The ClawBack Report

A Preference and Fraudulent Conveyance Newsletter

Volume 4 Edition 4

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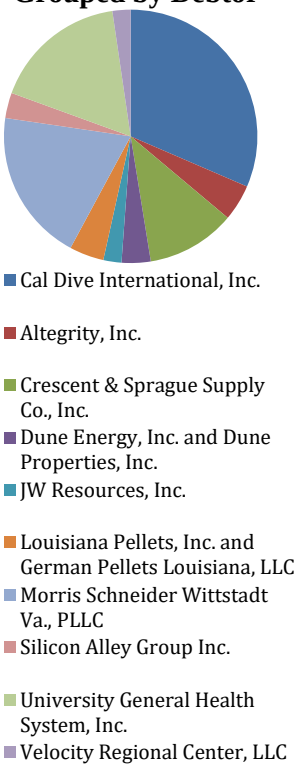
Adversary Proceedings Grouped by Debtor



INTRODUCTION

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

Trustees initiated more than **400** adversary proceedings nationwide during the month of March 2017. Most notable -

- **136** clawback lawsuits commenced in the bankruptcy cases of **Cal Dive International, Inc.**

Ruling for March –

- A Colorado Bankruptcy Court allowed a public utility company's claim seeking payment of $84,253.95 worth of electrical energy it supplied a debtor during the 20-day period that preceded the date the debtor declared bankruptcy as an administrative expense claim under §503(b)(9). Although courts were divided on the question of whether electrical energy was "goods" for purposes of §503(b) (9), the Colorado Court held that the better view was that it was.

Warm Regards,
Roland

News

- Cal Dive International Inc. Launches Its Clawback Campaign
- Former Madoff Employee Andrew Cohen to Give Up $1.1M He Received During the Madoff Ponzi Scheme
- Trustee Needs More Time to Object to General Unsecured Claims in the Trump Entertainment Resorts Inc. Clawback Suits
- Greenberg Traurig LLP Settles $2.2M Lawsuit With Brown Medical Centre

Opinions

- Metered Electrical Energy Delivered By a Defendant to the Debtor Constitutes "Goods" Under the Unambiguous Text of §503(b) (9)
- Failure of Proof Regarding the Fifth Element Under §547(b) (5) Precludes Judgment for Trustee
- Trustee Fails to Demonstrate that a Genuine Issue of Material Fact Exists as to the Debtor's Solvency on the Transfers

- Defendant Provided "Value" for the Alleged Transfer by Paying for the Parties' Living Expenses from the Transfer

Recent Preference and Fraudulent Conveyance News

Cal Dive International Inc. Launches Its Clawback Campaign

Delaware, March 13, 2017 - **Cal Dive International Inc**., an undersea oil drilling services firm, launched a campaign of avoidance actions last month, seeking to clawback more than $20 million in payments made before it filed for Chapter 11 protection. **Cal Dive's counsel, The Rosner Law Group LLC** initiated almost **130 avoidance actions** in the **Delaware Bankruptcy Cour**t to recover so-called preference payments under §§547 and 550 of the Bankruptcy Code, made during the 90-day period before the debtor entered bankruptcy. Before the wind-down of the debtors' operations, the debtors and their non-debtor foreign affiliates constituted a global marine contractor that provided highly specialized manned diving, pipelay and pipe burial, platform installation and salvage, and well-intervention services to a diverse customer base in the offshore oil and gas industry. The debtor is continuing to operate as debtors in possession. The case is *In re Cal Dive International, Inc.*, Case No. 15-10458 in United States Bankruptcy Court for the District of Delaware.

Second Circuit Hears Madoff Investor's Request to Re-consider $655M Settlement

March 10, 2017, New York -- Last month, a group of Tremont investors who lost money through Bernard Madoff's Ponzi scheme urged the Second Circuit that a $655 million class action settlement against the hedge funds they invested with should be reallocated because it unfairly favored certain investors over others. These investors had invested in various funds managed by Tremont Groups Holdings, Inc. which in turn pumped money into the Madoff scheme. The Tremont investors allegedly received an inferior recovery from the settlement plan. The investors alleged that the settlement plan was flawed. However, the opposite counsel asserted that plan treated all funds participating in the Madoff trustee settlement on equal footing. Further, the counsel stated that the settlement was arrived at pursuant to mediation and was approved by the federal court.

