

Defending Against Preferential Transfers Post-BAPCPA: Understanding the “Ordinary Business Terms” Defense

By Anthony J. Kochis

Introduction

After a business debtor has filed for bankruptcy protection, creditors have a number of concerns, the primary ones being whether they will be paid for goods and services owing from the debtor or whether the debtor will continue to operate. A concern that creditors sometimes overlook is whether the debtor will sue the creditor to recover transfers made by the debtor prior to bankruptcy. In the ninety days immediately preceding a debtor's bankruptcy filing, the debtor is presumed to be insolvent, and the debtor may sue to recover payments made to creditors during this period.¹ This lawsuit is known as a preference action, and it can create a major headache for a creditor. If the debtor's preference action is successful, a creditor may be forced to return payments that it received from the debtor in the ninety days prior to the debtor's bankruptcy filing. Luckily, there are a number of defenses that a creditor may invoke in defense of a preference action, including the “ordinary course of business” defense and the “ordinary business terms” defense. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) significantly changed the preference landscape, including, among other things, changes to the “ordinary business terms” defense.

The “ordinary business terms” defense (objective standard) is located in section 547(c)(2) of the Bankruptcy Code.² Pre-BAPCPA, section 547(c)(2) read:

(c) The trustee may not avoid under this section a transfer—

(2) to the extent that such transfer was —

(A) in payment of a debt incurred by the debtor in the ordinary course of business or

financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; *and*

(C) made according to ordinary business terms.³

A creditor defending against avoidance of a preferential transfer under section 547(c)(2) was required to prove both subsection (B) (subjective standard) and subsection (C) (objective standard) because of the conjunction “and.”

In an effort to make it easier for creditors to successfully invoke section 547(c)(2) in defense of a preference action, the United States Congress substituted the word “or” for the word “and” in section 547(c)(2).⁴ The statute now reads:

(c) The trustee may not avoid under this section a transfer —

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was —

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; *or*

(B) *made according to ordinary business terms*⁵

A creditor defending against a preferential transfer post-BAPCPA has a much lighter burden because a creditor may now prove either subsection (A) (subjective standard) or subsection (B) (objective standard) because of the conjunction “or.”

Although the changes to section 547(c)(2) appear relatively straightforward, since BAPCPA has taken effect, no consensus

has emerged regarding the interpretation of “ordinary business terms” under section 547(c)(2)(B). Issues such as the interpretation and weight of pre-BAPCPA caselaw are unresolved as courts struggle to determine whether the objective standard should continue to be interpreted as it was pre-BAPCPA, or whether it should be read in a more expansive light since it has been liberated from its conjunctive counterpart, the subjective standard. Further, courts have reached different conclusions regarding the evidentiary burdens required under section 547(c)(2)(B) and the means by which a creditor meets those evidentiary burdens. This article examines the objective standard and highlights post-BAPCPA interpretations of the objective standard.

The Objective Standard

To prevail under the objective standard, a creditor must prove that the debtor made the challenged transfer “according to ordinary business terms” or within the range of terms prevailing in the relevant industry.⁶ Courts interpreting the objective standard begin their analyses by defining the relevant industry applicable to the debtor/creditor relationship.⁷ The second step is to define what constitutes payment within “ordinary business terms” in the given industry.

Defining the Relevant Industry

In many situations, the parties disagree regarding how broadly or narrowly to construe the definition of the relevant industry. This is because courts interpreting the relevant industry are not uniform in their analysis,⁸ and the relevant industry standard is not a one-size-fits-all definition. The Seventh Circuit highlighted the inherent difficulty in defining the relevant industry in a case where the debtor, a pizza maker, issued checks to its supplier, a sausage maker, commenting: “is [the relevant industry], the sale of sausages to makers of pizza? The sale of sausages to anyone? The sale of anything to makers of pizza?”⁹

It is often easier to define the relevant industry where both debtor and creditor are involved in the same or related industries. For example, in a situation where the debtor is an automobile manufacturer, and the creditor is a manufacturer and supplier of automobile component parts, it is safe to conclude that the relevant industry is the automobile

industry. However, even among parties in the automobile industry, the definition of the relevant industry turns on the nature of the business and the relative size of the parties. In the automobile example, if the creditor is a high volume supplier, the creditor should take into account its sales volumes as compared to other similarly-situated creditors. A higher or lower sales volume will likely affect the timing, nature, and circumstances of transactions between debtor and creditor and, therefore, affect the definition of the relevant industry. Similarly, if the creditor supplies automobile components that are unique in nature, a creditor should be mindful that the specific nature of the goods may also affect the timing, nature, and circumstances of the transactions and play a significant role in crafting the definition of the relevant industry.

