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Developments in Commercial, Creditors' Rights, E-Commerce, and Bankruptcy Law of Interest to the Credit and Financial Professional

IN DEFENSE OF A PREFERENCE

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A fundamental responsibility of a credit executive is to assess a debtor's credit risk; and, based on the risk assessment, a credit executive determines appropriate credit terms. Should that customer file bankruptcy, the established credit terms, and whether the debtor honored those terms, are central issues as to whether you may prevail with an ordinary course of business defense.

Equally important, yet sometimes overlooked by creditors, is the burden to establish the payment history in the industry, not just the trade relationship between you and the debtor. The so-called industry standard prong of the ordinary course of business defense, or objective test, requires that you as the creditor show the industry payment history.

What evidence must you produce to establish the objective standard; and, how may an industry report assist you in establishing this prong of the defense? A bankruptcy court[1] recently considered the objective standard of the ordinary course of business and the kind of evidence a creditor must present to carry its burden with the objective standard of the ordinary course of business defense. An overview of the preference laws, as follows, is considered as well as the court's decision.

A. The Bankruptcy Preference Law

The Bankruptcy Code vests the debtor (or trustee if one is appointed) with far-reaching powers to avoid payments prior to a bankruptcy filing. The power to avoid preferential transfers is one of the most powerful weapons a trustee has. The Bankruptcy Code defines a preference expansively to include nearly every transfer by an insolvent debtor 90 days prior to bankruptcy.

The purpose of the preference provision is two-fold: First, unsecured creditors are discouraged from racing to the courthouse to dismember a debtor, thereby hastening its slide into bankruptcy. Second, a debtor is deterred from preferring certain creditors by requiring that a creditor who receives a greater payment than similarly situated unsecured creditors, disgorge the payment so that like creditors receive an equal distribution of the debtor's assets.

B. Beating the Preference Lawsuit: The Ordinary Course of Business Defense

Not all transfers made within the preference period may be recaptured. To protect those transactions that replace value to the bankruptcy estate previously transferred, the Bankruptcy Code carves out seven exceptions or defenses to the trustee's recovery powers. The most commonly asserted preference exception by a creditor is the ordinary course of business defense.

That defense protects payments, in all or part, received by an unsecured creditor within 90 days of the bankruptcy, from re-

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CONTRACT MODIFICATION - WAIVER OF THE NON-WAIVER CLAUSE

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As a vendor, you enter into a distribution agreement with a customer. The agreement contains a clause that any modification to the agreement must be in writing. Is it possible for you to waive, without a writing, the non-waiver clause? Under the recent case of *Wireless Distributors, Inc. v. Sprintcom, Inc.,* it may well be.

In *Wireless Distributors*, ABC Wireless entered into a telephone distribution agreement with Sprintcom, Inc., d/b/a Sprint PCS. The distribution agreement provided that any modification or waiver must be in writing and signed by both parties. Pursuant to the agreement, ABC Wireless agreed not to use independent contractors, franchises, dealers or other distributors to sell the products. However, Sprint PCS continued doing business with ABC Wireless with the knowledge that ABC Wireless sold the products to its dealers and subdealers not listed in the distribution agreement and that this was the predominate way in which ABC Wireless conducted its business.

Thereafter, ABC Wireless assigned its rights under the distribution agreement to Wireless Distributors. Prior to the assignment, Wireless Distributors's president met with Sprint PCS's account representative and informed that Wireless Distributors did not own any retail stores and would be selling the products to dealers and subdealers nationwide. Based on the conversation and

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PRESENTING POST-DATED CHECKS AFTER THE BANKRUPTCY FILING

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May a vendor present a post-dated check for payment after a debtor has filed bankruptcy? Although most credit professionals who are familiar with bankruptcy law and the automatic stay provision would likely respond "No," a bankruptcy court in the Western District of Missouri has stated otherwise. The bankruptcy court in *In re Thomas*[1] held that the presentment of post-dated checks upon a drawee bank for payment after the debtor filed a Chapter 7 petition was not a violation of the automatic stay. The court reasoned that since the holder of the check was entitled to enforce the negotiable instrument under applicable law there was not automatic stay violation.[2] The court went on to find that, although the transfer was not a violation of the automatic stay, the transfer of the funds from the debtor's checking account was subject to avoidance and recoverable from the creditor.[3]

In *In re Thomas* the debtor obtained four separate payday loans from the creditor, Money Mart. In exchange for cash, the debtor gave the creditor several post-dated checks. The debtor filed bankruptcy prior to the dates indicated on the post-dated checks. Moreover, the debtor's counsel and the court both notified the creditor of the bankruptcy filing. Notwithstanding, the creditor presented the post-dated checks to the debtor's bank which were honored almost one month after the bankruptcy filing. After the checks were cashed, the debtor asserted that the creditor violated the automatic stay by cashing the post-dated checks after the debtor filed bankruptcy. The debtor asserted that the creditor was subject to actual damages and punitive damages because of the willful violation of the automatic stay by the creditor.

Pursuant to Bankruptcy Code 11 U.S.C. § 362, a petition filed under § 301 operates as a stay, applicable to, among other things, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." Essentially, debt collection efforts must stop on the filing of the bankruptcy petition.

However, § 362(b) of the Bankruptcy Code contains several exceptions to the automatic stay, including § 362(b)(11) which provides that "[t]he filing of a petition under § 301…of this title…does not operate as a stay under subsection (a) of this section of *the presentment of a negotiable instrument* and the giving of notice of and protesting dishonor of such an instrument."[4] Given the plain language of the Bankruptcy Code, the court in *In re Thomas* was asked to determine whether the creditor was unaffected by the automatic stay because of the exception enumerated above.

The bankruptcy court noted that the post-dated checks were "negotiable instruments" and that "presentment" is defined as "a demand by or on behalf of a person entitled to enforce an instrument…"[5] The good news for the creditor professional is that the court found that the creditor was the holder of the instruments and was entitled to enforce the instruments under the exception to the automatic stay for such instruments. Although the checks were written prior to the petition filing, the drawee bank honored

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FROM THE PUBLISHER:

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Guest Column

PREFERENCE DEFENSE: EXPERT WITNESS V. EXPERT WITNESS

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"Just as purchasing a home is the average person's most common experience with the law, the average credit manager's most common brush with the bankruptcy process, aside from filing a proof of claim, is the Trustee's preference demand letter and ensuing litigation. Not only is the preference provision the most litigated of bankruptcy's avoiding powers, it can unwind a host of settled commercial transactions."[1]

The return of preferential payments under 11 U.S.C. §547 of the Bankruptcy Code is for the fair and equal treatment of all unsecured creditors. Reclamation of such payments is intended to redistribute the bankruptcy estate's assets equitably among all of the unsecured creditors.

