STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc., et al.	)	C-2011000036
RESPONDENTS	)	

HEALTHTRUST'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BSR'S MOTION FOR ENTRY OF DEFAULT ORDER

HealthTrust, Inc. ("HealthTrust") submits this memorandum of law in support of its motion for summary judgment on the claims asserted by the New Hampshire Bureau of Securities Regulation ("BSR") in its Motion for Entry of Default Order ("Motion"). For the reasons set forth below, the Presiding Officer should deny the Motion in its entirety.

Introduction

The Motion concerns the Settlement Agreement ("Agreement") between HealthTrust and Property-Liability Trust, Inc. ("PLT") that became operational on January 10, 2014, when the New Hampshire Supreme Court affirmed the provision of the August 16, 2012 Final Order ("Final Order") that PLT repay $17.1 million to HealthTrust. Appeal of Local Government Center, Inc., et al., No. 2012-729, slip op. at 18-19 (N.H. January 10, 2014). In the Motion, the BSR makes several arguments. First, the BSR contends that the Agreement improperly "extinguished" the requirement of the Final Order that PLT repay HealthTrust $17.1 million. Second, the BSR contends that the Agreement violates the Final Order by subjecting both property-liability and health "lines of coverage" to a single board of directors and bylaws. Third, the BSR asserts that the HealthTrust members were required to consent to the "acquisition" of the lines of coverage under RSA 5-B:3.

The BSR's challenges fail. The Agreement does not extinguish, but respects and enforces, the requirement that PLT return $17.1 million to HealthTrust under the Final Order. That obligation, absent the Agreement, rendered PLT insolvent, so the Agreement provides HealthTrust with <u>everything</u> that PLT had. PLT could not pay more than everything it had, and HealthTrust maximized its collection of the obligation and obtained the ability to control costs and determine when assets may be distributed to HealthTrust members. In fact, it now appears that HealthTrust will collect the entire $17.1 million, and HealthTrust's Board of Directors has already approved an initial distribution of $13.9 million from the PLT assets to HealthTrust members subject to Secretary of State approval.

PLT continues to exist with its own board of directors monitoring the runoff of the PLT coverage lines in the interest of PLT members. But even if the Agreement were deemed to combine property-liability and health lines of coverage in one program, the combination of the coverage lines is permitted by the statute. RSA 5-B:3, III expressly authorizes a program to offer "any or all" of many coverage lines. Additionally, the Agreement does not violate the organizational provisions of the Final Order. The Final Order concerned conflicts with respect to various entities in a conglomerate, not the combination of various coverage <u>lines</u> in a single <u>program</u> as permitted by statute. Finally, there is no requirement of member approval for debt work-out agreements like the Settlement. The statute allows a program to offer multiple coverage lines, and it does not provide for member consents or approvals when coverage lines are added.

Background

The BSR's Motion challenges the Agreement entered by HealthTrust and PLT, after approval by their respective boards of directors, to address the consequences of a potential

decision by the New Hampshire Supreme Court affirming the provision of the Final Order that PLT must repay $17.1 million to HealthTrust. Final Order ¶ 13. The HealthTrust and PLT boards had a responsibility to address that issue in advance of the Supreme Court's decision because the effect of such a decision would be to render PLT insolvent. During the summer and fall of 2013, PLT's financial statements showed that PLT did not have the ability to pay $17.1 million to HealthTrust and meet its coverage obligations. If PLT became insolvent, the likely outcome would be a bankruptcy filing, with its attendant unpredictability, cost and delay.

The Agreement allowed HealthTrust members to benefit from the largest possible PLT payment under the circumstances. The Agreement provided for the transfer of PLT's assets to HealthTrust and for HealthTrust to conduct PLT's runoff (which allows HealthTrust to control costs and to receive more rapid distributions than would otherwise have been possible), all while taking on little, if any, additional financial exposure. The Agreement also protected HealthTrust from the reputational harm that would result from having PLT's payments to claimants interrupted by a bankruptcy attributable to an obligation to HealthTrust, and it had the collateral benefit (from HealthTrust's perspective) of avoiding the harm to PLT's members (who are in many instances also HealthTrust members) of having payments interrupted.

Since the Agreement became operational, on January 10, 2014, HealthTrust has administered the runoff of the PLT coverage lines. HealthTrust has also analyzed the PLT transferred assets and liabilities, obtained updated actuarial loss analyses, and prepared pro forma financial statements of assets and liabilities for the runoff of the PLT coverage lines. Favorable loss development indicates that HealthTrust may be able to receive the entire $17.1 million, and the HealthTrust Board has voted to approve an initial distribution of $13.9 million from the assets transferred by PLT to HealthTrust members subject to the Secretary of State's approval.

A. **The Agreement**

1. **The Agreement was necessary because PLT did not have $17.1 million to pay HealthTrust and a PLT insolvency would harm HealthTrust members.**

PLT could not pay $17.1 million to HealthTrust by December 1, 2013 as directed in the Final Order ¶ 13.[1] The December 31, 2010 PLT financial statements relied on in the Final Order (see Final Order at 27-28) reported "total net assets" (assets net of liabilities) of $10,401,808. That $10.4 million figure did not account for either the $3.1 million distribution to PLT members or the $17.1 million repayment obligation to HealthTrust directed by paragraphs 11 and 13 of the Final Order. Absent appeal, the effect of the Final Order was thus to make PLT insolvent by approximately $9.8 million. HealthTrust's Statement of Undisputed Facts ("Statement") ¶ 5.

PLT's December 31, 2011 audited financial statements reported total net assets of $11,566,563, and its June 30, 2013 financial statements reported total net assets of $12,150,050; neither accounted for either the $3.1 million or $17.1 million. PLT's August 31, 2013 financial statements – which reflected PLT's payment of $3.1 million to PLT members but did not include the $17.1 million obligation on appeal – reported total net assets of $12,205,163.[2] Statement ¶¶ 6-7. Consequently, in the early fall of 2013, PLT's financial statements showed that it would be insolvent if the Supreme Court affirmed the $17.1 million PLT payment obligation, and that PLT could not both pay HealthTrust and meet its coverage obligations. Payment of the $17.1 million would make PLT insolvent by approximately $4.9 million. Id. ¶ 9.[3]

[1] The Supreme Court stayed this part of the Final Order pending its decision in the appeal. Appeal of Local Government Center, No. 2012-729 (Order entered October 23, 2013).

[2] Recognizing that PLT lacked the assets to make a $17.1 million payment, HealthTrust had demanded that PLT not make the $3.1 million payment unless it first made adequate provision to pay the $17.1 million. PLT declined, and HealthTrust asked the Secretary to cause PLT to delay the distribution. The BSR refused, and PLT made the distribution over HealthTrust's objection, thus leaving HealthTrust on its own to deal with PLT's possible insolvency. See Statement ¶ 8.

[3] The Final Order suggested at ¶ 13 that PLT borrow the money to pay HealthTrust, but no lenders indicated a willingness to extend a loan to provide cash for PLT to pay HealthTrust. See Affidavit of George Bald (Statement

2. **The effect of a PLT insolvency would likely be a bankruptcy proceeding in which neither claimants nor HealthTrust would be paid in full and any payments would be delayed.**

These financial circumstances placed the PLT Board of Directors in an untenable situation because, in the event of insolvency, they would owe duties to all of PLT's creditors, not all of whom could be paid. See Kapela v. Newman, 649 F.2d 887, 890 (1st Cir. 1981) (Breyer, J.) ("The preference section of the Bankruptcy Act imposes obligations upon a debtor to treat its creditors fairly once the threat of impending bankruptcy becomes apparent."); In re Felt Mfg. Co., 371 B.R. 589, 611 (Bkrtcy. D. N.H. 2007) ("Once a corporation is insolvent, its directors owe a fiduciary duty to the corporation's creditors and creditors have standing to maintain derivative claims for breaches of fiduciary duty."). Absent some agreement, the insolvency would require a filing for protection under the Bankruptcy Code or, possibly, some form of equity receivership because subsequent payments would prefer those receiving the payments. Statement ¶ 13.[4]

In a bankruptcy, PLT's payments to coverage claimants and others (including HealthTrust) would be interrupted. See 11 U.S.C. § 362 (Bankruptcy Code automatic stay). There is no priority in bankruptcy for claimants under the PLT coverage agreements. See 11 U.S.C. § 507 (bankruptcy priorities). PLT's Board of Directors therefore faced the prospect that coverage claimants (other than workers' compensation claimants whose claims were secured by a special deposit with the New Hampshire Department of Labor ("DOL") set at 120% of reserves), HealthTrust, and any other general creditors thus would not receive full payment, and the payments to all would be delayed. Statement ¶ 14.

