Central States
Bankruptcy Workshop

Business Track

Recent Issues with Fraudulent Transfers and Preferences

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CONCURRENT SESSION

2023

Recent Issues with Fraudulent Transfers and Preferences
ABI – Central States
June 8-10, 2023

Moderator: Hon. David D. Cleary, U.S. Bankruptcy Court (N.D. Ill.) | Chicago

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Fraudulent Transfers

Generally. The fraudulent transfer provisions in the bankruptcy code are found in Section 548. This section provides the legal framework for determining whether a transfer of property by a debtor was fraudulent and can be set aside by the bankruptcy trustee.

Under Section 548, a transfer made by a debtor can be considered fraudulent if (1) it was made with actual intent to hinder, delay, or defraud a creditor; or (2) if the debtor did not receive reasonably equivalent value for the transfer and was insolvent at the time of the transfer or became insolvent as a result of the transfer.

Recent Issue: **Extended Look-Back Periods**

The trustee's avoidance powers are subject to limitations, one being the statutory look-back period during which the purported fraudulent transfer can be avoided. Generally, the look-back period is 2-years brought through the Code (§548) and 4- or 6-years if brought through state law (§544).

But can it be more?

Section 544 of the Bankruptcy Code allows a trustee to 'step into the shoes' of any creditor holding an allowed, unsecured claim to avoid a prepetition transfer by the debtor, so long as the transfer is avoidable under applicable law. Voidable under applicable law, typically meant state law, which generally allowed for avoidance actions within 4 or 6 years from the transfer.

Section 544(b)(1) of the Bankruptcy Code provides in relevant part as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable

> law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b). Thus, a trustee (or DIP pursuant to section 1107(a)) may seek to avoid transfers or obligations that are "voidable under applicable law," which is generally interpreted to mean state law.

Halperine v. Morgan Stanley Investment Management Inc. (In re Tops Holding II Corporation) Case No. 18-22279 (RRD), Adv. Pro No. 20-08950, 2022 WL 6827457 (Bankr. S.D.N.Y. Oct. 12, 2022.

- Prior to filing for Ch. 11 protection, Tops Holding paid its private investors $375 million in dividends from 2009-2013.
- The trustee for the liquidation trust established in the confirmed plan subsequently sued the former equity investors to avoid the $375 million in dividend payments as actual and constructive fraud, using New York's state law. The allegation was that the payments were made while the grocery store chain had unfunded pension plan liabilities that grew from $85MM to $515MM during the equity investor's ownership.
- The investors moved to dismiss the claims, at least as to the 2009 and 2010 payments as time-barred.
- Here, the trustee argued that it could 'step into the shoes' of the IRS, who was not limited to state statutes of limitations, but could rather use the Internal Revenue Code's regulation that allows it to collect a tax assessment within 10 years of the assessment in question.
- 26 U.S.C. § 6502 – The IRS may collect a tax assessment (typically via levy or lawsuit) within ten (10) years of the assessment in question.
- Court held that the transfers at issue in this case were without fair consideration since a dividend, unless it is compensation, is made with respect to an owner's equity interest, and is therefore made without any consideration.
- Court held that the liquidation trust could use a 10-year lookback period before petition date, relying on IRS's applicable statute of limitations in it the Internal Revenue Code.
- The court rules that Section 544(b)'s plain meaning imposes no limitations on the Trustee's rights when standing in the shoes of the IRS versus any state court avoidance law.

But see Wagner v. Ultima Holmes (In re Vaughan), 498 B.R. 297, 302 (Bank. D.N.M. 2013).

- Here, the court rejected the "IRS as golden creditor" theory.
- The court reached its conclusion after considering policy and legislative intent.

- The court reasoned that the trustee is pursuing private interests, and the IRS is pursing public interests, making this dual theory prohibitive.
- According to the court, Congress did not intend for section 544(b) to vest sovereign power in a bankruptcy trustee, and allowing a trustee to take advantage of the IRC's 10-year statute of limitations would be an overly broad interpretation.
- Noting: the IRS is not bound by state law statutes of limitations because it exercises sovereign powers and is therefore protected by the doctrine of *nullum tempus occurrit regi* ("no time runs against the king").

