2014 EIGHTH CIRCUIT JUDICIAL CONFERENCE IN OMAHA, NEBRASKA

FRAUDULENT TRANSFERS AND BANKRUPTCY

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I. Eighth Circuit Cases on Fraudulent Transfers—Since 2000

A. Fraudulent Transfer Remedies

1. Recovery for the "Bankruptcy Estate." *Stalnaker v. DLC, Ltd.,* 376 F.3d 819 (8th Cir. 2004). The Chapter 7 Trustee filed a Complaint under Nebraska's Uniform Fraudulent transfer Act and § 544(b) to avoid certain transfers to insiders—the same person (the "Principal") owned both the debtor and the transferee entities. The Principal vigorously contested the matter for several years. Shortly before trial, the Principal settled all unsecured claims against the debtor and then asserted that the fraudulent transfer Complaint should be dismissed because the bankruptcy estate no longer contained any eligible creditor. The Bankruptcy Court rejected such argument, and the Eighth Circuit affirmed, ruling that (i) the "bankruptcy estate" is not synonymous with the concept of a pool of assets to be gathered for the sole benefit of unsecured creditors, and (ii) a debtor may not settle with unsecured creditors on the eve of trial and thereby thwart professionals in their attempt to collect fees for administering the bankruptcy estate.

2. Remedy for Lack of "Good Faith." *Doeling v. Grueneich,* 400 B.R. 688 (8th Cir. BAP 2009). The Bankruptcy Court found that Debtor transferred property having a value of $119,000 to his parents for a consideration of $65,000, that Debtor received less than a reasonably equivalent value, and that defendants failed to meet the burden of proving their good faith under § 550. The Eighth Circuit affirmed, explaining that good faith is determined on a case-by-case basis and that the transferee is subject to inquiry notice of debtor's possible insolvency. The Eight Circuit also ruled that a proper remedy for lack of good faith is a prohibition against defendants receiving the $65,000 consideration paid by them for the avoided transfer, because protections afforded to a "good faith" transferee under § 550(e) and under § 548(c) do not apply to a transferee who lacked good faith.

3. "Voluntary Transfer" of Exempt Property. *Sullivan v. Welsh (In re Lumbar)*, 457 B.R. 748 (8th Cir. BAP 2011). Shortly after their marriage in 1994, Debtor and her now-ex-husband ("the Ex") entered into a contract for deed to purchase a house from Debtor's parents with installment payments. In February 2006, the Ex filed for divorce, and litigation ensued over the house. A November 7, 2007 settlement gave (i) Debtor all marital property including the house, and (ii) the Ex an $85,000 payment from Debtor's father. On November 16, 2007, Debtor quit claimed her interest in the house to her parents, which transfer the Chapter 7 Trustee attempted to recover as a fraudulent transfer. The Minnesota Bankruptcy Court dismissed the case based upon its determination that exempt property in Minnesota cannot be fraudulently

transferred *per se* and did not discuss the elements of 11 U.S.C. § 548. The Eighth Circuit reversed and remanded because:

a. State law does not determine whether a transfer of a debtor's interest in property is fraudulent under § 548;

b. Potentially exempt property is part of the bankruptcy estate until the exemption is claimed and approved; and

c. When a trustee recovers fraudulently transferred property, an exemption may not be claimed in the recovered property if the debtor made a pre-petition "voluntary transfer" of such property (§ 522(g)).

For a similar ruling and analysis on the effect of a lack of "good faith," *see* discussion below of *Seaver v. New Buffalo Auto Sales, LLC (In re Hecker),* 459 B.R. 6 (8th Cir. BAP 2011).

