AMERICAN BANKRUPTCY INSTITUTE

Judicial Round & Round

Featuring the Judges of the 2019 Annual Spring Meeting

2019 ABI – Annual Spring Meeting Judges Round and Round Program Topics

NAME OF JUDGE	TOPICS
Barash, Martin	**Chapter 11 Reorganization-Friendly Ninth Circuit Decisions** Chapter 11 reorganization cases, including the Ninth Circuit's Recent Decision in *Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props. Inc.)*, 881 F.3d 724 (9th Cir. Jan. 25, 2018) (§ 1129(a)(10) need only be satisfied on a per plan basis in multi-debtor cases).
Blumenstiel, Hannah	**Dirt for Debt: May the indubitable equivalent standard under 11 USC 1129(b)(2)(A)(iii) be satisfied by surrendering a portion of a secured creditor's collateral in full satisfaction of the secured claim?** The 4th Circuit recently addressed this question in In re Bate Land & Timber, 877 F.3d 188 (4th Cir. 2017) and answered in the affirmative. This decision could be construed as at odds with In re Arnold & Baker Farms, 85 F.3d 1415 (9th Cir. 1996), which held (among other things) that, in light of the "obvious uncertainty in attempting to forecast the price at which real property will sell at some uncertain future date," dirt for debt plans could not satisfy 1129(b)(2)(A)(iii). Lower courts have issued rulings on both sides of this issue.
Carey, Kevin	**Trademark Rejection** Supreme Court argument on a circuit split was held in February. We will discuss which rights, if any, the licensee of a rejected trademark license agreement should have and what the broader implications of a Supreme Court decision may have.

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Collins, Dan	**Recent Supreme Court Arbitration Decisions. How Will They Impact the Insolvency World?** ***Epic Sys. Corp v. Lewis*, 138 S. Ct. 1612 (2018)** The legal question in *Epic Systems* involved the conflict between the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA). The issue was whether employees could bring a class action or collective actions against employers even though they individually agreed to one-on-one-arbitration. The Court reinforced the Congressional requirement and court adherence to enforce agreements to arbitrate under the FAA. However, for such adherence to apply there must not be an applicable exception to the FAA. The employees argued that Section 7 of the FAA, the savings clause, did apply. The savings clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." Such grounds have been generally applicable to contract defenses such as fraud, duress, unconscionability, or illegality. The court held, in a 5-4 decision, NLRA, which allows employees to bargain collectively, did not make the arbitration provision illegal or exempt under the savings clause. Justice Gorsuch explained that Supreme Court precedent has been to not invalidate arbitration agreements based on "defenses that only apply to arbitration" or interfere with fundamental attributes of arbitration. Additionally, the canons of construction of the NLRA do not support the contention that the NLRA was meant to override the FAA. ***Henry Schein, Inc. v. Archer & White Sales, Inc.*, 2019 WL 122164 (U.S. 2019)** This case is Justice Kavanaugh's his first Supreme Court opinion in this case. The unanimous Court resolved a circuit court dispute over the "wholly groundless" exception to the FAA. Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process. Such courts decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly groundless." In this case, the contract between the parties contained an arbitration provision which would resolve disputes via arbitration except for actions involving injunctive relief. The plaintiff sought money damages and injunctive relief. The district court, following Fifth circuit authority, refused to compel arbitration, finding the demand for arbitration was "wholly groundless" because the plaintiff was seeking an injunction. The Supreme Court held that the FAA contains no "wholly groundless" exception and that if "the parties contract delegates the arbitrability questions to the arbitrator," the court may not decide the arbitrability issue "so long as the parties' agreement does so by 'clear and unmistakable' evidence". The Court remanded the case to determine the factual issue of whether the contract delegated the arbitrability question to an arbitrator.

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Collins, Dan (Cont.)	***New Prime, Inc v. Oliveira*, No. 17-340, slip op. (Jan. 15, 2019)** *New Prime* further clarified the FAA's application in written agreements. New Prime is an interstate trucking company that entered into an independent contractor agreement with Mr. Oliveira. Mr. Oliveira alleged that New Prime treats him (and others) as employees and fails to pay statutory due minimum wages. The agreement included a delegation clause directing that any dispute arising out of the parties' relationship should be resolved by an arbitrator-even disputes over the scope of the arbitrator's authority. At issue was whether there was a valid exemption that prohibited forcing arbitration under the FAA, and, if so, does the court have authority to make that determination even if there is a delegation clause (also called a severability principle)? The court held that the FAA's §1 limited exemption to "contracts of employment" of certain transportation workers did apply, even to independent contractors. Therefore, if an agreement, in which the delegation clause appears, falls within §1's exemption to binding arbitration, the Court lacks authority under the Act to order arbitration. **How may these rulings impact Bankruptcy?** Bill Rochelle, the author of Rochelle's Daily Wire, hints that "[i]f Justice Kavanaugh's ruling in *Henry Schein Inc. v. Archer & White Sales Inc.* is applied rigorously in bankruptcy, it's a 'really big deal. . . .'" It could mean "bankruptcy judges will not be able to bar creditors from initiating arbitrations over "core" issues such as allowance of claims, objections to dischargeability of debts, and even adequate protection." (Bill Rochelle, *Supreme Court Decision on Arbitration Has Ominous Implications for Bankruptcy*, American Bankruptcy Institute (January 14, 2019), https://www.abi.org/newsroom/daily-wire/supreme-court-decision-on-arbitration-has-ominous-implications-for-bankruptcy). The same issue raised in *Epic Systems* has been raised in bankruptcy cases. The Second, Fourth, Fifth, and Ninth Circuits have held that in bankruptcy cases the court may decline to compel arbitration if the issue is "core" and arbitration would represent a "severe conflict" with the Bankruptcy Code. However, each of the cases were all decided before the 5/4 decision in *Epic Systems*. The key issue will likely come down to whether the Bankruptcy Code adequately constitutes a threshold exemption of the FAA to retain jurisdiction. Each of the three recent Supreme Court cases discussed above emphasized the preference forarbitration and that an exemption was necessary to retain court jurisdiction. Rochelle, identifies several considerations that favor an exemption: • The underpinning of the Bankruptcy Code is centrality of administration; • Individual cannot gain a fresh start and companies cannot reorganize if issues related to bankruptcy must be litigated in several forums; • The central design of bankruptcy is to enable one judge to decide all core disputes. Even if there is a *Stern* problem, it still goes to a judge in the same courthouse. *Stern v. Marshall*, 564 U.S. 462 (2011). • Initiating or continuing arbitration without relief from the bankruptcy court would violate the bankruptcy automatic stay

Collins, Dan (Cont.)	These considerations, like the arguments in *Epic Systems*, will likely decide whether the savings clause applies to arbitration agreements in bankruptcy. If the Supreme Court considers bankruptcy law analogous to the NLRA, which does not override or exempt the FAA, then even such matters of arbitrability under *Schein* may require the bankruptcy court to refer the dispute to an arbitrator. Could Justice Kavanaugh's very first opinion delivered in *Schein* signal the Court's preference for arbitration over bankruptcy? Only time will tell.

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Diehl, Mary Grace	**Should venue choice for Chapter 11 be revised?** Congress is considering whether to amend the Venue Provisions of 28 U.S.C. §1408 to restrict the venue choice for non-individual debtors to the venue in which the entity's headquarters or principal assets are located. In the case of multiple related debtors, the proper venue for the parent entity would control. In essence, these changes would eliminate state of incorporation as an available venue and eliminate the ability of a group of entities to file in a venue proper for any of the affiliates. Venue choice has changed over the years with the Chandler Act restricting venue for Chapter X (major companies) to principal place of business/assets but allowing state of incorporation for Chapter XI cases. From 1973-1979, Bankruptcy Rules restricted all corporations and partnerships to principal place of business/assets. The 1978 Bankruptcy Code contained a new venue statute – 28 U.S.C. §1472 which combined the treatment of individual and entity debtors to allow selection of "domicile" by either type of debtor. The affiliate provision was also added. While renumbered as 28 U.S.C. § 1408 by the 1984 Bankruptcy Amendments, the substantive provisions were unchanged and exist today. Arguments in Favor of Change: 1. Promote Public Confidence in system integrity. 2. Further the development of uniform national bankruptcy law 3. Promote access for all parties in large business cases 4. More efficient allocation of judicial resources 5. Reduction in administrative expenses 6. Promote local economies Arguments Against Change 1. Venue in state of incorporation is consistent with federal venue 2. Affiliate venue choice is consistent with long-standing practice 3. Courts are free to transfer venue where warranted 4. Uncertainty as to "headquarters: or "principal assets" adds uncertainty 5. Creditors are national creditors and technology overcomes obstacles Bankruptcy system is not broken, so don't try and fix it.
Dow, Dennis	***In re Taggart* (cert. granted U.S. Jan. 4, 2019) – Pending Supreme Court case regarding whether a creditor's good faith is a defense to a discharge violation.** See attached materials.

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Drain, Robert	**A One-day Chapter 11 Case: Really?** Discussion will focus on three recent prepackaged chapter 11 plans that Judge Drain confirmed in less than a week after the start of the case, including *In re Fullbeauty*.
Fagone, Michael	**Is an order granting relief from stay (or an order denying a request for such relief) is always a final order?**

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Harner, Michelle	**Substantive Consolidation of Debtors and Non-Debtors in Chapter 11 Cases**
	
	The doctrine of substantive consolidation is in large part an equitable remedy that pre-dates the Bankruptcy Code. *See Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941). Under the doctrine, the assets of the subject entities are pooled together and distributed pro rata to the entities' collective creditors. Substantive consolidation ignores the separate identity of the subject entities and, consequently, the structural priorities of their collective creditors in the distribution scheme. The Bankruptcy Code does not expressly incorporate substantive consolidation, save perhaps in the reference to consolidation in section 1123(a)(5) of the Bankruptcy Code. Nevertheless, most courts recognize that the doctrine continues to have some application in bankruptcy cases but approach the doctrine cautiously and with care, given its potential impact on a bankruptcy estate and its creditors.
	
	Substantive consolidation raises a number of interesting and complex issues in chapter 11 cases. These issues range from basic questions such as when and how a bankruptcy court may invoke the doctrine to jurisdictional and *Law v. Siegel* related questions concerning whether certain provisions of the Bankruptcy Code preclude the court's use of substantive consolidation. The answers to many of these questions also may vary depending on whether the proposed substantive consolidation involves only debtor entities or combining debtor and non-debtor entities. Notably, these questions may arise in any size chapter 11 case, from smaller cases involving, for example, an individual owner and related limited liability companies, to mega cases involving large corporate families.
	
	The discussion points will focus on, among other things:
	
	• What questions remain concerning substantive consolidation of debtor entities?
	  o For a review of the current state of the law on this issue, see, e.g., *In re Woodbridge Group of Cos.*, 592 B.R. 761 (Bankr. D. Del. 2018); *In re ADPT DFW Holdings, LLC*, 574 B.R. 87 (Bankr. N.D. Tex. 2017). *See also In re Stillwater Asset Backed Offshore Fund Ltd.*, 2018 WL 1610416 (S.D.N.Y. Mar. 30, 2018) (discussing de facto substantive consolidation).
	
	• Can the bankruptcy court consolidate a debtor with a non-debtor entity?
	  o For a review of the current state of the law on this issue, see, e.g., *In re Concepts America, Inc.*, 2018 WL 2085615 (Bankr. N.D. Ill. May 3, 2018).

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Harner, Michelle	**Substantive Consolidation (Cont'd.)** • What is the impact of Bankruptcy Code provisions like section 303(a) on substantive consolidation involving non-debtor entities? o For a review of the current state of the law on this issue, see, e.g., *In re Archdiocese of Saint Paul & Minneapolis*, 553 B.R. 693 (Bankr. D. Minn.), *aff'd sub nom. Official Comm. of Unsecured Creditors v. Archdiocese of Saint Paul & Minneapolis*, 562 B.R. 755 (D. Minn. 2016), *aff'd sub nom. In re Archdiocese of Saint Paul & Minneapolis*, 888 F.3d 944 (8th Cir. 2018).
Harwood, Bruce	**Automatic Stay Termination for Repeat Filers** The automatic stay will terminate "with respect to the debtor" 30 days after the petition date under Section 362(c)(3) if the court does not enter an order extending it within that 30 day period. Does that also terminate the stay with respect to "property of the debtor," or as to a co-debtor? Courts are divided, although a trend may be developing on this "close question." *See Smith v. State of Maine Bur. Rev. Svcs. (In re Smith)*, 910 F 3d 576 (1st Cir. 2019).
Houser, Barbara	**Supreme Court Decision Discussion**
Isicoff, Laurel	**Proportionality in Discovery** Proportionality in discovery has always been expected but honored more in the breach. In response, the Federal Rules of Civil Procedure were amended to make clear that the court and the parties are responsible for keeping discovery reasonable and related to the disputes at issue. We will look at those rule changes and discuss what changes you have experienced since Rule 26 was amended. Additional materials attached.
Thorne, Deborah	**Paid Versus Unpaid New Value – The Circuit Split** See attached materials.

