



Waiting for the Dust to Settle

Creditors that agree to a settlement of a debt may find that the payment constitutes a preference in a subsequent bankruptcy proceeding

By Terence S. Nunan and
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Imagine a scenario in which parties settle a lawsuit after a contentious battle involving a \$1 million claim against a defendant who is in financial difficulty. The plaintiff accepts a settlement of \$250,000. Fifty days after the plaintiff cashes the settlement check, the defendant, now the debtor, files for bankruptcy. More than a year later, the plaintiff calls his lawyer with the news that he has received in the mail an adversary proceeding complaint filed in Bankruptcy Court asserting that the entire settlement payment has to be repaid to the debtor's trustee in bankruptcy since the payment constitutes a "preference."¹

A preference is a transfer of a debtor's property or an interest therein to a creditor in satisfaction of a past-due debt at a time when the debtor is insolvent. More specifically, Bankruptcy Code Section 547(b) provides that, with certain exceptions:

- [A] 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 the 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 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
 - (5) that enables such creditor to receive more than such creditor would receive if:
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.²

To implement this section of the Bankruptcy Code, the trustee (who is often the debtor in a chapter 11 case) usually will review the debtor's records for a period within 90 days or longer before the case was filed and then sue to recover payments that were made by the debtor during that period if the payment appears to have been a preference. The underlying policy is to treat all similarly situated creditors equally so as not to "prefer" one creditor of the debtor

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over any other. For this reason, transfers to insiders—who include relatives or officers and directors—that were made one year from the date the petition was filed can be recovered. In contrast, transfers to those not financially or personally related to the debtor can only be recovered if the transfers were made within the 90-day period before the petition was filed. It is usually difficult to explain this procedure to a defendant in a preference

establishing that all five elements of Section 547(b) have been satisfied. The burden then shifts to the creditor to demonstrate the existence of any of the defenses that are available under Section 547(c). Although several defenses are available, most creditors utilize three major defenses: 1) “contemporaneous exchange,” 2) “ordinary course of business,” and 3) “new value.”

Section 547(c) lists when “the trustee may

business or financial affairs of the debtor and the transferee; and (C) made according to business terms.⁴

If a creditor and a debtor have an ongoing business relationship with established payment terms, the creditor provides goods or services according to the usual practice between the two businesses, the payment terms are consistent with industry standards,

While there is a rebuttable presumption that a debtor is insolvent 90 days before the bankruptcy petition is filed, a person who has received a preference payment is not without defenses.

action who is struck by the injustice of the request for recovery.

In the scenario, assume that the plaintiff (now the creditor) repays the preference and then decides to file a claim against the debtor’s bankruptcy estate. The size of the creditor’s claim has a major impact on how much the creditor can recover from the debtor’s bankruptcy estate. Assume that the net value of the debtor’s bankruptcy estate to be paid to creditors is \$900,000, and there are \$3 million in other claims in addition to the creditor’s claim. If the creditor’s claim is approved for \$1 million, he will receive \$225,000; if the creditor’s claim is for \$250,000, he will receive only \$69,231.

When Bankruptcy Code Section 547 was enacted in 1978, it represented a significant change in bankruptcy law. Prior to 1978, it seemed that most practitioners did not assume that good faith settlements of litigation could be preferential. In 1986, the legislature established that all five elements of Section 547(b) must be shown to establish an avoidable preference.

Defenses to Preference Actions

While there is a rebuttable presumption that a debtor is insolvent 90 days before the bankruptcy petition is filed, a person who has received a preference payment is not without defenses. First, the trustee has the burden of

not avoid under this section a transfer.” Under the first defense, Section 547(c)(1) provides that the trustee may not avoid 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.³

The most common example of a contemporaneous exchange is a payment for goods delivered on a C.O.D. or other cash basis. If the creditor was paid at the same time the goods or services were delivered to the now bankrupt debtor, the creditor can retain the payment since it was intended to be, and actually was, a contemporaneous exchange.

