AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop 2021

360° of Investigation: A Roundtable Discussion Regarding the Investigation of Debtors and Recovery of Assets

Marchand Boyd
Axos Bank; Delaware, Ohio

Richard R. Gleissner
Gleissner Law Firm, LLC; Columbia, S.C.

Michael L. Martinez
Grier Wright Martinez PA; Charlotte, N.C.

Jamie W. Olinto
Adams and Reese LLP; Jacksonville, Fla.

Grace E. Robson
Markowitz, Ringel, Trusty + Hartog, P.A.; Fort Lauderdale

CONCURRENT SESSION

2021

360 DEGREES OF INVESTIGATION

I. BEFORE GOING DOWN PATH OF INVESTIGATION

A. Know your client:

Whether a trustee, secured creditor, unsecured creditor, lessor, vendor, scorned ex (business partner, significant other, etc., with too much money and fighting on principle?) – it is mission critical to understand your client's goal(s), the amount of money at issue, and tolerance for "the hunt" so you can advise your client on the appropriate scope of investigation and the budget involved.

II. INVESTIGATING THE DEBTOR & IDENTIFYING POSSIBLE ASSETS (DOCUMENTS/RECORDS)

A. Start With Low Hanging Fruit (low-cost discovery)

1. Schedules
    i. A/B – Real and Personal Property (review assets and values listed)
        a. Real Property
            - Search the public registry and tax records for the taxing authorities for all parcels of real property identified on Schedule A/B specifically to confirm allegations in the schedules.
            - Cross-reference SOFA Item # 2 (for individuals) or SOFA Item # 14 (for non-individuals); search the public registry and tax records for the taxing authorities (and surrounding counties) for disclosed prior addresses and places of conducting business.
            - Additional Practice Tips:
                - Establish a relationship with a residential real estate broker/agent who can provide reliable Broker Price Opinions (BPOs) or Comparative Market Analyses (CMAs) for a small fee (or no fee) in cases where there might be residential real property with non-exempt equity. Saves money on purchasing appraisals when there might not be any equity in the property. Often worth the small fee, even if the price/value conclusion results in the potential asset not being administered.
                - Likewise, establish a relationship with a commercial real estate broker/agent. Should also be willing to give informal value opinions in exchange for the prospect of future business. Pick someone with bankruptcy sale process experience to help shepherd potential buyers through the process.
                - If the debtor holds title to real property in the debtor's name, file a notice of *lis pendens* in the public registry for where the subject property is located.
        b. Personal Property
            - Tangible Personal Property:
                - Like with real estate brokers for real property, make friends with an auctioneer who can give you value opinions on tangible personal property disclosed in Schedule A/B and otherwise sell physical assets when necessary.

- Considerations for liquidating/valuing TPP: Are the premises housing the TPP leased by the debtor or owned by the debtor? Can the TPP be sold in place, or will auctioneer have to move it? Are there different lienholders on different assets? What is the auction strategy: group assets into one lot, multiple smaller lots, or piece by piece?
- Be sure to physically inspect the property to better understand what is there (and not there).
  - "Check the trunk"
  - Count the cows

- Vehicles: Verify liens listed in Schedule D by calling the applicable state authority for registering vehicle titles (sometimes requires an "access code" or an advance registration with the governmental authority so it is comfortable releasing information to you). Be mindful that the IRS may have perfected liens against vehicles even if not depicted on the titles themselves.
- Interests in Businesses: Minority interests (or majority interests, for that matter), even non-voting economic interests, in business entities might have more marketable value than you'd expect. Familiarize yourself with some companies around the country that specialize in buying and holding minority interests in closely-held enterprises.
- Additional Practice Tips:
  - If you're an estate fiduciary for an estate that includes live animals, then, unless the animals can be monetized very quickly, swiftly move to abandon the animals to avoid storage costs, feeding costs, and other significant headaches.
  - Storage facility operators typically do not understand § 365 or bankruptcy in general. For better or worse, if you want to take a look at items in a storage unit, might want to make a payment to the storage unit operator if the debtor has already been locked out so you can take a look at what is inside.

ii. C – Claimed exemptions
   a. Cross-reference all property listed on Schedule A/B with exemptions claimed on Schedule C to identify exposed assets.
   b. Keep in mind that exemption laws vary from state-to-state, so if debtor has moved recently or owns assets in different states, don't assume that an asset is necessarily protected by the exemption laws you're used to dealing with.

iii. I/J – income and expenses (source and spending habits)
   a. Look for sources of income identified in Schedule I (or the debtor's paystub) that are not disclosed in Schedule A/B (or Schedule C). Paystubs may also reveal financial assets not otherwise disclosed, which may or may not be exempt-able (or the exemption may have been waived depending on the circumstances) (*e.g.*, retirement accounts, insurance assets, health savings accounts, etc.).
   b. Look for expenses on Schedule J for maintaining assets that may have not been disclosed in Schedule A/B (or Schedule C).

2. Statement of Financial Affairs
   i. Identify present/past revenue sources

ii. Identify transfers before bankruptcy to insiders and others
- Additional Practice Tips:
  - If you might have a constructive/resulting/equitable trust claim or any other interest in real property titled to someone besides the debtor, then immediately file adversary proceedings averring such interests and file notices of *lis pendens* in the public registry for where the subject property is located.

iii. Identify litigants from lawsuits
a. Counterparties listed in lawsuits disclosed in the SOFA are often excellent sources of information regarding the debtor's financial affairs. Try reaching out to their attorneys early in the case for information on the debtor and potential leads on assets/transfers.
b. Valuable litigation claims have also been asserted by the debtor in the corresponding lawsuits.

iv. Identify Accountants/bookkeepers
a. Acquire exportable Quickbooks/Quicken/Accounting Software files, acquire usernames and passwords for those accounting files, and deliver them to your forensic accountant.
- Be sure to create or retain unaltered master copies of the files for "chain of custody" purposes.
- If you cannot obtain the usernames or passwords, your forensic accountant might have mechanisms to "break into" the files.
- Forensic accountants also have ways to review historical edits to transaction entries.

b. If justified by the needs of the case, considering seeking emails/correspondence between the debtor and the debtor's accountant/bookkeeper and other documents/information concerning the debtor maintained by the accountant/bookkeeper. Such communications/documents are likely not privileged and, therefore, discoverable.

3. Bank Statements
i. Identify payees (regular/recurring vs outside ordinary course)
ii. Disclosed/Undisclosed Transfers
iii. Identify payees not listed in schedules/statement of financial affairs
- Additional Practice Tips:
  - Seek records for the period ending on the petition date and looking backward for the entire duration provided in the applicable jurisdiction's voidable transactions statute.
  - *Provided, however*, that, if the IRS is a creditor in the case, obtain records for the period ending on the petition date and looking backward ten (10) years.

4. Tax Returns
i. FRBP 4002 - (4) Tax Returns Provided to Creditors. If a creditor, at least 14 days before the first date set for the meeting of creditors under §341, requests a copy of the debtor's tax return that is to be provided to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the meeting of creditors under §341, shall provide to the requesting creditor a copy

of the return, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

ii. Common items to look for in tax returns that may lead to assets...
   a. Interest income
   b. Capital gain/loss
   c. Deductions/claimed expenses
   d. Schedule C – Profit of Loss from Business
      - Currently, by way of a change in the law through the CARES Act, Net Operating Losses (NOLs) for certain years may be carried back up to five years, thereby allowing the bankruptcy estate to monetize the tax attribute in certain situations.
      - Keep an eye out for lines of business not otherwise disclosed or depreciation of assets not otherwise disclosed.
   e. K-1s
      - Additional Practice Tips:
        - Ask for the debtor's prior two income tax returns that have been filed, at least.

5. Additional low cost discovery considerations for creditors...
   i. Especially in individual and small business cases, the debtor is often willing to provide you the same information they provided to the trustee because it costs nothing more to forward those documents. Doesn't hurt to ask for it, but the debtor(s) will not always voluntarily turn it over.
   ii. Compare assets disclosed and the debtor's valuations of those assets to personal financial statements previously provided by the debtor, previous bankruptcy filings, pending or prior domestic actions, and similar disclosures in other litigation.
   iii. Rarely hurts to call the trustee, U.S. Trustee, or counsel to the creditors committee (depending on the size of the case and your client' position in the case) to discuss potential assets and exchange information that may lead to asset recovery.

B. Search Online:

1. <u>For All Debtors</u>:
   i. Public record searches for:
      a. Real property
         - Search generally for the debtor's name and variations through the public registry and tax records for the taxing authorities for all parcels of real property identified on Schedule A/B and surrounding counties/taxing authorities/jurisdictions.
         - Might also want to search real estate records for taxing authorities for the addresses and places of business for the prior 5–10 ten years disclosed for the debtor in a standard public records search.
         - Additional Practice Tips:
           - Consider hiring a title searcher to verify information revealed in informal/online searches if justified by available assets, unreliability of debtor, or otherwise.
      b. Personal property

- Check registrations for certain assets that must be licensed, such as aircraft, watercraft, firearms, etc.
- Consider searching unclaimed asset databases for potentially easy money. The North Carolina search interface is available at: https://www.nc.gov/unclaimed-property-search; other states have similar portals.

c. Business interests
d. Lawsuits/judgment
e. Liens (UCC-1, etc)
   - Additional Practice Tips:
     - For a fee, there are services available that provide "one-stop" searches of many of these databases, such as Lexis/Accurint, Westlaw/PeopleMap.

ii. Google searches for the Debtor and insiders/affiliates.
   - Additional Practice Tips:
     - In addition to standard Google searches, search Google Maps in particular and zoom in to the debtor's various parcels of real property or places of business; undisclosed assets may be visible.

2. <u>For Individuals</u>:
   i. Addresses Used and Name Variations
   ii. Search secretary of state for businesses where individual listed as owner/officer and/or registered agent
   iii. Driver Licenses
   iv. Criminal Records
   v. Professional Licenses
   vi. Relatives/Friends/Business partners (family law proceedings, i.e., divorce, probate, quiet title, etc.)
   vii. Employment record
   viii. Look for posts on Social Media Accounts (Facebook, Instagram, Twitter, etc)
3. <u>For Businesses</u>:
   i. Reach out to bookkeeper and/or accountant (subpoena)
   ii. Quickbooks & Accounting Records
   iii. Server/ hard drives (does debtor maintain records in cloud?)
   iv. Did company's owner(s) file bankruptcy
   v. Check whether "affiliates" of debtor filed bankruptcy

C. Additional Documents or In Person Inspection May be Warranted

1. Credit Card Statements - possible subpoena for statements – 2-4 years
2. Bank/Financial Record Statements - possible subpoena for statements – 2-4 years
3. Financial statement(s) provided to lenders
4. Safe Deposit Box
5. Storage Unit(s)
6. Computer/Laptop
   i. Gain access to all cell phones and other computers owned by the debtor and make forensic images of those computers.
      - Additional Practice Tips:

- Put "mounting software" on your computer (several free or low-cost options) whereby you can access the forensic images of the computers when you want; also prevents manipulation of the master file for "chain of custody" purposes.

ii. Check to see if you can access internet search histories and electronic calendars.

iii. Gain access to all email accounts used in connection with the debtor's business and create or retain .ost/.pst files that you do not alter for "chain of custody" purposes.

iv. Search calendars linked to email accounts in addition to emails themselves.

v. Privilege/Privacy Concerns.

- If the debtor is an entity in bankruptcy, the trustee controls the privilege. *See CFTC v. Weintraub*, 471 U.S. 343, 353 (1986).
- If the debtor is an entity, whether individual officers/directors/employees have a reasonable expectation of privacy in cell phones and other computers paid for by the debtor-employer is a question to be answered on a case-by-case basis. See *In re Asia Global Crossing, LTD.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (holding that "[i]n light of the variety of work environments, whether the employee has a reasonable expectation of privacy must be decided on a case-by-case basis."); In re Royce Homes, LP, 449 B.R. 709, 737-738 (Bankr. S.D. Tex. 2011) (finding that employee did not have a reasonable expectation of privacy in his e-mails considering a clear electronic communications policy established by the debtor-company banning dissemination of confidential communication over its computer system and warning that 'personal communications may be accessed, viewed, read, or retrieved by a company manager or employee."); *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y. 2006) (finding that employee did have a reasonable expectation of privacy and had not waived the attorney client privilege where the employee used the company laptop at her home and attempted to delete the privileged communications before returning the laptop to her employer).
- More complex privacy and privilege concerns when the debtor operates as a sole proprietorship; probably won't be able to seize the debtor's emails/cell phones/computers over the debtor's objection.

7. Electronic currency
8. Paypal or other account
9. Gift cards
10. Home Safe
11. In addition to the foregoing, common documents requested in the standard chapter 7 case include:
    i. government-issued identification card;
    ii. social security card;
    iii. pay stubs from all employers for the 60 days prior to the petition date;
    iv. life insurance policy declaration page (or other similar documentation) for each policy showing the type of policy, the owner, the insured, the

beneficiary(ies), the amount of cash value (if any), and the amount of any outstanding loan;

v. proof of ERISA qualification as to any plan claimed as not property of the estate and the most recent statement for each such account;

vi. proof of IRA status on any account claimed exempt and the most recent statement for each such account;

vii. for any section 529 education account, a copy of the most recent statement;

viii. most recent mortgage statement; and

ix. registration cards for each automobile or other vehicle owned or, if owned free and clear, vehicle titles.