A creditor should also keep in mind that it may be difficult to obtain payment information and trends regarding the relevant industry. There are several factors that prevent parties from gathering this information, such as antitrust issues, proprietary concerns, or the lack of available data due to the non-existence of competitors in the industry.¹⁰ Accordingly, a creditor attempting to define the relevant industry must have a firm understanding of the evidence that will be used to support its case and must be prepared to offer sufficient admissible evidence to convince the court to accept its definition of the relevant industry. All of these factors must be thoroughly explored and understood before engaging in an ordinary business terms analysis.

Demonstrating “ordinary business terms”

The Bankruptcy Code does not define the term “ordinary business terms,” but the federal circuit courts have developed several interpretations. For example, the Second Circuit has held that the objective standard requires a creditor to demonstrate that payments fall within the bounds of ordinary practice of others similarly situated.¹¹ The Seventh Circuit has held that the objective standard refers to a range of terms that are similar to the way the creditor engages, and that dealings outside that range are outside the scope of the objective standard.¹² Similarly, the Sixth Circuit has held that the objective standard means “that the transaction was not so unusual as to render it an aberration in the

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relevant industry.”¹³ In *Luper v Columbia Gas (In re Carled, Inc)*, the Sixth Circuit attempted to further refine the definition of “ordinary business terms” by specifically rejecting two definitions of ordinary business terms:

1. “[W]e reject the definition of ‘ordinary business terms’ adopted by the district court, which would require that the transactions at issue resemble a *majority* of the industry’s transactions”; and
2. “[W]e reject the definition adopted by the bankruptcy court requiring Columbia to establish the lateness as a pattern for a *significant* percentage of specific customers.”¹⁴

The Sixth Circuit found the transfers at issue in *In re Carled, Inc* within the “ordinary business terms” of the relevant industry where the transfers were within the billing cycle and thus, not “aberrational, unusual, or idiosyncratic.”¹⁵ As demonstrated by *In re Carled, Inc*, a creditor invoking the objective standard is not required to present evidence of a single, uniform set of credit terms in the relevant industry and then apply that evidence to the alleged preferential transfers.¹⁶ Instead, a creditor must fashion evidentiary support demonstrating that the alleged preferential transfers are not outside the realm of what would be considered normal within the relevant industry.

Creditors presenting evidence in support of their definition and application of the relevant industry standard often rely on the testimony of company representatives or employ experts to evaluate and summarize statistical data related to the alleged preferential transfers.¹⁷ Typically, the experts have some sort of financial or accounting expertise. An expert should be advised of the facts comprising the debtor/creditor relationship and information pertaining to the alleged preferential transfers. With a firm understanding of the nature of the parties’ relationship, an expert will generally gather information related to the relevant industry. Sources such as Capital IQ, the Credit Research Foundation, the Risk Management Association, and Dun & Bradstreet collect payment information in varying degrees. The expert must compare and contrast the relevant industry data with the debtor/creditor data. Ultimately, the expert must establish a standard of evidentiary reliability, and the court, as gatekeeper, must decide how much or how little weight to give the testimony of the expert.¹⁸

Section 547(c)(2)(B) Post-BAPCPA

In substituting “or” for “and,” Congress lessened a creditor’s evidentiary burden by requiring that a creditor demonstrate that the transfer was within either the “ordinary course of business” or “ordinary business terms.”¹⁹ This change has liberated the objective standard from the controlling influence of the subjective standard and placed the objective standard on equal footing.²⁰ While not completely overruling pre-BAPCPA caselaw regarding the objective standard, the revision has created ambiguity regarding the weight that should be afforded pre-BAPCPA interpretations of the objective standard.

