NORTON BANKRUPTCY LAW ADVISER

Monthly Analysis of Important Issues and Recent Developments in Bankruptcy Law

May 2019 Issue 5

OUT WITH THE OLD LIMITATIONS ON THE NEW VALUE DEFENSE

Kim K. Hillary

Schafer & Weiner
Bloomfield Hills, MI

For many years, bankruptcy, district and circuit courts of appeals across the country have been divided as to whether a defendant could rely on the new value defense to preference recovery under 11 U.S.C.A. § 547(c)(4) if the new value provided by the defendant was subsequently repaid by the debtor. Throughout the 1980s and early 1990s, the majority rule among the circuits was that § 547(c)(4) required new value to remain unpaid to provide an effective new value defense.[1] Over the years, this once-majority rule has slowly eroded as cases have been overturned or holdings marginalized as dictum. With the recent decision by the United States Court of Appeals for the Eleventh Circuit in *Kaye v. Blue Bell Creameries, Inc.* (*In re BFW Liquidation, LLC*), it is undeniable that the tide has shifted: the old majority rule that new value must remain unpaid is now the new minority.[2] Given the strength of legal analysis undertaken by the new majority courts, it appears that it is only a matter of time until the new minority rule is rendered extinct.

IN THIS ISSUE:

THOMSON REUTERS®

Mat #42156095

I. THE NEW MAJORITY ON NEW VALUE

A. FIVE CIRCUITS NOW ADHERE TO THE RULE THAT NEW VALUE NEED NOT REMAIN UNPAID

With its ruling in *BFW Liquidation*, the Eleventh Circuit became the Fifth Circuit court of appeals to rule that § 547(c)(4) does not require that new value remain unpaid, joining the Fourth, Fifth, Eighth, and Ninth Circuits.[3]

(i) ELEVENTH CIRCUIT—*BFW LIQUIDATION*

Prior to *BFW Liquidation*, courts in the Eleventh Circuit regularly held that new value must remain unpaid to provide an effective defense to receipt of a prior preference payment.[4] These courts largely based this holding on what they deemed to be precedent established by the Eleventh Circuit in *Jet Florida System*. The *Jet Florida System* opinion recited the requirements of § 547(c)(4) as including that "new value must remain unpaid."[5] The panel of the Eleventh Circuit in *BFW Liquidation* tilted the landscape by characterizing as non-binding dictum the statement in *Jet Florida System* that new value must remain unpaid.[6]

Unbound by *Jet Florida System*, the *BFW Liquidation* court undertook an extensive analysis of the new value defense, including an exhaustive review of the statutory language, legislative history, and relevant policy objectives.[7] *BFW Liquidation* determined that there is no requirement in § 547(c)(4) that new value remain unpaid and held that "by its plain terms, then, the statute only excludes 'paid' new value that is paid for with 'an otherwise unavoidable transfer' . . . therefore, so long as the transfer that pays for the new value is itself avoidable, that transfer is not a barrier to assertion of § 547(c)(4)'s subsequent new value defense."[8]

The *BFW Liquidation* court went further. Despite stating that a review of legislative history was unnecessary because § 547(c)(4) was unambiguous, the *BFW Liquidation* court went on to dissect the legislative history and policy considerations behind the enactment of § 547(c)(4) to further support its holding.[9]

The *BFW Liquidation* started by looking at the previous statutory language of § 60c of the former Bankruptcy Act which stated:

> If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes part of the debtor's estate, the amount of such new credit *re-*

Norton Bankruptcy Law Adviser (USPS 013-530), is published Monthly, 12 times per year by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Periodicals Postage is paid at Twin Cities, MN.

POSTMASTER: send address correspondence to Norton Bankruptcy Law Adviser, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

> *maining unpaid* at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.[10]

The *BFW Liquidation* court found that the language of § 547(c)(4) represents a "substantive departure from the way exchanges of new value between creditors and debtors during the preference period were handled under the Bankruptcy Act of 1898."[11] When Congress replaced the words "remaining unpaid" with § 547(c)(4)'s requirement that the debtor "not make an otherwise unavoidable transfer to or for the benefit of [creditor]," it intended a departure from, and not a recodification of, § 60(c)'s "remaining unpaid" language.[12]