It doesn't seem fair does it? As a practicing credit professional, you extended credit to a customer (debtor) on behalf of your employer. Your customer never disputed the account balance due your employer. Yet, after your customer files bankruptcy and you filed your proof of claim with the proper court, you are suddenly confronted by a demand letter from the Trustee, counsel for the Debtor In Possession (DIP) or counsel for an unsecured creditor's committee, seeking repayment of all monies received from your customer within the ninety (90) days [one year if payment was received from an insider] prior to the 'petition date.' This period is commonly known as the "preference period." The Bankruptcy Code presumes that a debtor is insolvent during the ninety-day period before the bankruptcy petition is filed. Therefore, all payments and transfers made to creditors by the debtor during that period are suspect.

"Preferential transfers under federal bankruptcy law are generally defined in 11 U.S.C. §547(b), although a number of other sections provide definitions and other rules used to determine how the elements are applied. Section 547 provides that the trustee may avoid (set aside) transfers of the debtor's interest in property:

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ESCHEATMENT: ARE YOU COMPLYING WITH YOUR STATE LAWS?

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Given the current fiscal health of many states, each state is considering ways to continue to pay for the services they provide. One answer more states are turning to is stepping up the enforcement of their escheatment laws, or more popularly known as unclaimed/abandoned property law. States where more businesses choose to incorporate, such as Delaware and California, will receive significant sums of unclaimed property that must be escheated to the state under their state laws. While the escheated property is merely being held for the rightful owner to claim it, the state may use a large portion of the property to help fund state services.

History of Escheatment

Modern escheatment law has its beginning under feudal law. The lord, upon termination of his tenant's tenure of land by reason of banishment, treason, forfeiture, or want of heirs, was presumed to resume his original title to the land by way of escheatment. All lands were deemed to be held by the subject either from his lord, or from the king as lord.

Escheatment today refers to the process by which property is transferred to the state for the rightful owner to claim it. State laws were enacted to prevent holders of unclaimed property from using the money and taking it into income. Escheatment laws provide states an opportunity to return money to the rightful owners and provide parties with a single source to report and claim the abandoned property. Every state has unclaimed property laws which declare money, property, and other assets to be abandoned after a period of time, usually three to five years, depending upon a state's laws.

During this abandonment period, or dormancy period, business organizations are generally required to attempt to return the unclaimed property to their rightful owners. Some states require the holder of the abandoned property to satisfy the states due diligence requirements before the property escheats. This involves the holder of the property giving notice to the rightful owner that they have property that may be escheated to the state. Some states, such as Delaware, have no due diligence requirement. Those who must escheat property to the state of Delaware may do so without giving notice to the rightful owner.

In California, by contract, the due diligence requirements require the holder of the unclaimed property to send by mail, to the address of record, a notice either:

1. Not less than two years, nor more than two and one-half years, after the date of last activity or communication with the owner with respect to the account; or

2. Not less than six nor more 12 months before the time the account becomes reportable to the California State Controller.

In the United States, state law almost exclusively governs unclaimed property law or the process of escheatment. Businesses and residents abandon over a billion dollars of tangible and intangible property annually. According to the Abandoned Property Division of Massachusetts, for the fiscal year end 2003, the state of Massachusetts collected over $234 million and approved over 38,000 claims and returned over $24 million to the citizens of the commonwealth. The increasing need for states to fund their state budgets has resulted in unclaimed property departments adding positions to enforce unclaimed property laws. Florida has a reported $1 billion in unclaimed property. There is, however, no statute of limitations. Parties have the right to claim property, at no cost to them, at any time, regardless of the amount.

Aggregate Amount

Most states distinguish how one reports escheatable property by setting an amount at which the reporting entity may report escheatable property in the aggregate. The aggregate amount sets a minimum dollar amount at which a reporting entity must give detailed information regarding the owner of the property to the state. If the unclaimed property has a value less than the aggregate amount, then each account may be reported together as one total. In California, which has set their aggregate amount at $50, a reporting company with 20 separate accounts, each with a $30

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PACA TRUSTS AND PERSONAL LIABILITY: THE VENDOR FINDS ANOTHER POCKET FOR PAYMENT?

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Can a seller of perishable goods, such as fruits and vegetables, get a priming lien on the goods sold, senior in priority to the financing of the customer's bank, until such seller is paid in full? Can an officer of a company or other person in charge of the disposition of purchased perishable goods be held personally liable when the seller of such goods is not paid? In other words, does the seller have a second pocket for payment, even without a personal guarantee?

Suppliers of perishable fruits and vegetables as well as vendors providing other products and services should be aware of the provisions of the Perishable Agricultural Commodities Act ("PACA"). As discussed below, PACA addresses these issues and (a) what sellers have to do to preserve PACA protections, (b) when payments must be tendered, what (c) conduct of the seller that causes a waiver of PACA protections, and (d) what buyers are covered by PACA.

Purpose of PACA

In 1930, Congress originally enacted PACA to provide protections to sellers of perishable agricultural commodities (produce sellers) in cases where a buyer failed to make payment as provided by contract. Congress believed that ordinary state court collection lawsuits, such as suits for recovery of damages, did not adequately protect sellers of perishable goods. Congress found that certain financing arrangements between dealers and brokers deprived suppliers of payment and disserved the public interest. The PACA amendments were designed to provide sellers with a self-help tool that would enable them to protect themselves against abnormal risk of losses resulting from the "slow-pay and no-pay practices by buyers or receivers of fruits and vegetables.

Statutory Trust Over Goods, Accounts Receivable and Proceeds

To protect produce sellers, Congress

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CASHING A CHECK MAY NOT BE ACCORD AND SATISFACTION

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Consider the following scenario. A customer disputes the amount of its delinquent account. They contend that $100,000 is owed; while you claim $125,000 is due. The customer mails a check for $110,000 in an attempt to resolve the dispute. The customer writes on the check "Payment In Full".

What are the consequences if you cash the check?

By cashing the check, do you waive the right to the balance you believe you are owed?

An opinion from the Court of Appeals for the Seventh Circuit[1], discusses the legal principle of "accord and satisfaction"; how a debtor and creditor may rewrite a contract to settle an account dispute without court intervention. The opinion reminds parties that an accord and satisfaction may be effected only where there is an honest dispute between the parties as to the amount due at the time payment was tendered. The debtor must make clear that issuing the check is intended to settle the outstanding claim between the parties and that the creditor, by cashing the check, accepts the settlement.

Accord And Satisfaction

…is an agreement to accept less than is legally due in order to discharge the matter. Once the accord and satisfaction is made and the amount is paid (even though it is less than owed) the debt is wiped out since the new agreement (accord) and the payment (satisfaction) replaces the original obligation.

