The ClawBack Report

A Preference and Fraudulent Conveyance Newsletter

Volume 4 Edition 3

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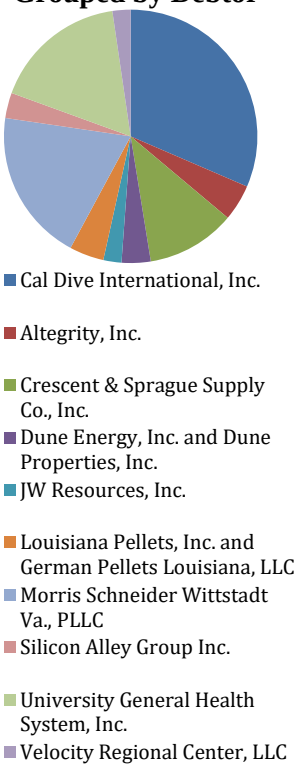
Adversary Proceedings Grouped by Debtor



INTRODUCTION

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

Trustees initiated more than **400** adversary proceedings nationwide during the month of February 2017. Most notable -

- **136** clawback lawsuits commenced in the bankruptcy cases of **Cal Dive International, Inc.**

Ruling for February –

- A Colorado Bankruptcy Court allowed a public utility company's claim seeking payment of $84,253.95 worth of electrical energy it supplied a debtor during the 20-day period that preceded the date the debtor declared bankruptcy as an administrative expense claim under §503(b)(9). Although courts were divided on the question of whether electrical energy was "goods" for purposes of §503(b) (9), the Colorado Court held that the better view was that it was.

Warm Regards,
Roland

News

- Cal Dive International Inc. Launches Its Clawback Campaign
- Former Madoff Employee Andrew Cohen to Give Up $1.1M He Received During the Madoff Ponzi Scheme
- Trustee Needs More Time to Object to General Unsecured Claims in the Trump Entertainment Resorts Inc. Clawback Suits
- Greenberg Traurig LLP Settles $2.2M Lawsuit With Brown Medical Centre

Opinions

- Metered Electrical Energy Delivered By a Defendant to the Debtor Constitutes "Goods" Under the Unambiguous Text of §503(b) (9)
- Failure of Proof Regarding the Fifth Element Under §547(b) (5) Precludes Judgment for Trustee
- Trustee Fails to Demonstrate that a Genuine Issue of Material Fact Exists as to the Debtor's Solvency on the Transfers

- Defendant Provided "Value" for the Alleged Transfer by Paying for the Parties' Living Expenses from the Transfer

Recent Preference and Fraudulent Conveyance News

Cal Dive International Inc. Launches Its Clawback Campaign

Delaware, February 28, 2017 - **Cal Dive International Inc**., an undersea oil drilling services firm, launched a campaign of avoidance actions last month, seeking to clawback more than $20 million in payments made before it filed for Chapter 11 protection. **Cal Dive's counsel, The Rosner Law Group LLC** initiated almost **130 avoidance actions** in the **Delaware Bankruptcy Cour**t to recover so-called preference payments under §§547 and 550 of the Bankruptcy Code, made during the 90-day period before the debtor entered bankruptcy. Before the wind-down of the debtors' operations, the debtors and their non-debtor foreign affiliates constituted a global marine contractor that provided highly specialized manned diving, pipelay and pipe burial, platform installation and salvage, and well-intervention services to a diverse customer base in the offshore oil and gas industry. The debtor is continuing to operate as debtors in possession. The case is *In re Cal Dive International, Inc.*, Case No. 15-10458 in United States Bankruptcy Court for the District of Delaware.

