



AMERICAN
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Winter Leadership Conference

Avoidance Action Roulette

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Avoidance Actions Roulette

Moderator:

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Agenda

- **Hot Topics in Avoidance Action Law:**
 - Pleading Standards
 - Who Has Standing to Pursue Avoidance Actions?
 - Chapter 13 Debtors
 - Delaware LLCs
 - Extending Look-Back Periods
 - Selling Avoidance Actions
- **Avoidance Actions at the Supreme Court**
- **Avoidance Actions in Crypto Cases**
- **Avoidance Actions in “Texas Two-Step Cases”**
- **Questions & Answers**



Pleading Standards

- **Overview of Section 547(b)**
- **Key Elements for a Preference Claim**
- **Legal Standards for Pleading Avoidance Actions**
 - Federal Rule of Civil Procedure 8(a)
 - Interpretation of Rule 8 in Bankruptcy Context:
- **Twombly/Iqbal and Its Impact on Preference Claims**
 - Twombly/Iqbal Standard
 - Application in Preference Claims
- **Best Practices for Pleading § 547(b) Actions**
- **Common Pitfalls in Pleading § 547(b) Actions**
- **Court Approaches to Deficient Pleadings**



Pleading Standards

- **Section 547(b) Due Diligence Obligations**
 - “[T]he trustee may, ***based on reasonable due diligence*** in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property”
 - **Element v. Affirmative Defense**
 - *Husted v. Taggart (In re ECS Refining, Inc.)*, 625 B.R. 425 (Bankr. E.D. Cal. 2020)
 - *Pinktoe Liquidation Trust v. Charlotte Olympia Dellal (In re Pinktoe Tarantula Limited)*, 2023 WL 2960894, (Bankr. D. Del. Apr. 14, 2023)
 - **Practice Tips:**
 - Demand Letter with invitation to provide defenses



Who Has Standing?

- **Chapter 13 Debtor Standing to Pursue Avoidance Actions**
 - **11 U.S.C. § 522(h):** “The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and (2) the trustee does not attempt to avoid such transfer.”
 - *Wright v. Trystone Capital Assets, LLC*, Adv. Pro. No. 20-1236, 2023 WL 3560551 (Bankr. D.N.J. May 18, 2023) (holding that chapter 13 debtor did not have derivative standing to assert avoidance actions on behalf of trustee)



Who Has Standing?

– Delaware LLC Derivative Standing to Pursue Avoidance Actions

- In DE, general rule had been that state law prohibited creditors from obtaining derivative standing to prosecute breach of fiduciary duty claims on behalf of the bankruptcy estate of a Delaware limited liability company.
 - Delaware LLC Act (“DLLCA”) allows a member of a DE LLC to sue derivatively for breach of fiduciary duties but limits who can be a plaintiff to members or certain assignees of an LLC interest
 - See *CML V, LLC v. Bax*, 6 A.3d 238 (Del. Ch. 2010) (examining plain meaning of the DLLCA and concluding creditors of an LLC never have standing to bring derivative FD breach actions on behalf of an LLC)
 - » Accord *In re HH Liquidation, LLC*, 590 B.R. 211 (Bankr. D. Del. 2018), *In re PennySaver USA Publishing, LLC*, 587 B.R. 445 (Bankr. D. Del. 2018), and *In re Citadel Waterford City Disposal Partners, L.P.*, 603 B.R. 897 (Bankr. D. Del. 2019).
- **But see** *In re Pack Liquidating, LLC*, No. 22-10797 (CTG), 2024 WL 409830 (Bankr. D. Del. Feb. 2, 2024) (Judge Goldblatt holding that the DLLCA did **not** preclude the court from granting standing to the creditors committee to pursue estate causes of action, *so long as* the committee otherwise met the established standards for granting that relief, and finding that *Cybergenics* controlled over *Bax* (and were not in conflict regardless))
 - See *Official Comm. Of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) (bankruptcy court can authorize a committee to pursue certain estate claims and that such authority was implicit in the Bankruptcy Code)
 - *Pack* defendants: (i) *Cybergenics*'s reliance on §§ 1109(b), 1103(c)(5), and 503(b)(3)(B) suggest its reasoning applies only to a debtor's failure to bring an **avoidance action** and (ii) relevant provisions of the Bankruptcy Code “evince Congress's approval of derivative avoidance actions by creditors' committees, and that bankruptcy courts' equitable powers enable them to authorize such suits as a remedy in cases where a debtor-in-possession unreasonably refuses to pursue an avoidance claim.”
 - » Judge Goldblatt says **no**—*Cybergenics* is *not* confined to granting derivative standing for avoidance actions