The second defense is that the debt was paid in the ordinary course of business between the parties. Section 547(c)(2) provides that the trustee may not avoid a transfer:

- (2) to the extent that such transfer was:
 - (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
 - (B) made in the ordinary course of

and the creditor receives payment in accordance with the established terms, then the creditor has an ordinary course of business defense.⁵ For example, a supplier of goods has been sending goods to a manufacturer for more than a year. The terms of the supplier’s invoice provide that the supplier must be paid within 30 days from the date of the invoice. The payment is received within those 30 days. In this circumstance the supplier has been paid pursuant to business terms and the funds need not be returned.

The new value defense is available to a creditor when two events occur: 1) the payment (now being sought as a preference) was received by the creditor, and 2) after receipt of the payment, the creditor delivered new goods or services to the debtor for which the creditor was not paid. According to Section 547(c)(4), the trustee may not avoid a transfer:

- (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor:
 - (A) not secured by an otherwise unavoidable security interest; and
 - (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.⁶

The creditor can reduce the amount of

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1. A preference is any transfer of a debtor's property or an interest therein to a creditor in satisfaction of a debt.
True.
False.
2. To be considered a preference, a transfer of the debtor's property or interest must have taken place within 90 days before the bankruptcy petition was filed.
True.
False.
3. One public policy behind preference law is to treat similarly situated creditors equally.
True.
False.
4. A preference action must be filed within 90 days of the filing of a bankruptcy petition.
True.
False.
5. A debtor is presumed to be insolvent within 90 days before the filing date of the bankruptcy petition, but this presumption is rebuttable.
True.
False.
6. The burden of proof in a preference action is completely on the creditor.
True.
False.
7. A transfer by check occurs when the check is honored.
True.
False.
8. When the debtor and the creditor intend for a transfer to be a contemporaneous exchange for new value, the transfer may not be avoided by the trustee.
True.
False.
9. A creditor who receives a payment that does not comport with its usual business arrangements with the debtor may assert the "ordinary course of business" defense.
True.
False.
10. Only three defenses to preference actions are available.
True.
False.
11. A payment to settle a lawsuit is always in the ordinary course of business.
True.
False.
12. The value of goods or services that are provided to a debtor before a preferential payment is received can reduce the amount of the preference.
True.
False.
13. The value of goods or services provided to a debtor for which a creditor is paid can reduce the amount of a preference.
True.
False.
14. The value of goods or services provided to a debtor after a preferential payment is received and for which a creditor is not paid can reduce the amount of the preference.
True.
False.
15. Structured settlement payments are considered to be part of the debtor's ordinary course of business.
True.
False.
16. The contemporaneous exchange defense always applies to settlement payments.
True.
False.
17. A trustee is not required to pursue all potential preference actions.
True.
False.
18. Under the Bankruptcy Code, ipso facto provisions are valid in executory contracts.
True.
False.
19. A clause that provides that a contract is invalid when a debtor files a bankruptcy petition is an ipso facto provision.
True.
False.
20. A debtor's contract rights become property of the debtor's estate despite the existence of any ipso facto clauses in an agreement between the debtor and the creditor.
True.
False.



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the preference by the amount of the new value delivered. For example, a creditor delivers goods worth \$5,000 to the debtor with an invoice for net 30-day terms. The creditor is paid in full 60 days later. Two days after the creditor receives the payment, the creditor ships additional goods invoiced at \$3,000 to the debtor. The debtor does not pay for the second shipment and files a bankruptcy petition two weeks later. The creditor has a new value defense of \$3,000. The creditor can reduce the \$5,000 preference payment by the \$3,000 value of the second shipment to \$2,000. Under these circumstances, a partial defense is better than none.

