The ClawBack Report

A Preference and Fraudulent Conveyance Newsletter

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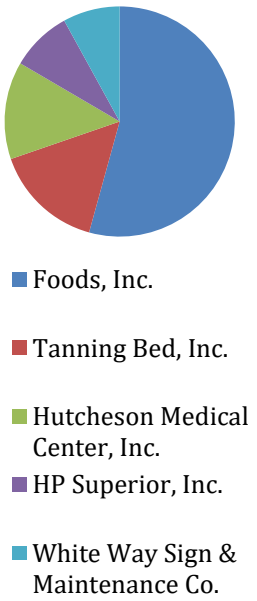
Groups of Adversary Proceedings Filed by Debtors



INTRODUCTION

Your monthly dispatch from the clawback wars by Roland Gary Jones Esq., "The Clawback Guy."

Trustees initiated more than **150** adversary proceedings nationwide during the month of November 2016. Most notable -

- **95** clawback lawsuits commenced in the bankruptcy cases of Foods, Inc.

Ruling for November –

- A Bankruptcy Court held that accepting a fraudulent transfer creates "sufficient contact" with a forum to establish jurisdiction. The Court ruled that it had personal jurisdiction over a foreign defendant under Fed. R. Bankr. P. 7004 because by intentionally accepting the transfer, the Defendant made sufficient minimum contacts with the United States.

Warm Regards,
Roland

News

- Madoff Cohmad Clawback Lawsuit Settles For $32 Million
- Crystal Seafood Company Appeals $1 Million Deepwater Clawback Judgment
- Madoff Trustee May Not Clawback Monies From Koch Brothers
- Claims Against SunEdison's Directors and Officers To Go To Mediation

Opinions

- A Transfer of a Valueless Asset is Not a Fraudulent Conveyance Under §548
- Award of Property Sale Proceeds Under the Divorce Decree is not Avoidable Because There Was No Transfer of Interest of the Debtor's Property
- Idaho Court Avoids Imperfect Security Interest as Preference

- Plausibility of Claim Pertinent to Survive a Motion to Dismiss
- Accepting a Fraudulent Transfer Creates Sufficient Contact with a Forum to Establish Jurisdiction

Recent Preference and Fraudulent Conveyance News

Madoff Cohmad Clawback Lawsuit Settles For $32 Million

November 4, 2016, New York – Victims of **Bernard Madoff's Ponzi scheme will soon receive another $32.1 million under a new settlement deal with Madoff trustee Irving Picard and Cohmad Securities Corp.** Picard accused Cohmad of siphoning huge sums into the Madoff's defunct brokerage, Bernard L. Madoff Investment Securities LLC (BLMIS). The settlement represents the amount transferred by BLMIS to Sonny Cohn, Marilyn Cohn and Marcia Cohn of Cohmad Securities, as withdrawals from their investment advisory accounts during the six-year period before the BLMIS liquidation filing. "Cohmad" is a contraction of "Cohn" and "Madoff." Cohmad Securities, founded by Madoff and his friend and former neighbor Maurice "Sonny" Cohn, allegedly spent more than 20 years recruiting high-net-worth clients into the Madoff's Ponzi scheme.

With this settlement, the total recovery for Madoff customers will reach $11.49 billion. According to the trustee's estimate, the customers lost $17.5 billion in total in the Madoff Ponzi scheme. The cases *are Picard v Cohmad Securities Corp et a*l., U.S. Bankruptcy Court, Southern District of New York, No. 09-ap-01305; and *In re Bernard L. Madoff Investment Securities LLC* in the same court, No. 08-01789.

Crystal Seafood Company Appeals $1 Million Deepwater Clawback Judgment

Louisiana, November 7, 2016 – Earlier this month, **Deepwater Horizon oil spills** Claims Administrator urged the Fifth Circuit to uphold a judgment, which ordered **Crystal Seafood Company** and its owners to return $1 million they received from the claims program. The Claims Administrator alleged that the seafood company fraudulently claimed the cash under the claims program.

Previously in May 2016, Honorable Judge Carl J. Barbier had ordered Crystal Seafood Company to pay more than $1 million in restitution after having found that the business fraudulently stated having an ongoing shrimp processing business at the time of the oil spill. Judge Barbier also held Faegre Baker Daniels LLP jointly and severally liable for the amount it received on a contingent fee basis for representing Crystal's claim.