Former Madoff Employee Andrew Cohen to Give Up $1.1M He Received During the Madoff Ponzi Scheme

February 27, 2017, New York -- A New York federal judge ruled that **a former employee of Bernie Madoff** will have to give up $1.1 million he withdrew from his investment account at **Bernard L. Madoff Investment Securities LLC.** The **trustee Irving Picard sued Andrew H. Cohen**, who worked at Madoff Investment Securities from 1991 through 2000 and was not part of the fraud, to recoup the amount by which Cohen's withdrawals exceeded his investments. **The Court held that the alleged amount** that he thought were profits on investments was instead money from newer victims of the Ponzi scheme. Cohen was a BLMIS investor who was a "net winner" – he withdrew more from BLMIS than he invested. Cohen raised the "value" defense under §548(c) of the Bankruptcy Code, which, in brief, would allow him to retain payments received from BLMIS to the extent that he gave value to BLMIS in exchange for the payments. Cohen's principal defense was that BLMIS owed antecedent debts that were satisfied by the payment of fictitious profits, and therefore, the fictitious profits were received for value. The Bankruptcy Court, after a trial, issued proposed findings of fact and conclusions of law, which the District Court reviewed de novo. **The District Court ruled for the Trustee and granted the judgment of $1,143,461.00 against Cohen.**

The case is Irving H. Picard, as Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff v. Andrew H. Cohen, case number 1:16-cv-05513, in the U.S District Court for the Southern District of New York.

Trustee Needs More Time to Object to General Unsecured Claims in the Trump Entertainment Resorts Inc. Clawback Suits.

February 24, 2017, New York - The trustee in **Trump Entertainment Resorts Inc.'s** Chapter 11 case urged a Delaware bankruptcy court that he needs more time to decide whether to object to what's left of the $1.9 billion in general unsecured claims asserted against the former casino operator in Atlantic City, New Jersey. The trustee **Nathan A. Schultz** requested the court for an additional 180 days to object to remaining general unsecured claims. The trustee stated that approximately 900 proofs of claim asserting more than $1.9 billion in general unsecured claims had been filed against the debtors and to date, the trustee has been able to expunge or otherwise resolve approximately 748 of such proofs of claims totaling almost $1.7 billion. **The trustee further claimed that despite his best efforts, he has not yet completed the process and, therefore, may not be able to fully reconcile all general unsecured claims before the claims objection deadline. The trustee requested an extension of time until August 23, 2017**. No objections were filed so far against the trustee's motion for entry of an order extending the period to object to claims. The objection deadline was March 10, 2017.

Greenberg Traurig LLP Settles $2.2M Lawsuit With Brown Medical Centre

February 3, 2017, Southern Texas - **Greenberg Traurig LLP** recently settled a lawsuit, for an undisclosed amount, seeking the return of **$2.2 million in legal fees** it received for representing the now-deceased owner of an insolvent medical center management company, **Brown Medical Centre, Inc.**

The bankruptcy estate agent for Brown Medical Center Inc., Elizabeth Guffy, agreed to dismiss her suit with prejudice. Earlier, she had alleged that the fees were technically fraudulent transfers because they were made after the company's insolvency, within two years of the petition date and were avoidable as fraudulent transfers under §548. Specifically, Guffy alleged that the Debtor received less than reasonably equivalent value in exchange for the transfers because Greenberg provided no legal services for the benefit of Brown Medical Centre. Guffy further contended that all value provided by the law firm was specifically for the benefit of Michael Brown or Brown's wholly-owned entities unrelated to the Debtor. However, in its recent filing last month, Guffy filed agreed motion to dismiss the case with prejudice against Greenberg Traurig, LLP with each party to bear its respective fees and costs. In its agreed to motion to dismiss, Guffy states that the plan agent and Greenberg Traurig have settled the issues that form the basis of this matter and accordingly, the Court should enter an order granting the agreed motion to dismiss with prejudice.

Recent Preference and Fraudulent Conveyance Opinions

Metered Electrical Energy Delivered by a Defendant to the Debtor Constitutes "Goods" Under the Unambiguous Text of §503(b)(9).