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Wedoff, Gene	**Can Chapter 13 debtors deduct ongoing retirement contributions from the disposable income payable to creditors?** A BAPCPA amendment added a hanging paragraph to the end § 541(a)(7) of the Code, which sets out exclusions from property of the estate. The paragraph now reads as follows: (7) any amount—(A) withheld by an employer from the wages of employees for payment as contributions—(i) to— (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986; (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; *except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2).* The hanging paragraph has been treated in different ways in bankruptcy decisions, as set out in In re Cantu, 553 B.R. 565, 572 (Bankr. E.D. Va. 2016): There are essentially three divergent lines of cases. The first line of cases holds that the debtor is not entitled to any deduction for voluntary retirement contributions, whether or not he or she was making voluntary retirement contributions pre-petition. In re Seafort, 669 F.3d 662, 674-75 (6th Cir. 2012); In re McCullers, 451 B.R. 498, 503-05 (Bankr. N.D. Cal. 2011); In re Prigge, 441 B.R. 667, 672-78 (Bankr. D. Mont. 2010). The second view, that voluntary retirement contributions may be continued post-petition as long as they are consistent with the debtor's pre-petition history of contributions, is represented by the Sixth Circuit Bankruptcy Appellate Panel's decision in In re Seafort, 437 B.R. 204 (6th Cir. B.A.P. 2010), aff'd, 669 F.3d 662 (6th Cir. 2012). The third line of cases, which is the majority view, concludes that Section 541(b)(7) allows the deduction, whether or not the debtor was making voluntary contributions prior to the bankruptcy filing, but subject to a determination of the debtor's good faith. In re Vanlandingham, 516 B.R. 628 (Bankr. D. Kan. 2014); In re Johnson, 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006).

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Lorenzen v. Taggart (In re Taggart)

888 F. 3d 438 (9th Cir. 2018), *cert. granted* (U.S. Jan. 4, 2019)

Facts: Bradley Taggart (debtor) was a real estate developer who owned a 25% interest in a business center LLC. He eventually sold his interest to his attorney. Other interest-holders in the business center sued Taggart and his attorney in state court, claiming that he breached the operating agreement by failing to provide the requisite notice to allow them to exercise their right of first refusal. Shortly before trial, Taggart filed Chapter 7. The state court proceeding was stayed and Taggart received a discharge.

Procedural history: Following the discharge, the debtor moved to dismiss the state court lawsuit because of his bankruptcy discharge. The state court determined that the debtor was a necessary party and denied his dismissal motion, but ruled that no monetary judgment would be awarded against him.

The plaintiffs prevailed at trial and sought post-discharge attorney's fees because the debtor had "returned to the fray" by willingly engaging in the state court action after his discharge. [Actually, the debtor did not appear or participate in the trial, but did appear for his deposition.] The debtor opposed the request for fees, arguing that his discharge barred any such claims.

While the attorney's fee petition was pending, the debtor moved the bankruptcy court to reopen his case. His motion was granted. The debtor then sought to hold the plaintiffs in contempt for violating his discharge.

Meanwhile, the state court awarded attorney's fees to the LLC, ruling that the debtor could be held liable for fees incurred after his discharge because he had "returned to the fray" by continuing to seek dismissal of the lawsuit postpetition. The debtor appealed to the Oregon court of appeals.

The bankruptcy court subsequently denied the debtor's motion for contempt, agreeing with the state court's determination that the debtor had returned to the fray. The debtor appealed to the district court. The district court reversed, concluding that the debtor's actions were not "sufficiently affirmative and voluntary" to be considered returning to the fray. It remanded for a determination whether the plaintiffs knowingly violated the discharge injunction by seeking attorney's fees.

On remand, the bankruptcy court held that the plaintiffs had willfully violated the discharge injunction, and awarded sanctions to the debtor. It adopted the willfulness test articulated in *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996), which requires as a first prong that the creditor "knew the discharge injunction was invoked." That is, it effectively imposes a strict liability standard.

The plaintiffs appealed to the Ninth Circuit BAP which reversed the bankruptcy court. The BAP determined that the plaintiffs could not be held in contempt unless they knew the discharge injunction applied to them, and in this case, they had a good faith belief, although unreasonable, that it did not.

In the meantime, the Oregon court of appeals reversed the state court award of attorney's fees. It found that the debtor's actions did not constitute a "return to the fray," and concluded that the discharge injunction barred the recovery of fees.

Ultimately, the plaintiffs were barred from pursuing attorney's fees by the rulings of both the district court and the Oregon court of appeals. However, due to the BAP's ruling, they were not liable for sanctions for knowingly violating the discharge injunction by seeking those fees.

The debtor appealed to the Ninth Circuit, challenging the BAP's decision to reverse the bankruptcy court's contempt finding. [The plaintiffs cross-appealed, challenging the district court's ruling that the debtor had not returned to the fray. That was never reached by the Ninth Circuit.]

Discussion: The Ninth Circuit adopted a two-part test for determining the propriety of a contempt sanction for a discharge violation: the movant must prove that the creditor 1) knew the discharge injunction was applicable, and 2) intended the actions which violated the injunction. In this case, only the first prong was at issue.

Citing *In re Zilog, Inc.*, 450 F. 3d 996 (9th Cir. 2006), the Court required that knowledge of the applicability of the injunction could not be inferred simply because the creditor knew of the bankruptcy, thus rejecting the strict liability standard. In addition, the creditor's good faith belief that the discharge injunction did not apply to his or her claim precluded a finding of contempt, even if that belief was unreasonable.

The Ninth Circuit concluded that the bankruptcy court abused its discretion by applying an incorrect rule of law. The bankruptcy court's holding that the creditor's good faith belief was irrelevant for purposes of determining whether there was a "knowing" violation of the discharge injunction conflicted with *Zilog's* clear statement of the law (as stated above).

In this case, the plaintiffs relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorney's fees. Although they were ultimately incorrect, their good faith belief insulated them from a finding of contempt. Therefore, the BAP was correct when it reversed the contempt sanctions entered by the bankruptcy court.

Circuit split: The *Taggart* holding is a departure from the rule in many circuits that a creditor's beliefs are irrelevant in determining whether a creditor can be found in contempt for violating the discharge injunction. Hence, the U.S. Supreme Court granted certiorari.

The following are examples of cases in which the court essentially eliminated the intent requirement, contra to *Taggart*.

In re Hardy, 97 F. 3d 1384, 1390 (11th Cir. 1996) -- effectively imposing a strict liability standard with respect to the first prong of the willfulness test (*i.e.,* requiring only that the creditor "knew the discharge injunction was invoked").

In re Pratt, 462 F.3d 14 (1st Cir. 2006) – rejecting the proposition that a stay violation (and discharge violation, by analogy) could not be actionable if the creditor made a good faith mistake.

In re Fina, 550 Fed. Appx. 150 (4th Cir. 2014) – the fact that the creditors were aware of the injunction at the time they violated it was sufficient to establish that the violation was willful.

In re Eppolito, 583 B.R. 822, 826 (Bankr. S.D.N.Y. 2018) – requiring movant to show "by clear and convincing evidence that the offending party had actual or constructive knowledge of the discharge injunction and that the creditor did not comply with the order."

In re Golden, 2019 WL 442298, at *28 (Bankr. E.D.N.Y. Jan. 31, 2019) – debtor must allege that he received a discharge, that creditor received notice of that discharge, creditor intended the acts that violated the discharge, and the order applied to the debt in question.

A sampling of post-*Taggart* decisions:

First State Bank of Roscoe v. Stabler, 914 F.3d 1129 (8th Cir. 2019) – noting that sanctions should generally be unavailable when creditors violate a discharge injunction in good faith reliance on the belief that their actions are permissible.

In re Bradford, 2018 WL 6422858 (Bankr. E.D. Cal. Dec. 4, 2018) – applying *Taggart* willfulness standard and finding contempt in the context of an automatic stay violation.

In re Dickerson, 2019 WL 298933 (Bankr. W.D. Wash. Jan. 18, 2019) – sympathizing with the debtor's frustration at the high bar set by *Taggart,* but denying motion for sanctions because debtor failed to meet his burden.

In re Parker, 2019 WL 386842 (Bankr. E.D. Cal. Jan. 29, 2019) – as to creditor who had good faith belief that debtor was liable for post-discharge homeowners' assessment, court was unwilling to hold creditor in contempt for collection efforts.

In re Cobbs, 2018 WL 5289698 (9th Cir. BAP Oct. 24, 2018) – bankruptcy court correctly considered creditor's intent regarding discharge violation, but erred in deciding this without holding an evidentiary hearing.

Practical considerations: Although there are no reported cases criticizing the *Taggart* decision, commentators have pointed out flaws in the approach taken by the Ninth Circuit. For one, the discharge ensures that debtors receive a fresh start and are not strong-armed into paying discharged debts. The *Taggart* opinion rests on the subjective state of mind of the creditor. Commentators note that it would be relatively easy for a creditor to say that he or she did not believe the discharge applied. To give creditors a shield of "I didn't know!" and excusing good faith creditors from liability only undermines the effectiveness of the discharge. *Bankruptcy Law Letter*, Sept. 2018, Volume 38, Issue 9.

Additionally, if the rule in *Taggart* is applied, the expense of the creditor's mistake in violating the discharge injunction is shifted to the debtor. As the court recognized in the recent case of *In re Parker*, 2019 WL 386842, at *15 (Bankr. N. D. Ca. Jan. 29, 2019), "The clear and convincing standard creates an exacting evidentiary burden on [the debtor]." Commentators opine that it would be most equitable to hold creditors accountable for their own mistakes rather than forcing debtors to bear the cost of a creditor's misconduct. *Norton Bankruptcy Law Adviser,* Sept. 2018, Issue 9.

JUDGE ISICOFF MATERIALS

CURRENT VERSION – Rule 26(b)

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering ***the importance of the issues at stake in the action, the amount in controversy***, the parties' relative access to relevant information, ***the parties' resources, the importance of the discovery in resolving the issues,*** and ***whether the burden or expense of the proposed discovery outweighs its likely benefit.*** Information within this scope of discovery need not be admissible in evidence to be discoverable.

PRIOR VERSION – Rule 26(b)

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense**--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.**

All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) ***Limitations on Frequency and Extent.***

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) ***the burden or expense of the proposed discovery outweighs its likely benefit***, considering the needs of the case, ***the amount in controversy, the parties' resources, the importance of the issues at stake in the action***, and ***the importance of the discovery in resolving the issues.***

JUDICIAL ROUND AND ROUND:

Paid versus Unpaid New Value – The Circuit Split

Judge Deborah L. Thorne
Bankruptcy Court for the Northern District of Illinois

NEW VALUE CIRCUIT COMPARISON

CIRCUIT	HOLDING	CASE	COMMENT
FIRST (Maine, Massachusetts, Rhode Island, New Hampshire)	New value must be unpaid to be used as a defense. ——— The First Circuit adopted the "emerging trend" among other courts that "new value defense is available despite payment if the payment was an avoidable transfer."	*In re Keydata Corp.*, 37 B.R. 324 (Bankr. D. Mass. 1983); *In re Columbia Packing*, 44 B.R. 613 (Bankr. D. Mass. 1984). ——— *In re PMC Mktg. Corp.*, 518 B.R. 150, 158 (B.A.P. 1st Cir. 2014).	
SECOND (New York, Connecticut, Vermont)	Rejected majority rule and opined that there exists in the statute no requirement that new value remain unpaid so long as payment is by an otherwise avoidable transfer. ——— Other bankruptcy courts, however, have stated that the new value must remain unpaid.	*In re Musicland Holding Corp.*, 462 B.R. 66, 70 (Bankr. S.D.N.Y. 2001); *In re Van Dyck/Columbia Printing*, 289 B.R. 304 (D. Conn. 2003); *In re Maxwell Newspapers*, 192 B.R. 633 (Bankr. S.D.N.Y. 1996). ——— *In re Teligent*, 315 B.R. 308 (Bankr. S.D.N.Y. 2004); *In re Pameco Corp.*, 356 B.R. 327 (Bankr. S.D.N.Y. 2006); *In re Enron Corp.*, 357 B.R. 32 (Bankr. S.D.N.Y. 2006).	No circuit court cases. ——— *In re Teligent* suggests in *dicta* that new value must remain unpaid. Two bankruptcy court cases also state that new value must remain unpaid, one citing *In re Teligent*.
THIRD (Delaware, New Jersey, Maryland,	New value must be unpaid as of petition date to be used as a defense.	*In re New York City Shoes*, 880 F.2d 679 (3d Cir. 1989) (*dicta* states new value must remain unpaid); *In re Winstar Commc'n Inc.*, 554 F.3d	Recent Delaware Bankruptcy Court cases distinguish *In re New York City Shoes*. *See Jon Wahoshi v.*

CIRCUIT	HOLDING	CASE	COMMENT
Pennsylvania)	——— New value paid post-petition does not affect a creditor's new value defense.	382 (3d Cir. 2009) (same). ——— *In re Friedman's Inc.*, 738 F.3d 547 (3d Cir. 2013).	*American & Efrid Inc. (In re Pillowtex Corp.),* 416 B.R. 123 (Bankr. D. Del. 2009) (payment must not be from otherwise unavoidable transfer and whether new value is unpaid is not required); *In re Proliance Int'l, Inc.*, 514 B.R. 426, 438 (Bankr. D. Del. 2014) (subsequent new value need not remain unpaid). However, Third Circuit recently confirmed that the new value must remain unpaid.
FOURTH (Virginia, North Carolina, South Carolina, West Virginia)	No requirement that new value remain unpaid so long as payment is by "an otherwise unavoidable transfer."	*In re JKJ Chevrolet Inc.*, 412 F.3d 545 (4th Cir. 2005); *In re Meredith Manor Inc.,* 902 F.2d 257 (4th Cir. 1990) (citing *In re Thomas W. Garland Inc.*, 19 B.R. 920 (Bankr. E.D. Mo. 1982)).	
FIFTH (Texas, Louisiana, Mississippi)	No requirement that new value remain unpaid so long as payment is by an otherwise unavoidable transfer.	*In re Toyota of Jefferson Inc.*, 14 F.3d 1088 (5th Cir. 1994).	
SIXTH (Michigan, Ohio, Kentucky, Tennessee	No requirement that new value remain unpaid so long as payment is by an otherwise unavoidable transfer.	*In re Phoenix Rest. Grp., Inc.*, 373 B.R. 541, 547 (M.D. Tenn. 2007); *In re Check Reporting Servs. Inc.*, 140 B.R. 425 (Bankr. W.D. Mich.	No circuit court cases. *These cases cited contain excellent analysis.*