The case is In Re: Tremont Securities Law, the U.S. Court of Appeals for the Second Circuit.

Trustee Needs More Time to Object to General Unsecured Claims in the Trump Entertainment Resorts Inc. Clawback Suits.

February 24, 2017, New York - The trustee in **Trump Entertainment Resorts Inc.'s** Chapter 11 case urged a Delaware bankruptcy court that he needs more time to decide whether to object to what's left of the $1.9 billion in general unsecured claims asserted against the former casino operator in Atlantic City, New Jersey. The trustee **Nathan A. Schultz** requested the court for an additional 180 days to object to remaining general unsecured claims. The trustee stated that approximately 900 proofs of claim asserting more than $1.9 billion in general unsecured claims had been filed against the debtors and to date, the

trustee has been able to expunge or otherwise resolve approximately 748 of such proofs of claims totaling almost $1.7 billion. **The trustee further claimed that despite his best efforts, he has not yet completed the process and, therefore, may not be able to fully reconcile all general unsecured claims before the claims objection deadline. The trustee requested an extension of time until August 23, 2017**. No objections were filed so far against the trustee's motion for entry of an order extending the period to object to claims. The objection deadline was March 10, 2017.

SunEdison Lenders Respond to Fraudulent Transfer Allegations

March 24, 2017, New York – Many financial investment groups that had taken part in a $725 million financing agreement with SunEdison Inc., including BlackRock Financial Management Inc. and Citigroup Financial Products Inc., urged a New York bankruptcy court last month to dismiss fraud and other allegations launched against them by the bankrupt energy company's official unsecured creditors committee. These second-lien lenders had loaned the debtor companies $725 million in new financing and exchanged $336 million of outstanding unsecured notes for $225 million worth of senior secured convertible notes in January 2016 and are now accused of participating in fraudulent transfers that provided the lenders the benefit of gaining secured collateral just before SunEdison filed for Chapter 11 in April 2016. The unsecured creditor's committee asserted that the alleged transfers benefited those lenders at the expense of unsecured creditors, which were left with a diminished likelihood of recouping from SunEdison when it went bankrupt. The second-lien lenders urged the court to reject the committee's claims as the loan transactions were proper and not subject to avoidance because SunEdison received reasonably equivalent value in exchange for the liens.

SunEdison, which develops renewable energy products around the world, had filed for Chapter 11 protection in April 2016. The unsecured creditors committee is represented in its lawsuit by Michael S. Kim, Jeremy C. Hollembeak, Benjamin J.A. Sauter and Sara B. Gribbon of Kobre & Kim LLP. SunEdison is represented by Jay Goffman, J. Eric Ivester, Shana Elberg, James J. Mazza Jr. and Louis S. Chiappetta of Skadden Arps Slate Meagher & Flom LLP. The adversary case is Official Committee of Unsecured Creditors v. Wells Fargo Bank NA et al., case number 1:16-ap-01228, and the bankruptcy is In re: SunEdison Inc. et al., case number 1:16-bk-10992, both in the U.S. Bankruptcy Court for the Southern District of New York.

Recent Preference and Fraudulent Conveyance Opinions

Metered Electrical Energy Delivered by a Defendant to the Debtor Constitutes "Goods" Under the Unambiguous Text of §503(b)(9).

Schoenmann v. Bank of the W. (In re Tenderloin Health, FKA), 849 F.3d 1231 (9th Cir. 2017)