Crystal Seafood Company Inc. has appealed, alleging that Judge Barbier ignored the facts submitted by the company in support of its argument. The Company claimed that it didn't knowingly misrepresent itself. The case is *In re Deepwater Horizon*, case number 16-30717, in the U.S. Court of Appeals for the Fifth Circuit.

Madoff Trustee May Not Clawback Monies From Koch Brothers

New York, November 23, 2016 – Koch Industries and others who invested in the Madoff fund from offshore accounts won a key ruling in the bankruptcy court later this month. The court ruled that the funds held abroad, estimated at $2 billion could not be made available to victims of the Madoff scheme because of international concerns.

The billionaire brothers, Charles and David, and about 100 other Madoff customers claimed that the trustee can't recoup their profits for distribution because the money had been transferred outside the U.S. long before Madoff got arrested in December 2008. The trustee argued that he should get the money because the investors used the feeder funds that operated in the United States even though they were registered offshore, i.e., those funds gathered investor money on behalf of Madoff. **However, Judge Stuart M. Bernstein in the Manhattan bankruptcy court said that the foreign bankruptcy proceedings blocked the trustee from accessing the money**.

Koch Industries is one of 88 cases in which management, service providers and investors received overseas transfers of money. Koch Industries began investing in the Madoff fund well before its collapse and pulled $21.5 million out in 2005. The money withdrawn from the Madoff fund went to a fund registered in the British Virgin Islands and then to a Koch entity in Britain.

Claims against SunEdison's Directors and Officers To Go For Mediation

November 28, 2016, New York – **Recently, SunEdison urged a New York bankruptcy court to order a court-supervised mediation to resolve disputes involving claims against the directors and officers of the company and the unsecured creditor's committee's attempt to clawback assets transferred to SunEdison's non-debtor Yieldco subsidiaries.**

SunEdison requested the bankruptcy court to hold pending motions in abeyance as the debtors and committee have reached an agreement to mediate. SunEdison asserted that substantial good faith participation is required from all parties - the debtors, the committee, the Yieldcos, the insurers, plaintiffs and the directors and officers in the court-ordered mediation to facilitate the prompt and cost-effective resolution of the proposed claims that were the subject of the committee's adversary complaint.

SunEdison, which develops renewable energy products around the world, filed for Chapter 11 protection in April 2016. The bankruptcy case is *In re SunEdison Inc*., case number 1:16-bk-10992, in the U.S. Bankruptcy Court for the Southern District of New York.

Recent Preference and Fraudulent Conveyance Opinions

A Transfer of a Valueless Asset is Not a Fraudulent Conveyance Under §548

Yip v. Connedx Corp. (In re Gomez), Nos. 13-22713-BKC-AJC, 14-1574-BKC-AJC-A, 2016 Bankr. LEXIS 3955 (U.S. Bankr. S.D. Fla. Nov. 10, 2016)

Debtor Ibes Gomez was allegedly a convicted fraudster. **Defendant Connedx Corporation**, the primary vehicle of Gomez's fraudulent operation had zero net value. The Debtor defrauded investors, including the **Defendant Lisa M. Madalon**, by misrepresenting that several hospitals are allegedly contracting with Connedx and the conservative value of the estimated revenue from those purported contracts was $1.3 million. Madalon fell into the Debtor's trap. She purchased the Debtor's stock interest in Connedx for $49,000 and transferred the amount to the Connedx bank account. Maria Yip, as trustee for the estate of the Debtor, brought an adversary action against the Defendants, alleging that Madalon purchased a percentage of the Debtor's stock interest in Connedx for $49,000.00, but didn't pay the Debtor anything in exchange. She tendered that payment to Connedx and not the Debtor. So, **the Debtor did not receive reasonably equivalent value in exchange for the transfer and hence the alleged transfer of interest in stock was fraudulent under §548.**

The Court determined that the transfer of a valueless asset cannot hinder, delay or defraud any creditor of value as **it is impossible to receive less than reasonably equivalent value for an asset that has no value.** The Court added that in the case at bar, the Debtor received $49,000.00 by accessing and spending the monies from the bank account for personal gain, all for stock worth zero. The value received by the Debtor was significantly in excess to what the Debtor gave up, as he was selling Madalon worthless stock. The Court stated that it would be **fundamentally counter to the statutory purpose of the Trustee's avoidance power for the transfer of the stock and payment to be avoided.** The Court reasoned that this would run directly counter to the equitable policies of the Bankruptcy Code to actually compel Madalon to sustain another loss of $49,000.00 in exchange for valueless stock and bind Madalon anew to a transaction where a convicted fraudster duped her.

