

Bankruptcy litigation on a budget: A consumer attorney's tip sheet

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B.S. in engineering and J.D., UCLA.

U.S. Bankruptcy Court, Central District of California (1974-present).

Chief Bankruptcy Judge, U.S. Bankruptcy Court, Central District of California (2003-2006).

Bankruptcy Appellate Panel for the Ninth Circuit (Chief Judge, 1999-2001).

Faculty, Federal Judicial Center, Washington, D.C. (1977-present).

American Bar Association's Franklin N. Flaschner Judicial Award (outstanding judge in a trial court of special jurisdiction, 1987).

Los Angeles County Bar Association, Outstanding Jurist Award (2004).

Association of Insolvency and Restructuring Advisors (AIRA), Lifetime Achievement Award, Bankruptcy and Restructuring Field (2008).

San Fernando Valley Bar Association, Stanley Mosk Legacy of Justice Award (2009).

Thomson Reuters and American Bankruptcy Institute, William L. Norton, Jr., Judicial Excellence Award (2013).

Fellow, American College of Bankruptcy.

Los Angeles County Bar Association, Dispute Resolution Services, Emil Gumpert judicial alternative dispute resolution award (2000).

Author of West's Bankruptcy Evidence Manual.

Earned a little pin money playing table tennis in college. (Not verified.)

Founder of bankruptcy mediation
program, U.S. Bankruptcy Court,
Central District of California –
30 years ago!



Joseph Boufadel

Partner, Salvato Boufadel LLP (SalvatoBoufadel.com).

Certified Specialist, Bankruptcy Law, State Bar of California,
Board of Legal Specialization (former commissioner).

2024 Honoree - American Bankruptcy Institute (ABI) "40 Under 40" Emerging
Leaders in Insolvency Practice.

Selected Southern California "Super Lawyer."

Recent co-chair of the Insolvency Law Committee; Current vice-chair of
Member Services for the Business Law Section of the California Lawyers
Association.

Wishes he could dunk a basketball.

Kathryn Diemer

Partner, Diemer & Wei, LLP (diemerwei.com).

Brown University A.B.

Washington University in St. Louis School of Law J.D.

Bankruptcy litigator.

Tried over 30 cases to verdict.

Regular speaker on topics ranging from “What Every State Court Litigator Should Know About Bankruptcy” and “What Every Bankruptcy Lawyer Should Know About Evidence” to “Understanding Ethical Issues In Litigation.”

Officer and Member of the Board of Trustees, Santa Clara County Bar Association

Trainer -- Agility Training with a Great Dane and a Miniature Dachshund.

Captain -- Tsunami Ice Hockey Team.

J. Scott Bovitz

Senior partner, Bovitz & Spitzer (bovitz-spitzer.com).

Fellow, American College of Bankruptcy.

Board Certified, Business Bankruptcy Law, American Board of Certification (past chair).

Certified Specialist, Bankruptcy Law, State Bar of California Board of Legal Specialization (past chair).

Rated "AV Preeminent" by Martindale-Hubbell.

Selected Southern California "Super Lawyer" in Bankruptcy & Creditor/Debtor Rights (every year).

Adjunct Professor, William S. Boyd School of Law, University of Nevada, Las Vegas (2022), California Western School of Law, San Diego (2022-2023), Loyola Law School, Los Angeles (1982-1987).

California Bankruptcy Forum: CBF Director (1998-2001, 2008-2009); Co-chairman (Education), CBF Insolvency Conference (2001); Co-Conference Chair, CBF Insolvency Conference (2004); Sponsor, Bankruptcy Poetry Competition, CBF Insolvency Conference (2011-2012); Co-chairman, Consumer Bankruptcy Program, CBF Insolvency Conference (2013); Sponsor, Bankruptcy Joke Contest, CBF Insolvency Conference (2013); Sponsor, Bankruptcy Photography Contest, CBF Insolvency Conference (2014, 2015, 2016); Sponsor, Bankruptcy Cartoon Caption Contest, CBF Insolvency Conference (2017); Sponsor, Bankruptcy Flash Fiction Contest, CBF Insolvency Conference (2018); Sponsor, Modern Maxims of Insolvency Contest, CBF Insolvency Conference (2019); Sponsor, A Word of Advice Contest, CBF Insolvency Conference (2022).

Founder and webmaster of bankruptcydog.com (2004-present).

Composed, performed, recorded, produced, mixed, remixed, and/or mastered more than 820 original songs (bovitz.com); the American Bar Association has licensed his songs for "ABA Business Bankruptcy Basics" and "Bad Boys in Bankruptcy" podcasts.