In 2009, Defendant Bank of West extended a $200,000 line of credit to a Debtor Tenderloin Health, a walk-in clinic serving AIDS patients in San Francisco. Two years later, the Defendant loaned another $100,000 to the Debtor. The loans were secured by the Debtor's personal property, including its deposit

accounts with the Defendant. In late 2011, the Debtor winded up its affairs and sold its property for $1,295,000. The Debtor used the proceeds of that sale to execute two transactions - it paid $190,595.50 to the Defendant to satisfy its outstanding loan obligations (debt) and $526,402.05 to its own deposit account (deposit). Subsequently, the Debtor filed for bankruptcy. The Trustee sued the Defendant, alleging that the debt payment was preferential, and subject to avoidance under §547(b)(5). The bankruptcy court determined that the Bank did not receive more than it would have in a hypothetical liquidation because it maintained a right of setoff that entitled it to full payment, and the Debtor's deposit account held the requisite amount of funds on the petition date. The Trustee appealed and argued that the Trustee would avoid the $526,402.05 deposit in a hypothetical liquidation, such that the deposit account would contain only $37,713.87 on the petition date, a sum far less than the $190,595.50 the Bank actually received, even allowing for its right of setoff. The District Court affirmed, and the Trustee timely appealed to the Ninth Circuit. The Bank alleged that it is impermissible to entertain a hypothetical preference action within a hypothetical liquidation and that the deposit made by the Debtor into its deposit account does not meet the definition of an avoidable preference.

The Ninth Circuit reversed the judgment and held that the courts may account for hypothetical preference actions within a hypothetical chapter 7 liquidation when such an inquiry was factually warranted, was supported by appropriate evidence, and the action would not contravene an independent statutory provision. The Court ruled that $526,402.05 deposit received by the bank would constitute an avoidable preference in the hypothetical liquidation at issue. The Court reasoned that the Bank gained a beneficial interest in the funds through deposit and became indebted to the Debtor for $564,115.92, and correspondingly increased its right to exercise a setoff for the full amount of its loan. Thus, the trustee demonstrated that the Bank received more as a result of the debt payment that it would in a hypothetical chapter 7 liquidation

Failure Of Proof Regarding the Fifth Element Under §547(b) (5) Precluded Judgment For Trustee

Spradlin v. Pryor Cashman LLP (In re Licking River Mining, LLC), Nos. 14-10201, 16-1031, 2017 Bankr. LEXIS 805 (U.S. Bankr. E.D. Ky. Mar. 24, 2017)

Chapter 7 Trustee Phaedra Spradlin for Debtor U.S. Coal Corporation and its nine co-debtor subsidiaries brought a complaint against Defendant Pryor Cashman LLP for avoidance of fraudulent transfers under Sec. 548 of the Bankruptcy Code. The Defendant filed the motion to dismiss, alleging that the Trustee's allegations failed to state a claim upon which relief could be granted as a matter of law, the claims were implausible as plead and the fraud claims were not plead with requisite particularity. The Trustee filed an amended complaint in response to the Defendant's motion to dismiss. The Trustee alleged that the Debtor retained the Defendant as a legal counsel in July 2006 and transferred 375,000 shares of stock to the Defendant in exchange for its willingness to defer payment of the Defendant's attorneys' fees until the Debtor obtained financing for its project. The complaint sought to recover these funds the Debtor paid to the Defendant between July 2010 and May 2014 totaling $1,633,286.18 as fraudulent because the Defendant rendered no legal services to the Debtor's subsidiaries and they received no benefit from

the Defendant's services, yet the Debtor used the subsidiaries' funds to pay the Defendant's legal fees. The Trustee's argument was that the Debtor generated no income of its own and took payments from the subsidiaries to pay the Debtor's operating expenses. The Defendant objected.

The Court agreed with the Defendant's first argument and held that the amended complaint also failed to describe or identify any specific transfers from the subsidiaries to the Debtor sufficiently under Civil Rule 8. It did not state which subsidiary made a transfer to the Debtor, the amount each subsidiary transferred, or the date of any transfer. The Court found that complaint failed to state a claim against defendant as a mediate or immediate transferee under 11 U.S.C.S. § 550(a)(2), as the complaint failed to state a claim for avoidance of any transfers from the subsidiaries to the Debtor based on either actual or constructive fraud. Next, the complaint failed to state viable claims against the Defendant as an initial or beneficiary transferee of the subsidiaries under § 550(a)(1), as it did not allege facts sufficient to support an allegation that the Debtor was a mere conduit; [3]-Complaint failed to allege a sufficient basis to avoid and recover the cash transfers as actually fraudulent or constructively fraudulent; [4]-Complaint stated a claim against defendant as an initial transferee of preferential transfers under 11 U.S.C.S. § 547, as its allegations, along with an exhibit, were sufficient to allow defendant to assert its defenses.

