The ClawBack Report

A Preference and Fraudulent Conveyance Newsletter

Volume 3 Edition 10

JONES

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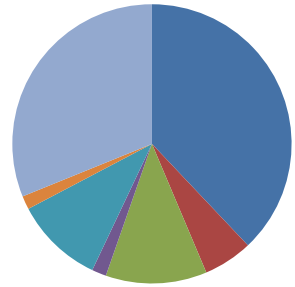
Groups of Adversary Proceedings Filed by the Debtors



INTRODUCTION

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

Trustees initiated more than **800** adversary proceedings nationwide during the month of September 2016. Most notable -

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- **340** clawback lawsuits initiated in the bankruptcy cases of **ADI Liquidation, Inc.**

Ruling for September –

- The Ninth Circuit ruled that the dismissal of a debtor's §548(a) claim without leave to amend by the bankruptcy court was appropriate. The Court ruled that the price received at a California tax sale conducted in accordance with the state laws conclusively establishes reasonably equivalent value for purposes of §548(a) because California tax sales have the same procedural safeguards as the California mortgage foreclosure sale in light of the rule in *BFP v. Resolution Trust Corp.*

Warm Regards,
Roland

News

- Trump Entertainment Resorts, Inc. Launches its Clawback Campaign
- Jay Borromei, "Alleged" Key Personnel in the TelexFree Ponzi scheme, Files for Bankruptcy
- Guinn, Son of Former Nevada Governor, Accused of Duping Late Boyd Gaming President in an Alleged Ponzi Scheme
- Madoff Accountants Says Trustee Can't Reargue Dismissal of Clawback Claims
- Trustee Appeals Bankruptcy Court's Decision : Pre-bankruptcy Payment of a Child's Tuition Fee is Not a Constructively Fraudulent Transfer

Opinions

- State Court Judgment Recorded After Filing of the Bankruptcy is Not a Transfer Under §547(b)(4).
- Trustee's Avoidance Action Collapses as Defendant Did not Qualify as a Non-Statutory Insider
- Creditor Defeats Recovery of Antecedent Credit Card Debt Under §550(b)(1) Because it Took Payment in Good Faith and Without Knowledge of its Voidability
- Genuine Issue of Facts Precluded Judgment in Favor of Trustee
- Trustee Establishes the Avoidability of Properties Under §548 Based on Multiple Badge of Fraud
- A Tax Sale Conducted in Accordance with the California State Laws is Not a Fraudulent Transfer Under §548(a)

Recent Preference and Fraudulent Conveyance News

Trump Entertainment Resorts, Inc. Launches Clawback Campaign

Delaware, September 6, 2016 – Nathan A. Schultz, as a trustee for the bankruptcy estate of **Trump Entertainment Resorts, Inc**.(Debtor) commenced adversary proceedings against several defendants by filing **more than 90 complaints** in the Debtor's avoidance action cases. The complaints were filed last month in the Delaware bankruptcy court and **sought to recover more than $14 million in payments made shortly before the Atlantic City casino operator filed for bankruptcy**. The Debtors owned and operated two casino hotels located in Atlantic City, New Jersey - the Trump Taj Mahal Casino Resort and the Trump Plaza Hotel. **The trustee alleged that the assets held by the defendants belong to the Debtor and that the payments received by various defendants are avoidable and subject to recovery under §§547, 548, 549 and 550 of the Bankruptcy Code.** The trustee is represented by the law firms ASK LLC and Gibbons, P.C. The case number is 14-12103 (KG).

Jay Borromei, "Alleged" Key Personnel in the TelexFree Ponzi scheme, Files for Bankruptcy

California, September 13, 2016 – Two years ago, TelexFree Inc. filed for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the District of Nevada and now, **Jay Borromei,** alleged key personnel in **TelexFree Ponzi scheme**, has declared personal bankruptcy. Post filing of bankruptcy, Borromei has requested for an automatic stay of the Telexfree trustee Stephen B. Darr's April 2016 lawsuit against him and his company, **Opt. 3 Solutions, Inc.** for return of more than $1.8 million. Borromei was accused of aiding and abetting the TelexFree Ponzi scheme that affected hundreds and thousands of people worldwide. Borromei filed his bankruptcy petition on Sept. 13 in the U.S. Bankruptcy Court for the Central District of California.