B. Procedural and Evidence Issues

4. "Derivative Standing" to Pursue Chapter 5 Claims. *PW Enterprises, Inc. v. North Dakota Racing Commission (In re Racing Services, Inc.),* 540 F.3d 892 (8th Cir. 2008). The opinion begins with an explanation that, while the Bankruptcy Code expressly authorizes a trustee (or debtor-in-possession) to pursue avoidance claims (*e.g.,* preferences and fraudulent transfers), courts have allowed *creditors* to pursue such claims by exercising "derivative standing." The opinion contains extensive discussion on standards for determining whether such derivative standing is proper. The factual background of the case is this: five days before the statute of limitations was to expire, a creditor asked the Chapter 7 Trustee to file a complaint to avoid certain preferences and fraudulent transfers, but the Trustee declined; two days later, without bankruptcy court permission, the same creditor filed its own complaint to avoid such transfers; and two months later, the same creditor moved for leave to pursue these claims, *i.e.*, sought derivative standing. The Eighth Circuit ruled that, "derivative standing is available to a creditor to pursue avoidance actions when it shows that a Chapter 7 trustee (or debtor-in-possession in the case of Chapter 11) is 'unable or unwilling' to do so" (540 F.3d at 898). Elements a creditor must establish to obtain derivative standing are: "(1) it petitioned the trustee to bring the claims and the trustee refused; (2) its claims are colorable; (3) it sought permission from the bankruptcy court to initiate an adversary proceeding; and (4) the trustee unjustifiably refused to pursue the claims" (540 F.3d at 900). The Eighth Circuit explained that the first three elements are readily satisfied (*e.g.,* a claim is "colorable" if it would survive a motion to dismiss) and that the creditor's challenge is in proving the fourth element (unjustified refusal). The fourth element requires the bankruptcy court to perform a cost-benefit analysis focusing on such matters as probabilities of legal success and financial recovery, the proposed fee arrangement; and anticipated delays and expenses involved. Additionally, the creditor filed its complaint just-in-time to beat the statute of limitations deadline and thereafter sought permission to do so—the Eighth Circuit approved such action in the circumstances at hand but emphasized that the creditor could not prosecute its derivative complaint before receiving bankruptcy court permission.

5. Presumption of Insolvency from "Nonpayment of Debts." *Williams v. Marlar*, 267 F.3d 749 (8th Cir. 2001). Debtor transferred his interest in 712 acres of Arkansas farmland

to his son for ten dollars with love and admiration. In his bankruptcy case, the Trustee brought an action under § 544(b)(1) to avoid the transfer under Arkansas law—its Fraudulent Transfer Act. The Bankruptcy Court granted summary judgment in favor of the Trustee on grounds that the transfer occurred without adequate consideration and rendered Debtor insolvent. Appellant argued that summary judgment should not have been granted because of fact issues on insolvency. The Eighth Circuit disagreed because, (i) uncontroverted evidence demonstrated that Debtor was not paying his debts as they came due, and (ii) under Arkansas law, such evidence creates a presumption of insolvency. Notably, the Uniform Fraudulent Transfer Act ("UFTA") contains a presumption of insolvency from evidence showing that a debtor is not paying debts as they become due (see Section 2), and the proposed 2014 Amendments to the UFTA (see discussion below) elaborate on such presumption by adding the following provision: "The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than not." Note: the Bankruptcy Code contains no corresponding or similar presumption of insolvency under § 548.

C. Renunciation of Inheritance and Fraudulent Transfer Rules

6. Renunciation—Avoidability under UFTA & 11 U.S.C. § 544(b). *Blackwell v. Lurie* (*In re Popkin & Stern),* 223 F.3d 764 (8th Cir. 2000). This case was decided exclusively under state law and § 544(b)—11 U.S.C. § 548 was not involved (*see* footnotes 11 & 12). Edna Lurie died on December 26, 1991, leaving an estate that included certain real estate and a will identifying her two sons as intended beneficiaries, one of whom (Ronald) was a general partner of the Debtor. Shortly after her death, Ronald renounced any interest in his mother's real estate. The Chapter 11 Trustee brought an adversary proceeding to declare the purported renunciations of inheritance invalid and that Ronald's sons received Edna's real estate from Ronald through a fraudulent transfer under Missouri's UFTA. The Bankruptcy Court ruled in favor of the Trustee, declaring the renunciations to be a sham, an attempt to defraud creditors and a fraudulent transfer, and the BAP affirmed. The Eighth Circuit reversed, citing the following Nebraska rule of law as "the majority view" and the absence of any known Missouri law to the contrary:

> a renunciation under the applicable state probate code is not treated as a fraudulent transfer of assets under the UFTA, and creditors of the person making a renunciation cannot claim any rights to the renounced property in the absence of an express statutory provision to the contrary.

