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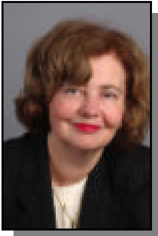
THE TRADE VENDOR QUARTERLY

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

ESCHEATMENT IN THE POST-SEPT. 11 ENVIRONMENT: A PROBLEM FOR THE CREDIT EXECUTIVE?



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The recent anniversary of Sept. 11 reminds us that states are still struggling to meet the new financial burdens that the Sept. 11 terrorist acts created. States are incurring enormous financial costs for homeland security. In light of this, states are looking for untapped revenue sources. The *Chicago Tribune* recently reported that New York state's annual budget now includes $408 million line item for escheatment, or abandoned property. Other states are looking at abandoned property as a source of substantial revenue to offset rising costs post-Sept. 11.

Given this environment, how does a state's focus in abandoned property as revenue source affect the credit professional? A credit professional often manages a portfolio of hundreds of commercial accounts, with credit extensions that can be in the millions of dollars. With an active trade relationship, it is not uncommon for the credit professional to have accounts with a surplus or credit balance. On occasion the corporate customer may never claim the credit balance.

Are escheatment laws, or as commonly referred unclaimed property, a problem for the credit executive, especially post-Sept. 11 where states are seeking untapped revenue sources to help offset the expense of homeland security? What is considered unclaimed property that may fall under the escheat laws? Does a credit balance qualify? What may be the consequence if the vendor declares the unclaimed property as income and applies it to the bottom line, as the vendor views it as a windfall to offset losses from unrelated delinquent accounts?

Post-Sept. 11 and the States Efforts to Find Untapped Revenue

The post-Sept. 11 costs to state governments are estimated in the billions. For example, New York property claims associated with the 11th attacks are expected to reach up to 16reach up to $16 billion. Local governments and cities report that municipal revenues have been affected by the Sept. 11 attacks, and many are finding it difficult to meet budgets, in part, because of a decrease in tax collection and an increase in expenses to cover security. In this setting, states are looking for sources of revenue, and abandoned property, as the press reports, may be that untapped source for states. Escheatment revenue is an appealing revenue source from the states' view as it does not require raising taxes. States are more aggressive in their escheat efforts. Several private firms are working on behalf of states on a contingency fee basis to lo-

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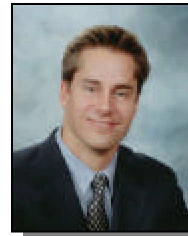
CONSIDERING THE INDUSTRY STANDARD OF THE ORDINARY COURSE OF BUSINESS PREFERENCE DEFENSE



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Thousands of vendors around the country find themselves, like ABX Enterprises, Inc. (ABX), defending preference actions brought by debtors, trustees and plan administrators in Delaware. Some vendors are in the unfortunate position of having the ordinary course of business exception as their sole defense. As ABX and the Debtors' plan administrator have found, to successfully assert or defeat an ordinary course defense in a motion for summary judgment, a party must introduce evidence of those practices in which firms generally similar to the debtor and defendant engage.

In *In re APS Holding Corporation*, 282 B.R. 795 (3rd Cir. 2002), the U.S. Bankruptcy Court denied cross-motions for summary judgment on APX's ordinary course of business defense. The Court found that the parties' failed to introduce evidence of the industry standard. The Court also ruled that ambiguities existed as to whether the alleged preferential transfers were made in the ordinary course of business between APX and the Debtors.

The Plan Administrator introduced the Debtors' employee's testimony that the Debtors customarily paid

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CALCULATING THE PREFERENCE PERIOD: EFFECTIVE DATE OF THE TRANSFER AND THE INAPPLICABILITY OF FEDERAL RULE OF BANKRUPTCY PROCEDURE 9006(a) TO THE TRUSTEE'S AVOIDANCE POWERS

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A threshold issue to preference litigation is the determination of whether a transfer occurred within the applicable preference period. The Bankruptcy Code empowers a trustee to avoid any transfer in interest made on or within 90 days of the filing of the bankruptcy petition, or alternatively, within one-year if the transfer is made to an insider. *See* Title 11 U.S.C. § 547(b)(4)(the "Bankruptcy Code"). Accordingly, determining the effective date of the transfer and calculation of the preference period is essential in preference litigation.

