.

Special Treatment for Small Preference Claims

One of the major perceived abuses in the preference law is that trustees often bring small preference claims in jurisdictions that are far-removed from where the creditor is located. The cost of defense of these actions is not justified by the amount in controversy, the result being that creditors are inclined to pay something just to get rid of the case. Two provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 give creditors new protection against small preference claims. First, if the aggregate amount of the transfers that constitute potential preferences is less than $10,950, then a suit to recover the preference must be brought where the creditor is located, not where the bankruptcy case is pending, as was the case with the old law. In addition, in a case involving a debtor whose debts are not primarily consumer debts, payments under $5,475 in the aggregate[5] are not subject to avoidance if made to a non-insider.

There is one important thing to keep in mind in applying these limits. In determining whether the threshold dollar amount has been met for bringing the action in the first place or for the venue of the action, the court will look only to the amount of transfers made on account of antecedent debts, without regard to whether any or all of those payments are subject to a defense. Thus, even if the creditor extended $5,000 of undisputed subsequent new value in a case involving $11,000 of transfers, the action could still be brought where the bankruptcy case is pending.

Defending Preference Claims

In defending preference claims, it is important to understand the preference law and your billing and payment data. Before entering into settlement discussions, you should have fully analyzed not only the ordinary course of business, new value and contemporaneous exchange defenses, but you should also have made a determination as to what payments were made within 90 days, whether there is an argument that the debtor was not insolvent, and whether your claim is one of those that, if left unpaid, was entitled to be paid in full in a chapter 7 case. It is perhaps just as important to keep in mind the following:

[5] There is some argument that the $5,475-test is applied to each payment rather than the payments in the aggregate. It is widely believed, however, that the statute is intended to be applied to the aggregate of the payments. Thus, two payments of $4,000 each could be subject to a preference suit even though each payment is less than $5,475.

- Especially if the case is in chapter 7, the trustee may be required to rely solely on the debtor's books and records, which often are incomplete.

- When the trustee relies solely on books and records, he or she will often miss some of the information that will either support the preference claim or support the defense. Preference defendants will want to make sure that the trustee has all of the information needed to support the defense and should take care not to inadvertently supply the trustee with information that will help the trustee to make his case. Do not assume that a trustee knows that payment was made by wire transfer or that payment was made after the creditor's president personally visited the debtor to pick up a check. At the same time, the trustee may not know that a payment was made unusually late because there was a delay in delivering a part and that, when measured against the date of delivery of the missing part, the payment was ordinary.

- Preference claims in large cases tend to be handled in bulk. Often, this means that even cases with weak defenses can be settled for a relatively small amount of money, especially where the preference claim is one of the smaller ones. At the same time, there is a certain economy of scale that trustees achieve in pursuing preference claims *en masse*, which sometimes makes settling these claims difficult.

- Creditors that pay back preferences are entitled to a general unsecured claim for the amount that they pay back. It is rare that a preference claim cannot be settled by estimating the amount that is expected to be paid on the aggregate of the claim arising from paying back the preference and the amount of any existing pre-petition claim, and then netting that amount against the preference amount.

- Virtually any preference claim can be settled for less than the full amount. Most trustees are authorized to settle preference claims for somewhere between 70 percent and 90 percent, even if there is no defense.

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Mr. Bodoff is board-certified in Business Bankruptcy Law by the American Board of Certification. He is active in the American Bankruptcy Institute, where he served on its Board of Directors and its Executive Committee and as co-chair of the ABI Unsecured Trade Creditor Committee. Under his leadership, ABI, with the cooperation and support of NACM, published a *Creditors' Committee Manual*, over 50,000 copies of which have been distributed. He also led a two-year project studying the Bankruptcy Code's preference provisions. Three of the recommendations resulting from the study were incorporated in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Mr. Bodoff is a frequent lecturer and author on bankruptcy and creditors' rights topics. Among his publications, he is the author of the chapter on Creditors' Committees appearing in the treatise, *Bankruptcy Business Acquisitions.*