III. IDENTIFYING POSSIBLE ASSETS THROUGH EXAMINATIONS OF THE DEBTOR AND OTHERS

A. Meeting of Creditors

1. Limited time to ask questions
   x. Find out in advance from the person conducting the 341 meeting how much time they typically allow for questioning the debtor.
2. Show up early and *talk* to debtor's counsel
   i. Similarly, if a creditor is represented at the 341 by counsel, then the creditor is animated about the bankruptcy; find the creditor's counsel after the 341 and talk to the creditor's counsel about the debtor's assets and affairs.
3. Actually listen to questions and answers – it is easy to "zone out" when you have heard the questions a million times
4. Close the loop on anything of interest that was not fully developed
5. If you know of something interesting – ASK about it here – you might interest the trustee (you may have already shared the information if speaking with trustee in advance)
6. Basic questions that are typically asked, or should be asked, at every 341:
   i. Did you sign the petition, schedules, statements, and related documents and is the signature your own?
   ii. Did you read the petition, schedules, statements, and related documents before you signed them?
   iii. Are you personally familiar with the information contained in the petition, schedules, statements and related documents?
   iv. To the best of your knowledge, is the information contained in the petition, schedules, statements, and related documents true and correct?
   v. Are there any errors or omissions to bring to my attention at this time?
   vi. Are all of your assets identified on the schedules?
   vii. Have you listed all of your creditors on the schedules?
   viii. Are you currently a member of a class in a pending class action lawsuit or otherwise a plaintiff in any lawsuits?
   ix. Other than your bankruptcy counsel sitting next to you, have you engaged or hired any lawyers for any purpose?

x. Have you transferred any of your assets (other than payments to creditors) to any person in the last three years?
xi. Have you paid any creditor more than $1,000 during the last year, other than regular monthly payments?

B. Schedule/Attend Rule 2004 Examination of Debtor and Others With Information
1. Inquire regarding "hard to find" assets:
i. Assets in names of companies
ii. Assets where debtor holds equitable interest but its not "on paper"
iii. Assets that are offshore
iv. Electronic & other hard to trace assets – digital currency, bearer bonds
v. Home safe
vi. Storage unit

C. Informal Examinations.
1. Often, debtor's counsel is willing to allow trustees to informally interview the debtor before (or sometimes after) the 341 meeting depending on the circumstances.
i. If so, have a list of specific questions you want answered prepared, but also just try to get the debtor talking; seemingly innocuous disclosures often lead to the discovery of present assets.
ii. In the early phases of the case, honey catches more assets than vinegar (there will be plenty of opportunity for vinegar later).
- Additional Practice Tips:
  - Consider recording your conversations with the debtor. Not only is an audio recording more reliable than handwritten notes, but also you could use the recording later on for litigation purposes. Caution: Check your jurisdiction's laws on recording parties without the other party's knowledge and obtain affirmative consent if necessary.
2. Again, remember to informally interview scorned spouses, former friends, and non-institutional creditors burned by the debtor; these case constituents often have the inside scoop on where assets may be located.

IV. PROCEDURE IN BANKRUPTCY CASES FOR SEEKING DOCUMENTS

A. Bankruptcy Rule 2004 vs. Bankruptcy Rule 9016.

i. A comprehensive analysis of the distinction between obtaining discovery under Rule 2004 and Rule 9016 can be found in *In re Patel*, No. 16-65074-LRC, 2017 WL 377943, at *2 (Bankr. N.D. Ga. Jan. 26, 2017):
- "Rule 9016 provides that Federal Rule 45 applies in "cases under the Code." Fed. R. Bankr. P. 9016. Federal Rule 45, in turn, permits a "party" to obtain a subpoena commanding the production of documents. Fed. R. Bankr. P 9016; Fed. R. Civ. P. 45(a)(1)(C); 45(a)(3). Federal Rule 45(a)(2) requires that every subpoena must "issue from the court where the action is pending." Fed. R. Civ. P. 45(a)(2). Under Federal Rule 45(a)(2), therefore, there must be an

"action" pending in order for a subpoena to be issued. *See Application of Royal Bank of Canada*, 33 F.R.D.296 (1963).

- Rule 9002 provides that certain words used in the Federal Rules have specific meanings when a Federal Rule is made applicable to "cases under the Code," unless that meaning "is inconsistent with the context." Fed. R. Bankr. P. 9002. Relevant to this issue, Rule 9002(1) defines the word "action" to mean "an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter." Fed. R. Bankr. P. 9002(1). Thus, when reading Federal Rule 45 in a bankruptcy case, the Court substitutes "adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter" for the word "action." Accordingly, a subpoena must issue from the court where the adversary proceeding, contested petition, or proceedings to vacate an order for relief or to determine any other contested matter is pending.
- There is an exception. When no proceedings are yet pending in a bankruptcy case, Rule 2004 provides a discovery tool for parties in interest to gather information from "any entity" about the "acts, conduct, or property" or the "liabilities and financial condition of the debtor," or regarding the "administration of the debtor's estate" or the "debtor's right to a discharge." Fed. R. Bankr. P. 2004(a). Even in the absence of an adversary proceeding or contested matter, a party in interest may move the Court for an examination and, pursuant to Rule 2004(c), such party in interest may compel the attendance and production of documents as provided in Rule 9016 (i.e., through Federal Rule 45). Fed. R. Bankr. P. 2004(c).
- Therefore, under a plain reading of Federal Rule 45 and Rules 9002(1), 9016, and 2004, to obtain a subpoena for production of documents, a party in interest must either be a party to an adversary proceeding, contested petition, or contested matter, or, when there is no litigation pending, have obtained a Rule 2004 order."

ii. Thus, if you are seeking production of documents or information relevant to a pending adversary proceeding or litigation dispute, unilaterally serving a Rule 34 request for production of documents without advance notice on a party—or a subpoena duces tecum without advance notice (other than filing a notice of intent to serve subpoena) on a non-party—is appropriate.

iii. However, if you are seeking general information concerning the debtor's assets outside of a pending litigation dispute or adversary proceeding, then the procedure set forth in Rule 2004 and any local rule applicable thereto should be followed.

B. Bankruptcy Rule 2004 Motions/Orders. Bankruptcy Rule 2004 provides that an examination into the debtor's financial affairs, administration of the estate, or the debtor's right to a discharge may be ordered by the Court. Some jurisdictions require the filing of a motion and entry of an order prior to a Rule 2004 examination.

However, other jurisdictions modify Bankruptcy Rule 2004 to allow the examination of a debtor to be scheduled by notice rather than by motion. *See* U.S.B.C, Middle District of Florida, Local Rule 2004-1, U.S.B.C., Southern District of Florida, Local Rule 2004-1.

C. Subpoena Procedure and Limitations.

i. The Court where the subject action is pending may issue a subpoena to anyone within the United States. *See* FED. R. CIV. P. 45(a)(2) & (b)(2)

- However, FRCP 45's "100-mile rule"—requiring production at a location within 100 miles of where the producing party resides or regularly conducts business in person—still applies. *See* FED. R. CIV. P. 45(c)(2)(A).

ii. You must file a Notice of Intent to Serve Subpoena on the docket before serving the subpoena. *See* FED. R. CIV. P. 45(a)(4).
- There is no minimum time period required in between filing the notice of intent and serving the subpoena. The purpose of the notice is to alert the other parties that you are seeking certain information from a certain party so they can subsequently ask for it if they want to see what is produced – not to provide time to object to the issuance of the subpoena.

D. Subpoenas/Demands for Turnover on Financial Institutions

i. Be very specific in your request for information because financial institutions will generally only provide what the subpoena/requests stipulates, nothing more. For example, request all Debtor statements related to:
  - DDA's
  - MMA's
  - CD's (or other term interest-bearing accounts)
  - Merchant accounts (if a business)
  - Investment/securities accounts (if the institution has a brokerage or investment arm)
  - DACA-controlled accounts that may involve a 3rd party lender

ii. Always include a response or compliance deadline within the request

iii. It is helpful if you have a Court order

iv. Consider the size of the bank and the size of the request; bank size matters but does not always determine the bank's responsiveness

v. Who to target with the request for information? - Aim high, aim wide
- Target titles containing the words "Chief," "EVP" or "Counsel" - Chief Legal Officer, Chief Compliance Officer, General Counsel.
- Follow the well-traveled path - Utilize industry organization listservs to identify helpful/responsive bankers at specific institutions.
- The more individuals targeted within the institution, the greater the chance for a more immediate response.

vi. Example of specific language used in a request for production from a financial institution:
- "All deposit account records, including, without limitation, all signature cards, copies of all monthly account statements, copies of all checks and debits to and from the account(s), detailed descriptions of any miscellaneous account debits or credits, copies of all cashier's checks or certified checks purchased with funds from the account(s), detailed information on all account incoming and outgoing wire transfers including date, amount, recipient, or originator, and any additional information identifying all funds deposited into or withdrawn from the account(s)."

vii. If you have questions about the completeness of the debtor's identification of deposit accounts in prior disclosures, then consider subpoenaing the largest depository institutions doing business in the geographic areas where the debtor resides or operates.

E. Property in the Hands of the Debtor.

i. If the property or documents are in the hands of the debtor and the debtor refuses to turn the property or documents over, the trustee can file a motion. Code Section 521(a)(3) requires a debtor to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties". 11 U.S.C. §521(a)(3). Code Section 521(a)(4) requires that the debtor "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate." 11 U.S.C. §521(a)(4). While there is no private cause of action for a Debtor's failure to fulfill its obligations, courts generally hold that:
- There can be no question that a trustee may seek an order compelling a debtor to comply with his duties under § 521.
- By rejecting the Trustee's argument that there is an implied cause of action for damages against a debtor who breaches their [sic] duties under § 521 to cooperate with the Trustee, to file information and to surrender property, the Court does not mean to suggest that a debtor may take those duties lightly.
- The provisions of that section are mandatory, not optional. And the Trustee is correct that a trustee should not have to pull teeth to get a debtor to file required information and surrender property that is required to be surrendered. But if a debtor fails to perform those duties in an honest and diligent fashion, trustees and creditors are not without remedy. The Court earlier in this opinion noted several remedies that exist. Where the facts so warrant, the Court has no hesitation in granting motions to compel a debtor to perform their duties upon a showing that they have failed to do so, to award sanctions and find contempt where a debtor disobeys an order, or to dismiss a case or deny discharge.
  - *In re Mathis*, 548 B.R. at 472–73. A simple motion to compel Dr. Wojtkun's compliance with his statutory duties would have been sufficient.

- *In re Wojtkun*, 13-12719-MSH, 2018 WL 4057348, at *3–4 (Bankr. D. Mass. Aug. 23, 2018), *aff'd*, 596 B.R. 74 (D. Mass. 2019).

ii. Similarly, in the case of *In re: Correra*, 589 B.R. 76 (Bankr. N.D. Tex. 2018), the court had a situation involving a computer. A computer was discovered and the court ordered the turnover of the computer. The person in possession of the computer refused to produce the computer because it contained "personal information." The court ordered the turnover to the Trustee because of her fiduciary capacity. The Court states:

- To further understand the original mindset of the court with regard to the Computer, first, the Bankruptcy Code imposes certain self-executing statutory obligations upon a debtor (without the requirement of a motion or order). A debtor must cooperate with any trustee appointed in a bankruptcy case to enable him or her to perform the trustee's duties (11 U.S.C. § 521(3)), and a debtor must surrender all property of the estate and recorded information (11 U.S.C. § 521(4)). Moreover, "[o]ther provisions of the Bankruptcy Code impose analogous obligations on a much broader class. With certain exceptions, any entity in possession, custody or control of property that the trustee can use, sell or lease, must turn that property over to the trustee." Most notably, section 542(e) provides: "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee."
  - *In re Correra*, 589 B.R. 76, 95 (Bankr. N.D. Tex. 2018) (citations in footnotes omitted).

iii. In *Correra*, the Court later discovered that information had been intentionally deleted from the computer and actions were taken by the person in possession of the computer to intentionally destroy the data on the computer. The Court stated:

- As earlier stated, a federal court has the inherent power to sanction a party who has abused the judicial process. The spoliation of evidence is one such abuse. Spoliation is the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.
  - *In re Correra*, 589 B.R. 76, 127 (Bankr. N.D. Tex. 2018).

iv. The *Correra* court held that sanctions of damages and attorneys fees were appropriate against the person or persons that contributed to the spoliation of evidence and the withholding of the documents from the Trustee.