Trustee's Avoidance Powers

Pursuant to § 547(b), a trustee may avoid any transfer of interest of the debtor if the transfer meets certain requirements enumerated in the Bankruptcy Code. Generally, a transfer is preferential if made to a creditor on account of antecedent debt while the debtor was insolvent. *See* 11 U.S.C. § 547(b)(1-3). In addition, the transfer must occur during the applicable preference period and permit a creditor to receive more than it is entitled to under a hypothetical liquidation. *See* 11 U.S.C. § 547(b)(4-5). The Bankruptcy Code's definition of a transfer is expansive and encompasses "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property." *See Barnhill v. Johnson*, 503 U.S. 393, 400 (1992); 11 U.S.C. § 101(54).

Method of the Transfer and the Effective Date

The method of transfer determines the effective date of the transfer. Generally, the effective date occurs when the transferee receives an interest in the property through possession or control. For example, the effective date of a transfer by cashier's check or wire transfer is the date that the transferee receives the property. *See In re Lee*, 179 B.R. 149, 159 (9th Cir. 1995)(reasoning that a cashier's check is accepted upon issuance and that a transferee may still enforce its rights if the cashier's check is lost or destroyed); *In re Barefoot*, 952 F.2d 795 (4th Cir. 1991)(concluding that the receipt of the wire transfer was the effective date).

However, for the limited purpose of § 547(b), if the transfer occurs through an ordinary check, then the date of honor is the effective date of the transfer. *See Barnhill*, 503 U.S. at 400. The *Barnhill* Court reasoned that a myriad of events can intervene between the delivery and presentment of a check including the closing of an account, acquisition of liens and garnishments, or mistaken refusal to honor a check. *See Id.* at 399. However, the *Barnhill* decision may not apply to defenses applicable under § 547(c), and therefore, the decision dubiously creates different meanings to the prosecution and defenses in preference litigation. *See Barnhill*, 503 U.S. at 401 (discussing legislative history suggesting that the date of delivery rule, and not the date of honor rule, is controlling for the

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FROM THE PUBLISHER:

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OPERATING LEASES: SKEWING FINANCIAL ANALYSIS

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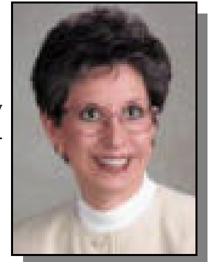

Question: Why would a bond rating company rate a firm as highly leveraged when their debt to equity ratio does not appear high?

Answer: The total debt to equity ratio does not take into account operating leases, which are lease commitments that are not shown on the balance sheet.

Key ratios used in conventional financial analysis may be inaccurate for a company that has large operating leases. In the U.S., a lease that meets certain accounting rules is considered an operating lease. Operating leases are not capitalized as an asset and liability on the balance sheet, but rather, are shown just as an expense on the income statement. Information about operating leases can be found in the footnotes and footnotes are only in audited financial statements.

I was recently involved with the analysis of a Financial statement for a retailer who extensively utilized operating leases. This company had a very low debt to equity ratio which might lead one to conclude their leverage was low. However, the bond rating company considered this account very highly leveraged. After calling the analyst at the bond rating company I found that, as a conservative analysis of risk, the bond rating company revised leverage calculations to incorporate the risk from operating leases.

Here are some points to be aware of when analyzing a customer with large operating leases:

- The assets financed and the debt involved with an operating lease are not included in the balance sheet.
- Future amounts owed as lease commitments are recorded only as a footnote to audited financial statements.
- Since operating leases are not capitalized, the debt to net worth of your customer will be understated when doing conventional ratio analysis.
- A company with large operating

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BANKS NOT LIABLE WHEN CHECK RETURNED 'NSF' EVEN AFTER CONFIRMING FUNDS ARE ON HAND

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A credit professional dealing with a customer whose financial condition is uncertain may insist on cash before releasing goods. Suppose your customer offers a check, and after getting phone confirmation from the customer's bank that cash is on hand to cover the order, you release the goods. The check is then returned NSF because there were outstanding checks that cleared prior to yours. The customer files Chapter 11. After you make a reclamation demand, you ask whether the customer's bank should make good on the check, given their representation that cash was on hand.

No Claim Against Bank

In *Harrington v. MacNab*, 45 UCC Rep. 2s 698 (2001), the creditor sued the debtor's bank because the creditor had obtained the bank's confirmation over the telephone that there were sufficient funds to cover the check. Yet the check bounced. The creditor's suit was filed under a theory of negligent misrepresentation based on the bank representative's confirmation of sufficient funds. The court rejected the creditor's claims, contending that there is no contractual privity between the creditor and the bank.