In re Escalera Res. Co., 563 B.R. 336 (Bankr. D. Colo. 2017)

Debtor Escalera Resources Co. produces coal bed methane gas from its wells in Wyoming. Defendant **PacifiCorp d/b/a Rocky Mountain Power**, a public utility company, supplied the Debtor with metered electrical energy. The Debtor sought protection under the Bankruptcy Code, and PacifiCorp filed a proof of claim for $240,479.43 on the basis of "electricity sold by electric utility". PacifiCorp asserted that about $87,853.94 portion of the claim was entitled to administrative expense priority under §503(b) (9). PacifiCorp alleged that this was the value of the electricity sold to the Debtor and received by the Debtor in its ordinary course of business during the 20-day period before the petition date. The Debtor opposed. The Debtor did not challenge the amount of the claim but contended that none of the claims should receive administrative expense priority treatment. **The Debtor argued that electricity was not a "Good" under the Uniform Commercial Code and §503(b)(9).**

The Court, however, agreed with PacifiCorp and allowed its claim of $84,253.95 as the worth of electrical energy it supplied the Debtor during the 20-day period that preceded the date the Debtor declared bankruptcy as an administrative expense claim under §503(b)(9). The Court found that all bankruptcy courts construing §503(b) (9) in the context of electrical energy have adopted the UCC Section 2-105 definition of "goods." But, despite this uniformity in initial analytic approach, such bankruptcy courts have reached starkly contradictory results concerning whether electrical energy is "goods." After carefully reviewing the text of UCC Section 2-105 and UCC case law (both in and outside of bankruptcy), the Court reached its conclusion about whether electrical energy satisfies the UCC definition of "goods." The Court pointed out that under UCC Section 2-105, "goods" are: (1) things existing and identifiable; (2) movable at the time of identification; and (3) capable of being sold. The Court stated that there are no other requirements beyond these. The Court further said that federal antitrust law, federal labor law, federal energy regulatory law, state tort law, tax law and international treaties (including the international equivalent of the UCC) all confirm that electrical energy is "goods." Accordingly, the Court ruled that the **metered electrical energy delivered by PacifiCorp to the Debtor constituted "goods" under §503(b) (9). The Court allowed the PacifiCorp's claim seeking payment of $84,253.95 worth of electrical energy as an administrative expense claim under § 503(b)(9).**

Failure Of Proof Regarding the Fifth Element Under §547(b) (5) Precluded Judgment For Trustee

Johns v. First Cmty. Bank (In re Trent), Nos. 2:14-bk-20526, 2:15-ap-02035, 2017 Bankr. LEXIS 407 (U.S. Bankr. S.D. W. Va. Feb. 13, 2017)

Debtor Herman Trent sought a loan from a **Defendant First Community Bank** in an amount of $7,044.80. The Defendant provided the loan, which enabled the Debtor to purchase a truck. Following the loan, the Bank disbursed $6,735.50 of the proceeds to Auto Discount Exchange, Inc., by check, and Herman Trent took possession of the truck on May 9, 2014. On August 19, 2014, the Bank perfected its security interest in the truck by registering its name and address on the face of the certificate of title as the first lien creditor. On July 21, 2016, the Debtor registered a certificate of title to the truck in his name. After that, the Debtor filed for bankruptcy. The Bank filed a proof of claim against the Debtor on

February 5, 2016. The Trustee moved for summary judgment, asserting that the transfer of interest in the vehicle should be avoided because it was on account of an antecedent debt and that the Bank will receive preferential treatment because it was receiving more than it would have had the transfer not occurred. The Bank argued that the Trustee did not meet his burden, namely, a showing that the Bank will receive more than it would have had the transfer not been made.

The Court found that all elements of Sec. 547(b) were satisfied except the fifth element. The Court pointed out that the transfer was made on account of an antecedent debt under §547(b)(2) because the perfection occurred 102 days after the Debtor took possession of the vehicle and also 102 days after the Debtor acquired liability on the claim. The Debtor was insolvent on August 19, 2014, when the transfer was made, and the Bank did not refute the presumption of insolvency in §547(b) (3). Next, the **§**547(b) (4) was satisfied, as the transfer occurred within 90 days of filing the petition. However, the Court found that Trustee did not submit evidence that the bank was in a more favorable position resulting from the transfer as required by §547(b) (5). The Court stated that there was no evidence that the Bank will receive more than it would - had the case been filed under Chapter 7; had the transfer had not been made; had it received payment to the extent provided under Chapter 11. **The Court determined that that the Trustee merely offered a statement reciting §547(b) (5) as a means to prove the element**, which was not sufficient. **Thus, the Court concluded that the Trustee was not entitled to summary judgment.**