Creditors in a practical sense often accept it if a customer is financially unstable and the creditor wants to receive all it can but recognize they will not get 100% satisfaction. "A bird in hand is worth two in the bush". However, it is sometimes used by debtors as a method to short pay or deceive a creditor by attempting to sneak a payment through the seller's receivable system for less than the amount owed.

Accord and satisfaction is generally defined as a substitute contract between a debtor and creditor for the settlement of a debt for a different amount than allegedly owed. Accord and satisfaction has evolved from common law principles that encourage parties to settle a disputed debt without judicial intervention.

Under the common law, if a creditor received a check for less than the full amount owed and that check contained a conspicuous notation that it was tendered as satisfaction of the entire debt, the creditor had two options:

(1) Reject the offer by returning or destroying the check; or

(2) Cash the check and accept the accord.

A creditor cannot avoid an accord and satisfaction by either: (a) reserving his or her rights by writing on the check; or, (b) by crossing out the full settlement language on the check.

The Uniform Commercial Code (UCC) codified the common law, with some variations to reflect modern business practices. Section 3-311 of the UCC specifically deals with accord and satisfaction in the commercial marketplace. Certain states, such as California, have overlapping accord and satisfaction provisions in their UCC and state statutes.

The "**accord**" is the agreement between parties to accept something different from, or less than, the amount one party contends is owed. The "**satisfaction**" is the execution of the agreement, which extinguishes the obligation.

Under the UCC, before an accord and satisfaction can be established, there must be a bona fide dispute between the parties. The test to determine if a bona fide dispute exists is whether the dispute was in good faith. Ordinarily, a party must prove that they acted in good faith in tendering an instrument as full satisfaction of a claim. Thus, there must be an honest dispute between the parties as to the amount due at the time payment was tendered. When a party is acting dishonestly as to the dispute, they will not meet the good faith test. For example, the customer notes on the check that "acceptance of this check is payment in full", but there is really no dispute creating an accord. The presumption then is that the customer is acting dishonestly in an attempt to not pay the full obligation to the creditor.

Before a check can create an accord and satisfaction, the party who presents the check must make clear -- by appropriate and conspicuous wording -- that cashing the check will be construed as settlement of all outstanding claims between the parties. Such notation can take the form of a debtor writing on the check, or accompanying voucher: "*Payment in full settlement of the stated accounts*" or "*Endorsement of the check constitutes a complete settlement of your claim*" in conspicuous letters.

Under the UCC, a party may avoid an accord and satisfaction by returning the money within ninety days. If a dispute exists, a party's bid to prevent a satisfaction by accepting the check but scratching out the restrictive endorsement and adding the words "without prejudice" *is of no avail*. Under the UCC, words of protest cannot change the legal effect of an accord and satisfaction once a check has been cashed.

The UCC provides for prevention of an accord and satisfaction mistakenly taking place. Sometimes checks are sent to an automated collection center or bank lock box and are cashed without inspection. A creditor may require that, to be effective, any attempted accord and satisfaction must be sent to a particular office.

Accord And Satisfaction In Action

The court in *McMahon Food Corp. v. Burger Dairy Co.* considered accord and satisfaction. A creditor regularly sold milk products to the debtor, a distributor of dairy products. The creditor invoiced the customer weekly. A dispute arose between the parties as to unauthorized deductions taken by the customer for product shipped, as well as unauthorized credits taken by the customer for empty milk cases returned. The parties met to resolve the dispute. They examined the invoices and payment practices. No agreement was reached as to the delinquent account; according to the creditor who continued to bill the customer the amount it claimed was in arrears. The debtor alleged that the creditor agreed to take less than the amount owed.

The debtor had attempted to resolve the account dispute by paying less than the amount contended by the creditor. The debtor remitted checks to the creditor dated June 17 and August 18. Tendered with the checks were vouchers stating, "Paid in full" through particular dates. The creditor, how-

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covery where the creditor establishes certain elements detailed below. The policy supporting the ordinary course of business defense is three-fold:

1) Protect customary transactions;

2) Encourage creditors to continue to extend credit to financially troubled debtors, possibly helping the debtor avoid bankruptcy; and

3) Discourage unusual collection practices during the debtor's financial demise. Pursuant to section 547(c)(2), the Bankruptcy Code provides that a transfer may not be avoided if the transfer was in payment of a debt incurred in the ordinary course of business.

1. The Subjective Inquiry: Payments Must Be In The Ordinary Course Of Business Between The Debtor And The Creditor

Courts often employ a "baseline of dealings" test to determine whether the transfer was made in the ordinary course of the business or financial affairs of the debtor and creditor. The baseline of dealings compares two time periods to determine the course of dealings between the debtor and creditor.

The first time period is the course of dealings prior to the 90-day preference period ("pre-insolvency period"). The second time period is the preference period that includes the date of the bankruptcy filing through the 90th day after the date of the bankruptcy petition.

If the course of dealings between the two periods is consistent, then the payments satisfy the subjective prong of the defense. However, if the course of dealing between the two periods is not consistent, then the payment is not made in the ordinary course of business and may be recovered as a preference.

In addition to the baseline of dealings test, courts review the "ordinariness" of the transfer between the debtor and creditor in relation to past practices. Issues that are considered include:

a. The length of time that the parties were engaged in the transaction at issue;

b. Whether the amount or form of the payment differed from past practices;

c. Whether the debtor or creditor engaged in any unusual collection or payment activity; and

d. Whether the creditor took advantage of the debtor's deteriorating financial condition. If any of these factors are present, then a court may find that the transfer does not qualify for an ordinary course of business defense.

2. The Objective Inquiry: Payments Must Be In The Ordinary Course Of Industry

The third element requires the vendor to show, by a preponderance of evidence, that the transaction occurred according to "ordinary business terms" for the industry. This is often referred to as the objective test and is the majority approach in evaluating the ordinary course of business defense. This is the prong that the Smith Road court considered.

Ordinary business terms for the industry are generally defined as the range of terms that encompass the practices in which businesses similar in some way to the creditor in question engage; and, that only dealings so unusual as to fall outside that range should be considered extraordinary and outside the scope of the industry. In addition, the Smith Road court considered the length of the parties' trade relationship. In the Smith Road case, the court observed that the vendor (creditor) is required to prove that the preferential transfers were objectively ordinary in relation to industry standards. Examining the industry standard requires:

1) "An identification of the relevant industry; and,

2) An objective examination of its standards and practices to determine if this transfer is within the outer boundaries of the industry."[2] The Smith Road court noted that the creditor's industry is the

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Executive Summary

- Creditors often receive a demand on behalf of a bankruptcy estate (from either a trustee, debtor in possession, or the creditor's committee attorney) to repay to the bankruptcy estate payments the creditor received from its customer within 90 days of the customer filing bankruptcy.