The court also found that the creditor was not a third-party beneficiary. The court pointed to Article 3 of the Uniform Commercial Code, section 3-408, citing that the bank is not liable as an assignee of the drawer on a check. Further, the court recognized that a cause of action under the circumstances would create a tort remedy allowing suit to be brought for certification of a check, which violates UCC policy. The court reasoned that to adopt the creditor's position "would place substantial and potentially unlimited liability on [bank] for uncertified checks in contravention of the basic policies underlying the checking system in the United States as codified in the Uniform Commercial Code." *Harrington*, 45 UCC Rep. Serv. 2d at 701.

Lesson for the Credit Executive

Harrington illustrates that you may want to hold the order until the debtor's check clears. As the court stated: "The sound practice of requiring the buyer to pay with an accepted draft (certified check) or a bank draft is justifiable. Indeed, the reason for the practice of requiring certified or bank checks is that, in the eyes of the U.C.C., such instruments are the equivalent of cash as far as satisfying the underlying obligation goes." In other words, the vendor cannot look to the customer's bank as a guarantor for payment if it does not insist on certified funds. Otherwise it must wait for the check to clear before releasing the goods.

CAN YOU REFUSE TO OFFER A CASH DISCOUNT TO YOUR CREDIT-CARD PAYING CUSTOMERS ON THEIR COMMERCIAL ACCOUNTS AND NOT VIOLATE THE ANTITRUST LAWS?

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You offer commercial customers paying on credit a cash discount for early payment, "2% 10 days—net 30 days". Your commercial credit card program provides that customers paying for their commercial sale by credit card are not entitled to the cash discount for early payment. Under your credit card program, the issuing credit card company refuses to allow you to pass on to your customer the higher transaction cost of accepting payment by credit cards. Can you fairly discriminate against customers that pay by credit card and deny them a cash discount for early payment and not violate the antitrust laws?

Pursuant to Title 15 U.S.C. §1666f, ("Inducements to Cardholders By Sellers of Cash Discounts for Payments by Cash, Check, or Similar Means; Credit Card Surcharge Prohibition; Finance Charge for Sales Transactions Involving Cash Discounts"), a vendor may refuse to offer a cash discount to credit paying customers if certain conditions are met.

Federal Statute

Title 15 U.S.C § 1666f (West Supp. 2000) ("TLIA)

(a) Cash discounts

With respect to credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

(b) Finance charge

With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.

California Statute

(a) No retailer in any sales, service, or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means. A retailer may, however, offer discounts for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, provided that the discount is offered to all prospective buyers.

(b) Any retailer who willfully violates this section by imposing a surcharge on a cardholder who elects to use a credit card and who fails to pay that amount to the cardholder within 30 days of a written demand by the cardholder of the retailer by certified mail, shall be liable to the cardholder for three times the amount at which actual damages are assessed. The cardholder shall also be entitled to recover reasonable attorney's fees and costs incurred in the action…[jurisdiction omitted]

(c) Consumer shall not be deemed to have elected to use a credit card in lieu of another means of payment for purposes of this section in a transaction with a retailer if only credit cards are accepted by that retailer in payment for an order made by a consumer over a telephone, and only cash is accepted at a public store or other facility of the same retailer.

(d) Charges for third-party credit card guarantee services, when added to the price charged by the retailer if cash were to be paid, shall be deemed surcharges for purposes of this section even if they are payable directly to the third party or are charged separately.

(e) It is the intent of the Legislature to promote the effective operation of the free market and protect consumers from decep-

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ESCHEATMENT IN THE POST-SEPT. 11 ENVIRONMENT: A PROBLEM FOR THE CREDIT EXECUTIVE?

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cate abandoned property that should have been turned over to the state.

Escheatment Defined

Businesses and residents abandon over a billion dollars of tangible and intangible property annually. Every state has legislation that requires companies to escheat to the state after some period. California, for example, requires escheatment to the state after three years of abandonment. Escheatment includes all forms of property, both tangible and intangible. For the credit professional, an accounts' credit balance may qualify an abandonment of property. Escheatment laws provide that the state becomes the legal owner of abandoned property, based on the concept of state sovereignty. In looking at escheatment as a revenue source, states are considering those businesses that have failed to escheat.