V. LITIGATION & OTHER STRATEGIES

1. Trustee Strategies
   a. Turnover – Section 542
      i. Section 542(a) generally provides that a third party noncustodian that has custody or control over property of the estate that either the Trustee may use, sell or lease or that the debtor may exempt must turn that property over

to the Trustee, unless the property is of inconsequential value or benefit to the estate. This section is useful when the particular property is in the hands of a third party.

ii. Section 542(b) provides that an individual that owes a matured debt shall pay that debt to the order of the trustee, unless the debt is being set-off under Section 553. Trustee's often use this section when collecting accounts receivables listed by the debtor. By referring to this section, the Trustee is alleging a core proceeding, making the collection of accounts receivable easier.

iii. Subsections 542(c) and (d) provides specific instances where the third party does not have to turn the property over to the Trustee. Specifically, if the party does not know of the commencement of the case, or if the third party is transferring life insurance benefits.

iv. 542(e) also requires the turnover of books and records from individuals such as attorneys and accountants to the Trustee. Note that Section 542(e) does not waive or constitute any exception to the attorney-client privilege.

b. Turnover – Section 543 – from a custodian. Custodians are receivers or trustees appointed in a non-bankruptcy proceeding, an assignee appointed under a general assignment for the benefit of creditors, or even someone contracted by the debtor to take charge of property of the debtor. See 11 U.S.C. §101(11). These custodians are required to deliver any property in their possession to the Trustee and account to the Trustee for the property, including any proceeds, product, offspring, rents or profits of the property.

c. Exemptions

d. Discharge

2. From a creditor's perspective:

a. Cash collateral

i. Rents

ii. Cash collateral orders – replacement liens

b. Stay relief/abandonment

c. Conversion

i. Chapter 7 Individual Debtor – high income, no assets – consider converting to Chapter 11 (must be worth the cost, but can monetize the future income stream). *In re Baker*, 503 B.R. 751 (Bankr. M.D. Fla. 2013)

ii. Chapter 11 to 7 (if business is not truly viable – move quickly)

d. Dismissal

e. Appointment of Chapter 11 Trustee/ removal of subchapter v debtor (if warranted)

f. Objection to Discharge/Dischargeability

g. Valuation Litigation – if low-ball valuations

h. Try to get the trustee/Trustee interested in information you've dug up (or in helping to dig deeper) – offer to assist with litigation/information/cost sharing

3. Financial Institution Perspective

a. Once assets are located, make demand for turnover using same banking point of contact

b. It will help to have a court order

c. Establish a new and separate fiduciary account with an independent banking institution
    i. Does the account(s) need to be opened at a court/UST-approved institution?
        1. If Chapter 7, account opening generally facilitated through case management software and corresponding banking relationships
        2. If Chapter 11, receivership or other fiduciary situation, typical documents are needed to open an account:
            a. Court order
            b. W9
            c. Photo ID for all signers
            d. Same institutions may also require entity formation documents (LLC operating agreements, articles of incorporation, etc.)
        3. Do the funds require collateralization or bonding (pre-confirmation vs. post-confirmation)?
        4. What treasury management services will I need for this situation?
            a. Online access with the ability to make deposits, initiate wires, transfer funds, assign additional users
            b. Disbursement services
            c. Positive-pay

4. Strategies for Cases with Significant Risk of Asset Concealment and Other Fraud Concerns
    a. Consider whether the potential recoveries, confidence in the accuracy of the information available, and other circumstances justify the cost of hiring a private investigator to verify asset information.
    b. Determine if a civil or criminal investigation is ongoing, if you can.
        i. Make friends with prosecutors and investigators, they have investigatory powers and access to resources far superior to a private party's.
        ii. If no investigation is ongoing as far as you can tell, consider making a criminal referral.
    c. When the debtor was engaged in fraud prepetition, make sure to follow the money until you reach a transferee who provided reasonably equivalent value for the transfer without knowledge of the fraud.
        - Additional Practice Tips:
            - Often, pursuant to unjust enrichment/constructive trust types of theories, otherwise exempt-able assets acquired or maintained with proceeds from the fraud will NOT be protected.

Attachments:

USBC ED Tn: Local Form M-201E: Motion for Rule 2004 Examination (ex parte)

USBC ED Tn: Local Form M-201H: Motion for Rule 2004 Examination (hearing)

USBC ED Tn: Local Form O-201D: Order on Motion for Rule 2004 Examination of Debtor

USBC ED Tn: Local Form O-201W: Order Authorizing Rule 2004 Examination of Nondebtor Witness

USBC SD Fla: Local Form 84: Subpoena for Rule 2004 Examination

USBC SD Fla: Local Form 14: Notice of Rule 2004 Examination

Checklist

360 DEGREES OF INVESTIGATION - CHECKLIST

I. BEFORE GOING DOWN PATH OF INVESTIGATION

- ☐ Identify client goals
- ☐ Identify scope of investigation
- ☐ Establish budget

II. INVESTIGATING THE DEBTOR & IDENTIFYING POSSIBLE ASSETS (DOCUMENTS/RECORDS)

Schedules - review and identify assets and values:

- ☐ Schedule A/B - Homestead and Personalty (dates/sources of funds for acquisition of assets)
- ☐ C – Claimed exemptions (dates/sources of funds for acquisitions as may be avoidable; check for § 522(o) and (p) issues on homestead)
- ☐ I/J – income and expenses (source and spending habits)

Statement of Financial Affairs:

- ☐ Identify present/past revenue sources
- ☐ Identify transfers before bankruptcy to insiders and others
- ☐ Identify litigants from lawsuits
- ☐ Identify Accountants/bookkeepers

Bank Statements

- ☐ Identify payees (regular/recurring vs outside ordinary course)
- ☐ Disclosed/Undisclosed Transfers
- ☐ Identify payees not listed in schedules/statement of financial affairs

Tax Returns

- ☐ Interest income
- ☐ Capital gain/loss
- ☐ Deductions/claimed expenses
- ☐ Schedule C – Profit of Loss from Business
- ☐ K-1s

DIP Reports

- ☐ Compare report with bank statements
- ☐ Suspicious transactions
- ☐ Credit card payments (obtain detailto back up the charges)

Online Searches:

All Debtors:

- ☐ Real property
- ☐ Personal property (motor vehicles, boats, other titled property)
- ☐ Business interests
- ☐ Lawsuits/judgment
- ☐ Liens (UCC-1, etc)

For Individuals:

- ☐ Addresses Used and Name Variations
- ☐ Search secretary of state for businesses where individual listed as owner/officer and/or registered agent
- ☐ Driver Licenses
- ☐ Criminal Records
- ☐ Professional Licenses
- ☐ Relatives/Friends/Business partners (family law proceedings, i.e., divorce, probate, quiet title, etc.)
- ☐ Employment record
- ☐ Look for posts on Social Media Accounts (Facebook, Instagram, Twitter, etc)

For Businesses:

- ☐ Reach out to bookkeeper and/or accountant (subpoena)
- ☐ Quickbooks & Accounting Records
- ☐ Server/ hard drives (does debtor maintain records in cloud?)
- ☐ Did company's owner(s) file bankruptcy
- ☐ Check whether "affiliates" of debtor filed bankruptcy

Additional Documents or In Person Inspection May be Warranted

- ☐ Credit Card Statements - possible subpoena for statements – 2-4 years
- ☐ Bank/Financial Record Statements - possible subpoena for statements – 2-4 years
- ☐ Financial statement(s) provided to lenders
- ☐ Safe Deposit Box
- ☐ Storage Unit(s)
- ☐ Computer/Laptop
- ☐ Electronic currency
- ☐ Paypal or other electronic account(s)
- ☐ Gift cards - i.e., did debtor take cash and convert to gift cards
- ☐ Home Safe - cash, jewelry, etc
- ☐ Passport(s) - where has debtor been?
- ☐ Trunk of Car(s)
- ☐ Trust agreements where debtor is trustee or beneficiary

III. IDENTIFYING POSSIBLE ASSETS THROUGH EXAMINATIONS OF THE DEBTOR AND OTHERS

Meeting of Creditors – 341 Meeting

- ☐ Prepare list of targeted questions to ask at the 341 Meeting
- ☐ Request tax returns at least 14 days in advance of first scheduled 341 Meeting
- ☐ Talk to Trustee in advance of Meeting of Creditors

Rule 2004 Examination of Debtor and Others

- ☐ Prepare list of questions aimed at "hard to find" assets:
  - ☐ Assets in names of companies
  - ☐ Assets where debtor holds equitable interest but its not "on paper"
  - ☐ Assets that are offshore
  - ☐ Electronic & other hard to trace assets – digital currency, bearer bonds
  - ☐ Home safe
  - ☐ Storage unit
- ☐ Places visited (foreign tax haven, etc)
- ☐ Real and Personal Property bought/sold
- ☐ Credit card charges (jewelry, trips, etc)
- ☐ Cash transactions
- ☐ Business associates
- ☐ Ask deponent to identify others that have information

IV. PROCEDURE IN BANKRUPTCY CASES FOR SEEKING DOCUMENTS

- ☐ Check for Local Forms for Bankruptcy Rule 2004 Motions/Orders
- ☐ Check for Local Form Subpoenas
- ☐ Calendar Deadline to Request Copies of Tax Returns (at least 14 days prior to first set meeting of creditors. *See* FRBP 4002); make sure to request attachments, transcript(s) (or a written statement that the document does not exist)

Subpoena Procedure and Limitations.

- ☐ Calculate mileage for issuance of subpoena. *See* FED. R. CIV. P. 45(c)(2)(A).
- ☐ File a Notice of Intent to Serve Subpoena on the docket before serving the subpoena. *See* FED. R. CIV. P. 45(a)(4).

Subpoenas/Demands for Turnover on Financial Institutions

- Prepare detailed request for information. For example, request all Debtor statements related to:
    a. DDA's
    b. MMA's
    c. CD's (or other term interest-bearing accounts)
    d. Merchant accounts (if a business)
    e. Investment/securities accounts (if the institution has a brokerage or investment arm)
    f. DACA-controlled accounts that may involve a 3rd party lender
- Remember to include a response or compliance deadline as part of the request
- Obtain Court order if appropriate/necessary

Trustee Litigation by Richard R. Gleissner
Gleissner Law Firm, LLC

The litigation brought by Trustees is generally based upon the statutory authority found in sections 542 (turnover), 543 (turnover by custodian), 544 (acting as a judgment creditor), 545 (setting aside statutory liens), 547 (preferences), 548 (fraudulent conveyances) and 549 (post petition transfers). This section of the material will discuss each of these section in turn.

I. 11 U.S.C. §542 - Turnover Orders

Section 542(a) generally provides that a third party noncustodian that has custody or control over property of the estate that either the Trustee may use, sell or lease or that the debtor may exempt must turn that property over to the Trustee, unless the property is of inconsequential value or benefit to the estate. This section is useful when the particular property is in the hands of a third party. But, what if the property is in the hands of the debtor and he refuses to turn the property over.

Code Section 521(a)(3) requires a debtor to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties". 11 U.S.C. §521(a)(3). Code Section 521(a)(4) requires that the debtor "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate." 11 U.S.C. §521(a)(4). While there is no private cause of action for a Debtor's failure to fulfill its obligations, courts generally hold that:

> There can be no question that a trustee may seek an order compelling a debtor to comply with his duties under § 521.
>
> By rejecting the Trustee's argument that there is an implied cause of action for damages against a debtor who breaches their [sic] duties under § 521 to cooperate with the Trustee, to file

> information and to surrender property, the Court does not mean to suggest that a debtor may take those duties lightly.
>
> The provisions of that section are mandatory, not optional. And the Trustee is correct that a trustee should not have to pull teeth to get a debtor to file required information and surrender property that is required to be surrendered. But if a debtor fails to perform those duties in an honest and diligent fashion, trustees and creditors are not without remedy. The Court earlier in this opinion noted several remedies that exist. Where the facts so warrant, the Court has no hesitation in granting motions to compel a debtor to perform their duties upon a showing that they have failed to do so, to award sanctions and find contempt where a debtor disobeys an order, or to dismiss a case or deny discharge
>
> *In re Mathis*, 548 B.R. at 472–73. A simple motion to compel Dr. Wojtkun's compliance with his statutory duties would have been sufficient.

In re Wojtkun, 13-12719-MSH, 2018 WL 4057348, at *3–4 (Bankr. D. Mass. Aug. 23, 2018), aff'd, 596 B.R. 74 (D. Mass. 2019).

In the case of *In re: Correra*, 589 B.R. 76 (Bankr. N.D. Tex. 2018), the court had a situation involving a computer. A computer was discovered and the court ordered the turnover of the computer. The person in possession of the computer refused to produce the computer because it contained "personal information." The court ordered the turnover to the Trustee because of her fiduciary capacity. The Court states:

> To further understand the original mindset of the court with regard to the Computer, first, the Bankruptcy Code imposes certain self-executing statutory obligations upon a debtor (without the requirement of a motion or order). A debtor must cooperate with any trustee appointed in a bankruptcy case to enable him or her to perform the trustee's duties (11 U.S.C. § 521(3)), and a debtor must surrender all property of the estate and recorded information (11 U.S.C. § 521(4)). Moreover, "[o]ther provisions of the

> Bankruptcy Code impose analogous obligations on a much broader class. With certain exceptions, any entity in possession, custody or control of property that the trustee can use, sell or lease, must turn that property over to the trustee." Most notably, section 542(e) provides: "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee."