Thinking about bankruptcy litigation

Often, a defendant needs to win the battle on just one element of a trustee's claim for relief; the trustee bears the burden of proof.

How does that work?

Gather evidence.

Focus on the important evidence.

Keep the professional fees in check.

Early mediation?

Before you spend fees preparing for trial, consider the FREE mediation program. The Central District of California bankruptcy mediation program settles about 2/3 of the cases that are sent to mediation.

www.cacb.uscourts.gov/mediation-program (“The United States Bankruptcy Court for the Central District of California recognizes that formal litigation of disputes in bankruptcy cases and adversary proceedings frequently imposes significant economic burdens on parties and often delays resolution of those disputes. Therefore, the Court established a Mediation Program to provide litigants with the means to resolve their disputes more quickly, at less cost, and often without the stress and pressure of litigation.”).

What other mediation programs are in effect in California?

A sitting judge can mediate

Rochelle's Daily Wire (American Bankruptcy Institute)

Arresting the Debtor During Mediation Is a Very Big No-No. ...

Baek v. Halvorson (In re Halvorson), 15-1391 (Bankr. C.D. Cal. Feb. 14, 2018) ...

Creditors with otherwise meritorious claims were thrown out of court because they pulled off a scheme to have the debtor arrested in the midst of mediation. ...

Bankruptcy Judge Mark S. Wallace of Santa Ana, Calif., said in his Feb. 14 opinion that the creditors shocked the conscience of the court by sabotaging settlement talks for the pleasure of seeing the debtor humiliated in front of his family, his counsel, and the trustee. ...

Without having told the debtor he had been indicted or giving him an opportunity to turn himself in, the wife's counsel and Oregon prosecutors arranged for the debtor to be arrested in the courthouse by U.S. Marshals during the mediation. After the mediation had been ongoing for several hours, [mediator] Judge Jury was notified of the impending arrest only minutes before it took place. Judge Wallace reported that Judge Jury was "flabbergasted." She terminated the mediation after the arrest.

Paid mediators are available, if the parties have the funds

Bovitz (and Boufadel and Diemer) have mediated cases before Hon. Mitchel Goldberg (ret.) and Hon. Randall Newsome (ret.).

In the Northern District, your bankruptcy judge may ask another judge to mediate your case. Worth raising at mediation conference!

Eastern District?

Join the mediation panel in your district.

Let's focus on "preference" litigation to show a shoestring approach to litigation

The Bovitz schematic (first meeting through trial)

Draw timeline on a folder – from the beginning of time to now.

Put witnesses and parties in bubbles, with arrows and notes.

List the elements (bullet list) of each cause of action, with a mini-citation to an exhibit or witness.

Use a spreadsheet to keep track of dates and potential exhibits.

Start here: Elements of a claim for relief

11 U.S.C. §547(b) ...



... the trustee may avoid any 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.

Bovitz: I count eight elements.

A prudent litigator thinks about the burden of proof.

Remember that the chapter 7 trustee has NOTHING to start with, except a few bad accounting records.

Burden of proof (elements of claim)

In re Bullion Reserve of N. Am., 836 F.2d 1214, 1216-1217 (9th Cir. 1988)

A bankruptcy trustee may recover property for the benefit of the debtor's estate if there (1) was a transfer; (2) of property of the debtor; (3) to or for the benefit of a creditor; (4) for or on account of an antecedent debt; (5) made while the debtor was insolvent; (6) made on or within ninety days before the date of the filing of the debtor's bankruptcy petition; (7) that enables the creditor to receive more than he would receive if the transfer had not been made and the debtor's estate liquidated according to the provisions of the bankruptcy code. 11 U.S.C. § 547(b) (1982).

The burden of proving the existence of these elements is on the bankruptcy trustee. Grover v. Gulino (In re Gulino), 779 F.2d 546, 549 (9th Cir. 1985).

Remember: in other types of bankruptcy litigation, the burden of proof can shift (e.g., claims litigation).

Burden of proof (affirmative defenses)

11 U.S.C. § 547(g):

For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under [11 U.S.C. § 547(b)] ...

... and ***the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer*** under [11 U.S.C. § 547(c)]

How does this “burden of proof” thing work exactly?

A few word from Judge Russell on the burden of proof.