Further, the Court ruled that the argument, that the payment was made to Connedx and not the Debtor, had no merit. The Debtor personally received the benefit of the stock payment because he spent the entirety of that $49,000.00 for his personal benefit. The Debtor was the sole signatory on the bank account where the stock payment was deposited, and he was the only individual who had access to the funds in that bank account, and he used them for his personal, non-business related expenses. The Court ruled for Madalon holding that the Debtor received more than the value of the worthless stock he transferred to Madalon.

Award of Property Sale Proceeds Under the Divorce Decree is not Avoidable Because There Was No Transfer of Interest of the Debtor's Property

West v. Christensen (In re Christensen), Nos. 11-30743, 13-02248, 2016 Bankr. LEXIS 3921 (U.S. Bankr. D. Utah Nov. 4, 2016)

Debtor Louis Christensen and the **Defendant Marlese Christensen**, the Debtor's former wife, together purchased a martial home and spent money on landscaping and remodeling it. A few months later, the Debtor acquired title to the marital home and fraudulently got the documents signed from the Defendant. The Debtor misrepresented that the signatures would give the Defendant a right to ownership of the marital home. Additionally, the Debtor also fraudulently got other deeds signed from the Defendant which allowed the Debtor to get a line of credit from a bank for up to $120,000, using the

Defendant's other home as collateral. The Defendant learned about all these six months later and filed for divorce. The divorce court awarded each party one-half of its marital assets. The Defendant put the marital home up for sale and sold it for $290,000. The Defendant used his partial share of $120,000 to pay off the Debtor's loan with a bank that encumbered her other home. The Debtor filed for bankruptcy and the Trustee filed a complaint against the Defendant to recover the transfer of $120,000 which she received after the sale of the marital home. **The Trustee argued that the award of property sale proceeds under a divorce decree was an avoidable preference under §547 because the Defendant did not own the asset that was sold.** The Defendant's right to a share of the property settlement in the divorce was merely the claim of a creditor and not an award of property in which she had an ownership interest.

The Court concluded that the Trustee's claims were barred by issue preclusion because the issue of ownership of the proceeds was decided by the state divorce court, which constituted a final judgment on the merits. The Court determined that the divorce court's property division found the marital home to be marital property, with each spouse owning a one-half interest. Thus, when the Defendant received her share of the proceeds from the sale of the marital home, there was no transfer of an interest of the debtor in property under §547(b) because the Defendant received her property. Thus, the threshold issue of a preferential transfer was not met and hence the alleged transfer was not avoidable. The Court held for the Defendant.

Idaho Court Avoids Imperfect Security Interest as Preference

Hopkins v. Dig. Fed. Credit Union (In re Parker), Nos. 14-40133-JDP, 16-8004-JDP, 2016 Bankr. LEXIS 3982 (U.S. Bankr. D. Idaho Nov. 15, 2016)

Debtor Jace Reed Parker purchased a 2010 vehicle, which was financed by a loan extended to him by **Defendant Digital Federal Credit Union**. Under the loan agreement, the vehicle was to serve as security for the loan. To perfect its security interest, the Credit Union prepared an application for issuance of a certificate of title to the vehicle noting its lien. However, imprudently, it gave the title application to the Debtor to file with the Idaho Transportation Department, which the Debtor never did. As a result, no certificate of title reflecting the Credit Union as a lienholder was ever issued for the vehicle. The Debtor made several monthly loan payments to the Credit Union, including three during the ninety days preference period. After the Debtor had filed for bankruptcy, the Trustee commenced the adversary proceeding to avoid the lien and the prepetition payments made by the Debtor to the Credit Union within 90 days of the bankruptcy.

The Court concluded that the Trustee was entitled to avoid and recover the payments made to the Credit Union on a vehicle loan of $354.56 per month, totaling $1,063.68, within the 90 days preceding the bankruptcy petition filing. The Court reasoned that it was uncontested that Credit Union's security interest in the vehicle was not properly perfected under Idaho law as of the date of the Debtor's bankruptcy filing because its lien was never noted on the vehicle's certificate of title.

