

Preference Quarterly Law Journal

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An Introduction to Preference Quarterly

Thank you for reading this, our inaugural edition of the Preference Quarterly Law Journal.

We, the editors, envision Preference Quarterly as providing practical tips, information, and commentary focusing primarily on preferences under section 547 of the Bankruptcy Code. Preference litigation is prevalent in the United States, but we are not aware of any publication directed specifically to this area of bankruptcy practice. Believing that providing high-quality information to those in the field can only improve the field as a whole, our objective is to reach out to bankruptcy specialists, attorneys with only occasional exposure to preference litigation, and even non-attorneys with this information on a quarterly basis for the benefit of all, including our various clientele.

We have opted to not establish a fixed format for the Preference Quarterly so that any one edition may be tailored to the needs of the moment. In general, we anticipate that each edition will run about four to six pages in length and have two or three articles covering some aspect of preferences or preference-related material (though we may wander beyond

continued on page 8

Preference Actions and Kitchen Sink Affirmative Defenses

Not too long ago, I filed what I thought was a plain vanilla preference recovery action. The answer filed in response contained fourteen affirmative defenses, among them being laches, setoff, waiver, and estoppel. The last of the affirmative defenses reserved the right to raise additional affirmative defenses as information became available. Raising such “kitchen sink” defenses can be prudent, especially when counsel is required to file an answer at the last minute and without much information. However, a body of case law is developing that limits valid defenses to § 547 claims and renders the kitchen sink approach to pleading potentially ineffective.

continued on page 2

Did you know

Bankruptcy Rule 7007.1 requires corporations that are parties to an adversary proceeding to file a statement identifying any other corporation that directly or indirectly owns 10% or more of the corporate party's equity interests. The statement must be filed with the corporate party's first pleading. Thus, a corporate defendant in a preference adversary proceeding should typically file the statement with its answer. Rule 1007(a)(1) requires the debtor to file an equivalent statement with its petition.

Kitchen Sink Defenses continued from page 1

In one early case limiting affirmative defenses in a § 547 action, McColley v. M. Fabrikant & Sons, Inc. (In re Candor Diamond Corp.), 26 B.R. 850 (Bankr. S.D.N.Y. 1983), the defendant raised the affirmative defense that, because of the prepetition gross negligence of a secured creditor that enabled the debtor to perpetrate a fraud upon its creditors, it would be inequitable to require the § 547 defendant to disgorge the preferential transfer because such disgorgement would benefit that negligent secured creditor. The plaintiff argued that the only exceptions to recovery are enumerated in § 547(c) and, since this affirmative defense is not enumerated therein, it should be stricken from the answer. The bankruptcy court agreed and wrote that “where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” Id. at 851, quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 617-18 (1980). In summary, the court granted the motion to strike because Congress set forth in § 547(c) explicit exceptions to recovery of preferential transfers, and the “court will not imply an additional exception.” Id. at 852.

Relying on Candor Diamond, and with no additional analysis of its own, the court in Sterling Die Casting Co., Inc. v. Local 365 UAW Welfare & Pension Fund (In re Sterling Die Casting Co., Inc.), 118 B.R. 205 (Bankr. E.D.N.Y. 1990), struck good faith as an affirmative defense in a § 547 action on the same grounds.

These cases leave one scratching his or her head: if the only permissible affirmative defenses in a § 547 action are those set forth in § 547(c), how does one plead such basic defenses as statute of limitations or waiver? Read literally, these cases would prevent a defendant from defending on the basis that the plaintiff has brought the action after the limitation periods set forth in § 546 or that a debtor in possession waived such claim as part of, say, a postpetition financing agreement or

transferred its causes of action pursuant to a plan of reorganization.

The Northern District of Illinois has attempted to resolve this by holding that, in addition to the enumerated defenses set forth in § 547(c), a defendant may also raise what are termed “threshold” defenses. One of the earlier uses of the term with respect to § 547 actions is found in Raleigh v. Mid American National Bank and Trust Co. (In re Stoecker), 131 B.R. 979 (Bankr. N.D. Ill. 1991). In that case, the § 547 defendant raised recoupment as a defense. The court fell in line with earlier cases and held that recoupment was not one of the enumerated exceptions to recovery set forth in § 547(c) and struck the defense. The court also noted one important point: “Although threshold challenges on issues such as lack of in personam jurisdiction, service of process, standing, and the like, can be raised by preference defendants, same are not defenses on the merits of the subject transfers involved in preference litigation.” Id. at 983. We note that jurisdiction and service of process are matters pleaded under FRCP 12(b) and, while parties will often plead standing as an affirmative defense, lack of standing is more properly raised by motion under the FRCP 12(b) defenses of jurisdiction or failure to state a claim. Thus, the court did not state that any of the FRCP 8(c) affirmative defenses could be threshold defenses that may be pleaded in a § 547 action.

