

contractor) to a creditor (here, your company) or a lien on the creditor's property for a debt owed at the time the transfer was made while the debtor was insolvent, which was made within 90 days of the debtor filing bankruptcy or within one year of the debtor filing bankruptcy if the transfer was to an insider of the debtor that enables the creditor to receive more than it would have received if the debtor had filed for Chapter 7 bankruptcy. Exceptions include if the transfer was an exchange for new value, for a debt in the ordinary course of business of the debtor, or if that transfer creates a certain type of security interest.

Getting back to our example, if your company was paid within 90 days of filing for bankruptcy, you will want to argue that the payment was in the ordinary course of business for the debtor or that it was a transfer for new value. If the attorney for the bankruptcy trustee does not agree, that attorney may file an adversary Complaint against your company in the bankruptcy court alleging that the transfer was a preference. However, the attorney for the bankruptcy trustee will not always file such an adversary Complaint. For example, if the amount in controversy is relatively small, for example, less than \$10,000, it is possible that the trustee's attorney will not bother with commencing an adversary action. Similarly, if the transfer of money was arguably for new value or in the ordinary course of the debtor's business, the attorney for the trustee may not bother filing a Complaint.

Two examples of a preference may arise when the facts do not appear to be a preference. First, if your company obtains a judgment against a debtor and then records the judgment within 90 days of the debtor filing for Chapter 11 bankruptcy, your company has created a judgment lien against real property owned by the debtor. That lien is considered a transfer and, therefore, a preference. Second, if your company obtains a judgment against the debtor and garnishes his bank account within 90 days of the debtor filing for Chapter 11 bankruptcy, any funds you received are considered a preference.

If you are contacted by a trustee's attorney demanding payment of an alleged preference, I suggest holding off. It may be a bluff; the attorney may never file an adversary Complaint. If the attorney does file an adversary Complaint, you can then take steps to resolve the matter, and you will not be exposed to paying the attorneys' fees of the attorney for the trustee.

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When Getting Paid is Not Getting Paid: Preferences in Bankruptcy

By Timothy D. Ducar

Your company subcontracted with a general contractor for roofing work. You get paid. Shortly thereafter, the general contractor files for Chapter 11 reorganization bankruptcy. You then receive a letter from the bankruptcy trustee advising you that the transfer was a preference and that your company needs to pay the money to him on behalf of the bankruptcy estate.

What the heck? How is that fair? What was Congress thinking?

Preferences are defined in the bankruptcy code as a transfer of an interest in the debtor (here, the general