

BANKRUPTCY PREFERENCE CLAIMS:
HOW TO AVOID THEM AND MAXIMIZE DEFENSES

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I. PREFERENCE CLAIM

- A. Recovery of Funds and Avoidance of Transactions. A preference action allows the trustee to recover funds the debtor paid to a creditor or transaction entered into prior to the commencement of the bankruptcy case. 11 U.S.C. § 547(b).
- B. The Seven Elements. For a transfer to be considered a “preferential transfer,” the trustee (or debtor-in-possession or other entity assigned the claims, usually through a plan of reorganization), must show seven elements:
1. There has been a transfer. 11 U.S.C. § 547(b).
 - i. Transfer “means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property.” 11 U.S.C. § 101(54); see also In re Pepmeyer, 225 B.R. 539 (Bankr. N.D. Iowa 2002).
 - ii. Division of marital property in a divorce constitutes a transfer. In re Erlewin, 349 F.3d 205 (5th Cir. 2003).
 - iii. Forgiveness or release of a debt owed to the debtor is a transfer. In re Dehon, Inc., 334 B.R. 71 (Bankr. D. Mass. 2005).
 - iv. Renegotiating a contract altering debtor’s rights and liabilities constitutes a transfer. In re Sherlock Holmes of W.N.Y., Inc., 246 B.R. 19 (Bankr. W.D.N.Y. 2000).
 - v. Transfers also include “involuntary” transfers such as a garnishment or an attachment lien. In re Connor, 733 F.2d 1560 (11th Cir. 1984); In re Merrimac Paper Co., Inc., 317 B.R. 215 (D. Mass. 2004).
 - vi. Even if the property is exempt or potentially exempt (and consequently likely beyond the reach of creditors outside of

bankruptcy), the majority of courts hold that this constitutes a transfer. Tavener v. Smoot, 257 F.3d 401 (4th Cir. 2001); but see In re Treiber, 92 B.R. 930 (Bankr. N.D. Okla. 1988).

- vii. A set-off is not a transfer. In re Holyoke Nursing Home, Inc., 273 B.R. 305 (Bankr. D. Mass. 2002); In re Rehab Project, Inc., 238 B.R. 363 (Bankr. N.D. Ohio 1999).
2. The debtor has an interest in the property transferred. 11 U.S.C. § 547(b).
 - i. Because the Bankruptcy Code does not define this phrase, courts look to state law and 11 U.S.C. § 541 to determine whether the debtor had an interest in property transferred.
 - ii. Section 541(a)(1) defines property of the debtor's estate as "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).
 - iii. The courts have found useful the standard that measures the debtor's interest in property by whether the property would have been available to the estate's creditors had it not been transferred pre-petition. Stated differently, if the transfer had not occurred, would the property be part of the bankruptcy estate.
 - iv. Debtor has an interest in the property: In In re Hixon, 295 B.R. 866 (B.A.P. 8th Cir. 2003), aff'd, 387 F.3d 695 (8th Cir. 2004), the debtor had received a third party's property in trust as part of a scheme to hinder, delay or defraud the third party's creditors. Under the trust agreement, the debtor held a general power of appointment as well as the usual rights of a trustee. The court held that, because the debtor could have distributed the trust property to herself or her creditors, she had a beneficial interest in the corpus so that the reconveyance or distribution of the assets back to the third party could be recovered.
 - v. Debtor has no interest: In Spradlin v. Jarvis (In re Tri-City Turf Club, Inc.), 323 F.3d 439 (6th Cir. 2003), the trustee sought to recover from the defendant steel fabricator the value of steel repossessed by the fabricator from the failure of the debtor's general contractor to pay the balance owed under a supply contract with the fabricator. Although the debtor was not a party to the supply contract, the trustee argued that the debtor was a third-party beneficiary to the

contract, and thus had an “interest” in the steel at the time it was removed from the construction site by the fabricator. The court of appeals held that because the fabricated steel was never property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings, no preferential transfer occurred.