As further evidence that § 547(c)(4) represented a substantial revision, the *BFW Liquidation* court pointed to the fact that the Commission on the Bankruptcy Laws of the United States, established by Congress in 1970 to "study, analyze, evaluate, and recommend changes to the [Bankruptcy Act of 1989]," recommended that Congress revise § 60c to eliminate the "remain unpaid" provision:

> Given that all other signs point toward a conclusion that § 547(c)(4) represents a departure from, rather than a recodification of, the "remaining unpaid" requirement in § 60(c), we conclude that removal of the "remaining unpaid" language effected a substantive change in the meaning of the statute. Thus, a review of the statutory development of § 547(c)(4) bolsters our conclusion that § 547(c)(4) does not require new value to remain unpaid.[13]

The court found that the Commission's recommendation that the "remaining unpaid" requirement be eliminated "cuts against an inference that Congress might have intended to preserve that requirement . . . ."[14]

Next, the *BFW Liquidation* court dissected the policy considerations behind the new value defense and determined that allowing new value to be paid furthered the policy objective of encouraging creditors to continue extending credit to financially troubled vendors.[15] In fact, the *BFW Liquidation* court determined that the old rule of requiring new value to remain unpaid would hinder this objective. The court reasoned that if new value must remain unpaid, then vendors who sense that a debtor is in financial difficulty will have every incentive to stop delivering goods because the vendor would be at risk of having to return the payments it received for the goods provided.[16] In effect, under the old rule, it does not make financial sense for a vendor to continue to supply a financial strained entity on credit because—in the event the company winds up in bankruptcy—the vendor will have to return some or all of the payments it receives for the goods shipped. As a result, the old rule provides a "strong disincentive[] for a vendor to continue supplying an ailing customer with goods . . . ." and creates a scenario where vendors fair better by immediately cutting off a financially troubled customer.[17]

> Under the interpretation the Trustee gives the new-value defense, the vendor would have to return all of the payments it subsequently received for the new value it provided the debtor. Were this the rule, a prudent vendor, sensing financial problems by the debtor, would be foolish to continue delivering goods to the debtor . . . .[18]

The *BFW Liquidation* court's extensive analysis of § 547(c)(4), including a review of the statutory language and dissection of the legislative history and policy considerations, provides creditors facing a "remain unpaid" challenge to new value with a highly persuasive opinion in support of their position. Given the strength of *BFW Liquidation*, and

the now extensive body of case law that supports it, it is hard to imagine that any court not bound to do so would continue to adhere to the antiquated rule that new value must remain unpaid.

(ii) FOURTH CIRCUIT—*JKJ CHEVROLET*

More than a decade before *BFW Liquidation*, the United States Court of Appeals for the Fourth Circuit joined the new majority in *JKJ Chevrolet*.[19] In *JKJ Chevrolet*, the Fourth Circuit recognized that "the requirement that the new value remain unpaid is inaccurate and confusing paraphrase" and that "the proper inquiry is whether the new value has been paid for by *an otherwise unavoidable transfer*."[20] As a result of *JKJ Chevrolet*, defendants in the Fourth Circuit are entitled to rely on paid new value as a preference defense, so long as the payment is not otherwise unavoidable.[21]

(iii) FIFTH CIRCUIT—*TOYOTA OF JEFFERSON*

In *Toyota of Jefferson*, the Fifth Circuit was one of the first circuits to conclude that the new value defense was not negated by a subsequent repayment, so long as the repayment was itself avoidable.[22] The Fifth Circuit demonstrated a firm grip on the mandates of § 547(c)(4), and there is no question that courts in the Fifth Circuit have long adhered to the new majority rule.

(iv) EIGHTH CIRCUIT—*JONES TRUCK*

The United States Court of Appeals for the Eighth Circuit in *Jones Truck* unequivocally ruled that an otherwise avoidable payment from the debtor did not deprive a creditor of § 547(c)(4) protections.[23] In reaching this result, the *Jones Truck* court agreed with two other circuit courts by finding that its previous reference to a requirement that new value must "remain unpaid" in *In re Kroh Brothers Development Co.*,[24] was simply "an adequate shorthand description of § 547(c)(4)(B)" and was not controlling.[25] By clarifying that the language in *Kroh Brothers* stating that new value must remain unpaid was non-binding dicta, the *Jones Truck* court placed the Eighth Circuit solidly in the camp of the new majority.