In re Correra, 589 B.R. 76, 95 (Bankr. N.D. Tex. 2018) (citations in footnotes omitted). In *Correra*, the Court later discovered that information had been intentionally deleted from the computer and actions were taken by the person in possession of the computer to intentionally destroy the data on the computer. The Court stated:

> As earlier stated, a federal court has the inherent power to sanction a party who has abused the judicial process. The spoliation of evidence is one such abuse. Spoliation is the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

In re Correra, 589 B.R. 76, 127 (Bankr. N.D. Tex. 2018). The Court held that sanctions of damages and attorneys fees was appropriate against the person or persons that contributed to the spoliation of evidence.

Section 542(b) provides that an individual that owes a matured debt shall pay that debt to the order of the trustee, unless the debt is being set-off under Section 553. Trustee's often use this section when collecting accounts receivables listed by the debtor. By referring to this section, the Trustee is alleging a core proceeding, making the collection of accounts receivable easier.

Subsections 542(c) and (d) provides specific instances where the third party does not have to turn the property over to the Trustee. Specifically, if the party does not know of the commencement of the case, or if the third party is transferring life insurance benefits. 542(e) also requires the turnover of books and records from individuals such as attorneys and accountants to the Trustee. Note that Section 542(e) does not waive or constitute any exception to the attorney-client privilege.

Lastly, the court may exceed its equitable power if it orders turnover of property held by a creditor without first providing adequate protection for that property. *In re Empire for Him, Inc.*, 1 F.3d 1156 (11th Cir. 1993).

II. 11 U.S.C. §543 - Turnover from Custodian

Custodians are are receivers or trustees appointed in a non-bankruptcy proceeding, an assignee appointed under a general assignment for the benefit of creditors, or even someone contracted by the debtor to take carge of property of the debtor. See 11 U.S.C. §101(11). These custodians are required to deliver any property in their possession to the Trustee and account to the Trustee for the property, including any proceeds, product, offspring, rents or profits of the property.

III. 11 U.S.C. §544 - Trustee as Lien Creditor

Under Section 544, the Trustee has all the rights of a judgment creditor. It is by these rights that the Trustee is able to bring most of the State Law Causes of Action. Another section at this workshop is presenting the intersection of State Law and Bankruptcy. We will leave it to

that section to discuss the State Law Causes of Action brought by a Trustee pursuant to his powers under Section 544.

IV. 11 U.S.C. §545 - Setting Aside Statutory Liens

The statutory liens that the trustee may set aside are those that become effective:

(A) when a caase under the bankruptcy code is commenced;

(B) when an insolvency proceeding other than under bankruptcy is commenced;

(C) when a custodian is appointed or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard;

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

11 U.S.C. §545(1). Further, if the statutory lien is not perfected or enforceable against a bona fide purchaser, then the trustee may set aside the lien. 11 U.S.C. §545(2). Lastly, if the Statutory lien is for rent or the distress for rent, it may be set aside. 11 U.S.C. §545(3) and (4).

V. 11 U.S.C. §547 - Preferences

The elements of a preference cause of action pursuant to section 547(b) of the United States Bankruptcy Code provide that a trustee may avoid any transfer of an interest of the debtor in property:

(1) to or for the benefit of the creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtors was insolvent;

(4) made --

(a) on or within 90 days before the date of the filing of the petition; or

(b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if --

(a) the case were under chapter 7 of this title;

(b) the transfer had not been made; and

(c) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). It is the trustee's burden to prove each and every one of these elements. *Id.* at § 547(f); *Danning v. Bozek*, 836 F.2d 1214 (9th Cir. 1988). Failure to meet this burden on any one element precludes a finding that a transfer is a preference. *In re Hood*, 118 B.R. 417 (Bkrtcy.D.S.C. 1990); *In re Cockreham*, 84 B.R. 757 (D.Wyo. 1988). Further, because the elements above are objective, the intent of the debtor is irrelevant. *Marathon Oil Co. v. Flatau*, 785 F.2d 1563 (11th Cir. 1986). Accordingly, it is the *effect* of the transfer which is controlling. *Barash v. Public Fin. Corp.*, 658 F.2d 504 (7th Cir. 1981).

B. Transfer of an Interest of the Debtor in Property

Section 101 of the Bankruptcy Code defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and

foreclosure of a debtor's equity of redemption." 11 U.S.C. § 101(54). This definition is exceptionally broad, and therefore includes virtually every conceivable transfer, including the creation or fixing of judicial liens.[1] Precisely because this definition is so broad, the true test is not whether a transfer occurred, but whether the debtor had an actual or constructive ownership interest in the transferred property. *In re Hood*, 118 B.R. 417 (Bkrtcy.D.S.C. 1990); *In re Flooring Concepts, Inc.*, 37 B.R. 957 (9th Cir. 1984).[2] In this regard, ownership is determined by the debtor's ability to control the disposition of the property. *Id.*

For example, in *In re Cybermech, Inc.*, 13 F.3d 818 (4th Cir. 1994), the Fourth Circuit Court of Appeals addressed the question of whether a debtor corporation's return of another corporation's down payment on the purchase of office machines constituted an avoidable preference. In the court held that the debtor did have an interest in the payment funds because the debtor, upon receipt of the funds, could deposit it, commingle it with other funds, withdraw from it, transfer it or otherwise use the payment funds in anyway it so desired. *Id.* at 820. Therefore, the debtor's "ability to exercise complete 'dominion and control over the funds' was sufficient to 'demonstrate an interest in property' under the preferential transfer provision . . . the [money] transferred . . . was a transfer of an 'interest of the debtor in property.'" *Id.* at 821 (quoting *In re Smith*, 966 F.2d 1527 (7th Cir. 1992)).

[1] *See* 4 COLLIER ON BANKRUPTCY § 547.03 (15th Ed. 1991) ("Any judicial proceeding that creates or fixes a lien upon the debtor's property will constitute a preference."). In South Carolina, a lien is created as to real property when the judgment is enrolled. S.C. Code Ann. § 15-35-810 (1976).

[2] In determining whether a debtor has an interest in property, state law governs.

Another illustrative case is *In re Hood*, 118 B.R. 417 (Bkrtcy.D.S.C. 1990). There, the debtor was facing an imminent sheriff's levy when a friend of the debtor's intervened by offering to personally pay the debtor's debts. The debtor's creditors, however, refused to accept her checks. The debtor then took his friend's personal checks to the bank where they were exchanged for cashier checks and used to pay off the creditors. After finding that the transfer satisfied the other elements of a preference, the court turned to the ultimate question of whether or not the debtor possessed an interest in the transferred funds. Accordingly, the court held that the debtor did not have an interest in the funds because the debtor did not and could not control the disposition of the funds. In so holding, the court adopted and applied the "earmark" doctrine. This doctrine essentially states that funds loaned to a debtor by a third party that are "earmarked" for a particular creditor do not belong to the debtor. Its application requires:

> (1) The existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt. Where the payment is made directly by the third party to the creditor, this requirement is inapplicable;
>
> (2) Performance of that agreement according to its terms; and
>
> (3) Transaction, when viewed as a whole, including the transfer of new funds out to the old creditor, does not result in the diminution of the estate.

Id. at 420 (citing *In re Bohlen Enter.*, 859 F.2d 561 (8th Cir. 1988)). Applying the doctrine, the court found that (1) the debtor and his friend entered an agreement that earmarked the funds for the payment of the debtor's creditors; (2) the debtor's friend directly paid the creditors; (3) the agreement was performed according to its terms; (4) the funds transferred were never property of the debtor nor did they become property of the debtor; and (5) the transfer did not diminish the

debtor's bankruptcy estate. *Id*. Therefore, the court concluded that the transfer was not an interest of the debtor in property simply because the debtor did not and could not control the disposition of the property. *Id.* at 421.

C. To or For the Benefit of a Creditor . . .

Section 101 of the Bankruptcy Code defines a "creditor," in relevant part, as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). Further, a "claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5)(A)(B). In construing these terms, the United States Supreme Court stated in *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985) that Congress intended for them to be used in their broadest possible sense. The courts have obliged by finding creditors in even the most contingent and remote cases. *See*, *e.g., In re Cybermech*, 13 F.3d 818 (4th Cir. 1994) (buyer was a creditor of the seller because the buyer had paid for the goods, and therefore had a claim against the seller for a right to payment or a right to an equitable remedy for breach of performance); *In re Gold Coast Seed Co.*, 751 F.2d 1118 (9th Cir. 1985) (holding that a seller acquired a claim against the buyer at the time the buyer received and accepted the goods).

The transfer, however, must also benefit the creditor. Accordingly, this benefit can either be direct, *see, e.g., In re Cardon Realty Co.*, 146 B.R. 72 (Bkrtcy.W.D.N.Y. 1992) (holding that debtor's payment to creditor/assignee of loan obligation benefitted the creditor/assignee, regardless of what she did with the money after she received it, because it paid off an antecedent debt), or indirect, *see, e.g., In re Conrad Corp.*, 806 F.2d 610 (5th Cir. 1987) (holding that the debtors' transfer of restaurants in exchange for a simultaneous assumption of their debt by a third party benefitted the creditor, and therefore, constituted a voidable indirect transfer to the creditor).

D. Ninety Day Reachback Period; "Insider" Extension of the Preference Period . . .

Subsection (b)(4) of section 547 provides that a transfer can only be avoided where it was made on or within ninety days before the filing of the petition. 11 U.S.C. § 547(b)(4)(A). While this is generally an absolute rule, subsection (b)(4)(B) immediately follows and provides that where the transfer was made to an "insider," the time limit for avoidance is extended to one year pre-petition. An "insider," in the conventional sense, is simply someone who stands in a close relationship with the debtor and who possesses the ability to control the debtor's actions. *In re Pineview Care Center, Inc.*, 152 B.R. 703 (D.N.J. 1993).[3] The most common examples include a relative or general partner of the debtor in the cases where the debtor is an individual or a partnership, and the director(s) or officers of the debtor in the cases where the debtor is a corporation. 11 U.S.C. §101(31).

E. For or on Account of an Antecedent Debt . . .

An antecedent debt is simply a debt that the debtor incurs before he makes the alleged preferential transfer. 4 COLLIER ON BANKRUPTCY § 547.05 (15th Ed. 1991). This element is present to promote the central concept governing the existence of a preference action -- the preservation of the debtor's assets. Accordingly, any transfer to a creditor that occurs during the preference period on account of an antecedent debt serves only to deplete the debtor's bankruptcy estate, and therefore is in derogation of this policy of preservation.

While the term "antecedent" is easy enough to grasp, the existence of a "debt" depends upon the existence of a claim. In *In re Cybermech*, the creditor, Royal Cake Co, Inc. (hereinafter "Royal") entered a sales agreement with the debtor, Cybermech, Inc. (hereinafter "Cybermech") whereby Royal paid Cybermech a substantial down payment for various equipment. Due to financial troubles, however, Cybermech soon informed Royal that it would be unable to perform the contract and returned the down payment. Three weeks later, Cybermech filed a voluntary Chapter Seven petition. The trustee quickly moved to have the returned down payment set aside as a preference. Royal, however, challenged the trustee and alleged, among other things, that the returned payment was not an antecedent debt because (1) Cybermech never owed a debt to Royal; and (2) even if Cybermech did, the debt was not antecedent to the transfer. The court disagreed and held that because Royal possessed a claim against Cybermech for performance under the contract, Royal was a creditor, and Cybermech owed Royal the debt of performance.[4]

[3] A more exact definition of the term appears in 11 U.S.C. § 101(31).

[4] For a discussion of how the *Cybermech* court determined that Royal was a creditor, and thus possessed a claim, *see supra.* Section II(B).

In so holding, the court stated that the terms "claim" and "debt" were coextensive; where one exists then so does the other:

> The Code defines "debt" as "liability on a claim." 11 U.S.C. § 101(12). By making "claim" the operative term in the definition of debt, "Congress gave debt the same broad meaning it gave claim." [Citation omitted]. Indeed, it is clear that "the terms 'debt' and 'claim' are coextensive: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." [Citations omitted]. By defining debt as "liability on a claim," Congress did not impose an additional element, namely that legal liability be established through litigation. "[W]hen a claim exists, so does a debt." [Citation omitted]. They are but different windows in the same room.

Id. at 822. Therefore, Cybermech did owe a debt to Royal and said debt was antecedent to the transfer because Cybermech contracted the debt well before it returned the money.

F. Made While the Debtor was Insolvent . . .

A debtor is essentially insolvent when his liabilities exceed his assets. 4 COLLIER ON BANKRUPTCY § 547.06 (15th Ed. 1991).[5] In this regard, there is a presumption of insolvency during the ninety day reachback period. *Id*. In *Transit Homes, Inc. v. South Carolina Nat'l Bank*, 57 B.R. 40 (Bkrtcy.D.S.C. 1985), however, the court held that the presumption of insolvency can be rebutted by the introduction of the debtor's filed schedules.