See also Shuford v. Kearns (In re JTR1, LLC), 643 B.R. 403 (Bankr. W.D. N. Car. 2022).

- Within six (6) years of filing for bankruptcy protection, the debtor paid consultants to reduce the apparent underfunding of a private defined benefit pension plan.
- The government had a guaranty of the pension, and thus an allowed claim.
- The Fair Debt Collection Procedures Act governs the collection of debts owed to the United States and has a 6-year look-back.
- However, the FDCPA only governs collection of debts owed *to the United States*, not those debts that the United States is seeking to collect behalf of private parties or that they acquired through assignment.
- Thus, the court held that because the debt is owed to the pension fund, not a debt owed to the United States, the trustee could not utilize the FDCPA to avoid the transfers to the consultants.

Practical Implications of this update:

Consider whether the tax debt was due at the time the transfer was made.

- To satisfy the standing requirements of §544(b), the triggering creditor must be the same creditor on both the transfer date *and* the petition date, although it need not hold the same claim for these two points in time

Consider whether—10 years ago—the trustee can prove that the debtor was insolvent at the time of transfer

- This fact issue will presumably become more difficult for a trustee to prove, the longer that time as passed since the transaction.

Consider other federal government departments or agencies that may be creditors of debtors.

- This analysis could be subject to extending beyond the IRS's claims and rules. This paves the way for trustees to utilize *other* federal government departments or agencies.

Consider the ability given that the claims that can be asserted by the trustee are not capped at the size of the IRS's claim.

- *In re Tronox Inc.*, 464 B.R. 606, 616 (Bankr. S.D.N.Y. 2021) ("[A] trustee [may] avoid a fraudulent transfer without regard to the size of the claim of the creditor whose rights and powers the trustee is asserting…").
- For instance, a de minimis tax claim in favor of the IRS may allow for the pursuit of substantially larger claims against punitive defendants.

Consider, in pre-bankruptcy planning, whether to pay down manageable IRS debts.

Consider, related factors such as:

- Actual fraud (intent) vs. constructive fraud (insolvent or becoming insolvent as a result of actions taken and lack of value)
- Timing: Can subsequent market/business issues be ignored/downplayed while actions taken 6-10 years prior considered the primary driver of insolvency
- Costs: Tough road for trustee to prove – probably require years of forensic analysis at substantial cost, with low probability of success

***Recent Issue*: A Trustee's Options on Selling or Assigning Claims**

Bankruptcy trustees often deal with estates that are administratively illiquid, but nevertheless hold potentially valuable preference and fraudulent transfer actions. Trustees are then faced with a difficult decision – hire someone on a contingency fee basis, find litigation funding, abandon the claims, or – if there is a particularly active creditor in the case – sell some or all of the preference and fraudulent transfer claims.

Sometimes a trustee cannot find a firm to take litigation on a contingency fee basis or a litigation funding partner – or the trustee simply does not value the claims in the same way a particularly active creditor may value it. Where there is a creditor that has a long history with the debtor prior to bankruptcy, that creditor may be interested in purchasing the causes of action to take advantage of their institutional knowledge to seek recovery on their claim.

However, there is a minority body of case law which holds that chapter 5 causes of action, such as preferences and fraudulent transfers, are not salable because they are not "property of the estate." This issue is at the core of a pending appeal in the Eighth Circuit arising out of the *In re Simply Essentials* bankruptcy case, Case No. 20-00305 (Bankr. N.D. Iowa.) In that case, the chapter 7 bankruptcy trustee sold chapter 5 causes

of action against insiders to a creditor. The insider-target of those actions objected to the sale, lost, and appealed. *Pitman Farms v. ARKK Food Company, LLC (In re Simply Essentials, LLC)*, Case No. 22-2011 (8th Cir.)

Statutory Authority. 11 U.S.C. § 541(a) defines property of the estate and specifies seven examples of estate property, including following relevant subsections:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

***

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

***

(7) Any interest in property that the estate acquires after the commencement of the case.

Legal Arguments.

- *Preferences and Fraudulent Transfer Actions **Are** Property of the Estate*

  - Section 541(a)(1): Preference and fraudulent transfer actions are pre-petition, equitable, contingent interests in property (i.e. the assets transferred) which ripen upon filing bankruptcy and fall under section 541(a)(1).

