

# The ClawBack Report

A Preference and Fraudulent Conveyance Newsletter

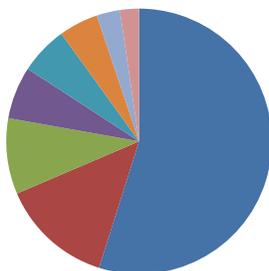
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**Groups of Adversary Proceedings Filed by the Debtors**



- GT Advanced Technologies, Inc. and GT Advanced Equipment Holding LLC
- SunEdison, Inc., et al.
- Turner Grain Merchandising, Inc.
- Yellow Cab Cooperative, Inc.
- National Air Cargo, Inc.
- 62SGAC, Inc.
- A.N. Frieda Diamonds, Inc.
- ECSM Utility Contractors, Inc.

## INTRODUCTION

Your monthly dispatch from the clawback wars by Roland Gary Jones Esq., "The Clawback Guy."

Trustees initiated more than **500** adversary proceedings nationwide during the month of October 2016. Most notable -

- **309** clawback lawsuits commenced in the bankruptcy cases of **GT Advanced Technologies, Inc. and GT Advanced Equipment Holding LLC.**

Ruling for October –

- The Michigan Court held that a \$6,000.00 payment made by a Debtor to her son, the Defendant, representing proceeds of a vehicle in which he held a perfected security interest qualified as a contemporaneous exchange for new value under §547(c)(1), even though the exchange was not simultaneous.

Warm Regards,  
Roland

## News

- ↳ Creditors Sue Billionaire Blavatnik in Trial Over Lyondell Bankruptcy
- ↳ UnitedHealth Accused of Allegedly Overcharging Customers on Prescription Drugs
- ↳ Madoff Renounces Defendant's Motion to Compel Discovery in the Clawback Fight
- ↳ Preference Actions Filed in GT Advanced Technologies, Inc. and GT Advanced Equipment Holding LLC
- ↳ Cay Clubs Principal Indicted On Bank Fraud and Tax Charges

## Opinions

- ↳ Trustee Can Not Recover the Transfers Made by the Debtor's President to Himself for Lack of Evidence
- ↳ Michigan Court – Release of a Security Interest and Receipt of

Payment by the Defendant was a Contemporaneous Exchange, Even though the Release Occurred Weeks Before the Payment was Made

- ↳ Trustee Demonstrates Multiple Badges of Fraud to Successfully Avoid the Transfer as Fraudulent under §548
- ↳ Chief Judge Ferguson Denies Defendant's Motion to Dismiss in TransVantage Solutions, Inc.
- ↳ New York Court Denies Trustee's Motion to Re-Argue the Dismissal of the Pre-2001 Claims

## Recent Preference and Fraudulent Conveyance News

### UnitedHealth Accused of Allegedly Overcharging Customers on Prescription Drugs

October 5, 2016, Minnesota – Earlier this week, UnitedHealth Group Inc. was sued by its clients, accusing the largest US health insurer of allegedly charging co-payments for prescription drugs that were higher than their actual cost. **The customers asserted that the health insurer was defrauding them by setting up a system that discreetly overcharged for prescription medicines that cost less than the actual amount and pocketed the difference.** Further, the customers alleged that the company purportedly worked out deals with pharmacies for its drug benefits plans that include cutting the prices for certain drugs, but the benefits of those cuts were not passed on to the customers. However, as per the court filings, the insurer didn't admit any wrongdoings so far. The case is *Mohr v. UnitedHealth Group Inc.*, 16-cv-03352, U.S. District Court for the District of Minnesota.

### Creditors Sue Billionaire Blavatnik in Trial Over Lyondell Bankruptcy

New York, October 17, 2016 – Almost a decade after the ill-fated deal that created chemical

giant LyondellBasell Industries NV, creditors headed to court to try to recover billions of dollars that they alleged Len Blavatnik extracted before the company went bankrupt. At a trial in the Manhattan bankruptcy court, the creditors sought to recover and avoid more than \$1.7 billion from **Blavatnik, his firm Access Industries Holdings LLC** and other affiliates. The creditors also attempted to avoid about \$2 billion more from Blavatnik and other executives for alleged mismanagement of LyondellBasell, which filed for bankruptcy in 2009. **The creditors alleged that he extracted money as a shareholder and intentionally transferred certain fees in an improper manner from the financially precarious company, dooming it to failure.** Blavatnik allegedly denied wrongdoing. The case is *Lyondell Litigation Trust*, 09-01375, U.S. Bankruptcy Court Southern District of New York (Manhattan).