G. That Enables the Creditor to Receive More Than Such Creditor Would Have Received in a Hypothetical Chapter 7 Case.

Subsection (b)(5) is merely a codification of the United States Supreme Court holding in *Palmer Clay Products Co. v. Brown*, 297 U.S. 227, 56 S.Ct. 450, 80 L.Ed. 655 (1936). There,

[5] For a more extensive definition, *see* 11 U.S.C. § 101(32).

the court held that whether a transfer is preferential should be determined "not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, *but by the actual effect of the payment as determined when bankruptcy results*." [Emphasis added]. In this regard, the court in *Elliot v. Frontier Prop./LP*, 778 F.2d 1416, 1421 (9th Cir. 1985) stated:

> This analysis requires that in determining the amount that the transfer "enables the creditor to receive," 11 U.S.C. § 547(b)(5) (1982), such creditor must be charged with the value of what was transferred *plus* any additional amount that he would be entitled to receive from a Chapter 7 liquidation. The net result is that, as long as the distribution in bankruptcy is less than one-hundred percent, *any* payment " on account" to an unsecured creditor during the preference period will enable the creditor to receive more than he would have received in liquidation had the payment not been made. [Emphasis theirs].[6]

[6] The Supreme Court demonstrated this principle in *Palmer* with the following example:

> [W]here the creditor's claim is $10,000, the payment on account of $1,000, and the distribution in bankruptcy is 50%, the creditor to whom the payment on account is made receives $5,500, while another creditor to whom the same amount was owing and no payment on account was made will receive only $5,000.

Palmer, 297 U.S. at 229, 56 S.Ct. at 451, 80 L.Ed. at 656.

This section is also applicable to secured creditors. In *Smith v. Creative Fin. Management, Inc.*, 954 F.2d 193, 199 (4th Cir. 1992), the court stated:

> While the bankruptcy code recognizes and respects the preeminent status given to the secured creditor by state commercial codes, a creditor is "secured" under the code only to the extent of the value of his interest in the property of the estate . . . Section 547(b)(5) does not, as Creative seems to argue, add any special protections for the secured creditor. Indeed, the term "secured creditor" is not even included in that section . . . As the plain language of [section] 547(b)(5) convey, the court must focus, not on whether a creditor may have recovered all of the monies owed by the debtor *from any source whatsoever*, but instead upon whether the creditor would have received less than a 100% payout in a Chapter 7 liquidation.

See also 4 COLLIER ON BANKRUPTCY § 547.08 (15th Ed. 1991) ("The analysis [for unsecured creditors] is similar for secured creditors . . . .").

H. Primary Defense -- The Ordinary Course of Business Exception

While section 547(c) sets forth a number of instances where a trustee cannot avoid a preference transfer, the most important of these "defenses" is the ordinary course of business exception. This exception is embodied in the text of subsection (c)(2) which provides that a trustee cannot avoid a transfer in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and such transfer was:

(A) made in the ordinary course of business or financial affairs of the debtor or the transferee; or

(B) made according to ordinary business terms.

The essential purpose of this exception is "to leave undisturbed normal financial relations because it does not detract from the general policy of the section to discourage unusual action by

either the debtor or its creditors during the debtor's slide into bankruptcy." *Morrison v. Champion Credit Corp.*, 952 F.2d 795, 801 (4th Cir. 1991). In this regard, the creditor who claims the exception also possesses the burden of proof. *Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044, 1047 (4th Cir. 1995). Further, the creditor must satisfy its burden by a preponderance of the evidence. *Id.*

In *In re Jeffrey Bigelow Design Group*, 956 F.2d 479 (4th Cir. 1992), the Fourth Circuit Court of Appeals held that what is now subsection (c)(2)(A) is analyzed pursuant to a subjective test. There, the court stated that the "'focus of [the] inquiry must be directed to an analysis of the business practices which were unique to the particular parties under consideration.'" *Id.* at 486 (quoting *Waldschmidt v. Ranier*, 872 F.2d 739, 743 (6th Cir. 1989). This inquiry is "'peculiarly factual, . . .'" *Id.* (quoting *In re First Software Corp.*, 81 B.R. 211, 213 (Bkrtcy.D.Mass. 1988), and "[a]ttention should be drawn to the reality of the situation and not the formal structure." *Id.* at 488. In this regard, the court emphasized that "form must not be elevated above substance." *Id*.

The Fourth Circuit utilized a different approach, however, in examining what is now subsection (c)(2)(B). In *Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044 (4th Cir. 1995), the creditor was a direct mail advertising firm that required its customers to prepay for its services. One of these customers was the debtor. In the ninety-day period preceding the debtor's bankruptcy petition, the debtor made twelve payments to the creditor. Two of the payments were prepayments while the remaining ten payments were for services previously rendered. The creditor had waived the last ten payments and had allowed the debtor to pay when able. Shortly

after the debtor filed for Chapter 11 protection, the trustee moved to avoid the latter ten payments as preferences. The creditor countered that said payments fell within the ordinary course of business exception, and therefore, were unavoidable.

The court began its analysis by refusing to apply then subsection (c)(2)(A)and (B)'s subjective test for subsection (C). *Id.* at 1048 ("[b]ecause subsection B and C are written in the conjunctive, the use of subsection B's subjective approach under subsection C would render subsection C superfluous . . . [w]e refuse to say that Congress wrote a separate subsection for no reason at all."). The court then held that subsection (C) should be analyzed under an objective test whereby a court looks to the industry norms for the determination of "ordinary business terms." *Id*. The court then explained the application of this test:

> [T]he extent to which a preference payment's credit terms can stray from the industry norm yet still satisfy [section] 547(c)(2)(C) depends on *the duration of the debtor-creditor relationship*. "[T]he more cemented (as measured by its duration) the pre-insolvency relationship between the debtor and the creditor, the more the creditor will be allowed to vary its credit terms from the industry norm yet remain in the safe harbor of [section] 547(c)(2)(C)." *Id*. at 225. A "sliding-scale window" is thus placed around the industry norm. On the one end of the spectrum, "[w]hen the relationship between the parties is of recent origin, or formed only after or shortly before the debtor sailed into financially troubled seas, the credit terms will have to endure a rigorous comparison to credit terms used generally in a relevant industry." *Id.* In such a case, only those "departures from [the] relevant industry's norms which are not so flagrant as to be 'unusual' remain within subsection C's protection." *Id.* at 226.
>
> On the other end of the spectrum, "when the parties have had an enduring, steady relationship, one whose terms have not significantly changed during the pre-petition insolvency period, the creditor will be able to depart substantially from the range of terms

> established under the objective industry standard inquiry and still find a haven in subsection C." *Id.*

Id. at 1049 (quoting *Fiber Lite Corp. v. Molded Acoustical Products, Inc.*, 18 F.3d 217 (3d Cir. 1994)). In so holding, the court also emphasized that "subsection C never tolerates a gross departure from the industry norm, not even when the parties have had an established and steady relationship." *Id.* at 1050.

Applying their "newly adopted" sliding scale approach to subsection (c)(2)(C), the court found that the creditor had failed to meet its burden of satisfying subsection (c)(2)(C). Because the creditor's normal business practice was to require prepayment, their waiving of the requirement for the debtor constituted a gross departure from their industry norm. Therefore, and despite their longstanding relationship with the debtor, the creditor was held liable for the preference payment.

Since the holding in Advo-System, Congress revised the ordinary course of business defense. Now, the previous subsection B is subsection A and the previous subsection C is subsection B. Further, they are no longer separated by an "and" and instead, they are separated by an "or". Thus, it is unclear if the "sliding scale approach" continues to have validity. As one court states:

> it is important at this point to consider the amendment to § 547(c)(2) made by the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. The superseded section had three prongs embodied in its subsection. The first prong focused on whether the defendant was in the business of selling the goods during the preference period and whether the debtor was in the business of buying the goods, a matter rarely at issue. In addition to the subsumption of this prong into § 547(c)(2), a second critical

> change was the substitution of the word "or" for the word "and" so that, by virtue of the 2005 amendments, Defendant succeeds if either subsection (c)(2)(A) or (c)(2)(B) is met. Thus, in the analysis of this case, the test for the adequacy of the ordinary course defense is considerably loosened from the rule under which the decisions were made in such cases as *Advo-System, Inc. v. Maxway Corp., supra, In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 488 (CA4 1992), and *In re Daedalean, Inc.*, 193 B.R. 204, 211 (BC Md. 1996).

Englander v. Hekman Furniture Co. (In re Mastercraft Interiors, Ltd.), 2009 Bankr. LEXIS 4218, *7-8, 63 Collier Bankr. Cas. 2d (MB) 602 (Bankr. D. Md 2009).

I. Defense -- The New Value Exception

Another defense worthy of mention is the new value exception. It is embodied in section 547(c)(1)(A)(B) which provides:

(c) The trustee may not avoid under this section a transfer --

(1) to the extent that such transfer was --

(A) intended by the debtor and the creditor to or or whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange.

The exception's existence and purpose is to protect transactions that do not diminish the bankruptcy estate. *In re Martin*, 188 B.R. 689 (M.D.Ala. 1995). In this regard, it is the intent of the parties which constitutes the most critical element. *See In re Hersman*, 20 B.R. 569 (Bkrtcy.N.D.Ohio 1982) ("The key inquiry, therefore, is whether the parties at the outset intended the exchange to be contemporaneous."). Legislative history reveals the type of transaction that this exception was designed to cover:

> However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous," and if the check is presented for payment in the normal course of affairs . . . that will amount to a transfer that is "in fact substantially contemporaneous.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 373 (1977), U.S. Code Cong. & Admin. News, p. 5787 (1978). A check, then, is the classic example. *See In re Davis*, 22 B.R. 644 (Bkrtcy.M.D.Ga. 1982) (holding that the only type of credit transaction which would result in a transfer under the new value exception is a check transaction, which is for all practical intents and purposes really a cash transaction). Conversely, a credit card transaction is the classic bad example. In *In re Hersman*, the court explained:

> Where goods are paid for by a check, the payor had funds in the banking institution upon which the check is drawn when he makes the check payable to the person furnishing the goods. The payee need only present the check for payment . . . When using a credit card to pay for goods, a consumer is generally seeking that which its name implies -- the extension and receipt of credit. By using a credit card, the credit card consumer does not intend a contemporaneous exchange for value. Instead, what is generally intended is the receipt of goods or services presently and time to pay for the same in the future . . . .

In re Hersman, 20 B.R. at 573.

A transaction, however, need not only be contemporaneous, but it must create new value as well. While the question of new value is always a question of fact, *In re Spada*, 903 F.2d 971 (3d Cir. 1990), its form can be virtually anything. *See In re Prescott*, 805 F.2d 719 (7th Cir. 1986) (stating that new value includes new credit, goods, services and property). In *In re Townsend-Robertson Lumber Co.*, 144 B.R. 407 (Bkrtcy.E.D.Ark. 1992), the court found new value in the

retention of fees for the storing of a Chapter 7 debtor's lumber. In *In re Mantelli*, 149 B.R. 154 (9th Cir.BAP Cal. 1993), however, the court held that a debtor's payment to his wife of a civil contempt sanction did not create new value because the payment was not made for goods or services, but in lieu of a five day jail sentence.

VI. 11 U.S.C. §548 – Fraudulent Conveyance

Section 548 of the Bankruptcy Code provides the federal rule available to trustees and debtors-in-possession. The section provides that a trustee may avoid any transfer of an interest of the debtor that was made or incurred on or within two years before the date of the filing of the petition, if procured through fraudulent means of the debtor. 11 U.S.C. §548.

The elements of an 11 U.S.C. §548 claim are: (1) a transfer; (2) of an interest of the debtor in property, or any obligation incurred by the debtor; (3) incurred within two years before the date of the filing; and (4) the transfer was voluntary or involuntary. After discussing each of these elements, this section will discuss who has standing to bring the claim.

A. Elements of a Fraudulent Conveyance Action

1. transfer

The term transfer, includes every method of disposing of or parting with property or possessions. *Hoecker v. United Bank of Boulder*, 476 F.2d 838 (10th Cir. 1973). The transfer does not have to be made directly by the debtor, as long as one can connect the transfer to the debtor, either directly or indirectly. *In re FBN Food Services, Inc.*, 185 B.R. 265, *affirmed and remanded* 82 F. 3d 1387, *rehearing denied* (N.D.Ill 1995); *Matter of Clover Donut of White Plains Corp.*, 14 B.R. 205 (Bankr. S.D.N.Y. 1981). Nevertheless, a transfer needs to be made.

Therefore, a change in form or substance of the asset does not necessarily constitute a transfer. *E.g. In re Levine*, 139 B.R. 551 (Bankr. M.D. Fla. 1992) (Conversion of non-exempt property into exempt property did not constitute a transfer.).

a. Acts constituting transfers

(i) Consignment of goods -- *In re Factory Tire Distributors*, Inc., 64 B.R. 335 (W.D. Pa. 1986).