- The receipt of a preferential payment is not illegal. A debtor has a right to pay whichever creditor it may choose at whatever time it chooses. However, one of the primary objectives of the Bankruptcy Code is to ensure that all creditors of a class are treated alike. One of the ways that the Bankruptcy Code attempts to accomplish this objective is to recover from the creditor those payments that meet the statutory definition of a preference. The trustee can file suit to obtain a judgment against the creditor for the amount of the alleged preferential payment(s).

- The Bankruptcy Code provides for several defenses that may protect the creditor from returning the alleged preference. Pursuant to section 547(c)(2) of the Bankruptcy Code, a transfer may not be recaptured if the transfer was in payment of a debt incurred in the ordinary course of business. The ordinary course of business defense adheres to bankruptcy's general policy to discourage unusual collection practices during the debtor's financial demise.

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controlling industry under the objective standard.

Although the industry standard does not require a creditor to establish the existence of a uniform set of business terms, it does require evidence of a prevailing practice among similarly situated members of the industry facing the same or similar problems. To establish the industry standard, the creditor must usually rely on evidence that is external to the debtor and creditor. Generally, reliance on the testimony of the creditor attesting to the industry standard may be ineffective as it blurs the distinction between the objective and subjective elements to the ordinary course of business exception.

How may an industry report assist the vendor with meeting the objective prong of the ordinary course of business defense?

The Objective Inquiry and Industry Reports

The objective test requires that you, as the creditor, establish industry standards through empirical evidence generally in the form of industry payment history compiled by an independent, authoritative source. Data, such as that supplied by The Credit Research Foundation in the quarterly report, "National Summary of Domestic Trade Receivables" sets forth an index, by industry, based on information assembled from creditors. The data, which indexes six key metrics such as: Collection Effectiveness, Days Sales Outstanding, Best Possible DSO, Average Days Delinquent, Percent of Current AR and Delinquent AR over 91 Days Past Due, provides a valuable tool in establishing the criteria to meet the objective test to the "ordinary course" in a preference defense. The objective test, previously discussed, can be built based on a practical examination of the Best Possible Days Sales Outstanding index. A correlation can be made between BPDSO and terms based on the theory that BPDSO is calculated without the influence of past due receivables. Therefore, since there is no delinquency in the BPDSO figure, hypothetically all customers are paying according to terms. Consequently, examination of the BPDSO for any given industry will show a strong parallel to that industry's aggregated standard business terms.

An analysis of each quarter for the last 23 years illustrates that, across all industries, the median Best Possible DSO is 31.7 days and the average is 31.8 days. Arguably, the most common standard term across all industries is 30 days; therefore supporting the theory that the BPDSO for any given industry correlates to the standard industry terms.

Further utilizing the CRF data to support a specific industry, we can illustrate an example from the 1st quarter 2004 report for the apparel industry. The median BPDSO for that industry in the quarter January through March 2004 was 37.8 days. The upper quartile was 45.1 and the lower was 27.7 days. Using this data to establish a "standard" for a creditor in the apparel industry, it could be said that ordinary business terms range from 28 days to 45 days in the apparel industry.

The Smith Road Decision

In Smith Road, a creditor provided product to a debtor in the bedding manufacturing industry. The creditor established 10-day terms. The debtor filed Chapter 11 and brought a preference action to recover payments made to the creditor during the preference period. The creditor contended that the payments qualified as an ordinary course of business defense. The debtor moved for summary judgment.

In considering whether the creditor had an ordinary course of business defense, the court considered the objective prong of the standard. The court observed that the industry norm of the debtor's industry, bedding manufacturing, was payment 45-50 days from the invoice date based on the creditor's expert's report. The creditor had put the debtor on terms of 10 days three years prior to the bankruptcy filing. The debtor contended that as the creditor's 10 day terms vary from the industry norm of 30 days, the creditor did not have an ordinary course of business defense. The court observed that a sliding scale standard applies to the objective rule:

"The more cemented the pre-insolvency relationship between debtor and the creditor, the more the creditor will be allowed to vary its credit terms from the industry norm yet remain in the safe harbor of Section 547(c)(2). The likelihood of unfair overreaching by a creditor to the disadvantage of other creditors is reduced if the parties sustained the same relationship for a substantial time frame prior to the debtor's insolvency. After all, if at the starting point of the relationship insolvency was a distant prospect, a trade creditor does not unfairly overreach, impel insolvency, or inequitably advantage itself at other creditors' expense by tolerating more generous or commanding more stringent repayment schedules than its competitors."[3]

Even though the court held that issues existed as to whether the debtor's long relationship with the creditor, during which time the creditor, for three years prior to petition date had required the debtor to pay the creditor's invoices within 10 days of invoice date, was sufficient to permit the creditor to insist on payment within 10 days and still meet the objective standard, the debtor's motion for summary judgment was denied.

C. The Lesson for the Credit Professional

The court's opinion underscores that a credit professional should mount a vigorous preference defense when a preference demand letter or preference complaint is received. The court's opinion is instructive for a credit professional of the importance of supporting the objective prong of the ordinary course of business defense with independent evidence, such as the Credit Research Foundation's NSDTR or other industry data.

The court made a special point that the more established the trade relationship between the parties, the more that a creditor will be permitted to deviate from the industry standard and still qualify for the ordinary course of business exception. However, it is the creditor's burden to establish the industry payment standard. For the vendor to meet its burden with the objective standard, consider using an industry report to establish the common terms used by other trade creditors in the same industry facing similar problems.

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1 In re Smith Road Furniture, Inc., 304 B.R. 793 (Bankr. S.D. Ohio 2003)
2 Smith Road, 304 B.R. at 796
3 Smith Road, 304 B.R. at 797

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Guest Column

PREFERENCE DEFENSE: EXPERT WITNESS V. EXPERT WITNESS

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(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made – (A) on or within 90 days before the date the petition was filed; or (B) if the creditor was an insider, on or within one year before the date the petition was filed; and

(5) that enabled the creditor to receive more than the creditor would have received if – (A) the case were a case under Chapter 7 of the Bankruptcy Code; (B) the transfer had not been made; and (C) the creditor received payment of such debt to the extent provided by the provisions of Chapter 7.[2]

To recover a preference, the Trustee, DIP or Creditor's Committee must establish all five elements. In the event all five elements cannot be proven, a preference has not been established and no recovery can be made. However, if all five elements are established, creditors have a number of defenses that can be raised to eliminate any liability.

As maddening as it can be, §547 does not require proof of intent to receive a preference, notice of insolvency, fraud or other subjective elements.