Trustee Failed to Demonstrate that a Genuine Issue of Material Fact Exists as to the Debtor's Solvency on the Transfers

Roach v. Skidmore Coll. (In re Dunston), Nos. 14-41799-EJC, 15-04048-EJC, 2017 Bankr. LEXIS 362 (U.S. Bankr. S.D. Ga. Feb. 7, 2017)

Debtor Dr. Leslie Kyrin Dunston is a medical doctor specializing in obstetrics and gynecology. The Debtor filed for Chapter 7 bankruptcy relief due to an acute cash-flow shortage that occurred when her medical practices experienced difficulty collecting reimbursements from medical insurance companies for services performed. The Trustee commenced adversary proceeding to avoid three payments made by the Debtor to a **Defendant Skidmore College** for her daughter's tuition and other costs of attendance. The Trustee alleged that the transfers made to Skidmore were avoidable and recoverable under §§548(a) (1) (B) and 550. Skidmore alleged that the Trustee's complaint failed to state a claim because the Trustee cannot meet his burden of proof as to each of the elements of §548(a) (1). The Trustee argued that had the alleged transfers not occurred, the funds transferred to Skidmore arguably would have remained in the Debtor's checking account and become the property of the Debtor's bankruptcy estate under §541(a) (1). Skidmore argued that the particular funds it received consisted of the funds withdrawn from the Debtor's 529 Plans. Accordingly, had the transfers not occurred the funds would have remained in the 529 Plans and would have been excluded from the Debtor's bankruptcy estate under §541(b) (6) of the Bankruptcy Code.

The Court concluded that the college was not entitled to summary judgment based on its argument that the funds were excluded from property of the estate under §541(b) (6) because facts were in dispute regarding the tracing of the funds. The Court further found that the Trustee failed to show that no genuine issue of material fact existed regarding whether the funds transferred could be traced to the Debtor's 529 plans and thus were not transfers of an interest of the Debtor in property. **Further, the Trustee was not entitled to summary judgment as to any of the transfers on the basis that Debtor received reasonably equivalent value in exchange for the transfers because there was no evidence of an economic benefit conferred on the Debtor who only felt a moral obligation to pay for her daughter's college education**. Next, the Court found that there was a genuine issue of material fact regarding the Debtor's insolvency at the time of the most recent transfer which was made 56 days before the petition date. Accordingly, **the Court granted the Trustee's motion in part and denied in part.**

Defendant Provided "Value" for the Alleged Transfer By Paying For the Parties' Living Expenses From the Transfer

Silagy v. Schroeder (In re Schroeder), Nos. 14-62604, 16-6017, 2017 Bankr. LEXIS 420 (U.S. Bankr. N.D. Ohio Feb. 14, 2017)

Debtor Scott D. Schroeder worked in the financial services industry. **Defendant Robbye Schroeder** had a master's degree in education and taught English until 2010. The Debtor and the Defendant got married in 2000. Subsequently, in 2013, they moved to Ohio from California, and at that time the Debtor had several lawsuits against him. In 2014, one of the lawsuits resulted in a $5M+ judgment against the Debtor. On December 1, 2014, Debtor filed an individual Chapter 7 bankruptcy petition and eventually waived his discharge in the case. The parties divorced in 2015 although they continued to cohabitate. **After the Debtor had filed for bankruptcy, the Chapter 7 Trustee Anne Piero Silagy filed a motion for summary judgment against the Defendant; the Debtor's now ex-wife on fraudulent counts**. The Defendant opposed.

There were two main transfers were at issue: (i) The Debtor and the Defendant maintained a joint savings account and a joint checking account. However, in 2014, the Debtor opened individual checking and savings accounts in the Defendant's name and transferred the entire balance of the joint savings, $60,046.40 into the Defendant's individual savings account. The Trustee sought recovery of this $60,046.40 transfer as a fraudulent transfer. (ii) Next, the Trustee sought to avoid the check transfer of $3000 from the Debtor to the Defendant made on September 9, 2014, as fraudulent. The Defendant contended that the said amount was used for living expenses.