CIRCUIT	HOLDING	CASE	COMMENT
		1992); *In re Intercontinental Polymers, Inc.*, 359 B.R. 868 (Bankr. E.D. Tenn. 2005) (citing *In re Roberds Inc.*, 315 B.R. 443 (Bankr. S.D. Ohio 2004)).	
SEVENTH (Indiana, Illinois, Wisconsin	New value must be unpaid to be used as a defense.	*In re Prescott*, 805 F.2d 719 (7th Cir. 1986). ——— *Gouveia v. The RDI Group (In re Globe Building Materials Inc.)*, 484 F.3d 946 (7th Cir. 2007). ——— *In re OneStar Long Distance, Inc.*, 872 F.3d 526 (7th Cir. 2017) (citing *Unsecured Creditors Comm. Of Sparrer Sausage Co., Inc. v. Jason's Foods, Inc.*, 826 F.3d 388 (7th Cir. 2016).	*In re Prescott* allows only unpaid new value, but statement is *dicta*. ——— Discussion of what constitutes new value. ——— New value must remain unpaid in order to reduce the creditor's preference liability.
EIGHTH (North Dakota, South Dakota, Minnesota, Iowa, Missouri, Arkansas, Nebraska	No requirement that new value remain unpaid so long as payment is by an otherwise unavoidable transfer. This trend at first remained unclear because of a few bankruptcy court cases, but recent cases hold that new value does not need to remain unpaid.	*In re Phoenix Rest. Grp., Inc.*, 373 B.R. 541, 547 (M.D. Tenn. 2007); *In re Check Reporting Servs. Inc.*, 140 B.R. 425 (Bankr. W.D. Mich 1992); *In re Intercontinental Polymers, Inc.*, 359 B.R. 868 (Bankr. E.D. Tenn. 2005) (citing *In re Roberds Inc.*, 315 B.R. 443 (Bankr. S.D. Ohio 2004)).	No circuit court cases. These cases cited, however, contain excellent analysis.

CIRCUIT	HOLDING	CASE	COMMENT
NINTH (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Hawaii, Alaska)	No requirement that new value remain unpaid so long as payment is by an otherwise unavoidable transfer.	*In re IRFM Inc.*, 53 F.3d 228 (9th Cir. 1995); *In re National Lumber & Supply Inc.*, 184 B.R. 74 (9th Cir. B.A.P. 1995); *In re Inland Global Med. Group Inc.*, 362 B.R. 459 (Bankr. C.D. Cal. 2006); *In re Inland Global Med. Group Inc.*, 2006 Bankr. LEXIS 2463 (Bankr. C.D. Cal. 2006).	No circuit or district court cases. The current trend continues not to require new value to remain unpaid.
TENTH (Wyoming, Utah, Colorado, Kansas, Oklahoma, New Mexico)	New value must be unpaid to be used as a defense.	*In re Eleva Inc.*, 235 B.R. 486 (10th Cir. B.A.P 1999); *In re Furrs Supermarkets, Inc.*, 296 B.R. 33 (Bankr. D.N.M. 2003); *but see In re Liberty Livestock Co.*, 198 B.R. 365 (Bankr. D. Kan. 1996).	No circuit or district court cases. *Dicta* only in *Eleva*. *In re Liberty Livestock Co.* contains very well-reasoned analysis stating that new value is available as a defense so long as it is paid by an otherwise unavoidable transfer.
		— *In re Interior Res., Inc.*, No. 03-13110, 2007 WL 734818, at *1 (Bankr. D. Kan. Mar. 7, 2007).	— Despite *In re liberty Livestock Co.*, *In re Interior Res. Inc.* cites *In re Kroh Bros. Dev. Co.* and holds that new value must remain unpaid.

CIRCUIT	HOLDING	CASE	COMMENT
ELEVENTH (Alabama, Georgia, Florida)	New value does not need to remain unpaid.	*In re Jet Florida Sys. Inc.*, 841 F.2d 1082 (11th Cir. 1988). *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018).	The court in *Blue Bell* conclusively stated that new value does not need to remain unpaid. The statement to the contrary in *Jet Florida* was *dictum* only.
DISTRICT OF COLUMBI A	Forbearance does not constitute new value.	*Drabkin v. A.I. Credit Corp.*, 800 F.2d 1153 (D.C. Cir. 1986).	D.C. Circuit has not addressed paid vs. unpaid new value.

594 B.R. 879
United States Bankruptcy Court,
N.D. Illinois, Eastern Division.

IN RE: CALUMET PHOTOGRAPHIC, INC., et al., Debtors.
Catherine Steege, as Trustee for Calumet Photographic, Inc., Plaintiff,
v.
Canon U.S.A., Inc., Defendant.

Bankruptcy Case No. 14-08893
|
Adversary Case No. 16-00195
|
Signed January 9, 2019

Synopsis
Background: Trustee brought adversary proceeding to avoid allegedly preferential payments to creditor, and creditor asserted "subsequent **new value**" defense, on which both parties cross-moved for summary judgment.

[Holding:] The Bankruptcy Court, LaShonda A. Hunt, J., held that only unpaid **new value** can be used by a creditor to reduce **preference** liability.

Ordered accordingly.

West Headnotes (4)

[1] **Bankruptcy**
Subsequent advances;net result rule
Creditor that has received payment(s) on account of antecedent debt during 90-day **preference** period may rely on its subsequent advance of **new value** in order to reduce its **preference** liability, but only if that **new value** remains unpaid; if debtor has paid for such **new value**, even in transaction that is itself avoidable, such **new value** will not support a "subsequent **new value**" defense to **preference** claim. 11 U.S.C.A. § 547(c)(4)(B).

Cases that cite this headnote

[2] **Bankruptcy**
Judgment or Order
When the only issue before court is the meaning of statutory phrase, resolution of that legal question on summary judgment is appropriate.

Cases that cite this headnote

[3] **Bankruptcy**
New Value
Preference defenses are designed to encourage creditors to continue to sell on credit to a buyer slipping into bankruptcy and to perhaps prevent the bankruptcy altogether. 11 U.S.C.A. § 547(c).

Cases that cite this headnote

[4] **Bankruptcy**
Preferences
Creditor that raises a "subsequent **new value**" defense to **preference** claim bears burden of establishing that **new value** was extended, which remains unsecured and unpaid after the preferential transfer. 11 U.S.C.A. § 547(c)(4).

Cases that cite this headnote

Attorneys and Law Firms

***880** Howard L. Adelman, Erich S. Buck, Alexander F. Brougham, Adelman & Gettleman, Ltd., Attorneys for Chapter 7 Trustee

David D. Cleary, Brett M. Doran, Martin S. Kedziora, Greenberg Traurig, LLP, Attorneys for Canon U.S.A.

ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

LaShonda A. Hunt, United States Bankruptcy Judge

At issue before the court is the purely legal question of whether the law of this Circuit still holds that only unpaid **new value** can be used by a creditor to reduce **preference** liability under 11 U.S.C. § 547(c)(4)(B). After reviewing the parties' cross-motions for partial summary judgment and the applicable case law, the court concludes the answer to that question is yes.

Background

The parties agree on the salient facts. [1] Debtor Calumet Photographic, Inc. ("debtor"), filed for chapter 7 bankruptcy relief on March 12, 2014, and plaintiff Catherine Steege was appointed as case trustee ("Trustee"). In March 2016, the Trustee filed this adversary proceeding against defendant Canon U.S.A., Inc. ("Canon"), to avoid nearly $3 million in preferential payments made by debtor to Canon during the 90-days preceding the bankruptcy filing. [2] Canon responded to the complaint with **new value** and ordinary course defenses. Fact discovery concluded in January **2018**, and expert discovery closed several months thereafter.

***881** Canon then moved for partial summary judgment on its **new value** defense pursuant to 11 U.S.C. § 547(c)(4)(B), which allows a creditor to offset its net **preference** liability by the amount of subsequent **new value** it provided to the debtor during the **preference** period. The parties agree that the **new value** for which the debtor never paid amounts to $1,351,792, although there is apparently an additional $124,311 in "unapplied credit memos" in dispute. The primary disagreement, at this point, involves the remainder of **new value**—$803,932—which Canon contends was paid by avoidable transfers. [3] Canon argues that a recent decision, *In re OneStar Long Distance, Inc.*, 872 F.3d 526 (7th Cir. 2017), expands application of the **new value** defense to allow offset "where debtor either never pays for the **new value** or makes an otherwise avoidable payment." (Canon Mem. at 5-6, Dkt. # 72). In other words, Canon asserts that its **preference** exposure may be reduced by both the **new value unpaid** by the debtor at the petition **date** *and* the **new value paid** by the debtor with avoidable transfers.

The Trustee opposes Canon's motion and has cross-moved for summary judgment on this point, citing *In re Prescott*, 805 F.2d 719 (7th Cir. 1986) and later cases, as binding precedent affirming that the Seventh Circuit adheres to the "remains unpaid rule," whereby only **unpaid new value** can reduce **preference** liability. (Trustee Resp. at 3-4, Dkt. # 83). In its reply brief, Canon challenges the Trustee's interpretation of *Prescott*—a case Canon curiously did not mention in its opening brief—as inconsistent with the "plain and unambiguous language" of Section 547(c)(4) and that provision's statutory history, as well as important policy considerations behind the **new value** defense. (Canon Rep. at 12-13, Dkt. # 87). The court has considered the well-reasoned arguments on both sides and concludes that the Trustee has the better position.

Analysis

[1] **[2]** Summary judgment is appropriate if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (made applicable to adversary proceedings by Fed. R. Bankr. P. 7056); *Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1019 (7th Cir. 2003). Here, the Trustee and Canon agree on the material facts, and with respect to the applicable law that the Seventh Circuit has held the defense in 11 U.S.C. § 547(c)(4)(B) applies to subsequent **new value** that remained **unpaid** as of the bankruptcy filing **date**. The dispute between the parties, then, centers on whether binding precedent interpreting the relevant statutory language also encompasses **paid new value**. Where "the only issue before the court is the meaning of a statutory phrase," resolution of that legal question on summary judgment is appropriate. *Local 1239 v. Allsteel, Inc.*, 9 F.Supp.2d 901, 902 (N.D. Ill. 1998).

Section 547(c)(4) of the Bankruptcy Code provides as follows:

> The trustee may not avoid under this section a transfer —to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave **new value** to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
>
> (B) on account of which **new value** the debtor did not make an otherwise ***882** unavoidable transfer to or for the benefit of such creditor;

11 U.S.C. § 547(c)(4). Two distinct viewpoints have emerged among the Circuits with respect to interpretation of that language. In *Prescott*, the Seventh Circuit explained that:

> The three requirements for a section 547(c)(4) defense were set forth in *In re Saco Local Development Corp.*, 30 B.R. 859 (Bankr. D. Me. 1983):
>
> > Section 547(c)(4) establishes a subsequent advance rule whereby a preferential transfer is insulated from a trustee's avoiding powers to the extent that a creditor extends **new value**, which is unsecured and remains unpaid, to a debtor after the preferential transfer.

805 F.2d at 728. The opinion continues with a citation to two additional bankruptcy cases in support of the rule, *In re Formed Tubes*, 46 B.R. 645 (Bankr. E.D. Mich. 1985) and *In re Bishop*, 17 B.R. 180 (Bankr. N.D. Ga. 1982). Each of those courts had previously affirmed that the statute imposes those requirements, particularly the unpaid **new value** rule. *See Formed Tubes*, 46 B.R. at 647 ("if the creditor ... is paid for the **new value** by the debtor, there is in effect no return of the **preference** and the section 547(c)(4) defense is not available to the creditor"); *Bishop*, 17 B.R. at 183 ("the **new value** must go unpaid").

Since *Prescott*, the Seventh Circuit has consistently reiterated the **new value** remains unpaid requirement when analyzing **preference** actions. *See e.g., OneStar*, 872 F.3d at 530 ("That is, the ***new value must remain unpaid*** in order to reduce the creditor's **preference** liability.") (emphasis added); *Unsecured Cred. Comm. of Sparrer Sausage Co., Inc. v. Jason's Foods, Inc.*, 826 F.3d 388, 397 (7th Cir. 2016) ("A creditor may avail itself of [the **new value**] defense if, after receiving a preferential transfer from the debtor, it advanced additional, unsecured credit ***that remains unpaid.***") (emphasis added); *In re P.A. Bergner & Co.*, 140 F.3d 1111, 1121 (7th Cir. 1998) (concluding that a **new value** defense fails because the creditor "gave no subsequent unsecured credit ***which remained unpaid*** ") (emphasis added). Lower courts in this district have likewise followed suit. *See, e.g. In re GGSI Liquidation, Inc.*, 313 B.R. 770, 777 (Bankr. N.D. Ill. 2004) (collecting cases). Indeed, the bankruptcy court in *GGSI Liquidation* soundly rejected the creditor's argument that "the law in this circuit does not require **new value** to remain unpaid." *Id.* at 778.