Contrast elements of a trustee's case in chief with affirmative defenses

First Am. Title Ins. Co. v. Bowles Rice, LLP, 2018 U.S. Dist. LEXIS 1938, *14 (N.D.W. Va. Jan. 5, 2018)

Contesting an issue on which the plaintiff bears the burden of proof is necessarily distinct from asserting an affirmative defense. See *Wise*, No. 2:12-cv-01378, 2015 U.S. Dist. LEXIS 12473, 2015 WL 461484, at *2. "A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). "Affirmative defenses plead matters extraneous to the plaintiff's prima facie case, which deny plaintiff's right to recover, even if the allegations of the complaint are true." *Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, 313 F.R.D. 572, 575 (N.D. Cal. 2016) (quoting *G&G Closed Circuit Events, LLC v. Nguyen*, No. 10-168, 2010 U.S. Dist. LEXIS 104980, 2010 WL 3749284, at *5 (N.D. Cal. Sept. 23, 2010)).

At that first client meeting, what evidence is available?

How expensive will it be to get the missing evidence? Every deposition costs thousands of dollars.

Requests for admission could be helpful.

Gathering evidence

Initial client interview. [*The story only goes downhill from there...*]

Client documents, including computer records (letters, e-mails, text messages, contracts, purchase orders).

Early meeting of counsel -- exchange of documents.

The bankruptcy schedules.

Tax and bank records (especially in preference cases).

Papers filed by other parties in the bankruptcy case and adversary proceedings.

Public records (e.g., Secretary of State). Public hearings (e.g., 341(a) meetings and court transcripts).

Discovery (interrogatories, requests for production of documents, requests for admission, depositions/interviews of the parties, depositions/interviews of third parties, records subpoenas, custodian of records declarations).

More sources of evidence

Interesting old documents in dusty file cabinets at the headquarters of the corporate debtor.

Really dumb (helpful) statements at deposition or other proceedings.

Photographs.

Maps.

Newspaper articles.

Social media.

Press releases.

Google.com, web sites, archive.org (Wayback Machine).

AI?

Federal Rule of Bankruptcy Procedure 7026

“Rule 26 F.R.Civ.P. applies in adversary proceedings.”

Federal Rule of Civil Procedure 26(a)(1)(A) initial disclosures in adversary proceeding

“...a party must, without awaiting a discovery request, provide to the other parties:

- (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) a computation of each category of damages ...; and
- (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable ...”

Federal Rule of Bankruptcy Procedure

9014(c)

”... the following rules apply in a **contested matter**: ... 7026 ...

Unless the court orders otherwise, the following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, do not apply in a contested matter:

- (a)(1), mandatory disclosure;
- (a)(2), disclosures about expert testimony;
- (a)(3), other pretrial disclosures; and
- (f), mandatory meeting before a scheduling conference.

Federal Rule of Civil Procedure 26(a)(2)(A), (B), (D) expert witness disclosures

“In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. ... this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. ...at least 90 days before the date set for trial or for the case to be ready for trial...”

It is all about disclosure.

Was there a preferential transfer?

11 U.S.C. § 547(b) (avoid transfers); 11 U.S.C. §101(54) :

The term “transfer” means—

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor’s equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

(i) property; or

(ii) an interest in property.

Did a preferential payment come from the debtor -- or did it come from another entity (especially in procedurally consolidated cases)?

Obtain the signed contract, amendments to the contract, purchase order, and invoice.

Was the debtor a party to the contract? Was the defendant also a party?

Does the payment show up in the Statement of Financial Affairs of the debtor or the affiliate? If the payment in question came from an affiliate of the debtor, it may not be a “transfer of an interest **of the debtor** in property.”

Was the defendant a creditor?

11 U.S.C. §101(10) (“The term ‘creditor’ means ... entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor”).

Look at the schedules. Is a claim listed?

Pull the claims register. Download the proof of claim and its exhibits.

What was the payment for?

11 U.S.C. §547(b)(2) (“for or on account of an antecedent debt owed by the debtor before such transfer was made”).

Was the debtor paying money to a creditor to satisfy an existing claim (credit) for goods sold or services provided in the past? Look for two invoices in a row (the original invoice and evidence of payment on the next invoice in the series).

Even if the debtor owed the creditor for prior goods and services, was this payment earmarked for NEW goods and services? You will find evidence for this in e-mail communications between the debtor and creditor.

Was the defendant just a conduit (passing along most or all the payment to the principal)? Look at e-mail communications.

Was the debtor insolvent?