Plausibility of Claim Pertinent to Survive a Motion to Dismiss

Heath v. Evans (In re Evans), Nos. 15-00090 (Chapter 7), 16-00002, 2016 Bankr. LEXIS 3999 (U.S. Bankr. D. Guam Nov. 10, 2016)

Debtor Myrna Castro Evans allegedly quitclaimed two parcels of real property to her husband, **Defendant Roy Kenneth Evans**, when she executed a divorce and property settlement agreement. Allegedly, the transfer of these two properties was quitclaimed to the Defendant, under duress, for either absent or inadequate consideration within one year of the date she filed for bankruptcy. The Trustee brought a complaint against the Defendant Evans for the avoidance of these fraudulent transfer under §548 of the Bankruptcy Code. **The Defendant moved to dismiss the Trustee's complaint, arguing that the Trustee failed to allege specific facts to state a plausible claim and inadequately plead facts sufficient to satisfy the elements of causes of action related to purported fraudulent transfers of real property.** The Trustee contended that the complaint met the pleading requirements of the FRCP, but requested leave to amend his complaint if the Defendant's motion to dismiss was granted.

The Court found that the Defendant was correct that the Trustee failed to plead facts forming the basis for the assertion that the Debtor or Evans knew that the value of the consideration received by the Debtor in exchange for the properties was not of reasonably equivalent value. Additionally, the complaint generally referenced that the properties at issue were quitclaimed to her husband under duress, under either absent or inadequate consideration within one year of the date she filed for bankruptcy. The Court also found that **the facts asserted by the Trustee in opposition to the motion to dismiss was outside the complaint and were improper. The Trustee did not allege those facts in the complaint,** i.e., the properties were held jointly, that the spouse misrepresented, that the debtor would be criminally prosecuted unless the spouse dismissed the complaint and that the terms of a divorce settlement were fair and equitable. The Court granted Evans motion to dismiss the complaint with leave to amend the complaint.

Accepting a Fraudulent Transfer Creates Sufficient Contact with a Forum to Establish Jurisdiction

Montoya v. Akbari-Shahmirzadi (In re Akbari-Shahmirzadi), Nos. 11-15351-t11, 13-01035-t, 2016 Bankr. LEXIS 3957 (U.S. Bankr. D.N.M. Nov. 14, 2016)

Defendant Nancy Akbari Shahmirzadi was also the Debtor in this case. Within thirty days of her appointment as the administrator of her deceased mother's probate estate, the Debtor distributed over $4 million of the estate's assets to herself and her brother. The Debtor also wrote several checks from her Morgan Stanley account in the United States, payable to herself and her husband. They deposited the checks in their Swiss bank account. The Debtor and her husband also transferred monies from their Swiss bank account to various friends and family. **At issue was the transfer of $250,000 check by the Debtor and her husband to the Defendant, AL Dokhan on the instructions of the Defendant Mahmood Akbari-Shahmirzadi.** The Trustee alleged that the transfer of $250,000 was fraudulent

because it was done with actual intent to hinder, delay, or defraud creditors while the Debtor was insolvent, and for inadequate consideration. The Defendant filed a motion for lack of personal jurisdiction as the Defendant Al Dokhan was based out of Dubai.

The Court stated that to determine the applicability of the personal jurisdiction of a federal court; the relevant inquiry is whether a foreign defendant has had sufficient minimum contacts with the United States or not. The Court relied upon the factors in *In Newsome v. Gallacher* – (1) **whether the defendant purposefully directed its activities at residents of the forum state; (2) whether the plaintiff's injury arose from those purposefully directed activities; and (3) whether exercising jurisdiction would offend traditional notions of fair play and substantial justice. The Court determined that all three factors were met to satisfy sufficient minimum contact requirement.** Al Dokhan intentionally accepted $250,000, which was traceable to the Debtor's Swiss bank account. The transfer was to hurt the Debtor's creditors and was expressly aimed by the recipient and the transferor at the forum jurisdiction (the United States). The brunt of the wrongful conduct by the transferor and the transferee would undoubtedly be felt in the forum jurisdiction and in particular by the Debtor's creditors. Given the relatively narrow range of issues presented by the Trustee's claim and the alleged connections between Al Dokhan and the Debtor, the Court ruled that exercising jurisdiction over Al Dokhan would not offend traditional notions of fair play and justice. The Court held that the Trustee made a prima facie showing that the Court had specific jurisdiction over Al Dokhan to hear the fraudulent transfer claim.