(v) NINTH CIRCUIT—*IRFM*

The Ninth Circuit also embraced the new majority early on with its ruling in *In re IRFM, Inc.*, in which the court provided this roadmap of the new value defense:

> "If the debtor has made payments for goods or services that the creditor supplied on unsecured credit after an earlier preference, *and if these subsequent payments are themselves voidable as preferences* (or on any other ground), then under section 547(c)(4)(B) the creditor should be able to invoke those unsecured credit extensions as a defense to the recovery of the earlier voidable preference. On the other hand, the debtor's subsequent payments might not be voidable on any other ground and not voidable under section 547, because the goods and services were given C.O.D. rather than on a credit, or because the creditor has a defense under section 547(c)(1), (2), or (3). In this situation, the creditor may keep his payments but has no section 547(c)(4) defense to the trustee's action to recover the earlier preference. In either event, the creditor gets credit only once for goods and services later supplied."[26]

As a result of *In re IRFM, Inc.*, the Ninth Circuit has long adhered to the rule that new value need not remain unpaid to be an effective preference defense.

B. THE TIDE IS SHIFTING AMONG LOWER COURTS IN FAVOR OF THE MAJORITY RULE

As can be seen in the cases that follow, district and bankruptcy courts in the First, Second, Sixth and Tenth Circuits have come out in favor of the new majority rule by finding that the plain language of § 547(c)(4) does not require that new value remain unpaid. In fact, the only judicial circuit that continues to adhere to the now minority position is the Seventh Circuit with *In re Prescott*.[27]

(i) FIRST CIRCUIT—FOLLOWS THE MAJORITY APPROACH

There does not appear to be any court of appeals level precedent in the First Circuit addressing the issue whether new value must remain unpaid, and lower courts in the circuit are split. Recent decisions from courts in the circuit have sided strongly in favor of the new majority approach. In *Rentas v. BPP Retail Properties LLC (In re PMC Mktg. Corp.)*, the United States Bankruptcy Court for the District of Puerto Rico evaluated case law across the circuits and determined that the better reasoned opinions and plain language of the statute clearly favor the new majority rule.[28] In *Bogdanov v. Avnet, Inc.*, the district court upheld a bankruptcy court decision that new value need not remain unpaid.[29] The district court concurred with and adopted the reasoning of the *In re Check Reporting* court and found that "as a matter of law, the subsequent new value defense does not require that the subsequent new value remain unpaid, but does require that the preference payment be avoidable ('not otherwise unavoidable'), so accessible to the Trustee for replenishing the estate."[30]

Prior to these recent decisions, at least one opinion from a bankruptcy court in the First Circuit held, without analysis, that § 547(c)(4) required that new value remain unpaid.[31] Somewhat less clear is the *Rovzar v. Prime Leather Finishes Co. (In re Saco Local Development Corp.)* opinion, which appears to have followed the new majority rule in practice, although not in recitation.[32] The *Saco* court stated that "a preferential transfer is insulated from a trustee's avoiding powers to the extent that a creditor extends new value, which is unsecured and *remains unpaid*, to a debtor after the preferential transfer."[33] However, the *Saco* court went on to apply the "subsequent advance rule" which provides a defendant credit for new value despite its receipt of subsequent payments from the debtor.[34]

While the law in the First Circuit remains unsettled, recent opinions embracing the new majority view are better reasoned and provide a more thorough analysis regarding the mandates of § 547(c)(4). The persuasiveness of these recent opinions, coupled with the extensive body of case law emerging in support of the majority view, suggests that courts in the First Circuit will continue to adhere to the new majority rule.

(ii) SECOND CIRCUIT—FOLLOWS THE MAJORITY APPROACH

Bankruptcy courts within the Second Circuit are also employing the new majority rule. The court in *Musicland Holding Corp. v. Best Buy Co. (In re Musicland Holding Corp.)*, squarely and concisely identified the "error" in the former majority rule of "remains paid":

> First, most of these courts that identified the majority rule did so in dicta. Second, the majority rule ignores § 547(c)(4)(B) which states that the defense is available if the debtor "did not make an otherwise unavoidable transfer to or for the benefit of such

> creditor." Obviously, this phrase implies some payments will not deprive the transferee of the new value defense. The . . . statute means that the new value defense is available, despite payment, if the payment was an avoidable transfer, i.e., a preference or fraudulent transfer. Under those circumstances, the creditor must return the second payment, and there is no logical reason to distinguish between a creditor that was paid by an avoidable transfer and one that was never paid at all.[35]