Ex. A). By letter dated May 10, 2013, RBS Citizens, N.A., denied PLT's request for a credit facility as part of a plan to repay the $17.1 million to HealthTrust. Statement ¶ 10.

[4] There is no precedent for a state receivership of an insolvent pooled risk management program.

PLT's potential insolvency and bankruptcy or receivership proceeding also placed HealthTrust in a difficult position. Any payment to HealthTrust on the $17.1 million would be partial and would only follow a potentially lengthy period of time necessary to obtain court approval as part of an insolvency proceeding. A PLT bankruptcy proceeding would entail expense, both for the proceeding and for administering coverage claims, which would reduce the assets available to pay PLT creditors, including HealthTrust. Further, PLT's failure to timely pay coverage obligations to claimants against its members (who in most instances were also HealthTrust members) would harm the members and inflict reputational damage on HealthTrust. Statement ¶ 15.

In sum, if HealthTrust and PLT did not anticipate and address the consequences of a potential Supreme Court decision affirming the PLT $17.1 million payment obligation, and such a decision issued, then PLT could thereby be rendered insolvent and consequently precluded from negotiating with creditors outside of a bankruptcy. In that case, (1) PLT would not be able to pay HealthTrust in full, (2) any PLT payment to HealthTrust would be significantly delayed, (3) PLT's assets would be depleted by the expenses of a bankruptcy, (4) PLT's payments to coverage claimants would be interrupted, (5) the DOL would need to act to liquidate the deposit and arrange for payment of workers' compensation claims, and (6) PLT's other coverage obligations would not be paid in full. Additionally, HealthTrust would be competing with such PLT claimants for recovery from PLT's estate, and HealthTrust's members who are also members of PLT would be harmed, as would HealthTrust's reputation. Statement ¶ 16.

3. The Agreement was negotiated to benefit HealthTrust and its members.

In these circumstances, HealthTrust negotiated the Agreement with PLT to avoid these adverse consequences from affirmance of the portion of the Final Order directing the $17.1

million PLT payment. It was conditional and only became operational when the Supreme Court affirmed the payment obligation that remained in excess of PLT's ability to pay without precluding PLT from paying coverage obligations in full. Agreement ¶ C.3. Statement ¶ 17.

The Health Trust Board of Directors approved the Agreement at the Board meeting on October 28, 2013. The HealthTrust Board considered PLT's financial condition and concluded that forcing PLT to default in its coverage obligations and file for bankruptcy would not be in the interest of HealthTrust or its members because of the additional administration costs and delay in realizing on PLT's available assets that would result. Agreement ¶ A.11(d). HealthTrust's Board also considered that: (1) the insolvency of PLT (and resulting hardship for PLT members) would cause reputational harm to HealthTrust because of the two entities' long association in the marketplace and because more than half of HealthTrust members are also PLT members; and (2) because the $17.1 million obligation to HealthTrust would be the cause of PLT's insolvency – HealthTrust might wrongfully be viewed as being responsible for the hardships imposed on PLT members and claimants, which could substantially erode HealthTrust's goodwill and damage its business. Id. ¶ A.10. The HealthTrust Board concluded that HealthTrust's realization on the $17.1 million potential PLT obligation would be maximized by accepting an assignment of PLT's assets and liabilities, agreeing to handle the claims of PLT coverage claimants, and agreeing that those claimants would be the first paid from PLT assets. See id. ¶ 11(f). See Statement ¶¶18-20.

The PLT Board of Directors approved the Agreement at its meeting on October 29, 2013. The PLT Board recognized that if PLT had to repay the full $17.1 million, it would render PLT insolvent. Agreement ¶ 9(c). That outcome could lead to bankruptcy, which would result in the payment of only part of PLT's coverage obligations, thus causing severe hardship to PLT

members and claimants. Id. ¶ 9(e). The PLT Board concluded that it was in the best interest of PLT's members and claimants to reach agreement in advance on how the $17.1 million potential obligation would be satisfied if the Supreme Court affirmed it. Id. ¶ 9(f). See Statement ¶ 21.

In the Agreement, PLT and HealthTrust agreed that if the Agreement became operational, PLT would transfer all of its assets and liabilities to HealthTrust (Agreement ¶ D.1); HealthTrust would accept the assignment of all PLT's assets and liabilities in full satisfaction of PLT's obligations to it under the Final Order, including the repayment (¶ D.2); HealthTrust would manage the runoff of PLT's coverage obligations, using the assets transferred from PLT and the existing administrative structure and that to the extent of PLT's assets, HealthTrust would give priority to the payment of PLT's coverage obligations (¶ D.3)[5]; and any transferred assets remaining after the satisfaction of PLT's coverage obligations would be the sole property of HealthTrust (¶ D.5). Statement ¶ 22.

The Agreement contains provisions concerning the runoff of PLT's coverage obligations. HealthTrust agreed to initially hire the PLT employees until it determined the best staffing option for on-going operations. Agreement ¶ E.1. It provides that HealthTrust will track and report (in its financial statements) the operating and financial results for its health coverages and the PLT runoff separately; that the provisions of the Final Order would apply separately to the health coverage pool and the PLT runoff; and that claim payments for the PLT runoff would not be included in any calculations of surplus to be retained by HealthTrust. Id. ¶ E.2. Statement ¶ 23.

[5] For policy renewal offers made prior to the date the Agreement became operational, HealthTrust agreed to honor the rate structures offered by PLT for business so written or renewed for fiscal years 2015 and 2016. Agreement ¶ F.2.f. PLT's independent consulting actuaries, the national actuarial consulting firm Towers Watson, performed rate level and experience modifier analyses concerning PLT's 2013/2014 property-liability, workers' compensation and unemployment compensation coverages. Based on the Towers Watson indications, the rates and experience modifiers included in PLT offers made in the fall of 2014 were priced at or above break-even. Statement ¶ 12.

B. The Runoff of the PLT Coverage Lines, Collection of Assets and Proposed Distribution to HealthTrust Members.

1. The Agreement has allowed HealthTrust to collect $13.9 million, and it appears HealthTrust will ultimately realize the full $17.1 million.

The Agreement became operational on January 10, 2014, when the Supreme Court issued its decision that, among other things, affirmed the $17.1 million repayment obligations. Since then, HealthTrust has administered the runoff of PLT's coverage obligations. HealthTrust has tracked and reported the operational and financial results of the runoff of PLT coverage lines separately. HealthTrust has realized $13.9 million on the $17.1 million PLT obligation and stands to realize the full $17.1 million amount of the obligation as described below.

At the time the Agreement was entered, HealthTrust and PLT anticipated that PLT would be unable to pay the $17.1 million to HealthTrust and meet its coverage obligations. PLT's financial statements as of August 31, 2013, reported PLT net assets of $12.2 million. Accordingly, subject to the costs of administering the runoff of PLT's coverage obligations at a level equal to or less than the reserves established for that purpose, at the time the Agreement was entered, HealthTrust could reasonably anticipate that it would ultimately realize approximately the net asset amount of $12.2 million. Statement ¶ 24.[6]

The reserves for incurred coverage obligations reported in PLT's financial statements were based on analyses by its independent consulting actuary, the national actuarial firm of Towers Watson. The claims reserves carried in the August 31, 2013 financial statements reflected the December 31, 2012 actuarial central estimates provided by Towers Watson as updated by PLT. Statement ¶ 26.

[6] The PLT financial statements available before January 10, 2014 reported similar amounts of net assets. PLT's September 30, 2013 financial statements reported net assets of $12.5 million. PLT's October 31, 2013 financial statements reported net assets of $12.7 million. The November 30, 2013 financial statements reported net assets of $12.5 million. See Statement ¶ 24 n. 4.

Towers Watson prepared updated analyses as of August 31, 2013 for PLT and issued reports late in 2013. The reports reduced Towers Watson's selected estimates by a total of $3.3 million from the estimates underlying the August 31, 2013 financial statements. Pro forma PLT financial statements as of December 31, 2013 incorporated the updated Towers Watson reserve estimates. Those financial statements show total net assets of $15,813,101. Statement ¶¶ 27-28.