In most cases, a payment to settle litigation does not qualify for the ordinary course of business defense. In the case of *In re Florence Tanners, Inc.*,⁷ for example, the debtor paid a former employee to settle a sexual discrimination lawsuit. The debtor subsequently filed for bankruptcy and was able to recover the settlement proceeds as a preference on the ground that the payment was not made in the ordinary course of business, which for the debtor was the sale of fur and leather goods. In *In re Aero-Fastener, Inc.*,⁸ a court determined that a prepetition transfer of goods pursuant to a settlement agreement was preferential. In reaching this conclusion, the court noted that the purpose of the settlement agreement was to resolve a collection lawsuit for goods sold to the debtor and, as a consequence, no new value had been provided. The court opined that forbearing to proceed with a lawsuit did not constitute new value and therefore was not a defense to a preference action.

Structured payments in settlement of litigation are also vulnerable. In *In re Maloney-Crawford Inc.*,⁹ the court determined that the debtor's payments to its creditor during the preference period were not made in the ordinary course of business. Moreover, the reduction of the creditor's claim in exchange for periodic payments did not constitute new value.¹⁰

The decisions regarding settlements and preferences are not completely uniform. In *Lewis v. Diethorn*,¹¹ the Third Circuit held that the debtors' prepetition payment to settle a lawsuit and remove a *lis pendens* was not a preferential transfer, because the payment was not for an antecedent debt. In this case, the creditor had constructed a house for the debtors that the debtors contended was defective. The debtors agreed to pay for the work in exchange for the creditor's discontinuance of its lawsuit and withdrawal of the *lis pendens*. In the view of the *Lewis* court, the debtors' payment freed them from the risk of litigation and was not for an antecedent debt.

For the creditor in the scenario who set-

tled a million-dollar lawsuit for \$250,000, certain issues arise: Does the creditor satisfy the elements of Section 547(b) in this case? Probably yes.¹² What about his defenses? Has he given the debtor any new goods or services? Has he been paid according to a contract entered into in the ordinary course of business? Has there been a contemporaneous exchange? Probably not. Unfortunately, if the creditor has not already returned the settlement payment, the creditor will likely be forced to do so because the payment constitutes a preference.

On the other hand, will the creditor at least have a claim in the debtor's bankruptcy for \$1 million, which comprises the entire amount of the creditor's loss? Unfortunately, no. The creditor agreed to accept \$250,000 in payment of his claim and dismissed his lawsuit as part of the settlement agreement. Under the circumstances of a typical settlement agreement, after repaying the \$250,000 to the trustee for the bankruptcy debtor, the creditor's bankruptcy claim will be limited to \$250,000—not \$1 million. Therefore, assuming creditors ultimately receive 25 cents on the dollar for their claims, the creditor will be paid \$62,500, not \$250,000.

A Claim Preservation Clause

There may be a way to avoid this unhappy result. Every settlement agreement should include a claim preservation clause with language that protects the recipient of a payment to settle a lawsuit in the event of a subsequent bankruptcy filing. The clause should provide that:

In the event Defendant shall file for bankruptcy within 95 days after the Defendant's settlement check clears the bank, Plaintiff shall not be obligated to file a dismissal of the proceeding unless the Bankruptcy Court having jurisdiction determines that payment of the settlement proceeds does not constitute a preference subject to avoidance. If the Bankruptcy Court determines that the settlement payment was a preference pursuant to Bankruptcy Code Section 547, the plaintiff shall not be obligated to dismiss the proceeding and the Plaintiff's original claim is reinstated in full.

What if this type of claim preservation clause is incorporated into the settlement agreement in the scenario, and the trustee asserts the right to recover the \$250,000 settlement payment as a preference? The creditor, would still be able to file a claim for the \$1 million requested in the original lawsuit rather than just \$250,000. While it is possible the trustee may contest the original \$1 million claim, the creditor is in a much stronger bar-

gaining position and can still seek to prove the validity of the full original claim. With the addition of the claim preservation clause to the settlement agreement, the creditor may be able to recover 25 percent of the \$1 million—or \$250,000—as his share of the bankruptcy estate of the debtor. It should be noted that for the creditor to recover \$250,000, he will probably need to prove the validity of his original \$1 million claim. At some point, the creditor may be required to elect to pursue a contested \$1 million claim or acquiesce to an uncontested claim for the \$250,000 settlement that was turned over to the bankruptcy trustee as a preference.