11 U.S.C. §547(b)(3) (“made while the debtor was insolvent”).

11 U.S.C. §101(32)(A) (“The term “insolvent” means— financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation [BUT] exclusive of— (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity’s creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title.

11 U.S.C. §547(f) (“the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition”).

Arguments are not evidence, according
to Judge Russell

Comm. of Equity Sec. Holders of Federal-Mogul Corp. v. Official Comm. of Unsecured Creditors (In re Fed. Mogul-Global, Inc.), 348 F.3d 390, 406 (3d Cir. Del. 2003):

“[T]he Bankruptcy Court's only explanation for its finding that the Debtors were probably insolvent relied on the figures provided in the Creditors Committee's objections . . . The Creditors Committee's objections do not indicate the basis of the Committee's calculations As a result, the present record does not permit us to determine whether the Creditors Committee's calculations are based on reliable data or on mere speculation by the Committee's counsel. . . . [I]t is well settled that **arguments by counsel cannot provide factual support for a trial court's findings**. See *United States v. Rose*, 104 F.3d 1408, 1416 (1st Cir. 1997) ("Argument by counsel is not evidence."); *United States v. Jewel*, 947 F.2d 224, 230 (7th Cir. 1991); *Morrissey v. William Morrow & Co.*, 739 F.2d 962, 967 (4th Cir. 1984); *GTE Prods. Corp. v. Kennametal, Inc.*, 772 F. Supp. 907, 917 (W.D. Va. 1991). Accordingly, we find it necessary to vacate the Bankruptcy Court's order and remand so that the court can explain the basis for its determination that the Equity Committee likely stands to receive no value from the Debtors' reorganization.”

Solvency is an area where expert testimony may be helpful, but experts are professionals that need money to pay private school tuition for their kids

Since we are trying to keep expenses down, can multiple defendants hire a joint expert to investigate and provide an expert report on solvency?

There can be less expensive alternatives (i.e., CPAs with knowledge of the business or a business-asset appraisal completed around the time of the bankruptcy), but they may not be as effective. Use the subpoena power.

Debtor can testify about the valuation of their assets.

Law of the case doctrine

Will your judge make a finding of solvency in adversary proceeding number 18-00001 and carry that decision over to another adversary proceeding (“law of the case”)? Judge Russell, what do you say?

In re Evangeline Ref. Co., 890 F.2d 1312, 1321-1322 (5th Cir. 1989)

The **law of the case doctrine** "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Browning v. Navarro*, 887 F.2d 553, 556 (5th Cir. 1989) (citing *Messenger v. Anderson*, 225 U.S. 436, 443, 56 L. Ed. 1152, 32 S. Ct. 739 (1912)). The doctrine is discretionary and not an inexorable command that rigidly binds a court. 7 As Wright, Miller and Cooper emphasize, for the law of the case doctrine to apply, "only a 'final ruling' will do" 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 (1981 & Supp. 1989). Finality in this sense does not refer to technical concepts of finality but rather is a functional finality which "seeks to identify a determination intended to put a matter to rest." *Id.*

How much “evidence” is needed to rebut?

Are the debtor’s schedules sufficient to rebut the presumption of insolvency?
[Probably not.]

Debtor's schedules used to rebut insolvency presumption

Lanik v. Smith (In re Cox Motor Express of Greensboro, Inc.), 2016 Bankr. LEXIS 2913, *30-31 (Bankr. M.D.N.C. Aug. 9, 2016)

To rebut the presumption of insolvency under 11 U.S.C. §547(f), the Defendant must come forward [with] some evidence showing that the Debtor was solvent. ... the remaining evidence provided by the Defendant on the issue of solvency is the Debtor's bankruptcy schedules ... While the values assigned to assets by the Debtor in its schedules are not necessarily determinative of their fair value, ... **a reflection of solvency in the schedules can be sufficient to rebut the presumption of insolvency provided by 11 U.S.C. § 547(f)**. In re Affinity Health Care, Mgmt., Inc., 499 B.R. 246, 257 (Bankr. D. Conn. 2013) ("The presumption of insolvency may be rebutted if the debtor's schedules submitted in support of its bankruptcy petition indicate that assets exceed liabilities) ... Based on a showing of solvency on the Debtor's bankruptcy schedules, the Defendant has sufficiently rebutted the presumption of insolvency during the 90-Day Preference Period.

If a defendant rebuts the presumption of insolvency, how can the trustee still prevail on the insolvency element?

Is the judge going to pick a date that the debtor became insolvent?

Can a debtor go in and out of insolvency?