Snapshot of Clawback Cases Filed

Groups of Adversary Proceedings filed by the Debtors	Total cases filed	Name of Judge	Largest Case in the group	Claim Amount of the Largest Case	Petition Date	District
Foods, Inc.	95	Anita L. Shodeen	Thrifty White Pharmacy	$1,955,403.68	11/9/2014	Southern District of Iowa
Tanning Bed, Inc.	27	Michael J. Kaplan	Wegmans Food Markets In	$54,261.85	12/11/2014	Western District of New York
Hutcheson Medical Center, Inc.	24	Paul W. Bonapfel	US Foods, Inc.	$243,998.60	11/20/2014	Northern District of Georgia
HP Superior, Inc.	15	Paul W. Bonapfel	To be determined	To be determined	11/3/2014	Northern District of Georgia
White Way Sign & Maintenance Co.	14	Donald R Cassling	American Express	$310,240.76	11/12/2014	Northern District of Illinois

BIO

About Roland Jones

Mr. Jones has practiced bankruptcy law for over two decades. His primary focus is representing corporate defendants in preference and fraudulent conveyance litigation. Mr. Jones has a national client base and has also represented corporate clients based in Europe and the Far East.

In addition to his law practice, Mr. Jones has authored professional articles on bankruptcy issues for the *New York Law Journal*, *The Environmental Claims Journal*, *The Mergers and Acquisitions Report*, and other scholarly publications.

Mr. Jones also edits and writes the ***Clawback Report***, a monthly publication on preference and fraudulent conveyance litigation.

Mr. Jones was the founding member and former Chair of the Federal Bar Association Empire State Chapter Bankruptcy Committee. The Bankruptcy Committee has hosted experts to speak on topics important to both bankruptcy and non-bankruptcy practitioners. Guest speakers have included The Honorable Jerrold Nadler on new bankruptcy legislation, Wilbur L. Ross, Jr. of Rothschild Inc. on the distressed bond market, and Professor Edward Altman of New York University on bankruptcy investing.

Mr. Jones is the founding member and current President of the National Association of Bankruptcy Litigators. The NABL is a new organization focusing exclusively on clawback issues consisting of 110 bankruptcy lawyers from throughout the country.

Mr. Jones' introduction to bankruptcy practice began by serving as a judicial law clerk to Chief U.S. Bankruptcy Judge Conrad B. Duberstein of the Eastern District of New York during law school. He continued his training after graduation by clerking for U.S. Bankruptcy Judge Cecilia H. Goetz of the Eastern District of New York from 1990 to 1991.

Mr. Jones attended the Horace Mann School, Columbia University (B.A. Ancient Studies) and Brooklyn Law School (J.D. 1990) He is admitted to practice law before the United States District Courts for the Southern and Eastern Districts of New York, as well as the United States Court of Appeals for the Second Circuit.

Mr. Jones was born in New York City.

Bar Admissions

New York State Bar Admission - 1990
United States District Court Southern District of New York - 1991
United States District Court Eastern District of New York - 1991

Professional Memberships
President: National Association of Bankruptcy Litigators
Member: New York State Bar Association
Member: Association of Bar City of New York
Member: Turnaround Management Association
Member: American Bankruptcy Institute

Education
1972 – 1977: The Horace Mann School
1977 – 1979: Vassar College
1985 – 1987: Columbia University; top 10% of the graduating class
1988 – 1990: Brooklyn Law School; top 10% of the graduating class

Writings
“Are repos exempt from automatic stay?”; Bankruptcy Law - New York Law Journal; Pg. 31, (col. 6); Vol. 213, 2586 words

"Bankruptcy's Conflict of Interest Rule"; Outside Counsel - New York Law Journal; Pg. 35, (col. 3); Vol. 212, 2117 words

"Bankruptcy and Environmental Law," The Environmental Claims Journal

"Mergers and Acquisitions in Bankruptcy," The Mergers and Acquisitions Report

The Clawback Report, A Quarterly Publication on Preference and Fraudulent Conveyance Litigation Issues.

"Introduction to Preference Law," National Association of Bankruptcy Litigators Journal

Bankruptcy Bulletin: “Wellness International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)”, National Association of Bankruptcy Litigators Journal

Majority Report: “Redefining the Circuit Split Over the §547(c)(4) Subsequent New Value Defense” by Roland Jones, Esq. and Solomon Rotstein, National Association of Bankruptcy Litigators Journal