Nevertheless, the Seventh Circuit "remains unpaid" rule is the minority viewpoint among the Circuits. In *In re BFW Liquidation, LLC*, the Eleventh Circuit recently concluded that its prior precedent reciting the *Prescott* statutory requirements was nonbinding dicta, and held, instead, that "so long as the transfer that pays for the **new value** is itself avoidable, that transfer is not a barrier to assertion of § 547(c)(4)'s subsequent-**new-value** defense." 899 F.3d 1178, 1189 (11th Cir. **2018**). The court described that holding as being on "common ground with the Fourth, Fifth, Eighth, and Ninth Circuits," *Id.*, and "in contrast" to the Seventh and Third Circuits that still "require **new value** to remain unpaid." *Id.* at 1189, n.9. Significantly, the Eleventh Circuit asserted that "[s]ince [*Prescott* in 1986), "the Seventh Circuit has continued to follow that approach." *Id.* at 1189, n.9.

Canon nonetheless insists that language in the Seventh Circuit's 2017 *OneStar* decision indicates that the court has, in fact, shifted to the majority approach, but that is not so. In discussing the standard for excepting preferential transfers from avoidance under § 547(c)(4), the court explained ***883** that "[i]f the debtor pays for the creditor's **new value** (and that payment isn't itself avoidable), then the **new value** is canceled out. That leaves only the preferential payment that § 547 is designed to address in the first place." *OneStar*, 872 F.3d at 530. Canon latches on to that parenthetical note as evidence of the court's change in position, (Canon Rep. at 4-5), but reading further in the opinion clearly demonstrates that Canon is taking that phrase out of context. Indeed, the court continues:

> Accordingly, the Code disallows the **new-value** defense when 'on account of the **new value**, the debtor responds with 'otherwise unavoidable transfer to or for the benefit of [the] creditor.' § 547(c)(4)(B). That is, ***the new value must remain unpaid in order to reduce the creditor's preference liability.*** (emphasis supplied).

Id. In sum, the Seventh Circuit in *OneStar* certainly referenced the statutory language, which plausibly could be read as the majority of Circuits have done to include **new value** paid with avoidable transfers, but then reaffirmed its position that only unpaid **new value** counts. Thus, Canon's reliance on *OneStar* is misplaced.

[3] **[4]** In conclusion, Canon raises a number of interesting policy considerations for allowing both unpaid and paid **new value** to offset **preference** liability. (Canon Rep. at 12-14). After all, the **preference** defenses are designed "to encourage creditors to continue to sell on credit to a buyer slipping into bankruptcy and perhaps prevent the bankruptcy altogether." *See* Deborah L. Thorne, *Inequality Among **Preference** Defendants: How Is That Fair?*, Am. Bankr. Inst. J., Nov. 2014, at 24. And as the other Circuits have concluded, the "remains unpaid" rule is arguably inconsistent with that goal. *See generally BFW Liquidation, LLC*, 899 F.3d at 1192-99. But that is clearly not the interpretation of § 547(c)(4) that the Seventh Circuit has adopted. And this court must follow the decisions of that higher court. *See GGSI Liquidation*, 313 B.R. at 778, *citing Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 2019 (7th Cir. 2004) (reiterating that decisions of courts of appeals are binding on lower federal courts in the same circuit). Consequently, "[t]he creditor that raises a 'subsequent advance' defense has the burden of establishing that **new value** was extended, which remains unsecured and unpaid after the preferential transfer." *Prescott*, 805 F.2d at 731. Canon is entitled to partial summary judgment, but only on the factual issue with respect to the portion of unpaid **new value** that was advanced. The Trustee is entitled to partial summary judgment on the question of the applicable law.

Conclusion

For the reasons stated above, defendant's motion for partial summary judgment is granted in part. This matter is continued to February 7, 2019, for a pretrial status hearing, to set a trial **date** on the remaining issues.

All Citations

594 B.R. 879, 66 Bankr.Ct.Dec. 192

Footnotes

1 See Tr. Resp. to Def.'s Statement of Undisputed Facts, Dkt. # 84.

2 The parties do dispute whether the **preference** period ends on March 11, 2014 (one day before filing) or March 12, 2014 (the petition filing **date**), but resolution of that fact does not impact the court's analysis of the legal question presented in the cross-motions.

3 Canon did not present evidence establishing that these payments were otherwise avoidable. For purposes of the discussion, though, the court will assume *arguendo* its characterization is accurate.

End of Document

899 F.3d 1178
United States Court of Appeals, Eleventh Circuit.

IN RE: BFW LIQUIDATION, LLC, Debtor.
William S. Kaye, Trustee of the BFW Liquidating Trust, Plaintiff-Appellee,
v.
Blue Bell Creameries, Inc., Defendant-Appellant.

No. 17-13588
|
(August 14, 2018)

Synopsis

Background: Liquidating trustee appointed pursuant to the confirmed plan of liquidation of Chapter 11 debtor, an Alabama-based grocery-store chain, filed adversary complaint seeking to recover more than $500,000 in allegedly preferential payments made by debtor to ice cream supplier. Supplier conceded that all elements of a **preference** claim had been satisfied, but asserted, inter alia, a "subsequent-**new-value**" defense. Following trial, the United States Bankruptcy Court for the Northern District of Alabama, No. 2:09-bk-00634-TOM11, Tamara O. Mitchell, J., 2016 WL 7383719, determined that it was bound by circuit precedent to limit supplier's **new-value** defense to that **new value** that "remained unpaid" as of the petition **date**. Supplier appealed, and the parties' petition for permission to appeal directly to the Court of Appeals was granted.

Holdings: The Court of Appeals, Julie Carnes, Circuit Judge, held that:

[1] the Eleventh Circuit's statement in *In re Jet Florida System, Inc.*, 841 F.2d 1082, indicating that the Bankruptcy Code requires **new value** to "remain unpaid" was dictum;

[2] the Code does not require **new value** to remain unpaid as of the petition **date** in order to use it as an offset against a creditor's **preference** liability; and

[3] the term "otherwise unavoidable transfer," as used in the subsection of the Code setting forth the subsequent-**new-value** defense, refers to transfers that are unavoidable for reasons other than that provision's subsequent-**new-value** defense.

Judgment reversed and vacated, and matter remanded.

West Headnotes (33)

[1] **Bankruptcy**
Elements and Exceptions

Under the Bankruptcy Code, a "**preference**" occurs when an insolvent debtor transfers money to pay a creditor for a prior debt within 90 days before filing a bankruptcy petition. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[2] **Bankruptcy**
Petition for leave;appeal as of right; certification

District court, bankruptcy court, or parties acting jointly may certify an order of the bankruptcy court for direct appeal to the Court of Appeals if specified conditions are met. 28 U.S.C.A. § 158(d)(2).

Cases that cite this headnote

[3] **Courts**
Dicta

"Dictum" refers to a statement that neither constitutes the holding of a case, nor arises from a part of the opinion that is necessary to the holding of the case.

1 Cases that cite this headnote

[4] **Courts**
Dicta

Whether a particular statement constitutes a holding or dictum depends on the facts of the case.

1 Cases that cite this headnote

[5] **Courts**
Dicta

If a statement is not necessary to the result the court reached in the case, then that statement is "dictum."

1 Cases that cite this headnote

[6] **Courts**
Dicta

Dicta of a court is not binding on anyone for any purpose.

Cases that cite this headnote

[7] **Courts**
Dicta

Eleventh Circuit's statement in *In re Jet Florida System, Inc.*, 841 F.2d 1082, indicating that the Bankruptcy Code requires **new value** to "remain unpaid" as of the petition **date**, was dictum; although the appellate court had recited the elements of the Bankruptcy Code's subsequent-**new-value** defense, namely, that the **new value** had to be provided subsequent to a payment by the debtor, that the **new value** must have been unsecured, and that the **new value** must remain unpaid, it only relied on the first of those elements in agreeing with the district court that creditor had not provided any **new value** to debtor subsequent to the payment in question. 11 U.S.C.A. § 547(c)(4).

1 Cases that cite this headnote

[8] **Bankruptcy**
New Value

Section of the Bankruptcy Code setting forth the subsequent-**new-value** defense does not require **new value** to remain unpaid as of the petition **date** in order to use it as an offset against a creditor's **preference** liability; plain, unambiguous language of the statute does not require **new value** to remain unpaid, statutory history supports that reading of the provision, and policy considerations, including encouraging creditors to continue extending credit to financially troubled entities and promoting equality of treatment among creditors, strongly favor that reading of the Code. 11 U.S.C.A. § 547(c)(4).

Cases that cite this headnote

[9] **Federal Courts**
Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews questions of statutory interpretation de novo.

Cases that cite this headnote

[10] **Statutes**
Language

Starting point in statutory interpretation is the language of the statute itself.

Cases that cite this headnote

[11] **Statutes**
Plain language;plain, ordinary, common, or literal meaning

Statutes
Design, structure, or scheme

If the statutory language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case, and the statutory scheme is coherent and consistent, the inquiry is over.

Cases that cite this headnote

[12] **Statutes**
What constitutes ambiguity;how determined

Statutes
Context

In determining whether a statute is plain or ambiguous, courts consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Cases that cite this headnote

[13] **Statutes**
What constitutes ambiguity;how determined

Statutory language is "ambiguous" if it is susceptible to more than one reasonable interpretation.

Cases that cite this headnote

[14] **Bankruptcy**
Time of Transfer

Under the **preferences** section of the Bankruptcy Code, a bankruptcy trustee may avoid certain transfers that the debtor made to a creditor within 90 days of the petition **date**. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[15] **Bankruptcy**
Preferences

Bankruptcy
Preferences

Transfer that meets the requirements for avoidance under the **preferences** section of the Bankruptcy Code is called a "**preference**," and the trustee has the burden of proof on whether any particular transfer meets those requirements. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[16] **Bankruptcy**
Avoidance rights and limits thereon, in general

If a transfer is avoided as a **preference**, then the trustee may recover the amount of the transfer from the creditor to whom the transfer was made, after which the creditor will have only an unsecured claim against the bankruptcy estate for the amount recovered by the trustee. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[17] **Bankruptcy**
Effect of avoidable transfer and surrender thereof

If a transfer to a creditor is avoided as a **preference**, any claim that the creditor has against the estate will be disallowed until the creditor repays the amount of the avoided transfer. 11 U.S.C.A. §§ 502(d), 547(b).

Cases that cite this headnote

[18] **Bankruptcy**
Elements and Exceptions

Subsection of the Bankruptcy Code setting forth defenses to **preference** avoidance excepts from avoidance certain transfers that would otherwise be avoidable. 11 U.S.C.A. §§ 547(b), 547(c).

Cases that cite this headnote

[19] **Bankruptcy**
Preferences

Creditor against whom avoidance is sought under the **preferences** section of the Bankruptcy Code has the burden of proving nonavoidability under the subsection of the Code setting forth defenses to **preference** avoidance. 11 U.S.C.A. §§ 547(b), 547(c), 547(g).

Cases that cite this headnote

[20] **Bankruptcy**
New Value

For an offset to a creditor's **preference** liability to be available on "**new value**" grounds, the plain language of the Bankruptcy Code requires only that: (1) any **new value** given by the creditor must not be secured by an otherwise unavoidable security interest, and (2) the debtor must not have made an otherwise unavoidable transfer to or for the benefit of the creditor on account of the **new value** given. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[21] **Bankruptcy**

New Value

So long as the debtor's transfer that pays for a creditor's **new value** is itself avoidable, that transfer is not a barrier to the creditor's assertion of the Bankruptcy Code's subsequent-**new-value** defense. 11 U.S.C.A. § 547(c)(4).

1 Cases that cite this headnote

[22] **Statutes**

Plain language;plain, ordinary, common, or literal meaning

When the plain language of a statute is unambiguous, courts need not, and indeed should not, look beyond that plain language to determine its meaning.

Cases that cite this headnote

[23] **Statutes**

Earlier and later statutes

Changes in statutory language generally indicate an intent to change the meaning of the statute.

Cases that cite this headnote

[24] **Statutes**

Construction of Revised Statutes and Codes

When statutory language is changed in a recodification, it is ordinarily presumed that the change in language does not connote a change in meaning unless Congress's intention to make a substantive change is clearly expressed.

Cases that cite this headnote

[25] **Statutes**

Policy considerations;public policy

Court's interpretation of the language of a statute trumps any opposing policy argument.

Cases that cite this headnote

[26] **Bankruptcy**

Preferences

Bankruptcy

New Value

One of the principal policy objectives underlying the **preferences** section of the Bankruptcy Code is to encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse; another related objective is to promote equality of treatment among creditors. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[27] **Bankruptcy**

Subsequent advances;net result rule

Subsection of the Bankruptcy Code setting forth the subsequent-**new-value** defense to **preference** liability prohibits the trustee from undoing a transfer to the creditor where the creditor has subsequently provided **new value** if, "on account" of this **new value**, the debtor did not make "an otherwise unavoidable" transfer for the benefit of the creditor; in other words, the trustee is prevented from avoiding a transfer to the extent that, after the transfer, the creditor gave **new value** to the debtor, unless the debtor made an "otherwise unavoidable transfer" to the creditor "on account of" that **new value**. 11 U.S.C.A. § 547(c)(4)(B).

1 Cases that cite this headnote

[28] **Bankruptcy**

Trustee as representative of debtor or creditors

To prevent the inequity that could result if a debtor improperly favored some creditors over others shortly before filing for bankruptcy, and to promote the prime bankruptcy policy of equality of distribution among creditors, the Bankruptcy Code allows a trustee to "avoid," that is, undo, certain pre-bankruptcy transfers. 11 U.S.C.A. §§ 544(b), 547(b), 548(a).