Under the Bankruptcy Code, a Trustee, DIP or creditor's committee has two years from the date the bankruptcy petition was filed in which to commence a preference reclamation action. As many credit professionals have learned, their first notice of a preference action is receipt of a demand letter from a Trustee, DIP or creditor's committee. Such a demand generally includes the debtors name, your account number, totally dollar amount of payments made during the preference period or value of any goods returned, check numbers, check amounts and invoices being paid. The demand letter will also state the period to time in which the preference is to be repaid (grace period) before any litigation action is commenced.

At this point, the credit professional must make a decision: pay the amount of the demand; attempt to negotiate a settlement for a lesser amount, or hire outside counsel to mount a defense against the preference claim. Such a decision will most likely be driven by the dollar amount of the preference claim.

In the case of a preference claim for $100,000 (example amount only) or more, the credit professional, with proper management approval, will more than likely want to hire outside counsel for representation in a defense action. §547(c) sets forth the following exceptions to a preference claim: 1) transfer was made in a contemporaneous exchange of new value to the debtor; 2) transfer was made in the ordinary course of business; 3) transfer was a security interest in property securing new value to the debtor; 4) transfer was made before the creditor provided new value; 5) transfer was a security interest in inventory or a receivable, such as a floating lien, that did not impair other creditors; 6) the transfer was the fixing of a statutory lien; 7) transfer was of an alimony or child support payment; or 8) transfer was of property with an aggregate value less than $600.00.

Although an "ordinary course of business" defense is the most expensive and difficult defense to establish, the number of such cases appears to be on the increase. "Three elements make up the ordinary course of business defense:

- First, the debt must be incurred in the ordinary course of business or financial affairs of the debtor and vendor.
- Second, the transfer must have been made in the ordinary course of business or financial affairs of the debtor and vendor. This element is often referenced as the "subjective" test to the ordinary course of business defense.
- Third, the transfer must have been made according to ordinary course of business terms within the respective industry. This element is often referenced as the "objective" test of the ordinary course of business defense."[3]

This is where the important role of a Certified Expert Witness (CEW) comes into play. The National Association of Credit Management (NACM), through its qualification and testing program, has certified ninety-two (92) credit professionals as Certified Expert Witnesses. Individual credit professionals who meet all qualification and testing requirements are "certified" by NACM as experts in bankruptcy matters, including preference defense cases.

A CEW who is retained by counsel for the defense (creditor) will be challenged to meet the burden of proof of the three elements outlined above. The CEW's activities may include, but not be limited to the following: 1) reviewing the business transaction history between creditor and debtor; 2) reviewing payment history between creditor and debtor for the preference period as well as the ninety days prior to the preference period – including a review of payment terms, invoices and copies of checks received from the debtor, usually through a lockbox system [payments are deemed "received" when honored, not by check date or deposit date]; 3) creditor's credit policy and procedures – consistency in both theory and practice are important factors in establishing "ordinary course of business;" 4) all correspondence between creditor and debtor relating to business transactions – internal and external; 5) reports on the debtor generated by credit reporting agencies; 6) industry group statistics on payment history (DSO – Days Sales Outstanding) or other available industry statistics such as the National Summary of Domestic Trade Receivables compiled and reported by the Credit Research Foundation; 7) interview relevant creditor personnel who had frequent, ongoing contact with debtor, such as credit manager, collectors and sales personnel.

Following his or her review of the previously described documents and personnel interviews, the CEW will be required to render a report to engaging counsel. Such report may include, but not be limited to the following: 1) Statement of engagement; 2) Explanation of the scope of engagement; 3) CEW's CV outlining his or her business, professional and educational experience; 4) details of activities in carrying out the engagement; 5) copies of all pertinent documents (exhibits) supporting the report; 6) summary and opinion in support of ordinary course of business defense.

While fulfilling the terms of their engagement, the CEW should keep in mind

(Continued on page 8)

PRESENTING POST-DATED CHECKS AFTER THE BANKRUPTCY FILING

(Continued from page 2)

the checks in good faith, and the trustee did not attempt to avoid the transfer, the court noted that the debtor's checking account balance became property of the estate on the date of the petition, and that the checks were honored by the debtor's bank after that time. As such, after proper a demand, the creditor was required to turn over the funds, however, the creditor was not subject to punitive damages because there was no violation of the automatic stay.

When considering whether to accept a post-dated check, in addition to the bankruptcy provisions above, the credit professional should also consider the following from the Uniform Commercial Code.

Under section 4-401 of the Uniform Commercial Code, a post-dated check is permissible so long as the drawee has given the financial institution notice of the post-dated check and has described the post-dated check with "reasonable certainty." In order to assure that a post-dated check will not be cashed early, notice to the bank must be received by the financial institution so as to provide them with a reasonable opportunity to respond to the request. Otherwise, the bank may cash the check and hold the drawee responsible.

To recap, according to the court in *In re Thomas*, the creditor may present the post-dated check after the bankruptcy without risking violation of the automatic stay, however, the proceeds from the post-dated check may be subject to avoidance as a post-petition transfer of property of the estate. Additionally, a financial institution may honor a post-dated check early, without recourse, unless proper notice was given to the financial institution.

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1. 2004 WL 1354301 (Bankr. W.D.Mo. 2004).
2. *Id* at **2.
3. *Id*.at **5.
4. (emphasis added).
5. 2004 WL 1354301, **2 (Bankr. W.D. Mo. 2004).

Guest Column

PREFERENCE DEFENSE: EXPERT WITNESS V. EXPERT WITNESS

(**Continued from page 7**)

that the Trustee, DIP or Creditor's Committee counsels will more than likely be engaging their own "expert witnesses" to counter their works. Expert witnesses hired by the plaintiff may well be other CEWs. However, it has been this writer's experience that most such witnesses are public or certified public accountants. This is not to infer that an expert witness who is not "certified" is less competent to perform their examination. It has been this writer's experience however, that expert witnesses who are not professional credit practitioners may not be familiar with the nuances of the creditor-debtor relationship or industry in which they do business. The assignment of the plaintiff's (debtor) expert witness is similar to that of the defendant (creditor); develop support for their preference claim.

In anticipation of the preference claim proceeding to trial, both expert witnesses will be subject to deposition conducted by opposing counsel. The primary purpose of the deposition is to question the expert witness regarding his or her professional and educational background; scope of the engagement and fees to be paid; experience in bankruptcy matters; experience with specific types of customers and industries; methodology used in developing their report and opinion; documents reviewed, and individuals interviewed. Answers to questions posed by counsel conducting the deposition also give them insight into the viability of the opposition's defense. During the deposition, counsel accompanies the witness being deposed. However, while opposing counsel may object to questions "as to form," the witness is required to answer all questions to the best of his or her ability. At the end of the deposition, counsel representing the expert witness has the opportunity to ask questions to correct or clarify answers previously given by the witness. Although depositions are generally conducted in a 'non-adversarial' atmosphere, the expert witness being deposed must maintain their professional composure at all times, despite opposing counsel's attempts to upset or confuse them. Remember, it is opposing counsel's job to attempt to discredit you as an "expert witness" and while difficult at times, you should not take their efforts personally.

