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Inadequate Shorthand: The Circuit Courts are Split as to whether there is a "Remains Unpaid" Requirement in the New Value Exception to Preference Liability

By Travis Powers, Esq. [a1]

I. Introduction

This article addresses the split in the courts over the meaning of the "new value" exception in section 547c)(4) of the Bankruptcy Code (the "New Value Exception"). Under one line of cases, the amount of a preference claim is reduced by the amount of new value not secured by an otherwise unavoidable security interest or on account of which the debtor did not make an otherwise unavoidable transfer for the creditor's benefit. Another line of cases, however, have injected a further limitation not found in the text of the statute. Under those cases, the New Value Exception is available only to the extent that the new value "remains unpaid."

The context of preference claims in the Code may illuminate the divergent interpretations of the New Value Exception under section 547(c)(4) When a trustee or debtor in possession begins the daunting task of attempting to replenish a debtor's bankruptcy estate, there are helpful tools in Chapter 5 of the U.S. Bankruptcy Code ("Code") that assist in this undertaking. Code section 542 requires an entity in possession of debtor's property to turn that property over to the estate. Section 543 operates in a similar fashion by requiring a custodian in possession of the debtor's property to likewise return it to the estate. Section 548 allows the trustee or debtor in possession to avoid certain transfers of the debtor's property for the benefit of the debtor's estate and, necessarily, for the debtor's creditors, and section 549 allows the avoidance of certain post petition transfers. Section 547, the primary focus of this article, allows a trustee or debtor in possession to avoid preferential transfers made to creditors in the 90 days preceding a debtor's bankruptcy petition, provided certain requirements are met. However, recognizing that blanket authority to avoid all payments to creditors during this preference period may lead to inequitable results, the legislature has provided a reprieve to creditors by inserting certain exceptions or defenses to preference avoidance in section 547(c). One such exception found in section 547(c)(4) is the New Value Exception. This provision excepts from the trustee's preference avoidance authority certain transfers that are followed by new extensions of value by the creditor.

The New Value Exception allows a creditor to retain the transfer at issue as long as the creditor gave the debtor new value after receiving the transfer and "on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." [1] This exception allows a creditor comfort in the knowledge that when providing goods or services to a financially disabled debtor it is protected from preference liability for certain transfers it receives during the preference period. The New Value Exception applies especially to revolving credit relationships where a debtor and creditor may engage in hundreds, if not thousands, of transactions in a short period of time. If the creditor receives a later transfer on account of any new value, the New Value Exception protects the creditor in most circumstances from being forced to return the preferential payment to the extent of the new value provided by the creditor after it received the preference. However, a split among the circuit courts has developed over the previous decades as to how to apply the New Value Exception. While some courts follow the plain language of the statute and allow a creditor to use the exception unless the debtor made an "otherwise unavoidable" transfer on account of the new value, without imposing as a limitation on the exception that the new value remain unpaid ("Subsequent Advance" approach). Other courts, however, have inserted into clause (c)(4) a further limitation on the New Value Exception, under which it is not available to the extent of any transfer, avoidable or unavoidable, on account of the new value. In essence, under this interpretation of clause (c)(4), the exception is available only to the extent that the new value remains uppaid (the "Remains Unpaid" approach). The Remains Unpaid approach appears to be the lingering effect of the predecessor to section 547(c)(4), and is in derogation of the statute's plain language.

Part II of this article discusses a creditor's preference liability under sections 60(a) and (b) of the Bankruptcy Act of 1898 (“Act”), which, unlike section 547(c)(4), set forth an express “remains unpaid” limitation, and also discusses the exception to such liability found in Act section 60(c) and the judicially created Net Result Rule. Part II concludes with a brief introduction of the exception to preference liability found in current section 547(c)(4) of the Code. Part III explains the genesis of the Remains Unpaid approach that a number of circuit courts follow when applying the exception to preference liability in section 547(c)(4), and provides a brief description of the leading circuit court cases advancing this approach. Part IV introduces the leading circuit court cases that follow the Subsequent Advance approach, and examines the rationale asserted in these decisions. Part V briefly analyzes the plain text language of section 547(c)(4), and explains why the Subsequent Advance approach comports directly with the language and intended purposes of section 547(c)(4). Further, Part V notes that the requirement that new value must remain unpaid is based on an erroneous interpretation of Code section 547(c)(4)(B), and also on language found in Act section 60(c) that was not carried into the Code. Finally, Part VI concludes this article by asserting that those courts that have followed the Remains Unpaid approach to section 547(c)(4) have done so based on an inaccurate reading of that section's requirements, and, rejecting the “remains unpaid” approach, posits that the Subsequent Advance approach is the correct application .

II. Bankruptcy Act Section 60, The Net Result Rule, and Bankruptcy Code Section 547

A. Preference Liability under section 60 of the Act

Prior to the 1978 adoption of the Code, preferential transfers were governed by section 60 of the Act. Specifically, section 60(a) of the Act stated,

A person shall be deemed to have given a preference if, being insolvent, he has... made a transfer of any of his property, and the effect of the... transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. [2]

Section 60(a) of the Act was merely elucidatory, rather than remedial, as it outlined the circumstances under which a debtor was to have preferred one creditor to another. [3] A trustee's curative rights arose under section 60(b) of Act, which allowed the trustee to recover the transferred property, or its value, from the preferred creditor. [4] However, while section 60(a) was broad in its definition of what constituted a “preference,” section 60(b) constricted the category of preferential transfers that a trustee could avoid quite considerably. [5] In order to so recover the bounty of the preferential transfer, the transfer must have been made within four months of the debtor's petition, and the preferred creditor must have “had reasonable cause to believe that it was intended thereby to give a preference.” [6]

As a result of the relationship between sections 60(a) and (b) of the Act, courts and commentators established the following test to determine if a debtors transfer to a creditor was preferential, thus enabling a trustee to avoid and recover the transferred property or its value:

> (1) the debtor must have transferred its property; (2) the property must have been transferred to or for the benefit of the creditor; (3) the transfer must have been made on account of an antecedent debt owed by the debtor to the creditor; (4) the debtor must have been insolvent when it made the transfer; (5) the transfer must have been made within four months of the debtor's petition; (6) the transfer must have allowed the receiving creditor to realize a greater percentage on the debt owed than similar creditors of the same class; and (7) the creditor must have had reasonable cause to believe the debtor to be insolvent. [7]

This last requirement, that the creditor had a "reasonable cause to believe" that the transfer was intended to be a preferential transfer, placed an emphasis on the subjective intent of the transferee. [8]

However, even lacking such "reasonable cause to believe," a transferee of a preferential payment under the Act was subject to harsh results if it also held a claim against the debtor. Section 57(g) of the Act, the precursor to section 502(d) of the Code, [9] explicitly disallowed claims asserted by those creditors who had received preferential transfers and failed to "surrender the preference" to the debtor's estate despite the lack of "reasonable cause to believe" on the transferee's part. [10] As a result, though the trustee was unable to avoid a transfer that was technically preferential under section 60(a), section 57(g) ensured that the transferee was unable to participate in any subsequent distribution unless the transfer was returned. [11] This harsh result was confirmed by the U.S. Supreme Court in 1901, when it stated

[I]f [a preference] is taken under the conditions mentioned... it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts. His election is between keeping the preference and surrendering it. That is the favor of the law to his innocence, but, aiming to secure equality between him and other creditors, can the law indulge further? He may have been paid something,--maybe a greater percentage than other creditors can be. That is his advantage, and he may keep it. If paid a less percentage he can obtain as much as other creditors by surrendering the payment, and an equality of distribution of the assets of the bankrupt is assured. The effect is equitable, and that it was intended is supported by prior legislation.