In January 2014, HealthTrust asked Towers Watson to update its estimates of the incurred obligations for the PLT coverage lines as of January 10, 2014. Towers Watson's updated analysis reduced its actuarial central estimates by a total of $1.4 million from the total of the estimates as of August 31, 2013. HealthTrust prepared a pro forma financial statement for the runoff of PLT's coverage lines as of January 31, 2014 using the Towers Watson updated estimates. The pro forma statement showed total net assets of $18,119,988, which indicates that there could be a positive net amount of $1,019,988 after the runoff of the PLT coverage obligations and payment of the full $17.1 million obligation to HealthTrust. Statement ¶¶ 29-30.[7]

2. The PLT Board continues to exist and monitor the runoff of the PLT coverage lines in the interest of PLT members.

The PLT Board of Directors exists to monitor compliance with the Agreement by HealthTrust. Since January 10, 2014, HealthTrust has provided the PLT Board with information concerning the runoff of the PLT coverage lines, including the pro forma January 31, 2014 financial statement for the PLT runoff and the Towers Watson analyses as of January 10, 2014. The PLT Board met to discuss the runoff and those materials on March 4, 2014. Noting that the PLT risk management pool program had historically maintained a 90% confidence level margin

[7] That $1 million in potential ultimate net assets is significantly less than the 90% confidence level margin of $4,402,000 calculated by Towers Watson as of January 10, 2014. PLT historically reflected a 90% confidence level margin in its net assets as reported in its financial statements. The $1,019,988 net position corresponds to a confidence level margin of 68% as calculated by Towers Watson. Statement ¶ 31.

and that the approximately $1 million in potential ultimate net assets (after satisfaction of all obligations including the $17.1 million to HealthTrust) was significantly below that level, the PLT Board concluded that it was not in the interest of PLT members to seek to terminate or rescind the Agreement. The PLT Board concluded that PLT could not operate as a viable pooled risk management program with such thin potential net assets. Statement ¶¶ 32-34.

3. The HealthTrust Board has authorized an initial distribution of $13.9 million to HealthTrust members, subject to the consent or expressed non-objection of the Secretary.

At its meeting on April 1, 2014, the HealthTrust Board of Directors voted to approve a distribution of $13.9 million by HealthTrust from the assets transferred by PLT as soon as possible after June 30, 2014, proportionally to the then existing HealthTrust members with medical and dental coverage, subject to the advance approval or expressed non-objection of the Secretary.[8] The HealthTrust Board decided to authorize the $13.9 million initial distribution after giving consideration to (1) the Towers Watson reports as of August 31, 2013 and January 10, 2014; (2) the PLT Board's practice of maintaining a 90% confidence level margin; and (3) the significant changes in estimates of PLT coverage line incurred obligations that have taken place over the past several months. The HealthTrust Board will make decisions concerning further distributions after it receives updated Towers Watson reserve analyses for the close of the current fiscal year, June 30, 2014. Statement ¶ 35.

ARGUMENT

The BSR's "Motion for Entry of Default Order" alleges three violations. See Motion ¶¶ 23-25. The BSR contends that:

[8] HealthTrust requested the Secretary's consent or expressed non-objection to the $13.9 million distribution to HealthTrust members on April 8, 2014. To date, the Secretary has declined to consent or express no objection to the distribution. Statement ¶ 36.

(1) The Settlement Agreement allegedly served "to extinguish the $17.1 million debt owed by PLT to HT" and allegedly violates the requirements of Paragraphs 13 and 14 of the Final Order "requiring the return of the $17.1 million unlawful subsidy" (Motion ¶ 24);

(2) The Settlement Agreement and the transfers under it allegedly violate Paragraph 1 of the Final Order as "both the property-liability lines and the health trust lines are now subject to a single [allegedly] conflicted board of directors and a single set of bylaws" (Motion ¶ 23); and

(3) The Settlement Agreement was entered without "resolution[s] or consents" by the PLT and HT members that the BSR alleges were "required under RSA 5-B:3" (Motion ¶ 23).

The BSR asserts that PLT and HealthTrust are "in default of the requirements of the [Final Order], and in particular those portions that require Respondents to re-organize with separate boards and bylaws and to repay $17.1 million." Motion ¶ 25. The Presiding Officer should grant summary judgment to HealthTrust against the BSR on each of these contentions.

I. THE AGREEMENT DID NOT EXTINGUISH OR AVOID COMPLIANCE WITH THE $17.1 MILLION PLT REPAYMENT OBLIGATION; INSTEAD, IT IS A WORKOUT AGREEMENT THAT RESPECTS THE OBLIGATION AND UNDER WHICH HEALTHTRUST NOW STANDS TO COLLECT THE ENTIRE AMOUNT.

The BSR contends that the Agreement violated the requirements of Paragraph 13 of the Final Order, which provided that PLT "shall re-pay the $17.1 million subsidy" to HealthTrust "no later than December 1, 2013."[9] Motion ¶ 24. The BSR characterizes the Agreement as representing a "compromise or forgiveness" of the obligation by HealthTrust that improperly "extinguishes" it. Motion ¶¶ 18, 24. The characterization disregards the fact that PLT would have been insolvent absent the Agreement. The Agreement did not avoid compliance with the $17.1 million payment obligation. It complies with that obligation by maximizing HealthTrust's return.

[9] The Supreme Court stayed this part of the Final Order pending its decision by Order entered October 23, 2013.

The BSR's motion ignores the economic reality faced by PLT and HealthTrust in the summer and fall of 2013: PLT's financial statements showed that PLT could not both meet its coverage obligations and pay the $17.1 million if the Supreme Court affirmed the repayment obligation. The Agreement is a commercially responsible means to address the situation by maximizing HealthTrust's return on PLT's obligation while eliminating the harm that would have resulted from PLT's sudden insolvency and a resulting bankruptcy proceeding. In fact, in light of favorable development in claims and reserves estimates for the PLT coverage lines, it now appears that HealthTrust will realize the full $17.1 million from PLT's transferred assets.

Contrary to the BSR's assertions, the Agreement did not "compromise" or "extinguish" PLT's obligation. PLT turned over everything it had to HealthTrust in satisfaction of the obligation, and the Agreement does not limit HealthTrust's ability to collect in the event PLT's assets prove sufficient to pay all of its obligations. Agreement ¶ D. The legally erroneous assumption underlying the BSR's position is that the order requires HealthTrust to insist that PLT pay $17.1 million immediately even if PLT lacks the means to do so. When a debtor has an obligation that renders it insolvent, the debtor must either reach an agreement with its creditor(s) or cease making payments and seek bankruptcy protection. PLT could not simply pay one creditor (HealthTrust) to the detriment of others (coverage claimants) without exposing its board and creating claims for preferential transfers. See Kapela, 649 F.2d at 890; Felt, 371 B.R. at 611; 11 U.S.C. § 547 (avoidable preference actions); 11 U.S.C. § 548 (fraudulent transfer actions); 11 U.S.C. § 544(b) (fraudulent transfer actions applying state law such as the New Hampshire Uniform Fraudulent Transfer Act, RSA 545-A). In a bankruptcy, general creditor claims such as PLT's obligations to HealthTrust and PLT's coverage obligations would share in PLT's assets after payment of priority claims. See 11 U.S.C. § 507.

It was plain that the repayment obligation, if upheld, would render PLT insolvent so that PLT could not immediately pay – and HealthTrust could not immediately receive – the $17.1 million. PLT would not be able to pay HealthTrust in full, any payment would be delayed due to a PLT bankruptcy proceeding, the costs of such a proceeding would reduce the assets ultimately available to pay creditors including HealthTrust, payments on PLT's coverage obligations would be interrupted and coverage obligations (other than those secured by the workers' compensation special deposit) would not be met in full. These realities would cause economic harm to HealthTrust members and damage HealthTrust's reputation and business.

In these circumstances, HealthTrust negotiated the Agreement with PLT to maximize its ultimate collection of the $17.1 million obligation. The Agreement does not "compromise" or "forgive" the obligation. Instead, HealthTrust receives everything that PLT had (all of PLT's assets). Agreement ¶ D.1. Furthermore, HealthTrust is to administer the runoff of PLT's coverage obligations, which allows HealthTrust to see that the runoff is conducted efficiently to permit the maximum return to HealthTrust on its claim and to determine when transferred assets should be distributed to HealthTrust members. Agreement ¶ D.3. Any other party that administered the runoff for PLT would charge more than cost, which would reduce the assets available to Health Trust. While HealthTrust acknowledges that the Agreement is in full satisfaction of the Final Order obligation (Agreement ¶¶ D.2, D.5), there is no forgiveness because PLT has nothing more to give.