223 F.3d at 769 (quoting from *Essen v. Gilmore,* 259 Neb. 55, 607 N.W.2d 829 (2000)). The Eighth Circuit explained further that, under applicable state law, the effect of a properly-effectuated renunciation of inheritance is that (i) the property passed directly from Edna to Ron's sons by operation of law as if Ronald had predeceased Edna, and (ii) Ronald never had an interest in the property to transfer. Accordingly, the Eighth Circuit reversed and declared that Ronald's renounced interest in the real estate is not subject to the claims of Ronald's creditors.

7. Renunciation—Avoidability under 11 U.S.C. § 548. *Blackwell v. Lurie* (*In re Popkin & Stern),* 223 F.3d 764 (8th Cir. 2000), provides the following explanation in footnote 12:

> Although not discussed by the parties, we note that our decision in *Drye Family 1995 Trust v. United States*, 152 F.3d 892 (8th Cir.1998) (holding that state law consequences of disclaimer and relation-back doctrine are of no concern to operation of federal tax law), *aff'd*, 120 S.Ct. 474 (1999), is inapposite because the fraud statute at issue here is Missouri's UFTA, not a federal law. *Cf. In re Kloubec*, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) (applying *Drye* by analogy to federal bankruptcy fraud provision (11 U.S.C. 1208(d)) and concluding "artificially-created state [relation-back] doctrine cannot modify a substantive Federal statute"). We do not face the question of whether *Drye* carries over to the federal bankruptcy fraud context and save that issue for another day. *Compare Simpson*, 36 F.3d at 453 (Chapter 7 debtor's disclaimer of interest in testamentary disposition of property, executed one day before filing of petition, held not to be fraudulent transfer under 11 U.S.C. § 548(a); "under Texas law a disclaimer is not a fraudulent transfer under 11 U.S.C. 548"), and *Jones*, 925 F.2d at 211 (same principle), with *Lowe v. Brajkovic (In re Brajkovic)*, 151 B.R. 402, 405-11 (Bankr. W.D. Tex. 1993) (474.490's relation-back doctrine is legal fiction of state law that should not be imported in contravention of federal bankruptcy fraud provision 548).

So, the question appears to remain open in the Eighth Circuit as to whether a properly-effectuated renunciation of inheritance can be avoidable as a fraudulent transfer under 11 U.S.C. § 548.

D. Transfers for "Pre-Bankruptcy Planning"—Risks and Opportunities

1. <u>Fraudulent Transfer as a Bankruptcy Crime.</u> *United States v. Novak,* 217 F.3d 566 (8th Cir. 2000). A fraudulent transfer in anticipation of bankruptcy is a crime punishable by fine, imprisonment of not more than 5 years or both, under 18 U.S.C. § 152(7); it is a crime for a person "in contemplation of a case under title 11 . . . or with intent to defeat the provisions of title 11, [to] knowingly and fraudulently transfer or conceal any of his property" (217 F.3d at 574). The full text of 18 U.S.C. § 152(7) reads:

> A person who—
> …
> (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
> …
> shall be fined under this title, imprisoned not more than 5 years, or both.