The inclusion of a claim preservation clause also may discourage thoughtful trustees from bringing a preference action since it may reduce the net recovery to other creditors. A trustee in bankruptcy is not required to commence a preference action—and the existence of a claim preservation clause may be a powerful deterrent to a prudent trustee from filing a preference action.

The claim preservation clause does not appear to challenge the public policy that negates any agreement that seeks to preclude the right to file for bankruptcy. The claim preservation clause instead provides a positive incentive for the debtor not to seek bankruptcy until the preference period expires. Indeed, if bankruptcy is sought within the 90-day period, the creditor will have a claim for the *entire* amount of the debt rather than the reduced amount that was agreed to in the settlement agreement. Having to relitigate a claim that the plaintiff/creditor thought was settled may be cold comfort, but the outcome is far more attractive than having a claim for less than the amount requested in the original litigation.

Enforceability Issues

While it may seem that a claim preservation clause should only be included in settlement agreements when there is a fear that the paying party may seek bankruptcy protection, the recent history of insolvencies of major corporations and public entities such as Enron, WorldCom, PG&E, Orange County, and Texaco suggests otherwise. It is difficult to predict who will file for bankruptcy. Bankruptcy, like death, is often unanticipated and seldom welcomed.

The claim preservation clause does not solve every problem, however. Courts may be unwilling to agree to defer dismissal of a lawsuit if the settlement agreement provides for periodic payments over a long time. In the event the lawsuit is against an insider, few courts are likely to agree to delay dismissal of a settled lawsuit for more than a year.

Practitioners should exercise caution

regarding the dismissal of the civil lawsuit in the event of a settlement. The lawsuit should not be dismissed until the settlement check actually clears the debtor's bank to avoid problems determining the transfer date.¹³ Practitioners should make sure to wait the full 90 days after the funds are transferred before the dismissal of the lawsuit is filed.

Does any provision of the Bankruptcy Code invalidate the claim preservation clause? Bankruptcy Code Section 365 permits a trustee in bankruptcy to assume or reject any executory contract of the debtor. Is a settlement agreement with a claim preservation clause an executory contract that the trustee in bankruptcy can reject?

The established definition¹⁴ of an executory contract in the bankruptcy context is a contract that is substantially unperformed by both sides.¹⁵ For example, if the plaintiff/creditor in the scenario had agreed to furnish goods and services to the defendant/debtor for the next two years in exchange for periodic payments, the contract would be an executory one and the debtor in bankruptcy could reject the entire contract. A consummated settlement in which the only remaining action required is the dismissal of the case is arguably not executory. Once the defendant pays the plaintiff, the only performance remaining on either side is the dismissal of the lawsuit by the plaintiff/creditor after 95 days. While the settlement is probably not an executory contract, a challenge on this ground is possible nevertheless.

Another challenge may arise based on Bankruptcy Code Section 365(e)(1), which serves to invalidate ipso facto provisions in executory contracts. Ipso facto¹⁶ provisions are contractual provisions for the "automatic" termination of the contract due to: 1) the insolvency or financial condition of the debtor at any time before the closing of the case, 2) the filing of a bankruptcy petition, or 3) the appointment of a trustee under Title 11 or a custodian before the filing of a bankruptcy petition.¹⁷

The response to these challenges is that a settlement agreement is not an executory contract, since only the creditor has any remaining contractual obligation to perform on the petition filing date. Whether the claim preservation clause is truly an ipso facto provision is debatable. The bankruptcy court—not the mere act of filing for bankruptcy—will determine if a payment was preferential, thus relieving the creditor of the obligation to dismiss the creditor's lawsuit.

The creditor should be aware that, pursuant to Bankruptcy Code Section 541(c), the debtor's interest in property (including the debtor's contract rights) becomes property of the bankruptcy estate notwithstanding any

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ipso facto provision in an agreement between the debtor and the creditor. Again, the debtor and the creditor may be forced to address whether the claim preservation clause qualifies as an ipso facto provision, but the creditor at least has the opportunity to dispute the reduction of the creditor's claim to the amount under the settlement agreement.