The only respect in which the Agreement could arguably be viewed as giving up a potential right is the provision according priority to payment of PLT's coverage obligations from the transferred assets. Agreement ¶ D.3. However, insisting on a PLT bankruptcy so that PLT would not pay coverage obligations in full would have increased the costs of PLT's runoff and

delayed payments. Under the Agreement, HealthTrust is to manage the runoff of PLT's coverage obligations. HealthTrust will incur only the actual cost, which will increase the benefit of the $17.1 million obligation to HealthTrust. In a bankruptcy, a third-party unfamiliar with the PLT coverage and claims would likely be engaged, the cost of any such administrator would include a profit margin, and the proceeding itself would entail administrative expense. Having HealthTrust administer the runoff avoids these increased costs and maximizes the assets.

As manager under the Agreement, HealthTrust can determine when during the runoff it is appropriate to distribute PLT assets to HealthTrust members. In a PLT bankruptcy, the bankruptcy court would determine when amounts can be paid out to creditors, including HealthTrust. Only at that time would amounts be available to be considered as part of the determination of HealthTrust member distributions. Thus, the Agreement does not delay payments to HealthTrust members in accordance with Paragraph 14 of the Final Order. Instead, it gives HealthTrust control over the timing of payments to HealthTrust and its members. As favorable events since January 10, 2014 have demonstrated, the Agreement clearly advantaged HealthTrust and its members compared with a PLT bankruptcy or receivership proceeding.

The absence of any "compromise", "forgiveness" or "extinguishment" of PLT's $17.1 million obligation is shown by subsequent events. As described above, Towers Watson's updated estimates of claims reserves and favorable operating results now indicate that PLT's assets should be sufficient to pay its coverage obligations and the $17.1 million. If so, HealthTrust will receive the full $17.1 million amount. If the Agreement had "compromised" or "extinguished" the obligation, then HealthTrust would not ultimately receive the full amount.

The Agreement mimicked the result in an insolvency proceeding, although without the expense of such a proceeding. In a liquidation, obligations are not extinguished. Instead, the

liabilities are recognized, but they are only paid to the extent assets allow. Cf. 11 U.S.C. § 726 (priorities of distribution in bankruptcy); RSA 402-C:44 (priorities in insurer liquidation). Here, PLT was liable for the entire $17.1 million obligation but was not able to immediately pay the full amount, so HealthTrust "settled" for all that PLT had. However, in the event that PLT's assets turn out to exceed its liabilities, HealthTrust will be paid in full. The situation under the Agreement is therefore more advantageous to HealthTrust than a bankruptcy because the HealthTrust Board has the ability to determine when PLT assets may be distributed to HealthTrust members. The Board has exercised that authority in determining that $13.9 million may be distributed in short order (upon the Secretary's approval or non-objection).

II. THE AGREEMENT DOES NOT VIOLATE THE FINAL ORDER REQUIREMENTS CONCERNING ORGANIZATION OF RISK POOL PROGRAMS.

The BSR's Motion conflates two separate issues in its argument that HealthTrust has violated the governance aspects of the Final Order, namely: (1) whether the reorganization in November 2012 complied with paragraph 1 of the Final Order; and (2) whether the Agreement violates the governance principles set forth in the Final Order. The distinction between these two issues is important because the timely reorganization required by paragraph 1 was, by the terms of the Final Order, enforced by the "automatic" corporate death penalty set forth in paragraph 2. See Final Order p. 73 ¶¶ 1, 2. The required reorganization was made in 2012 as recognized by the BSR and the Supreme Court, so the first issue has already been determined and further consideration is barred by res judicata.

By contrast, the question whether the Agreement violates the Final Order is a new one that depends upon subsequent facts. That question is not precluded by res judicata. However, as a new and separate issue, it is not subject to any automatic penalty under paragraph 2. Instead, if

there were a violation (which HealthTrust denies), the Presiding Officer would need to consider all the circumstances and determine what, if any, penalty is appropriate. The BSR's efforts to frame this matter as a "default" are an attempt to avoid consideration of the facts and circumstances bearing upon the proper determination of these issues.

A. The BSR'S Claim of "Default" by Failure to Reorganize Lacks Merit Because the Required Reorganization Was Made and the Claim Is Barred By Res Judicata.

The BSR claims that HealthTrust and PLT are in "default" of the Final Order's requirement that "[n]o later than 90 days from the date of this Order Local Government Center shall organize its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws." Final Order p. 73 ¶ 1. See Motion ¶ 25. The Final Order also provided that "[f]ailing timely reorganization as ordered above in § 1, the LGC, Inc., is deemed to continue in violation of RSA 5-B and this order . . . and shall . . . . be penalized by forfeiture of the statutory exemption from the State's insurance laws and of the exemption from state taxation . . . ." Final Order p. 73, ¶ 2. The plain meaning of these provisions is that the then-Respondent entities had to reorganize the property-liability and health programs into a structure where each had an independent board and its own bylaws within 90 days of August 16, 2012 or face the specified penalty. They did so. There was no default in the "timely reorganization" ordered by these provisions because LGC, Inc. reorganized as required. The penalty paragraph thus no longer has any application.

The meaning of the Final Order must be determined from the order itself. See In re Salesky, 157 N.H. 698, 703 (2008) ("In construing a court order, we look to the plain meaning of the words used in the document."); Edwards v. RAL Automotive Group, Inc., 156 N.H. 700, 705 (2008) ("Neither what the parties thought the judge meant nor what the judge thought he or she

meant, after the time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.") (quoting Universal Assurors Life v. Hohnstein, 500 N.W.2d 811, 814 (Neb. 1993)). Further, the Final Order must be construed in light of the issues before the Presiding Officer. See Salesky, 157 N.H. at 703 ("As a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide.").

The Final Order does not address a contractual workout and runoff arrangement like the Agreement. It addresses the unique issues presented by the LGC, Inc. governance structure. At the time of the Final Order, the two programs were LLCs[10] that were controlled by LGC, Inc., as part of a "conglomerate" or "parent/subsidiary" structure, and neither LLC had a board of directors or bylaws. See Final Order at 12-13, 15, 19-20. As discussed in greater detail below, the Presiding Officer found conflicts within that structure and held that it violated the requirements of RSA 5-B:5, I(b) and (e), such that the corrective action of paragraph 1 was required and, if it was not timely taken, the sanction of paragraph 2 should follow.

The then-Respondents timely reorganized as required by the Final Order. As the BSR acknowledges, LGC, Inc., took timely action to comply with Paragraph 1 by appointing separate boards for the two existing LLCs and having them adopt separate bylaws: "[I]n November 2012, Local Government Center HealthTrust, LLC ('LGCHT') and Local Government Center Property-Liability Trust, LLC ('LGCPLT') adopted separate Bylaws and appointed a separate Board of Managers." Motion ¶ 11. Statement ¶ 2. Indeed, BSR attorneys testified that paragraph 1 of the Final Order had been complied with in testimony before the legislative Committee to Review the Hearing Officer's Report with Regard to the New Hampshire Local

[10] Under RSA 5-B, the program and the legal entity embodying it are congruent: "Each program shall: (a) Exist as a legal entity organized under New Hampshire law . . . ." RSA 5-B:5, I (emphasis added).

Government Center on August 21, 2013. Statement ¶ 3. It is thus undisputed that the Respondents timely complied with paragraph 1 of the Final Order.[11] Accordingly, paragraph 2 became moot in November of 2012. By its terms that paragraph was to compel particular action by a particular time. It has no application to subsequent events not contemplated at the time it was issued.[12]

Moreover, challenges to timely compliance with paragraph 1 of the Final Order are barred by the doctrine of res judicata. The Respondents included the reorganization requirement as an issue in their Appeal by Petition pp. 4, 15, and the Supreme Court accepted the appeal. In their brief, Respondents advised the Court that they had "since complied with these provisions and take[] no further appeal from those portions of the Order." Appellants' Brief, p. 11 n. 9. The BSR did not dispute or challenge the Respondents' position that they had complied with the Final Order's directive to timely reorganize the risk management pool programs. In its decision, the Supreme Court began its discussion of the specific remedies required by the Final Order with the reorganization requirement: "To remedy the violations of RSA 5-B:5, I(b) and (e), the presiding officer ordered LGC to reorganize HealthTrust and P-L Trust 'into a form that provides each program with an independent board and its own set of written bylaws.'" Appeal of Local Government Center, slip op. at 10. The Court then stated: "The respondents complied with this

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[11] On September 1, 2013, as part of a reorganization, LGCHT and LGCPLT assigned their respective assets and liabilities to HealthTrust and PLT, each of which had its own set of bylaws and its own board of directors. The propriety of aspects of this reorganization is being litigated before the superior court in New Hampshire Municipal Ass'n, Inc. et al. v. State of New Hampshire Dep't of State et al., No 217-2013-CV-00511 (Merrimack Super. Ct.). HealthTrust and PLT each continue to have an independent board and its own set of bylaws. Statement ¶ 4.