Based upon the earlier language in Stoecker, the Northern District of Illinois recently has further fleshed out what it means by threshold defenses. K-Mart Corp. v. Uniden Am. Corp. (In re K-Mart Corp.), 318 B.R. 409 (Bankr. N.D. Ill. 2004) appeal denied 2004 U.S. Dist. LEXIS 19829 (N.D. Ill. Sept. 30, 2004). “Threshold defenses are those defenses that would bar recovery, before even opening the door to consider the substantive nature of the claim.” Id. at 415. Thus, according to the court’s analysis, venue (a FRCP 12(b) defense), waiver, and estoppel are added to personam jurisdiction, service of process, and standing as being threshold defenses; the court also appears to add § 550(a) to the list of threshold

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defenses. Fraud and unclean hands are rejected as threshold defenses. Setoff and recoupment are likewise not threshold defenses because “they would necessarily require an analysis of whether the preference claim and the claim the defendant seeks to setoff or recoup against it arose from the same transaction.” Id. at 417-18.

At least one court has expressly rejected the notion that § 547(c) provides the only defenses to a § 547(c) action. In Phillip Services Corp. v. Luntz (In re Phillip Servs. Corp.), 267 B.R. 62 (D. Del. 2002), Judge Walrath wrote:

Section 547(c) by its very terms does not purport to list the only defenses to a preference action. The Bankruptcy Code itself contains other express defenses to such an action. For example, the most obvious defense to a preference action is the statute of limitations, which is contained in section 546(a)(1), not in section 547(c). Further, section 546 lists a number of other limitations on avoidance actions which is as applicable to section 547 as to other provisions of the Code. Similarly, section 553 of the Bankruptcy Code expressly preserves setoff rights, notwithstanding anything else in the Code. Consequently, we reject the Plaintiffs' assertion that as a matter of law the Defendants may not raise any affirmative defenses that are not contained in section 547(c).

Id. at 70–71. Of course, the § 546 issues raised by Judge Walrath in her opinion are included in the Illinois court's threshold defenses, and the District Court for the Northern District of Illinois acknowledged as much when it denied Uniden leave to appeal the K-Mart decision. K-Mart Corp. v. Uniden Am. Corp. (In re K-Mart Corp.), 2004 U.S. Dist. LEXIS 19829 *8-*9 (N.D. Ill. Sept. 30, 2004). Whether Luntz will prove a guiding case remains to be seen. Courts may find it tempting to interpret Luntz as really holding that permissible defenses consist of § 547(c) plus

threshold defenses – just using different words – but Luntz's treatment of setoff and the logic underpinning such treatment argues against that interpretation. We note that the District Court in K-Mart considered the case law against Luntz to be sufficiently overwhelming to deny leave to appeal the question.

One problem with the theory that § 547 does not allow for any affirmative defenses other than threshold defenses (and the exceptions listed in § 547(c)), which we will call the “threshold rule,” is that one can argue whether some affirmative defenses would be threshold or not. A particular defense might even be a threshold issue in certain circumstances but not in others. For example, is payment a threshold defense? If the creditor responded to a preference demand letter and disgorged the alleged preference, it certainly should be able to show that the payment was made and the action dismissed. However, determining whether payment was made in the proper amount necessarily involves the substantive nature of the claim. Surely the courts using the threshold rule would not require the creditor to disgorge the preference twice and then be forced recover the second payment in a separate action; presumably the threshold test would be further modified or developed to cover such circumstances.

Setoff as an Affirmative Defense

A blanket rule of not permitting setoff to be raised as an affirmative defense is problematic. Section 553 does not affect a creditor's state law right of setoff, except as provided in § 553 itself and certain specifically enumerated sections of the Code. Sections 547 and 550 are not among the enumerated sections, suggesting that the right of setoff is not constrained by § 547. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Act”) adds even more exceptions to § 553, and § 547 is still not listed among them. The threshold rule relies primarily on the theory that, “where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be

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implied,” whereas the state law right of setoff under § 553 is not constrained except for specific exceptions. Given the tension between the two, a defendant could easily argue that the former is a rule of interpretation that must give way to a contradicting statute providing a clear expression of Congressional intent or, alternatively, that the language of § 553 does provide an express exception to the general prohibition.

