The ClawBack Report

A Preference and Fraudulent Conveyance Newsletter

Volume 4 Edition 1

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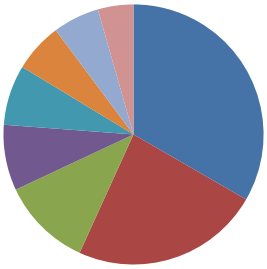
Groups of Adversary Proceedings Filed by Debtors



- Fresh & Easy, LLC
- Lehman Brothers Holdings Inc.
- Seal123, Inc.
- Tengion, Inc.
- Craighead County Fair Association
- Plaza Recycling & Waste Services, LLC
- S&S Steel Services, Inc.
- Citadel Watford City Disposal Partners, LP

INTRODUCTION

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

Trustees initiated more than **250** adversary proceedings nationwide during the month of December 2016. Most notable -

- **95** clawback lawsuits commenced in the bankruptcy cases of Fresh & Easy, LLC.

Ruling for December –

- The Bankruptcy Appellate Panel for the Sixth Circuit affirmed the Bankruptcy Court's decision in avoiding the alleged transfer made six days before a debtor filed for Chapter 7 protection as a preference because the debtor's attorney had not previously perfected a lien on the vehicles pledged by the debtor as collateral for the repayment of unpaid legal fees.

A very happy and prosperous 2017!

Warm Regards,
Roland

News

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Preference Because Appellant Did not Have Valid Lien Over Vehicles
- Delaware Bankruptcy Court Grants Dismissal of Preference and Fraudulent Transfer Claims For Failure to Adequately State Facts

Recent Preference and Fraudulent Conveyance News

Trump Entertainment Resorts, Inc. Targets New Batch for Clawback Actions

December 8, 2016, Delaware – The **Trump Entertainment Resorts Inc**. bankruptcy trustee, **Nathan A. Schultz** launched several lawsuits last month seeking to clawback payments made before it filed for Chapter 11 protection to entities that include **Unite Here Health, Aramark Uniform and Career Apparel, LLC and utility provider Atlantic City Electric Co.** The trustee is allegedly seeking to recover roughly $3 million from both Atlantic City Electric and Unite Here Health and comparatively a smaller amount of $13,000 from Aramark Uniform & Career Apparel LLC. The trustee already commenced his clawback campaign way back in September 2016, with filing approximately 100 lawsuits to recover more than $14 million. According to the court records, many of those cases have been resolved as well.

Trump Entertainment filed for Chapter 11 protection for the second time in five years in 2014. The trustee is represented by Natasha M. Songonuga of Gibbons PC, and Joseph L. Steinfeld, Jr. and Edward E. Neiger of ASK LLP. The adversary cases are *Schultz v. Unite Here Health*, case number 1:16-ap-51544, *Schultz v. Aramark Uniform & Career Apparel LLC*, case number 1:16-ap-51545, and *Schultz v. Atlantic City Electric Co*., case number 1:16-ap-51546, all in the U.S. Bankruptcy Court for the District of Delaware. The bankruptcy case is *In re Trump Entertainment Resorts Inc. et al*., case number 1:14-bk-12103.

Preference Actions Filed in Seal123, Inc. Bankruptcy

December 15, 2016, Delaware - Last week**, Seal123, Inc. Liquidation Trust** filed approximately 68 complaints seeking the avoidance and recovery of allegedly preferential and/or fraudulent transfers under Sections 544 and/or 547, 548 and 550 of the Bankruptcy Code. Seal123, Inc. and its affiliated debtors filed voluntary petitions for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware on January 15, 2015, under Chapter 11 of the Bankruptcy Code. On October 30, 2016, the Court confirmed the Debtors' joint plan of liquidation. Previously, the company operated as a multi-channel specialty retailer that sold fashionable and contemporary apparel and accessory items for female consumers. The various avoidance actions are pending before the Honorable Christopher S. Sontchi. The pretrial conference has been scheduled for February 28, 2017, at 10:00 AM at US Bankruptcy Court, 824 Market St., 5th Fl., Courtroom #6, Wilmington, Delaware.