Was there a transfer within 90 days?

11 U.S.C. §547(b)(4) (“made ... on or within 90 days before the date of the filing of the petition”).

How do we count the days?

If there is a check, get copies of the check (front and back)

The trustee will be relying on the debtor's accounting records. The debtor's accounting department (?!) probably recorded the date each check was written. But when was each check actually mailed, received, and cashed by the defendant?

Barnhill v. Johnson, 503 U.S. 393, 112 S. Ct. 1386 (1992) (“no transfer of any part of the debtor's claim against the bank occurred until the bank honored the check on November 20 ... by paying it.”).

Remember: a wire is in good funds. Consider the issue of third-party payer services with ACH transfers (with the delay in payment)

Obtaining and authenticating documents from a bank

FRE 803(6) hearsay and FRE 902(11)

Rambus, Inc. v. Infineon Techs. AG, 348 F. Supp. 2d 698, 699-701 (E.D. Va. 2004) ("Rambus claims that the documents fall within the business records exception to the hearsay rule, Rule 803(6), and has offered purportedly authenticating declarations under Rule 902(11) in an effort to have them admitted. ... **Rule 803(6)** . . . was amended in 2000 to add that, in lieu of live testimony, the foundation for admissibility of a business record may be established by a certification that complies with Rule 902(11). . . . Rules 803(6) and 902(11) go hand in hand. Making reference to Rule 803(6), the Advisory Committee Notes explain that Rule 902(11) '**sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.**' . . . Rule 902(11) 'provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. . . . The final requirement of Rule 902(11) is that it must have been a regular practice of a 'regularly conducted activity' to make and keep the record at issue. . . . A 'regularly conducted activity' is a business activity, whether conventional or unconventional, or even illegal. . . . none of the fourteen affidavits meet the fourth requirement.").

Greater amount test

11 U.S.C. §547(b)(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”).

Schoenmann v. Bank of the W. (In re Tenderloin Health, FKA), 849 F.3d 1231, 1235-1236 (9th Cir. 2017)

This element—11 U.S.C. § 547(b)(5)—constitutes the **so-called "greater amount test,"** which **"requires the court to construct a hypothetical chapter 7 case and determine what the creditor would have received if the case had proceeded under chapter 7"** without the alleged preferential transfer. ... courts may entertain hypothetical preference actions within hypothetical chapter 7 liquidations. ... *See In re Kiwi Int'l Air Lines, Inc.*, 344 F.3d at 314 (“[T]he assumption of a contract under 11 U.S.C. § 365 bars a preference claim by a trustee.”)

Is Judge Russell impressed when a defendant provides 19 affirmative defenses in the answer?

Contemporaneous transfer

11 U.S.C. §547(c)(1)

The trustee may not avoid under this section a transfer— to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and **(B)** in fact a substantially contemporaneous exchange.

11 U.S.C. §547(a)(2)

“new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

Janas v. Marco Crane & Rigging Co. (In re JWJ Contracting Co.), 287 B.R. 501, 506-507 (B.A.P. 9th Cir. 2002)

These types of transfers are protected by the Code “because, unlike payments to unsecured creditors, they do not affect the equality of distribution of estate assets.” ... The § 547(c)(1) defense “is grounded in the principle that the transfer of new value to the debtor will offset the payments, and the debtor's estate will not be depleted to the detriment of other creditors.” ... New value is measured at the time of the transfer. ... While releasing a fully secured interest may constitute new value, the release of an unsecured claim does not.

What evidence will help with determinations of “contemporaneous” and “new value”?

Ordinary course

11 U.S.C. §547(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 ...

Abolafia v. Poulin (In re HMA Sales, LLC), No. NV-08-1161-MoPaD, 2009 Bankr. LEXIS 4538, *29 (B.A.P. 9th Cir. Feb. 13, 2009)

A transfer on account of an antecedent debt is not an avoidable **preference** to the extent the debt was incurred in the **ordinary course** of business and the payment (1) was made in the **ordinary course** of business or financial affairs of the debtor and the transferee; or (2) the payment was made according to ordinary business terms. 11 U.S.C. § 547(c)(2). Given that Appellant contended for the first time on appeal that distributions made to him (including, presumably, the Note Repayments) were made in the ordinary course of business, he introduced no evidence to support such a contention. To the contrary, the evidence shows that the distributions to him were not in the ordinary course of business; such distributions violated the Operating Agreement, which required third-party non-insiders to be paid before members such as Appellant could be repaid on any loans made to HMA. The ordinary course defense of section 547(c)(2) is therefore inapplicable.