A number of the cases dealing with the issue of setoff as an affirmative defense to a preference claim fail to explain the context in which the defendant attempted to raise setoff as a defense, which makes any analysis difficult. We will, therefore, present the more likely situations in which setoff might be raised as a defense and analyze the effect of the threshold rule.

If the context in which setoff is raised is that a prepetition obligation of the debtor to the creditor should be setoff against the obligation of the creditor to disgorge a preference, this use of setoff should be prohibited by § 553 itself, which permits setoff only of mutual obligations. As the creditor’s obligation to disgorge a preference only arises postpetition, that obligation should never be mutual as to a prepetition obligation of the debtor.

If the context is that a preference recovery should not be permitted because a setoff was accomplished prepetition, not permitting setoff to be raised as a defense is more troubling.

Most prepetition setoffs are book entries made precisely because the future debtor has not paid its debt to the creditor. The debtor, having failed to pay any money on its obligation prepetition, will not have made a transfer that can be recovered.

To the extent the debtor does pay down an obligation prepetition and there is also a prepetition setoff, the setoff and the recovery of the payment should not interfere with each other in most cases. If a payment was made and the setoff occurred before such payment, then the payment

probably now represents an overpayment that would need to be disgorged by the creditor notwithstanding § 547. If a payment was made and the setoff occurred after such payment, the debtor’s obligation to the creditor was reduced by the amount of the payment, and the amount the creditor could have setoff is likewise reduced. (A natural result is that the creditor’s claim against the debtor is reduced and, to the extent so reduced, the creditor no longer has a claim that can be disallowed, eliminating the possibility that the setoff can be avoided under § 553(a)(1)). For example, if the debtor owed \$100,000 to the creditor and then made a \$40,000 transfer, the most the creditor could then setoff is \$60,000. A suit to recover the \$40,000 is seeking recovery of an amount separate from the \$60,000 that was setoff, and setoff would not seem to be a relevant defense.

But what if the debtor chooses a § 547 action as the mechanism to assert that a prepetition setoff was improper under state law or impermissible under § 553(a)(2)(B) or (a)(3)? Since only a setoff violating § 553(b) is actionable under § 550, some other section listed in § 550, such as § 547, must be used. Or what if the debtor argues that the setoff itself was a preferential transfer? In either case, the real issue in the proceeding is not so much whether there was a preference but whether the setoff was made and was permissible. In either instance, the defendant does not have a true counterclaim; rather, setoff is properly raised as an affirmative defense “concern[ing] allegations outside of the plaintiff’s *prima facie* case that the defendant therefore cannot raise by a simple denial in the answer.” 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (Civ. 3d ed. 2004).

Faced with one of these situations, the Fourth Circuit Court of Appeals permitted setoff to be raised. Durham v. SMI Indus. Corp. (In re Continental Commodities, Inc.), 882 F.2d 881 (4th Cir. 1989). In that case, the future debtor and creditor exchanged checks within the preference

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period to satisfy mutual obligations. The trustee brought a preference action to recover the transfer represented by the debtor's check delivered to the creditor. The defendant raised setoff as a defense, arguing that the exchange of checks was intended to be a setoff of mutual obligations. The circuit court agreed, determining that the "clear intent of the parties" was for the exchange of checks to constitute a setoff. *Id.* at 884. Because a valid setoff is protected from recovery under § 547, "[o]nly if the court finds the setoff invalid, and further concludes that no right of setoff exists in bankruptcy, is section 547 applied." *Id.* at 882.

Other courts also find that a § 547 action cannot undo a valid setoff. Brooks Farms v. United States Dept. of Agric. (In re Brooks Farms), 70 B.R. 368, (Bankr. E.D. Wis. 1987) ("When § 553 is determined to be applicable, § 547 cannot thereafter be utilized to undo its effect"); Eckles v. Petco, Inc. (In re Balducci Oil Co.), 33 B.R. 847, 851-52 (Bankr. D. Co. 1983) (§ 547 may not be used to avoid a setoff and noting that the definition of "transfer" excludes setoff).