(iii) THIRD CIRCUIT—FOLLOWS THE MAJORITY APPROACH

Despite early dicta favoring the remain unpaid approach, the United States Court of Appeals for the Third Circuit has now all but officially adopted the new majority approach. In *New York City Shoes, Inc. v. Bentley International, Inc. (In re New York City Shoes, Inc.)*, the Third Circuit stated—without analysis—that the third element of the new value defense was that "the debtor must not have fully compensated the creditor for the 'new value' as of the petition date."[36] However, the Third Circuit subsequently determined in *Friedman's Liquidating Trust v. Roth Staffing Cos. LP,* that the third element was not at issue in *New York City Shoes*, so that the *New York City Shoes'* court's statement regarding new value remaining unpaid as of the petition date was dicta.[37] While the *Friedman* court was analyzing *New York City Shoes'* reference to the petition date, and not its reference to new value remaining unpaid, the *Friedman* court's holding is equally applicable here because *Friedman* found that *New York City Shoes'* entire recitation of the third element, including a reference to new value remaining unpaid, was dicta.[38] As explained by the bankruptcy court in *Dots, LLC v. Milberg Factors, Inc. (In re Dots, LLC)*:

> [B]ecause . . . the issue in *N.Y. City Shoes* involved the proper date of the transfer, and did not depend on whether the new value was paid or unpaid, the Third Circuit's reference in *N.Y. City Shoes* to 'new value which remains unpaid' was likewise not germane to its analysis in that case. . . . Accordingly, it too, is dicta, and is not binding on this Court.[39]

Similarly, the bankruptcy court in Delaware in *Wahoski v. American & Efrid, Inc. (In re Pillowtex Corp.)*, did not feel bound by the language of *New York City Shoes* and ruled that "payment for subsequent new value deprives the [d]efendants of the § 547(c)(4) defense only if the payment is unavoidable."[40] The court in *AFA Investment Inc. v. Dale T. Smith & Sons Meat Packing Co. (In re AFA Investment Inc.)*, also adopted the majority rule and allowed new value for unpaid and paid invoices "provided the paid invoices were not themselves paid by an 'otherwise unavoidable transfer.' "[41]

(iv) SIXTH CIRCUIT—FOLLOWING MAJORITY APPROACH

Courts in the Sixth Circuit have come out nearly unanimously in favor of the new majority rule. As explained in *Intercontinental Polymers, Inc. v. Equistar Chemicals, LP (In re Intercontinental Polymers, Inc.)*:

> [t]he Sixth Circuit Court of Appeals has not addressed the issue, but the emerging view and the consensus of the bankruptcy courts within this circuit that have considered the issue is that the 'remain unpaid' approach is inconsistent with the plain language of the statute which only requires that the new value not be paid by an otherwise unavoidable transfer.[42]

The bankruptcy court in *Boyd v. The Water Doctor (In re Check Reporting Services, Inc.)*, undertook an extensive analysis and probative review of case law, legislative history and policy concerns before concluding that the unambiguous language of § 547(c)(4) only disqualifies the new value defense if the

debtor pays for the new value with an unavoidable transfer.[43] There are older cases from courts in the Sixth Circuit reciting without analysis that § 547(c)(4) requires new value remain unpaid.[44] However, given the strength of recent decisions in the Sixth Circuit, it is unlikely that courts will be persuaded by these outdated recitations of § 547(c)(4)'s requirements. There is every reason to suspect that bankruptcy courts in the Sixth Circuit will continue to follow the new majority approach.

(v) TENTH CIRCUIT—FOLLOWING MAJORITY APPROACH

Courts in the Tenth Circuit, including in *Jobin v. McKay (In re M&L Business Machine Co.)*, and *Gonzales v. Sun Life Ins., Co. (In re Furr's Supermarkets, Inc.)*, have held that new value can be used as a preference defense under § 547(c)(4) so long as the new value has not been repaid with an unavoidable transfer.[45] The *M&L Business Machine* court observed that this interpretation "comport[s] not only with the language of the statute and congressional intent, but also serve[s] the legislative goal of encouraging creditors to maintain business relationship with financially troubled enterprises by recognizing the commercial realities of these transactions."[46] The *Furr's Supermarkets* court followed the new majority approach and determined that postpetition critical vendor payments to the defendant negated the new value defense because the critical vendor payments were not avoidable.[47]