Development of Escheatment Law

The origin of escheatment law dates back to British law. Abandoned land was returned to the king. The states within the United States have followed this principle.

Uniform Disposition of Unclaimed Property Act

With the growing popularity of state unclaimed property statutes as a new source of state revenue in the 1950's, uniformity of such laws became a necessity, as controversies between states over conflicting claims to property developed. For example, if a corporation abandons credits it has based on a trade relationship with a vendor, several states might attempt to claim custody. The credits could be covered under the law of the state where the company was incorporated, or the state where the corporate headquarters was located. In addition, any state that was doing significant business with the corporation might claim the property.

In 1954, the Uniform Disposition of Unclaimed Property Act (the "Uniform Act") was introduced to unify the state statutory scheme of escheatment. The Uniform Act was amended in 1966 and 1981. The Uniform Act attempts to prevent multiple sate claims for property by designating the last known address of the owner as the basic test of jurisdiction. Thus, under the Uniform Act, if two sates claim the same property, the law of the state of the last known address of the owner governs. If property is abandoned, the state must establish its right to the property by proving that the property is located within its territorial limits.

Generally, if the property is considered to have a situs within the state, it is subject to escheat. The Uniform Act establishes a period for a presumption of abandonment for most types of property. For example, in California if the property is unclaimed for three years after it becomes payable. Presently, forty-two states (including California, New York, Texas, and Florida) and the District of Columbia have enacted some version of the Uniform Act.

Delaware receives a significant portion of escheated property, notwithstanding that its population is but 800,000. This is because a large percentage of corporations incorporate in Delaware. Under the escheat laws, a party forwards the abandoned property to the company's state of incorporation, where the address of the owner can no longer be located.

Business to Business Exception

Under the business-to-business exception, outstanding balances between vendors may be deemed a duplicate payment. Accordingly, under this exception there is no unclaimed property to turnover. Nine states recognize the exception: Illinois, Iowa, Kansas, Maryland, Masschusetts, North Carolina, Ohio, Virginia and Wisconsin. However, application of the exception has proven a problem. Under the ruling of Texas v. New Jersey, should one state not require unclaimed property be turned over, but another state does require turnover, the later state would control for turnover of the property. Thus, only those cases where both states do not require turnover does the credit professional not have to escheat.

Change to Law May be Coming

Populous states are shouldering a larger financial burden with homeland security post-Sept. 11. A multiyear agreement between the states concerning escheatment expires in 2004. Because of this heavier financial burden populous states object to the escheatment provision that allows for the state of incorporation to serve as the basis for money to be turned over where the company cannot be located. Populous states are pushing for the location of the company's headquarters as the basis for jurisdiction for escheatment.

Risks of Not Escheating

Most states require businesses to review their records to determine whether any property has been unclaimed for the dormancy period and to make an annual report, especially post Sept. 11. State escheat statutes have harsh provisions for parties that fail to timely report or turnover unclaimed property. In addition to interest that runs from the period that the property should have been turned over, a state may assess fines, penalties and damages.

States Adopting Amnesty Program

While most states had offered amnesty programs for companies that had not escheated, only California still offers amnesty. The amnesty program provides waiver of penalties for parties who come forward prior to December 31, 2002.

Escheatment Audit

A state generally enforces its escheatment law through an audit. Audits are usually handled by the state treasurer's office or controller. The scope of the audit usually goes back several years. The auditors usually request the following: (1) chart of accounts; (2) general ledger/trial balance; (3) annual report; (4) journal entries; (5) bank reconciliations; and (6) accounting policies.

Steps to Protect Against Escheatment Claims

A credit executive should develop a game plan, and consider the following:

Step One: Determine the Situation

- Review past compliance. Has the company every reported unclaimed property? If so, what, when, and where?
- Has the company every been subject to an escheatment audit? If so, what were the results?
- Are there any subsidiaries to be

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CALCULATING THE PREFERENCE PERIOD: EFFECTIVE DATE OF THE TRANSFER AND THE INAPPLICABILITY OF FEDERAL RULE OF BANKRUPTCY PROCEDURE 9006(a) TO THE TRUSTEE'S AVOIDANCE POWERS

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purpose of preference defenses).