What type of evidence governs
“ordinary course of business”?

Does Judge Russell expect expert
testimony?

5 *Collier on Bankruptcy* P 547.04 (16th 2018)

The underlying debt on which the payment was made must have been incurred by the debtor in the ordinary course of business or financial affairs of both parties as opposed to *between* the debtor and the transferee. ... The controlling factor is whether the transactions between the debtor and the creditor both before and during the 90-day period were consistent.

Even if the challenged payments were irregular, they may be considered “ordinary” for purposes of section 547(c)(2) if they were consistent with the course of dealing between the particular parties. However, when a debtor prioritizes payments to certain creditors and not others, the payments cannot be considered to be in ordinary course.

5 *Collier on Bankruptcy* P 547.04 (16th 2018)

Courts have uniformly held that “ordinary business terms” (the alternative to the “subjective test” considered immediately above) implies an objective standard based on the relevant industry. Thus, under section 547(c)(2)(B), even if the challenged payments were irregular, they may be considered “ordinary” for purposes of section 547(c)(2) if they were consistent with the patterns within a relevant industry. ... In order to determine whether the defendant has satisfied its burden of showing that the payments were within industry standards, the court must first define the relevant industry.

Subsequent new value

11 U.S.C. §547(c)

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

- (A)** not secured by an otherwise unavoidable security interest; and
- (B)** on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor ...

Stahl v. Whelan Elec., Inc. (In re Modtech Holdings, Inc.), 503 B.R. 737, 745 (Bankr. C.D. Cal. 2013)

To establish a new-value defense under § 547(c)(4), in the Ninth Circuit, Defendant must show that: (1) it advanced new value to the debtor after the preferential transfer; (2) that the advance of new value was unsecured; and (3) that the advance of new value remains unpaid or, if paid, the payment must also be avoidable. *Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228, 230 (9th Cir.1995). Defendant has provided testamentary evidence that establishes these elements.

Subsequent new value can become an accounting nightmare, if there is an ongoing relationship...so what kind of witnesses or evidence do I need to establish this defense?

5 *Collier on Bankruptcy* P 547.04 (16th 2018)

A challenging question is presented when a creditor ships goods to a debtor before receiving the preferential transfer at issue but the goods are not received by the debtor until after the preferential transfer is made. Courts have held that in such circumstances a creditor extends new value at the time the goods are shipped. ...

Difficulty in analysis occurs when the debtor deals with a creditor on a running or open account, making frequent purchases of goods or property and making payment on account at various intervals, some of which fall within the preference period. The subsequent-advance exception of section 547(c)(4) is Congress's solution for running-account creditors.

5 *Collier on Bankruptcy* P 547.04 (16th 2018)

Another timing question that has arisen is whether new value extended can be used to shield only the immediately preceding preference, or whether it can also provide a shield for earlier preferences to the extent that the new value exceeds the dollar amount of the immediately preceding preference.

Example: On January 15 and within the 90-day preference period, Debtor makes a preferential transfer to Creditor in the amount of \$15,000 for which no other defense is available. On January 20, Creditor provides \$10,000 of new value to the debtor, which remains unpaid at the time of the bankruptcy. On January 31, Debtor makes a preferential transfer to Creditor in the amount of \$4,000 for which no other defense is available. On February 10, Creditor provides \$9,000 of new value to Debtor which remains unpaid at the time of the bankruptcy. On February 20, Debtor files bankruptcy.

The well-reasoned rule is that the Creditor has no liability because the \$9,000 of new value may shield not only the \$4,000 preference that came immediately before this provision of new value, but it may also shield the \$5,000 of preference vulnerability that remains from other prior but not immediately preceding transfers.

Requests for admission

Send **requests for admission** about the authenticity of documents. FRBP 7036; FRCP 36(a)(1)(B) ("A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the **genuineness of any described documents**. . . . A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.").

Make a **request for judicial notice of the adjudicative fact**. FRE 201 (" This rule governs only judicial notice of adjudicative facts. ... A judicially noticed fact must be one not subject to reasonable dispute. . . .").

Authenticate the documents, prepare for hearsay objections, and consider the original writing (best evidence) rule. FRE 901, 902.

If appropriate, stipulate to authentication.

Judge Russell, what do we get wrong about requests for judicial notice?

Witness testimony

Interview your client. Write it down. Share your summary with the client. Get corrections.

Interview friendly witnesses (in person, on the telephone, by letter, by e-mail).