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[C]ounsel have ably urged against our interpretation of the statute considerations which should be noticed. They assert its incorrectness because: (1) That the provisions of 57 *g*, which denies allowance to the claims of creditors unless such creditors surrender the preferences they have received, are penal and should be strictly construed. Being penal, it is contended, there should be a guilty intent to incur their punishment. (2) Of the defectiveness of 60 *a*, and the necessity of explaining it and enlarging [sic] it by other provisions. (3) Of the consequences of the construction,--consequences which are declared to be anomalous and even absurd. ... We cannot concur in the view that 57 *g* is a penal requirement. [12]

This would seemingly require a practical analysis on the transferee's part so as to determine whether refusing to surrender a technical preference would result in a shortfall based on the amount of any claim the creditor could assert against the debtor. Would it be beneficial to return the technical preference in order to participate pari passou with other creditors with regard to any distribution from the bankruptcy estate, or would retaining the preference be more economically advantageous?

As is the case currently in the Bankruptcy Code, there was an exception to the general preference avoidance rule. Specifically, section 60(c) of the Act stated,

If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him. [13]

As can be seen from the plain langue of this section, when a preferred creditor gave new credit to the debtor after receiving the preferential payment, that credit could offset the creditor's preference liability. [14] However, the newly advanced credit must have remained unpaid on the petition date in order for the creditor to utilize that sections application. [15]

B. The Net Result Rule

To lessen the sting that arose through the interaction between Act sections 60(a), 60(c), and 57(g), some courts began to utilize the "Net Result" Rule whereby "all 'technical,' nonvoidable preferences received by a creditor and all unsecured credit extended by that creditor during the then four month preference period were viewed as a single transaction." [16] If analysis of this single transaction showed a gain to the debtor's estate, then the creditor was not required to surrender any portion of the payments to the estate. [17] However, if it was shown that the gain was to the creditor's benefit, the creditor's claim against the estate would be disallowed unless and until the creditor returned the gain to the estate. [18] The U.S. Supreme Court confirmed the validity of the Net Result Rule in 1903, stating that "payments on a running account, where new sales succeed payments, and the net result is to increase the value of the estate, do not constitute... preferential transfers under § 60 *a*." [19] In 1903, Congress amended Act section 57(g) [20] such that it applied only to void or voidable preferences. [21] From that point forward, a creditor who received a technical preference without knowledge of the debtor's insolvency was no longer required to give back the preference before it could participate in any distribution from the estate. [22] Though this would seemingly spell the demise of the Net Result Rule, many courts continued to apply it in certain cases. [23]

C. Preference Liability under Section 547 of the Code and the New Value Exception

Upon enactment of the Code, preference avoidance was, and remains, controlled by section 547(b), which allows a trustee to avoid a transfer from the debtor to a creditor that was made within the 90 days preceding the debtor's bankruptcy, provided that the transfer was: (1) made to the creditor or for its benefit; (2) made on account of an antecedent debt; (3) made while the debtor was insolvent; and (4) enables the creditor to receive more than it would have in a Chapter 7 case had the transfer not been made. [24] Section 547 is fundamentally the same as section 60 of the Act, save for some modification not currently relevant. [25] And like Act section 60(c), the Code contains an exception to preference avoidance based on a creditor's advances of new value after receiving the preferential payment in question. [26] Section 547(c)(4) states that the trustee may not avoid a preferential payment if the payment was to or for a creditor's benefit, and after the creditor received the payment it gave new value to the debtor. [27] However, this exception to preference liability may only be utilized if "on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." [28] The purpose of section 547(c)(4), as is the purpose for all exceptions to a trustee's preference avoidance powers, is to encourage creditors to continue to do business with financially distressed debtors "on normal business terms by obviating any worry that a subsequent bankruptcy filing might require the creditor to disgorge as a preference an earlier received payment." [29]

As will be shown below, application of this exception to preference avoidance has been problematic with respect to section 547(c)(4)(B), as two opposing analyses of its application have emerged. The first approach, the Remains Unpaid approach, restricts application of section 547(c)(4) to only those extensions of new value that remain unpaid as of the debtor's petition date. [30] The second approach, the Subsequent Advance approach, allows the creditor to use the exception in section 547(c)(4) even if it was repaid for its extensions of new value provided the later transfers are "avoidable." [31]

III. *Bishop*, *New York City Shoes*, and the genesis of the "Remains Unpaid" Approach

A. The Bankruptcy Court for the Northern District of Georgia Begins the "Remains Unpaid" Approach

The 1982 decision by the U.S. Bankruptcy Court for the Northern District of Georgia in *Pettigrew v. Trust Co. Bank (Matter of Bishop)* [32] is widely recognized as the genesis of the Remains Unpaid dispute as applied to cases decided under the Code. [33] The debtor in *Bishop*, a steel-building construction business, filed for Chapter 7 protection on December 21, 1979. [34] On September 27, 1979, just inside the 90-day preference period, the debtor made an $18,418.50 payment to the defendant to repay certain credit extensions. [35] Between October 3 and November 21, 1979, after receiving the payment, the defendant made three loans

totaling $38,440.80 to the debtor:. [36] Finally, after these additional extensions of credit, the debtor made two payments totaling $21,628.16 to the defendant between November 28 and December 4, 1979. [37] Following the debtor's Chapter 7 petition, the trustee sought avoidance of the debtor's three payments to the defendant that were made during the preference period, and both the defendant and the trustee subsequently filed competing motions for summary judgment. [38]

In its partial summary judgment motion, the defendant moved for dismissal of the trustee's count seeking avoidance of the debtor's initial $18,418.50 payment, arguing that it was immune from avoidance under Bankruptcy Code section 547(c)(4) subsequent New Value Exception. [39] The court began its analysis by enunciating three requirements for application of section 547(c)(4): "the creditor must extend new value as defined in § 547(a)(2)... the new value must be unsecured... [and] the new value must go unpaid." [40] The court initially determined that the defendant extended new value to the debtor, and that the new value was unsecured. [41] The court then determined that the defendant's New Value Exception was allowed only in the amount of $16,812.64, as that was the amount of new value remaining unpaid upon the debtor's petition. [42] In reaching this conclusion, the court subtracted the debtor's payments of $21,628.16 from the defendant's extension of $38,440.80 in new credit, without analyzing whether the transfers were "otherwise unavoidable" as required by section 547(c)(4)(B). [43]