2. <u>Exemptions and Discharge are at Risk for Intent to Hinder, Delay or Defraud.</u> *Addison v. Seaver (In re Addison)*, 540 F.3d 805 (8th Cir. 2008). The Debtor, while subject to a

$1.3 million guaranty claim, took a number of pre-petition steps to maximize his exemptions, such as putting $8,000 of non-exempt funds into Roth IRAs for himself and his spouse and making an $11,500 principal pre-payment on their home mortgage. The Minnesota Bankruptcy Court sustained the Trustee's objection to Debtor's exemption claims, based in part upon a finding that Debtor intended to hinder, delay or defraud creditors; whereupon, the Trustee filed a Complaint to deny discharge under § 727(a)(2) based on such finding—the Bankruptcy Court denied Debtor's discharge too. On appeal, the Eighth Circuit reversed both denials (of exemptions and of discharge) and identified a number of legal considerations in addressing the matter, including the following:

a. Regarding homestead exemption issues under § 522(o), the Eighth Circuit explained—(i) although § 522(o) uses the disjunctive "hinder, delay, or defraud," the Eighth Circuit "has been reluctant to deny a homestead exemption without a finding of intent to defraud" (540 F.3d at 812), (ii) it did not find evidence of fraud, and (iii) "the record here does not support the reduction of Addison's homestead exemption based on an intent to hinder or delay" (540 F.3d at 813).

b. Regarding the $11,500 principal pre-payment on home mortgage, the Eighth Circuit found no fraud involved, denied the objection, and explained: (i) "It is well settled that the mere conversion of non-exempt assets to exempt assets is not in itself fraudulent" (540 F.3d at 813), and (ii) such a conversion "on the eve of bankruptcy for the express purpose of placing that property beyond the reach of creditors, without more, will not deprive the debtor of the exemption" (*id.).*

c. The rules change when actual fraud is involved: (i) "where the debtor acts with actual intent to defraud creditors, his exemptions will be denied" (*id.*), but (ii) "<u>Before actual fraudulent intent can be found there must appear in evidence some facts or circumstances which are extrinsic to the mere facts of conversion of non-exempt assets into exempt and which are indicative of such fraudulent purpose</u>." (*id.*, underline added for emphasis). The Court explained, further

> [T]he bankruptcy court's finding that Addison converted his nonexempt property to exempt property with the intent "to keep value away from creditors" does not provide extrinsic evidence of fraud as such an intent is not automatically impermissible.

(540 F.3d at 814).

d. The Eighth Circuit in *Addison* then compared the case before it with other Eighth Circuit precedents as follows:

i. *Hanson v First Nat'l Bank,* 848 F.2d 866 (8th Cir. 1988). The Hanson claims of exemptions were allowed—they did not borrow money to place into exempt properties; they accounted for the cash they received from the sales; they had a preexisting homestead; and they did not obtain goods on credit, sell them, and then place the money into exempt property. Moreover, the Hansons, upon advice of counsel, sold their nonexempt property for its fair market value and used the proceeds to take advantage of some limited exemptions (540 F.3d at 815).

ii. *Sholdan v. Dietz,* 108 F.3d 886 (8th Cir. 1997) & *In re Sholdan*, 217 F.3d 1006 (8th Cir. 2000). The *Sholdan* debtor, a 90 year-old in an assisted living facility, sold substantially all of his nonexempt assets, used the proceeds to purchase a home with cash, and filed bankruptcy three months later. While in the new home he had nursing assistance but but returned to the assisted living facility to spend the night when nurses were not available. For thirteen years prior to the assisted living arrangement, he lived in an apartment. The Eighth Circuit in *Sholdan* found extrinsic evidence of fraud.

iii. *Norwest Bank Nebraska, NA v. Tveten,* 848 F.2d 871 (8th Cir. 1988). The debtor, a physician who owed creditors nearly $19 million, converted almost all of his nonexempt property (approximately $700,000) into exempt life insurance policies and annuities on the eve of bankruptcy. The Eighth Circuit denied his discharge, finding extrinsic evidence of fraud, based upon "the entire pattern of conduct" of attempting to convert almost his entire net worth into exempt assets while attempting to discharge a huge amount of debt—it seems that the Eighth Circuit believed that the debtor acted too aggressively [this old bankruptcy adage seems to have been applied: "Pigs get fed but hogs get slaughtered"].