Although the words “ordinary business terms” were not changed by BAPCPA, the context in which they appear in section 547(c)(2) has substantially changed.²¹ In fact, some authorities have suggested that cases decided under former section 547(c)(2)(C) will be less instructive in interpreting new section 547(c)(2)(B).²² Under pre-BAPCPA caselaw, courts often subordinated the importance of “ordinary business terms” in cases where the parties had an extensive history.²³ The evidentiary burden required to meet the objective standard was light where a prior history existed between the debtor and creditor because the objective standard was relevant, but less significant than the subjective standard.²⁴ Accordingly, the interpretation of the objective standard was often influenced, if not completely subordinated to, the subjective standard.

Some courts continue to apply pre-BAPCPA precedent to post-BAPCPA section 547(c)(2)(B). For example, in *Womack v Horob Livestock Inc (In re Horob Livestock Inc)*, the court noted that pre-BAPCPA caselaw is instructive when interpreting the objective standard post-BAPCPA, stating that the application of section 547(c)(2)(B) is “well-settled.”²⁵ While the court did not reach the merits of the application of the objective standard, the court relied upon controlling Ninth Circuit precedent.²⁶ Pre-BAPCPA Ninth Circuit caselaw applied a two-part test that examined a broad range of dealing between similarly situated debtors and creditors and required the creditor to prove that the transfers were within these business terms.²⁷ The Ninth Circuit has acknowledged that this is a lenient standard, which creditors should be able to satisfy with ease.²⁸ One potential concern is that courts construing the objective standard post-BAPCPA may view pre-BAPCPA prec-

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edent as too lenient or undeveloped and require an additional showing by the creditor to meet the objective standard.

For instance, at least one court in the Fourth Circuit has held that the objective standard requires a creditor to present additional evidence post-BAPCPA, such as evidence of the relevant industry of the debtor and standards applicable to business in general.²⁹ Prior to BAPCPA, controlling Fourth Circuit precedent analyzed only the norm in the creditor's industry when determining whether a transfer was made according to ordinary business terms.³⁰ The additional evidence required by the court in *National Gas Distribs v Branch Banking & Trust Co (In re Nat'l Gas Distribs)* indicates that some courts will revisit, or at least more closely scrutinize, pre-BAPCPA interpretations of the objective standard.³¹

Revised section 547(c)(2) is supported by clear congressional intent to lighten a creditor's burden of proof in defending against preferential transfers.³² Courts interpreting post-BAPCPA section 547(c)(2)(B) are faced with a quandary—now that the objective standard is a separate and equivalent defense, should courts require a higher evidentiary standard in order to account for the subordinated treatment and interpretation of the objective standard under pre-BAPCPA caselaw, or would requiring a higher evidentiary standard run counter to congressional intent to lighten a creditor's evidentiary burden?

Unfortunately, there are more open questions than answers regarding this issue, and it is unknown how courts in other jurisdictions will interpret post-BAPCPA section 547(c)(2)(B). A creditor should be mindful of these concerns and carefully examine the applicable caselaw in its jurisdiction regarding the objective standard. Although BAPCPA lightened a creditor's burden, a court construing pre-BAPCPA objective standard precedent may require additional evidence to demonstrate "ordinary business terms" post-BAPCPA.

How Post-BAPCPA Objective Standard May Be Applied

The legislative history of section 547 indicates that the purpose is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or creditors during the debtor's slide into bankruptcy.³³

Despite the varying interpretations of section 547(c)(2)(B), a creditor defending a preference action is better equipped to defend against alleged preferential transfers post-BAPCPA for a number of reasons. First, a creditor may defend against alleged preferential transfers by proving that the transfers are subjectively in the ordinary course of business between the parties. This allows a creditor to cast a wider net compared to pre-BAPCPA because creditors may defend against transfers that meet the subjective standard without worrying about meeting the requirements of the objective standard. Second, a creditor may defend against alleged preferential transfers by proving that the payments were made pursuant to ordinary business terms. This again is a wider net as compared to pre-BAPCPA because it is possible that transfers during the pre-preference period are completely out of sync with transfers during the preference period, but that the preference period transfers still conform to the industry norm. Under these facts, a creditor could argue that the transfers were made according to ordinary business terms, while ignoring the subjective standard, which was not possible under pre-BAPCPA section 547(c). Third, and maybe most importantly, a creditor may assert the subjective and objective standards at the same time, which results in layered defense that constitutes a much wider net than what was possible pre-BAPCPA.