After determining that the defendants were entitled to the New Value Exception only to the extent that the new value remains unpaid, the court noted that the defendant sought a determination that the trustee was only entitled to recover $1,605.86 by operation of the judicially created net result rule. [44] In correctly determining that the net result rule had no application under Bankruptcy Code section 547(c)(4), the court engaged in a concise analysis of the historical root of the net result rule as well as its legislative dissolution with the enactment of Bankruptcy Code section 547(c)(4). [45] As the net result rule safeguards preferential payments made before extensions of new value, it collides with the clear language of section 547(c)(4) and, thus, is inapplicable. [46] In essence, the court rejected application of the net result rule based on the clear statutory language of section 547(c)(4) stating that a transfer may not be avoided to the extent that new value was given after the transfer in question. [47] In contrast, however, the court undertook no analysis whatsoever with regard to the plain language of section 547(c)(4)(B), opting instead to reduce that subsection to the Remains Unpaid requirement that fuels the current dispute. [48]

B. The Third Circuit Weighs In, Strengthening the "Remains Unpaid" Approach

Though the Third Circuit's decision in *New York City Shoes* [49] has been analyzed ad nauseum, its importance with regard to the current thesis and its ramifications going forward require that it be introduced, or reintroduced as the case may be. To be fair, the primary issue in *New York City Shoes* was not the interpretation of Bankruptcy Code § 547(c)(4)(B), as the court was set on its construct from the start. Rather, the court was tasked with determining when a postdated check was deemed "transferred" for purposes of § 547(c)(4). [50] However, the court's analysis of the primary issue, in concert with its understanding of § 547(c)(4), has reverberated throughout subsequent bankruptcy jurisprudence, as trustees and debtors-in-possession seeking to recover preferential payments in spite of Bankruptcy Code section 547(c)(4) have routinely cited the Third Circuit.

In February 1987, Bentley International, Inc. ("Bentley") shipped $15,960 worth of shoes to New York City Shoes, Inc. ("NYC"), who then placed a second order prior to making any payment to Bentley on account of the first shipment. [51] Bentley refused to make the second shipment based on NYC's nonpayment, causing NYC to issue two checks in the beginning of March as payment for the first shipment. [52] However, one of the checks, for $7,960, was postdated to April 1 ("Postdated Check"). [53] In reliance on the Postdated Check, Bentley shipped an additional $40,000 worth of shoes to NYC between March 3 and 10. [54] Bentley attempted to deposit the Postdated Check on April 1, but, due to insufficient funds in NYC's deposit account, it did not clear until April 13. [55] On July 7, NYC filed its bankruptcy petition and the trustee subsequently attempted to avoid the payment of the Postdated Check as a preferential payment. [56] In response, Bentley argued that because it received the Postdated

Check on March 1, and only then made the second shipment, the transfer was protected under Bankruptcy Code § 547(c)(4) as a subsequent advance of new value, and therefore could not be avoided. [57]

The court began by articulating the three "well established" requirements of Bankruptcy Code § 547(c)(4): 1) the creditor must have received an otherwise voidable preference; 2) the creditor must have advanced new value after receiving the preferential payment; and 3) "the debtor must not have fully compensated the creditor for the 'new value' as of the" petition date. " [58] The court further noted that a creditor satisfying these three elements may "set off the amount of the 'new value' *which remains unpaid* on the date of the petition against the amount which the creditor is required to return to the trustee on account of the preferential transfer it received." [59] The preceding dicta is the entirety of what may be viewed as the court's analysis of section 547(c)(4)(B), as the remainder of the Third Circuit's opinion focuses primarily on the issue of "when a postdated check given by a debtor to a creditor should be deemed transferred for purposes of section 547(c)(4)," and whether Bentley extended the additional $40,000 in credit before or after the transfer from NYC. [60] However, it must be noted that by the court's own admission, and under a stipulation between the trustee and Bentley, the requirement of section 547(c)(4)(B) were satisfied. [61] The court noted that the parties stipulated to the fact that the Postdated check was an avoidable preference under Bankruptcy Code section 547(b). [62] To put it another way, the transfer was not "otherwise unavoidable," and would have satisfied section 547(c)(4)(B) by its clear language but for the fact the court found the subsequent value defense inapplicable on other grounds.

C. Reaching Back to Dicta and the "Remains Unpaid" Progeny

The fact that there is a split among federal circuit courts regarding the proper treatment of Code section 547(c)(4) is well known among practitioners and commentators. [63] Seven circuits have undertaken the task of determining whether new value must "remain unpaid," and three of those circuits, the Third, Seventh, and Eleventh, have held that the New Value Exception is unavailable if the creditor has been paid for the new value extended to the debtor. [64] Conversely, and discussed in further detail below, the Fourth, Fifth, and Ninth Circuits have held that the Subsequent Advance approach is the proper interpretation of section 547(c)(4). [65] The Eighth Circuit, the last of those circuit confronted with this issue, has penned conflicting decisions, which will be discussed at more length below. Rather than go into an in depth analysis of this circuit split, it is important to discuss the rationale, or lack thereof, behind these differing decisions.

1. Between *Bishop* and *New York City Shoes* and the Rise of the "Remains Unpaid" Circular Logic

While *Bishop* is regarded as the starting point for the "Remains Unpaid" dispute and *New York City Shoes* fueled the debate, the intervening period between the two saw a string of cases decided that were devoid of any statutory analysis yet still required new value to remain unpaid. [66] The Third Circuit in *New York City Shoes* cited the 1986 decision by the Bankruptcy Court for the Northern District of Illinois in *Chaitman v. Paisano Automotive Liquids Inc. (In re Almarc Mfg. Inc.)* [67] for the proposition that new value must remain unpaid in order for a creditor to utilize the defense in Bankruptcy Code section 547(c)(4). [68] In turn, the court in *Almarc* simply states, "additional post-preference unsecured credit must be unpaid in whole or in part as of the date of the petition." [69] Rather than undertake an analysis of the requirements of Bankruptcy Code section 547(c)(4)(B) and its "otherwise unavoidable" language, the court in *Almarc* cites a 1986 decision by the Bankruptcy Court for the Eastern District of Pennsylvania in *Beiger v. Airtech Servs., Inc. (In re American Intern. Airways, Inc.)*. [70] The court in *Beiger* attempts an explanation of the rationale behind the Remains Unpaid approach, yet never undertakes an analysis of the plain language of section 547(c)(4)(B). [71] The court focused primarily on the effect to the debtor's bankruptcy estate and whether the preferential payment at issue has diminished the estate, and whether the creditor has negated such diminishment by the extension of new value. [72] Much like the Third Circuit and the Bankruptcy Court for the Northern District of Illinois, the court in *Beiger* simply cites to previous authority for the Remains Unpaid requirement as proof that such a requirement is judicially sound. [73] While

an explanation of each of the cited cases would belabor the point that the Remains Unpaid requirement in the Third Circuit has resulted from a dearth of an analytical pursuit of section 547(c)(4)(B)'s plain language, it deserves note that three of the cases cited by the *Beiger* court merely cite the *Bishop* court in determining that subsequent new value must remain unpaid. [74]