(ii) Church contributions -- *In re Young*, 82 F.3d 1407 (8th Cir. 1996) *rehearing and suggestion for rehearing en banc* denied 89 F. 3d 494.

(iii) Judgments barring debtors from reasserting claims -- *Matter of Besing*, 981 F. 2d 1488 (5th Cir. 1993) (Prejudicial dismissal was for debtor's discovery abuse.).

(iv) Transfers according to divorce decree, separation agreement, or marital property settlement -- *In re Lange*, 35 B.R. 579 (Bankr. E.D. Mo. 1983).

(v) Foreclosures -- *In re Littleton*, 888 F.2d 90 *rehearing denied* 890 F.2d 1167 (11 Cir. 1989).

(vi) Termination of lease.

(vii) Leveraged buyouts -- *In re Oxford Homes, Inc.*, 180 B.R. 1 (Bankr. D. Me. 1995).

(viii) Mortgage modifications -- *Matter of Venice Western Motel, Ltd.*, 67 B.R. 777 (Bankr. M.D. Fla. 1986) (transfer where net effect of modification increased principle amount of loan.).

(ix) Down payments on real property -- *In re McConnell*, 934 F.2d 662 (5th Cir. 1991); *but see Matter of Wey*, 854 F.2d 196 (7th Cir. 1988).

b. Acts not constituting transfers

(i) Conversion of non-exempt property into exempt property -- *In re Levine*, 139 B.R. 551 (Bankr. M.D. Fla. 1992); *but see In re Beckman*, 104 B.R. 866 (Bankr. S.D. Ohio 1989); *In re Breuer*, 68 B.R. 48 (Bankr. N.D. Iowa 1985); *In re O'Brien*, 67 B.R. 317 (N.D. Iowa).

(ii) Franchisor's termination of debtor's franchise-dealership contracts pursuant to terms of agreement -- *Matter of Jermoo's Inc.*, 38 B.R. 197 (Bankr. W.D. Wis. 1984); but see cases involving termination of lease by a lessor for breach of covenant contained therein, which is a transfer -- *In re Ferris*, 415 F. Supp. 33 (D.C. Okl. 1976); *In re Queen Ciry Grain, Inc.*, 51 B.R. 722 (Bankr. S.D. Ohio 1985).

2. Interest of the debtor in property, or any obligation incurred by the debtor

An essential element of an action under this section is that the debtor must have had an interest in the property transferred. *In re Jackson*, 105 B.R. 15 (Bankr. S.D. Ohio 1989). Because the interest of the debtor in the property is an undefined term in the bankruptcy code, the court will generally look to state law to help define its parameters. *In re Hulm*, 738 F.2d 323, (C.A.N.D. 1984), *cert. denied* 469 U.S. 990, 83 L. Ed. 2d 331, 105 S. Ct. 398, *on remand* 45 B.R. 523; *Matter of Simpson*, 36 F.3d 450 (5th Cir. 1994); *In re Dews*, 152 B.R. 982 (D. Colo.

1993); *In re Reynolds*, 151 B.R. 974 (Bankr. S.D. Fla. 1993); *In re Brajkovic*, 151 B.R. 402 (Bankr. W.D. Tex. 1993).

The battles are fought in two areas: (1) where the debtor owns legal title to a piece of property, and (2) where they do not possess legal title but some equitable interest. When the former is the case, it is often the debtor who must sustain the burden of proof that while legal title may be vested in his or her name, de facto or equitable title belongs to the alleged transferee. For example, in *In re Reynolds*, 151 B.R. 974 (Bankr. S.D. Fla. 1993), the debtor was the legal title holder to real estate. The court found however, that no fraudulent conveyance had taken place because the debtor did not have an interest in the property beyond the face of the document. The debtor successfully proved that he was the legal title holder of the property for the benefit of his son to allow him to obtain financing for the property, and that neither the debtor, nor the son, had ever considered the debtor to be the legal title holder.

Other times, the creditor is on the attack and is attempting to prove that the debtor had an equitable interest that was conveyed. Typically, a possessory interest in property is sufficient to trigger the provisions of § 548. *See e.g. In re Ocean Line of North Florida*, 137 B.R. 540 (Bankr. M.D. Fla. 1992).

3. incurred within two years before the date of the filing.

The timing of the transfer, therefore, becomes exceedingly important. Obviously, from the language found in the statute, the object of section 548 was to prevent prepetition transfers, not postpetition transfers. *See Consolidated Partners Inv. Co. v. Lake*, 152 B.R. 485 (N.D. Ohio 1993). Therefore, a transfer that occurs after the bankruptcy petition is filed is not covered under

this statute. See 11 U.S.C. §549. *Consolidated Partners Inc. Co. v. Lake*, 152 B.R. 485 (Bankr. N.D. Ohio 1993); *Matter of Fisher*, 80 B.R. 58 (Bankr. M.D.N.C. 1987); *In re Sattler's Inc.*, 73 B.R. 780 (Bankr. S.D.N.Y. 1987).

In complex transactions, the specific date of the transfer could prove to be important. Generally, where a lien of some sort is granted as part of the transaction, the transfer is deemed to take place on the date the lien is perfected, provided it is done prior to the bankruptcy filing. *In re Tucker Oil Co., Inc.*, 55 B.R. 78, *appeal decided* 64 B.R. 183 (Bankr. W.D. Ark. 1985). At the same time, a granting of a security interest to a preexisting creditor during the two year period, without receiving new consideration, will alter the entire transfer or debt to the latest transaction date. *In re Kelley*, 7 B.R. 384 (Bankr. D.S.D. 1980). In deed questions, the operative date is when the deed is recorded. *In re Levy*, 185 B.R. 378 (Bankr. S.D. Fla. 1995). The obvious pattern is that the court will usually look to the date that actual title vests or the date on which the last significant part of the transfer took place. In other words, the transfer date is liberally construed to find coverage under the statute.

4. voluntarily or involuntarily

Fraud, as a general rule, requires some type of intent on the part of the actor. The common law, however, does recognize constructive fraud. However, constructive fraud is just another way of proving intent, as mental intent is often very difficult to prove. The fact that involuntary actions can be grounds for a fraudulent act seems contrary to common sense and the common law. Nevertheless, Congress added this interesting twist to the types of activities that

constitute fraudulent conveyances, and the question must be answered whether these words serve any purpose or modify in any way the listed actions that can constitute fraudulent behavior.

Courts have held that subjective intent to commit a fraud is not required under bankruptcy code § 548. *In re Nance*, 26 B.R. 105 (Bankr. S.D. Ohio 1982); *In re Checkmate Sterio and Electronics*, 9 B.R. 585, aff'd 21 B.R. 402 (Bankr. E.D.N.Y. 1981). In both of these cases, a trustee was applying the second method of proving fraudulent behavior. Bankruptcy Code § 548 is split into two sections. The first is discussed at i below; the second is discussed at ii. The second section of 548 is admittedly much more objective, and requires little testing of the debtor's motivations or mental state. Therefore, these cases do not answer the question of whether the involuntariness referred to in the primary paragraph of § 548 can be coupled with "actual intent," found in the first subparagraph, to create a much more relaxed standard of proof.

a. actual intent to hinder, delay or defraud a creditor

Actual intent does not need to be proven by direct evidence or by an admission. *In re Sergio, Inc.*, 16 B.R. 898 (Bankr. D. Hawaii 1981). There exists common circumstantial indicia of a fraudulent intent that can be used to prove actual intent: (1) actual or threatened litigation against the debtor; (2) purported transfers of all or substantially all of the debtor's property; (3) insolvency or other unmanageable indebtedness on the part of the debtor; (4) a special relationship between the debtor and the transferee; and (5) retention by the debtor of property involved in putative transfer (i.e., reservation of benefits, control or dominion by the debtor -- *In re Warner*, 87 B.R. 199, *appeal dismissed* 94 B.R. 734 (M.D. Fla. 1988)). *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248 (1st Cir. 1991), on remand 149 B.R. 274.

Other badges of fraud that have been noted in categorical form include:(1) absconding with the proceeds of the transfer immediately after their receipt; (2) absence of consideration when the transferor and transferee know that outstanding creditors will not be paid; (3) a huge disparity in value between the property transferred and the consideration received; and (4) the fact that the debtor was the officer, agent, or creditor of the transferor. *In re FNB Food Services, Inc.*, 185 B.R. 265 (N.D. Ill. 1995), *affirmed after remanded* 82 F.3d 1387, *rehearing denied*. Still other cases have sited additional badges of fraud: (1) the conveyance is concealed; (2) the transferee takes property in trust for the transferor and transferor remains in possession; and (3) debtor deals with property as his own. *In re Sergio, Inc.*, 16 B.R. 898 (Bankr. D. Hawaii 1981).

These badges of fraud and other suspicious behavior must be considered as a whole. A trustee does not have to prove any one of these factors with any degree of certainty. The facts, as taken together, only needs to lead to the conclusion that actual fraud existed. *In re Jeffry Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992). The test requires a subjective determination of the debtor's motivation. Id. The standard is that fraudulent intent exists where the trustee shows that the transferor acted under circumstances precluding any reasonable conclusion other than that the purpose of the transfer was fraudulent as to his creditors. *Matter of Life Science Church of River Park*, 34 B.R. 529 (Bankr. N.D. Ind. 1983).

Which parties must be shown to have intent to defraud is unclear. Certainly, the debtor/transferor must have the requisite intent, but some courts hold that the transferee must have the intent as well. *Stratton v. Equitable Bank*, 104 B.R. 713 (D. Md. 1989), *aff'd* 912 F.2d 464 (4th Cir. 1989); *Business Systems, Inc.*, 642 F.2d 200 (C.A. Tenn 1981) (Transferee does not

have to return payments if transferee entered transaction in good faith without knowledge of intent to defraud creditors.); *Presbrey v. Noble*, 505 F.2d 170 (C.A. Utah 1974) (Transferee had bonafide purchaser status which trumped rights of trustee.). The apparent logic for this rule is simple. If a bona fide purchaser, without knowledge or intent to defraud, takes the property for a value, then he or she has paid what he or she believes to be fair consideration for the item, or, at the very least, the debtor has no hope of gaining a return on the transfer after the bankruptcy has passed. In these cases, the transferee must still show that the consideration paid was in an amount that he or she believed to be reasonable. *Id*. In truth, the rule appears to be that once the badges of fraud have been proven against the debtor, then the transferee is presumed to have a similar intent, and this intent can be overcome by showing that the transferee was a bona fide purchaser for value. If proven, then the transfer cannot be undone. The policy reasons for this rule are obvious, and an adoption of this rule would benefit public policy, particularly under economic efficiency arguments (the arguments are the same justifications for a bona fide purchaser rule under the Uniform Commercial Code).

There is, however, a middle ground between the two rules. Some cases have held that a transferee is protected from the fraudulent conveyance statute to the extent of the consideration given. Of course, which of the three positions taken will depend upon the party asserting the argument. *In re Mesa*, 48 B.R. 208 (Bankr. S.D. Fla. 1985). Under the presumption that the transferred item is always more valuable than the consideration paid, trustees will inevitably always argue that only the debtor's intent needs to be proven, as this test will grant the trustee the return of the entire item with no refund to the transferee; the transferee will always argue that

both party's intent needs to be proven, because by keeping the property, the transferee retains his benefit of the bargain; and finally, the most logical remedy, the one in the middle, will go unargued, but will be the source of many judicial opinions, and has been termed the good faith rule. *See In re Maddalena*, 176 B.R. 551 (Bankr. C.D. Cal. 1995) (If transferee neither knew nor should have known of the fraudulent nature of the transfer, then transferee is entitled to retain the fraudulent transfer to the extent of the value given in the exchange; if transferee knowingly or recklessly participates in the fraudulent scheme, then he or she is not protected.); *Matter of Laughlin*, 18 B.R. 778 (Bankr. W.D. Mo. 1982). In cases where the transferee's "good faith" is an issue or the subject of discussion, courts generally look for earmarks of an arms-length transaction, or whether there are gross departures, to determine whether the transferee is entitled to any special treatment. *Bullard v. Aluminum Co. of America*, 468 F.2d 11 (C.A. Ind. 1972); *In re Browning Tufters, Inc.*, 3 B.R. 487 (Bankr. N.D. Ga. 1980).