Cases that cite this headnote

[29] **Bankruptcy**
Fraudulent conveyances in general

Bankruptcy Code allows a trustee to avoid a fraudulent transfer, that is, a transfer that was made within two years of the petition **date** in which either (1) the debtor received less than a reasonably equivalent value in exchange for the transfer and was insolvent on the **date** that the transfer was made, or (2) the debtor made the transfer with the intent to hinder, delay, or defraud its creditors. 11 U.S.C.A. § 548(a).

Cases that cite this headnote

[30] **Bankruptcy**
Contemporaneous character; time element

Under the Bankruptcy Code, if a creditor has provided "**new value**" to a debtor by selling the latter an item and receiving payment from the debtor in what constitutes a substantially contemporaneous exchange, such as through a contemporaneous cash payment or cash-on-delivery (COD) payment, then that transfer by the debtor to the creditor is not avoidable. 11 U.S.C.A. § 547(c)(1).

Cases that cite this headnote

[31] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

Under the Bankruptcy Code, a payment by the debtor of debt incurred in the ordinary course of business, with the payment to the creditor being made according to ordinary business terms, is a type of **preference** that the trustee is not permitted to avoid. 11 U.S.C.A. § 547(c)(2).

Cases that cite this headnote

[32] **Bankruptcy**
Purchase money security interests; enabling loans

Under the Bankruptcy Code, with certain qualifications, a bankruptcy trustee cannot avoid a transfer that creates a perfected purchase money security interest. 11 U.S.C.A. § 547(c)(3).

Cases that cite this headnote

[33] **Bankruptcy**
Subsequent advances; net result rule

Term "otherwise unavoidable transfer," as used in the subsection of the Bankruptcy Code setting forth the subsequent-**new-value** defense which prevents the trustee from avoiding a transfer of money from the debtor to a creditor to the extent that, after the transfer, the creditor gave **new value** to the debtor, unless the debtor made an "otherwise unavoidable transfer" to the creditor "on account of" that **new value**, refers to transfers that are unavoidable for reasons other than that provision's subsequent-**new-value** defense. 11 U.S.C.A. §§ 547(c)(4), 547(c)(4)(B).

Cases that cite this headnote

Attorneys and Law Firms

***1182** John Douglas Elrod, Greenberg Traurig, LLP, ATLANTA, GA, for Plaintiff-Appellee.

Bill D. Bensinger, Christian & Small, LLP, BIRMINGHAM, AL, for Defendant-Appellant.

Appeal from the United States Bankruptcy Court for the Northern District of Alabama, B.K. Docket No. 2:09-bk-00634-TOM11

Before MARTIN, JULIE CARNES, and GILMAN,* Circuit Judges.

Opinion

JULIE CARNES, Circuit Judge:

Bruno's Supermarkets, LLC ("the Debtor") filed for bankruptcy under Chapter 11. In administering and ultimately liquidating the bankruptcy estate, the Trustee filed an adversary proceeding against Blue Bell Creameries, Inc. ("Blue Bell") to recover monies the Trustee contended were owed by Blue Bell to the estate. Specifically, the Trustee sought to recover from Blue Bell more than $500,000 in a series of payments that Blue Bell had received from the Debtor during the 90-day period preceding the Debtor's bankruptcy filing. Each payment by the Debtor was made for recent shipments of ice cream and other merchandise that Blue Bell had delivered to the Debtor for the latter to sell to the public.

[1] Blue Bell acknowledged that the payments it received from the Debtor constituted **preferences** under 11 U.S.C. § 547(b), [1] which meant that absent a valid defense by Blue Bell, the Trustee would be empowered to "avoid" those payments: that is, require Blue Bell to repay the money it had earlier been paid by the Debtor for goods it had actually delivered. Blue Bell argued below that it had just such a defense. Specifically, 11 U.S.C. § 547(c)(4) prohibits "avoidance" by the trustee to the extent the recipient of payments during the **preference** period provided "**new value**" to the debtor during that same period.

Despite Blue Bell having provided **new value** to the Debtor here—lots of ice cream products that the latter was able to sell to its customers in its efforts to remain financially afloat—the bankruptcy court concluded that it was bound by our precedent to reject, in large part, Blue Bell's **new-value** defense. Specifically, relying on *Charisma Investment Company, N.V. v. Airport Systems, Inc. (In re Jet Florida System, Inc.)*, 841 F.2d 1082 (11th Cir. 1988), the bankruptcy court held that Blue Bell was entitled to an offset against its **preference** liability only to the extent that any **new value** it extended to the Debtor "remained unpaid" as of the **date** the bankruptcy petition was filed. Because Blue Bell was paid for many of the products that it had delivered, the bankruptcy court concluded that *Jet Florida System* prevented Blue Bell from using the **new-value** defense to defeat the Trustee's efforts to "avoid" such payments. As a result, the court ruled that Blue Bell had to return much of the money it had been paid for the goods it provided the Debtor.

Blue Bell appeals the bankruptcy court's decision. After careful review, and with the benefit of oral argument, we conclude that ***1183** the language in *Jet Florida System* relied on by the bankruptcy court was dictum and, as such, it does not bind us. Construing § 547(c)(4) anew, we conclude that it does not require **new value** to remain unpaid. We therefore vacate the bankruptcy court's judgment and remand for a new calculation of Blue Bell's **preference** liability.

BACKGROUND

I. Factual Background

The Debtor, Bruno's Supermarkets, LLC, [2] was a grocery-store chain with more than 60 stores in Alabama and Florida. Blue Bell sold ice cream and related products to the Debtor on credit. The Debtor traditionally paid Blue Bell twice weekly, meaning that, under that payment scheme, the Debtor remained current as to the money it owed Blue Bell.

The Debtor began suffering from liquidity problems, however, and in August 2008, it hired an advisory firm to provide guidance on cash-flow management. Absent immediate action, the Debtor expected to run out of cash. On the advisory firm's recommendation, the Debtor began writing checks to its vendors, including Blue Bell, only once a week, not twice. It also began "stretching," or delaying, payments, which occasionally included cutting checks and then holding those checks for a period of time. Under this new "slow-pay" protocol, the Debtor would ultimately pay Blue Bell for the products it had delivered, but it would take longer to do so. This practice also resulted in Blue Bell receiving payments at irregular intervals, particularly during the 90 days immediately preceding the bankruptcy filing.

Between November 7, 2008, and February 5, 2009, [3] the Debtor paid Blue Bell a total of $563,869.37 in 13 separate payments. At least $250,000 of that total was for products that Blue Bell had delivered to the Debtor before November 7, 2008. During the same time period —between November 7, 2008, and February 5, 2009 —Blue Bell delivered $435,705.65 worth of ice cream and other merchandise to the Debtor's grocery stores. Blue Bell delivered these products in relatively small batches on an almost daily basis, making about 1,700 separate deliveries. These transactions are summarized in the following chart [4]:

***1184**

Date / Time Period	Invoices / Deliveries from Blue Bell to the Debtor	Payments Made to Blue Bell
Nov 7, 2008 – Nov 11, 2008	$24,271.70	
Nov 12, 2008		$18,924.17
Nov 12, 2008 – Nov 24, 2008	$108,872.64	
Nov 25, 2008		$67,821.23
Nov 25, 2008 – Dec 1, 2008	$42,858.51	
Dec 2, 2008		$55,149.91
Dec 2, 2008 – Dec 4, 2008	$11,523.17	
Dec 5, 2008		[illegible]
Dec 5, 2008 – Dec 8, 2008	$13,783.29	
Dec 9, 2008		[illegible]
Dec 9, 2008 – Dec 14, 2008	$41,029.32	
Dec 15, 2008		[illegible]
Dec 15, 2008 – Jan 4, 2009	$101,670.75	
Jan 5, 2009		[illegible]
Jan 5, 2009	$10,337.94	
Jan 6, 2009		[illegible]
Jan 6, 2009 – Jan. 12, 2009	$39,041.37	
Jan 13, 2009		[illegible]
Jan 13, 2009 – Jan 19, 2009	$23,737.88	
Jan 20, 2009		[illegible]
Jan 20, 2009 – Jan 29, 2009	$10,297.79	
Jan 30, 2009		$33,180.46
Jan 30, 2009		$48,213.42
Jan 30, 2009 – Feb 2, 2009	$7,246.81	
Feb 3, 2009		[illegible]
Feb. 3, 2009	$1,034.48	

II. Procedural History

The Debtor filed a voluntary Chapter 11 bankruptcy petition on February 5, 2009. On September 25, 2009, the bankruptcy court confirmed the Debtor's Fourth Amended Plan of Liquidation. Pursuant to the plan and confirmation order, William Kaye ("the Trustee") was appointed the liquidating trustee for the Debtor's bankruptcy estate. Acting for the benefit of the bankruptcy estate, the Trustee was responsible for enforcing any avoidance actions that might lie against creditors of the Debtor.

In January 2011, the Trustee brought this adversary proceeding against Blue Bell seeking to avoid, as a **preference**, the $563,869.37 that the Debtor had paid to Blue Bell during the 90-day period prior to the filing of the bankruptcy petition: that is, any payments made between November 7, 2008, and February 5, 2009. Blue Bell and the Trustee eventually stipulated that all of the elements of a **preference** claim under 11 U.S.C. § 547(b) had been satisfied with respect to each of the transfers making up the $563,869.37. That is, Blue Bell had received these monies during the **preference** period and they were in payment of a prior debt.

Blue Bell asserted two defenses to the Trustee's **preference** claims: § 547(c)(2)'s ***1185** ordinary-course-of-business defense and § 547(c)(4)'s subsequent-**new-value** defense. The bankruptcy court rejected Blue Bell's invocation of the ordinary-course-of-business defense. Blue Bell does not challenge that ruling on appeal.

With respect to the subsequent-**new-value** defense, the bankruptcy court concluded that Blue Bell was entitled to an offset against its **preference** liability only to the extent that any **new value** it extended to the Debtor during the **preference** period "remained unpaid" as of the petition date. The court relied on *Jet Florida System*, in which our Court stated that § 547(c)(4) had "generally been read to require ... that the **new value** must remain unpaid." *See In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083.

Excluding all **new value** for which the Debtor had paid, the bankruptcy court concluded that the Trustee could avoid—that is, claw back—$438,496.47 of the $563,869.37 transferred to Blue Bell during the **preference** period. It reached this figure by relying on the calculations of the Trustee's expert witness, who had analyzed the Debtor's books and records and traced each of the 13 payments made during the **preference** period to the particular invoices those payments were designated to cover. Any invoice the Debtor had paid was excluded from the amount of **new value** that Blue Bell could use to offset its **preference** liability. The bankruptcy court entered judgment in favor of the Trustee and against Blue Bell on December 20, 2016.

[2] Blue Bell filed a notice of appeal to the district court. Shortly thereafter, Blue Bell and the Trustee jointly certified that an immediate appeal of the bankruptcy court's order directly to this Court would materially advance the progress of the case.[5] Blue Bell then filed a petition for permission to appeal the bankruptcy court's order directly to this Court. A panel of this Court granted the petition, and we now turn to the merits of Blue Bell's appeal.

DISCUSSION

Blue Bell argues that the statement in *Jet Florida System* indicating that **new value** must remain unpaid is dictum, and that the statute does not set out any such requirement. The Trustee argues that the statement at issue in *Jet Florida System* constitutes precedent that we are bound to follow. Even if that statement is dictum, however, the Trustee contends that policy considerations nonetheless weigh in favor of requiring **new value** to remain unpaid in order for that **new value** to offset a defendant's **preference** liability. The Trustee further argues, in the alternative, that transfers avoidable as a **preference** under § 547(b), and on no other ground, are "otherwise unavoidable" under § 547(c)(4)(B) and, therefore, any **new value** paid for with such transfers cannot offset a creditor's **preference** liability.

*1186 I. Whether the Statement in *Jet Florida System* Indicating that § 547(c)(4) Requires New Value to "Remain Unpaid" Is Dictum

A. Definition of "Dictum"

[3] [4] [5] "*Dictum* is a term that has been variously defined as a statement that neither constitutes the holding of a case, nor arises from a part of the opinion that is necessary to the holding of the case." *Black v. United States*, 373 F.3d 1140, 1144 (11th Cir. 2004) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *United States v. Hunter*, 172 F.3d 1307, 1310 (11th Cir. 1999) (Ed Carnes, J., concurring)). Whether a particular statement constitutes a holding or dictum depends on the facts of the case. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("[R]egardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case."). If a statement is "not necessary to the result the Court reached in the case," then that statement is dictum. *See Hunter*, 172 F.3d at 1310 (Ed Carnes, J., concurring); *see also United States v. Caraballo-Martinez*, 866 F.3d 1233, 1244 (11th Cir. 2017) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us." (quoting *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009))), *cert. denied*, — U.S. —, 138 S.Ct. 566, 199 L.Ed.2d 445 (2017).

[6] "[D]icta is not binding on anyone for any purpose." *Edwards*, 602 F.3d at 1298. Accordingly, if the statement in *Jet Florida System* indicating that **new value** must remain unpaid is dictum, then we are "free to give ... fresh consideration" to this question. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir. 1992).