Interview neutral witnesses.

Are depositions necessary? If so, how about depositions by written questions (Federal Rule of Civil Procedure 31)? Have you tried a deposition on the telephone or Zoom?

When depositions are needed in person, what is your goal?

Examine the debtor at the 341(a) and transcribe the testimony with a court reporter.

Special considerations for depositions

Will it help to record the deposition on video? (Expensive. Hard to pull up a video at trial when you really need it. How do you “mark” and “countermark” a video deposition?)

A party’s testimony can be offered by the other side for any purpose.

Do “objections” count for much at depositions?

Preparing your client for deposition. (“When you appear before the Special Counsel, just answer Yes, No, or I don’t recall.”)

The first question after a break in the deposition should be, “What did your lawyer say to you in the bathroom during the break?” The correct answer is, “Slow down. Take a breath. Just keep telling the truth.”

Requests for production

Originals

Do you have the originals? If not, where are the originals?

Do you have the front and back side of all of the invoices and purchase orders?

Do you have the front and back side of the checks?

Interrogatories

Names, addresses.

Contention interrogatories.

Do you contend that plaintiff is the owner of Blackacre?

Do you contend that defendant A is the alter ego of defendant B?

State all facts on which you base your contention that [quote allegation in pleading.

Contention interrogatories are frequently combined with interrogatories requesting the factual basis for a contention, *e.g.*, “If you contend that plaintiff’s conduct constitutes contributory negligence regarding the accident of January 12, 2016, state the facts on which you base that contention.”

Judicial notice -- FRE 201 -- Judge Russell sees confusion on this topic

(a) Scope. This rule governs judicial notice of an **adjudicative fact** only, not a legislative fact.



(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1)** is generally known within the trial court's territorial jurisdiction; or
- (2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

- (1)** may take judicial notice on its own; or
- (2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

The taking of judicial notice is often merely a way of simplifying the process of authenticating documents which would generally require certification under FRE 901 and 902, and overcoming FRE 1002 best evidence problems (i.e., the concept that because they are in the Court's own files they are accepted as genuine). It is clear however, that authenticating a document does not automatically insure its introduction into evidence in the face of other objections, such as hearsay.

"While a bankruptcy judge may take judicial notice of a bankruptcy court's records, see Fed.R.Evid. 201(c), ... we may not infer the truth of the facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court. See Barry Russell Bankruptcy Evidence Manual § 201.5 at 201 (West 1995)." *In re Scarpinito*, 196 B.R. 257 (Bkrty.E.D.N.Y.1996).

When money is tight, why would a party ever file a motion for summary judgment?

Judge Russell, when are motions for summary judgment helpful?

Pre-trial stipulation

If appropriate, stipulate to authentication of documents (or stipulate to facts) in the pre-trial stipulation. FRBP 7016; FRCP 16(e) ("Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence.").

What's going on in Judge Russell's mind during trial?

Trial briefs

Opening statement (short)

Witnesses for trial

Client.

“Our” witnesses (direct testimony by way of declaration). How does that work?

Their witnesses.

Third party witnesses (facts, authentication, custodians of records).

Expert witnesses.

The trial lawyer as travel agent.

Trial declarations (friendly direct)

Judge Russell, what do attorneys miss with testimony by direct declaration?

Judge Russell, should we ever rely on an attorney's declaration in support of a motion or trial?

Hostile cross-examination

Exclusion of witnesses -- FRE 615

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a)** a party who is a natural person;
- (b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d)** a person authorized by statute to be present.

Expert not excluded -- FRE 615(c)

Mayo v. Tri-Bell Industries, Inc., 787 F.2d 1007, 1013 (5th Cir. Tex. 1986) :

We conclude that the trial court properly allowed the defense's expert witnesses to testify. Fed. R. Evid. 703 provides that an expert may base his opinion on facts or data obtained "at or before the hearing." As experts they would be testifying solely as to their opinion based on the facts or data in the case, and, accordingly, were properly exempted from the exclusion of witness order. . . . Because the experts were not witnesses whose recollections might have been colored by accounts of prior witnesses, there was no prejudice. See, e.g., *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902, 910-11 (2d Cir. 1985).

When may FRE 615 be invoked?

Wood v. Southwestern Bell Tel. Co., 637 F.2d 1188, 1193-1194 (8th Cir. Mo. 1981):

Appellant . . . argues that the district court erred in failing to exclude witnesses from the courtroom, pursuant to Fed.R.Evid. 615, after appellant had moved for such exclusion. The motion for exclusion of the witnesses came on the second day of trial, after some of appellant's witnesses had testified. The district court denied appellant's motion on the ground that it was not timely made. . . .