Look-Back Periods

- Introduction to Avoidance Actions and Look-Back Periods
- Key Statutory Look-Back Periods
 - 11 U.S.C. § 547 (Preference Claims)
 - 11 U.S.C. § 548 (Fraudulent Transfers)
 - State Law Fraudulent Transfer Claims
- Grounds for Extending Look-Back Periods
 - Invoking State Law (Under § 544(b))
 - Tolling Doctrines
- Best Practices for Extending Look-Back Periods
- Key Factors Courts Consider in Extending Look-Back Periods
- Common Challenges and How to Overcome Them
- Practical Tips



Look-Back Periods

- Can the trustee “step into the shoes” of the IRS for 10-year look back period?
 - Generally, the look-back period is 2-years brought through the Code (§548) and 4- or 6-years if brought through state law (§544)
 - Section 544 of the Bankruptcy Code allows a trustee to ‘step into the shoes’ of any creditor holding an allowed, unsecured claim to avoid a prepetition transfer by the debtor, so long as the transfer is avoidable under applicable law.
 - *Halperine v. Morgan Stanley Investment Management Inc. (In re Tops Holding II Corporation)*, Case No. 18-22279 (RRD), Adv. Pro No. 20-08950, 2022 WL 6827457 (Bankr. S.D.N.Y. Oct. 12, 2022) (liquidation trust could use a 10-year lookback period before petition date, relying on IRS’s applicable statute of limitations in it the Internal Revenue Code)
 - *Wagner v. Ultima Holmes (In re Vaughan)*, 498 B.R. 297, 302 (Bank. D.N.M. 2013) (Congress did not intend for section 544(b) to vest sovereign power in a bankruptcy trustee, and allowing a trustee to take advantage of the IRC’s 10-year statute of limitations would be an overly broad interpretation)



Sale of Avoidance Actions

- Are avoidance actions property of a debtor’s estate that can be sold?
 - *Yes in First, Third, Fifth, Eighth and Ninth Circuits*
 - *In re Ontos, Inc.*, 478 F.3d 427, 431 (1st Cir 2007)
 - *In re Wilton Armetale, Inc.*, 968 F. 3d 273, 285 (3d Cir. 2020).
 - *In re Moore*, 608 F.3d 253, 262 (5th Cir. 2010)
 - *Nat’l Tax CredNit Partners, L.P. v. Havlik*, 20 F.3d 705, 708-09 (7th Cir. 1994)
 - *In re Simply Essentials, LLC*, 78 F.4th 1006, 1008 (8th Cir. 2023)
 - *In re Lahijani*, 325 B.R. 282, 288, 44 Bankr. Ct. Dec. (CRR) 247 (B.A.P. 9th Cir. 2005)
 - Some uncertainty in other Circuits



Avoidance Actions at SCOTUS

- **United States v. Miller**
 - **Issue:** Whether a bankruptcy trustee may avoid a debtor's tax payment to the United States under 11 U.S.C. § 544(b) when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.
 - **Background:** All Resort Group, a Utah transportation firm, filed for bankruptcy in 2017. The bankruptcy trustee attempted to reverse a 2014 payment that the company had made of approximately \$145,000 to the Internal Revenue Service ("IRS") to cover the personal tax debts of two company officials. It relied on state law that allows four years to recover fraudulent transfers. The trustee pointed to a debt owed to a former employee, who had sued the company for discrimination and won. The IRS contended that sovereign immunity would have barred the former employee from suing it to recover the tax payments that ALG had made to the IRS.
 - 11 U.S.C. § 544(b)(1) authorizes the pursuit of state law fraudulent transfer actions: "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim"
 - 11 U.S.C. § 106(a) **waives sovereign immunity for § 544 claims:** "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections . . . 544 . . . of this title."
- **Circuit Split:**
 - **Seventh Circuit:** Because sovereign immunity would bar recovery from the IRS *outside* of bankruptcy, a trustee cannot sue the IRS *inside* of bankruptcy.
 - **Fourth, Ninth and Tenth Circuits:** Sovereign immunity is not a barrier to avoidance actions against the United States
- **Argued December 2, 2024.**



Avoidance Actions in Crypto Cases

- FTX, Celsius, and Genesis initiated preference litigation against customers who withdrew digital assets in the preference period
 - Suit thresholds
 - Mediation requirements
- Issues raised by targets
 - Valuation issues when crypto assets fluctuated wildly
 - 550(a) (recover the asset or the value?)
 - 502(h) ("dollarize" the claim?)
 - Application of Section 546 safe harbors (security? commodity? swap?)
 - Are customer deposited digital assets property of the estate?