Calculating the Preference Period: Counting Backwards from the Date of the Petition or Forward from the Date of the Transfer

There is a jurisdictional split regarding the correct computation of the preference period. The split arises from the applicability of § 547 to Federal Rule of Bankruptcy Procedure 9006(a)("Rule 9006 (a)"). *See* Fed. R. Bankr. P. 9006(a). A majority of courts conclude that Rule 9006 (a) is not applicable to § 547(b). *See e.g., Greene v. MBNA America*, 223 F.3d 1064 (9th Cir. 1999). The majority cites to the plain meaning of § 547(b)(4), which empowers the trustee to avoid any transfer of interest "*on or within* 90 days [or one-year if made to an insider] before the filing date of the petition." *See* 11 U.S.C. § 547(b)(4) (emphasis added). The majority computes the applicable preference period backwards 90-days, or one year if the transfer was to an insider, beginning with the day immediately preceding the bankruptcy filing. Moreover, the majority contends that the counting forward approach is absurd since the filing of the petition gives rise to the trustee's avoidance powers and that counting backwards is logical since the trustee counts only once instead of counting from each alleged transfer. *See e.g., Nelson Co. v. Counsel for the Official Committee of Unsecured Creditors (In re Nelson Co.)*, 959 F.2d 1260, 1265 (3d. Cir. 1992).

Alternatively, a minority of jurisdictions count forward from the date immediately following the transfer to determine whether a transfer constitutes a preference. *See Wilmington Nursery Co., Inc. v. Burkert (In re Wilmington)*, 36 B.R. 813 (Bankr.E. D.N.Y.). In doing so, the minority applies Bankruptcy Rule 9006(a), which excludes the "date of the act" (i.e., transfer), and counts forward 90-days, or one year if the transfer was to an insider.

Rule 9006(a) Is Not Applicable to § 547(b)

Although these differing methods usually produce the same preference period, application of Bankruptcy Rule 9006(a) may serve to impermissibly extend the preference period beyond 90-days. *See Levinson v. Security Sav. Bank SLA (In re Levinson)*, 128 B.R. 365, 368 (Bankr.S.D.N.Y. 1991)(concluding that 9006(a) is only relevant if the terminal date falls on a weekend or holiday). The minority's use of Rule 9006(a) to determine the first day of the computation also serves to extend the preference period beyond the 90th day, if the 90th day falls on a weekend or holiday. Rule 9006(a) provides in pertinent part, that:

> [i]n computing any period of time prescribed or allowed by these rules ... or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included [and] the last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday ... in which event the period runs until the end of the next day which is not one of the aforementioned days.

For example, if counting forward from the date of the transfer, and the 90th day falls on a Sunday, then pursuant to Rule 9006(a), the effective date of the Transfer would be on the following Monday. This effectively expands the time period provided by § 547 by one day, or two-days if the 90th day falls on a Saturday, or three-days if the 90th days falls on a Saturday of a three-day weekend. Noticeably, the counting forward approach does not benefit creditors.

The majority's reasoning is sound and based in the Bankruptcy Code. The majority concludes that § 547 is not an "applicable statute" within the meaning Bankruptcy Rule 9006(a). *See Greene*, 223 F.3d at 1069. In support, the majority cites to the Advisory Committee's comments that Bankruptcy Rule 9006(a) only governs the time for "acts to be done and proceedings to be had [in cases under the Code] and any litigation commenced therein." The majority concludes that the occurrence and timing of pre-petition transfers do not constitute a "procedure" in chapter 11 case since the transfer is made independently of any judicial action and there is no "act to be done or proceeding to be had." *See Id.* Most important, the majority contends that a transfer can take place on any day of the week, including a weekend or holiday, and therefore does not require the bankruptcy court to be open for business for the purpose of determining the preference period. *See Id.* Accordingly, the 90th day controls and may not be extended.

The majority also concludes that Rule 9006(a) is not applicable to § 547 on substantive grounds. Pursuant to the Rules Enabling Act, the Bankruptcy Rules may not "abridge, enlarge, or modify any substantive right." *See* Title 28 U.S.C. § 2075. The Rules Enabling Act only applies to substantive rights. To determine whether a rule is substantive or procedural, the inquiry is whether the rule regulates procedure (i.e., the judicial process to enforce substantive rights and duties) or is substantive in nature (i.e., rules of decision that a court determines a party's rights). *See Hanna v. Plumer*, 380 U.S. 460, 464 (1985). The majority concludes that § 547 is a substantive right because the power to avoid a preferential transfer within the applicable period is a substantive element of a cause of action requiring no action by the trustee. Accordingly, § 547 creates a statutory period, and an extension of this period, would be an impermissible enlargement of the trustee's avoidance powers permitted by statute.