### Madoff Renounces Defendant's Motion to Compel Discovery in the Clawback Fight

New York, October 17, 2016 - **Irving Picard, the court-appointed trustee of the liquidating Bernie Madoff's fraudulent investment firm,** challenged a discovery request in a New York bankruptcy court lawsuit that sought to recover \$1.5 million from the former Madoff customers. The trustee alleged that the defendant's attorney

is resorting to unprofessional personal attacks against him. Further, the trustee argued that the discovery conduct had no basis in fact and did not reflect a good faith effort to investigate factual matters as required by Federal Rule of Civil Procedure 26(g). The trustee stated that it took an enormous and unprecedented effort to transparently make available all of the underlying materials supporting the determination that Madoff operated the largest and longest running financial fraud in the modern history. Despite that, the defendants' counsel ignored the evidence provided by the trustee and served the trustee in over 80 cases, 18 discovery requests demanding burdensome interrogatory responses concerning unrelated subjects and complex investigations into the evidence previously furnished.

The case is *Picard v. Trust U/Art Fourth O/W/O Israel Wilenitz*, case number 10-04995. The bankruptcy case is *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC et al.*, case number 1:08-ap-01789, in the U.S. Bankruptcy Court for the Southern District of New York.

### Preference Actions Filed in GT Advanced Technologies, Inc. and GT Advanced Equipment Holding LLC

**October 11, 2016, New Hampshire - The estate of GT Advanced Technologies Corp. and its affiliates (GTAT) initiated nearly 300 lawsuits over the past few weeks to recover millions of dollars it had paid to vendors 90 days before Chapter 11 reorganization.** GTAT continued to operate its business and manage its properties as debtors in possession under §§1107(a) and 1108 of the Bankruptcy Code. GTAT in its bankruptcy plan's disclosure statement stated that approx. \$195.5 million was

allegedly transferred during the 90 days before its bankruptcy filing, and less than half of the \$91.6 million is potentially voidable. The biggest target, according to the disclosure statement, would be **Heibei Hengbo Fine Ceramics Material**, a Chinese firm, for \$13.2 million. GT Advanced filed for bankruptcy on October 6, 2014, after it allegedly banked on supplying material for Apple's iPhone, but Apple apparently went in a different direction. The cases are jointly administered under Case No. 14-11916 before the Honorable Judge Henry J. Boroff in the United States Bankruptcy Court for the District of New Hampshire.

### Cay Clubs Principal Indicted On Bank Fraud And Tax Charges

*Florida, October 18, 2016 - David Schwarz, the former CFO of Cay Clubs Resorts and Marinas*, who falsely claimed it was developing luxury resorts in the Florida is facing a lawsuit for conspiracy to commit bank fraud, making false statements to a financial institution, and interfering with the administration of the IRS.

Cay Clubs operated from 2004 to 2008, marketing the offering and sale of interests in luxury resorts nationwide. Through the purported purchase of dilapidated luxury resorts and the subsequent conversion into luxury resorts, Cay Clubs allegedly promised investors a steady income stream that included an upfront "leaseback" payment of 15% to 20%. In total, the company was able to raise over \$300 million from approximately 1,400 investors. However, by 2006 the company was alleged to have lacked sufficient funds to carry through on the promises made to investors. Instead of using resources to develop and refurbish the resorts, Cay Clubs allegedly used incoming investor funds to pay "leaseback" payments to existing

investors in what authorities alleged was a classic example of a Ponzi scheme.

## Recent Preference and Fraudulent Conveyance Opinions

### Trustee Can Not Recover the Transfers Made by the Debtor's President to Himself For Lack of Evidence

*Rentas v. Gomez (In re Indrescom Sec. Tech. Inc.)*, No. 12-07047, 2016 Bankr. LEXIS 3618 (U.S. Bankr. D.P.R. Oct. 4, 2016)

The Trustee brought an adversary proceeding to avoid and recover transfers made by **Defendant Jose A. Rodriguez Gomez**, the president of **Debtor Indrescom Security Technology, Inc.** to himself, alleging that these transfers were preferential in nature. The Trustee contended that the Debtor made the alleged payments to Gomez as a creditor of the Debtor on account of the previous debt. The Defendant asserted that the alleged transfers were not preferences as they were used to pay the salaries of the Debtor's employees and hence neither he was a creditor nor had any antecedent owed.