[12] HealthTrust disputes that the penalty set forth in paragraph 2 was proper. Among other things, the statute authorizes specified relief in RSA 5-B:4-a, I(b), V, VI, and VII. Nowhere does the chapter authorize the corporate "death penalty." The BSR appears to assume that the Secretary has licensing authority (that is, the ability to revoke a regulated entity's ability to do business). However, the Legislature did not grant that authority to the Secretary as it has to other agencies (such as the Insurance Department, see RSA 402:10, RSA 401-B:12). In the absence of legislation, the agency cannot confer such power on itself. See Appeal of Somersworth School Dist., 142 N.H. 837, 841 (1998). These issues were not addressed on appeal, as the reorganization issue – and thus the related penalty question (Appeal by Petition pp. 5, 19) – became moot. See Appeal of Local Government Center, slip op. at 10. The determination in paragraph 2 of the Final Order thus has no preclusive effect. See Restatement (Second) of Judgments § 28, comment a (1982).

portion of the presiding officer's decision in the fall of 2013."[13] Id. The question of compliance with paragraph 1 was thus actually decided in the appeal.

The Supreme Court's decision precludes further consideration of the issue pursuant to the doctrine of res judicata because:

> Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. The doctrine applies when three elements are met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action.

Kalil v. Town of Drummer ZBA, 159 N.H. 725, 730 (2010) (citing Sleeper v. Hoban Family Partnership, 157 N.H. 530, 533 (2008)). The elements of res judicata are met. There is an identity of parties; the same cause of action was before the Supreme Court; and the Supreme Court rendered a judgment on the merits. Consequently, the BSR cannot now contend that the Respondents did not timely reorganize as required by paragraph 1.

B. The Agreement Does Not Violate Statutory or Final Order Requirements Concerning the Organization of Pooled Risk Management Programs.

The BSR contends that the Agreement violates the Final Order because "both the property-liability lines and the health trust lines are now subject to a single conflicted board of directors and a single set of bylaws." Motion ¶ 23 (emphasis added). The BSR's argument erroneously assumes that HealthTrust acquired or merged PLT out of existence. However, the Agreement was a work-out of a debt due under which HealthTrust is administering the runoff of the PLT coverage lines in exchange for the assignment of PLT's assets. PLT continues to exist and its Board of Directors monitors the runoff. BSR's argument also ignores the statutory authorization for a program to offer multiple coverages, and it misconstrues the Final Order.

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[13] As noted above, that reorganization actually occurred in November 2012.

1. PLT and HealthTrust continue to exist with separate boards of directors and bylaws.

The BSR's argument that the property-liability lines and health lines are now governed by a single board rests on an erroneous premise. It incorrectly assumes that PLT and its Board somehow ceased to exist when the Agreement became operational. However, the Agreement only provided for a transfer of assets and liabilities to address the $17.1 million obligation, with HealthTrust to administer the runoff of the PLT coverage obligations. Agreement ¶¶ D.1, E. It did not merge PLT into HealthTrust or eliminate PLT's Board or bylaws. The Agreement contemplates their continued existence and provides for HealthTrust to track the operational and financial results for the PLT runoff separately. Id. ¶ E.2.

The PLT Board continues to exist and to monitor the runoff of the PLT coverage lines. Statement ¶ 33. HealthTrust has provided financial and operational information concerning the runoff to the PLT Board, and the Board has acted with respect to it. For example, on March 4, 2014, the PLT Board met to discuss Towers Watson's updated reserve analyses as of January 10, 2014 and the pro forma financial statements for the runoff. Notwithstanding those favorable results, the PLT Board of Directors decided not to seek to rescind or terminate the Agreement. Id. ¶ 34. The PLT members are thus not being "deprived" of separate governance by the PLT Board. The PLT Board remains focused on the interests of PLT members. The PLT Board established the coverages offered to PLT members and the terms and the pricing of those coverages before the Agreement became operational. Id. ¶ 11. Since that time, the PLT Board has monitored the runoff of the PLT coverage obligations.[14]

[14] The Agreement made clear that claim payments for the PLT runoff will not be included in the calculation of surplus to be retained by HealthTrust, Agreement ¶ E.2, so that the interests of HealthTrust members in surplus and distributions pursuant to RSA 5-B:5, I(c) will not be "diluted" by HealthTrust's administration of the PLT runoff. Also, HealthTrust – not PLT – members are entitled to any assets not needed to fund PLT coverage obligations.

2. If the Agreement is deemed to combine property-liability and health coverages in one program, that is allowed by statute.

Even assuming the Agreement effected the combination of the health coverages and the runoff of the property-liability coverages in one program, that does not violate RSA 5-B or the Final Order. Property, casualty and health lines may be combined in the same program. The principles of statutory interpretation applicable to RSA 5-B:3 are well established:

> [The courts] first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. [The courts] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [They] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [they] do not consider words and phrases in isolation, but rather within the context of the statute of a whole. This enables [the courts] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

Appeal of Local Government Center, slip op. at 12 (citing State Employees' Assoc. of N.H. v. State of N.H., 161 N.H. 730, 738-39 (2011)). Under the plain meaning of the statute, HealthTrust may properly provide health, property and casualty lines.

The statute expressly authorizes pooled risk management programs to provide "any or all" of the listed coverages, including property, casualty, health and life. RSA 5-B:3, III and III (a), (b), (f), (g). "Pooled risk management programs established for the benefit of political subdivisions may provide any or all of the following coverages . . . ." RSA 5-B:3, III (emphasis added). The enumerated coverages include "Casualty" ("including general and professional liability [and] workers' compensation and employer's liability"); "Property"; "Hospital, medical, surgical or dental benefits for employees and their dependents"; and "Life, income maintenance, accidental death and dismemberment, vision loss or impairment, or legal benefits for employees and their dependents." RSA 5-B:3, III, (a), (b), (f), (g).

The plain meaning of the statute thus authorizes one pooled risk management program to provide multiple coverages ("any or all" of the listed coverages). Any other reading would render the words "or all" superfluous, contrary to the established principles of statutory construction. See, e.g., Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26 (2002) (Courts "must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words."). Where the statute expressly allows a program to offer multiple coverages, it does not preclude HealthTrust's determination that it could most effectively collect the obligation owed by PLT by accepting the transfer of PLT's assets and its property and casualty obligations.

3. The Final Order also allows the combination of multiple coverage lines in one program.

Consistent with RSA 5-B:3, III, the Final Order did not prohibit having property liability "lines" and health "lines" in the same program. The meaning of the Final Order must be determined from the order itself, based on its plain meaning construed with reference to the issues before the Presiding Officer at the time. See Salesky, 157 N.H. at 702-703. "Neither what the parties thought the judge meant nor what the judge thought he or she meant, after the time for appeal has passed, is of any relevance." Edwards, 156 N.H. at 705. The Final Order does not bar having property-liability and health lines in the same program, and the Agreement does not violate the Final Oder.

As an initial matter, paragraph 1 of the Final Order says nothing about coverage "lines." It requires that "each program" have its own independent board and written bylaws. As noted above, PLT and HealthTrust each continue to have their own independent boards and bylaws. The BSR's position confuses coverage lines with risk pool programs. The two are distinct. See

RSA 5-B:5, I(a) (a "program" is to exist as a "legal entity"); RSA 5-B:3, III (a program may provide "any or all" of the enumerated coverages).

The BSR's argument that the HealthTrust board is "conflicted" like the old LGC board when a program includes multiple lines of coverage rests on an incorrect interpretation of the Final Order. The Final Order unmistakably disapproved of boards with conflicted duties, but the plain meaning of the Final Order, especially when construed in light of the issues before the Presiding Officer at the time, does not concern coverage lines. The conflicts at issue in the Final Order involved a single board with duties respecting various entities (including RSA 5-B programs) that were part of a "conglomerate." See Appeal of Local Government Center, slip op. at 6. The present structure does not have those flaws.