It is clear from the wording of Rule 615 . . . the exclusion of witnesses so they cannot hear the testimony of other witnesses is required when requested by a party. . . . Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial.

Exhibits

Demonstrative exhibits.

Legible exhibits.

Electronic exhibits.

File exhibits in the adversary proceeding?

Keeping track of admitted exhibits.

Redaction.

The trustee may not be able to
authenticate the debtor's records

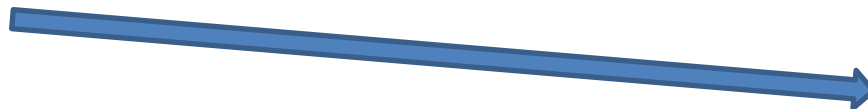
Professor Dan Schechter, Loyola Law School, Los Angeles,
Insolvency e-Bulletin, Oct. 23, 2015:

A district court in Pennsylvania has held that because a bankruptcy trustee was unable to verify the accuracy of the corporate debtor's books and records in order to prove the entity's insolvency, his fraudulent transfer action against the debtor's affiliated corporations failed for lack of proof. [*In re Dressel Associates, Inc.*, 2015 Westlaw 4956098 (W.D. Pa.)] A bankruptcy trustee brought a fraudulent transfer action, claiming that the corporate debtor had made payments to its affiliates while it was insolvent, without receiving reasonably equivalent value. The trustee relied on the testimony of his predecessor trustee, who had taken over the debtor's affairs upon its bankruptcy filing. After trial, judgment was entered for the defendants on the ground that the trustee had failed to prove the debtor's insolvency at the time the payments were made. The district court affirmed, holding that the testimony of the predecessor bankruptcy trustee had been insufficient to establish the accuracy of the financial statements that purportedly proved effective insolvency: [The predecessor trustee's] statement that Debtor's financial schedules were "as accurate as they can reasonably be" . . . is not an affirmative statement of actual accuracy.

Bankruptcy trustee (not a custodian)

Smith v. Litchford & Christopher, P.A. (In re Bay Vista of Va., Inc.), 428 B.R. 197, 212, 214-215 (Bankr. E.D. Va. 2010):

The Trustee initially relies upon the so-called "business records" exception to the hearsay exclusion, contending that both the First Account and the Wilson Letter are business records of Bay Vista because he found copies of them among the records of Bay Vista. The "business records" hearsay exception, found in Federal Rule of Evidence 803(6), provides for the admissibility of a record that would otherwise be inadmissible as hearsay under Federal Rule of Evidence 802... The Trustee cannot meet his burden under Federal Rule of Evidence 602, as he lacks personal knowledge as to the authenticity of both the First Account and the Wilson Letter. The Trustee testified that he found the documents among Bay Vista's records, but . . . discovery of these documents among the debtor's papers does not suffice to allow the Trustee to lay an adequate foundation for his testimony regarding the contents of the document and the truth thereof. Without authentication of these documents, the Court cannot admit them...



Judge Russell, do you ever see an attorney's declaration to lay the foundation for the business records exception to hearsay?

Additional bases exist to exclude these documents as well. The Trustee here is not "the custodian or other qualified witness," whose testimony is required by Federal Rule of Evidence 803(6), of either the First Account or the Wilson Letter, both of which were apparently prepared by individuals or entities other than Bay Vista, its principal or employees, or by the Trustee.

Further, the Trustee failed to show that both documents were "kept in the course of a regularly conducted business activity" by Bay Vista and that "it was the regular practice of [Bay Vista in the course of its] business activity to make" these records. Accordingly, the Court correctly sustained the objection of Litchford as to the admissibility of these documents under the "business records" exception to the hearsay rule.

ABCs of objecting to evidence

Should you object to proffered evidence? Does this piece of evidence really matter? Will you be able to keep it out? If so, how?

When do you object?

Format of objections. Written (before trial). Oral (at trial during live testimony).

Should proponents respond to written evidentiary objections? Is there a provision to do so?

Is the court required to rule on evidentiary objections?

Evidentiary objections during witness testimony are hard because we do not have a live court reporter.

May I bring my own live reporter, at my expense?

Closing (cite to the record)

Confirm which exhibits were admitted.

Shake the hand of your opponent and thank the court and court staff for its careful consideration of this case.

Closing comments