What follows is a hypothetical example of how a creditor may layer the two defenses: suppose that debtor, NDebt Co., is in the business of manufacturing automobiles, and creditor, ABC Co., supplies automobile components. In the automobile industry, the average number of days for payment after invoice is approximately forty-five days.³⁴ In the course of dealing between ABC Co. and NDebt Co., payments average approximately twenty-five days after invoice.

Oblivious to the near certain demise of a company named NDebt Co., ABC Co. supplies NDebt Co. with automobile components, and NDebt Co. makes ten transfers of \$10,000 each to ABC Co. within ninety days of NDebt Co.'s bankruptcy filing. Debtor, NDebt Co., now alleges that the aggregate amount, \$100,000, constitutes preferential transfers in favor of ABC Co. and seeks to avoid the transfers. The payment history during the preference period is as follows:

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| Shipment/Invoice Date | Payment Date | Days | Payment Amount |
|-----------------------|--------------|------|---------------------|
| 8/9/2009 | 9/1/2009 | 23 | \$10,000.00 |
| 8/15/2009 | 9/9/2009 | 25 | \$10,000.00 |
| 8/24/2009 | 9/19/2009 | 26 | \$10,000.00 |
| 8/19/2009 | 9/20/2009 | 32 | \$10,000.00 |
| 8/12/2009 | 9/23/2009 | 42 | \$10,000.00 |
| 8/14/2009 | 9/27/2009 | 44 | \$10,000.00 |
| 8/21/2009 | 10/5/2009 | 45 | \$10,000.00 |
| 9/5/2009 | 10/21/2009 | 46 | \$10,000.00 |
| 9/9/2009 | 10/22/2009 | 43 | \$10,000.00 |
| 10/7/2009 | 10/31/2009 | 24 | \$10,000.00 |
| TOTAL | | | \$100,000.00 |

Looking at the preference period payment history, four payments were made approximately twenty-five days after invoice, and five payments were made approximately forty-five days after invoice. Because payments approximately twenty-five days after invoice are in the ordinary course of business between ABC Co. and NDebt Co., ABC Co. may invoke the subjective standard to shield these transfers.³⁵ If successful, \$40,000 would not be subject to avoidance under the subjective standard. Additionally, considering that the average number of days for payment after invoice is approximately forty-five days in the automobile industry, ABC Co. may also invoke the objective standard with respect to five payments. These five payments range between one and three days of the industry norm, and ABC Co. would have a strong argument that payments fluctuating between one and three days of the industry norm are not an aberration in the industry. Therefore, if successful, \$50,000 would not be subject to avoidance under the objective standard. In total, by combining both defenses, ABC Co. is able to defend against \$90,000 of the alleged preferential transfers. This result would not have been possible pre-BAPCPA because ABC Co. could not have layered the subjective and objective course defenses in this manner.

As the above example indicates, ABC Co. was able to defend against alleged preferential transfers by combining both the objective and subjective standards. A court applying pre-BAPCPA section 547(c) would have examined the parties' dealings with one another, the timing, the amounts at issue, the circumstances of the transactions, and then examined whether the particular transactions in question comport with the objective and subjective standards.³⁶ Considering that

average transfers in the automobile industry are forty-five days after invoice in the above hypothetical, and the course of dealing between the parties is twenty-five days after invoice, ABC Co. would have a difficult time defending against the alleged preferential transfers under pre-BAPCPA standards. But because the objective and subjective defenses are now disjunctive, ABC Co. can simultaneously invoke sections 547(c)(2)(A) and 547(c)(2)(B) to defend against the alleged preferential transfers. By layering the subjective and objective defenses, a creditor may defend against a much larger range of allegedly preferential transfers.