C. ONLY THE SEVENTH CIRCUIT REMAINS TETHERED TO THE "REMAIN UNPAID" REQUIREMENT

The Seventh Circuit appears to be the only judicial circuit with binding precedent holding that new value is required to remain unpaid under § 547(c)(4). The United States Court of Appeals for the Seventh Circuit in *Prescott* found—without any analysis of the statute—that § 547(c)(4) only provides a preference defense when the "creditor extends new value, which is unsecured and remains unpaid, to a debtor *after* the preferential transfer."[48] The *Prescott* court went on to uphold the district court's determination that the defendant was not entitled to the new value defense when it "failed to meet [its] burden because it never showed that any of the [new value] went unpaid."[49]

Recently, the Seventh Circuit gave a nod to the new majority approach when it stated in *Levin v. Verizon Business Global, LLC (In re OneStar Long Distance, Inc.)*, that "[i]f the debtor pays for the creditor's new value (and that payment isn't itself avoidable), then the new value is canceled out."[50] However, the issue whether new value would still be effective if repaid by an avoidable transfer was not at issue in *OneStar* because the court ultimately determined that the new value given by the defendant was never repaid (by an avoidable transfer or otherwise).[51] As a result, the *OneStar* court's reference to a payment that "isn't itself avoidable" is arguably dicta because the avoidability of repayment was not at issue.[52] Furthermore, the *Calumet Photographic* court had the opportunity to determine whether new value is required to remain unpaid after the *OneStar* decision and the *Calumet Photographic* court found that the language in *OneStar* as it relates to an "otherwise unavoidable" transfer was simply a recitation of the statutory language and the *OneStar* holding actually continued to uphold the "remain unpaid" precedent.[53] Whether other courts in the Seventh Circuit are going to follow the *Calumet Photographic* court's lead on this issue remains to be seen.

CONCLUSION

The overwhelming majority of courts now hold that creditors are entitled to assert paid new value as a preference defense so long as the repayment was itself an avoidable transfer. All circuits except the Seventh appear to have embraced this new majority view, and given the strength of reasoning behind this view, it is likely that the Seventh Circuit will eventually follow suit.

ENDNOTES:

[1]*Kroh Bros. Dev. Co. v. Continental Constr. Eng'rs, Inc. (In re Kroh Bros. Dev. Co.)*, 930 F.2d 648, 652-53 (8th Cir. 1991); *New York City Shoes, Inc. v. Bentley Int'l, Inc. (In re New York City Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989); *Charisma Inv. Co., N.V. v. Airport Sys., Inc. (In re Jet Fla. Sys., Inc.)*, 841 F.2d 1082 (11th Cir. 1988); *In re Prescott*, 805 F.2d 719, 728 (7th Cir. 1986); *McKloskey v. Schabel (In re Schabel)*, 338 B.R. 376, 381 (Bankr. E.D. Wisc. 2005); *Grant v. Sun Bank/North Cent. Fla. (In re Thurman Constr., Inc.)*, 189 B.R. 1004, 1014 (Bankr. M.D. Fla. 1995); *Braniff, Inc. v. Sundstrand Data Control, Inc. (In re Braniff, Inc.)*, 154 B.R. 773, 784 (Bankr. M.D. Fla. 1993); *Energy Coop., Inc. v. Cities Serv. Co. (In re Energy Coop., Inc.)*, 130 B.R. 781, 789 (N.D. Ill. 1991); *Chaitman v. Paisano Auto. Fluids, Inc. (In re Almarc Mfg., Inc.)*, 62 B.R. 684, 686 (Bankr. N.D. Ill. 1986); *Erman v. Armco Inc. (In re Formed Tubes, Inc.)*, 46 B.R. 645, 646-47 (Bankr. E.D. Mich. 1985); *Waldschmidt v. Ranier (In re Fulghum Constr. Corp.)*, 45 B.R. 112, 119 (Bankr. M.D. Tenn. 1984); *Keydata Corp. v. Boston Edison Co. (In re Keydata Corp.)*, 37 B.R. 324, 328 (Bankr. D. Mass. 1983); *Rovzar v. Seaboard Chems., Inc. (In re Saco Local Dev. Co.)*, 30 B.R. 870, 872 (Bankr. D. Me. 1983); *Rovzar v. Prime Leather Finishes Co. (In re Saco Local Dev. Corp.)*, 30 B.R. 859, 861-62 (Bankr. D. Me. 1983); *Pettigrew v. Trust Co. Bank (In re Bishop)*, 17 B.R. 180, 183 (Bankr. N.D. Ga. 1982).

