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Avoidance Action in Bankruptcy

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Preferential Transfers - Introduction

- Overview of Section 547
- Dual purpose of preference section
- Debtor's motive is not material
- Preferences vs. fraudulent transfers

Section 547(a) - Definitions

- Inventory
- New Value
- Receivable
- Tax Indebtedness

Elements of the Claim

- Transfer
- To or for the benefit of a creditor
- For or on account of an antecedent debt
- Made while the debtor was insolvent
 - Presumption of insolvency
- Made within 90 days of the bankruptcy filing
 - 1 Year for “insiders”
- That enables the creditor to receive more than such creditor would have received in a chapter 7.
- All elements must be satisfied

Creditor Defenses

- Contemporaneous exchanges
 - Intent requirement
 - Exchange must in fact be contemporaneous

Creditor Defenses

- Payments in the ordinary course of business
 - Debt incurred in ordinary course of business
 - Transfers made in the ordinary course of parties' business
 - Transfers made according to ordinary business terms
 - Long term debts, Ponzi schemes and settlement agreements

Creditor Defenses

- Purchase Money Security Interests
- Transfers of subsequent new value
 - Policy behind exception
 - Timing of transfers and new value
 - Other new value issues
- Security interests in Inventory or receivables
- Valid statutory liens

Creditor Defenses

- Alimony, Maintenance or Support
- Consumer debtors
- Transfers aggregating less than \$5,475

Perfection and the timing of transfers

- Real property
- Fixtures and personal property
- Time of perfection determined by state law
- Continuous perfection and lapses in perfection
- After-acquired property

Fraudulent Transfers - Overview

- Section 548 of the Bankruptcy Code
- Section 544 of the Bankruptcy Code
- Standing
 - *In pari delicto*
- Statutory Reach-Back Periods

Actual Fraud

- Elements of Section 548(a)
- Proving actual intent
 - Circumstantial Evidence
 - Badges of Fraud
 - Pleading with Particularity
 - Insolvency immaterial

Constructive Fraud

- Elements of Section 548(b)
 - Insolvency
 - Reasonably equivalent value
 - Fair consideration

Specific Application

- Employment Contracts
- Transfers to Insiders under UFTA
- Charitable gifts
- Sales
- Liens
- Matrimonial awards
- Self-Settled Trusts

Good Faith Purchasers for Value

- Section 548(c)
- Preservation of property
- Transferees giving less the equivalent value

Partnerships

- Section 548(b)
 - Intent
 - Value

Safe-Harbor Provisions

- Section 548(d)
- Protected Parties
- Protected Transactions

Other Particular Applications

- Leveraged Buyouts
- Ponzi Schemes

Post-Petition Transactions

- Section 549
 - Purpose
 - Elements
 - Transfers that may not be avoided

Liability of transferees of avoided transfers

- Section 550
 - Overview
 - Right to recover transferred property – 550(a)
 - Only to the extent of the avoided transfer
 - For the benefit of the estate
 - Recovery of property or its value
 - Initial, immediate and mediate transferees

Liability of transferees of avoided transfers

- Conduits distinguished
- Equitable exceptions
- Limitations on right to recover
 - Good faith
 - Non-insiders – 550(c)
 - Single satisfaction rule

Liability of transferees of avoided transfers

- Transferee's lien for property improvements – 550(e)
- Time limitations – 550(f)