D. The "Remains Unpaid" Progeny

1. The Seventh Circuit: In re Prescott

In 1986, the Seventh Circuit handed down its decision in *Matter of Prescott*, [75] which held that new value must remain unpaid in order for a creditor to utilize Code section 547(c)(4) to avoid preferential transfer liability. The debtor in *Prescott* funded its purchase of a grocery store with a $125,000 loan from Marine Bank ("Marine"). [76] In order to secure the loan, the debtor provided, among other security, a $45,000 certificate of deposit and the debtor's deposit accounts held at Marine. [77] After the grocery store was taken over by a third party creditor, Marine froze the debtor's three deposit accounts, which contained $18,353.59, and offset that amount against the balance remaining on the loan. [78] In addition, Marine cashed the certificate of deposit, receiving $34,290.12, and applied that amount against the remaining indebtedness. [79] The debtor filed for chapter 7 relief on June 14, 1983, and the trustee subsequently brought an adversary proceeding against Marine to recover preferential transfers arising from the offset of the deposit account funds and the cashing of the certificate of deposit. [80] The Bankruptcy Court for the Western District of Wisconsin determined that the setoff and cashing of the certificate of deposit were preferential transfer to the extent that Marine was an undersecured creditor, or $40,733.33, and entered judgment accordingly. [81] On appeal to the district court, Marine argued under Code section 547(c)(4) that the bankruptcy court erred by not taking into account new value provided to the debtor during the preference period. [82] Marine asserted that after cashing the certificate of deposit, it allowed overdrafts by the debtor in the amount of $17,320.36, and that this amount constituted new value that should be deducted from its preference liability. [83] However, the District Court affirmed the decision of the bankruptcy court and appeal to the Seventh Circuit followed. [84]

In analyzing whether the New Value Exception was applicable, the court quoted a 1983 decision by the Bankruptcy Court for the District of Maine in *Rovzar v. Prime Leather Finishes Co. (In re Saco Local Development Corp.),* [85] stating, "Section 547(c)(4) establishes a subsequent advance rule whereby a preferential transfer is insulated from a trustee's avoiding powers to the extent that a creditor extends new value, which is unsecured and *remains unpaid*, to a debtor *after* the preferential transfer." [86] And thus was the sum of the Seventh Circuit's analysis of the New Value Exception. The court's reliance on *Saco Land Development* is puzzling, as the Bankruptcy Court for the District of Maine cited no authority whatsoever for the remains unpaid requirement, and undertook no analysis of Code section 547(c)(4)(B). [87] The Court in *Prescott* cited to two additional cases in support of its pronouncement that new value must remain unpaid: [88] *Bishop* and *Erman v. Armco, Inc. (Matter of Formed Tubes, Inc.)*. [89] However, the court's holding in *Formed Tubes* also relies solely on *Bishop* and *Saco Local Development* in finding that new value must remain unpaid. [90] Like the Third Circuit in *New York City Shoes*, the Seventh Circuit's holding relies primarily on previous case law that is devoid of anything resembling comprehensive analysis of the plain language of Code section 547(c)(4)(B). Rather, the cited authority summarily dismisses the applicability of the New Value Exception by enforcing a requirement found nowhere in the plain language of Code section 547(c)(4)(B).

2. The Eleventh Circuit: Jet Florida System

The Eleventh Circuit's 1988 decision in *Charisma Investment Co. v. Airport Sys., Inc. (In re Jet Florida System, Inc.)*, [91] like the decisions of the Third and Seventh Circuits, arises from misplaced reliance on case law finding that new value must remain unpaid. Though the facts are brief, the defendant received $11,761.33 from the debtor during the 90-day preference period

leading up the debtor's petition. [92] Both the Bankruptcy and District Courts for the Southern District of Florida held that the preferential payments were avoidable and that Code section 547(c)(4) was inapplicable although the defendant had continued to make certain leased premises available to the debtor after the payments at issue. [93] Though the defendant's New Value Exception was negated by the fact that it did not provide any value at all to the debtor after the preferential payments, the court, in dicta, stated, "the new value must remain unpaid." [94] In doing so, the court cited to *Bishop*, *Keydata Corp. v. Boston Edison Co. (In re Keydata Corp.)* [95] (which in turn cites only to *Bishop* and need not be discussed), and *Waldschmidt v. Ranier (In re Fulghum Const. Co.)* [96] (which cites only to *Bishop* and *Keydata* and, therefore, also needs no discussion). As was the case with Seventh Circuit in *Prescott*, the authority utilized in *Jet Florida System* represents the circular use of erroneous application of the New Value Exception perpetuated by a lack of clear analysis of statutory language.

3. The Curious Case of the Eighth Circuit: Kroh Brothers *and* Jones Truck Lines

The issue of whether new value must remain unpaid seems unresolved in the Eighth Circuit, but controlling case law would appear to require that new value must, in fact, remain unpaid. [97] Though the Eighth Circuit later articulated that it did not believe such a requirement exists, that articulation came in dicta and is not controlling. [98]

In February 1987, the debtor, a Missouri real estate developer, filed for Chapter 11 protection and sought to recover two payments totaling $57,400.13 that it made to Continental Construction Engineers, Inc. ("Continental") during the preference period. [99] In the Bankruptcy Court for the Western District of Missouri, Continental argued that the payments were unavoidable because it provided new value in the form of construction services to the debtor after receiving the payments. [100] The Bankruptcy Court agreed and offset the preference payments by the amount of new value, and awarded the debtor $27,909.94. [101] The U.S. District Court for the Western District of Missouri affirmed, and appeal to the Eighth Circuit followed. [102] On appeal, the debtor argued that Continental could not rely on section 547(c)(4) because it was paid for the construction services it was asserting constituted new value. [103] The court, in reversing the lower court decisions, stated from the outset that "the majority of courts... hold that a creditor who has received payment from the debtor for new value cannot rely on section 547(c)(4)." [104] The court focused its analysis on whether the creditor has returned the preference to the estate with its advance of new value. [105] The court noted that if a debtor has paid the creditor for the new value there is no return of the preference to the estate, and the creditor receives an unfair benefit. [106] The court ended its analysis on the issue by stating,

To the extent that the opinions of the bankruptcy and district courts can be read to hold that a creditor who has been paid for new value... can nevertheless assert a new value defense, we disagree. Rather, we think that section 547(c)(4) is not available to a creditor to the extent the creditor has received payment from the debtor for the goods or services constituting new value. [107]

In 1997, the Eight Circuit revisited the issue of whether new value must remain unpaid in *Jones Truck Lines, Inc.* The debtor in *Jones*, a large interstate trucking company, filed for Chapter 11 protection in July 1990, and sought to avoid $5,684,838.80 in payments made to the Central States, Southeast and Southwest Areas Pension Fund ("Central States"). [108] In the Bankruptcy Court for the Western District of Arkansas, Central States argued that the payments were unavoidable because they were for contemporaneous exchanges of new value, they were not on account of an antecedent debt, and Central States provided subsequent new value. The Bankruptcy Court disagreed and concluded that the debtor could avoid all of the payments made during the preference period. [109] The District Court for the Western District of Arkansas affirmed, and appeal to the Eighth Circuit followed.