Guinn, Son of Former Nevada Governor, Accused of Duping Late Boyd Gaming President

Las Vegas, September 27, 2016 - Jeff Guinn, son of late Nevada governor, Kenny Guinn, is being sued by investors in connection with his

alleged Ponzi scheme, which he ran through his real estate lending company, **Aspen Financial Services, LLC**. The investors are allegedly seeking $6.9 million from Guinn. Guinn filed bankruptcy for himself and Aspen Financial in 2013. The victims of the alleged scam included Donna Ruthe, the wife of the former president of a casino operator, Boyd Gaming Corp., Chuck Ruthe. Donna Ruthe claimed that Jeff Guinn used his father's name to attract investors to the now-bankrupt Aspen Financial Services. The Ruthe family lost $6.9 million, and Donna Ruthe is now pursuing the claim through the bankruptcy courts.

Madoff Accountants Say Trustee Can't Reargue Dismissal of Clawback Claims

New York, September 21, 2016 — The two accountants, Frank Avellino and Michael Bienes, urged a New York bankruptcy judge last month to deny the motion of the Madoff trustee, Irving Picard, to reargue the clawback claims against them that were dismissed in July earlier this year. The accountants asserted that the trustee's motion to reargue should not be granted because the very basis of the Court's granting of the motion to dismiss in part was the lack of subject matter jurisdiction of the Court to hear claims for fraudulent transfer which occurred prior to January 1, 2001. Further, the accountants contended that **as the trustee has already presented its arguments to the Court**, has shown no controlling decisions of facts that the Court overlooked which would have coaxed the Court to decide differently, **the trustee fails to meet the standard for a motion to reargue and therefore, the trustee's motion should be denied.**

Trustee Appeals Bankruptcy Court's Decision: Pre-bankruptcy Payment of a Child's Tuition Fee Is Not a Constructively Fraudulent Transfer

Massachusetts, September 14, 2016 - The Massachusetts bankruptcy court, in *DeGiacomo v. Sacred Heart University, Inc. (In re Palladino)*, recently held that **debtors' pre-bankruptcy payment of their child's college tuition was not avoidable as a constructively fraudulent transfer because they received reasonably equivalent value in exchange.** The Court stated that a parent can very well reasonably assume that paying for a child to obtain an undergraduate degree will enhance the child's financial well-being and that will confer an economic benefit on the parent later on.

Although, the bankruptcy court's decision in *Palladino* represented a notable step toward barring these types of avoidance claims, the issue is still undecided. **Earlier this month, the Palladinos trustee appealed the bankruptcy court's decision and sought direct certification to the United States Court of Appeals for the First Circuit.** It is still unclear whether the issue gets resolved with this appeal or not. However, until then, educational institutions need to prepare themselves to take measures to mitigate the risks so that the payments made to them by parents on behalf of students are protected from avoidance later on.

Recent Preference and Fraudulent Conveyance Opinions

State Court Judgment Recorded After Filing of the Bankruptcy is Not a Transfer Under §547(b)(4).

Gallinghouse & Assocs., Inc. v. Black (In re Black), Nos. 15-11935, 15-1071, 15-1073, 2016 Bankr. LEXIS 3495 (U.S. Bankr. E.D. La. Sep. 26, 2016)

The matter came before the court as a trial on the complaint of Joanne and Walter Gallinghouse, Gallinghouse & Associates, Inc., and G & A Publishing against William Matthew Black seeking non-dischargeability of a debt under §§523(a)(4), (6), (7), (13) and (17), and on a separate adversary complaint filed by Black against the Gallinghouses seeking to avoid a preferential transfer under §547.

Debtor William Mathew Black brought an adversary complaint against **Defendant Gallinghouse & Assocs.**, alleging an avoidable preference under §547(b), stemming from the entry of final judgment in a state court civil suit. The only transfer that the Debtor alleged in the adversary complaint was the entry of the state court's judgment on October 14, 2015. The Debtor filed for bankruptcy on July 31, 2015. The Debtor alleged that because the trial in the state court concluded (the judgment was signed later) before the filing of the bankruptcy petition, the judgment was incurred during the 90-day period required by §547(b)(4) and hence was avoidable as a preference.