Conclusions

The determination of the effective date of a transfer and the applicable preference period may be the key to a litigant's success in a preference action. The plain meaning and logic of the Bankruptcy Code illustrates that the backwards approach should control the computation of the preference period. It follows, that since 9006(a) is not applicable to § 547, then the counting forward approach should not be used as an earmark to begin the computation period, or likewise, to extend the preference period beyond the time permitted by the Bankruptcy Code. Moreover, it is imperative that the litigant determine the effective date of the transfer to conclude whether it falls within the applicable preference period.

CAN YOU REFUSE TO OFFER A CASH DISCOUNT TO YOUR CREDIT-CARD PAYING CUSTOMERS ON THEIR COMMERCIAL ACCOUNTS AND NOT VIOLATE THE ANTITRUST LAWS?

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tive price increases for goods and services by prohibiting credit card surcharges and encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card.

Analysis

By definition, the Truth in Lending Act applies only to consumer transactions. The majority of law in the consumer context suggests that a vendor may provide discounts to induce a consumer to use cash instead of credit. The key distinction is the framing of the issue; if there is a "normal price," then cash payment may receive a discount, however, if there is a "normal" price and a credit card is charged at a higher rate, then this is a surcharge.

For classification purposes, the following elements must be met for a sales transaction to be classified as a cash discount and not a surcharge:

(1) The discount is offered to all prospective buyers; and
(2) Its availability is disclosed clearly and conspicuously.

Federal law once prevented price distinctions between cash and credit card transactions. See 15 U.S.C. § 1666f(9)(2) (1982). However, Congress amended the Truth in Lending Act to allow "discounts" for cash transactions, but banned "surcharges" for credit transactions. Many states also explicitly forbid credit card surcharges, but allow for cash discounts. See, e.g., Cal. Civ. Code § 1748.1 (West Supp. 2000); See also Colo. Rev. Stat. Ann. § 5-3-110 (West Supp. 2000); Conn. Gen. Stat. § 42-133ff (West Supp 2000). The credit card companies themselves often prohibit surcharges or any actions by retailers that "discriminate" against users of their credit card brand relative to users of other credit cards.

A prohibition on credit card surcharges can have effects different from those resulting from a prohibition on cash discounts. Mandating that all cash and credit transactions occur at the same price enforces price coherence across payment methods. However, if cash discounts are permitted a continued surcharge prohibition ensures that different brands of credit cards will be priced the same at retail. The cash discount is taken from a single credit card price. Permitting surcharges could permit differential charges for different brands carrying different merchant discount rates. Thus, a surcharge ban at least ensures for card issuers price coherence across credit card brands will continue, reducing price competition at the merchant level among competing brands.

OPERATING LEASES: SKEWING FINANCIAL ANALYSIS

(Continued from page 2)

leases, on a comparable basis with other companies, will tend to have higher net income in early years and lower net income in the later years.

There is another risk to consider should your customer file for bankruptcy in the U. S. Damage awards on rejected real property (land and building) leases (which could include operating leases) may be quite high. If the bankruptcy court accepts the operating lease contract, all past due amounts will be brought current. If the contract is rejected, they could provide the lessor with a claim against the bankrupt company for the lesser of 15% of the total future minimum lease amount to be paid or three years' rental. This could be a large bankruptcy claim if your customer has extensive use of operating leases for their real property.

Special analysis must be taken into account for customers with operating leases. The financial impact of operating leases on the company's financial strength
must be considered to effectively analyze these accounts.

CONSIDERING THE INDUSTRY STANDARD OF THE ORDINARY COURSE OF BUSINESS PREFERENCE DEFENSE

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their shippers by company check within ten days of the date of invoicing. The Plan Administrator asserted that such testimony evidenced the alleged preferential transfers were not ordinary in relation to industry standards. The Court found, however, that the argument was unpersuasive. The Court agreed that the testimony may be relevant as to industry standards, but is not determinative.