Though the Eighth Circuit found that the payments to Central States were unavoidable, as they were for contemporaneous exchanges of new value, it undertook analysis of Central States' additional defenses, to include its New Value Exception. [110]

The court examined the language of section 547(c)(4)(B) and noted that in order for a creditor to use the New Value Exception, the value cannot be repaid by an otherwise unavoidable transfer. [111] As the payments made to Central States were "otherwise *avoidable*," Central States was not deprived of the New Value Exception based solely on the fact that it was repaid for the extensions of new value during the preference period. [112] The court further stated that though the District Court based its decision on the Eighth Circuit's decision in *Kroh Bros.*, "*Kroh Brothers* did not did not involve the timing question in this case-whether prepetition payments to a creditor that are avoided after bankruptcy commences should offset that creditor's subsequent new value." [113] Rather, the primary issue in *Kroh Bros.*, according to the court, was whether payments to a creditor during the preference period by another creditor could be counted in a new value analysis. [114] Finally, the court noted that it "agree[d] with courts that have construed our reference to 'remaining unpaid' as an adequate shorthand description of § 547(c)(4)(B)." [115] This distinction is dubious at best, as it does not account for the statement in *Kroh Bros.* that "section 547(c)(4) is not available to a creditor to the extent the creditor has received payment from the debtor for the goods or services constituting new value." [116] However, *Jones* is a clear indication that when the Eighth Circuit is next confronted with a defense under section 547(c)(4), it will most likely strike down the Remains Unpaid requirement, as it undertook its analysis, in dicta, "because the other issues presented on appeal may well have significance in future cases." [117]

IV. The Subsequent Advance Approach and the Weakening of *New York City Shoes*

A. The Fourth Circuit: JKJ Chevrolet

In 1991, several car dealerships filed consolidated Chapter 11 petitions in the Bankruptcy Court for the Bankruptcy Court for the Eastern District of Virginia [118] After the cases were converted to consolidated Chapter 7 cases, the court-appointed trustee commenced an adversary proceeding to recover $6,462,585.70 in preferential transfers made by the three debtors to Chrysler Credit Corp. ("Chrysler") under a floor financing arrangement. [119] At issue for purposes of Chrysler's asserted New Value Exception was $2,109,274.26 in transfers received from JKJ Chrysler Plymouth, Inc. ("JKJ CP") during the preference period. [120] Chrysler asserted that that because it continued to extend credit to JKJ CP after receiving the payments, it was entitled to the defense under section 547(c)(4). [121] The Bankruptcy Court held that because all of the new value that Chrysler extended was repaid, it was deprived of the New Value Exception. [122] The District Court for the Eastern District of Virginia stated that the Remains Unpaid approach was "inaccurate and unsupported by the language of the statute," [123] and certified the dispute to the Fourth Circuit for the proper interpretation of section 547(c)(4). [124]

The Fourth Circuit found that the District Court's interpretation of section 547(c)(4), that the proper inquiry must focus on whether the creditor received payment by an otherwise unavoidable transfer, was the correct one. [125] Even if a creditor were to receive full payment on account of any new value extended, under the plain terms of section 547(c)(4) the creditor retains the defense if such payments were otherwise unavoidable. [126]

B. The Fifth Circuit: Toyota of Jefferson

On May 30, 1989, Amelia Normond ("Normond") made a loan totaling $30,830.75 to the debtor, who repaid this amount on October 24, 1989. [127] On January 8, 1990, Normond made an additional loan in the amount of $82,993 to the debtor, who, again, repaid this amount between January 12 and January 19, 1990. [128] On February 22, 1990, Normond made a final loan to the debtor totaling $90,169, which was repaid between February 22 and February 24, 1990. [129] The debtor filed for Chapter 11 protection on September 28, 1990, and the case was converted to one under chapter 7 on October 23, 1991. [130] The trustee then filed an adversary proceeding against the defendant, Normand's testamentary executrix, alleging that the payments by the debtor to Normand were preferential and subject to avoidance. [131] The U.S. Magistrate Judge [132] rejected the defendant's

contemporaneous new value and ordinary course of business defenses, but found that only the debtor's final $90,169 payment could be avoided, as "[t]he same money was borrowed and repaid three times. To allow recovery of the total-$203,992.75-would be an unjust increase of the bankruptcy estate... Only the final and largest transfer... in the amount of $90,169.00, may be avoided." [133]

The trustee appealed the Magistrate Judge's decision, arguing that because the debtor repaid all of the funds that it had been loaned, the New Value Exception was inapplicable; the new value did not "remain unpaid." [134] The Fifth Circuit immediately noted that the trustee's interpretation of Code section 547(c)(4) was "contrary to the statute's plain language." [135] Absent the debtor's final $90,169 payment to Normond, each preferential payment detailed above was returned to the estate by an extension of new value that far exceeded the preceding payment. [136] In essence, neither the estate, nor its creditors were harmed in any discernible fashion due to the new value provided the debtor. [137] Though the court did not spend a great deal of its analysis on the plain language of Code section 547(c)(4)(B), it did state,

a more complete statement of the (c)(4) exception would be that a creditor who raises it has the burden of proving that (1) new value was extended after the preferential payment sought to be avoided, (2) the new value is not secured with an otherwise unavoidable security interest, and (3) the new value has not been repaid with an otherwise unavoidable transfer. [138]

Finally, though Normond was repaid for certain extensions of new value to the debtor, the payments were made with preferential transfers that were not otherwise unavoidable. [139] The Fifth Circuit once again strengthened the Subsequent Advance approach in 2006 when it stated that as long as the new value extended by the creditor meets the "*Toyota of Jefferson* Test" articulated above, it can be applied to any payment made by the debtor on account of any new value extended. [140]

C. The Ninth Circuit: IRFM

In April 1995, the Ninth Circuit noted that when a court focuses solely whether new value must remain unpaid, absurd results might follow. [141] The debtor in *IRFM*, a California retail grocery store, filed for Chapter 11 protection in July, 1988, and the case was converted to one under Chapter 7 shortly thereafter. [142] The court-appointed trustee sought to avoid $72,895.17 in preferential transfers from Ever-Fresh Food Company, Inc. ("Ever-Fresh"), arguing that though Ever-Fresh had provided subsequent new value to the debtor, such new value did not remain unpaid. [143] The Bankruptcy Court for the Central District of California rejected the trustee's argument, holding that new value need not remain unpaid, and allowed Ever-Fresh to offset the entire amount of payment is received during the preference period. [144] The District Court for the Central District of California affirmed, and appeal to the Ninth Circuit followed. [145]