This added twist on the law makes the adequacy of consideration all that much more important, and in some cases, a necessary factor in proving a fraudulent conveyance case. *See In re Pinto Trucking Service, Inc.*, 93 B.R. 379 (Bankr. E.D. Pa. 1988) (even where debtor did become insolvent as a result of transfer, court would not conclude fraudulent conveyance where debtor received adequate and fair compensation for sale.); *In re 18th Ave. Development Corp.*, 18 B.R. 904 (Bankr. S.D. Fla. 1982) (Evidence that transfer received a fair value was sufficient to show not a fraudulent conveyance.). However, in most cases, unequal consideration will not in itself prove a fraudulent conveyance case. *See e.g., In re Gutierrez*, 160 B.R. 788 (Bankr. W.D. Tex. 1993) (Purchase at 70% of value is insufficient, without other badges of fraud, to prove

fraudulent conveyance.). And there are cases that hold that valuable consideration is not an affirmative defense to a fraudulent conveyance. *Matter of Beechwood Medicenter of Flint*, 23 B.R. 939 (Bankr. E.D. Mich. 1982); *Matter of Montanino*, 15 B.R. 307 (Bankr. D.N.J. 1981) (Sale to parents living in same home was perceived to be effort to defraud creditors, and therefore, revocable, regardless of adequacy of consideration.). Upon review of the *Beechwood* case, the court had the facts of a preference case, and because of time limitations, it was trying to fit it into the fraudulent conveyance statute. The case does however stand for the proposition that, even if fair consideration is received, the transaction will be unwound where it is determined that the debtor was attempting to either prevent certain creditors for receiving what they would receive without the transfer, or the debtor was attempting to make the eventual receipt of those payments or property more difficult for one or more creditors. *Id*.

One of the highly litigated issues and one of the acts that angers trustees and creditors alike is where a debtor transfers non-exempt assets into exempt assets. While some courts hold that these internal transfers are not transfers at all, the majority of the courts do. *Supra*. Those courts that get past the initial question are inevitably faced with the question of whether the transfer to exempt property is a badge of fraud in and of itself. Creditors and trustees are often disappointed to find that the answer is no. The overwhelming number of cases state that the trustee must go one step further and prove that the transfer was made to prevent hinder or delay creditors from reaching the assets. *In re Holt*, 894 F.2d 1005 (8th Cir. 1990); *In re Breuer*, 68 B.R. 48 (Bankr. N.D. Iowa 1985); *In re O'Brien*, 67 B.R. 317 (N.D. Iowa 1986); *In re Levine*, 40 B.R. 76 (Bankr. S.D. Fla. 1984); *In re Oliver*, 38 B.R. 407 (Bankr. D. Mass. 1984). However,

the additional proof necessary does to appear to minimal. *In re Barker*, 168 B.R. 773 (Bankr. M.D. Fla. 1994) (Even though placing funds into annuities was sound investment strategy, evidence appeared to show that transfer was made in attempt to hinder creditor's attempt to obtain the items.).

b. the Second Method of Proving Fraudulent Conveyance under § 548

(i) received less than equal consideration; and

Obviously, in this phase of the test, the court is comparing what left the estate to what entered into the estate. *In re Southmark Corp*., 138 B.R. 820 (Bankr. N.D. Tex. 1992). Generally, the litmus test in this case is -- as long as the unsecured creditors are no worse off because of the transfer, then the debtor received a reasonably equivalent value to that which left the estate because of the transfer. *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992). This does not mean that the debtor needs to receive a dollar for dollar exchange in order to have been paid a "reasonably equivalent value." *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119 (5th Cir. 1993); *In re Southmark Corp.*, 138 B.R. 820 (Bankr. N.D. Tex. 1992). There is no magic percentage of fair market value that needs to be achieved in order to constitute reasonably equal consideration. *In re Fargo Biltmore Motor Hotel Corp.*, 49 B.R. 782 (Bankr. D.N.D. 1985) (Flat percentage basis approach is inappropriate, however, a good starting point with which to gauge a transfer's reasonableness.). However, one line of cases holds that anything less than 70% of the value is not reasonably equal. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980); *In re Thrifty Dutchman, Inc.*, 97 B.R. 101 (Bankr. S.D. Fla. 1988). In another case, *Misty Management Corp. v. Lockwood*, 539 F.2d 1205 (C.A. Nev. 1976),

the court held that a transfer that was for over 70% of the collateral's value was unreasonable, where the difference amounted to $276,000. One court has stated that the relative percentage of fair market value[7] is but one factor to be compared along with good faith and the relative difference in amount paid compared to the fair market value. *In re Smith*, 24 B.R. 19 (Bankr. W.D.N.C. 1982). Other courts follow the 70% rule only in cases of private sales. *Madrid v. Lawyers Title Ins. Corp.*, 725 F.2d 1197 (9th Cir. 1984). A final line of cases holds that courts must determine reasonably equivalent value on a case by case basis. *First Federal Savings & Loan Assn. of Bismark v. Hulm*, 738 F.2d 323 (8th Cir.), *cert denied*, 469 U.S. 990 (1984).

While the court generally must look to the surrounding circumstances of the transaction to determine value, *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119 (5th Cir. 1993), it is improper for a court to consider sentimental value of the debtor or other similarly subjective criteria. *In re First Capital Holdings Corp.*, 179 B.R. 902 (Bankr. C.D. Cal. 1995). At the same time, a completely objective, mathematical standard does not apply either; a court must consider things such as whether indicia of an arms length transaction are present and other factors showing the actual fair market value of the property sold. *In re Morris Communications NC, Inc.*, 914 F.2d 458 (4th Cir. 1990) (appearing to side with the *First Federal v. Hulm*, *supra*, line of cases).

The operative date is the value of property and consideration as of the date of transfer. *In re Robinson*, 80 B.R. 455 (1987).

[7] Note that fair market value is the standard barometer unless the property is transferred under a forced sale environment, in which case the value is liquidation value. In re Hollar, 184 B.R. 243 (Bankr. M.D.N.C. 1995).

(ii) insolvent/small capital remaining/ debt incurred beyond ability to pay

Some courts hold that if the party attacking the transfer as being fraudulent meets the burden of proving that the consideration given was inadequate, the burden of the defense of the transferor's solvency, or the proof that one of the three subsections of § 548(a)(2)(B) exists, passes to the party seeking to uphold the transfer. *See e.g., In re Joshua Sloam, Ltd.*, 103 B.R. 610 (Bankr. E.D. Pa. 1989). However, most cases place this burden on the trustee. *See e.g., In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127 (Bankr. D. Mass. 1989).

(a) Insolvency

Courts look to see whether a debtor is either insolvent at the time of the transfer or rendered insolvent as a result of the transfer, and either one will be sufficient to pass this portion of the analysis. *In re Newtowne, Inc.*, 157 B.R. 374 (Bankr. S.D. Ohio 1993). To decide whether a debtor is insolvent, courts generally ask -- what would the buyer be willing to pay for the debtor's entire package of assets and liabilities? If the price is positive, the debtor is solvent; if the price is negative, the debtor is insolvent. *Covey v. Commercial National Bank of Peoria*, 960 F.2d 675 (7th Cir. 1992). Courts look to the debtors balance sheet. *Mellon Bank, N.A. v. Metro. Communications, Inc.*, 945 F.2d 635 (3d Cir. 1991), *cert. denied* 112 S. Ct. 1476, 117 L. Ed. 2d 620 (1992). However phrased, this method is a review of the assets and liabilities of the debtor, and a comparison between the two.

When looking at assets, the court must assign to those assets that are readily susceptible to liquidation, *In re Joshua Sloam*, 103 B.R. 610 (Bankr. E.D. Pa. 1987), their fair market value. In re Davis, 169 B.R. 285 (E.D.N.Y. 1994); *In re Pioneer Home Builders, Inc.*, 147 B.R. 889

(Bankr. W.D. Tex. 1992) (Fair market value price at time of transfer is most equitable standard.). Therefore, assets are best valued by determining what price they would bring on the open market. An open market value has been further defined as that value that a prudent business person could obtain from the sale of an asset when there is a willing buyer and a willing seller. *See Pioneer*, *supra*. Under this approach it is inappropriate to add costs and expenses associated with the sale of the assets. *Id*. The method of market price valuation focuses on what a willing buyer would pay, not necessarily what a willing seller would ultimately receive. *Id*. However, the value can be reduced by factors regarding the difficulty of the sale of the asset, but only if they affect the market price and do not relate to the costs of sale. *Id*. The value may be further adjusted by the net costs of making the asset marketable. *Id*. The court cannot take into consideration the debtor's subjective sentimental value placed upon the item. *Id*. The court can value doubtful or contingent claims at less than face value. *In re Join-In Inern. (USA) Ltd.*, 56 B.R. 555 (Bankr. S.D.N.Y. 1986). If a debtor is a guarantor on a liability, courts will generally multiply the total debt by the percent chance that the guarantee will be exercised to determine the liability to be included in the balance sheet. *Covey v. Commercial Nat'l Bank of Peoria*, 960 F.2d 657 (7th Cir. 1992) (cited in 26 Collier Bankr. Cas.2d 1046). Goodwill can be considered an asset, and can be determined by average high earnings over a period of years, valuable customer lists, and/or by trade names. *In re Roco Corp.*, 701 F.2d 978 (2d Cir. 1983).

The assets are to be reduced by liabilities. Courts can refer to 11 U.S.C. § 101(4) to determine what is a liability. *See In re: Joshua Slocum, Ltd.*, 103 B.R. 610 (Bankr. E.D. Pa.

1989) (finding that shareholders stock redemptions were not liabilities under Bankruptcy Code § 101(4).

At least one court has allowed the use of the retrojection method to prove insolvency. *In re R. Purbeck & Assocs., Ltd.* 27 B.R. 953 (Bankr. D. Conn. 1983) (analyzing insolvency in a preference action). Since insolvency at a given point in time is often difficult to demonstrate by direct proof, courts permit the trustee to show that the debtor was insolvent at one point in time and then prove that the same condition existed at the time of the subject transfer. "This method ... applies equally to situations in which the trustee starts at a point in time prior to the transfer....[to use this method, the trustee must] show the absence of any substantive or radical charges in the assets or liabilities of the bankruptcy between the retrojection dates. Possibly another burden would be to show that the evidence relating to solvency at the time of the transfer was scant." *Id.* (Evidence was scant.)

(b) Unreasonably small capital remaining

The Bankruptcy Code does not define unreasonably small capital. However, most courts hold that the definition indicates a financial condition short of insolvency. *E.g., Murphy v. Meriton Sav. Bank* (*In Re: O'Day Corp.*), 126 B.R. 370, 407 (Bankr. D. Mass. 1991). However, the condition must be severe enough that it soon turns to, or severely threatens, insolvency; otherwise, the statute is overly broad. In re *Badnais Lumber Supply, Inc.*, 100 B.R. 127 (Bankr. D. Mass. 1989). Some cases have confused unreasonably small capital remaining with the third subsection, dealing with ability to pay expenses as they become due. *See Pioneer Home Builders, Inc.*, 147 B.R. 889 (Bankr. W.D. Tex. 1972). While it is one method of reviewing

capital, the method renders this provision meaningless, in light of its cousin, § 548(a)(2)(13)(iii). However, determining whether enough capital exists to continue the business would not be inappropriate or redundant. *In re Joshua Slocum, Ltd.*, 103 B.R. 60 (Bankr. E.D. Pa. 1989); *In re Vadnais Lumber Supply, Inc.,* 100 B.R. 127 (Bankr. D. Mass. 1989). *In Vadnais*, the Court held that the analysis must somehow be tied to insolvency. Since the standard is something less than insolvency, then it must somehow be tied to causing or inevitably leading to insolvency. *Id.*. Delving into the courts logic, one is faced with the conclusion that subparts ii and iii are strikingly similar.

(c) Incurred debt beyond ability to pay

There is scant authority specifically referring to 548(a)(2)(B)(iii). The language of this provision requires that the debtor intended to incur, or believe he would incur, debts that would be beyond his ability to pay. Bankruptcy Code § 548(a)(2)(B)(iii). Therefore, a fundamental issue is whether this provision applies at all in cases where the transfer is involuntary, especially when the debtor is admittedly solvent. All cases that do discuss the provision examine the intent of the debtor when the transfer was made. The provision requires an affirmative act by the debtor. The court in *In Re Hall*, 131 B.R. 213 (Bankr. N.D. Fla. 1991), has held that involuntary transfers were not contemplated by 548(a)(2)(B)(iii). *Id.* (Reconciling with general "involuntary" language of 548).

B. Standing to bring the claim:

The statute grants the federal fraudulent conveyance cause of action to trustees and debtors-in-possession, and therefore, a creditor generally does not have standing to prosecute an

action for fraudulent conveyance. *In re Auxano, Inc.*, 87 B.R. 72 (Bankr. W.D. Mo. 1988); *In re Grell*, 83 B.R. 652 (Bankr. W.D. Mo. 1988); *In re Hess*, 21 B.R. 465 (Bankr. W.D. Va. 1982). However, courts hold that an individual creditor can bring an action for recovery of an alleged fraudulent transfer provided they can show that the trustee or creditor's committee failed to zealously prosecute the action on behalf of estate. *In re Gibson Group, Inc.*, 66 F.3d 1436 (6th Cir. 1995); *In re v. Savings Oil & Heating Co., Inc.*, 91 B.R. 655 (Bankr. E.D.N.Y. 1988); *In re Conley*, 159 B.R. 323 (Bankr. D. Idaho 1993).