The Court found that although the trial was concluded prior to the filing of bankruptcy, the judgment was **signed** *after* the commencement of the bankruptcy case. Thus, the requirement of §547(b)(4) that the transfer be made on or within 90 days *before* the date of the filing of the bankruptcy petition was not met. The Court also determined that the Debtor did not cite any case law to support his proposition and the Debtor's argument, that the findings of the state court judge constitute a "transfer" under §547(b)(4), was not persuasive particularly because the judgment was not recorded. The Court dismissed the Debtor's adversary complaint and held that **there was no avoidable preference as the elements of §547(b) were not met and there was no pre-petition transfer to the Defendant.**

Trustee's Avoidance Action Collapses as Defendant Did not Qualify as a Non-Statutory Insider

Seaver v. Glasser (In re Top Hat 430, Inc.), Nos. BKY 13-40651-WJF, 15-04025-MER, 2016 Bankr. LEXIS 3537 (U.S. Bankr. D. Minn. Sep. 27, 2016)

This adversary action primarily centered around the **Defendant Pennie Glasser's** relationship with the **Debtor Top Hat 430, Inc**., her former employer and its principal, her former spouse, **David Pomije**. The Debtor operated a jewelry business. In March 2011, Pomjie sought loan from Glasser. Glasser issued a check for $200,000.00 to the Debtor and in return Pomije executed a promissory note in favor of Glasser. The terms of the promissory note provided for repayment of the principal in 90 days as well as a 20% interest rate if default occurred. Almost after a year, the Debtor paid interest to Glasser totaling $36,555.55 and also transferred a check in the amount of $205,444.45. After few months, the Debtor filed for bankruptcy and the Trustee brought an adversary proceeding against Glasser to avoid and

recover alleged transfers pursuant to §547 of the Bankruptcy Code and under Minn. Stat. §513.45(b). **The Trustee argued that the Defendant's status as a former spouse to the Debtor's principal, her employment history with Pomjie and her receipt of payment for the debt supported a showing of closeness between the Defendant and the Debtor and that Glasser was an insider within the meaning of §547(b)(4) and hence the alleged transfer was avoidable as a preference.**

The Court found that Glasser was not an insider under §101(31). **Her status as the Debtor's former spouse did not qualify her as a non-statutory insider as their post-divorce relationship lacked the closeness contemplated by the term "insider".** As an employee of the Debtor, the record did not show that Glasser had authority over the Debtor "as to unqualifiedly dictate corporate policy and the disposition of corporate assets". The Court also concluded that though a less-than-arm's length transaction occurred between the Debtor and the Defendant, Glasser lacked any meaningful closeness with, or control over, the Debtor. The Court ruled that the Trustee failed to carry his burden of showing that Glasser was a non-statutory insider and hence the alleged transfer cannot be recovered as a preference.

Creditor Defeats Recovery of Antecedent Credit Card Debt Under §550(b)(1) Because it Took Payment in Good Faith and Without Knowledge of its Voidability

Desmond v. Am. Express Centurion Bank, Inc. (In re Callas), Nos. 13 B 43900, 15 A 00140, 2016 Bankr. LEXIS 3523 (U.S. Bankr. N.D. Ill. Sep. 27, 2016)

Michael K. Desmond, the Chapter 7 Trustee for the bankruptcy estate of **Debtor Sam Callas** brought an adversary complaint against **Defendant American Express Centurion Bank, Inc**. to avoid and recover the allegedly fraudulent transfers made by **Katina Callas, the Debtor's non-filing spouse** pursuant to §§§547,548(a)(1) and 550(a) of the Bankruptcy Code. American Express did not challenge the avoidability of the transfer, but contended that even if the transfer was avoidable, it cannot be recovered from American Express as an immediate or subsequent transferee of Katina. American Express asserted an affirmative defense under §550(b)(1) to the Trustee's recovery claims. It argued that as a subsequent transferee under §550(b)(1), it was allowed to avoid liability for avoided transfers because it took the transfer for value, towards satisfaction of an antecedent debt, in good faith, and without knowledge of the voidability of the transfer. The Trustee disputed that American Express did not prove the elements of §550(b) defense.