Conclusion

Congressional revisions to section 547(c) have substantially altered the strategy and possibly the analysis involved in defense of preferential transfers. Strategically, post-BAPCPA section 547(c) appears to allow a creditor to invoke the subjective standard, objective standard, or simultaneously layer the objective and subjective standards to defend against a wider range of preferential transfers. Creditors should, however, be mindful that pre-BAPCPA caselaw may be less instructive and that courts may distinguish pre-BAPCPA precedent that subordinated the importance of the objective standard. Overall, when crafting a strategy and analysis in defense of alleged preferential transfers, creditors should be mindful of the underlying policy of section 547 to leave undisturbed normal financial relations between the parties prior to a debtor's bankruptcy filing. With these considerations in mind, a creditor will be well-suited to defend against preferential transfers under the objective standard.

NOTES

1. See generally, 11 USC 547. The elements of a preference are a 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 this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

2. 11 USC 101 et seq.

3. 11 USC 547(c) (1978) (emphasis added).

4. See *Collier on Bankruptcy* ¶ 547.LH[(5)] (15th ed. 2009) (discussing the 2005 BAPCPA amendments to Section 547).

5. 11 USC 547(c) (2009) (emphasis added).

6. *Luper v Columbia Gas (In re Carled, Inc)*, 91 F3d 811, 815 (6th Cir 1996) ("courts do not look only at the manner in which one particular creditor interacted with other similarly situated debtors, but rather analyze whether the particular transaction in question comports with the standard conduct of business within the industry").

7. *Scharffenberger v United Creditors Alliance Corp (In re Allegheny Health, Educ & Research Found)*, 292 BR 68, 86 (WD Pa 2003) ("Before one can ascertain what constitutes the relevant industry norm, one must determine what constitutes the relevant industry").

8. For instance, the Fourth Circuit has stated that the objective standard requires analysis of the creditor's industry, while the Eighth Circuit has held that the objective standard requires analysis of the debtor's industry. Compare *Advo-System v Maxway Corp*, 37 F3d 1044, 1048 (4th Cir 1994) (courts must "look to the norm in the creditor's industry") with *Shodeen v Airline Software, Inc (In re Accessair, Inc)*, 314 BR 386, 394 (8th Cir BAP 2004) ("Section 547(c)(2)(C) requires the transferee to demonstrate that the debtor made the preferential transfer according to the ordinary business terms prevailing within the debtor's industry"), *aff'd*, 163 Fed Appx 445 (8th Cir 2006).

9. *In re Tolona Pizza Prods Corp*, 3 F3d 1029, 1033 (7th Cir 1993).

10. *In re Carled, Inc*, 91 F3d at 819.

11. *Lawson v Ford Motor Co (In re Roblin Indus)*, 78 F3d 30, 41 (2d Cir 1996).

12. *In re Tolona Pizza Prods Corp*, 3 F3d at 1033.

13. *In re Carled, Inc*, 91 F.3d at 818; see also *In re Fred Hawes Org, Inc*, 957 F2d 239, 246 (6th Cir 1992) ("A transaction is objectively ordinary if it does not deviate from industry norm but does conform to industry custom").

14. *In re Carled, Inc*, 91 F3d at 818 (emphasis in original).

15. *Id.*

16. See also *In re Tolona Pizza Prods Corp*, 3 F3d at 1033 (stating that ordinary business terms "does not mean that the creditor must establish the existence of some single, uniform set of business terms.")

17. *Official Comm of Unsecured Creditors v Robinson Lumber Co (In re Hardwood P-G, Inc)*, No 06-50057-C, 2007 Bankr LEXIS 2762 (Bankr WD Tex Aug. 13, 2007) ("There must be some basis in the practices in the

industry to authenticate the credit arrangement at issue. Testimony of the transferee's company representatives about practices in the industry is sufficient to meet this burden") (internal citations omitted); *Schnittjer v Alliant Energy Co (In re Shalom Hospitality, Inc)*, 293 BR 211, 215 (Bankr ND Iowa 2003) ("Many courts have relied on expert testimony to establish industry practice as to the length of time it usually takes suppliers to be paid by customers, although expert testimony is not required"). 18. See *Kumho Tire Co v Carmichael*, 526 US 137, 149 (1999) ("We conclude that Daubert's general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, 'establishes a standard of evidentiary reliability.' It 'requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.' And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline'" (internal citations omitted); *Daubert v Merrell Dow Pharms*, 509 US 579, 589 (1993) ("under the [Federal Rules of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

19. See generally, Scott A. Wolfson, "And" to "Or" Means Preference No More: The Expansion of the "Ordinary Course" Bankruptcy Preference Defense, Mich Bus L J, Spring 2006.