Trustee Failed to Demonstrate that a Genuine Issue of Material Fact Exists as to the Debtor's Solvency on the Transfers

Geltzer v. Fleck (In re ContinuityX, Inc.), Nos. 13-10458 (MKV), 15-01015 (MKV), 2017 Bankr. LEXIS 709 (U.S. Bankr. S.D.N.Y. Mar. 17, 2017)

The Trustee for Debtor ContinuityX Solutions, Inc. brought an adversary proceeding against Defendant Robert J. Fleck to avoid and recover certain transfers pursuant to sections 547 and 550 of the Bankruptcy Code. Prior to the transfers, the Defendant provided certain financial accounting related services to the Debtor, and issued various invoices, which set forth the details of the services provided and the amount of payment owing for such services. The Defendant also submitted expense reports for reimbursement of his out-of-pocket expenses. The Defendant admitted that he received the alleged transfers from the Debtors on account of an antecedent debt and that the transfers were received within the 90 days preceding the petition date. However, the Defendant argued that summary judgment should be denied because the Debtors were solvent at the time the transfers were made and the Debtors made the alleged transfers to the Defendant on account of services the Defendant provided to the Debtors as the Debtor's employee and hence it was contemporaneous exchange for new value under Sec 547 (c) (1).

The Court held in favor of the Trustee. The Court found that the Defendant submitted two documents, i.e. Form 10-K and the Form 10-Q relating to the Debtor's financial condition. However, these documents referred to the Debtor's financial condition prior to the transfer period. Thus, the Court ruled that the evidence was insufficient to rebut the presumption of insolvency during or at the time of transfer. Next, the Court found that the Defendant failed to offer any competent evidence to support his defense that he was an employee entitled to a finding of non-avoidability under §547(c)(1). The Trustee

however acknowledged that the Defendant did provided new value in the amount of $13,940 and accordingly offset in part the claim.

Defendant Provided "Value" for the Alleged Transfer By Paying For the Parties' Living Expenses From the Transfer

Burtch v. Prudential Real Estate & Relocation Sevs. (In re AE Liquidation, Inc.), No. 16-252-LPS, 2017 U.S. Dist. LEXIS 47580 (D. Del. Mar. 30, 2017)

Debtor Eclipse Aviation Corporation, a manufacturer of private jets, engaged Defendant Prudential Real Estate &Relocation Services to provide relocation benefits to its employees under a relocation services agreement. The Debtor filed for bankruptcy and the Trustee brought a complaint against Prudential asserting that twelve transfers made by Eclipse to Prudential within the ninety days preceding the bankruptcy were preferential and avoidable under §547(b) of the Bankruptcy Code. Prudential asserted affirmative defenses under the Bankruptcy Code, including § 547(c)(2)'s ordinary course defense and § 547(c)(4)'s new value defense. The parties agreed that Prudential had a new value defense but disputed the amount. The Bankruptcy Court determined that Prudential had proven its new value defense in the full amount of $128,379.40 (to be applied against preferential transfers of $781,702.61). The Bankruptcy Court found the witness testimony on the alleged invoices to be "persuasive and uncontested" and that the services were performed approximately one week before the invoice date of March 5, 2009. Crediting the full amount of Prudential's new value defense, the Bankruptcy Court granted judgment in favor of Trustee in the amount of $653,323.20. Both parties appealed.

The Trustee argued that the Bankruptcy Court erred by including alleged invoices in its calculation of Prudential's new value defense because even if the services set forth in the alleged invoices were provided a week before the March 5, 2009 invoice date, as its witness testified, those services were still provided after the petition date, i.e. November 25, 2008, and post-petition transfers cannot qualify new value. Prudential argued that Trustee had waived this argument by waiting to raise it on appeal, but the bankruptcy court determined that Trustee had included the argument in its post-trial briefing. The Bankruptcy Court issued a remand order and determined that the amount of the new value defense should be reduced from $128,379.40 to $56,571.37 to reflect only services provided pre-petition. Prudential appealed the remand order.