In the Final Order, the Presiding Officer found that:

> LGC, Inc. and its entities, decided that they were going to operate in a manner that would allow the LGC, Inc., board of directors to have complete control and dominion, by fiat, over what had been separately governed RSA 5-B pooled risk programs. . . . Unable to legally merge each corporation with a corresponding limited liability company the LGC, Inc. simply arranged to eliminate the board that had been separately governing each pooled risk program. . . . [emphasis added]

Final Order at 15. The Presiding Officer held that this "parent/subsidiary" approach under which there was no separate board for each program resulted in conflicting responsibilities:

> The single board of directors . . . thereafter would be charged with simultaneously fulfilling the varying attendant obligations due to the participating members of the health trust and property liability trust as a qualifying RSA 5-B governing board, with those participants of a separately created workers compensation trust; participating owners of real estate interests; and participating members with legislative or lobbying interests.

Final Order at 15 (footnote omitted). The Presiding Officer later reiterated the conflicting interests presented by centralizing governance in the parent's board:

> (1) the operation, maintenance, and control of real estate interests of LGC Real Estate, Inc., placing the board in the position of both landlord and tenant; (2) the operation, maintenance and implementation of legislative advocacy and lobbying efforts and the

> information, legal advice, training and general support programs of the NHMA, Inc. placing the board in the position of advocate for the approximately one third of the state's municipalities participating in the workers compensation trust or the approximately two thirds of the municipalities who do not participate; and (3) the operation, maintenance and financial success of not a single, but three competing pooled risk management programs absorbed as subsidiaries, placing the board in the position of both borrower and lender.

Final Order at 21-22.[15] The Presiding Officer also observed that "[t]he duty of care . . . that was previously exclusive to trust members . . . faced competition with members of other LGC entities in existence and potentially additional LGC entities that may be added to the LGC conglomerate" and that duties of loyalty and fiduciary duties were "muddled," not least because LGC took the position that fiduciary duties "flowed 'up' to the parent." Final Order at 19.

In sum, the conflicts that required the reorganization of the programs into a form that provided each program with an independent board and bylaws were conflicts among the entities within the conglomerate, in particular, conflicts due to the parent's board running two separate pooled risk management programs which lacked separate boards and bylaws. The Final Order did not address any "conflicts" among lines of coverage within a single program or single entity.

This point is confirmed by the Presiding Officer's implicit recognition that a program may add coverage lines, including a former program. The Final Order notes at several points that, as of 2007, PLT included both the former property-liability and workers' compensation programs. Final Order at 13 & n. 14, 23, 41 n. 28. See Appeal of Local Government Center, slip op. at 4, 10-11. However, the Final Order did not hold that joinder of the property-liability and workers' compensation lines (and formerly separate programs) in one program was improper or require that those coverages be separated in independent corporate entities or direct that they

[15] While the Final Order found that initially there were three separate pooled risk management programs, it held that in 2012 (after two of the original three were combined into one legal entity in 2007) there were only two separate pooled risk programs and that each of the two programs, not the original three, required separate boards and separate bylaws pursuant to RSA 5-B.

have separate boards of directors or separate bylaws. Since the Final Order did not identify any perceived conflicts based on having multiple coverage lines within a single program, the Agreement – even if viewed as consolidating coverages in HealthTrust – does not violate or nullify the Final Order.

III. THE AGREEMENT DID NOT REQUIRE A RESOLUTION OR CONSENT OF HEALTHTRUST MEMBERS.

The BSR finally contends that some resolution or consent by HealthTrust members approving the Agreement was required under RSA 5-B:3. Motion ¶¶ 20, 23. However, that statute concerns the initial establishment of pooled risk management programs, and it does not provide for subsequent member consents or resolutions. The statute lacks any language that requires member consents or resolutions to approve an agreement concerning collection of a debt, which is the purpose of the Agreement. The Agreement was entered in the event that the Supreme Court held that PLT owed $17.1 million in order to maximize the amount payable to HealthTrust. Nothing in RSA 5-B:3 requires member approval of such an agreement to work-out the payment of a substantial debt to Health Trust.[16]

The BSR apparently contends that resolutions or consents are required because, as part of its effort to maximize recovery, HealthTrust agreed to accept a transfer of the "assets, liabilities and operations of property, casualty and workers compensation lines." Motion ¶ 20. Even if the BSR's assertion that PLT's "coverage lines" had become HealthTrust "coverage lines" under RSA 5-B was correct (which it is not), nothing in the statute provides for member approval if the lines of coverage handled by a program are expanded. As discussed above, RSA 5-B:3, III expressly authorizes a pooled risk management program to provide varied lines of coverage; such programs "may provide any or all" of a list of coverages, including property, casualty <u>and</u>

[16] Similarly, nothing in the statute or Final Order requires prior approval of such an agreement by the BSR.

health lines. There is no language in RSA 5-B:3, I, however, that requires or provides for member approval in the event that a program changes its coverage lines.

Construed according to its plain and ordinary meaning, RSA 5-B:3, I does not provide for any process of member approval (either by resolution or consent) for changes or additions to a program. The first two sentences of the statute authorize a political subdivision ("by resolution of its governing body") to enter into agreements to obtain insurance and authorize such agreements to provide for pooling of risks and expenses.[17] The third sentence allows two or more political subdivisions to "form" an association or "affirm" an existing association.[18] The term "affirm" reflects the existence of such associations before the 1987 enactment of RSA 5-B by 1987 Laws 329:1. See Final Order at 7-9. The statute concerns the initial formation of programs or the affirmance of programs existing in 1987. It does not provide for member approval of program changes such as the addition of coverage lines.

The BSR's interpretation of this provision to require member approval of coverage line changes would "add language that the legislature did not see fit to include," contrary to the principles of statutory interpretation. Appeal of Local Government Center, slip op. at 12 (citing State Employees' Assoc. of N.H. v. State of N.H., 161 N.H. 730, 738 (2011)). The Legislature could have conferred such an approval requirement, but it did not. Cf. Babiarz v. Town of Grafton, 155 N.H. 757, 759 (2007) (The legislature "could easily have conferred" a right to

[17] "A political subdivision, by resolution of its governing body, may establish and enter into agreements for obtaining or implementing insurance by self-insurance; for obtaining insurance from any insurer authorized to transact business in this state as an admitted or surplus lines carrier; or for obtaining insurance secured in accordance with any method provided by law. Agreement made pursuant to this paragraph may provide for pooling of self-insurance reserves, risks, claims and losses, and of administrative services and expenses associated with them among political subdivisions." RSA 5-B:3, I, first two sentences.

[18] "To accomplish the purposes of this chapter, 2 or more political subdivisions may form an association under the laws of this state or affirm an existing association so formed to develop and administer a risk management program having as it purposes reducing the risk of its members; safety engineering; distributing, sharing and pooling risks; acquiring insurance, excess loss insurance, or reinsurance; and processing, paying and defending claims against the members of such association." RSA 5-B:3, I, third sentence.

challenge a recount on various groups but did not). Accordingly, there is no requirement that the Agreement be approved by resolution or consent of HealthTrust members.[19]

CONCLUSION

For the foregoing reasons, the Presiding Officer should grant summary judgment to HealthTrust denying the BSR's Motion in its entirety.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

Dated: May 9, 2014

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CERTIFICATE OF SERVICE

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell
Michael D. Ramsdell

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[19] In this situation, HealthTrust members incur no real financial risk for PLT runoff obligations (based on Towers Watson's claims reserve studies) or renewal obligations (based on Towers Watson's pricing recommendations), and HealthTrust is entitled to any "surplus" funds from the transferred amounts. See Statement ¶¶ 12, 24, 30.

649 F.2d 887
United States Court of Appeals,
First Circuit.

Paul F. KAPELA et al., Defendants, Appellants,
v.
Samuel NEWMAN, Plaintiff, Appellee.

No. 80-1737. | Argued April 10, 1981. | Decided May 22, 1981.

Appeal was taken from a judgment of the United States District Court for the District of Massachusetts, Robert E. Keeton, J., holding that a voidable preference was created under the Bankruptcy Act. The Court of Appeals, Breyer, Circuit Judge, held that a guarantor does not receive a preference when a debtor uses a corporate asset to reduce the size of a creditor's loan, provided the asset is one in which the creditor held a perfected security interest and is not available to general creditors, and fact that asset involved consists of a debt that guarantor owes corporation makes no difference.

Reversed.

West Headnotes (7)

[1] **Bankruptcy**
Preferences

The preference section of the Bankruptcy Act imposes obligations upon a debtor to treat its creditors fairly once the threat of impending bankruptcy becomes apparent. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a).

Cases that cite this headnote

[2] **Bankruptcy**
Effect to Give More Than Under Bankruptcy Distribution

Bankruptcy
Transfers to Secured Creditors; Lien Enforcement

The detailed provisions of the Bankruptcy Act are written to prevent preferences as among creditors of the same class, while normally allowing secured creditors to obtain, and realize upon, their collateral. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a).