e. Extrinsic evidence of fraud in creating exemptions on the eve of bankruptcy would involve such matters as, (i) "conduct intentionally designed to materially mislead or deceive creditors about the debtor's position or use of credit to buy exempt property," (ii) "converting a very great amount of property," and (iii) "conveyances for less than adequate consideration" (540 f.3d at 816).

f. Discharge issues are handled under the same analysis as exemption issues:

> [T]he same standard applies to determine whether a discharge should be denied or whether a transfer of nonexempt property to exempt property should be voided; both require proof that the debtor acted with the intent to hinder, delay, or defraud a creditor. … Because we reversed the bankruptcy court's determination of intent to hinder, delay, or defraud a creditor on the exemption issues, the denial of discharge based on the collateral estoppel effect of that finding must also be reversed.

540 F.3d at 818-19.

II. <u>Preserving Avoided Transfers for Bankruptcy Estate—11 U.S.C. § 551</u>

A. 11 U.S.C. § 551 provides:

> § 551. Automatic preservation of avoided transfer
>
> Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724 (a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

Legislative history on § 551 includes the following:

> SENATE REPORT NO. 95-989. This section is a change from present law. It specifies that any avoided transfer is automatically preserved for the benefit of the estate. Under current law, the court must determine whether or not the transfer should be preserved. The operation of the section is automatic, unlike current law, even though preservation may not benefit the estate in every instance. A preserved lien may be abandoned by the trustee under proposed 11 U.S.C. § 554 if the preservation does not benefit the estate. The section as a whole prevents junior lienors from improving their position at the expense of the estate when a senior lien is avoided.

B. Automatic Preservation for the Estate & Other Remedies.

Seaver v. New Buffalo Auto Sales, LLC (In re Hecker), 459 B.R. 6 (8th Cir. BAP 2011). This case involved a series of post-petition registrations of judgments creating judgment liens avoidable under § 549(a) of the Bankruptcy Code. Regarding appropriate remedies, the Eighth Circuit BAP explained the interrelationship between § 550 and § 551 as follows:

1. "When the bankruptcy court avoids a post-petition lien against property of the bankruptcy estate, the lien is <u>automatically preserved for the benefit of the bankruptcy estate</u>. 11 U.S.C. § 551. 459 B.R. at 14 (underline added for emphasis).

2. If simply preserving the lien will not restore the bankruptcy estate's pre-transfer financial condition, the trustee may recover the property transferred or its value pursuant to 11 U.S.C. § 550(a)." *Id.*

3. "In the absence of a good faith transferee, the bankruptcy estate recovers the transferred property as well as any improvement in the property transferred. . . . An improvement to the property may specifically include 'payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee.' 11 U.S.C. § 550(e)(2)(D)." *Id.* [For an example of an "improvement" / "good faith" case, *see Doeling v. Grueneich,* 400 B.R. 688 (8 th Cir. BAP 2009), discussed above.]

C. § 551 is Clear and Unambiguous.

Kaler v. Overboe (In re Arzt), 252 B.R. 138 (8th Cir. BAP 2000). Debtors granted two mortgages on their homestead to secure antecedent debts and filed their voluntary Chapter 7 petition a few days later. The Chapter 7 Trustee filed an adversary proceeding against the mortgage transferees to avoid the mortgages as preferences and to preserve the avoided mortgages on Debtors' homestead for the benefit of the bankruptcy estate under § 551. The Eighth Circuit ruled that § 551 is clear and unambiguous: "We find that the language in section 551 is clear and unambiguous, therefore, it leaves 'no room for clarification by pre-code practice." 252 B.R. at 142.