The court noted that court are in general agreement that section 547(c)(4) contains two key elements: (1) the creditor must give unsecured new value to the debtor and (2) the new value must be given after the preferential transfer at issue. [146] However, a majority of courts have also adopted a shorthand approach that inserts a third element into section 547(c)(4): that the new value must remain unpaid. [147] Because an absurd result may follow if new value is required to remain unpaid, courts began to develop the emerging trend that requires a thorough analysis into the plain language of section 547(c)(4)(B). [148] According to this view, the primary focus should rest with the "otherwise unavoidable" language, and a creditor may assert the New Value Exception if the creditor is paid for the extension of new value and the trustee or debtor in possession may utilize other means to recover the payments at issue. Such an approach, the court stated, fully adheres to the plain language of the statute, while the Remains Unpaid approach does not. [149]

V. The Remains Unpaid approach, unlike the Subsequent Advance Approach, fails to Comport with the Plain Language of the Statute, and the Subsequent Advance Approach is the Most Doctrinally Sound Interpretation of Section 547(c)(4)

The Remains Unpaid dispute is primarily, if not solely, an issue of statutory construction and adherence to the clear and plain language of Code section 547(c)(4)(B). The majority of courts advancing the Remains Unpaid requirement have failed to carefully read section 547(c)(4)(B), leading to a misapplication of its intended purpose. [150] As noted above, courts requiring that new value remain unpaid have merely cited to previous authority when depriving creditors of the defense under section 547(c)(4), and have failed to undergo a thoughtful and thorough analysis of that section. There is no doubt that the statute is awkwardly worded and contains a double negative, but this merely makes the statute complex rather than ambiguous or nonsensical. [151] "A mathematical calculation may be exceedingly complex, yet at the end of the exercise there is but one right answer." [152]

To begin, Act section 60(c) explicitly stated that its application was restricted to "the amount of such new credit remaining unpaid." [153] However, that language was abandoned with the adoption of Code section 547(c)(4). Courts following the Remains Unpaid approach have inexplicable interposed the language of Act section 60(c) into the language of Code section 547(c)(4)(B) despite the drafters not having done so. As is well known, the cardinal canon of statutory interpretation requires that it be presumed "that a legislature says in a statute what it means and means in a statute what it says there." [154] In addition,
It is a well-established rule of statutory construction that "when a legislature amends a statute by omitting words, it is to be presumed that the legislature intended the statute to have a different meaning than that accorded it before the amendment. Even an earlier statute on the same subject which has expired or been repealed may be considered in construing an act of doubtful meaning." [155]

With this, all inquiries regarding the proper interpretation of section 547(c)(4) should cease, and that section must be applied with these canon's of construction in mind. While Act section 60(c), the precursor to Code section 547(c)(4), explicitly required that the invoices for which new value was asserted must remain unpaid, that language was omitted from section 547(c)(4). Therefore it must be presumed that in enacting Code section 547(c)(4), the legislature intended it to have a different interpretation and application that accorded its predecessor. However, as has been shown, several circuit courts have continued to insert the Remains Unpaid language.

Section 547(c)(4) "does not contain any language that *even suggests* that the new value rule contained therein is somehow limited to unpaid invoices." [156] Rather, section 547(c)(4) only deprives a creditor of its application if and to the extent that (1) new value is secured by an otherwise unavoidable security interest; or (2) after new value is advanced, the debtor makes a transfer to the creditor that is otherwise unavoidable. [157] If a transfer to a creditor on account of new value is preferential, then it is avoidable pursuant to section 547(b), and therefore is necessarily not unavoidable to satisfy the plain language of section 547(c)(4)(B). Under the plain language of the statute, if a debtor makes a transfer to a creditor on account of a previous extension of new value, and that transfer is itself preferential, section 547(c)(4)(B) remains satisfied, and the transferee is not deprived of its shield. On the contrary, if the transfers in question were made, among other circumstances, in the ordinary course of business or when the debtor was solvent, the transfers are "otherwise unavoidable" and a creditor is stripped of its defense under section 547(c)(4). [158]

"The dictum in the cases... to the effect that the new value must... go 'unpaid' is an inaccurate and confusing paraphrase of the clearly stated statutory purpose." [159] As was shown, those cases that advance the Remains Unpaid approach merely rely on the pronouncements of previous case law applying clause (c)(4) that was not based on clear statutory analysis. This has created an inaccurately and misguided application of the New Value Exception and one that is contrary to the plain language of the statute.

VI. Conclusion

The Remains Unpaid approach is a statutory relic that lingers from the language utilized in the Act in section 60(c), which did require that an invoice remain unpaid in order to be shielded from preference liability. With the enactment of the Code, this approach should have all but perished and made way for the Subsequent Advance approach, as it comports directly with the plain statutory language of Code section 547(c)(4), and is the correct way to apply the New Value Exception.

Footnotes

1 11 U.S.C.A. § 547(c)(4)(B).

2 11 U.S.C. § 60(a).

3 Lesser, Preferences under the Bankruptcy Act, 3 Fordham L. Rev 11, 17 (1916).

4 Lesser, 3 Fordham L. Rev at 17.

5 In re Hancock, 137 B.R. 835, 838, 22 Bankr. Ct. Dec. (CRR) 1157, Bankr. L. Rep. (CCH) P 74696 (Bankr. N.D. Okla. 1992).

6 11 U.S.C. § 60(b).

7 See, e.g., Kenneally v. First Nat. Bank of Anoka, 400 F.2d 838, 844 n.7 (8th Cir. 1968); 3 W. Collier on Bankruptcy ¶ 60.02 at 758-59 (14th ed. 1976).

8 Hancock, 137 B.R. at 838; see also In re Fulghum Const. Co., 7 B.R. 629, 640 (Bankr. M.D. Tenn. 1980), judgment aff'd, 14 B.R. 293, 32 U.C.C. Rep. Serv. 798 (M.D. Tenn. 1981).

9 In re MicroAge, Inc., 291 B.R. 503, 508 (B.A.P. 9th Cir. 2002); see also H.R.Rep. No. 95-595, at 354 (1977); S.Rep. No. 95-989, at 65 (1978), *509 U.S.Code Cong. & Admin.News 1978, pp. 5963, 6309-10, 5787, 5851.

10 Law of July 1, 1898, ch. 541, § 57g, 30 Stat. 560 as amended (repealed 1979).

11 C.f., In re Ford, 98 B.R. 669, 678, 19 Bankr. Ct. Dec. (CRR) 111 (Bankr. D. Vt. 1989).

12 Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 447, 448-49, 21 S. Ct. 906, 45 L. Ed. 1171 (1901); see also Kirksey, A Simplified Approach to Preference Calculations--Section 547(c)(4) of the Bankruptcy Reform Act of 1978 and the 'At Risk Rule, 61 Am. Bankr. L.J. 255, 259 (1987).

13 11 U.S.C. § 60(c).

14 Blakeley, Section 547(c)(4): Must New Value Remain Unpaid?, 23 Cal. Bankr. J. 201, 206 (1996).

15 Blakeley, 23 Cal. Bankr. J. at 206.

16 Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 Vand. L. Rev. 713, 783 (1985).

17 Countryman, 38 Vand. L. Rev. at 783.

18 Countryman, 38 Vand. L. Rev. at 783.

19 Jaquith v. Alden, 189 U.S. 78, 83, 23 S. Ct. 649, 47 L. Ed. 717 (1903).

20 Ch. 487, s 12(g), 32 Stat. 799 (1903).

21 See In re Thomas W. Garland, Inc., 19 B.R. 920, 923, 8 Bankr. Ct. Dec. (CRR) 1357, 6 Collier Bankr. Cas. 2d (MB) 1259 (Bankr. E.D. Mo. 1982).