  - Section 541(a)(7): Actions are post-petition property under section 541(a)(7) because they are traceable to property interests held by the debtor prior to the petition date; it is a cause of action that accrues post-petition.

- Common sense: Chapter 5 causes of action are routinely treated as estate property –collateral for DIP financing, sold to going concern buyers, and transferred to liquidating trusts.

- *Preferences and Fraudulent Transfer Actions **Are Not** Property of the Estate*

  - Section 541(a)(1): Debtor has no interest in chapter 5 causes of action as of the "commencement of the case" under section 541(a)(1) because they do not exist pre-petition.

  - Section 541(a)(7): Avoidance powers are not interests in "property" and are not "acquired" "after" the commencement of the case under section 541(a)(7) because they arise *upon* filing, not *after* commencement. They are simply "powers" of a trustee and, when exercised and a recovery obtained, the recovery itself becomes property of the estate.

  - Interpreting the Bankruptcy Code any other way would make sections 541(a)(3) and (a)(4) superfluous.

- Many of the cases presume, without analyzing, that preferences and fraudulent transfers are property of the estate while others only so state in dicta. Fewer courts have considered the statutory arguments raised in Simply Essentials.

- Case Law Splits

  - *Preferences and Fraudulent Transfer Actions **Are** Property of the Estate*

    - **Circuit Courts of Appeal**
      - *Morley v. Ontos, Inc. (In re Ontos, Inc.)*, 478 F.3d 427 (1st Cir. 2007) (claim for fraudulent conveyance is property of the estate).

      - *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010) (settlement of fraudulent transfer claims required court to evaluate compromise under section 363 as disposition property of the estate where another creditor sought to overbid for the claims).

- *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705 (7th Cir. 1994) (in dicta, right to recoup a fraudulent conveyance is property of the estate).

- *Silverman v. Birdsell*, 796 F. App'x 935 (9th Cir. 2020) (bankruptcy trustee may sell an estate's avoidance claims).

- *In re P.R.T.C., Inc.*, 177 F.3d 774, 781 (9th Cir. 1999) (affirming transfer of avoidance powers by trustee to estates' largest creditor)

- **Other Courts**
  - *Simantob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 287 (Bankr. App. 9th Cir. 2005) ("Causes of action owned by the trustee are intangible items of property of the estate that may be sold.")

  - *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 509 (Bankr. S.D. Ohio 2021) (claims for avoidance of prepetition transfers were cause of action included as property of the estate).

  - *Murray v. Guillot (In re Guillot)*, 250 B.R. 570, 599 (Bankr. M.D. La. 2000) ("The only way to interpret the 'rights and powers' clause of § 544(a) is as a statute that creates a property interest.").

  - *In re Greenberg*, 266 B.R. 45, 47 (Bankr. E.D.N.Y. 2001) ("An action to recover estate property becomes part of the debtor's bankruptcy estate.").

  - *Cedar Rapids Lodge & Suites, LLC v. Seibert*, 2018 WL 747408, at *8-11 (D. Minn. Feb. 7, 2018) (holding that avoidance claims are property of the estate and are transferrable by the trustee).

  - *I. Appel Corp. v. Val Mode Lingerie, Inc.*, 2000 WL 231072, at *3 n.2 (S.D.N.Y. Feb. 28, 2000) (rejecting *In re Sapolin Paints* and joining "the majority of recent case law [that] allows assignment of avoidance actions under appropriate circumstances").

- *Knoll, Inc. v. Zelinsky*, 2008 WL 11504632, at * (N.D.N.Y. Apr. 8, 2008) (holding that the sale of certain preference and fraudulent transfer claims to creditor was proper).