III. Avoiding OBLIGATIONS as Fraudulent Transfers

A. Legal Authorities for avoiding OBLIGATIONS.

1. Under Bankruptcy Law. 11 U.S.C. § 548(a)(1) provides (underlines added for emphasis):

> § 548. Fraudulent Transfers and <u>Obligations</u>.
>
> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or <u>any obligation (including any obligation to or for the benefit of an insider under an employment contract)</u> incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or <u>incurred such obligation</u> with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or <u>such obligation was incurred</u>, indebted; or
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or <u>obligation</u>; and
>
> (ii) (I) was insolvent on the date that such transfer was made or <u>such obligation was incurred</u>, or became insolvent as a result of such transfer or <u>obligation</u>;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or <u>incurred such obligation</u> to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

2. Under State Law. The Uniform Fraudulent Transfer Act is made operational in bankruptcy cases by 11 U.S.C. § 544(b), which provides as follows, subject to a charitable contributions exception (underline added for emphasis):

> [T]he trustee may avoid any transfer of an interest of the debtor in property <u>or any obligation incurred</u> by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Obligations are avoidable under the Uniform Fraudulent Transfer Act in the same or similar fashion as under § 548 of the Bankruptcy Code.

B. Remedies for OBLIGATIONS Avoided as Fraudulent Transfers under § 544 (via state fraudulent transfer laws) and/or under 11 U.S.C. § 548

1. Claim Reduction Remedy. When the object of a Chapter 5 avoidance action is to avoid an obligation as a fraudulent transfer, the preservation provisions of 11 U.S.C. § 551 generally do not apply. The avoidance of an obligation merely reduces the amount of debts against a bankruptcy estate, and nothing is preserved by avoidance of the obligation for the bankruptcy estate. *See, e.g., In re MacMenamin's Grill Ltd.,* 450 B.R. 414 (Bankr. S.D.N.Y. 2011); *U.S. Bank Nat'l Ass'n v. Verizon Communications Inc*., No. 10-1842, 2012 WL 3100778 (N.D. Tex. July 31, 2012); and *In re Asia Global Crossing, Ltd.,* 333 B.R. 199 (Bankr. S.D.N.Y. 2005). 5 Collier on Bankruptcy ¶ 551.02[1], at 551-5 (16th Ed.), emphasizes that "Section 551 preserves only 'transfers' and 'liens.'" This non-preservation rule for avoided obligations appears to be applicable under § 551 regarding the avoidance of general unsecured obligations as fraudulent transfers.

2. Academic Exercise. For the sake of an academic discussion and exercise, however, consider the following § 506(d) variation on the non-preservation rule for an avoided obligation:

a. <u>Academic Issue</u>: When an obligation secured by an in-the-money lien (*i.e.,* a lien on collateral having a value that exceeds the amount of debt it secures) is avoided as fraudulent under §§ 544 and/or 548, is anything preserved for the bankruptcy estate under § 551?

b. <u>Hypothetical Facts—Fraudulent Obligation</u>: Debtor grants to Creditor a first-priority lien in a valuable asset of the Debtor that secures a term loan and future-advances; debtor obtains a single future advance several years after the term loan is incurred; and the future advance is both (i) secured by the senior lien (an in-the-money lien), and (ii) an avoidable fraudulent obligation under §§ 544 and 548 of the Bankruptcy Code.

c. <u>Proposed Answer</u>: The lien securing the avoided obligation is preserved for the bankruptcy estate by "§ 506(d)" language in § 551.

d. Statutory Language:

i. The specific language in § 551 is this: "any lien void under section 506(d) of this title, is preserved for the benefit of the estate"; and

ii. The operative language in § 506(d) is this: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."

e. Explanation. "Section 506(d) avoids a lien to the extent that the claim to which it relates is disallowed." 4 Collier on Bankurptcy ¶ 506.06, at 506-132 (16th Ed.). A usual application of § 506(d) is for stripping off a valueless lien—*i.e.,* a lien on collateral having a value that is less-than the amount of debt it secures (s*ee, e.g., In re Davis*, 716 F.3d 331 (4th Cir. 2013)). However, it is difficult to see how the preservation of a valueless lien can be meaningful under the "§ 506(d)" provision of § 551. Moreover, the United States Supreme Court ruled that the phrase "allowed secure claim" in § 506(d):

i. does not have the same meaning as the same phrase in § 506(a) that bifurcates an under-secured claim into secured and unsecured claims; and

ii. refers to "any claim that is, first, allowed, and, second, secured." *Dewsnup v. Timm,* 502 U.S. 410, 415 & 417, 112 S.Ct. 773, 777 (1992).