22 Garland, Inc., 19 B.R. at 924.

23 Garland, Inc., 19 B.R. at 924.

24 11 U.S.C.A. § 547(b).

25 In re Kramer, 64 B.R. 531, 533 (B.A.P. 9th Cir. 1986).

26 See 11 U.S.C.A. § 547(c)(4).

27 11 U.S.C.A. § 547(c)(4).

28 11 U.S.C.A. § 547(c)(4)(B). This ignores section 547(c)(4)(A)'s requirement that the new value may not be secured by an otherwise unavoidable security interest. However, this prong of section 547(c)(4) is not at issue for purposes of this article.

29 Barnhill v. Johnson, 503 U.S. 393, 402, 112 S. Ct. 1386, 118 L. Ed. 2d 39, 22 Bankr. Ct. Dec. (CRR) 1218, 26 Collier Bankr. Cas. 2d (MB) 323, Bankr. L. Rep. (CCH) P 74501, 17 U.C.C. Rep. Serv. 2d 1 (1992).

30 See Steinfeld, Jr. & Casteel, Friedman's Improperly Adds Requirement that New-Value Analysis Closes at Petition Date, 31 ABI Journal 2, 41 (March 2012).

31 Steinfeld, Jr. & Casteel, 31 ABI Journal at 41.

32 Matter of Bishop, 17 B.R. 180, 8 Bankr. Ct. Dec. (CRR) 852, 5 Collier Bankr. Cas. 2d (MB) 1515 (Bankr. N.D. Ga. 1982).

33 See In re Check Reporting Services, Inc., 140 B.R. 425, 430, 22 Bankr. Ct. Dec. (CRR) 1568 (Bankr. W.D. Mich. 1992).

34 Bishop, 17 B.R. at 181.

35 Bishop, 17 B.R. at 181.

36 Bishop, 17 B.R. at 181.

37 Bishop, 17 B.R. at 181.

38 Bishop, 17 B.R. at 181.

39 Bishop, 17 B.R. at 183.

40 Bishop, 17 B.R. at 183.

41 Bishop, 17 B.R. at 183.

42 Bishop, 17 B.R. at 183.

43 Bishop, 17 B.R. at 183.

44 Bishop, 17 B.R. at 183.

45 Bishop, 17 B.R. at 184-85.

46 Bishop, 17 B.R. at 184-85; see also Check Reporting Services, 140 B.R. at 431.

47 Check Reporting Services, 140 B.R. at 431; see also 11 U.S.C.A. § 547(c)(4).

48 Check Reporting Services, 140 B.R. at 431 ("While the *Bishop* court's rejection of the net result rule was rooted in statutory language, its application of § 547(c)(4)(B) was not.").

49 In re New York City Shoes, Inc., 880 F.2d 679, 19 Bankr. Ct. Dec. (CRR) 1118, Bankr. L. Rep. (CCH) P 73030 (3d Cir. 1989).

50 New York City Shoes, 880 F.2d 679

51 New York City Shoes, 880 F.2d at 680.

52 New York City Shoes, 880 F.2d at 680.

53 New York City Shoes, 880 F.2d at 680.

54 New York City Shoes, 880 F.2d at 680.

55 New York City Shoes, 880 F.2d at 680.

56 New York City Shoes, 880 F.2d at 680, 681.

57 New York City Shoes, 880 F.2d at 681.

58 New York City Shoes, 880 F.2d at 680.

59 New York City Shoes, 880 F.2d at 680.

60 New York City Shoes, 880 F.2d at 679, 681-82.

61 New York City Shoes, 880 F.2d at 681.

62 New York City Shoes, 880 F.2d at 680.

63 See Falk, Section 547(c)(4): The Subsequent New Value Exception Defense To Preferences, 2004 Ann. Surv. of Bankr. Law, Part I, § Q (Norton, October 2004).

64 See In re Pillowtex Corp., 416 B.R. 123, 126-27, 52 Bankr. Ct. Dec. (CRR) 71 (Bankr. D. Del. 2009).

65 Pillowtex Corp., 416 B.R. at 126-27.

66 See Thorne & BatistaAre All Creditor "Animals" Equal? Treatment of New Value under § 547, XXII ABI Journal 3, 54, April 2004 ("Few courts have explained their apparent adoption of the majority rule. Instead,... the adopting courts have simply relied on dicta from prior cases.").

67 In re Almarc Mfg., Inc., 62 B.R. 684, 15 Collier Bankr. Cas. 2d (MB) 342, Bankr. L. Rep. (CCH) P 71260 (Bankr. N.D. Ill. 1986).

68 New York City Shoes, 880 F.2d at 680.

69 Almarc Mfg., 62 B.R. at 686.

70 In re American Intern. Airways, Inc., 56 B.R. 551 (Bankr. E.D. Pa. 1986).

71 American Intern. Airways, Inc., 56 B.R. at 554.

72 American Intern. Airways, Inc., 56 B.R. at 554.

73 American Intern. Airways, Inc., 56 B.R. at 554.

74 See In re White River Corp., 50 B.R. 403, 409 (Bankr. D. Colo. 1985), subsequently rev'd on other grounds , 799 F.2d 631, 14 Bankr. Ct. Dec. (CRR) 1341, 15 Collier Bankr. Cas. 2d (MB) 617, Bankr. L. Rep. (CCH) P 71462 (10th Cir. 1986); In re Quality Plastics, Inc., 41 B.R. 241, 242, 11 Collier Bankr. Cas. 2d (MB) 163, Bankr. L. Rep. (CCH) P 69981 (Bankr. W.D. Mich. 1984); In re Keydata Corp., 37 B.R. 324, 329, Bankr. L. Rep. (CCH) P 69749 (Bankr. D. Mass. 1983).

75 Matter of Prescott, 805 F.2d 719, Bankr. L. Rep. (CCH) P 71497 (7th Cir. 1986).

76 Prescott, 805 F.2d at 722.

77 Prescott, 805 F.2d at 722.

78 Prescott, 805 F.2d at 722.

79 Prescott, 805 F.2d at 722.

80 Prescott, 805 F.2d at 722.

81 Prescott, 805 F.2d at 723.

82 Prescott, 805 F.2d at 723.

83 Prescott, 805 F.2d at 728.

84 Prescott, 805 F.2d at 723.

85 In re Saco Local Development Corp., 30 B.R. 859, 10 Bankr. Ct. Dec. (CRR) 962 (Bankr. D. Me. 1983).

86 Prescott, 805 F.2d at 728 (quoting Saco Land Development, 30 B.R. at 867) (first emphasis added).

87 See Saco Land Development, 30 B.R. at 861-862.

88 Prescott, 805 F.2d at 728

89 Matter of Formed Tubes, Inc., 46 B.R. 645, 12 Bankr. Ct. Dec. (CRR) 960 (Bankr. E.D. Mich. 1985).

90 Formed Tubes, Inc., 46 B.R. at 646-47.

91 In re Jet Florida System, Inc., 841 F.2d 1082, Bankr. L. Rep. (CCH) P 72261 (11th Cir. 1988).

92 Jet Florida, 841 F.2d 1082.

93 Jet Florida, 841 F.2d 1082.

94 Jet Florida, 841 F.2d 1082.

95 Keydata, 37 B.R. at 328.

96 Fulghum Const., 7 B.R. at 640.

97 See Matter of Kroh Bros. Development Co., 930 F.2d 648, 652, 21 Bankr. Ct. Dec. (CRR) 982, 24 Collier Bankr. Cas. 2d (MB) 1757, Bankr. L. Rep. (CCH) P 73937, 16 U.C.C. Rep. Serv. 2d 408 (8th Cir. 1991).