Instead, the Court held that the industry standard must be established not only by evidence of those practices in which the Debtors engage with their own shippers, but also evidence of those practices in which firms generally similar to the Debtors and APX engage citing to the Ninth Circuit case of *In re Kaypro*, 218 F.3d 1070, 1073-1074 (9th Cir. 2000). Both vendor and prosecutor alike, must be mindful of their responsibility to introduce evidence of the practices in which firms generally similar to the debtor and defendant engage to successfully assert or defeat an ordinary course defense.

ESCHEATMENT IN THE POST-SEPT. 11 ENVIRONMENT: A PROBLEM FOR THE CREDIT EXECUTIVE?

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included?

- Has the company made any recent acquisitions that should be included?

Step Two: Determine Eligible Property

- Does your company have some of the property types covered by most states? For the credit professional these include:
  - vendor checks,
  - payroll checks,
  - customer credits,
  - refunds,
- What states are represented among the names and addresses to be reported?
- If this is an initial filing, what about years that may not be on the books?

Step Three: Perform the due diligence

- What due diligence is required by state? Specifically, focus on:
  - the minimum dollar mount,
  - timing,
  - method and content notice.
- What about operational due diligence? This might include developing a strategy to minimize unclaimed property liability and reviewing potentially reportable items.
- Prepare the due diligence letter. This should include:
  - response deadline
  - id number and amount
  - property type/reason
  - instructions for claiming

Step Four: Prepare Reports and Remittances

- Identify due dates for states
- Prepare a cover sheet with signature
- Use the proper media, paper, diskette, etc.
- Use the proper report format
- Include the remittance, which might be a check, wire transfer etc.

Step Five: Filing Reports and Remittances

- File on time to avoid penalties and interest
- If you get an extension, get it in writing. Only some states will grant them.

Step Six: Follow up…Reconcilement

- Reconcile general ledger to detail
- Reconcile paid items to appropriate accounts/divisions
- File any necessary holder reimbursement claims with the states
- Establish a filing system for reports and work papers.

Credit professionals can also look to the following web site for guidance: National Association of Unclaimed Property Administrators: www.unclaimed.org

Turning Over the Property

If your company decides to turnover the property to the state, most state statutes provide that the vendor should turn the property over to the state controller. Most legislation requires the vendor to make reasonable efforts to notify the owner of the property by mail that the owner's property will escheat to the state. The notice should be mailed not less than six months before the property is to be turned over to the state controller.

Depending upon the nature, all unclaimed property should either be delivered to the State Treasurer or Controller. When the unclaimed property is cash, delivery is made to the State Treasury; all other types of personal property go to the Controller.

The party delivering the property is relieved and held harmless by the state from all claims regarding the property. No action or lawsuit may be maintained against the holder of the property.

Prior to delivery, the holder must furnish notice to the Controller. At a minimum notice must include the amount of cash, or nature or description of other personal property; the name and last known address of the person entitled to the property; and reference to a specific statutory provision under which the property is being transmitted.

RECENT ENGAGEMENTS AND ACTIVITIES

Blakeley & Blakeley LLP Recent Engagements and Activities for Winter 2002

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

- ◊ Scott spoke to the ***National Group Management's National Food Manufacturers Group*** in Las Vegas regarding ***Offset and Post Audit Issues.***
- ◊ Scott spoke to ***NACM/Chicago-Midwest's National Paper and Packaging Credit Group*** in San Francisco regarding ***The Internet, E-Commerce and Legal Issues Affecting the Credit Professional.***
- ◊ Scott spoke to the ***Credit and Collections Practices Group of the National Freight Haulers Grup*** in New Orleans regarding ***Creditors' Rights.***
- ◊ Scott spoke to the ***North American Retail Group*** in Las Vegas regarding ***Creditors' Rights.***
- ◊ Scott spoke to the ***NACM Houston's Metals Industry Group*** in San Diego regarding ***Mechanic's Lien Law.***
- ◊ Scott spoke to **NACM/Ohio's National Manufacturers Group** in Las Vegas regarding ***The Internet, E-Commerce and Legal Issues Affecting the Credit Professional.***
- ◊ Scott spoke to ***NACM/Connecticut's National Electrical Group*** in Phoenix, Arizona regarding ***The Critical Trade Vendor Doctrine and Creditors' Rights.***
- ◊ Scott spoke to ***CMA Business Credit Service's Orange County Credit Professionals*** in regarding ***Credit Applications: From the Basic to Hot Topics.***

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