So, what is the significance of having an explicit reference to "§ 506(d)" in § 551? The statutory language of §§ 506(d) & 551 seems to suggest that, if a debt claim secured by an in-the-money lien is disallowed on substantive grounds, then the "void" lien (under § 506(d)) is preserved for the bankruptcy estate under § 551. I've never seen any case law or treatise explaining or construing the § 506(d) language of § 551—but such statutory language should have an effect of some sort and not be redundant or surplusage.

Does the hypothetical future advance qualify as a "transfer" for § 554 preservation purposes, since it is secured by the existing first-priority lien? Perhaps. I suggest, however, that the preservation answer is this: (i) the obligation is avoided as fraudulent under §§ 544 & 548 and is, therefore, not an "allowed" claim, and (ii) the lien securing the avoided obligation is, therefore, preserved for the bankruptcy estate under the "§ 506(d)" language of § 551. The rationale is this: because the avoided obligation is not an "allowed secured claim" under § 506(d); the lien securing the avoided obligation "is void" under § 506(d) and, therefore, preserved for the benefit of the bankruptcy estate under the "506(d)" provision of § 551.

IV. *Executive Benefits Insurance Agency v. Arkison*—Recent Supreme Court Opinion on Bankruptcy Jurisdiction for Fraudulent Transfer Cases

On June 9, 2014, the United States Supreme Court issued its opinion in the bankruptcy case of *Executive Benefits Insurance Agency v. Arkison* that clarifies how a fraudulent transfer case should proceed in light of the Supreme Court's prior *Stern v. Marshall* opinion.

Procedurally, the Executive Benefits case originated with the Bankruptcy Court granting summary judgment for the Chapter 7 Trustee on a fraudulent transfer claim, the District Court sustaining the judgment on appeal, and the Circuit Court affirming. The Supreme Court affirmed on the basis of 28 U.S.C. § 157(c)(1), which authorizes the Bankruptcy Court to propose findings of fact and conclusions of law to the District Court for final order or judgment. The Supreme Court explained that, although the case did not arrive in the District Court in the "proposed findings of fact and conclusions of law" format specified in § 157(c)(1), the District Court still satisfied the essential requirements of § 157(c)(1) by reviewing de novo the Bankruptcy Court's summary judgment ruling—a legal question.

This new Supreme Court ruling should not come as a surprise because the Supreme Court in *Stern v. Marshall* spoke favorably of the "division of labor" specified in 28 U.S.C. § 157(c)(1). Nevertheless, the *Executive Benefits* case did little to resolve the following types of issues:

> i. What is the universe of claims that bankruptcy courts cannot adjudicate on their own and without the "proposed findings of fact and conclusions of law" process identified in § 157(c)(1)?
>
> ii. What is the extent of jurisdiction that can be obtained by "consent of all the parties" under § 157(c)(2)?
>
> iii. What qualifies as "consent" under § 157(c)(2)?
>
> iv. What are the "appropriate orders and judgments" that may be entered by "consent of all the parties" under § 157(c)(2)?

V. 2014 Amendments to the Uniform Fraudulent Transfer Act Proposed by the National Conference of Commissioners on Uniform State Laws.

The Conference's Summary of changes being proposed includes the following:

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

In 2014 the Uniform Law Commission approved a set of amendments to the Uniform Fraudulent Transfer Act, which retitled it the Uniform Voidable Transactions Act. The amendment project was instituted to address a small number of narrowly-defined issues, and was not a comprehensive revision. The principal features of the amendments are:

Choice of Law. The amendments add a new Section 10, which sets forth a choice of law rule for claims of the nature governed by the Act.