98 See In re Jones Truck Lines, Inc., 130 F.3d 323, 329, 31 Bankr. Ct. Dec. (CRR) 973, 39 Collier Bankr. Cas. 2d (MB) 50, 21 Employee Benefits Cas. (BNA) 2162, Bankr. L. Rep. (CCH) P 77563 (8th Cir. 1997).

99 Kroh Bros., 930 F.2d at 649.

100 Kroh Bros., 930 F.2d at 649.

101 Kroh Bros., 930 F.2d at 649.

102 Kroh Bros., 930 F.2d at 650.

103 Kroh Bros., 930 F.2d at 651.

104 Kroh Bros., 930 F.2d at 652 (citing New York City Shoes, 880 F.2d at 680; Jet Florida, 841 F.2d at 1083; Prescott, 805 F.2d at 728, 731; In re Hancock-Nelson Mercantile Co., Inc., 122 B.R. 1006, 1016, Bankr. L. Rep. (CCH) P 73800 (Bankr. D. Minn. 1991); Ford, 98 B.R. at 681 (Bankr.D.Vt.1989); Almarc Mfg., 62 B.R. at 686.

105 Kroh Bros., 930 F.2d at 652.

106 Kroh Bros., 930 F.2d at 652.

107 Kroh Bros., 930 F.2d at 653.

108 Jones Truck Lines, 130 F.3d at 325-26.

109 Jones Truck Lines, 130 F.3d at at 326.

110 Jones Truck Lines, 130 F.3d at at 328. It is important to note that the "value" that the debtor received in *Jones* was the continued service of its employees after making payments to Central States for various employee benefits.

111 Jones Truck Lines, 130 F.3d at at 329.

112 Jones Truck Lines, 130 F.3d at at 329 (emphasis in original).

113 Jones Truck Lines, 130 F.3d at at 329

114 Jones Truck Lines, 130 F.3d at 329.

115 Jones Truck Lines, 130 F.3d at 329.

116 Kroh Bros., 930 F.2d at 653.

117 Jones Truck Lines, 130 F.3d at 328.

118 In re JKJ Chevrolet, Inc., 412 F.3d 545, 547, 44 Bankr. Ct. Dec. (CRR) 256, Bankr. L. Rep. (CCH) P 80312 (4th Cir. 2005) .

119 JKJ Chevrolet, 412 F.3d at 547.

120 JKJ Chevrolet, 412 F.3d at 551.

121 JKJ Chevrolet, 412 F.3d at 551.

122 JKJ Chevrolet, 412 F.3d at 551.

123 Chrysler Credit Corp. v. Hall, 312 B.R. 797, 804, 43 Bankr. Ct. Dec. (CRR) 125, 52 Collier Bankr. Cas. 2d (MB) 919 (E.D. Va. 2004).

124 JKJ Chevrolet, 412 F.3d at 552.

125 JKJ Chevrolet, 412 F.3d at 552.

126 JKJ Chevrolet, 412 F.3d at 552.

127 Matter of Toyota of Jefferson, Inc., 14 F.3d 1088, 1089, 25 Bankr. Ct. Dec. (CRR) 458, 30 Collier Bankr. Cas. 2d (MB) 1054, Bankr. L. Rep. (CCH) P 75720 (5th Cir. 1994).

128 Toyota of Jefferson, Inc., 14 F.3d at 1089.

129 Toyota of Jefferson, Inc., 14 F.3d at 1089.

130 Toyota of Jefferson, Inc., 14 F.3d at 1090.

131 Toyota of Jefferson, Inc., 14 F.3d at 1090.

132 See 28 U.S.C.A. § 636(c) (allowing a magistrate judge to conduct a trial and enter judgment in any civil matter referred by the district court upon the parties' consent).

133 Toyota of Jefferson, 14 F.3d at 1090.

134 Toyota of Jefferson, 14 F.3d at 1092.

135 Toyota of Jefferson, 14 F.3d at 1092.

136 Toyota of Jefferson, 14 F.3d at 1092.

137 Toyota of Jefferson, 14 F.3d at 1092.

138 Toyota of Jefferson, 14 F.3d at 1093 n.2.

139 Toyota of Jefferson, 14 F.3d at 1093.

140 In re SGSM Acquisition Co., LLC, 439 F.3d 233, 241, 45 Bankr. Ct. Dec. (CRR) 276, 55 Collier Bankr. Cas. 2d (MB) 715, Bankr. L. Rep. (CCH) P 80459 (5th Cir. 2006).

141 See In re IRFM, Inc., 52 F.3d 228, 231, 27 Bankr. Ct. Dec. (CRR) 77, 33 Collier Bankr. Cas. 2d (MB) 237, Bankr. L. Rep. (CCH) P 76452 (9th Cir. 1995).

142 IRFM, 52 F.3d at 229.

143 IRFM, 52 F.3d at 229.

144 IRFM, 52 F.3d at 230.

145 IRFM, 52 F.3d at 230.

146 IRFM, 52 F.3d at 231.

147 IRFM, 52 F.3d at 231.

148 IRFM, 52 F.3d at 231.

149 IRFM, 52 F.3d at 231.

150 Check Reporting Services, 140 B.R. at 430.

151 Check Reporting Services, 140 B.R. at 434.

152 Check Reporting Services, 140 B.R. at 434.

153 11 U.S.C.A. § 60c.

154 Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

155 In re Cavaciuti, 2009 WL 3617516 at *7 (Bankr. D. Conn. 2009) (quoting 73 Am.Jur.2d Statutes § 106 (2009)).

156 Check Reporting Services, 140 B.R. at 432 (emphasis added).

157 Check Reporting Services, 140 B.R. at 432.

158 Check Reporting Services, 140 B.R. at 432; see also Jones Truck Lines, 130 F.3d at 328. ("For Central States to need the § 547(c)(4) exception, we must assume... that § 547(c)(1) contemporaneous new value exception does not apply.").

159 Check Reporting Services, 140 B.R. at 432-33.

a1 The views expressed herein are solely those of the author. Mr. Powers is an associate attorney at Buchanan Ingersoll & Rooney, P.C.'s Buffalo, New York office, as well as a 2010 graduate of the LL.M. in Bankruptcy Program of St. John's University School of Law.

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