Cases that cite this headnote

[3] **Bankruptcy**
Creation of Lien or Security Interest

While conflicts can develop between provision of the Bankruptcy Act governing preferences and provision of Uniform Commercial Code relating to secured transactions, as when a lender takes a secured interest in after-acquired receivables which do not come into existence until just prior to a bankruptcy, it is important to interpret the two provisions in a way that minimizes such conflicts and harmonizes the policies that underline them. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a); U.C.C. § 9-101 et seq.

3 Cases that cite this headnote

[4] **Bankruptcy**
Transfers to Secured Creditors; Lien Enforcement

Corporate shareholder, who guaranteed repayment of corporation's basic loan from bank and, just before corporation went bankrupt, paid a sum of money to bank which he claimed at one and the same time reduced his obligation as guarantor of the basic loan as well as the debt which he himself owed to the corporation, a debt in which the bank had a secured interest as partial collateral for the basic loan, did not receive a voidable preference under the Bankruptcy Act, where the payment was not a transfer of the bankrupt's property, the transfer of the note, while a transfer of a bankrupt's property, was not a transfer for antecedent debt, and the transfers, whether taken separately or together, did not diminish the bankrupt's estate available to other comparable creditors. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a).

5 Cases that cite this headnote

[5] **Bankruptcy**

Transfers to Secured Creditors; Lien Enforcement

Realization upon a note legitimately held as collateral by a secured creditor should not create a preference in favor of the guarantor of the creditor's basic loan when it would not create a preference in the favor of the creditor. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a).

1 Cases that cite this headnote

[6] **Bankruptcy**

Elements and Exceptions

Bankruptcy

Transfers to Secured Creditors; Lien Enforcement

When the bankrupt debtor's assets are transferred to the basic loan creditor, the transfer creates a preference in the basic loan guarantor, provided that the creditor did not have a previously secured interest in those assets and all other preference conditions are met; the result is just the opposite if the creditor of the basic loan previously had a secured interest in the assets that were transferred, for then the transfer did not significantly affect other creditors. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a).

2 Cases that cite this headnote

[7] **Bankruptcy**

Transfers to Secured Creditors; Lien Enforcement

A guarantor does not receive a preference when a debtor uses a corporate asset to reduce the size of a creditor's loan, provided the asset is one in which the creditor held a perfected security interest and is not available to general creditors, and fact that asset involved consists of a debt that guarantor owes corporation makes no difference. Bankr.Act, § 60(a), 11 U.S.C.A. § 96(a).

8 Cases that cite this headnote

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Marshall F. **Newman**, Boston, Mass., with whom Philip Slotnick and **Newman** & **Newman**, P. C., Boston, Mass., were on brief, for plaintiff, appellee.

Before ALDRICH, CAMPBELL and BREYER, Circuit Judges.

Opinion

***889** BREYER, Circuit Judge.

A Bank makes a large loan to a corporation. A corporate shareholder guarantees repayment of this Basic Loan. At the same time the guarantor himself owes money to the corporation a debt in which the Bank has a secured interest as partial collateral for its Basic Loan. The corporation goes bankrupt. The guarantor just before bankruptcy pays a sum of money to the Bank money which he claims at one and the same time reduces his debt to the corporation and also reduces his obligation as guarantor of the Basic Loan. If so, has he received a voidable "preference" under section 60(a) of the Bankruptcy Act of 1898, 11 U.S.C. s 96(a)? Has property belonging to the corporation been transferred in a manner that benefitted the guarantor at the expense of other creditors of the same class? The district court believed that such a preference was created. We disagree and reverse its decision.

I.

The facts on this appeal are not in dispute. The defendants, **Kapela** and Brovenick, were sole shareholders of Amesbury Woodcraft, Inc. In early 1976 Amesbury borrowed $100,000 (the Basic Loan) from Century Bank and Trust Company, Somerville, Massachusetts. The Bank obtained a chattel mortgage in virtually all of Amesbury's assets as security. The mortgage included, among other things, all "notes, bills general intangibles and all other debts, obligations and liabilities in whatever form whether now existing or hereafter arising " Amesbury also executed a loan and security agreement giving the Bank a secured interest in, among other things, all Amesbury's "rights to the payment of money, now existing or hereafter arising " And, the Bank filed an appropriate financing statement on March 9,

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1976, noting its secured interest in this property. Kapela and Brovenick also personally guaranteed the Bank's Basic Loan to Amesbury.

Between March 22, 1976 and December 27, 1976, Brovenick borrowed money from the corporation. On January 13, 1977, Brovenick provided the corporation with a promissory note for $24,640 as evidence of this debt. The corporation then assigned the note to the Bank as collateral under its security agreements.

On March 2, 1977, Brovenick sent the Bank a check for $21,540 upon the back of which he wrote, “Pay to the order of Century Bank & Trust Co., assignee of my note of 1/13/77”. [1] At the same time, Brovenick (who also supervised the corporate bookkeeping) made accounting entries in the corporation's books reducing his debt to it by $21,540.

On March 9, 1977, the corporation went bankrupt. The corporation had been insolvent for the preceding four months, and both Kapela and Brovenick knew, or should have known, it.

On August 14, 1977, Samuel Newman, the corporation's trustee in bankruptcy, brought this suit in order to recover, for the corporation, the money that Brovenick paid to the Bank. He argued that the payment of $21,540 to the Bank (at least when taken together with the transfer of Brovenick's note from Amesbury to the Bank) constituted a “voidable preference”, for it satisfied each of the Bankruptcy Act's seven conditions. [2] There was:

***890** (1) A transfer of the debtor's property (the note or money, which “belonged” to Amesbury, was transferred to the Bank);

(2) to or for the benefit of a creditor (Brovenick and Kapela, as guarantors of the Basic Loan were “contingent creditors” of Amesbury [3] and benefitted as guarantors by a reduction in the amount due on the Basic Loan);

(3) for or on account of an antecedent debt (the Basic Loan);

(4) while insolvent;

(5) and within four months of bankruptcy;

(6) which enabled Brovenick and Kapela to obtain a greater percentage of their debt (the “contingent debt” for repayment of their payment of the guaranty) than other creditors of the same class;

(7) and Kapela and Brovenick had reasonable cause to believe that Amesbury was insolvent.
See Collier on Bankruptcy s 60.12 (14th ed. 1977). The district court found that each of these classic conditions was indeed met, declared a “voidable preference”, and ordered Kapela and Brovenick jointly to pay $21,500 to the corporation. [4]

We reverse, however, because we believe (1) that the payment of $21,500 was not a transfer of the bankrupt's property, (2) that the transfer of the note, while a transfer of the bankrupt's property, was not a transfer for antecedent debt, and (3) that the transfers, whether taken separately or together, did not diminish the bankrupt's estate available to other comparable creditors.

II.

[1] [2] [3] The preference section of the Bankruptcy Act imposes obligations upon a debtor to treat its creditors fairly once the threat of impending bankruptcy becomes apparent. Thus, four months before the filing of a bankruptcy petition, the debtor loses its common law right to prefer one creditor over another. At the same time, the Act recognizes the importance of preferring secured, to unsecured, creditors. The detailed provisions of the Act are written to prevent preferences as among creditors of the same class, while normally allowing secured creditors to obtain, and realize upon, their collateral. Occasionally, conflicts can develop between section 60 of the Bankruptcy Act governing preferences, and Article 9 of the Uniform Commercial Code, relating to secured transactions as, for example, when a lender takes a secured interest in “after acquired” receivables, which do not come into existence until just prior to a bankruptcy. See Benedict v. Ratner, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925). [5] ***891** Yet, it is important to interpret the two statutes in a way that minimizes such conflicts and harmonizes the policies that underlie them.

[4] The threat that the district court's holding poses to those seeking to give security for credit can best be seen by analyzing this case from the point of view of the Bank, the secured creditor. It seems clear that the Bank held a valid secured interest in Brovenick's debt to the corporation as partial collateral for its Basic Loan. If so, neither the

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transfer of the note evidencing that debt to the Bank, nor the subsequent payment of that note, would constitute a preference to the Bank. Neither the transfer of the note nor the payment diminished the bankrupt's estate available to pay other creditors, for the other creditors were never entitled to the Brovenick debt, to the note that evidenced it, or to the funds used to pay the debt. Paying off that debt did not hurt them.