SunEdison's CEO Opposes Unsecured Creditor's Clawback Motion

December 22, 2016, New York – During the last week, **SunEdison CEO John S. Dubel** filed a supplemental declaration in the New York court testifying that the renewable energy giant may have substantial and plausible claims against its yieldco subsidiaries and allowing unsecured creditors to pursue them would hamper a joint process seeking sale or reorganization. John S. Dubel alleged that it was best for any potential claims against the yieldcos to remain under the debtor's control so as not to upset negotiations over a possible sale transaction or reorganization under a plan. **The official committee of unsecured creditors in the clawback motion argued that projects, payments and services transferred to publicly traded yieldcos TerraForm Power Inc. and TerraForm Global Inc. were done when SunEdison was already insolvent, and there was a huge difference between the equity values it received in exchange**.

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

Alabama Court Upholds "Remains Unpaid" Approach to Shield Preference Transfers While Applying Subsequent New Value Defense

Kaye v. Barber Milk, LLC (In re BFW Liquidation, LLC), Nos. 09-00634-TOM-11, 11-00062, 11-00071, 2016 Bankr. LEXIS 4378 (U.S. Bankr. N.D. Ala. Dec. 20, 2016)

Debtor Bruno Supermarket, LLC was a grocery store chain with stores in Alabama and Florida. Trustee William S. Kaye brought an adversary proceeding against **Defendants Barber Milk, LLC and Southern Foods Group, LLC** to recover $636,018.97 in transfers under §§547 and 550 of the Bankruptcy Code. Before the filing of the adversary proceeding, the Trustee stipulated with the Defendants that they would have an allowed claim under §503(b)(9) for goods provided during the twenty days before the petition date. According to the pre-trial brief filed by the Trustee, §503(b)(9) claims of Barber and Southern were paid. After the adversary proceedings had been initiated, the Defendants asserted a subsequent new value defense under section 547(c)(4) of the Bankruptcy Code. The Trustee and the Defendants disagreed over how this defense should be applied. **The Trustee contended that only subsequent new value that remains "unpaid" could be used to shield preferential transfers, while the Defendants asserted that they should be given credit for new value whether it remains "paid" or "unpaid."**

The Court strictly relied upon the three-part test identified by the Eleventh Circuit for determining whether the new value defense applied to the facts of the case. The three part test included - that the creditor must have extended the new value after receiving the challenged payments; that the new value must have been unsecured, and that the new value must remain unpaid. The Court stated that to allow a debtor to both avoid the preference and recover the payment for the new value provided by a creditor (from which the debtor materially benefitted) while denying the

creditor the new value defense would not further the principal policy objections underlying the preference provisions of the Bankruptcy Code. The Court added that the utility of defense is limited to the extent to which the estate was enhanced by the creditor's subsequent advances during the preference period. Thus, the Court concluded that the **Defendants were entitled to the new value defense only to the extent that the new value they extended remains unpaid.**

Debtor Avoids Payment Made to Her Former Attorneys on Account of Legal Fees As Preference

Pantazelos v. Benjamin (In re Pantazelos), Nos. 15-bk-08916, 15-ap-00314, 2016 Bankr. LEXIS 4512 (U.S. Bankr. N.D. Ill. Dec. 27, 2016)

Debtor Faye T. Pantazelos filed a petition for bankruptcy relief under Chapter 13 of the Bankruptcy Code and later brought an adversary proceeding against her former attorneys to recover an allegedly preferential payment of $14,000. **Defendants, Kevin J. Benjamin and the law firm of Benjamin Brand LLP (BBLLP)**, the Debtors prior attorneys provided legal services to the Debtor in connection with her two bankruptcy cases. The Debtor claimed that the alleged preferential payment was made during the 90-day period of filing her bankruptcy case on account of the legal fees. The Defendants argued that the alleged payment was not preferential as the Debtor was not insolvent at the time she made the alleged payment and the alleged payment did not enable them to receive more than otherwise they were entitled.