20. *National Gas Distribs v Branch Banking & Trust Co (In re Nat'l Gas Distribs)*, 346 BR 394, 403 (Bankr EDNC 2006) ("The yolk [sic] between the ordinary course of business defense and the ordinary business terms components of § 547(c)(2) has been removed by BAPCPA, and ordinary business terms has been released from the controlling influence of the ordinary course of business subsection") (internal quotations omitted).

21. *Id.* at 396.

22. *Collier on Bankruptcy* ¶ 547.04[(2)(a)(i)] (15th ed. 2009).

23. *In re Nat'l Gas Distribs*, 346 BR at 402 ("subsection (C) was perceived as somewhat less important because it focused on objective, larger-scale industry standards instead of the more immediate facts of the parties' relationship, which were reserved for discussion under the umbrella of subsection (B)").

24. *Advo-System v Maxway Corp*, 37 F3d at 1050 ("On the other hand, when the parties have an established relationship, the terms previously used by the parties in their course of dealing are available as a potential baseline. The industry norm, though still relevant, becomes less significant").

25. *Womack v Horob Livestock Inc (In re Horob Livestock Inc)*, 382 BR 459, 487 (Bankr D Mont 2007).

26. See *id.* at 487 ("The application of § 547(c)(2)(B), which is now separated from § 547(c)(2)(A) with an 'or' rather than an 'and', is equally 'well-settled'" (citing *Sigma Micro Corp v Healthcentral.com (In re Healthcentral.com)*, 504 F3d 775, 791 (9th Cir 2007)).

27. *In re Healthcentral.com*, 504 F3d 775, 791 (9th Cir 2007) ("To satisfy § 547(c)(2)(C) the creditor must demonstrate that the relevant payments were ordinary in relation to prevailing business terms. As before, this effectively breaks down into two components. First the creditor must establish the broad range of business terms employed by similarly situated debtors and creditors, including those in financial distress, during the relevant period. Second, the creditor must show that the relevant payments were ordinary in relation to these prevailing business terms.") (internal quotations and citations omitted).

28. *Id.* ("In general, § 547(c)(2)(C) should not pose a particularly high burden for creditors").

29. See *In re Nat'l Gas Distribs*, 346 BR at 404 (“Now that ‘ordinary business terms’ is a separate defense, the court must consider the industry standards of both the debtor and its creditors. Furthermore, there are general business standards that are common to all business transactions in all industries that must be met”).

30. *Advo-System v Maxway Corp*, 37 F3d at 1048 (“we hold that subsection C requires us to look to the norm in the creditor’s industry when determining whether preference payments were made according to ordinary business terms”).

31. The court reasoned that the additional evidence was justified because “[i]f the ‘ordinary business terms’ defense only requires examination of the industry standards of the creditor, there would be no review or check on the debtor’s conduct.” *In re Nat'l Gas Distribs*, 346 BR at 404. Further, the opinion suggests (but does not explicitly state) that pre-BAPCPA objective standard precedent may be too lenient. See *id.* at 405 (“Although the creditor’s burden [under the objective standard] has been lightened by BAPCPA, it still has some weight, and it has not been lightened to the extent that BB&T can prevail in this proceeding”).

32. See *supra* n.4.

33. H.R. Rep. No. 95-595, at 373 (1977); S. Rep. No. 95-989, at 88 (1977); see also *Savage & Assocs v Mandl (In re Teligent Inc)*, 380 BR 324, 340 (Bankr SDNY 2008).

34. This figure is for the purposes of the hypothetical only.

35. This analysis assumes that ABC Co. could satisfy its evidentiary burden.

36. *Brandt v Repco Printers & Lithographers (In re Healthco Int'l)*, 132 F3d 104, 109 (1st Cir 1997) (“several factors . . . bear upon whether a particular transfer warrants protection under section 547(c)(2). These factors include the amount transferred, the timing of the payment, the historic course of dealings between the debtor and the transferee, and the circumstances under which the transfer was effected”).



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