- vi. Earmarking: This defense grew out of the Bankruptcy Act (pre-1978 law) cases in which a debtor’s guarantor paid a debt and then stepped into the creditor’s shoes. Some courts held that the payment made by the guarantor could be recovered as a preferential transfer. In recognition of the unfairness of these holdings, the earmarking doctrine was developed. National Bank of Newport v. National Herkine County Bank, 225 U.S. 178 (1912). Any payment made by a third party with its own funds would not be avoidable, and to compel the guarantor to repay the bankruptcy estate would amount to forcing the party to pay the same debt twice.
 - vii. Earmarking Extended: Some courts do not wish to extend the earmarking doctrine beyond cases involving payment by sureties, guarantors, or co-debtors, but often courts take a broader view. See, e.g., In re Francis, 252 B.R. 143 (Bankr. E.D. Ark. 2000); see also In re Nation-Wide Exch. Servs., Inc., 291 B.R. 131 (Bankr. D. Minn. 2003).
3. To or for the benefit of the creditor. 11 U.S.C. § 547(b)(1).
- i. 11 U.S.C. § 101(10) defines “creditor” as “an entity that has a claim against the debtor that arose at the time or before the order for relief concerning the debtor.”
 - ii. The Bankruptcy Code defines “claim” broadly as, among other things, the “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” 11 U.S.C. § 101(5)(A).
 - iii. In some instances, the courts have allowed transfers made on a debt secured by another party to be recovered against the guarantor. Krasiniski v. Walsh (In re Denochick), 287 B.R. 632 (W.D. Pa. 2003).
 - iv. An equity interest holder is not a creditor because the equity interest does not constitute a “claim.” Carrieri v.

Jobs.com, Inc., 393 F.3d 508 (5th Cir. 2005); In re Hedge-Investments Assocs., Inc., 84 F.3d 1267 (10th Cir. 1996).

- v. Where a creditor assigns its right to payment to another party, the debtor may recover that payment from the creditor. In re Scott Wetzel Servs, Inc., 278 B.R. 613 (Bankr. N.D. Fla. 2002); In re Phelp Technologies, Inc., 245 B.R. 858 (Bankr. W.D. Mo. 2000).
4. For or on account of an antecedent debt owed by the debtor before the transfer was made. 11 U.S.C. § 547(b)(2).
 - i. An antecedent debt is a debt that arose prior to the transfer by the debtor. Lanes v. United Missouri Bank of Kansas City, N.A., 98 F.3d 1047 (8th Cir. 1996).
 - ii. The antecedent debt element comes into play when a transferee asserts that the transfer was made prior to or at the same time the goods or services were provided to the debtor.
 - iii. Thus, where the debt does not arise until after the payment is made, there is no antecedent debt to justify a preference action. Vanguard Airlines, Inc. v. Airline Automation, Inc. (In re Vanguard Airlines, Inc.), 295 B.R. 329 (Bankr. W.D. Mo. 2003).
 - iv. When a payment is made after the due date but prior to the expiration of the “grace period,” it still constitutes an antecedent debt. Peltz v. United Healthcare (In re Bridge Information Sys., Inc.), 299 B.R. 567 (Bankr. E.D. Mo. 2003).
 - v. A gift or other similar gratuitous transfer does not satisfy this element because there is no debt to satisfy. In re Galbreath, 207 B.R. 309 (Bankr. M.D. Ga. 1997).
 5. Made while the debtor was insolvent. 11 U.S.C. § 547(b)(3).
 - i. For a transfer to constitute an avoidable preference under section 547(b), the debtor must be insolvent on the date that each of the transfers were made.
 - ii. 11 U.S.C. § 101(32) defines insolvency for entities other than partnerships as a “financial condition such that the sum of such entity’s debts is greater than all such entity’s property, at fair valuation, exclusive of [fraudulent

concealed or transferred property and property exempt under section 522].” This is the “balance sheet” test.