The Court found that the evidence showed that the Debtor's financial condition had deteriorated between the filing of her Chapter 13 Case and the time when she made the $14,000 payment in December 2014. The Debtor's schedules showed that she was insolvent when this case was filed and no evidence was presented showing that the Debtor's assets were more valuable than she estimated them to be. **Thus, the Court concluded that the Defendants failed to present sufficient evidence to rebut the presumption of insolvency in §547(f).**

The Court further found that the Defendants received more than they would have been entitled under the Bankruptcy Code if the payment had not been made. The Court stated that even assuming that the entire Debtor's personal property was sold before at the full scheduled value, the net proceeds to the Trustee would not exceed $43,000 and based on the total general unsecured claims, this would have resulted in a distribution of approximately 13.2% to general unsecured creditors. Thus, the Court held that the $14,000 payment of the fee claimed by Benjamin and BBLLP before the transfer was made paid the Defendants much more than they would have received in a Chapter 7 case if the transfer had not been made. Further, the Defendants could not establish a defense under §547(c)(1) or §547(c)(2). The Court held for the Debtor.

Alabama Court Turns Down Defendant’s Ordinary Course and Subsequent New Value Defense

Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), Nos. 09-00634-TOM-11, 11-00063, 2016 Bankr. LEXIS 4377 (U.S. Bankr. N.D. Ala. Dec. 20, 2016)

Debtor Bruno Supermarket, LLC was a grocery store chain with stores in Alabama and Florida. **Defendant Blue Bell** manufactured and sold ice cream and related products to Bruno's on credit. The parties stipulated that Bruno paid a total of $563,869.37 to Blue Bell during the preference period and the Trustee brought an adversary proceeding to avoid and recover these transfers under §§547 and 550. Blue Bell alleged the ordinary course and subsequent new value defense under §547 of the Bankruptcy Code.

The Court found that Blue Bell failed to show that preferential transfers from the Debtor were made in the ordinary course of business to preclude avoidance of the transfers because, during the preference period, the Debtor retained a financial advisor which altered the issuance and frequency of payments, changed the timing of invoices and also engaged in unprecedented collection activity. The Court concluded that all this indicated a clear departure from the normal relationship and thus a departure from the ordinary course of business between Bruno's and Blue Bell. As regards to the Defendant's new value defense, the Court relied upon the three prong test identified by the Eleventh Circuit and concluded that that Blue Bell's defense based on the extension of subsequent new value to the Debtor was available only to the extent that the new value the creditor extended remained unpaid.

BAP Affirms the Ohio Court Ruling in Avoiding the Transfer as Preference Because Appellant Did not Have Valid Perfected Lien Over the Vehicles

Dymarkowski v. Savage (In re Hadley), No. 16-8010, 2016 Bankr. LEXIS 4445 (U.S. B.A.P. 6th Cir. Dec. 21, 2016)

Debtor Robert F. Hadley had a long-standing professional and personal relationship with **Defendant-Appellant Barry E. Savage**. Defendant provided legal services to the Debtor. Due to the business downturn, the Debtor was unable to pay the attorney fees due to the Defendant. So, in May 2012, the Debtor gave possession of its two vehicles to the Defendant towards the payment of the legal fees. **Although the Debtor turned over the possession, it did not transfer ownership of the vehicles, i.e. the Debtor did not sign the titles and completed the assignment of ownership forms until August 15, 2012 - just six days before the Debtor's Chapter 7 bankruptcy filing on August 21, 2012**. When the Defendant obtained title to the vehicles, he put the vehicles up as collateral on two bank loans totaling $37,500. Subsequently, the Defendant sold the vehicles to a third party for $40,000. More than eight months after the sale on August 1, 2014, the Trustee filed an adversary complaint against the Appellant under §547(b) to avoid the Debtor's transfer of ownership to the Defendant-Appellant and to recover the value of the vehicles. **The Trustee alleged that the transfer occurred when the Debtor signed the titles over to the Appellant, just six days before bankruptcy. The Appellant contended that he had a possessory attorney's lien on the vehicles to secure payment of his fees, which was perfected by possession of the title in 2007 or on or about May 1, 2012, when he took possession of the vehicles**. The Appellant alleged that either date fell outside the 90-day look-back period for the avoidance of a transfer under §547(b). Both parties filed motions for summary judgment. The

bankruptcy court concluded that the Appellant did not have a valid or perfected attorney lien on the vehicles under Ohio law and that the transfer occurred when the Debtor transferred ownership by signing over the vehicle titles on August 15, 2012, within the look-back period for avoidance.