In the event the preference claim cannot be settled through negotiations between counsels it will be necessary for the opposing expert witnesses to appear in court to give sworn testimony. This is an opportunity for opposing counsels to expand on questions posed during the deposition, to review documents and other information contained in your report, and possibly to introduce additional evidence.

Creditors should never ignore a preference demand. Nor, should a preference demand be feared. Rather, it should be considered as an opportunity for the creditor to fully utilize the defenses available to them under the Bankruptcy Code. And, include a Certified Expert Witness on your defense team. It is just good strategy.

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1 ABI Preference Handbook, 2002-2003, Page iii

2 ABI Preference Handbook, 2002-2003, Page 5

3 "In Defense of a Preference," Business Credit, Sept., 2004, Pages 36-39

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ESCHEATMENT: ARE YOU COMPLYING WITH YOUR STATE LAWS?

(Continued from page 3)

credit balance, may report the $600 in the aggregate and turnover the cash value of the credit balance to the state without setting forth particular information for each account.

Conducting Business in Multiple States

As important as it is for each state to have some sovereignty, having 50 different sets of laws to follow when conducting business throughout the country is cumbersome. Which state must one escheat the unclaimed property to? In general, the first priority right to take and hold unclaimed property is the state shown on the holder's books as the state of last known address of the property owner. Many types of unclaimed property are anonymous, meaning the holder never obtained, or no longer retains, an address for the owner in its records.

In this case, or when the customer's last known address is in a foreign country, the state of domicile of the holder (which is the state of incorporation for a corporate holder) has second priority rights to receive and hold the property. The state of the holder's domicile also has second priority rights where the state of the owner's last known address does not assert a claim to the type of property in question.

Recent Developments: Electronic Stored Value Cards and Gift Certificates

An often overlooked and evolving category of potentially escheatable property is electronic stored value cards, a prepaid card or gift certificate issued by entities which are not used or are lost. These items which store money for future use present a dilemma if specific laws have not been passed to address them. Under New York, law for example, the question of whether or not the value of a telephone card is escheatable property is not easily answered.

Based upon New York law, will an issuer consider the funds which have been collected and which represent unused telephone time as "unclaimed" by an "owner" who is "entitled" to them? The telephone company may put an expiration date on the card or gift certificate. Or the purchaser may have agreed that after two years the right to the funds for a call or purchase is cut off, and ownership reverts to the issuer. While New York has not passed specific language to address this issue, the Comptroller has taken the position that inactivity for the statutory dormancy period triggers the statutory filing and transfer requirements for this type of unclaimed property.

If a person subsequently receives the services to which he is entitled to by using the phone card or gift certificate, the entity which already escheated the property to the state may file a claim for reimbursement. What if the issuer made clear that what was being sold was the opportunity to make telephone calls or purchase merchandise in the future? One interpretation is where no person has an enforceable entitlement to the funds, the state cannot act on their behalf in collecting the funds as abandoned property. The funds would be earned income to the issuer who makes the services available as promised.

Massachusetts passed a law clarifying how gift certificates will be treated in their state. The new law requires gift certificates issued in Massachusetts to not expire for seven years from the date of purchase. The new law enables businesses to keep the money of unredeemed gift certificates after seven years as long as the expiration is clearly marked on them. Gift certificates without expiration dates are redeemable to perpetuity.

Enforcement of Escheatment Laws

States have broad power to investigate and audit companies to ensure compliance with unclaimed property laws. California may punish any person who willfully fails to report unclaimed property to the state by a fine of $100 for each day such report is withheld, but not more than $10,000. California may punish any person who willfully refuses to pay or deliver escheated property to the Controller of California a required shall be punished by a fine not less than $5,000, but no more than $50,000. The State of California may also charge interest of 12% per annum on the property or value of the property that should have been reported, paid or delivered. Most states have similar laws and penalties for not reporting.

Escheatment and the Credit Professional

A vendor needs to monitor their accounts. Forming a compliance plan and a systematic process for tracking unclaimed property may be essential. Individual state laws vary, and a potential audit by the state, and the penalties for not reporting and delivering unclaimed property are all compelling reasons to closely manage unclaimed property

PACA TRUSTS AND PERSONAL LIABILITY: THE VENDOR FINDS ANOTHER POCKET FOR PAYMENT?

(Continued from page 3)

amended PACA to provide for the creation of a statutory trust in favor of sellers. Under PACA, a trust is created in favor of the seller by automatic operation of law from the moment a seller delivers perishable agricultural goods to a buyer. The trust is created in the purchased goods, the accounts receivable from the sale of such goods, or the cash proceeds from the sale. PACA requires that the goods, accounts receivable, and proceeds be held in trust by the buyer for the benefit of all unpaid sellers until the sellers have been paid in full.

Priority Over Secured Creditors

Because the trust is automatically created the moment the goods are conveyed, title to unpaid goods is not transferred to the buyer until the seller is paid in full. One Bankruptcy Court has held that when the buyer files for bankruptcy, the unpaid goods do not become part of the buyer's bankruptcy estate.

This trust in favor of the seller of unpaid goods is, in effect, superior to the interest of the buyer's secured lender. Thus, if the buyer's bank has a lien on the buyer's inventory (of commodities) to secure the bank's loan, the PACA trust over the unpaid goods will, nonetheless, be superior to, i.e. prime, the bank's lien. This means that in the event the bank ever forecloses on the Debtor's inventory, the foreclosure sale should not include that portion of the inventory that is subject to the seller's PACA trust. If the inventory that is subject to the PACA trust is sold, the proceeds must be paid to the seller, not the bank.

Preserving A PACA Trust

A supplier must (a) deliver written notice of the supplier's intent to preserve trust benefits to the "Debtor" (the buyer), and (b) to the United States Secretary of Agriculture. The notice must be given within thirty (30) calendar days of three events:

(i) expiration of the time prescribed in the contract by which payment must be made, or

(ii) expiration of such other time by which payment must be made, as the parties expressly agreed in writing before entering into the transaction; or

(iii) the seller has received notice that the check tendered in prompt payment has been dishonored.

Deadline to Pay Suppliers

In the absence of a written agreement, under PACA a supplier is required to be paid within ten (10) days. However, the parties may extend the time period for payment by written agreement up to thirty (30) days without impairing the supplier's PACA protections.