- *Preferences and Fraudulent Transfer Actions **Are Not** Property of the Estate*
  - *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000) (holding that state law fraudulent transfer claims were not an "asset" of the debtors and "The fact that section 544(b) authorizes a debtor in possession . . . to avoid a transfer using a creditor's [state law] fraudulent transfer action does not mean that the fraudulent transfer action is actually an asset of the debtor in possession . . . .")
    - Issue was whether fraudulent transfer claims had been sold as part of a sale of all of the debtor's assets; unique because it specifically related to 544, not other provisions of the bankruptcy code
    - *Power*, not an "asset"
    - *But see Hacienda Real S.A. de C.V. v. N. Mill Capital, LLC (In re Wilton Armetale, Inc.)*, 968 F.3d 273, 285 (3d Cir. 2020) (stating that *Cybergenics* does not hold that trustees cannot transfer causes of action and, instead, left that question open)

  - *United Capital Corp. v. Sapolin Paints, Inc. (In re Sapolin Paints, Inc.)*, 11 B.R. 930, 937 (Bankr. E.D.N.Y. 1981) (holding that there "is the well-settled principle that neither a trustee in bankruptcy, nor a debtor-in-possession, can assign, sell, or otherwise transfer the right to maintain a suit to avoid a preference")

  - *Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co.*, 175 F. 335, 340 (6th Cir. 1909) (holding the 1898 Bankruptcy Act did not permit a bankruptcy trustee to transfer its right of avoidance to another)

  - *In re Petters Company, Inc.*, 550 B.R. 438 (Bankr. D. Minn. 2016) (in dicta, "The statutory *powers* on which a trustee sues to avoid and recover are not themselves assets of the estate, i.e. property of the estate. They can lead to the post-petition recapture of property that would have passed into the estate had it not been transferred pre-petition; and upon avoidance, at latest on post-judgment realization, any property recovered becomes property of the estate.")

- *In re DartCo, Inc.*, 203 B.R. 285, 295 n.19 (Bankr. D. Minn. 1996) (in dicta, "[T]echnically speaking, avoidance powers and rights of recovery under 11 U.S.C. §§ 544–551 are not property of the bankruptcy estate.... Once the trustee exercises avoidance powers, of course, the recovered assets become property of the estate.... However, the right of recovery itself probably cannot be said to be property reposing in the estate; it is created independently by statute, and lodges with whomever the statute empowers to wield it.").

Practical Implications of this update:

Consider...

- Obtaining Court Approval
- Providing Consideration to Creditors
- Serving Notice on Potential Defendants
- Building Fail-Safes Into Sale Agreement (i.e. derivative standing; trustee retain counsel of buyer's choice)

Preferences

Generally. The Bankruptcy Code provides rules and procedures for pursuing preferences in bankruptcy. A preference is a transfer of assets made by a debtor to a creditor within 90 days before filing for bankruptcy – or one year to an insider – that gives the creditor an advantage over other creditors. *See* 11 U.S.C. § 547(b).

If a transfer is found to be a preference, the bankruptcy trustee can recover the transferred property or its value from the recipient creditor. However, there are some defenses that a creditor may raise to protect the transfer from being avoided, such as if the transfer was made in the ordinary course of business or if the creditor gave new value to the debtor after receiving the transfer.

Recent Issue: **Wage Garnishments, when made**

The 7th Circuit recently addressed the issue of *when* a transfer is made under a wage garnishment, for purposes of calculating the 90-days. In *Warsco v. Creditmax Collection Agency, Inc.*,No. 22-1733 (7th Cir. 2023), the trustee uncovered that Creditmax had received ~$3,700.00 during the 90-days prior to the petition filing, but pursuant to an Indiana state court order dated *more than* 90 days begore the debtor filed for bankruptcy.

The argument by Creditmax was that the definition of "transfer" under §547 should be determined using state law, and that Indiana state law dictated that a "transfer" occurs when a garnishment order is entered, not when it is paid.

The 7th Circuit found, rather, that federal law, rather than state law defines the meaning of "transfer". And, under federal law, the "transfer" occurs when money changes hands. This ruling effectively overruled prior circuit court precedent, that said state law applied to when a transfer was made.

The effect was that the "transfer" under the garnishment occurred when the employer *paid* the money to the creditor, not when the court ordered it. Meaning, the

Practical Implications of this update:

Consider what other possible transfers may have a gap between an order and a payment

- Would this ruling potentially affect a charging order that was ordered outside the 90-days, but which payment was not made (or "transferred") to the creditor until within the 90-day look-back?