- iii. 11 U.S.C. § 547(f) establishes a presumption of insolvency during the ninety days prior to the bankruptcy filing. A defendant can rebut the statutory presumption by showing that a debtor was solvent at the time it made the alleged preferential payment.
 - iv. The presumption of insolvency does not apply to transfers made to insiders prior to the ninety-day preference period, even though insider transfers are vulnerable to preference attack for a full year.
 - v. If the debtor is operating at the time of the transfer, it should be valued as a going concern. In re Hoffinger Indus., Inc., 313 B.R. 812 (Bankr. E.D. Ark. 2004); In re Payless Cashways, Inc., 290 B.R. 689 (Bankr. W.D. Mo. 2003).
 - vi. Insolvency Likely Requires Expert Testimony: In Peltz v. Worldnet Corp. (In re USN Communications, Inc.), 280 B.R. 573 (Bankr. D. Del. 2002), the defendant argued that the presumption of insolvency could be rebutted by reference to a filing that the debtor made pre-petition with the Securities and Exchange Commission indicating that the debtor was meeting its obligations as they are becoming due. The court rejected this argument and noted that the transfer in question happened several months after the SEC filing and that the issue of insolvency required expert testimony, which the defendant did not provide.
6. The transfer was made (A) on or within ninety days before the date the petition was filed; or (B) if the creditor is an insider, on or within one year before the date the petition was filed. 11 U.S.C. § 547(b)(4).
- i. A payment by check is considered to have been made when the drawee bank honors the check, not when the payee receives it. Barnhill v. Johnson, 503 U.S. 393 (1992); In re Watkins, 325 B.R. 277 (Bankr. E.D. Mo. 2005).
 - ii. Normally, only transfers made within ninety days of the filing of the petition are subject to a preference attack. In re Organic Conversion Corp., 259 B.R. 350 (Bankr. D. Minn. 2001).

- iii. If, however, the transfers were made to an “insider,” then the reach-back period extends to one year. General Trading, Inc. v. Yale Materials Handling Corp., 119 F.3d 1485 (11th Cir. 1997).
 - iv. “Insider” is defined in 11 U.S.C. § 101(31). Generally, any party who had a close relationship with the debtor or the ability to control the debtor may be considered an insider, especially if the transfer does not bear the hallmarks of an arm’s-length bargain. In re Holloway, 955 F.2d 1008 (5th Cir. 1992).
 - v. Whether the creditor to whom or for whose benefit the transfer is made is an insider is determined as of the date of the transfer. In re Optical Technologies, Inc., 246 F.3d 1332 (11th Cir. 2001).
 - vi. Any transfer made more than 90 days or one year, whichever is applicable, before the filing of the petition cannot be avoided as a preferential transfer. In re Bame, 252 B.R. 148 (Bankr. D. Minn. 2000).
7. The transfer enabled the creditor to receive more than the creditor would have received if (A) the case was a case under chapter 7; (B) the transfer had not been made; and (C) the creditor received payment on such debt in the course with the provisions of chapter 7. 11 U.S.C. § 547(b)(5).
- i. In analyzing whether a transfer meets this requirement, the court must compare the amount a creditor received as a result of the transfer with the amount the creditor would have received in the chapter 7 liquidation.
 - ii. Where the trustee fails to establish that a creditor received more than in liquidation, the action will be dismissed. Doudin v. First Security Bank (In re Mid-South Auto Brokers, Inc.), 290 B.R. 658 (Bankr. E.D. Ark. 2003).
 - iii. Secured Creditor: Payments made to a fully-secured creditor cannot be preferential. In re Smith’s Home Furnishings, Inc., 265 F.3d 959 (9th Cir. 2001); In re Hagen, 922 F.2d 742 (11th Cir. 1991).
 - iv. Assumption of Contract: If the debtor assumes a contract under 11 U.S.C. § 365, then any pre-petition payment made under that contract is not a preferential transfer. In re Kiwi Int’l Airlines, Inc., 344 F.3d 311 (3d Cir. 2003); In re LCO

Enters., 12 F.3d 938 (9th Cir. 1993); In re Bridges Info. Systems, Inc., 321 B.R. 247 (Bankr. E.D. Mo. 2005).

- v. Critical Vendor: Because a creditor is determined to be a critical vendor does not insulate pre-petition transfers to a creditor as preferential transfers. In re Bridge Info. Systems, Inc., 321 B.R. 247 (Bankr. W.D. Mo. 2005)

C. Two-Year Statute of Limitation. 11 U.S.C. § 546.

1. The time within which a preference action must be brought is governed by 11 U.S.C. § 546(a).
2. It provides that the action must be commenced before (i) the case is closed or dismissed or (ii) the later of two years after the filing of the petition or one year after the appointment of the first trustee if the trustee is appointed prior to the expiration of two years after the filing of the case.
3. Generally, this means that a case must be commenced within two years of the time that a petition is filed. In re Farmland Industries, Inc., 305 B.R. 490 (Bankr. W.D. Mo. 2003).