If the creditor is not permitted to raise setoff in these circumstances in which the existence of a prepetition setoff is the real issue in the proceeding, how does the creditor defend itself? One possible answer is that the threshold rule courts may find setoff in this instance to be a threshold issue, i.e., setoff might bar recovery before analyzing the substantive § 547 claims. The language in Durham case provides support: "Only if the court finds the setoff invalid, and further concludes that no right of setoff exists in bankruptcy, is section 547 applied." Durham, 882 F.2d at 882. Unless the defense is well-pleaded, however, a threshold rule court might be tempted to strike the defense. In any event, we are not sure that the threshold rule provides for any exceptions to the seemingly blanket assertion that setoff may not be raised as an affirmative defense.

There are other possible work-arounds in these situations. Courts have held that setoff was

intentionally omitted from the definition of "transfer" so that a setoff is not a transfer for purposes of § 547. See, e.g., Eckles, 33 B.R. 851-52; 5 COLLIER ON BANKRUPTCY ¶ 553.09[1][a] (Alan N. Resnick & Henry J. Sommer eds., 15th ed., rev. 2005). Thus, a defendant may raise the setoff issue by denying in its answer that a transfer was made and require the plaintiff to prove, as part of its *prima facie* case, that a transfer was made. However, since setoff is not expressly excluded in the definition of transfer, a defendant would be taking a risk that the court would find the definition of transfer includes setoff. Taking the theory that the existence of a setoff is a plaintiff's *prima facie* case issue one step further, maybe the defendant can in good faith deny all § 547 allegations, i.e., since there was a setoff, there cannot have been a preferential transfer.

Regardless, we are genuinely troubled that, in these situations, setoff apparently cannot be raised as an affirmative defense in a threshold rule court.

Yet another use of setoff would be to argue that the secured nature of a setoff claim prevents recovery. Section 506(a) provides that an allowed claim that is subject to setoff is a secured claim. To recover on a preference, the plaintiff must prove under § 547(b)(5) that the preferential transfer enabled the defendant to receive more than it would have received in a chapter 7 case had the transfer not been made. The defendant may be able to argue that, because its setoff claim would be a secured claim in a chapter 7, it did not receive any more on account of the transfer than it would have received in a chapter 7 liquidation. See, e.g., Braniff Airways, Inc. v. Exxon Co., U.S.A. (In re Braniff Airways, Inc.), 814 F.2d 1030 (5th Cir. 1987). However, use of setoff in this context is not a true defense; rather, this argument contains facts that the plaintiff must overcome to prove its *prima facie* case for recovery. Instead of raising setoff as a defense, the defendant need merely deny in its answer the truth of plaintiff's §

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547(b)(5) allegation and require the plaintiff to prove the allegation at trial.

Finally, a likely use of a setoff defense would be one in which the creditor has postpetition administrative expense claims or some other claim that arose postpetition; in this instance, the obligations of the debtor and creditor are mutual. In re Doctor's Hospital of Hyde Park, Inc., 337 F.3d 951, 955 (7th Cir. 2003); Zions First Nat'l Bank, N.A. v. Christiansen Bros, Inc. (In re Davidson Lumber Sales, Inc.), 66 F.3d 1560, 1569 (10th Cir. 1995). Assuming the estate has sufficient funds to pay all postpetition expenses, the purpose of setoff - eliminating the need for A to pay B and then B to pay A - would seem well-served in this instance. Since setoff is granted at the discretion of the court, Newbery Corp. v. Fireman's Fund Ins. Co, 95 F.3d 1392, 1399 (9th Cir. 1996); United States v. Norton, 717 F.2d 767, 772 (4th Cir. 1983), a court facing the risk that the estate will be unable to pay all administrative expense claims could simply allow the claim but deny the setoff. In many cases, the defendant to a § 547 action may be able to circumvent the entire affirmative defense issue by bringing setoff as a permissive counterclaim, which presumably are not prohibited by the threshold rule.

Denying recoupment as a defense raises even more interesting questions, though we will not discuss them in depth. Given the requirement that recoupment would only apply to the same transaction as the preferential transfer, we find it difficult to envision a circumstance in which recoupment would be a legitimate defense to a preference claim. In addition, as it is not mentioned in § 553, a setoff defense would lose the benefit of the argument that § 553 trumps § 547. On the other hand, recoupment does not require mutual obligations so may cross the prepetition/postpetition divide. Recoupment is also so closely related to the claim, being a right to reduce the claim, that not permitting it to be raised as a defense is curious. Finally, recoupment – if it

actually applied – should be a compulsory counterclaim and permitted as such.