The Court found that the first requirement under §547(b)(1) was not satisfied. The Court reasoned that the evidence referenced by the trustee, i.e., copies of the canceled checks, its statement of uncontested facts, several bank statements from the Debtor's commercial account, etc. were not sufficient enough to prove that the Defendant was a creditor with a claim against the Debtor. Next, the Court found the Trustee's statements regarding the antecedent debt requirement contradictory. On the one hand, the Trustee denied that the alleged transfers were used to pay the employees' salaries and on the other hand, relied on the Defendant's defense under §547(c) (1),(2) to evince the first two elements of the alleged preferential transfers. **Thus, the Court concluded that no sufficient evidence was presented to prove that the Defendant was the Debtor's creditor and that such payments were on account of an antecedent debt.** Since the Trustee failed to prove the first two elements of §547(b), the Court did not analyze further on remaining elements and ruled that the alleged transfers were not preferences within the meaning of §547(b).

### Michigan Court – Release of a Security Interest and Receipt of Payment By the Defendant is a Contemporaneous Exchange, Even though the Release Occurred Weeks Before the Payment was Made

*In re Rosich*, 558 B.R. 199\_(Bankr. W.D. Mich. 2016)

**Defendant Christopher Rosich** made a loan to his **mother, Carol K. Rosich (Debtor)** which he secured by obtaining a security interest in a vehicle titled in her name. After a few years, the Debtor decided to sell the car and instructed her son, the Defendant to get the certificate of title ready to be delivered to a buyer. The Defendant signed the certificate of title for the release of liens on August 12, 2012. Subsequently, a few weeks later, the Debtor closed the sale of a vehicle to Mr. King, who paid the Debtor \$6,000.00. The Debtor deposited the \$6,000.00 in her daughter's savings account for the

Defendant's benefit on September 14, 2012, and asked the Defendant to send the certificate of title. The Trustee sought to avoid this transfer as a preference. The Defendant asserted that the alleged transfer was a contemporaneous exchange under §547(c)(1).

The Court agreed with the Defendant and found that the Debtor and her son intended the transaction to be a contemporaneous exchange. The Defendant and his mother decided that the Defendant would release the lien upon the sale of the car, which is in fact what happened. So, when the Defendant released his security interest, he gave "new value" to the Debtor as defined in §547(a)(2) and received payment (via the deposit into the savings account for his benefit) a few days later. The Court stated that although the Defendant signed the certificate of title for the release of liens on August 12, 2012, he did not release his interest until he delivered the certificate of title several weeks later after his mother sold the vehicle to Mr. King. However, the Court stated that this doesn't mean that the transfer cannot be a contemporaneous exchange because it was the nature and the mechanics of this particular transaction, which prevented the exchange from being simultaneous. The Court added that **the contemporaneous exchange defense is flexible enough to protect certain substantially contemporaneous exchanges like the one that occurred here between family members in different parts of the country at the time of the transaction. Thus, the Court held that the exchange in the present case, though not simultaneous, was intended to be substantially contemporaneous and thus, the Court ruled for the Defendant.**

### **Trustee Demonstrates Multiple Badges of Fraud to Successfully Avoid the Transfer as Fraudulent Under §548.**

*Corzin v. DiGiammarino (In re Maglione)*, Nos. 14-50685, 14-05110, 2016 Bankr. LEXIS 3722 (U.S. Bankr. N.D. Ohio Oct. 14, 2016)

Before May 2000, **Debtor Anthony F. Maglione** and his now ex-wife incurred debts on certain credit cards that were in the name of his mother, **Ruth B. DiGiammarino, the Defendant**. The Defendant borrowed funds from a bank to satisfy the outstanding balances on the credit cards. The Debtor and the Defendant agreed that the Debtor would repay the debt in monthly installments. A month after, the Debtor filed for bankruptcy. **The Debtor and his wife were then Chapter 13 debtors who were obligated to make plan payments to the Chapter 13 trustee on account of their creditors in an amount that exhausted their disposable income above and beyond their reasonable expenses. The Debtor nevertheless made monthly installment payments to the Defendant on account of the oral agreement to repay the original credit card debt.** The Trustee brought an adversary complaint against the Defendant to avoid the transfer made by the Debtor to the Defendant, his mother as fraudulent transfers under §548 of the bankruptcy code.