In the final analysis, the courts—especially bankruptcy courts—may find claim preservation clauses enforceable because they are fair. Bankruptcy courts are courts of equity. It is manifestly unfair for a plaintiff to settle a dispute and allow the defendant several years later to renege on the settlement and make the plaintiff return the settlement payment. Claim preservation clauses promote the settlement of litigation. The law should and does encourage settlement of disputes short of trial.¹⁸ Nevertheless, plaintiffs who are knowledgeable about the bankruptcy preference law would be reluctant to settle disputes if claim preservation clauses are determined to be invalid.

Recently, the U.S. Supreme Court granted certiorari to hear the case of *Archer v. Warner*,¹⁹ a prebankruptcy settlement case that does not involve a preference issue. In *Archer*, the Fourth Circuit, following the leads of the Seventh and Ninth Circuits, held that

a prepetition settlement agreement that included a release of fraud and tort claims constituted a novation. By doing so, a potentially nondischargeable claim was converted to a claim for breach of contract, which is dischargeable in bankruptcy. The District of Columbia Circuit in *United States v. Spicer*²⁰ and the Eleventh Circuit in *Greenberg v. Schools, Inc.*,²¹ however, have reached different results, and the Supreme Court should resolve this uncertainty in bankruptcy law.

The Supreme Court's decision will provide attorneys with a valuable lesson about settlements—and possibly place an even greater emphasis on establishing clawback provisions for both the nature and value of a party's claims. A claim preservation clause, which would maintain the creditor's rights to pursue the underlying litigation, could avoid many of the problems inherent in *Archer*.

While a claim preservation clause may not be a panacea, it may well help a disappointed client minimize the loss of a litigation settlement payment because of a bankruptcy filing. ■

¹ 11 U.S.C. §547(b).

² *Id.*

³ 11 U.S.C. §547(c)(1). See *In re Upstairs Gallery, Inc.*, 167 B.R. 915 (9th Cir. B.A.P. 1994) (A settlement does

not necessarily create a new obligation for which a payment may be deemed a contemporaneous exchange for new value.).

⁴ 11 U.S.C. §547(c)(2).

⁵ See *In re Loretto Winery, Ltd.*, 107 B.R. 707 (9th Cir. 1989).

⁶ 11 U.S.C. §547(c)(4).

⁷ *In re Florence Tanners, Inc.*, 184 B.R. 520 (Bankr. Mich. 1995).

⁸ *In re Aero-Fastener, Inc.*, 177 B.R. 120 (Bankr. Mass. 1994).

⁹ *In re Maloney-Crawford Inc.*, 144 B.R. 531 (Bankr. Okla. 1992).

¹⁰ See also *In re Bob Grissett Golf Shoppes Inc.*, 44 B.R. 156 (Bankr. Va. 1984) (Monthly installments were preferential transfers. Antecedent debt was incurred when original contract was executed.).

¹¹ *Lewis v. Diethorn*, 893 F. 2d 648 (3d Cir. 1990).

¹² See *In re Lewis Shurtleff, Inc.*, 778 F. 2d 1416 (9th Cir. 1985).

¹³ *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992) (A transfer by check occurs when the check is honored.).

¹⁴ See Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439, 446 (1973).

¹⁵ 3 COLLIER ON BANKRUPTCY §365.02[1] (15th ed. revised).

¹⁶ The legal term "ipso facto" is Latin and means "by the fact itself."

¹⁷ 11 U.S.C. §365(e)(1).

¹⁸ See CAL. BUS. & PROF. CODE §465.5(b).

¹⁹ *Archer v. Warner* (In re Warner), 283 F. 3d 230 (4th Cir. 2002), cert. granted, June 24, 2002.

²⁰ *United States v. Spicer*, 57 F. 3d 1152 (D.C. Cir. 1995).

²¹ *Greenberg v. Schools, Inc.*, 711 F. 2d 152 (11th Cir. 1983).

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