However, the Court found it was uncontested that the Debtor owed an antecedent debt to American Express and that the alleged transfer reduced that debt. Katina transferred funds to American Express to pay down antecedent credit card debt owed to American Express by the Debtor. American Express accepted the transfer for value by reducing the antecedent debt owed to it by the Debtor. By reducing the debt, American Express "gave up" its right to collect that amount from the Debtor. Accordingly, American Express took the transfer for value for purposes of § 550(b)(1). Next, the Court found that the facts established that American Express did not have enough knowledge of the events in connection with the transfer to permit the Court to conclude that American Express had a duty to investigate further.

Thus, **American Express had no reason to think that it was not "trading normally" with the Debtor and Katina or that the transfer was part of a scheme on their part to defraud their creditors**. So, it was clear that American Express received the alleged transfer in good faith and without knowledge of its voidability. The Court ruled that American Express successfully established a valid affirmative defense to liability under §550(b)(1).

Genuine Issue of Facts Precluded Judgment in Favor of Trustee

McCor v. Ally Fin., Inc. (In re USA United Fleet, Inc.), Nos. 1-11-45867-ess, 1-13-01219-ess, 2016 Bankr. LEXIS 3503 (U.S. Bankr. E.D.N.Y. Sep. 26, 2016)

The Trustee for the bankruptcy estate of the **Debtor USA United Fleet, Inc.** and its entities brought an action against **Defendant Ally Financial, Inc.** to recover several transfers made by or on behalf of the Debtors to Ally. The first set of transfers that the Trustee sought to recover were twenty-two payments made from several Debtor entities to Ally in connection with a vehicle purchase financed by Ally (the Car Payment Transfers). The second transfer that the Trustee sought to recover was a single wire transfer in the amount of $1,311,000 made from the Debtor entity to Ally (the May 2011 Transfer). The Trustee argued that during the time of May 2011 transfers, the Debtors were either insolvent or were rendered insolvent as a result of the transfers and the Car Payment Transfers were made without fair consideration, diminished the bankruptcy estates, conferred no benefit upon the Debtors and were actually fraudulent under §548(a)(1)(A). Ally contended that based on the mere conduit doctrine, the alleged transfers were never the property of the Debtors and hence, the alleged funds cannot be recovered by the Trustee as a preference or fraudulent transfer.

With respect to May 2011 transfers, the Court found that **there remain genuine disputes of material fact as to whether the relationships of the parties, the roles performed by the parties, the economic substance of the transactions, and the presence or absence of a benefit to the Defendant established the elements of Ally's mere conduit defense**. Since, Ally could not establish that there was no genuine dispute of material fact as to its defense; the Court ruled that there was no transfer of an interest of the Debtors in property. As regards to the Car Payment transfers, the Court held that there was a genuine issue of material fact on the issue of the Debtors' intent and the Trustee couldn't refute it successfully. The Court denied the Trustee's motion for summary judgment.

Trustee Establishes the Avoidability of Properties Under §548 Based on Multiple Badge of Fraud

Osherow v. Charles (In re Wolf), Nos. 15-31477-HCM, 16-03002-HCM, 16-03005-HCM, 2016 Bankr. LEXIS 3397 (U.S. Bankr. W.D. Tex. Sep. 15, 2016)

The Chapter 7 Trustee for the bankruptcy estate of **Debtor Abie Wolf** was allowed under §548 and Tex. Bus. & Com. Code Ann. §24.005 to avoid transfers of real property, that the Debtor made to his ex-wife and **Defendant Rema Charles,** because the transfers were made with intent to hinder, delay, or defraud creditors. The Court found that the badges of fraud were established at trial - the alleged transfers were

made by Abie to its relatives and family members; Rema was still Abie's spouse at the time of alleged transfers; Rema had been Abie's spouse for over 20 years; with transfer of the alleged properties, Abie became financially destitute, had few remaining assets, had little income, had no way to make a living, and became insolvent; the alleged transfer to Rema was a transfer of substantially all of Abie's valuable assets; Abie received nothing from Rema in exchange for the properties transferred. **The Court concluded that these multiple "badges of fraud" clearly demonstrated that Abie had the "actual intent" to hinder, delay, and defraud creditors within the scope of §548(a)(1)(A) of the Bankruptcy Code, as well as §24.005(a)(1) of TUFTA**. The Court also ruled that the alleged transfers were also constructively fraudulent under §548(a)(1)(B) and Tex. Bus. & Com. Code Ann. §24.006 because the Debtor did not receive reasonably equivalent value in exchange from Rema for the alleged properties and the Debtor was insolvent at the time of the alleged transfer.