[2]*Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018).

[3]*See Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545 (4th Cir. 2005); *Lake v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088 (5th Cir. 1994); *Jones Truck Lines, Inc. v. Central States, Southeast and Southwest Pension Funds (In re Jones Truck Lines, Inc.)*, 130 F.3d 323 (8th Cir. 1997); *IRFM, Inc. v. Ever-Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228 (9th Cir. 1995).

[4]*See, e.g., In re Jet Florida Sys., Inc.*, 841 F.2d at 1083; *In re Braniff, Inc.*, 154 B.R. at 783-84; *In re Thurman Constr., Inc.*, 189 B.R. at 1014; *In re Bishop*, 17 B.R. at 183.

[5]*In re Jet Florida Systems, Inc.*, 841 F.2d at 1083.

[6]*In re BFW Liquidation, LLC*, 899 F.3d at 1187.

[7]*In re BFW Liquidation, LLC*, 899 F.3d at 1187-96.

[8]*In re BFW Liquidation, LLC*, 899 F.3d at 1189.

[9]*In re BFW Liquidation, LLC*, 899 F.3d at 1189-96.

[10]11 U.S.C.A. § 96(c) (1976) (emphasis added); *In re BFW Liquidation, LLC*, 899 F.3d at 1190.

[11]*In re BFW Liquidation, LLC*, 899 F.3d at 1191.

[12]*In re BFW Liquidation, LLC*, 899 F.3d at 1191.

[13]*In re BFW Liquidation, LLC*, 899 F.3d at 1191-92 (quoting the Act of July 24, 1970, Pub. L. No. 91-354, § 1, 84 Stat. 468, 468).

[14]*In re BFW Liquidation, LLC*, 899 F.3d at 1192.

[15]*In re BFW Liquidation, LLC*, 899 F.3d at 1192-1196.

[16]*In re BFW Liquidation, LLC*, 899 F.3d at 1193-95.

[17]*In re BFW Liquidation, LLC*, 899 F.3d at 1195.

[18]*In re BFW Liquidation, LLC*, 899 F.3d at 1195.

[19]*In re JKJ Chevrolet, Inc.,* 412 F.3d at 552.

[20]*In re JKJ Chevrolet, Inc.*, 412 F.3d at

552 (citation and quotations omitted).

[21]*In re JKJ Chevrolet, Inc.*, 412 F.3d at 552.

[22]*In re Toyota of Jefferson, Inc.*, 14 F.3d at 1093. *See also MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 608 (Bankr. M.D. La. 1996) ("[T]he question is not whether a subsequent advance remains unpaid, but whether, if paid, it was paid by means of a transfer which was itself avoidable, or not. If the transfer on account of or after the new value is itself avoidable, then § 547(c)(4) insulates, to the extent of the new value, the preference which preceded it.").

[23]*In re Jones Truck Lines, Inc.*, 130 F.3d at 329.

[24]*In re Kroh Bros. Dev. Co.*, 903 F.2d at 651.

[25]*In re Jones Truck Lines, Inc.*, 130 F.3d at 329.

[26]*In re IRFM, Inc.*, 52 F.3d at 231-32 (quoting Vern Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 Vand. L. Rev. 713, 788 (1985)).

[27]*In re Prescott*, 805 F.2d at 722-23.

[28]*Rentas v. BPP Retail Props. LLC (In re PMC Mktg. Corp.)*, Nos. 09-02048(GAC) & 09-02049(GAC), 2013 Bankr. LEXIS 4429, at *16-24 (Bankr. P.R. Oct. 23, 2013).

[29]*Bogdanov v. Avnet, Inc.*, No. 10-CV-543-SM, 2011 WL 4625698, at *2 (D.N.H. Sept. 30, 2011).

[30]*Bogdanov v. Avnet*, 2011 WL 4625698, at *5.

[31]*In re Keydata Corp.*, 37 B.R. at 328 (holding, without analysis, that § 547(c)(4) requires that (i) the creditor must have extended new value after receiving a preference, (ii) the new value must have been unsecured, and (iii) the new value must remain unpaid).