B. The Statement at Issue in *Jet Florida System* Is Dictum

[7] Section 547(c)(4), in pertinent part, prohibits the Trustee from avoiding a transfer to a creditor (that is, requiring reimbursement from the creditor) if, after the transfer, the creditor gave **new value** to the debtor that was "not secured by an otherwise unavoidable security interest" and "on account of which **new value** the debtor did not make an otherwise unavoidable transfer" to the creditor. The statute makes no mention of any requirement that any **new value** provided by a creditor remain unpaid. Nevertheless, in *Jet Florida System*, we opined that § 547(c)(4) "ha[d] generally been read to require: (1) that the creditor must have extended the **new value** after receiving the challenged payments, (2) that the **new value** must have been unsecured, and (3) that the **new value** must remain unpaid." *In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083. We relied on three bankruptcy court opinions as the basis for this observation. *Id.* (citing *Waldschmidt v. Ranier (In re Fulghum Const. Corp.)*, 45 B.R. 112, 119 (Bankr. M.D. Tenn. 1984), *aff'd*, 78 B.R. 146 (M.D. Tenn. 1987), *rev'd*, 872 F.2d 739 (6th Cir. 1989); *Keydata Corp. v. Bos. Edison Co. (In re Keydata Corp.)*, 37 B.R. 324, 328 (Bankr. D. Mass. 1983); *Pettigrew v. Tr. Co. Bank (In re Bishop)*, 17 B.R. 180, 183 (Bankr. N.D. Ga. 1982)).

The trustee [6] in *Jet Florida System* had *1187 sought to avoid, as a **preference**, almost $12,000 in rent for a warehouse that the debtor had paid to the appellant during the **preference** period, arguing that because the debtor had vacated the premises before the beginning of the **preference** period, the latter received no value from the rental premises. *See id.* at 1082–83. The appellant argued that it was nonetheless entitled to an offset against its **preference** liability under § 547(c)(4) because, notwithstanding the debtor's choice not to make use of the offer, the appellant had continued to make the leased premises available to the debtor, which in itself constituted the providing of **new value**. The bankruptcy court found that the debtor had indeed vacated the premises before the beginning of the **preference** period. *Id.* at 1082, 1084. The district court found no error in that finding and, as a result, concluded that the appellant had not provided any **new value** to the debtor. That being so, the court held that the **new-value** defense was not applicable, and the appellant had to give the money back to the bankruptcy estate. *Id.* at 1083.

On appeal, we agreed with the district court and held that, absent any use of the leased premises by the debtor, simply making the premises available to the debtor did not confer a "material benefit" on the debtor sufficient to constitute "**new value.**" *Id.* at 1084. In other words, the extent of our ruling was to hold that the appellant had not provided any **new value** to the debtor subsequent to his payment of almost $12,000.

In our earlier recitation of the elements of § 547(c)(4)'s **new-value** defense, however, we had noted that, in addition to requiring the providing of **new value** subsequent to a payment—the prong on which the appellant floundered—there were two other elements: "that the **new value** must have been unsecured" and "that the **new value** must remain unpaid." *Id.* at 1083. Although we cited those additional two elements, neither played any role in our decision. Indeed, we noted that both elements had "concededly been satisfied." *Id.*

For this reason, our statement in *Jet Florida System* indicating that **new value** must remain unpaid was dictum. This purported requirement was never at issue in the case and it played no role in our decision or reasoning. *See Black*, 373 F.3d at 1144; *Hunter*, 172 F.3d at 1310 (Ed Carnes, J., concurring). Because our statement in *Jet Florida System* indicating that § 547(c)(4) requires **new value** to remain unpaid is dictum, we are "free to give ... fresh consideration" to the question of whether § 547(c)(4) requires **new value** to remain unpaid. *See Great Lakes Dredge & Dock Co.*, 957 F.2d at 1578. We do so now.

II. Whether § 547(c)(4) Requires New Value to Remain Unpaid

[8] Having analyzed the plain language of the statute, as well as the history of its development, we hold that § 547(c)(4) does not require **new value** to remain unpaid. As to the Trustee's argument that policy considerations support its interpretation, we disagree and conclude that policy considerations strongly disfavor the Trustee's position. We explain why.

A. Standard of Review and Analytical Framework

[9] **[10]** **[11]** **[12]** **[13]** Questions of statutory interpretation are reviewed *de novo*. *Bankston v. Then*, 615 F.3d 1364, 1367 (11th Cir. 2010); *see also Pollitzer v. Gebhardt*, 860 F.3d 1334, 1338 (11th Cir. 2017) ("Interpretations of the [Bankruptcy] Code are questions of law that we review *de novo*."). ***1188** "The starting point in statutory interpretation is the language of the statute itself." *Bankston*, 615 F.3d at 1367 (quoting *Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009)). "If the 'language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case,' and 'the statutory scheme is coherent and consistent,' the inquiry is over." *Id.* (quoting *Warshauer*, 577 F.3d at 1335). "In determining whether a statute is plain or ambiguous, we consider 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *Id.* (quoting *Warshauer*, 577 F.3d at 1335); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation. *Med. Transp. Mgmt. Corp. v. Comm'r of I.R.S.*, 506 F.3d 1364, 1368 (11th Cir. 2007).

B. The plain, unambiguous, language of § 547(c)(4) does not require new value to remain unpaid

[14] **[15]** Under § 547(b) of the Bankruptcy Code, a bankruptcy trustee may avoid certain transfers that the debtor made to a creditor within 90 days of the petition **date**.[7] A transfer that meets the requirements for avoidance under § 547(b) is called a **preference**, and the trustee has the burden of proof on whether any particular transfer meets those requirements. *See* 11 U.S.C. § 547(g).

[16] **[17]** If a transfer is avoided under § 547(b), then the trustee may recover the amount of the transfer from the creditor to whom the transfer was made.[8] *See id.* § 547(b) (providing for avoidance of a preferential transfer); *id.* § 550(a) (providing for recovery of the amount of an avoided preferential transfer). The creditor will then have only an unsecured claim against the bankruptcy estate for the amount recovered by the trustee. *See id.* § 502(h).

[18] **[19]** Section 547(c) excepts from avoidance certain transfers that would otherwise be avoidable under § 547(b). One of those exceptions—the subsequent-**new-value** defense—is defined in § 547(c)(4), which states:

> (c) The trustee may not avoid under this section a transfer—
>
> ....
>
> (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave **new value** to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
>
> (B) on account of which **new value** the debtor did not make an otherwise ***1189** unavoidable transfer to or for the benefit of such creditor....

Id. § 547(c)(4). The creditor against whom avoidance is sought under § 547(b) has the burden of proving nonavoidability under § 547(c). *Id.* § 547(g).

[20] Nothing in the language of § 547(c)(4) indicates that an offset to a creditor's § 547(b) **preference** liability is available only for **new value** that remains unpaid. Instead, the plain language of the statute requires only that (1) any **new value** given by the creditor must not be secured by an otherwise unavoidable security interest and (2) the debtor must not have made an otherwise unavoidable transfer to or for the benefit of the creditor on account of the **new value** given. *See id.*

[21] By its plain terms, then, the statute only excludes "paid" **new value** that is paid for with "an otherwise unavoidable transfer." *See id.* § 547(c)(4)(B). Therefore, so long as the transfer that pays for the **new value** is itself avoidable, that transfer is not a barrier to assertion of § 547(c)(4)'s subsequent-**new-value** defense. *See id.*

In reaching this conclusion, we find common ground with the Fourth, Fifth, Eighth, and Ninth Circuits. *See Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545, 551–52 (4th Cir. 2005) (rejecting the idea that § 547(c)(4) requires **new value** to remain unpaid and holding that, "under the plain terms of the statute," whether payments for **new value** deprive a creditor of the statute's **new-value** defense "depends on whether the payments were *otherwise unavoidable*" (emphasis in original)); *Jones Truck Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund (In re Jones Truck Lines, Inc.)*, 130 F.3d 323, 329 (8th Cir. 1997) (concluding that, "under the plain language of § 547(c)(4)(B)," payments that the creditor received from the debtor after providing **new value** did not prevent the creditor from using that **new value** as a defense to avoidance because the payments at issue were themselves "otherwise avoidable"); *Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228, 231–33 (9th Cir. 1995) (holding that "a **new value** defense is permitted unless the debtor repays the **new value** by a transfer which is otherwise unavoidable"); *Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1090–93, 1093 n.2 (5th Cir. 1994) (holding that a creditor was entitled to § 547(c)(4)'s subsequent-**new-value** defense because, although the debtor had paid for the **new value** provided, it did so "with **preferences** that were not 'otherwise unavoidable' ").[9]

C. The statutory history of § 547(c)(4) supports our conclusion that new value need not remain unpaid

[22] When the plain language of a statute is unambiguous, we need not—indeed, should not—look beyond that plain language ***1190** to determine its meaning. *Iberiabank v. Beneva 41-I, LLC*, 701 F.3d 916, 924 (11th Cir. 2012) ("We look first to the text of the statute. If the text of the statute is unambiguous, we need look no further." (citation omitted)); *see also Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969–70 (11th Cir. 2016) (en banc), *cert. denied*, — U.S. —, 137 S.Ct. 2292, 198 L.Ed.2d 724 (2017). Here, the plain language of § 547(c)(4) unambiguously excludes paid **new value** as a defense to a creditor's **preference** liability only when that **new value** is paid for with an "otherwise unavoidable transfer." 11 U.S.C. § 547(c)(4)(B). We therefore have no need to examine other interpretive resources, such as predecessor statutes, to determine whether we should divine a broader preclusion of paid **new value** under § 547(c)(4). *See, e.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." (citation omitted)); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62–63, 125 S.Ct. 460, 160 L.Ed.2d 389 (2004) (utilizing statutory history to resolve ambiguity in the plain language of a statute); *id.* at 66–67, 125 S.Ct. 460 (Kennedy, J., concurring) (endorsing the use of statutory history to resolve ambiguity in the text of a statute); *id.* at

67–68, 125 S.Ct. 460 (Thomas, J., concurring in judgment) (same).

Nevertheless, we are cognizant of the statutory history of § 547(c)(4), and our review of § 547(c)(4)'s predecessor statute bolsters our conclusion that **new value** need not remain unpaid. *Cf. Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor*, 712 F.3d 476, 480–86 (11th Cir. 2013) (reasoning that statutory history bolstered an interpretation of unambiguous statutory text). Section 547(c)(4) was enacted as part of the Bankruptcy Reform Act of 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2598–99. [10] The predecessor to § 547(c)(4) was § 60(c) of the Bankruptcy Act of 1898. *See, e.g.*, S. Rep. No. 95-989, at 88 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5874; H.R. Rep. No. 95-595, at 374 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6330; *see also* 11 U.S.C. tbl.II (Supp. III 1979) (identifying 11 U.S.C. § 96(c) (1976) as the predecessor to § 547(c)). [11]

Prior to the enactment of § 547(c)(4), § 60(c) provided as follows:

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

11 U.S.C. § 96(c) (1976) (emphasis added). [12]

***1191 [23]** When Congress repealed this provision in 1978 and replaced it with § 547(c)(4), the "remaining unpaid" language was replaced with § 547(c)(4)(B)'s requirement that the debtor "not make an otherwise unavoidable transfer to or for the benefit of" the creditor who gave **new value**. *See* Bankruptcy Reform Act of 1978 §§ 101, 401, 92 Stat. at 2598–99, 2682. *Compare* 11 U.S.C. § 96(c) (1976), *with* 11 U.S.C. § 547(c)(4)(B) (Supp. III 1979). "As we have explained, 'changes in statutory language generally indicate an intent to change the meaning of the statute.' " *Edwards*, 602 F.3d at 1299 (quoting *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) ("[A] change in the language of a prior statute presumably connotes a change in meaning."). Accordingly, in the absence of any evidence to the contrary, one can plausibly infer that, by replacing § 60(c)'s "remaining unpaid" language with new language that omits any such requirement, Congress intended to eliminate § 60(c)'s requirement that **new value** remain unpaid, and to replace that requirement with something substantively different.

[24] Of course, when a change in statutory language results from a mere recodification of the statute, making an assumption about the absence of earlier language becomes a trickier proposition. *See, e.g.*, *Fla. Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297, 1300 (11th Cir. 2016); *Koch Foods, Inc.*, 712 F.3d at 486. When statutory language is changed in a recodification, it is ordinarily presumed that the change in language does not connote a change in meaning "unless Congress's intention to make a substantive change is 'clearly expressed.' " *In re Bayou Shores SNF, LLC*, 828 F.3d at 1300 (quoting *United States v. Ryder*, 110 U.S. 729, 740, 4 S.Ct. 196, 28 L.Ed. 308 (1884)).

Section 547(c)(4), however, is not a mere recodification of § 60(c). Rather, § 547(c)(4) constitutes a substantive departure from the way exchanges of value between creditors and debtors during the **preference** period were handled under the Bankruptcy Act of 1898. That § 547(c)(4) worked a substantive change in the way **new value** may be used to offset **preference** liability is not only evidenced by the clear change in statutory language, but also suggested by the history leading to its enactment.

In 1970, Congress established the Commission on the Bankruptcy Laws of the United States ("the Commission") to "study, analyze, evaluate, and recommend changes to the [Bankruptcy Act of 1898]." Act of July 24, 1970, Pub. L. No. 91-354, § 1, 84 Stat. 468, 468. The Commission ultimately recommended "a substantial revision of the **preference** section." Comm'n on the Bankr. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc.

No. 93-137, pt.I, at 201 (1973). With respect to § 60(c), the Commission specifically recommended eliminating the requirement that **new value** remain unpaid on the petition **date**, stating:

> The provision in the present Act (section 60c) provides that if a creditor has been **preferred** and afterwards in good faith gives further credit to the debtor without security, the amount of the new credit unpaid at the **date** of bankruptcy may be set off against the amount recoverable from him on account of the **preference**.
>
> ***1192** The Commission recommends changes eliminating (a) the "remaining unpaid" provision; (b) the good faith requirement of any new credit extension; and (c) the requirement that no security be taken for the new credit.