Waiver of PACA Protections If Payment Extends Beyond 30 Days

Any agreement extending the payment period beyond thirty days generally constitutes a waiver of rights under the PACA trust.

Personal Liability Under PACA

Courts have held that PACA imposes fiduciary duties on any individual who is in the position to control the perishable goods that are the subject of a PACA trust. These Courts hold that individuals who do not preserve these assets for the beneficiaries of the PACA trust (the sellers), have breached their fiduciary duties. Courts have found such individuals personally liable for these tortuous acts.

For example, an officer or controller of a company in charge of the proceeds from the sale of perishable goods could be found to be personally liable to pay a seller if the proceeds are not turned over to the seller.

A bankruptcy court recently considered whether owners of a business should be personally liable to a PACA claimant, and whether the PACA claimant's debt should not be discharged in the bankruptcy.

In *In re Steinberg*, the debtor and his wife owned and operated a distributor of perishable products. The distributor was given notice by PACA claimants that it was out of trust to these claimants. The PACA claimants were not paid. The owner of the distributorship filed personal bankruptcy. A PACA claimant sued the owner of company in the bankruptcy court for failing to account for the sale of their perishable product.

The court considered whether the owner was personally liable to the PACA claimant, adopting a two part test:

1. Whether the individual's involvement with the corporation was sufficient to establish legal responsibility; and

2. Whether the individual in failing to exercise any appreciable oversight of the corporations' management, breached a fiduciary duty owed to PACA creditors.

The supplier failed to show that the debtor's involvement with the distributor was sufficient to establish legal responsibility. The court found that others involved in the business remained responsible for customers, sales, purchasing and day-to-day operations. The court noted that the debtor's goal was to keep the distributor operating long enough for it to repay the PACA claimants. The distributor was not successful. Because of the lack of evidence of the debtor's direct participation in the day-to-day management and control of the distributor's operations, the court determined that the debtor should not be held individually liable for the debts of the corporation.

PACA and Personal Liability

While the PACA trust gives the producer a superpriority claim, there may be instances where the corporate debtor does not have sufficient assets to pay the supplier's claims in full. The court=s analysis in *In re Steinberg* is helpful for suppliers looking for a second pocket for payment in such a situation. Where an officer or owner of the business has direct participation in he day-to-day management and control of a business and the PACA claimant goes unpaid, consider whether the individual may be able to make the supplier whole.

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CASHING A CHECK MAY NOT BE ACCORD AND SATISFACTION

(*Continued from page 4*)

ever, contended it was still owed $58,000.

The debtor met with a new employee of the creditor. The debtor reported that the two parties had, in a previous meeting with a former employee reached agreement to settle the delinquent account. After holding the June 17 check for several months, the creditor cashed the check, crossing out the words "Payment in full" and "Full statement of account to follow." The creditor added the notation "Without prejudice." The creditor cashed the August 18 check in the ordinary course of its operations. The creditor's accounting manager contended that she did not notice the "Paid in full" notation on the voucher. The creditor demanded the balance due from the debtor.

The debtor sued the creditor for declaratory relief contending that it effected an accord and satisfaction of its debt by tendering the checks with the vouchers. The creditor counter-sued seeking payment for the balance owed. The trial court ruled in favor of the creditor, finding that the debtor owed the arrearages. The debtor appealed.

The General Rule

The court analyzed the checks. The debtor's contention was that notations on the checks implying full satisfaction of the debt were conspicuous. The debtor also contended that the creditor understood that the checks were meant to fully satisfy the debt. Accordingly, the debtor argued, there was an accord and satisfaction of the debts.

The court cited the general rule:

"Where [an] amount due is in dispute, and the debtor sends [a] check for less than the amount claimed, clearly expressing that it is sent as settlement in full . . . [the] cashing of the check is almost always held to be an acceptance of the offer operating as full satisfaction."[2]

Good Faith Dispute

A good faith dispute between the parties is a prerequisite to an accord and satisfaction. In other words, the party seeking to establish an accord and satisfaction by tendering a check must do so in good faith. Under the UCC good faith is defined as honesty in fact. The court observed the nature of a good faith dispute:

"The debtor's mere refusal to pay the full claim does not make it a disputed claim. Where the refusal is arbitrary and the debtor knows it has no basis, the payment of less than the full amount claimed does not operate as an accord and satisfaction even though it is tendered and received as such."[3]

The court found that in this case, there was no honest dispute between the debtor and the creditor when the debtor tendered a check to the creditor. A debtor's open refusal to pay a debt is not enough to establish a good faith dispute. The debtor must demonstrate a just basis for refusing to pay. The court ruled that the debtor had purposefully misled a new employee of the creditor who met with the debtor. At that meeting, the debtor represented that the account had been settled. Because the debtor was taking advantage of the creditor at the time of tendering payment, the debtor failed to meet the good faith requirement of the UCC and, thus, *there was no accord and satisfaction.*

Clearly Intend to Settle Dispute

Before a check can manifest an accord and satisfaction, the party who presents the check must make it clear that cashing the check is intended to settle all outstanding accounts between the parties. While the debtor's August 18 check bore the notation "Paid in full", the restrictive note was the last of several lines of information inscribed on the voucher accompanying the check. The voucher referenced three invoices. The court ruled that the debtor had failed to make it sufficiently clear that depositing the check would settle all outstanding disputes. It was not clear that the check was not intended merely to settle the invoices referenced in the voucher.

The creditor's accounting clerk stated that she did not see the "Paid in full" reference before the cashing the check. The court determined that even if the "Paid in full" language was clear, the accounting clerk for the creditor was never advised by the debtor of the significance of the phrase, "Paid in full." Nor was there evidence that the accounting clerk had responsibility to any accord and satisfaction that the creditor might reach with its debtors. The UCC is intended to prevent an accord and satisfaction from mistakenly taking place when a check is sent to a collection center or lock box and is cashed without inspection. *A debtor cannot unilaterally create an accord and satisfaction.*

Words of Protest

It should be noted that *had there been a good faith dispute*, the creditor's cashing of the check would have served as an accord and satisfaction:

"Assuming there was an accord, [creditor's] bid to prevent a satisfaction by accepting the check, but scratching out the restrictive endorsement and adding the words "without prejudice" before he cashed the check was to no avail, for under the revised version of the UCC, words of protest cannot change the legal effect of an accord and satisfaction."[4]

On the other hand, a check given in payment of an account and marked "In full of account," that does not, as a matter of fact pay the entire account, presents a different consequence. If a claim is liquidated *and there is no dispute as to the amount due*, a check for a lesser amount than the claim, even though marked "Payment in full of account", *does not settle the account and the creditor may keep the check and sue for the balance.* If however as stated above, there is a bona fide dispute as to the amount of the claim, and the same is not liquidated, a check sent and marked " In full of account" is payment in full and the creditor must either return the check and sue for the amount claimed or accept the check in complete payment. Whether a bona fide dispute exists can be a matter of dispute in itself and obviously a debtor wishing to pay a lesser sum can very easily make such a claim.