In one case, *Glinka v. Abraham and Rose Co, Ltd.*, 199 B.R. 484 (D. Vt. 1996), the court allowed a creditor and the trustee to jointly pursue a fraudulent conveyance action. The court found that by itself, the estate lacked the funds to pursue the claim, and that allowing the creditor to join the trustee imposed no net financial burden on the bankruptcy estate.

VII 11 U.S.C. §549 – Post Petition Transfers

The Trustee may avoid a transfer of property of the estate "(1) that occurs after the commencement of the case and (2) (a) that is authorized only under section 303(f) and 542(c) of this title; or (B) that is not authorized under this title or by the court." 11 U.S.C. §549(a). Section 303(f) relates to an involuntary bankruptcy and the debtor's continue operation between the petition and the ruling on the petition. Section 542(c) deals with transfers by custodians that did not have any notice of knowledge of the bankruptcy case. The requirement that the transfer occurs post petition is modified in involuntary cases where adequate consideration is provided for the transfer. See 11 U.S.C. §549(b). It is also modified for good faith purchasers that pay "fair equivalent value." See 11 U.S.C. §549(c).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re:	)	
	)	
_____	)	**No. _____**
	)	**Chapter ____**
Debtor(s)	)	

MOTION FOR RULE 2004 EXAMINATION

_____ request(s) an order authorizing the movant(s) to conduct a Rule 2004 examination, and makes the following representations in support of this request:

1. The movant(s) seeks to examine _____.

2. The examination is needed to inquire into matters of the type described in Fed. R. Bankr. P. 2004(b), including the following: _____

_____.

3. [*Optional*] The debtor shall be examined on _____, _____, at _____.m., at _____.

4. [*any additional pertinent allegations*]

_____
[insert attorney's name, office address, telephone number, and bar number]

CERTIFICATE OF SERVICE

I certify that the foregoing paper will be served electronically on the entities specified in the Notice of Electronic Filing to be issued by the electronic case filing system. I further certify that the foregoing paper was served by mail on the following, at the following addresses, on this date [*or*] on _____, 20___:

[*list of names and addresses of entities served by mail*]

This the _____ day of _____, 20___.

_____
[insert attorney's name, office address,
telephone number, and bar number]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re:	)	
	)	
_____	)	**No. _____**
	)	**Chapter ____**
Debtor(s)	)	

MOTION FOR RULE 2004 EXAMINATION

NOTICE OF HEARING

Notice is hereby given that:

A hearing will be held on the motion on _____, 20__, at _____.m., in Courtroom _____, located at_____ TN.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the court to grant the relief requested, you or your attorney must attend this hearing. If you do not attend the hearing, the court may decide that you do not oppose the relief sought in the motion and may enter an order granting that relief.

_____ request(s) an order authorizing the movant(s) to conduct a Rule 2004 examination, and makes the following representations in support of this request:

1. The movant(s) seeks to examine _____.

2. The examination is needed to inquire into matters of the type described in Fed. R. Bankr. P. 2004(b), including the following: _____

_____.

3. [*Optional*] The debtor shall be examined on _____, _____, at _____.m., at _____.

4. [*any additional pertinent allegations*]

_____
[insert attorney's name, office address,
telephone number, and bar number]

CERTIFICATE OF SERVICE

I certify that the foregoing paper will be served electronically on the entities specified in the Notice of Electronic Filing to be issued by the electronic case filing system. I further certify that the foregoing paper was served by mail on the following, at the following addresses, on this date [*or*] on _____, 20___:

[*list of names and addresses of entities served by mail*]

This the _____ day of _____, 20___.

_____
[insert attorney's name, office address,
telephone number, and bar number]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re: Case No.
Chapter

_____ Debtor ___/

NOTICE OF RULE 2004 EXAMINATION

_____, by the undersigned attorney, will examine _____under oath on _____ at _____ m. at_____. The examination may continue from day to day until completed. If the examinee receives this notice less than 14 days prior to the scheduled examination date, the examination will be rescheduled upon timely request to a mutually agreeable time.

The examination is pursuant to Bankruptcy Rule 2004 and Local Rule 2004-1, and will be recorded by this method: _____. The scope of the examination shall be as described in Bankruptcy Rule 2004.

Pursuant to Local Rule 2004-1 no order shall be necessary. [If the examination is of a witness other than the debtor, the Local Form "Subpoena for Rule 2004 Examination" is included with this notice.]

☐ Production: [The examinee or your representatives, must also bring with you to the examination the documents, electronically stored information, or objects described on the attached schedule (or if the examination is of a witness other than the debtor, on the attached subpoena), and must permit inspection, copying, testing, or sampling of the materials.]

I CERTIFY that a true copy of this notice was filed with the court and served on the examinee, attorney for examinee, the debtor, the attorney for the debtor and the trustee [indicate name of party served, manner of service and date of service].

_____
signature

_____
print name

_____
attorney for

_____
address

_____
phone

_____
Attorney Bar No.

LF-14 (rev. 12/01/15)

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re:	**)**	
	)	
_____	**)**	**No.**
	)	**Chapter ___**
	Debtor(s)	**)**

ORDER

This case is before the court on a motion filed by

_____ for a Rule 2004 examination of a/the debtor in the above-styled case. Because it appears that the movant is entitled to the relief sought, it is hereby

ORDERED that the motion is granted. More specifically, it is ordered that the debtor/witness shall appear on _____, _____, at _____.m., at _____ _____ to be examined under Fed. R. Bankr. P. 2004.

# # #

APPROVED FOR ENTRY BY:

_____

[insert name, office address, telephone number, and bar number]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re:	**)**	
	)	
_____	**)**	**No.**
	)	**Chapter ___**
	Debtor(s)	**)**

ORDER

This case is before the court on a motion for a Rule 2004 examination filed by _____ _____. Because it appears that the movant is entitled to the relief sought, it is hereby

ORDERED that the motion is granted. The attendance of the witnesses for examination and for the production of documents may be compelled as provided in Rules 2004(c) and 9016 of the Federal Rules of Bankruptcy Procedure.

# # #

APPROVED FOR ENTRY BY:

_____

[insert name, office address, telephone number, and bar number]

UNITED STATES BANKRUPTCY COURT

Southern District of Florida

In re _____ Case No. _____
Debtor

Chapter _____

SUBPOENA FOR RULE 2004 EXAMINATION

To: _____
(Name of person to whom the subpoena is directed)

☐ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at an examination under Rule 2004, Federal Rules of Bankruptcy Procedure and Local Rule 2004-1.

PLACE	DATE AND TIME

The examination will be recorded by this method: _____

☐ *Production:* You, or your representatives, must also bring with you to the examination the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: _____

CLERK OF COURT

OR

_____ _____
Signature of Clerk or Deputy Clerk Attorney's signature

The name, address, email address, and telephone number of the attorney representing (name of party)_____ _____who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

PROOF OF SERVICE
(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any): _____
on (date) _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on (date) _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____.

My fees are $ _____ for travel and $_____ for services, for a total of $_____.

I declare under penalty of perjury that this information is true and correct.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information concerning attempted service, etc.:

Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)
(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)

(c) Place of compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

(A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises, at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt. The court for the district where compliance is required – and also, after a motion is transferred, the issuing court – may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For Access to Subpoena Materials

Fed. R. Civ. P. 45(a) Committee Note (2013)

- Parties desiring access to information produced in response to this subpoena will need to follow up with the party serving the subpoena to obtain such access.
- The party serving the subpoena should make reasonable provisions for prompt access.
- The court for the district where compliance with the subpoena is required has authority to order notice of receipt of produced materials or access to them.

Faculty

Marchand Boyd is an SVP and senior managing director for Axos Bank in Delaware, Ohio, and heads its Global Fiduciary Banking team. He formulates market and engagement-specific deposit-management solutions, and provides his clients with specialized banking accommodations. Mr. Boyd has fiduciary management and systems improvement experience, and he often will bridge the gap between banking and technology and present customized solutions to clients. He also is responsible for expanding professional client relationships across a wide range of fiduciary markets, and he has experience with treasury management and technology solutions for professional fiduciaries in domestic and international markets. Mr. Boyd received his Bachelor's degree in business administration and management from Suffield University.

Richard R. Gleissner is a practitioner with Gleissner Law Firm, LLC in Columbia, S.C., which he founded in 2007. He was admitted to the South Carolina Bar in 1990, the U.S. District Court for the District of South Carolina and the U.S. Court of Appeals for the Fourth Circuit in 1991. In 1998, the State of South Carolina's Supreme Court certified him as specialist in Bankruptcy and Debtor-Creditor Law, and he continues to be certified in this area of specialization. Mr. Gleissner is a member of the American Bar Association, the South Carolina Bar Association, ABI and the South Carolina Bankruptcy Law Association. In 2007, he taught commercial law and bankruptcy at the Charleston School of Law. Mr. Gleissner regularly lectures and gives seminars on various aspects of commercial and bankruptcy law for the South Carolina Bankruptcy Law Association, the South Carolina Bar, the National Judicial College, Lorman Educational Services and Strafford Educational Services. He received his undergraduate degree *magna cum laude* from the University of South Carolina in 1978, his Masters in Public Administration in 1981 and his J.D. *cum laude* in 1990, and during law school he was awarded membership in the Order of Wig and Robe and the Order of the Coif.

Michael L. Martinez is a member of Grier Wright Martinez, PA in Charlotte, N.C., and commonly represents federal equity receivers, chapter 11 trustees and chapter 7 trustees in fraud-based litigation. He also is a member of the subchapter V trustee pool in Charlotte. Mr. Martinez is Board Certified in Business Bankruptcy Law by the American Board of Certification and the North Carolina State Bar, and he focuses his law practice on debtor/creditor litigation and business workouts, as well as on general corporate law. He has been recognized for his *pro bono* work representing consumer debtors, and he received the 2018 North Carolina Bar Association Bankruptcy Section Outstanding Achievement in Pro Bono Award and the 2013 Legal Services of Southern Piedmont Outstanding Pro Bono Service Award. Mr. Martinez is a member of ABI's 40 Under 40 Class of 2020 and a co-managing editor of the *North Carolina Bankruptcy Practice Manual*, and he has been recognized as a "Rising Star" in business bankruptcy law by *North Carolina Super Lawyers* since 2018 and in Bankruptcy Law by *Business North Carolina's Legal Elite* since 2021. He received his B.A. from the University of Florida in 2006 and his J.D. from the University of North Carolina School of Law in 2009.

Jamie W. Olinto is a partner with Adams and Reese LLP in Jacksonville, Fla., and focuses her practice in the areas of bankruptcy and creditors' rights and commercial litigation. She represents banks and financial institutions, commercial landlords, leasing entities and other creditors in bankruptcy

cases, handling every facet of what can arise for a creditor when a borrower or a company that is a party to a contract with the creditor files for bankruptcy. Ms. Olinto has litigated objections to use of cash collateral, obtaining adequate protection, the value of assets and claims, claim priority disputes, assumption and assignment of executory contracts, objections to disclosure statements and proposed plans of reorganization, preference and fraudulent transfer avoidance adversary actions, and discharge and dischargeability complaints. She also advises clients in litigation regarding credit collection practices, including alleged violations of the TCPA. Additionally, Ms. Olinto represents businesses in litigation arising from contract disputes, such as shareholder disputes, breach of non-compete, nonsolicitation and nondisclosure agreements, and payment and performance disputes. She has represented companies and individuals in civil RICO cases, civil theft and fraud cases, as well as product-liability and defect claims, and environmental contamination and ADA compliance issues and disputes. Ms. Olinto received her B.S. in 2006 from the University of Florida and her J.D. in 2010 from the University of Florida Levin College of Law, after which she externed for Judge Glenn of the U.S. Bankruptcy Court for the Middle District of Florida.

Grace E. Robson is a partner in the Fort Lauderdale, Fla., office of Markowitz Ringel Trusty & Hartog, P.A. She is a Board-Certified bankruptcy attorney with more than 20 years of experience representing corporate debtors, trade and institutional creditors, trustees, receivers and creditors' committees. Ms. Robson focuses her practice on corporate reorganization and bankruptcy, debtor/creditor relations and litigation. She has been involved in all facets of reorganization-related representations, including pre-filing consultation, filing complex corporate bankruptcy cases, post-bankruptcy financing, and asset-purchase agreements. Ms. Robson contributed to ABI's publication *Individual Chapter 11* (2018) and has written articles for the *ABI Journal*. She is an active member of the ABA, currently serving as a co-chair of the Secured Creditors Subcommittee of its Business Law Section, Business Bankruptcy Committee. In addition, she serves on the board of directors of the Bankruptcy Bar Association for the Southern District of Florida, and she is the Broward Chair of the Pro Bono Committee, the Broward Chair of the CARE Program Committee, and a chair of the Wellness Committee. Ms. Robson is Board Certified in Business Bankruptcy Law by the American Board of Certification and has been listed in *The Best Lawyers in America* annually since 2013. She received her B.A. *cum laude* from the State University of New York at Albany in 1994 and her J.D. from the Benjamin N. Cardozo School of Law in 1997.