D. Ways to Defeat a Preference Claim.

1. Take the payment from a non-debtor.
2. Set-off competing claims.
3. Change terms to cash-on-delivery.
4. Obtain a deposit.
5. Obtain and perfect a security interest prior to 90 days before the filing.
6. Reclaim goods.
7. After the filing of the case, seek to have contract assumed.
8. After the filing of the case, refuse to conduct business post-petition unless the debtor obtains court approval of all payments made during preference period and approval to pay all outstanding amounts (i.e., critical vendor order).

II. AFFIRMATIVE DEFENSES

A. Contemporaneous Exchange for New Value. 11 U.S.C. § 547(c)(1).

1. Section 547(c)(1) provides that a preferential transfer may not be recovered to the extent the parties intended the transfer “to be a contemporaneous exchange for new value given to the debtor; and [the transfer is] in fact a substantially contemporaneous exchange.” 11 U.S.C. § 547(c)(1).
2. “New Value” is defined as “money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee. . . .” 11 U.S.C. § 547(a)(2).
3. Essentially, this is goods or services. It can also include what these goods or services permit a debtor to do, such as retain services of employees.
4. The defense is meant to encourage creditors to continue to deal with financially distressed debtors, if only on a cash-and-carry basis. In re Jones Truck Lines, Inc., 130 F.3d 323 (8th Cir. 1997); In re Payless Cashways, Inc., 306 B.R. 243 (B.A.P. 8th Cir. 2004).
5. In many respects, this is the mirror image of the requirement that the transfer must have been made on an account of an antecedent debt in order to be an avoidable preference in the first instance.
6. Substantially Contemporaneous Exchange: In Silverman Consulting, Inc. v. Canfor Wood Products Marketing (In re Payless Cashways, Inc.), 306 B.R. 243 (B.A.P. 8th Cir. 2004), the bankruptcy appellate panel affirmed the bankruptcy court’s decision finding that the transfer was protected by the contemporaneous exchange for new value because (1) the defendant creditor provided value to the debtor by shipping the lumber in accordance with the purchase order; (2) the parties intended the payment mechanism to be part of a contemporaneous exchange of goods for payment; and (3) despite an occasional slippage of a few days, all payments were made in substantially contemporaneous fashion.
7. No Substantially Contemporaneous Exchange: In In re Armstrong, 291 F.3d 517, 525 (8th Cir. 2002), the Eighth Circuit held the payments of gambling debts up to 30 days after the debts were incurred were neither intended to be contemporaneous nor substantially contemporaneous in fact.

- B. Ordinary Course of Business Exception. 11 U.S.C. § 547(c)(2).
1. Congress enacted section 547(c)(2) “to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or creditors during the debtor’s slide into bankruptcy.” House Report at 73, 1978 U.S. Code Cong. & Ad. News at 6329; see also Senate Report at 88, 1978 U.S. Code Cong. & Ad. News at 5874.
 2. Thus, the section is intended to protect reoccurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor’s transferee. The Official Plan Committee v. Expeditors Int’l, Inc. (In re Gateway Pacific Corp.), 153 F.3d 915 (8th Cir. 1998).
 3. In order to establish an ordinary course of business defense, the creditor must prove that the transfer was (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee (the subjective test); and (C) made according to ordinary business terms (the objective test). 11 U.S.C. § 547(c)(2)(A)-(C).
 4. Payment of a debt incurred by the debtor in the ordinary course of business or financial affair of the debtor and transferee. 11 U.S.C. § 547(c)(2)(A).
 - i. This means that the underlying debtor/creditor relationship itself must be normal and for ordinary purposes. In re Finn, 909 F.2d 903 (6th Cir. 1990).
 - ii. All that must be shown is that the transaction was nothing out of the ordinary for similarly-situated parties. In re Speco Corp., 218 B.R. 390 (Bankr. S.D.)
 - iii. Extending credit for gambling may be part of the ordinary course of a casino’s business, but incurring such a debt is not in the ordinary course of the debtor’s business unless a debtor happens to be a professional gambler. In re Armstrong, 291 F.3d 517 (8th Cir. 2002).
 5. Made in the ordinary course of business or financial affairs of the debtor and transferee. 11 U.S.C. § 547(c)(2)(B).
 - i. This involves a subjective inquiry as to what was normal between the parties. The amount, manner and timing of

payments must be scrutinized to see if transfers made during the preference period fell into the parties' normal dealings prior to the preference period. Gasmark Limited Liquidating Trust v. Louie Dreyfus Natural Gas Corp., 158 F.3d 312 (5th Cir. 1998); In re Bridge Info System, Inc., 287 B.R. 258 (Bankr. E.D. Mo. 2002).