Are there ways to utilize this rule that may benefit a debtor, in pre-planning?

- If the look-back period will commence upon actual *payment* rather than a court *order* for payment, could a debtor utilize this?

Could you contract your way around this issue?

- Could a creditor and debtor include contractual language in an agreement that the parties are agreeing that the payment is "transferred" or "paid" at X-date even though it is *actually* "transferred" or "paid" at a later Y-date? Akin to choosing an 'effective date' in a contract?

***Recent Issue*: Due Diligence Requirements**

The Small Business Reorganization Act of 2019, which became effective on February 20, 2020, included an amendment to section 547(b) of the Bankruptcy Code imposing upon the trustee a due diligence requirement prior to bringing preference claims – or at least purporting to impose such a requirement. The statute was amended to provide, in relevant part:

> (b) Except as provided in subsections (c), (i), and (j) of this section, the trustee may, **based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses**

> **under subsection (c)** avoid any transfer of an interest of the debtor in property . . .
> .

11 U.S.C. § 547(b).

Recent Case Law: Bankruptcy courts have nearly universally declined to impose a heightened level of due diligence into preference defenses prior to commencing an action. Indeed, courts are split as to whether this amendment imposes a new element to the trustee's *prima facie* case and most that are confronted with the issue have been able to skillfully dodge deciding the issue by ruling that the element was sufficiently pleaded or dismissed the complaint on other grounds. *See In re Center City Healthcare LLC,* 2022 WL 2133974 (Bankr. D. Del. June 13, 2022) (holding that debtors adequately pleaded reasonable due diligence, which included sending pre-filing demand letters); *Weinman v. Garton (In re Matt Garton & Assocs. LLC)*, 2022 WL 711518 (Bankr. D. Colo. Feb. 14, 2022); (denying motion to dismiss on basis that trustee sufficiently pleaded specific facts regarding due diligence); *Miller v. Nelson (In re Art Inst. of Phila. LLC)*, 2022 Bankr. LEXIS 68, at *49 n.116 (Bankr. D. Del. Jan. 12, 2022) (dismissing complaint on other grounds); *In re Insys Therapeutics Inc.*, 2021 WL 5016127, at *3 (Bankr. D. Del. Oct. 28, 2021) (declining to determine whether due diligence requirement is an element where plaintiff adequately pled due diligence); *In re Reagor-Dykes Motors LP*, No. 2021 WL 2546664 (Bankr. N.D. Tex. June 21, 2021) ("Whether the due diligence language creates an additional *pleading* requirement is unclear." But dismissing the complaint for failure to plead any non-conclusory allegations regarding due diligence and antecedent debt); *In re Trailhead Eng'g LLC*, 2020 WL 7501938 (Bankr. S.D. Tex. Dec. 21, 2020) (declining dismissal where trustee had reviewed bank and transfer records, invoices, correspondence, and contract).

Condition Precedent. However, two recent cases held that the due diligence requirement imposes a new condition precedent to filing a preference complaint. *See Husted v. Taggart (In re ECS Refining, Inc.)*, 625 B.R. 425, 453 (Bankr. E.D. Cal. 2020) (dismissing complaint for, among other reasons, notice-style pleadings and a very general nature of allegations which suggested a lack of pre-filing due diligence); *Pinktoe Liquidation Trust v. Charlotte Olympia Dellal (In re Pinktoe Tarantula Ltd.)*, 2023 WL 2960894 (Bankr. D. Del. Apr. 14, 2023) (dismissing complaint with leave to amend where plaintiff failed to include *any* allegation of due diligence)

Practical Implications of this update:

Consider…

- Sending pre-filing demand letters
- Describing nature of relationship with specificity
- At a minimum, new value defenses

- No need to *over*plead and reveal underlying analyses
- Reconciliation of true pre-90 balances and activity (consider order placement, issue of POs, not simply plaintiff's accounting records – this timing can often be crucial).
- Determining actual final value of product/service which can include price escalators, rebates, manufacturer incentives that are often calculated subsequently on a monthly or quarterly basis.

Recent Issue: **A Deed-Dive into Ordinary Course Elements**

Even if the timing of a customer's payments does not materially change during the preference period prior to bankruptcy, increased efforts by the supplier to manage the credit risk could result in disgorgement of the payments to a bankruptcy trustee.