Avoidance Actions in “Texas Two-Step” Cases

- What is the “Texas Two-Step”?
- Does the “Texas Two-Step” constitute a fraudulent conveyance?:
 - Three Issues:
 - Was there a transfer by the debtor?
 - » “When a merger takes effect . . . all rights, title and interests to all . . . property owned by each . . . party to the merger is allocated . . . as provided in the plan of merger ***without . . . any transfer or assignment having occurred***. . . Tex. Bus. Orgs. Code § 10.008(a) (emphasis added).
 - » *Official Comm. of Asbestos Personal Injury Claimants v. DBMP LLC*, No. 21-03023-JCW (Bankr. W.D.N.C. July 7, 2022) (denying motion to dismiss and holding that the allocation of assets and liabilities under the Texas divisional merger statute can be subject to avoidance as a fraudulent transfer)
 - Does the “non-transfer” language of the Texas Business Organizations Code control over the Uniform Fraudulent Transfer Act (UFTA) or § 548 of the Bankruptcy Code?
 - Did the debtor receive reasonably equivalent value for the incurrence of an obligation?
 - » Funding Agreement
- *Red River Talc* – Coalition asserts J&J’s divisive merger was “arguably the largest fraudulent transfer in United States history”

Faculty

Erin Diers is a partner in Hughes Hubbard & Reed LLP's Corporate Reorganization department in New York, where she focuses on bankruptcy, restructuring and commercial litigation. Her diverse practice includes the representation of debtors and creditors in a wide range of matters, including in- and out-of-court restructurings, debtor-in-possession financing and bankruptcy litigation, including avoidance actions. She also provides bankruptcy advice in connection with financing transactions. Ms. Diers maintains an active *pro bono* practice, representing clients in prisoners' rights, immigration and family law cases. Ms. Diers was recognized in 2022 as an ABI "40 Under 40" honoree and as an "Outstanding Young Restructuring Lawyer" by *Turnarounds & Workouts*. She also has been recognized as a "Rising Star" by *New York Super Lawyers* for seven consecutive years, and was recommended in *The Legal 500 United States* in the area of Finance – Restructuring (including Bankruptcy): Corporate from 2021-23. In 2022, Ms. Diers participated on panels at ABI's VALCON 2022 conference and for IWIRC NY's "Hot Topic Series." She also has published articles in such periodicals as *Airline Economics*, the *ABI Journal* and the *New York Law Journal*. Ms. Diers is an ABI member, a devoted mentor to young women at her firm, and an active participant in groups that focus on the connection, development and promotion of women in the insolvency industry. She co-chairs her firm's Women's Roundtable, and she is a member of her firm's Mentoring Task Force, a board member of the New York Chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC), and a member of the International Aviation Women's Association. Ms. Diers received her undergraduate degree *magna cum laude* from American University and her J.D. from Columbia Law School.

Hon. Bruce A. Harwood is a retired U.S. Bankruptcy Judge for the District of New Hampshire in Concord, appointed to the bench in March 2013, and currently resides in San Francisco. He also served a Chief Bankruptcy Judge prior to his retirement from the bench, and he served on the First Circuit's Bankruptcy Appellate Panel. Prior to his appointment to the bench, Judge Harwood chaired the Bankruptcy, Insolvency and Creditors' Rights Group at Sheehan Phinney Bass + Green in Manchester, N.H., representing business debtors, asset-purchasers, secured and unsecured creditors, creditors' committees, trustees in bankruptcy, and insurance and banking regulators in connection with the rehabilitation and liquidation of insolvent insurers and trust companies. He was a chapter 7 panel trustee in the District of New Hampshire and mediated insolvency-related disputes. Judge Harwood is ABI's President-Elect. He previously served as ABI's Secretary and Vice President-Communication, Information & Technology, as co-chair of ABI's Commercial Fraud Committee, as program co-chair and judicial chair of ABI's Northeast Bankruptcy Conference, and as Northeast Regional Chair of the ABI Endowment Fund's Development Committee. He also served on ABI's Civility Task Force. Judge Harwood is a Fellow in the American College of Bankruptcy and was consistently recognized in the bankruptcy law section of *The Best Lawyers in America*, in *New England SuperLawyers* and by *Chambers USA*. He received his B.A. from Northwestern University and his J.D. from Washington University School of Law.