Upon appeal, the BAP held that the bankruptcy court did not err in concluding that the transfers were preferential. **The Court stated that there are essentially three types of attorney liens at common law: (1) retaining liens; (2) charging liens; and (3) contractual liens.** In the case at bar, the Appellant attorney **did not have a retaining lien**, as the attorney did not take possession of vehicles in the course of his representation of the Debtor. The attorney **did not either have a charging lien** because he was not asserting that the titles or vehicles represented an award rendered as a result of his professional services. Next, the attorney **did not even have a contractual lien** because there was neither any written documentation nor any other memorialized security agreement between the Debtor and the attorney to evidence a security interest in the vehicles or their titles. Further, the Court held that even if the attorney had a valid attorney's lien, it was unperfected under applicable law. **Therefore, the BAP held that any claimed lien interest was unperfected and the Debtor's transfer of his ownership interest in the two vehicles six days prior to filing bankruptcy was preferential.**

Delaware Bankruptcy Court Grants Dismissal of Preference and Fraudulent Transfer Claims For Failure to Adequately State Facts

Miller v. Welke (In re United Tax Grp., LLC), Nos. 14-10486 (LSS), 16-50088 (LSS), 2016 Bankr. LEXIS 4322 (U.S. Bankr. D. Del. Dec. 13, 2016)

Before filing bankruptcy, **Debtor United Tax Group** was in the business of providing tax preparation services to consumers. During the period from March 7, 2012 to October 1, 2013, the Debtor made certain transfers totaling $821,402.69, which the Trustee sought to avoid as a preference or fraudulent. The Trustee alleged that the Debtor made the transfers to **Defendant Edward Welke** for his benefit and that he was the initial transferee or the beneficial transferee of the transfers. He also alleged that the Debtor was balance sheet insolvent at the beginning of 2012, according to the tax returns. The Defendant argued that the Trustee's complaint did not satisfy applicable pleading standards and that it was filed to harass the Defendant. The Delaware Bankruptcy Court dismissed the Trustee's allegations.

The Court found that the Trustee failed to adequately plead all counts necessary to give rise to a preference claim. Specifically, the Court held that the Trustee failed to: (i) identify the transferee of each transfer, and (ii) identify the nature and amount of each alleged antecedent debt. As for the fraudulent transfer claims, the Court found that the Trustee failed to allege facts necessary to demonstrate that the Debtor was insolvent at the time such transfers were made or that that the Debtor received less than reasonably equivalent value for certain of the transfers. Finding that the Trustee's allegations merely parroted the language of Section 548, the Court dismissed the Trustee's claims but granted the Trustee a leave to amend the complaint to adequately plead facts.

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
Fresh & Easy, LLC	98	Brendan Linehan Shannon	Unified Grocers Inc	$1,704,579.44	10/30/2015	District of Delaware
Lehman Brothers Holdings Inc.	69	Shelley C. Chapman	To be determined	To be determined	9/15/2008	Southern District of New York
Seal123, Inc.	33	Christopher S. Sontchi	UBS Securities, LLC	$831,500.00	1/15/2015	District of Delaware
Tengion, Inc.	24	Christopher S. Sontchi	Aon Risk Services Inc.	$739,919.00	12/29/2014	District of Delaware
Craighead County Fair Association	22	Phyllis M. Jones	To be determined	To be determined	10/13/2014	Eastern District of Arkansas
Plaza Recycling & Waste Services, LLC	18	Rosemary Gambardella	To be determined	To be determined	12/5/2014	District of New Jersey
S&S Steel Services, Inc.	17	Jeffrey J. Graham	Delaware Steel Co.	$74,254.96	8/31/2015	Southern District of Indiana
Citadel Watford City Disposal Partners, LP	13	Kevin J. Carey	Citadel H20, LLC	$497,382.57	6/19/2015	District of Delaware

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