- ii. The courts of the Eighth Circuit consider the following four factors in determining whether a payment is protected under the subjective test:
 - a. The length of time the parties were engaged in the transactions at issue;
 - b. Whether the amount or form of a tender 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.

Central Hardware Company v. The Walker-Williams Lumber Co.(In re Spirit Holding), 214 B.R. 891 (E.D. Mo. 1997) aff'd 153 F.3d 902 (B.A.P. 8th Cir. 1998); Sever v. Allstate Sales & Leasing Corp., 308 B.R. 388, 395 (Bankr. D. Minn. 2001).

- iii. If any one of the factors is compellingly inconsistent with prior transactions, the payment is deemed to be outside of the ordinary course of business between the parties. In re Laclede Steel Co., 271 B.R. 127, 132-33 (B.A.P. 8th Cir. 2002).
- iv. The payments that fall within the parties' contract terms typically satisfy this element. In re Vogel Van & Storage, Inc., 210 B.R. 27 (N.D.N.Y. 1997); In re Tennessee Valley Steele Corp., 201 B.R. 927 (Bankr. E.D. Tenn. 1996); but see In re R.M. Taylor, 245 B.R. 629, 636 (Bankr. W.D. Mo. 2000) (payments made within term but prior to pre-preference period average are recoverable).
- v. If the creditor had habitually acquiesced to late payments and had accepted them willingly, then a late payment during the preference period may fall within the scope of the second requirement. Lovett v. St. Johnsbury Trucking,

931 F.2d 494 (8th Cir. 1991); In re R.M. Taylor, Inc., 245 B.R. 629 (Bankr. W.D. Mo. 2000).

- vi. In contrast, if the payments during the preference period were elicited or resulted from threats, demand letters, or received in a non-typical form, the payments will now be considered ordinary between the parties. In re Accessair, Inc., 314 B.R. 386 (B.A.P. 8th Cir. 2004); In re Stewart, 282 B.R. 871 (B.A.P. 8th Cir. 2002); In re Sibilrud, 308 B.R. 388 (Bankr. D. Minn. 2004).
 - vii. Payment by wire without any prior similar method of payment likely removes a payment from the ordinary course defense. In re Spirit Holding, 153 F.3d 902, 906 (B.A.P. 8th Cir. 1998).
6. The transfer was made according to ordinary business terms. 11 U.S.C. § 547(c)(2)(C).
- i. The courts hold that this inquiry is objective, focusing on the norms of the relevant industry. Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991).
 - ii. There are significant evidentiary issues involved in proving the objective prong of the ordinary course of business defense. Some courts have held that testimony from the creditor or its employees is insufficient (often as a matter of law) to establish the standards in the industry. See, e.g., In re Bridge Info. Systems, Inc., ___ F.3d ___, 2006 WL 1716 193 (8th Cir. June 23, 2006); Logan v. Basic Distribution Corp. (In re Fred Haws Organization, Inc.), 957 F.2d 239 (6th Cir. 1992); Schwinn Plan Committee v. AFS Cycle & Co., Ltd. (In re Schwinn Bicycle Co.), 205 B.R. 557 (Bankr. N.D. Ill. 1997). As a result, testimony from an employee of the creditor may be insufficient and the creditor may be forced to retain an independent expert witness.
 - iii. Moreover, Fed. R. Civ. P. 26(a)(2), made applicable to adversary proceedings by virtue of Fed. R. Bankr. P. 7026, requires that an expert witness be disclosed before trial and the expert produce a report of the opinions to the opposing party prior to trial. The party who fails to designate an expert and provides the required report, even if the expert is just an employee, will likely be barred from presenting that expert's testimony at trial. Fed. R. Civ. P. 37.