Evan T. Miller is a partner with Saul Ewing LLP in Wilmington, Del., and a member of the firm's Bankruptcy & Restructuring Practice, where he handles corporate bankruptcy and restructuring matters for debtors (including those under subchapter V) and trustees. His representations also include

official committees of unsecured creditors, asset-purchasers, vendors and landlords. Mr. Miller’s clients span such industries as blockchain/cryptocurrency, technology, insurance, restaurants, retail, health care and aviation, both in and out of court. His work with cryptocurrency/blockchain matters includes advice on the treatment of digital assets in bankruptcy, including Bitcoin and nonfungible tokens (NFTs). Mr. Miller frequently represents clients in bankruptcy litigation, including preference and fraudulent-transfer litigants. He is also a certified mediator for the U.S. Bankruptcy Court for the District of Delaware and is included on the Register of Mediators and Arbitrators maintained by the court. Mr. Miller is often called upon as an expert witness in the areas of restructuring and insolvency. He frequently speaks on these and related topics and serves as the editor for the 2024 edition of *Strategic Alternatives For and Against Distressed Businesses*. During his law school years, Mr. Miller interned for Hon. Chandlee Kuhn, Chief Judge of the Family Court of the State of Delaware, and was a judicial extern to Hon. Jane R. Roth of the U.S. Court of Appeals for the Third Circuit. He was honored in 2001 as one of ABI’s “40 Under 40,” has been named one of “America’s Leading Lawyers in Bankruptcy/Restructuring” by *Chambers USA* since 2022, and was named to the *Lawdragon 500 X – The Next Generation* list for 2023. Mr. Miller received his B.A. in 2004 from Bloomsburg University of Pennsylvania and his J.D. *cum laude* from Widener University Delaware Law School in 2009 and with honors from the Delaware Law School’s Institute of Delaware Corporate and Business Law. While in law school, he served as the internal managing editor of the *Widener Law Review* for the 2008-09 academic year.

Nicolette Corso Vilmos is a partner in the Orlando and Tampa, Fla., offices of Berger Singerman LLP in the firm’s Dispute Resolution and Business Regulatory Teams. She focuses her practice in the areas of complex business litigation, including bankruptcy, intellectual property, banking law, lender liability, shareholder and business disputes, real estate workouts, noncompete litigation and landlord/tenant matters. Ms. Vilmos’s bankruptcy and creditors’ rights practice includes the representation of secured lenders, purchasers of assets from troubled companies, fiduciaries, creditors’ committees, and other stakeholders in multi-party disputes and reorganizations. In the area of intellectual property, she has litigation experience in state and federal courts and has represented clients in cases relating to patent infringement, trademark infringement, trade dress infringement, copyright infringement, anti-cybersquatting, theft of trade secrets, unfair competition, the Computer Fraud and Abuse Act, deceptive and unfair trade practices, tortious interference, breach of contract and/or breach of restrictive covenants, and other related claims. Ms. Vilmos counsels clients on various privacy and data-security issues, from systemwide network intrusions and ransomware attacks to cyber extortion, fraudulent wire transfers, email account compromises, stolen computer hardware and employee misconduct. She is president of the International Women’s Insolvency & Restructuring Confederation and a member of ABI’s Southeast Bankruptcy Workshop Advisory Board, the American Intellectual Property Law Association and the Federal Bar Association in Orlando. In addition, she is a graduate of Leadership Orlando, a member and mentor of the Central Florida Inns of Court, a visiting bankruptcy law professor at the FAMU School of Law and a real property adjunct professor at Valencia Community College. Ms. Vilmos has been listed in *Lawdragon’s 500 Leading U.S. Bankruptcy and Restructuring Lawyers* from 2022-23, as a *National Law Review* Go-To Thought Leader in 2022, among America’s Most Honored Lawyers in 2022, as one of Florida’s Legal Elite by *Florida Trend Magazine* from 2021-22, in *Chambers USA: America’s Leading Lawyers for Business* for Bankruptcy, and in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in 2023. She is rated AV-Preeminent by Martindale-Hubbell and received the Women of Achievement Award from the Women’s Executive Council of Orlando. Ms. Vilmos received her B.A.

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