Bankruptcy Code Section 547(c) provides multiple defenses that a creditor can assert to reduce its preference exposure encourage creditors to continue doing business with financially distressed companies. To use this defense, the creditor must first prove that a payment satisfied a debt incurred by the debtor in the "ordinary course of business" between the debtor and creditor and was made according to historic business terms

The decision in *Gregg Appliances, Inc. v. D & H Distributing Company (In re hhgregg, Inc. et al.)*, 17-502822022 Bankr. LEXIS 371, 2022 WL 370279 (Bankr. S.D. Ind. Jan. 13, 2022) in the United States Bankruptcy Court for the Southern District of Indiana is a prime example of how a creditor's reasonable actions to reduce its exposure may ultimately cost them the ordinary course of business defense and significantly increase their preference exposure.

The Debtor had been experiencing declining performance as early as 2013 and D&H Distributing, a supplier of electronic goods, was among the creditors that had attempted to manage exposure by steadily decreasing their credit limit from $10 million to $1 million and reducing credit terms from net 60 to net 30 and then again to 0.25% 15, net 16.

D&H would also contact the Debtors regarding payment of late invoices prior to the 90-day preference period. However, the tone of the parties' communications changed closer to and within the preference period. While communications were usually between members of the credit and accounts payable departments, these were now began coming from D&H's senior executives and often directed to senior executives of the Debtors. They also began threatening to stop deliveries in the event D&H did not receive

payment. Some of the Debtors own executives also appeared to advocate for payments to D&H due to the critical relationship.

D&H never actually threatened litigation or withheld any product from the Debtors and the timing of the Debtors' payments remained largely consistent both prior to and during the preference period. Based on evidence presented by D&H at trial, 95% of the payments made prior and during the preference period were between 5 days prior to and 15 days after their applicable due dates

The Court initially agreed with the creditors' committee that the ten-month period immediately prior to the Preference Period should be "truncated" – meaning ignored – because the Debtors were not financially healthy during that time and, thus, it did not serve as an appropriate historical baseline.

Using a truncated historical period, the Court concluded that D&H had established that the timing of the Transfers was not outside the parties' ordinary course of business. However, the court considered D&H's change in terms, its reduction in its credit limits, their senior management requests for payment, and threats to withhold deliveries. They also came to the conclusion that the Debtors prioritized paying the supplier over other of its creditors. Stating that its decision was "not an easy call", the Court found that the regularity of the payments was not enough to counteract the supplier's increased efforts to limit the credit risk of dealing with the floundering debtors and held that D&H was liable to pay $3.5 million.

Practical Implications

Despite the fact that payments to D&H had been made in a consistent manner both prior and during the preference period, the increased collection activity, the tone of that activity, and the escalation to senior management seemed to tip the scales against them. This, combined with what also appeared to be decision makers within hhgregg that advocated for payments to D&H, sealed their fate.

Consider…

- Adhering to credit policies at acceptable risk levels lest late payments and higher balances become the norm
- Consistency of collection activity –financial distress changing effective trade terms to become the "new normal" may not protect transfers from avoidance
- Avoiding significant shifts in tone and stated Terms, even without actual changes in payments

- Caution when enlisting favorable "insider" treatment from Debtor
- There is often value in getting "in line" for scarce commodities and services that may require specialized engineering, supply chain lead times, supplier purchasing risk (cash flow outlay), and supplier opportunity costs. Can this value be weighed against transfers within the 90-day look back?
- Some notice of financial distress is required to reclaim preferences. How sufficient has the communication been between parties? Are suppliers adequately provided with risk analysis/info?