Lesson Learned

Before a check can create an accord and satisfaction, the party who presents the check must make clear -- by appropriate and conspicuous wording -- that cashing the check will be construed as settlement of all outstanding claims between the parties; and a bona fide dispute must exist. Such notation can take the form of a debtor writing on the check, or accompanying voucher: "Payment in full settlement of the stated accounts" or "Endorsement of the check constitutes a complete settlement of your claim" in conspicuous letters.

The UCC provides for prevention of an accord and satisfaction mistakenly taking

(*Continued on page 12*)

CASHING A CHECK MAY NOT BE ACCORD AND SATISFACTION

(*Continued from page 11*)

place. Sometimes checks are sent to an automated collection center and are cashed without inspection. A creditor may require that, to be effective, any attempted accord and satisfaction must be sent to a particular office. Vendors should be mindful that certain states might have adopted variations of the UCC that would impact the outcome of such cases.

One last point

What about checks that are received by a creditor after a discount period has passed with the discount deducted and the check marked "In full payment of account"? Can such checks be properly deposited and claim made for cash discount? The answer is that they obviously fall under the above-mentioned guidelines and a claim can be made for the cash discount so deducted in cases where there is no dispute as to the terms. The practical effect of the matter is, however, that each single transaction represents, in most instances of this type, a comparatively small sum, for which it would be impractical, either on account of expense or distance, to sue, and the chances are that a debtor accustomed to "stealing" discounts would be even less likely to pay such discount after they had in their possession a cancelled check voucher marked "In full of account".

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1. *McMahon Food Corp. v. Burger Dairy Co.*, 103 F.3d 1307(7th Cir. 1997)
2. *McMahon Food Corp. v. Burger Dairy Co.*, 103 F.3d 1315.
3. *McMahon Food Corp. v. Burger Dairy Co.*, 103 F.3d 1317.
4. *McMahon Food Corp. v. Burger Dairy Co.*, 103 F.3d 13012.

CONTRACT MODIFICATION - WAIVER OF THE NON-WAIVER CLAUSE

(*Continued from page 1*)

visit, Sprint PCS knew and understood, prior to the assignment, that Wireless Distributors would be selling the products to its dealers and their subdealers nationwide and not directly through any retail stores. Sprint PCS consented to the assignment and did business with Wireless Distributors pursuant to the terms of the distribution agreement.

Later in the year, Sprint PCS amended the compensation structure under the distribution agreement. Wireless Distributors agreed to the amendment and the compensation addendum and agreed to continue to do business with Sprint PCS. Issues between the parties arose over the changes to the compensation structure and Sprint PCS terminated the distribution agreement in accordance with its terms. At no time prior to the termination of the distribution agreement did Sprint PCS claim that Wireless Distributors breached the distribution agreement by selling the products to its dealers and their subdealers.

Wireless Distributors filed suit against Sprint PCS alleging breach of contract and fraudulent misrepresentation. The distribution agreement was governed by Kansas law. Under Kansas law, when a contract is complete, unambiguous, and free from uncertainty, any parol evidence of prior or contemporaneous agreements or understandings tending to vary the terms of the contract evidenced by the writing is not admissible. Evidence of prior agreements, course of dealing and course of performance can be used to explain or supplement existing terms; however, they cannot be used to contradict the terms of a fully integrated written contract.

Wireless Distributors argued that Sprint PCS waived any rights it had relating to sale of the products through dealers or other distributors; thus, the parol-evidence rule is not applicable. Under Kansas law, a contract or portion of a contract may be modified or waived. The Kansas Code, which adopts the Uniform Commercial Code, provides that a signed agreement which excludes modification unless by a signed writing cannot be otherwise modified. However, if an attempt at modification is not in writing, it can still operate as a waiver. Waiver in contract law implies that a party has voluntarily and intentionally renounced or given up a known right, or has caused or done some positive act or positive inaction which is inconsistent with the contractual right.

Wireless Distributors conceded that the distribution agreement provided that any modification or waiver must be in writing and signed by both parties, and that the distribution agreement was not modified or waived in writing by the parties. The court found that the allegations that Sprint PCS continued doing business with Wireless Distributors with the knowledge that Wireless Distributors sold the products to its dealers and subdealers and that this was the predominate way in which Wireless Distributors conducted its business supported a finding that Sprint PCS not only waived the exclusive dealing requirement but also the provisions requiring that any waiver be in writing.

RECENT ENGAGEMENTS AND ACTIVITIES

Blakeley & Blakeley LLP Recent Engagements and Activities for Fall 2004

Blakeley & Blakeley continues to represent its vendor clients in the areas of creditors' rights, bankruptcy, commercial litigation and collection, preference defense, credit documentation, and out-of-court workouts.

◊ Scott spoke to the ***NACM's Book Publishers Industry Group*** regarding **What's Hot with Payment by Check.**

◊ Scott spoke to ***Manufacturing Clearing House's Industry Group*** in Chicago regarding **Recent Developments with Payment by Check.**

◊ Scott spoke to the ***JPMA Industry Group*** in Las Vegas regarding **The Opportunities and Risks of Accepting Payment by Credit Card**

◊ Scott spoke to ***NACM/Chicago-Midwest's Industry Group*** in Phoenix regarding **What's Hot with Payment by Check**.

◊ Scott spoke to ***NACM/Mid-Atlantic's Industry Group*** in Oakland regarding **Creditors' Rights and Bankruptcy.**

◊ Scott spoke to ***NACM/Ohio's Industry Group*** in Denver regarding **2004 Roundup of Credit Topics.**

◊ Scott spoke to ***NACM/Chicago-Midwest's Industry Group*** regarding **Credit Enhancements**.

◊ Scott spoke to ***NACM National*** regarding **Escheatment.**

◊ Scott spoke to the ***CMA Business Credit Services' Computer Industry Group*** regarding the **Sarbanes Oxley Act.**

◊ Scott spoke to ***NACM/Kansas City's Industry Group*** regarding **Bankruptcy Preferences and Escheatment**.

◊ Scott spoke at the ***Midwest Credit Conference*** in St. Louis regarding **Making Safer Credit Decisions and the Electronic Department**.

◊ Scott spoke at the ***What's Working in Credit teleconference*** regarding **Bankruptcy and the Credit Professional**.

◊ Scott spoke at the ***National Credit Exchange's Industry Group*** meeting regarding the **Sarbanes Oxley Act.**

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