Evidentiary Matters. New Sections 4(c), 5(c), 8(g), and 8(h) add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the Act. Language in the former comments to Section 2 defining the effect of the presumption of insolvency created by Section 2(b) has been moved to the text of that provision, the better to assure its uniform application.

Deletion of the Special Definition of "Insolvency" for Partnerships. Section 2(c) of the original Act set forth a special definition of "insolvency" applicable to partnerships. The amendments delete original Section 2(c), with the result that the general definition of "insolvency" in Section 2(a) now applies to partnerships. One reason for this change is that original Section 2(c) gave a partnership full credit for the net worth of each of its general partners. That makes sense only if each general partner is liable for all debts of the partnership, but such is not the case under modern partnership statutes. A more fundamental reason is that the general definition of "insolvency" in Section 2(a) does not credit a non-partnership debtor with any part of the net worth of its guarantors. To the extent that a general partner is liable for the debts of the partnership, that liability is analogous to that of a guarantor. There is no good reason to define "insolvency" more generously for a partnership debtor than for a non-partnership debtor some of whose debts are guaranteed by contract.

Defenses. The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

(i) As originally written, Section 8(a) creates a complete defense to an action under Section 4(a)(1) (which renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good faith and for a reasonably equivalent value. The amendments add to Section 8(a) the further requirement that the reasonably equivalent value must be given the debtor.

(ii) To the extent that a transfer is avoidable under the Act, Section 8(b) creates a defense for a subsequent transferee (that is, a transferee other than the first transferee or a person for whose benefit the first transfer was made) that takes in good faith and for value, and for any subsequent transferee from such a person. As originally written, this defense literally applied only to an action for a money judgment. The amendments make clear that the defense also applies to recovery of or from the transferred property or its proceeds, by levy or otherwise. This clarification parallels Bankruptcy Code §§ 550(a), (b).

(iii) Section 8(e)(2) as originally written creates a defense to an action under Section 4(a)(2) or Section 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligations it secures (a so-called "strict foreclosure").

"Voidable." As amended, the Act consistently uses the word "voidable" to denote a transfer or obligation for which the Act provides a remedy. As originally written the Act sometimes inconsistently used "fraudulent." No change in meaning is intended.

VI. Mediation of Fraudulent Transfer Cases

Attorneys responsible for "regular litigation" (as opposed to "Bankruptcy litigation") in state courts and U.S. District Courts commonly incorporate mediation as a strategic part of the litigation plan for each case—*i.e.,* they plan to engage in at least one formal mediation session at an opportune time before trial of the case. For some reason, it seems that attorneys responsible for Bankruptcy litigation processes have a different propensity—they don't even think about mediation as a possibility for resolving their disputes, let alone incorporate a formal mediation session into their litigation plan.

Fraudulent transfer cases in Bankruptcy seem to be particularly well-suited to resolution via a mediation process—as would other avoidance cases under Chpater 5 of the Bankruptcy Code. However, a couple impediments seem to have, historically, minimized the use of mediation processes in fraudulent transfer cases and other Chapter 5 avoidance cases. The first is the propensity mentioned above of bankruptcy attorneys to ignore mediation possibilities. The second, however, is more profound: defendants in avoidance actions not involving wrongful-intent (*e.g.,* preference claims and constructive-fraud claims) tend to be offended by the avoidance lawsuit, committed to the righteousness of their conduct, disbelieving of their liability exposure on top of losses already suffered through the bankruptcy process, and resistant to any payment whatsoever on the avoidance claim. Such tendencies often impair or impede the effectiveness of a mediation effort.

Nevertheless, fraudulent transfer cases (along with other Chapter 5 avoidance cases) should be viewed by Bankruptcy attorneys as prime candidates for resolution through mediation, and Bankruptcy attorneys in such cases should incorporate mediation into their litigation strategy for each case of this type—just as if it were a "regular litigation" case.