The Court found that the transfer of $60,046.40, into wife's individual savings account was made with actual intent to defraud creditors under § 548(a)(1)(A) because the transfer was a calculated effort by the Debtor to shield money that he had access to from reach of his creditors. The Court further noted that although the Defendant took funds in good faith without notice of the Debtor's fraud or insolvency, the amount that was not spent on living expenses and left in the account at the filing date, i.e., $33,500.85, did not qualify as value for transfer under §548(c). Next, the Court concluded that the

$3,000 check transfer to the Defendant, his then wife, was made for value and hence not avoidable as the wife deposited the check into her individual account, which she was using consistently to pay for living expenses. The Court stated that courts had accepted the payment of living expenses as reasonably equivalent value. The Court ruled that based on the bank statements, it was clear that the Defendant was using this account to pay living expenses, including food and retail purchases and insurance and utility payments. The Court concluded that the contemporaneous nature of transfer coupled with the Defendant's consistent use of that account to pay for living expenses convinced the Court that the Defendant took the alleged transfer for value.

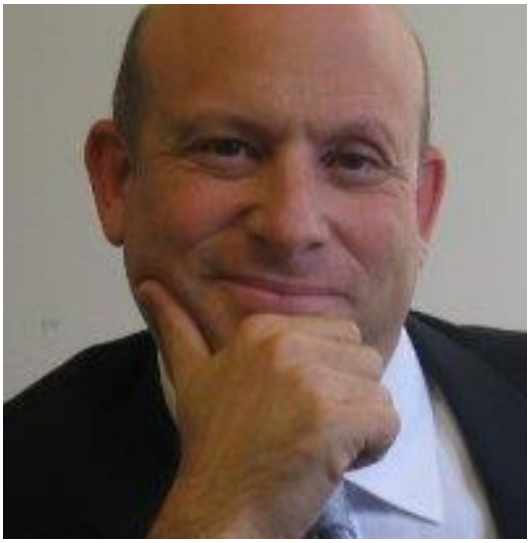
Snapshot of Clawback Cases Filed

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 (in USD)	Petition Date	District
Altegrity, Inc.	20	Laurie Selber Silverstein	Sterling Eugene Phillips	1,505,779	2/8/2015	District of Delaware
Crescent & Sprague Supply Co., Inc.	49	Charles M Caldwell	Do It Best Corp	140,213.69	7/10/2015	Southern District of Ohio
Dune Energy, Inc. and Dune Properties, Inc.	16	H. Christopher Mott	Premier Industries, LLC	544,530.23	3/8/2015	Western District of Texas
JW Resources, Inc.	10	Gregory R. Schaaf	Linsco Energy, LLC	1,065,264	6/30/2015	Eastern District of Kentucky
Louisiana Pellets, Inc. and German Pellets Louisiana, LLC	19	Robert Summerhays	To be determined	To be determined	2/18/2016	Western District of Louisiana
Morris Schneider Wittstadt Va., PLLC	84	Keith L. Phillips	Select Portfolio Servicing, Inc.	211,455.70	7/5/2015	Eastern District of Virginia
Silicon Alley Group Inc.	14	Christine M. Gravelle	To be determined	To be determined	4/28/2016	District of New Jersey
University General Health System, Inc.	74	David R Jones	Midcap Financial Services, LLC	1,231,835.88	2/27/2015	Southern District of Texas

Velocity Regional Center, LLC	10	Robert N. Kwan	Global Law Group Corporation	1,138,337.61	2/3/2015	Central District of California

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
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

Videos
Please feel free to watch our video, Basic Preference Law, on YouTube. Below is a list of other clawback related videos that we have uploaded to YouTube. For an in-depth review of the preference laws, please see our five-part video series. CLE credit is currently available for New Jersey and Texas.

We are expecting to be approved in more states shortly.
Introduction to the Bankruptcy Preference Laws - Part 1/5
Introduction to the Bankruptcy Preference Laws - Part 2/5

Introduction to the Bankruptcy Preference Laws - Part 3/5
Introduction to the Bankruptcy Preference Laws - Part 4/5