Faculty

Hon. David D. Cleary is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed in December 2019. Previously, he chaired Greenberg Traurig LLP's Business Reorganization & Financial Restructuring Practice in Phoenix, where he focused his practice on business restructuring and reorganizations, distressed-asset dispositions and financings, debt restructurings and workouts, and litigation. He regularly represented distressed companies, financial institutions, secured and significant creditors, noteholders and bondholders, hotel/resort owner/operators, boards of directors, debtors, official and ad hoc committees, and insurance and surety portfolios. Judge Cleary is a Master with the Arizona Inns of Court, past co-chair of the American Bar Association's Litigation Section of its Bankruptcy and Insolvency Committee, past chair of the Chicago Bar Association's Rules Sub-Committee of its Bankruptcy Committee, and past co-chair of ABI's Asset Sales and Health Care Committees. He was listed in *The Best Lawyers in America* and in *Southwest Super Lawyers*, and he was a member of the winning team for The M&A Advisor's "Restructuring of the Year (Over $500mm to $1 Billion)" award in 2015 for the restructuring of FriendFinder Networks. He is also rated AV-Preeminent by Martindale-Hubbell. Judge Cleary was admitted to practice in Arizona and Illinois, before the U.S. Courts of Appeals for the Ninth and Seventh Circuits, and before the U.S. District Courts for the District of Arizona and the Northern District of Illinois. He received his B.A. *cum laude* from Arizona State University in 1984 and his J.D. with honors from DePaul University College of Law in 1987, where he was an article and note editor for the *DePaul Law Review*.

Elizabeth L. Janczak is a partner in the Bankruptcy and Financial Restructuring Practice of Smith, Gambrell & Russell, LLP in Chicago. She previously was a partner at Freeborn & Peters, which combined with the firm in 2023. Ms. Janczak has represented creditors' committees, debtors, post-confirmation trustees, and creditors in a variety of chapter 11 proceedings, including § 363 sale transactions, chapter 11 plan confirmation, executory contract litigation, breach-of-fiduciary-duty litigation, and various chapter 5 avoidance actions. In addition to her restructuring experience, she is experienced in chapter 7 liquidation proceedings, having represented trustees and creditors in avoidance action litigation, involuntary petitions for bankruptcy relief, nondischargeability actions and appellate proceedings. In addition to her bankruptcy practice, Ms. Janczak has represented plaintiffs and defendants in litigation arising under the Perishable Agricultural Commodities Act (PACA) in federal courts across the country and before the USDA. She also has vetted PACA claims in chapter 11 cases as both special PACA counsel to the debtor and as creditors' committee counsel. Before joining Freeborn, Ms. Janczak was a staff law clerk for the U.S. Bankruptcy Court for the Northern District of Illinois and for Hon. Bruce W. Black. She received her B.A. *magna cum laude* from Loyola University and her J.D. *magna cum laude* from University of Illinois College of Law, where she was a recipient of the Harno Scholar and the CALI Excellence Award, and a notes editor of the *University of Illinois Journal of Law, Technology & Policy*.

Deanne M. Koll is an attorney and shareholder at Bakke Norman, S.C. in Menomonie, Wis., where her practice includes assisting clients with analyzing and litigating creditors' rights in bankruptcy, complex commercial collections, state insolvency proceedings and out-of-court business reorganizations. She recently was elected to the statewide position of Treasurer for the State Bar of Wisconsin, a position she will hold for two years. Ms. Koll is a current board member for the Wisconsin Trust

Account Foundation, which assists civil legal aid organizations in Wisconsin to increase access to justice. She is also vice chair of the Wisconsin Law Foundation, the charitable arm of the State Bar of Wisconsin. In addition, she serves her local hospital as secretary and finance chair. Ms. Koll was recently appointed by the Wisconsin Supreme Court to the board of administrative oversight for the Office of Lawyer Regulation. *Super Lawyers* has recognized her as a "Rising Star" every year since 2010 and as a "Super Lawyer" beginning in 2022. She is licensed to practice in both Wisconsin and Minnesota. Ms. Koll received her undergraduate degree *magna cum laude* from the University of Wisconsin-Oshkosh and her J.D. *cum laude* from William Mitchell College of Law in 2006.

Mac Rowland is a managing director with Harney Partners in Chicago. Over a more-than-30-year career including roles as CFO, CRO and turnaround consultant, he has provided specialized expertise to companies undergoing change during any stage of their lifecycle, including financial distress, sale and divestiture, capital restructuring, market growth and insolvency. He previously spent two decades in the automotive industry. Mr. Rowland received his Bachelor's degree in finance and economics from Central Michigan University and his M.B.A. from Oakland University.