[32]*Rovzar v. Prime Leather Finishes Co. (In re Saco Local Dev. Corp.)*, 30 B.R. 859, 861 (Bankr. D. Me. 1983).

[33]*In re Saco Local Dev. Corp.*, 30 B.R. at 861 (emphasis added).

[34]*In re Saco Local Dev. Corp.*, 30 B.R. at 861-62.

[35]*Musicland Holding Corp. v. Best Buy Co. (In re Musicland Holding Corp.)*, 462 B.R. 66, 71 (Bankr. S.D.N.Y. 2011) (citations, quotations, and internal punctuation omitted). *See also Official Comm. of Unsecured Creditors of Maxwell Newspapers, Inc. v. Travelers Idem. Co. (In re Maxwell Newspapers, Inc.)*, 192 B.R. 633, 639 (Bankr. S.D.N.Y. 1996) (similar ruling addressing the "errors" in the former majority rule).

[36]*In re New York City Shoes*, 880 F.2d at 680.

[37]*Friedman's Liquidating Trust v. Roth Staffing Cos. LP*, 738 F.3d 547, 552 (3d Cir. 2013).

[38]*Friedman's Liquidating Trust v. Roth Staffing Cos.* LP, 738 F.3d at 552.

[39]*Dots, LLC v. Milberg Factors, Inc. (In re Dots, LLC)*, 562 B.R. 286, 303 (Bankr. D.N.J. 2017) (internal citations omitted).

[40]*Wahoski v. American & Efrid, Inc. (In re Pillowtex Corp.)*, 416 B.R. 123, 130 (Bankr. D. Del. 2009).

[41]*AFA Inv. Inc. v. Dale T. Smith & Sons Meat Packing Co. (In re AFA Inv. Inc.)*, Case No. 12-11127, Adv. No. 14-50134(MFW), 2016 WL 908212, at *3 (Bankr. D. Del. March 9, 2016).

[42]*Intercontinental Polymers, Inc. v. Equistar Chems., LP (In re Intercontinental Polymers, Inc.)*, 359 B.R. 868, 880 (Bankr. E.D. Tenn. 2005) (citations, quotations, and internal punctuation omitted).

[43]*Boyd v. The Water Doctor (In re Check Reporting Servs., Inc.)*, 140 B.R. 425, 430-37 (Bankr. W.D. Mich. 1992); *see also Phoenix Rest. Group, Inc. v. Proficient Food Co. (In re Phoenix Rest. Group, Inc.)*, 373 B.R. 541, 547-48 (M.D. Tenn. 2007) (recognizing that "the new value must not have been paid for by the debtor with a transfer that cannot itself be avoided").

[44]*See, e.g., In re Formed Tubes, Inc.*, 46 B.R. at 646; *Remes v. Yeomans (In re Quality Plastics, Inc.)*, 41 B.R. 241, 242 (Bankr. W.D. Mich. 1984).

[45]*Jobin v. McKay (In re M&L Bus. Mach. Co.)*, 155 B.R. 531, 538-39 (Bankr. D. Colo. 1993); *Gonzales v. Sun Life Ins., Co. (In re Furr's Supermarkets, Inc.)*, 485 B.R. 672, 737 (Bankr. D.N.M. 2012).

[46]*In re M&L Bus. Mach. Co.*, 155 B.R. at

539 (quoting *Successor Comm. of Creditors Holding Unsecured Claims v. Bergen Brunswig Drug Co. (In re Ladera Heights Comm. Hosp., Inc.)*, No. LA 90-03504-LF, Adv. No. 92-01555, 1993 WL 119752, at *5 (Bankr. C.D. Cal 1993)).

[47]*In re Furr's Supermarkets, Inc.*, 485 B.R. 737.

[48]*In re Prescott*, 805 F.2d at 728.

[49]*In re Prescott*, 805 F.2d at 728.

[50]*Levin v. Verizon Bus. Global, LLC (In re OneStar Long Distance, Inc.)*, 872 F.3d 526, 530 (7th Cir. 2017).

[51]*In re OneStar Long Distance, Inc.*, 872 F.3d at 530.

[52]*In re OneStar Long Distance, Inc.*, 872 F.3d at 530.

[53]*Steege v. Canon U.S.A., Inc. (In re Calumet Photographic, Inc.)*, 574 B.R. 879, 883 (Bankr. N.D. Ill. 2019).