The Court found that the alleged transfer was avoidable because the Defendant made the transfer with an actual intent to hinder, delay, and defraud his now ex-wife and other creditors. The Court found multiple badges of fraud to give rise to the inference of fraudulent intent. First, the Defendant was the Debtor's mother and therefore had a close family relationship; next, the Debtor and Defendant had a history of

secret transactions and the debt that supposedly was owed by the Debtor to the Defendant was inadequate or for no consideration. Further, there was a dissipation of assets shortly before the divorce. The Court **stated that these badges of fraud shifted the burden to the Defendant to explain the legitimate purpose of the transfer, and the Defendant did not offer any sufficient explanation.** Further, the Trustee also failed to prove at trial a claim for avoidance of a constructively fraudulent transfer because he failed to meet his burden of establishing insolvency of the Debtor.

### Chief Judge Ferguson Denies Defendant's Motion to Dismiss in TransVantage Solutions, Inc.

*Giuliano v. Delta Air Lines, Inc. (In re TransVantage Sols., Inc.)*, Nos. 13-19753, 15-1882, 2016 Bankr. LEXIS 3672 (U.S. Bankr. D.N.J. Oct. 6, 2016)

The TransVantage cases were initiated under Chapter 7 of the Bankruptcy Code on May 3, 2013, following which **Alfred Giuliano** was appointed Chapter 7 Trustee for the **Debtor TransVantage Sols, Inc.** Two years later, the Trustee filed hundreds of preference and fraudulent transfer complaints against various defendants. **Debtors were in the business of providing freight audit and payment services on behalf of its customers to facilitate accurate and timely review and payment of freight invoices. The Defendants argued that the Trustee failed to sufficiently** plead the predicate elements of §547(b) of the Bankruptcy Code and urged the Court to dismiss the complaint. The Court concluded that the preference elements were sufficiently pled to survive dismissal. Further, an ordinary course of business defense under §547(c)(2) as raised by one of the Defendants was questioned both on procedural and substantive grounds by the Court. The Court held that the payments were neither made in the ordinary course of business nor made according to ordinary business terms. The Debtor used funds advanced by one customer to pay another customer's freight bills, and this method was not consistent with the ordinary business terms under §547(c)(2) because ordinarily, funds paid by customers were held particularly to pay the freight bills of that and only that customer.

### New York Court Denies Trustee's Motion to Re-Argue the Dismissal of the Pre-2001 Claims

*Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Nos. 08-01789 (SMB), 10-05421 (SMB), 2016 Bankr. LEXIS 3757 (U.S. Bankr. S.D.N.Y. Oct. 18, 2016)

Trustee Irving H. Picard brought the adversary proceeding **under the Securities Investor Protection Act (SIPA)**, and as representative of the substantively consolidated estate of **Debtor Bernard L. Madoff**, to avoid and recover transfers made to the accountants, **Frank Avellino and Michael Bienes**. The two auditors urged a New York bankruptcy judge last month to deny the motion of the Trustee to reargue these clawback claims against them as they were already dismissed earlier in July. The accountants urged the court to reject the trustee's motion to re-argue as the Court lacked subject matter jurisdiction to hear claims for the fraudulent transfers which occurred before January 1, 2001. **The Court agreed with the accountants and rejected the Trustee's motion to reargue the dismissal of pre -2001 claims.** The Court held that the SIPA Trustee, as trustee of BLMIS, could recover transfers of

customer property under SIPA but the Chapter 7 Trustee could not. The Trustee's argument that a SIPA's protective order covered the individual debtor as well as his LLC because they used the same SEC registration number lacked support. Next, an order consolidating individual debtor and LLC's bankruptcy cases did not authorize SIPA trustee to assert avoiding powers against transfers made by the individual debtor. Finally, the Court ruled that there was no manifest injustice and held for the accountants.