Id. at 210.[13] That the Commission specifically recommended eliminating § 60(c)'s "remaining unpaid" requirement cuts against an inference that Congress might have intended to preserve that requirement when it replaced the "remaining unpaid" language in § 60(c) with § 547(c)(4)(B)'s requirement that the debtor "not make an otherwise unavoidable transfer" to the creditor who received the **preference.**

Given that all other signs point toward a conclusion that § 547(c)(4) represents a departure from, rather than a recodification of, the "remaining unpaid" requirement in § 60(c), we conclude that removal of the "remaining unpaid" language effected a substantive change in the meaning of the statute. Thus, a review of the statutory development of § 547(c)(4) bolsters our conclusion that § 547(c)(4) does not require **new value** to remain unpaid.

Nonetheless, in light of the unambiguous statutory language, we would reach the same conclusion even if it could be shown that Congress did not intend a substantive change in the meaning of the statute when it replaced § 60(c)'s "remaining unpaid" language with § 547(c)(4)(B)'s requirement that the debtor "not make an otherwise unavoidable transfer to or for the benefit of" the creditor who gave **new value.** *Cf. United States v. Wells*, 519 U.S. 482, 496–97, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (concluding that a change in statutory language effected a substantive change in meaning even though the Reviser's Note to the amended statute explained that the amendment "was without change of substance"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 257 (2012) ("The new text is the law, and where it clearly makes a change, that governs. This is so even when the legislative history consisting of the codifiers' report expresses the intent to make no change.").

D. Policy considerations also weigh in favor of a conclusion that new value need not remain unpaid

[25] The Trustee argues that, notwithstanding the statutory language, we should nonetheless rule for him because policy considerations favor his argument that ***1193 new value** must remain unpaid in order for a creditor to rely on the **new-value** defense. Our interpretation of the language of the statute obviously trumps any opposing policy argument. But even if it didn't, we would disagree with the Trustee that policy considerations support his interpretation. To the contrary, we think that policy considerations strongly disfavor his position.

[26] As we noted in *Jet Florida System*, one of the "principal policy objectives underlying the **preference** provisions of the Bankruptcy Code" is "to encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse." 841 F.2d at 1083; *accord Union Bank v. Wolas*, 502 U.S. 151, 161, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991). "Another related objective of this section is to promote equality of treatment among creditors." *In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083; *see also Wolas*, 502 U.S. at 161, 112 S.Ct. 527 ("Second, and more important, the **preference** provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.").

1. Encouraging creditors to continue extending credit to financially troubled entities

Requiring **new value** to "remain unpaid" would hinder the policy objective of encouraging vendors to continue extending credit to financially troubled debtors, especially in situations like this one in which the vendor and the debtor regularly engaged in relatively short-term credit transactions. If **new value** must remain unpaid, then vendors who sense that a debtor is in financial difficulty will have an incentive to stop delivering any goods because any payments they receive, after extension of a short-term period of credit on these deliveries, might be avoided, and thereby clawed back by the trustee in bankruptcy.

By contrast, if **new value** need not remain unpaid, then a vendor can continue extending short-term credit to the debtor without fear of having all of the payments it receives for its newly delivered goods clawed back by the trustee in bankruptcy. So long as the vendor continues to extend additional credit to the debtor, it is at risk of losing only a portion of the payments it receives from the debtor, as explained below. Thus, a conclusion that **new value** need not remain unpaid promotes one of the "principal policy objectives underlying the **preference** provisions of the Bankruptcy Code"—encouraging creditors to continue extending credit to financially troubled debtors. *See In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083.

A chart can perhaps best illustrate the above concepts. The following chart illustrates a scenario where the vendor-creditor ships $1,000 worth of goods to the debtor every other week, and the debtor pays for those goods one week after delivery.

***1194**

	Transfer from creditor to debtor	Transfer from debtor to creditor
Transfer 1	$1,000 in goods	
Transfer 2		$1,000 in cash
Transfer 3	$1,000 in goods	
Transfer 4		$1,000 in cash
Transfer 5	$1,000 in goods	
Transfer 6		$1,000 in cash
Transfer 7	$1,000 in goods	
Transfer 8		$1,000 in cash
Transfer 9	$1,000 in goods	
Transfer 10		$1,000 in cash
DEBTOR'S BANKRUPTCY FILING		

Even-numbered transfers—Numbers 2, 4, 6, 8, and 10 —show five payments, in the amount of $1,000 each, by the debtor to the vendor-creditor within the 90-day **preference** period, meaning that each such payment is potentially avoidable by a trustee. Transfers 3, 5, 7, and 9, which show the shipment of goods by the vendor, constitute equivalent **new value** in the total amount of $4,000 provided by the vendor subsequent to payments 2, 4, 6, and 8, respectively. [14] That being so, and under Blue Bell's position, this $4,000 in new goods shipped would wash $4,000 of the previous payments made by the debtor, for purposes of avoidability. Yet, under the Trustee's position, the vendor loses this **new-value** defense because, after conferring **new value** via the shipment of goods equivalent to the previous payment made by the debtor, the debtor later paid off the value of the shipped goods that constituted the **new value**. Specifically, Transfer 4 paid off Transfer 3; Transfer 6 paid off Transfer 5; Transfer 8 paid off Transfer 7; and Transfer 10 paid off Transfer 9. According to the position of the Trustee in this case, the vendor in the above scenario would be required to repay the entirety of the $5,000 paid to him by the debtor, even though **new value** was conferred on the debtor as to $4,000 of these payments.

Blue Bell argues that a subsequent payment by the debtor to the vendor-creditor for **new value** that was previously provided to the former does not negate the defense as to the particular **new value** in question. Adopting that position, the vendor in this scenario would be protected by the **new-value** defense as to debtor payments 2, 4, 6, and 8 because, subsequent to each of these payments by the debtor, the vendor provided **new value** to the debtor in the form of new goods shipped. It is only the last $1,000 payment by the debtor—Transfer 10—that Blue Bell concedes would be avoidable by the trustee because the vendor delivered no goods after this last payment by the debtor, meaning the vendor provided no subsequent **new value**. Because it would lack a **new-value** defense to the **preference** represented by this last payment, the vendor would have to repay the estate the $1,000; it would then have a corresponding unsecured claim against the estate for that same $1,000. But the vendor would be entitled to retain the remaining ***1195** $4,000. *See* 11 U.S.C. §§ 547(b), 550(a), 502(h).

Notably, this is the same situation the vendor would have found itself in had it simply stopped doing business with the debtor after Transfer 2: it would have had to return that $1,000, and it would have had a $1,000 unsecured claim against the estate based on Transfer 2. It would have owed the estate no additional moneys as a clawback by the trustee for any **preferences**. Yet, the debtor (and the estate it leaves behind) would be in a worse position had the vendor decided to abandon the debtor after Transfer 2. Had that been the case, the debtor would not have received the $4,000 worth of future shipments of goods. With those additional shipments, however, the debtor had additional goods that it could sell to its customers, and thereby potentially increase the size of the estate available at the time of the later bankruptcy filing.

Consider, moreover, the strong disincentives for a vendor to continue supplying an ailing customer with goods if the Trustee's position wins out. Under the interpretation the Trustee gives the **new-value** defense, the vendor would have to return all of the payments it subsequently received for the **new value** it provided the debtor. Were this the rule, a prudent vendor, sensing financial problems by the debtor, would be foolish to continue delivering goods to the debtor following Transfer 2. *Cf. Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1091 (5th Cir. 1994) (noting that, without the protection of § 547(c)(4), "a creditor who continues to extend credit to the debtor, perhaps in implicit reliance on prior payments, would merely be increasing his bankruptcy loss"). Indeed, focusing on post-Transfer 2 events set out in the chart, not only would the vendor have to return the entirety of the payments it had received for goods it had delivered under the Trustee's interpretation, but it would also be out $4,000 in the value of the goods it had provided the debtor: $4,000 worth of goods that it could have to sold to another grocery store.

In short, were the Trustee's approach applicable, a sensible vendor should immediately cut off the debtor, which would likely hasten the latter's financial demise and his ensuing bankruptcy. Yet, the bankruptcy estate would almost always be better off if a vendor continues to supply the debtor with goods to sell, and the **new-value** defense, as interpreted by Blue Bell, would encourage it to do so.

2. Promoting equality of treatment among creditors

The Trustee argues that requiring **new value** to remain unpaid is necessary to ensure that short-term creditors like Blue Bell are treated the same as longer-term creditors whom the debtor did not repay during the **preference** period. We disagree with the Trustee's suggestion that longer-term creditors will necessarily be worse off in the absence of a requirement that **new value** remain unpaid.

As explained above, if **new value** must remain unpaid, then short-term creditors will have an incentive to stop extending credit to the debtor as soon as they sense that the debtor might be experiencing financial difficulty. As a result, such creditors might refuse to provide the debtor with the goods and services it needs to continue in business unless they receive payment in advance or on a COD (cash on delivery) basis. *See, e.g.*, 11 U.S.C. § 547(b)(2) (providing that, in order to constitute an avoidable **preference**, a transfer from the debtor to a creditor must be made on account of an antecedent debt); *see also id.* § 547(c)(1) (providing that a trustee may not avoid a contemporaneous exchange for **new value**). The debtor would then be deprived of the valuable opportunity ***1196** to receive credit in the form of money, goods, and services at a time when it may need such credit more than ever. And, all else being equal, with the vendor ceasing any new deliveries, the estate is ultimately left in the same position it would have been in had this short-term creditor instead been permitted to rely on a subsequent-**new-value** defense without any requirement that **new value** remain unpaid.

Moreover, by encouraging creditors to continue extending credit to financially troubled debtors, § 547(c)(4) has the potential to help such debtors avoid bankruptcy altogether, an outcome that longer-term creditors would almost certainly choose. We therefore find unpersuasive the Trustee's argument that it is necessary to require **new value** to remain unpaid in order to ensure that longer-term creditors are treated fairly in comparison with short-term creditors who extend **new value** to the debtor during the **preference** period.

III. Whether Transfers Avoidable as Preferences Under § 547(b), and on No Other Ground, Are "Otherwise Unavoidable" Under § 547(c)(4)(B)

[27] In the alternative, the Trustee argues that even if subsequent payment by the debtor does not defeat the **new-value** defense, Blue Bell is still not entitled to assert that defense because of another preclusion in § 547: specifically, § 547(c)(4)(B). Reading subsection (B) together with the other language of subsection (4), the provision prohibits the trustee from undoing a transfer to the creditor where the creditor has subsequently provided **new value** if, "on account" of this **new value**, the debtor did not make "an otherwise unavoidable" transfer for the benefit of the creditor. [15]

Admittedly, the double-negatives in the statutory language make for some difficult parsing. But to translate: § 547(c)(4)(B) prevents the trustee from undoing (avoiding) a transfer of money from the debtor to a creditor to the extent that, after the transfer, the creditor gave **new value** to the debtor, unless the debtor made an "otherwise unavoidable transfer" to the creditor "on account of" that **new value**. So, if the debtor paid for the **new value** with an "otherwise unavoidable transfer," then the creditor cannot use that **new value** as a defense against the trustee's attempt to avoid an earlier **preference**. Conversely, if the debtor makes a payment for the **new value** that is itself avoidable, then the creditor can avail itself of the **new-value** defense.

Before attempting to articulate the Trustee's argument, it is helpful to step back and examine the broader context of avoidance provisions within the Bankruptcy Code. When a debtor files for bankruptcy, any transfer that the debtor made shortly before the filing naturally becomes the subject of skepticism, particularly for creditors who would receive more money from a pro rata distribution of the debtor's estate if those transfers had not been made. For example, if a debtor with $100,000 in assets transferred all of those assets to a single creditor only days before filing for bankruptcy, leaving nothing available for his other creditors, those other creditors would naturally view that transfer suspiciously and seek a way to bring the money back into the estate so ***1197** that they might receive a portion of it when the estate is distributed.

[28] To prevent the inequity that could result if the debtor improperly favored some creditors over others shortly before filing for bankruptcy, and to promote "the prime bankruptcy policy of equality of distribution among creditors," *Wolas*, 502 U.S. at 161, 112 S.Ct. 527, the Bankruptcy Code allows a trustee to "avoid"—that is, undo [16]—certain pre-bankruptcy transfers. *See, e.g.*, 11 U.S.C. §§ 544(b), 547(b), 548(a).

[29] For example, § 548(a) allows a trustee to avoid a fraudulent transfer. A fraudulent transfer is one that was made within two years of the petition **date** in which either (1) the debtor received less than a reasonably equivalent value in exchange for the transfer and was insolvent on the **date** that the transfer was made, *id.* § 548(a)(1)(B); or (2) the debtor made the transfer with the intent to hinder, delay, or defraud its creditors, *id.* § 548(a)(1)(A). *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, — U.S. —, 138 S.Ct. 883, 888–89, 200 L.Ed.2d 183 (**2018**). No fraudulent transfers were alleged to have occurred in this case.

Under § 547(b), a trustee may avoid a transfer that constitutes a "**preference.**" [17] *See, e.g., Fid. Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 214–17, 118 S.Ct. 651, 139 L.Ed.2d 571 (1998). As defined by § 547, a **preference** is any transfer made by the debtor within 90 days of the petition **date** if that transfer was made "for or on account of" an antecedent debt, was made while the debtor was insolvent, and enabled the creditor who received it to receive more than it would have otherwise received in a Chapter 7 liquidation. 11 U.S.C. § 547(b). The payments to Blue Bell by the Debtor are conceded to be **preferences**.