In summary, there is a body of law developing, primarily in the Second and Seventh Circuits, that use of affirmative defenses by the defendant are limited in preference recovery actions. The Northern District of Illinois has determined that the only affirmative defenses a defendant may raise are those that would bar recovery by the plaintiff before the merits of the recovery action are considered. We do not pretend to take a stand on the issue, though we do see problems – especially in the context of setoff.

In practice, the threshold rule may have the primary result of simply culling meritless kitchen sink claims from the proceeding. With respect to setoff, we have shown that, in most instances, there should be ways of working setoff into the proceeding - when it truly applies - even if it cannot be raised as a defense. Inability to raise setoff as a defense may be just a tempest in a teapot. Certainly, given the likelihood of settling without trial, the typical preference action probably does not warrant the additional round of pleadings required to strike affirmative defenses.

Comments on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as It Relates to Preferences

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is now law, if not in effect. The Act makes a number of changes to § 547, all of which seem fairly straightforward. Below, we comment on two changes that are most likely to affect a typical preference action.

Section 409 of the Act alters § 547(c)(2) – the ordinary course defense – significantly. Under the former Code, in order to except a preferential transfer using ordinary course, the creditor had to prove all three of the following: (i) that the

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transfer was payment of a debt incurred by the debtor in the ordinary course of business of the debtor and the creditor, (ii) that the transfer was made in the ordinary course of business between the parties, and (iii) the transfer was made according to ordinary business terms.

Under the Code as amended by the Act, the ordinary course defense provides that a transfer may not be avoided:

to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms.

We believe this language has the effect of requiring the creditor to prove, as before, that the transfer was payment of a debt incurred by the debtor in the ordinary course of business of the debtor and the creditor. The creditor must also prove only one of the following elements: (i) the transfer was made in the ordinary course of business between the parties, or (ii) the transfer was made according to ordinary business terms.

Obviously, creditors gain in that they must only prove two instead of three elements. The real advantage to creditors, both in finding leverage in negotiations as well as at trial, is that the creditor must no longer prove that the transfer was made according to ordinary business terms. This third element is generally interpreted to require proof that the transfer was made according to ordinary business terms of the creditor's industry. Proving this may require obtaining an expert, and at a minimum requires a witness with personal knowledge gained within a relevant period of time. "General testimony by an employee of the defendant, unsupported by any specific data, is insufficient to prove 'ordinary course.'" Schwinn

Plan Comm. v. AFS Cycle & Co., Ltd. (In re Swchinn Bicycle Co.), 205 B.R. 557, 573 (Bankr. N.D. Ill. 1997). Thus, a creditor must either retain an expert to prove industry standards or have on staff someone that somehow had gained personal knowledge of the practices of competitors in the industry through some mechanism other than hearsay obtained while chatting at the bar.

Under the revised Code, a creditor may win by proving only that the transfer was made in the ordinary course of the parties. Proof of this is comparatively much simpler; a spreadsheet and a lucky volunteer from the creditor's accounts receivable department as a witness may suffice. While most ordinary course arguments are settled based on the payment pattern between the parties, under the Act, the plaintiff loses the threat during negotiations of forcing the creditor to prove industry standards and, if a settlement is not reached prior to trial, the creditor is relieved of an easily fatal burden of proof.

This revision also makes sense to the extent § 547 is designed to recover transfers made by a soon-to-be debtor that "preferred" one creditor over another with the last of the debtor's remaining cash. Under this theory, the most obvious and common defense of the creditor should be to show that the creditor was not preferred because the transfer fit a long-established pattern, i.e., was made in the ordinary course. However, the former ordinary course defense placed a heavy burden on the creditor to prove what should have been, given the purpose of preference recovery, the easiest defense to prove.

Under the Act, and provided the obligation was incurred in the ordinary course of business of the parties, the creditor now need only show that the payment was in line with the established practice of the parties, i.e, the creditor was not "preferred" over other creditors. Failing this, either because the parties had no established history or the immediately prepetition transfers were *not* in the ordinary course of the parties, the creditor can still win by showing that the transfers

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were made in accordance with the standards of the industry. Thus, the creditor wins either by showing either that the transfer was made according to the pattern developed between the parties or, if the pattern was altered, the alteration merely had the result of realigning the pattern to that of the industry as a whole (i.e., the pre-preference period pattern between the parties was an aberration). Congress got this one right.