## Snapshot of Clawback Cases Filed

<b>Groups of Adversary Proceedings filed by the Debtors</b>	<b>Total cases filed</b>	<b>Name of Judge</b>	<b>Largest Case in the group</b>	<b>Claim Amount of the Largest Case</b>	<b>Petition Date</b>	<b>District</b>
<b>GT Advanced Technologies, Inc. and GT Advanced Equipment Holding LLC</b>	309	Christopher J. Panos	Hebei Hengbo Fine Ceramics Material	\$ 13,325,000.00	10/6/2014	District of New Hampshire
<b>SunEdison, Inc., et al.</b>	77	Stuart M. Bernstein	To be determined	To be determined	4/21/2016	Southern District of New York
<b>Turner Grain Merchandising, Inc.</b>	52	Phyllis M. Jones	Turner Commodities, Inc.	\$ 29,727,363.65	10/23/2014	Eastern District of Arkansas
<b>Yellow Cab Cooperative, Inc.</b>	36	Dennis Montali	Amy L. Welch-Chapman	\$ 486,000.00	1/22/2016	Northern District of California
<b>National Air Cargo, Inc.</b>	33	Michael J. Kaplan	Atlas Air, Inc.	\$ 955,000.00	10/17/2014	Western District of New York
<b>62SGAC, Inc.</b>	27	Laura K. Grandy	American Express Credit Corp.	\$ 293,074.95	10/31/2014	Southern District of Illinois
<b>A.N. Frieda Diamonds, Inc.</b>	16	Michael E. Wiles	I.R. Inc.	\$ 169,379.60	7/16/2015	Southern District of New York
<b>ECSM Utility Contractors, Inc</b>	13	Mary D France	Cablevision	\$ 449,161.24	4/30/2014	Middle District

## About Roland Jones



Mr. Jones has practiced bankruptcy law for over two decades. His primary focus is representing corporate defendants in preference and fraudulent conveyance litigation. Mr. Jones has a national client base and has also represented corporate clients based in Europe and the Far East.

In addition to his law practice, Mr. Jones has authored professional articles on bankruptcy issues for the *New York Law Journal*, *The Environmental Claims Journal*, *The Mergers and Acquisitions Report*, and other scholarly publications.

Mr. Jones also edits and writes the *Clawback Report*, a monthly publication on preference and fraudulent conveyance litigation.

Mr. Jones was the founding member and former Chair of the Federal Bar Association Empire State Chapter Bankruptcy Committee. The Bankruptcy Committee has hosted experts to speak on topics important to both bankruptcy and non-bankruptcy practitioners. Guest speakers have included The Honorable Jerrold Nadler on new bankruptcy legislation, Wilbur L. Ross, Jr. of Rothschild Inc. on the distressed bond market, and Professor Edward Altman of New York University on bankruptcy investing.

Mr. Jones is the founding member and current President of the National Association of Bankruptcy Litigators. The NABL is a new organization focusing exclusively on clawback issues consisting of 110 bankruptcy lawyers from throughout the country.

Mr. Jones' introduction to bankruptcy practice began by serving as a judicial law clerk to Chief U.S. Bankruptcy Judge Conrad B. Duberstein of the Eastern District of New York during law school. He continued his training after graduation by clerking for U.S. Bankruptcy Judge Cecilia H. Goetz of the Eastern District of New York from 1990 to 1991.

Mr. Jones attended the Horace Mann School, Columbia University (B.A. Ancient Studies) and Brooklyn Law School (J.D. 1990) He is admitted to practice law before the United States District Courts for the Southern and Eastern Districts of New York, as well as the United States Court of Appeals for the Second Circuit.

Mr. Jones was born in New York City.

## Bar Admissions

New York State Bar Admission - 1990  
United States District Court Southern District of New York - 1991  
United States District Court Eastern District of New York - 1991

### **Professional Memberships**

President: National Association of Bankruptcy Litigators  
Member: New York State Bar Association  
Member: Association of Bar City of New York  
Member: Turnaround Management Association  
Member: American Bankruptcy Institute

### **Education**

1972 – 1977: The Horace Mann School  
1977 – 1979: Vassar College  
1985 – 1987: Columbia University; top 10% of the graduating class  
1988 – 1990: Brooklyn Law School; top 10% of the graduating class

### **Writings**

“Are repos exempt from automatic stay?”; Bankruptcy Law - New York Law Journal; Pg. 31, (col. 6);  
Vol. 213, 2586 words

"Bankruptcy's Conflict of Interest Rule"; Outside Counsel - New York Law Journal; Pg. 35, (col. 3);  
Vol. 212, 2117 words

"Bankruptcy and Environmental Law," The Environmental Claims Journal

"Mergers and Acquisitions in Bankruptcy," The Mergers and Acquisitions Report

The Clawback Report, A Quarterly Publication on Preference and Fraudulent Conveyance Litigation  
Issues.

"Introduction to Preference Law," National Association of Bankruptcy Litigators Journal

Bankruptcy Bulletin: “Wellness International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)”, National  
Association of Bankruptcy Litigators Journal

Majority Report: “Redefining the Circuit Split Over the §547(c)(4) Subsequent New Value Defense” by  
Roland Jones, Esq. and Solomon Rotstein, National Association of Bankruptcy Litigators Journal