[30] Yet, not all **preferences** will ultimately be avoidable by the trustee because the Bankruptcy Code creates defenses that a creditor may use to prevent the trustee from avoiding a **preference** payment made by the debtor. For example, if the "creditor" has provided "**new value**" to a debtor by selling the latter an item and receiving payment from the debtor in what constitutes a substantially contemporaneous exchange, then that transfer by the debtor to the creditor is not avoidable. *See id.* § 547(c)(1). A contemporaneous cash payment or COD delivery would be examples of this type of unavoidable **preference**. There were no contemporaneous cash payments or COD deliveries in this case.

[31] **[32]** In addition, a payment by the debtor of debt incurred in the ordinary course of business, with the payment to the creditor being made according to ordinary business terms, is a type of **preference** that the trustee is not permitted to avoid. *See id.* § 547(c)(2). Further, with certain qualifications, the trustee cannot avoid a transfer that creates a perfected ***1198** purchase money security interest. *See id.* § 547(c)(3). Neither type of transfer is at issue in this case. Finally, [18] we have debtor transfers followed by the providing of **new value** by the creditor, which is at issue in this case. *See id.* § 547(c)(4).

[33] With this context in mind, we now circle back to the Trustee's argument. To repeat our earlier dissection of the pertinent statutory language, if the debtor paid for the **new value** with an "otherwise unavoidable transfer," then the creditor cannot use that **new value** as a defense against the trustee's attempt to avoid an earlier **preference**. Conversely, if the debtor makes a payment for the **new value** that is itself avoidable, then the creditor can avail itself of the **new-value** defense. In this case, the Debtor clearly made post-**new value** payments that were avoidable. After Blue Bell delivered ice cream (which constituted the **new value** for previous payments by the Debtor), the Debtor made payments that all agree satisfied the elements of a **preference** under § 547(b).

Thus, because such payments by the debtor constituted **preferences**, they were avoidable, meaning Blue Bell seemingly has the winning argument when it asserts that § 547(c)(4) prevents the Trustee from avoiding any payments to the extent they were followed by the delivery of goods of equivalent value. The Trustee, however contends that because the statute uses the word "otherwise" in qualifying the unavoidable transfer that the debtor's payment cannot represent—"on account of which **new value** the debtor did not make an otherwise unavoidable transfer"—Blue Bell loses. Why? Well, the Trustee acknowledges that all of these payments by the Debtor were **preferences** under § 547, and hence avoidable. But, says the Trustee, the "otherwise" qualifier means that the avoidability of a debtor's payment cannot be derived from § 547, but instead it must come from somewhere else. The somewhere else would presumably be § 548, which prohibits fraudulent transfers, and which the Trustee uses as his example of an "otherwise avoidable" transfer that would be sufficient to allow a creditor to avail itself of the **new-value** defense under § 547(c)(4).

Of course, if correct, the Trustee's argument effectively eviscerates the **new-value** defense. Under his example, the creditor could take advantage of the defense only if the subsequent transfer by the debtor constituted a fraudulent transfer. But success in that endeavor would be a Pyrrhic victory because obviously the transfer would then be avoided as being fraudulent. In essence, the Trustee's argument largely renders § 547(c)(4) an empty set: not a result one would reasonably think Congress to have intended when it drafted this language.

Leaving aside the illogical end result of the Trustee's argument, we disagree with his interpretation of the statute. We read the phrase "otherwise unavoidable transfer" in § 547(c)(4)(B) as referring to transfers that are unavoidable for reasons other than § 547(c)(4)'s subsequent-**new-value** defense. Section 547(c)(4) excepts from avoidance transfers that otherwise meet all of the requirements for avoidance under § 547(b). In other words, § 547(c)(4) renders otherwise avoidable transfers unavoidable. The phrase "otherwise unavoidable transfer" in a provision that renders transfers unavoidable naturally means a transfer that is unavoidable for reasons other than that provision. Our interpretation is bolstered by the fact that § 547(c)(4) is only one exception to avoidability contained within a list of such exceptions. *See* 11 U.S.C. § 547(c)(1)–(9). Thus, a transfer that is rendered unavoidable by ***1199** one of those other exceptions, such as § 547(c)(2)'s ordinary-course-of-business defense, can naturally be said to be "otherwise unavoidable" for purposes of § 547(c)(4)(B).

We are not the first court to conclude that "otherwise unavoidable transfer" in § 547(c)(4)(B) means a transfer that is unavoidable for reasons other than § 547(c)(4). *Accord Phx. Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phx. Rest. Grp., Inc.)*, 317 B.R. 491, 499–500 (Bankr. M.D. Tenn. 2004); *Boyd v. Water Doctor (In re Check Reporting Servs., Inc.)*, 140 B.R. 425, 431–32, 435–36 (Bankr. W.D. Mich. 1992); *see also Roberds, Inc. v. Broyhill Furniture (In re Roberds, Inc.)*, 315 B.R. 443, 470–74 (Bankr. S.D. Ohio 2004). With respect to the Trustee's particular interpretation of the statute, the Trustee acknowledges that no other court has adopted his reading of "otherwise unavoidable" in § 547(c)(4)(B). In fact, courts have rejected the Trustee's interpretation. *See, e.g., In re Check Reporting Servs., Inc.*, 140 B.R. at 431–32, 435–36; *cf. In re IRFM, Inc.*, 52 F.3d at 233 (concluding that transfers avoidable as **preferences** under § 547(b) were not "otherwise unavoidable"). We likewise reject the Trustee's argument that transfers that are avoidable under § 547(b), and on no other ground, are "otherwise unavoidable" for purposes of § 547(c)(4)(B).

CONCLUSION

The statement in *Jet Florida System* indicating that § 547(c)(4) requires **new value** to "remain unpaid" is dictum. We are therefore free to give fresh consideration to the question of whether § 547(c)(4) requires **new value** to remain unpaid. Having analyzed that statute, we hold that § 547(c)(4) does not require **new value** to remain unpaid. Nor do we find the Trustee's argument based on § 547(c)(4)(B) to be meritorious. We therefore **REVERSE** and **VACATE** the bankruptcy court's judgment and **REMAND** for a new calculation of Blue Bell's **preference** liability.

All Citations

899 F.3d 1178, 66 Bankr.Ct.Dec. 27, Bankr. L. Rep. P 83,290, 27 Fla. L. Weekly Fed. C 1155

Footnotes

* Honorable Ronald Lee Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

1 In pertinent part, as defined by § 547(b), a **preference** occurs when an insolvent debtor transfers money to pay a creditor for a prior debt within 90 days before filing a bankruptcy petition.

2 During the underlying bankruptcy proceedings, the Debtor sold all of its intellectual property—including its name—and changed its name to BFW Liquidation, LLC.

3 February 5, 2009, is the **date** on which the debtor filed its bankruptcy petition. November 7, 2008, began the 90-day period prior to the filing.

4 The information in this chart is derived from an exhibit that the Trustee introduced at trial. In its initial brief on appeal, Blue Bell concedes that the Trustee's exhibit is accurate.

5 Under 28 U.S.C. § 158(d)(2), the district court, the bankruptcy court, or the parties acting jointly, may certify an order of the bankruptcy court for direct appeal to this Court if (1) the order involves a question of law as to which there is no controlling decision of this Court or of the Supreme Court; (2) the order involves a matter of public importance; (3) the order involves a question of law requiring resolution of conflicting decisions; or (4) an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A). Here, the parties jointly certified that an immediate appeal of the bankruptcy court's order directly to this Court would materially advance the progress of the adversary proceeding.

6 The district court's opinion in *Jet Florida System* indicates that the adversary proceeding in that case was brought by Air Florida, Inc. (the debtor) and Air Florida System, Inc. *See Charisma Inv. Co., N.V. v. Air Fla. Sys., Inc.*, 68 B.R. 596, 598 (S.D. Fla. 1986). Therefore, it appears that Air Florida, Inc. was acting as a debtor in possession with all the rights of a trustee. *See* 11 U.S.C. § 1107(a). For ease of discussion, and because Air Florida, Inc. was standing "in the shoes of a trustee," *Fanelli v. Hensley (In re Triangle Chemicals, Inc.)*, 697 F.2d 1280, 1284 (5th Cir. 1983), we refer to the plaintiff in *Jet Florida System* as "the trustee," which is consistent with West's synopsis at the beginning of this Court's opinion in *Jet Florida System*. *See In re Jet Fla. Sys., Inc.*, 841 F.2d at 1082.

7 Specifically, § 547(b) provides:

(b) Except as provided in subsections (c) and (i) of [§ 547], the trustee may avoid any transfer of an interest of the debtor in property—

(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** of the filing of the petition; or

(B) between ninety days and one year before the **date** of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of [the Bankruptcy Code];

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of [the Bankruptcy Code].

8 In addition, any claim that the creditor has against the estate will be disallowed until the creditor repays the amount of the avoided transfer. 11 U.S.C. § 502(d).

9 By contrast, in 1986, the Seventh Circuit held, without much discussion, that § 547(c)(4) does require **new value** to remain unpaid. *In re Prescott*, 805 F.2d 719, 727–28 (7th Cir. 1986). Since then, the Seventh Circuit has continued to follow that approach. *See, e.g., P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1121 (7th Cir. 1998). A few years later, the Third Circuit also stated in a conclusory fashion that § 547(c)(4) requires **new value** to remain unpaid. *N.Y.C. Shoes, Inc. v. Bentley Int'l, Inc. (In re N.Y.C. Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989). However, whether § 547(c)(4) requires **new value** to remain unpaid was not at issue in that case. *See id.* at 681–82; *cf. Friedman's Liquidating Tr. v. Roth Staffing Cos. (In re Friedman's Inc.)*, 738 F.3d 547, 551–52 (3d Cir. 2013) (concluding

that the statement in *New York City Shoes* indicating that **new value** must remain unpaid as of the petition **date** was not a holding with respect to whether post-petition petition payments could affect a creditor's subsequent-**new-value** defense).

10 Section 547(c)(4) has not been amended since it was enacted in 1978. *See* 11 U.S.C. § 547 note (2012) (Amendments). *Compare* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2598–99, *with* 11 U.S.C. § 547(c)(4) (2012).

11 Section 60(c) of the Bankruptcy Act of 1898 was codified at 11 U.S.C. § 96(c) in the pre-1978 version of title 11. *See* 11 U.S.C. § 547 note (2012) (Senate Report No. 95-989) ("The fourth exception codifies the net result rule in section 60c of current law [section 96(c) of former title 11]." (brackets in original)). *Compare* Bankruptcy Act of 1898, ch. 541, § 60(c), 30 Stat. 544, 562, *with* 11 U.S.C. § 96(c) (1976).

12 With the exception of two spelling changes in 1938, § 60(c) remained unchanged from its enactment in 1898 until its repeal in 1978. *See* 11 U.S.C. § 96 note (1976) (Amendments) (declaring that, in 1938, § 96(c) was "reenacted without change"); Chandler Act, ch. 575, sec. 1, § 60(c), 52 Stat. 840, 870 (1938) (changing "afterwards" to "afterward" and "estates" to "estate" in the statutory text). *Compare* 11 U.S.C. § 96(c) (1934), *and* Bankruptcy Act of 1898 § 60(c), 30 Stat. at 562, *with* 11 U.S.C. § 96(c) (Supp. IV 1938), *and* 11 U.S.C. § 96(c) (1976).

13 The Commission produced a proposed bankruptcy act that was introduced in both houses of Congress. *See* S. 236, 94th Cong. (1975); H.R. 31, 94th Cong. (1975); H.R. 10792, 93d Cong. (1973); S. Rep. No. 95-989, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5788; H.R. Rep. No. 95-595, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5964; Comm'n on the Bankr. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt.II (1973). With respect to the subsequent-**new-value** defense, the Commission's proposed legislation stated:

> A transfer is not voidable to the extent of **new value** given at the time of the transfer or at any time thereafter. In determining the amount of **new value** given, the value of any security taken for it shall be deducted.

Comm'n on the Bankr. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt.II, at 167 (1973). Although a competing bill drafted by the National Conference of Bankruptcy Judges ("NCBJ") was also introduced in both houses of Congress, that bill's subsequent-**new-value** provision was identical to the Commission's proposal. *Compare* S. 236, 94th Cong. § 4-607(c)(2) (1975) (the Commission's proposal as introduced in the Senate), *and* H.R. 31, 94th Cong. § 4-607(c)(2) (1975) (the Commission's proposal as introduced in the House), *with* S. 235, 94th Cong. § 4-607(c)(2) (1975) (the NCBJ's proposal as introduced in the Senate), *and* H.R. 32, 94th Cong. § 4-607(c)(2) (1975) (the NCBJ's proposal as introduced in the House).

14 Transfer 1 is not a candidate for a "**new-value**" set-off because there is no prior cash payment from the debtor for it to set off.

15 To repeat, § 547(c)(4)(B) provides in pertinent part: "The trustee may not avoid under this section a transfer ... to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave **new value** to or for the benefit of the debtor ... on account of which **new value** the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."

16 Because we are dealing here with transfers of money in payment for goods received by the Debtor, and because the Trustee sought both avoidance of the transfers and recovery from Blue Bell in the same complaint, we need not concern ourselves with the distinction between avoidance and recovery for purposes of our analysis. *See* 11 U.S.C. § 551 (providing that any transfer avoided by the trustee under certain sections of the Bankruptcy Code, including §§ 547 and 548, is "preserved for the benefit of the estate"); *id.* § 550(a) (providing that, after a transfer is avoided, the trustee may recover the property transferred or the value of that property from the initial transferee or a subsequent transferee).

17 And a trustee has other avoidance powers besides those described in §§ 547 and 548. For example, a trustee may also avoid certain post-petition transfers and set-offs, under §§ 549 and 553(b)(1), respectively.

18 There are other exceptions, not pertinent to this case, included in § 547(c).

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