Prudential argued that the remand order was entered in error because the Bankruptcy Court's decision to eliminate the subject invoices from Prudential's new value defense was explicitly based on the incorrect premise that Prudential wanted to rely on the factual record established at trial, despite Prudential's request to reopen the record. Prudential blamed the Bankruptcy Court and the Trustee for its failure to establish an essential element of its defense. However, the Court found that once the Trustee made a prima facie showing that the alleged invoices constituted preferential transfers under § 547(b), the burden shifted to Prudential to establish each element of its affirmative defense. To carry its burden of establishing new value, Prudential was required to prove the date on which services were rendered to the Debtor, and invoice dates were not sufficient. The Court opined that it remained Prudential's burden to establish that services constituting new value were rendered before the petition date and Prudential had a

full and adequate opportunity to set forth this evidence during a two-day trial. Thus, the Court held that Prudential's failure to do so did not warrant reopening the record, four years after trial, especially in light of the burden this would impose on the Trustee and considerations of judicial economy. In light of the foregoing facts and circumstances, the Court ruled that the Bankruptcy Court did not abuse its discretion in denying Prudential's request to reopen the record.

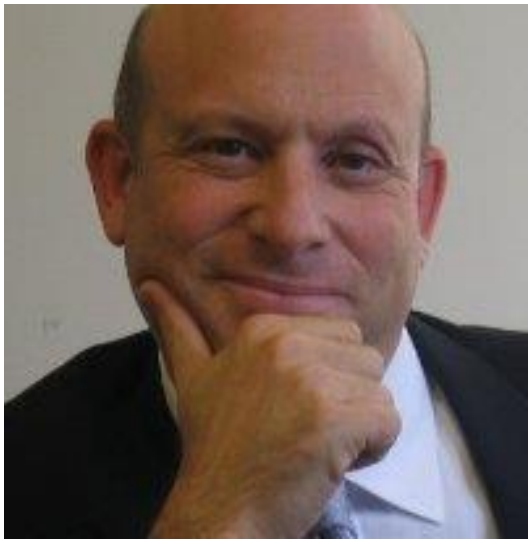
Snapshot of Clawback Cases Filed

Groups of Adversary Proceedings filed by the Debtors	Total cases filed	Name of Judge	Largest Case in the group	Claim Amount of the Largest Case (in USD)	Petition Date	District
Altegrity, Inc.	20	Laurie Selber Silverstein	Sterling Eugene Phillips	1,505,779	2/8/2015	District of Delaware
Crescent & Sprague Supply Co., Inc.	49	Charles M Caldwell	Do It Best Corp	140,213.69	7/10/2015	Southern District of Ohio
Dune Energy, Inc. and Dune Properties, Inc.	16	H. Christopher Mott	Premier Industries, LLC	544,530.23	3/8/2015	Western District of Texas
JW Resources, Inc.	10	Gregory R. Schaaf	Linsco Energy, LLC	1,065,264	6/30/2015	Eastern District of Kentucky
Louisiana Pellets, Inc. and German Pellets Louisiana, LLC	19	Robert Summerhays	To be determined	To be determined	2/18/2016	Western District of Louisiana
Morris Schneider Wittstadt Va., PLLC	84	Keith L. Phillips	Select Portfolio Servicing, Inc.	211,455.70	7/5/2015	Eastern District of Virginia
Silicon Alley Group Inc.	14	Christine M. Gravelle	To be determined	To be determined	4/28/2016	District of New Jersey
University General Health System, Inc.	74	David R Jones	Midcap Financial Services, LLC	1,231,835.88	2/27/2015	Southern District of Texas

Velocity Regional Center, LLC	10	Robert N. Kwan	Global Law Group Corporation	1,138,337.61	2/3/2015	Central District of California

BIO

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
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

Videos
Please feel free to watch our video, Basic Preference Law, on YouTube. Below is a list of other clawback related videos that we have uploaded to YouTube. For an in-depth review of the preference laws, please see our five-part video series. CLE credit is currently available for New Jersey and Texas.

We are expecting to be approved in more states shortly.
Introduction to the Bankruptcy Preference Laws - Part 1/5
Introduction to the Bankruptcy Preference Laws - Part 2/5

Introduction to the Bankruptcy Preference Laws - Part 3/5
Introduction to the Bankruptcy Preference Laws - Part 4/5