Section 409 of the Act also introduces a new exception: § 547(c)(9). This new provision would except a transfer from avoidance when:

“in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$5,000.”

This provision is subject to two interpretations. The first totals all of the potentially avoidable transfers and, if they aggregate less than \$5,000, the entire lot is excepted from avoidance. The other interpretation is to except from avoidance each discreet transfer that is less than \$5,000. Under this latter interpretation, if the debtor made fifty separate transfers of \$4,000 each within ninety days of the petition date (a total of \$200,000), none of the transfers could be avoided because each is less than \$5,000. Since the section refers to “each transfer,” this latter interpretation seems to fit well with § 547(c)’s practice of analyzing each discreet transfer separately for possible exceptions. For example, one transfer may be excepted from avoidance under new value, another may be excepted under ordinary course, and a third excepted because the transfer was less than \$5,000. While this may not make sense from a policy perspective, it may (absent other factors) be the result under a “plain meaning” philosophy of statutory interpretation, and nothing in this interpretation would be discordant with the rest of § 547 . . .

Except that § 547(c)(8) has essentially identical language. In fact, the issue of whether

the \$600 limitation set forth in § 547(c)(8) refers to discreet transfers of less than \$600 or transfers totaling, in the aggregate, less than \$600 is the subject of some case law. We believe the substantial weight of the case law finds the proper method of calculating the \$600 threshold is to add all transfers subject to the provision and, if the aggregate total exceeds \$600, then the exception does not apply to any of the transfers, i.e., all transfers are avoidable unless excepted by another provision. See, e.g., Electric City Merchandise Co. v. Hailes (In re Hailes), 77 F.3d 873, 874-75 (5th Cir. 1996).

We believe it likely that courts will interpret the new \$5,000 threshold in § 547(c)(9) in a manner consistent with existing § 547(c)(8). If so, the new provision will effectively eliminate preference actions for less than \$5,000 in non-consumer cases. All transfers of less than \$5,000 would still be avoidable, provided the aggregate total of potentially avoidable transfers to that creditor totals \$5,000 or more. We mention that this analysis is perfunctory and without the benefit of reviewing the bill’s history for legislative intent.

Introduction to Preference Quarterly

continued from Page 1

preferences if we have something important to say). Some articles will cover esoteric topics in which possibly only regular practitioners may have an interest, others will cover topics of a more general nature that will be accessible to general practitioners. In addition, the “Did you know . . .?” feature will pass on valuable practice tips in a quick, encapsulated form. We envision polling on various topics and publishing the results for the benefit of the readership, using a point/counter-point format to argue controversial topics, and noting significant new cases or developments in the field.

We would welcome written contributions by others; we certainly have our hands full with

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our daily practice without needing to write *everything* for the Preference Quarterly. In fact, we have already identified some practitioners, with whom one or both of us have worked, that we intend to approach on possibly writing particular articles - usually because we have been impressed with their knowledge in a particular area. But we will consider publishing anything that is submitted to us for publication, and the submitting author will get full credit. The guidelines are very simple: keep it short and accessible. The editors certainly reserve the right to suggest edits to the material, but the submitting author has final say on whether the final edited version is printed or not. If you don't want to write an article but have a topic worthy of consideration, let us know, and maybe we will publish an article on the topic.

Feedback is also important to us. The idea of the Preference Quarterly is to improve the information available to the field. If we err, overlook some point, or if you are aware of case law or information that should supplement what has been published, please forward that to us so that we can ensure that the information published is as accurate as possible. Also, if you have any ideas on how we can improve the Preference Quarterly, let us know.

Finally, at present we are publishing the Preference Quarterly and distributing it solely by e-mail. We have compiled a reasonable mailing list, which includes primarily our own personal contacts, but it is necessarily limited. If you deem this publication to be of value, please encourage others to request they be added to the list. On the other hand, if you do not wish to receive future editions, please request that you be stricken from the address database.

You can reach us at our telephone numbers or e-mail addresses on the first page of this edition. In general, however, we request that communication regarding the Preference Quarterly be directed to:

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Such communications would include submission of articles, complaints, comments, requests for additions or deletions to the distribution list, etc.

Again, thanks for reading the Preference Quarterly, and we hope you find it valuable.

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