A Tax Sale Conducted in Accordance with the California State Laws is Not a Fraudulent Transfer Under §548(a)

Tracht Gut, LLC v. L.A. Cnty. Treasurer & Tax Collector, No. 14-60007, 2016 U.S. App. LEXIS 16513 (9th Cir. Sep. 8, 2016)

This case involved the purchase of two properties by **Debtor Tracht Gut**. The properties were tax defaulted under California law as the property tax was not paid. The County sold both properties at a public auction. Almost after a month of tax sale, **the Debtor** filed for bankruptcy and subsequently brought an adversary proceeding, **asserting that the sales were fraudulent transfers under §548 because the sales price was far less than the market value of the alleged properties and no tax deed was recorded. The County** moved to dismiss the complaint under FRCP 12(b)(6) and FRBP 7012, **arguing that the sufficient facts were not alleged in the complaint to support the granting of relief and that the sale was carried out as per market price and in compliance with the applicable state laws.** The Bankruptcy Court dismissed the complaint with prejudice and without leave to amend, concluding that the Debtor had not properly alleged a cause of action under §§548,549, or 362, and that it would not be possible to amend the complaint to state a viable cause of action. The BAP affirmed the bankruptcy court's dismissal order. Debtor appealed.

The Ninth Circuit relied upon the BFP rule in *BFP v. Resolution Trust Corp* wherein, the Supreme Court had held that a prepetition mortgage foreclosure sale conducted in accordance with state law conclusively establishes that the price obtained at that sale was for reasonably equivalent value. **The Court also agreed with BAP that the Supreme Court's holding in *BFP* should also apply to tax sales conducted in accordance with the California state laws because the rationale and policy considerations behind the Court's holding in *BFP* were just as relevant in the California tax sale context.** Thus, applying BFP rule in the case at bar, the Court rejected the Debtor's argument that the sales price of a property was too low when compared to fair market value. **The Court reasoned that the market value has no applicability in the forced-sale context because the state law allows the "forced sales" of real estate and property sold at such sales is "simply worth less" than property "sold at leisure and pursuant to normal marketing techniques."** Thus, the lower price obtained at sale, when compared to a fair market valuation, is a result of the mechanism of forced sales, rather than

a "badge of fraud" under the law of fraudulent transfers. **Accordingly, the Court held that the dismissal of the Debtor's §548(a) claim without leave to amend was appropriate as the sale of the Debtor's property did not represent a fraudulent transfer under §548(a).** The Court further held that the leave to amend was also properly denied because the Debtor's proposed amendment would have been futile in light of the presumption that the price received at the tax sale was for reasonably equivalent value. **Since, it was conclusively established that reasonably equivalent value was obtained for the properties sold at the tax sales, the Ninth Circuit ruled that the alleged sales were not fraudulent transfers under §548(a).**

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
ADI Liquidation, Inc.	340	Kevin J. Carey	New World Pasta Company	$1,794,375.60	9/9/2014	District of Delaware
Craig Energy, LLC	51	Howard R Tallman	C&D Rentals, LLC	$685,000.00	2/19/2016	District of Colorado
Health Diagnostic Laboratory, Inc.	105	Kevin R. Huennekens	Yet to be determined	Yet to be determined	6/7/2015	Eastern District of Virginia
Magnetation LLC	15	William J Fisher	Hammerlund's Champion Steel, Inc.	$1,916,198.83	5/5/2015	District of Minnesota
Trump Entertainment Resorts, Inc.	92	Kevin Gross	Aetna Life Insurance Company	$2,594,621.32	9/9/2014	District of Delaware
Yellow Cab Cooperative, Inc	14	Dennis Montali	Amy L. Welch-Chapman	$486,000.00	1/22/2016	Northern District of California
GT Advanced Technologies, Inc. and GT Advanced Equipment Holding LLC	279	Christopher J. Panos	Yet to be determined	Yet to be determined	10/6/2014	District of New Hampshire

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