C. Subsequent New Value. 11 U.S.C. § 547(c)(4).

1. 11 U.S.C. § 547(c)(4) provides that a creditor may retain a preferential transfer to the extent that after the transfer, the preferred creditor advances “new value” to the debtor on an unsecured basis and the debtor does not make an otherwise unavoidable transfer to the creditor on account of such new value.
2. The purpose of this subsection is to encourage trade creditors to continue dealing with troubled businesses by allowing creditors to rely on payments of back-debt in shipping new goods. In re Teligent, Inc., 315 B.R. 308 (Bankr. S.D.N.Y. 2004).
3. It is also designed to treat fairly a creditor who has replenished the estate after having received a preference. In re Armstrong, 291 F.3d 517 (8th Cir. 2002).
4. The creditor may offset the value of the new unsecured advances that remain unpaid or the payments of that are avoidable against the prior avoidable preferences. In re Jones Truck Lines, Inc., 130 F.3d 323 (8th Cir. 1997).
5. It bears noting that all advances in all transfers during the preference period are not aggregated and then netted to determine overall result. Instead, new advances may be offset only against previous preferential transfers. In re Eleva, Inc., 235 B.R. 486 (B.A.P. 10th Cir. 1999).
6. Subsequent New Value Calculations: Preferential transfers totals \$20,000 and subsequent new value totals \$30,000.

i.	<u>Date</u>	<u>Preference Payment</u>	<u>New Value</u>	<u>Net Preference</u>
	01/01/05	\$ 5,000		\$5,000
	01/05/05		\$10,000	\$0
	02/01/05	\$10,000		\$10,000
	02/05/05		\$15,000	\$0
	03/01/05	\$ 5,000		\$5,000
	03/05/05		\$ 5,000	\$0

ii.	<u>Date</u>	<u>Preference Payment</u>	<u>New Value</u>	<u>Net Preference</u>
	01/01/05		\$10,000	\$0
	01/05/05		\$10,000	\$0
	02/01/05	\$ 5,000		\$5,000
	02/05/05		\$10,000	\$0
	03/01/05	\$ 5,000		\$5,000
	03/05/05	\$10,000		\$15,000

D. How to Maximize the Defenses

1. Supply new value and receive payment on a substantially contemporaneous basis.
2. Adhere to historical payment practices.
3. Supply goods only in exchange for payment.
4. Always take the payment.

III. THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

A. Effective Date

1. Generally, the Reform Act applies to “cases” commenced under Title 11 after October 17, 2005.
2. It is important to remember that the operative date for preference claims is the date the bankruptcy petition was filed, and not the date the adversary proceeding was commenced.
3. Because preference actions are not often commenced until a year or more after the filing of the petition, it will likely be another six months or more before the Reform Act takes full effect.

B. Ordinary Course Defense

1. The Reform Act only requires a creditor to show that the transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee and was made:
 - i. in the ordinary course of business or financial affairs of the debtor and the transferee; or
 - ii. according to ordinary business terms.

2. The disjoining of the final two elements should make it easier to protect transfers under the ordinary course defense. It will certainly make the defense cheaper as the defendant will not have to hire an expert or otherwise designate its own employee as an expert.
3. Some commentators speculate that trustees and debtors will more aggressively pursue preference actions. Thus, it is conceivable that the intended effect of the amendment may be muted.

C. Not Primarily Consumer Debt Case Threshold

1. The Reform Act adds section 547(c)(9). In cases where the “debts are not primarily consumer debts,” creditors who have received less than \$5,000 are not subject to preference claims.
2. The rationale is to protect creditors from having to incur costs of defending these small actions. The mechanics of this provision are illustrated by the chart found at the end of these materials.

D. Alternative Repayment Schedule

Subsection 547(h) has been added to protect payments made as part of “an alternative repayment schedule” created by an “approved nonprofit budget and credit counseling agency.”

E. Venue/Form Selection

1. 28 U.S.C. § 1409(b) has been amended to provide that an action to avoid a non-consumer debt against a non-insider for less than \$10,000 must be filed in the district in which the defendant resides (as opposed to the district where the bankruptcy case is pending).
2. That same section also requires actions to recover a money judgment of or property worth less than \$1,000 or consumer debt of less than \$15,000 (previously, \$5,000) to be commenced in the district in which the defendant resides (again, as opposed to the district where the bankruptcy case is pending). The mechanics of this provision are illustrated by the following chart.

<u>Action</u>	<u>Debtor</u>	<u>Total Amount of Claim</u>	<u>Type of Debt</u>	<u>Barred from Filing Suit</u>	<u>Bring Suit Where Defendant Resides</u>
Preference	Debts Not Primary Consumer	<\$5,000	N/A	X	
Money Judgment or Recover Property	N/A	<\$1,000	N/A		X
Money Judgment or Recover Property	N/A	<\$15,000	Consumer Debt		X
Money Judgment or Recover Property	N/A	<\$10,000	Non-Insider Business Debt		X

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