How then could transfer of the note to the Bank or payment of the note have constituted a preference to the guarantors ? Granted that the payment helped them by reducing their liability on their guaranty, how did it hurt the corporation's other creditors? How did it diminish the bankrupt's estate that would otherwise have been available to pay those other creditors? To find that it did, one would have to hold that, despite the fact that Brovenick's $24,000 debt was secured collateral for the Basic Loan, it should have been available to help satisfy other creditors; one would have to hold that the guarantors could not rely upon that debt's use to reduce their guarantor liability. Rather, they must pay the Bank $100,000 to satisfy the Basic Loan, despite the existence of this other collateral. In other words, one would have to hold that (at least as to some types of collateral) realization by the creditor of the collateral's value does not relieve the guarantor of his liability under the guaranty. He must still pay it either to the Bank or to the bankrupt corporation as a voided preference.

Such a holding seems undesirable. It seems unfair to a guarantor, who might, for example, have guaranteed a loan to a corporation because he knew that the corporation held an asset, such as a note, a receivable, or for that matter land or chattels, which when given as security, would protect him from having to pay on the guaranty. Such a holding would make one think twice before guaranteeing loans to corporations that appear to have adequate collateral.

[5] One could avoid this result, while supporting the holding below, only if one held that this is a special case that normally realization on collateral does not create a preference in favor of a Basic Loan's guarantor, but it does so here because Brovenick is guarantor, originator of the collateral and a major corporation shareholder all in one. Yet, no improper activity by Brovenick is alleged in this court. No reason has been presented as to why the fact that the collateral originates from the guarantor, from the corporation's owner, or from the owner/guarantor should make a difference. And, we can discern no such reason. Therefore, we believe that realization upon a note legitimately held as collateral by a secured creditor should not create a preference in favor of the guarantor of the creditor's Basic Loan when it would not create a preference in favor of the creditor.

This result is consistent with the language of the statute. If Brovenick's note was legitimately held as collateral by the Bank, the subsequent payment of that note ***892** is not a "transfer of the property of (the) debtor" a statutory requisite for a finding of a preference.[6] Indeed, there is no such "transfer" whether the payment is made directly to the creditor or given to the corporation, but earmarked for payment to the creditor.[7] For that matter, neither does such a transfer "diminish the fund to which creditors of the same class can legally resort for the payment of their debts" as the courts have held that the preference statute requires. See Collier on Bankruptcy s 60.20 (14th ed. 1977) at 859-60 and cases there cited.

Of course, Brovenick's note was itself transferred to the Bank within the critical four-month period and that note was "property" of the corporate "debtor". But, that transfer falls outside the preference statute as long as the Bank had a secured interest in the debt that it evidenced. If so, the giving of the note does not constitute a transfer of the debtor's assets. See Collier on Bankruptcy s 547.14 (15th ed. 1979) at 547-50; Collier on Bankruptcy s 60.13 (14th ed. 1977) at 819 and cases there cited. At worst, it might be viewed as the substitution of a new security (the note) for an old one (the debt that the note evidenced) already in the hands of the bank a transaction that has repeatedly been held to fall outside the statute's language: "transfer on account of an antecedent debt." Sawyer v. Turpin, 91 U.S. 114, 23 L.Ed. 235 (1875).[8] Nor would there seem to be any reason to lump the two transactions note and payment and treat them as one in the absence of any allegation of fraudulent or improper activity.

This result does not sanction or allow corporate shareholders/guarantors, such as Kapela or Brovenick, to manipulate the corporation's assets to benefit themselves. If, for example, Brovenick, foreseeing the corporation's bankruptcy, had taken the corporation's cash, or any other corporate asset, in which the Bank did not possess a secured interest, and transferred it to the Bank (or transformed it into an asset in which the Bank had a secured interest), Brovenick would have received a preference. The giving of such a corporate asset to the Bank would have benefitted Brovenick at the expense of other general creditors, and, if it took place within the relevant four-month period, Brovenick would have received a voidable preference. See Citizens National Bank

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of Gastonia, N. C. v. Lineberger, 45 F.2d 522, 531 (4th Cir. 1930). The transfer of the corporate asset to the Bank would have benefitted Brovenick as a guarantor of the Basic Loan at the expense of other general creditors. Thus, to bring the example closer to home, if Brovenick had taken from the corporation cash, in which the Bank had no secured interest, and replaced it with a debt, in which the Bank had a secured interest, that exchange would have created a preference in Brovenick's favor as well as the Bank's provided it took place within the relevant four-month period and the Bank was not otherwise fully secured. The record before us is ambiguous on this point, for it suggests that some of Brovenick's debt to the corporation may have arisen after November 9, 1976, four months prior to Amesbury's bankruptcy. But, the record is silent as to how that debt was created. Appellant claims that, whatever assets the corporation gave Brovenick when that debt was created, they were assets in which the Bank also held a secured interest; and the Trustee, appellee, does not attack that transfer. Thus, we here must assume that there was no such preferential manipulation.

***893** **[6]** Finally, this result is supported by what case law there is on the subject. The cases suggest that the key question when assets are transferred so as to benefit a guarantor is whether those assets would ordinarily have been available to help satisfy the claims of other (general) creditors. Thus, when a bankrupt debtor transfers assets directly to a guarantor of a Basic Loan as security for the "contingent debt" (to the guarantor) that will be created when the guarantor pays to the debtor's creditor the amount due on the Basic Loan, a preference is created (assuming time limit and other requirements are met). The guarantor cannot keep that security; he must return it to the bankrupt corporation, where it will be used to help satisfy all claims. National Bank of Newport v. National Herkimer County Bank, 225 U.S. 178, 32 S.Ct. 633, 56 L.Ed. 1042 (1912); Aulick v. Largent, 295 F.2d 41 (4th Cir. 1961); Huntington v. Baskerville, 192 F. 813 (8th Cir. 1911); Collier on Bankruptcy s 60.17 (14th ed. 1977) at 838. Moreover, when the bankrupt debtor's assets are transferred to the Basic Loan creditor, the transfer creates a preference in the Basic Loan guarantor, provided that the creditor did not have a previously secured interest in those assets (and all other "preference" conditions were met). That is to say, in the absence of the transfer those assets would have been available to meet the claims of other creditors. Kent-Reese Enterprises, Inc. v. Hempy, 378 F.2d 910 (9th Cir. 1967).

However, as Kent-Reese makes clear, the result is just the opposite if the creditor of the Basic Loan previously had a secured interest in the assets that were transferred, for then the transfer did not significantly affect other creditors. In Kent-Reese, two owners call them "D" and "R" loaned money to Big Boy, a corporation that subsequently went bankrupt. Kent-Reese, another corporation, guaranteed repayment of Big Boy's loan to D and R. Kent-Reese also owed Big Boy $54,000. (Transposed to the facts present here: D and R are equivalent to the Bank; Big Boy is the bankrupt corporation, Amesbury; and Kent-Reese is the guarantor, Brovenick.) Kent-Reese paid D and R $30,000 and reduced its debt to Big Boy by an equivalent amount. The court held that Kent-Reese received a preference because D and R did not have a perfected security interest in the $54,000 debt that Kent-Reese owed Big Boy. The entire issue in the case was whether a contract among the parties had created such an interest prior to the critical four-month period. The court held it did not because the special contract at issue there did not take effect until "within 4 months of the petition in bankruptcy" and "it could not, on the facts disclosed by the record, be binding on general creditors dealing with Big Boy". Kent-Reese Enterprises, Inc. v. Hempy, 378 F.2d at 912. Judge Ely, concurring, made explicit the fact on which the case turns: "Since there was no valid assignment of the Kent-Reese debt, the agreement did not provide (D and R) with a fixed security " Kent-Reese Enterprises, Inc. v. Hempy, 378 F.2d at 915. Similarly, the Fourth Circuit in Citizens Bank of Gastonia, N. C. v. Lineberger, supra, reached the same result that we reach here, though it treated the issue as one of "set off". [9] See also Collier on Bankruptcy s 547.18 (15th ed. 1979) at 547-64; Collier on Bankruptcy s 60.17 (14th ed. 1977) at 839.

It is conceivable that the Trustee here might have attacked the validity of the Bank's secured interest in Brovenick's debt, or in the assets used to create that debt, ***894** perhaps on reasoning similar to that employed in Benedict v. Ratner, supra. The issue of when a previously filed security statement perfects an interest in subsequently acquired "floating" property, such as deposits, or cash, or shifting intangibles, is by no means resolved. See Dubay v. Williams, supra, and Grain Merchants v. Union Savings Bank, supra. Yet, as previously mentioned, that issue has not been raised here. Thus, we treat the Bank's interest in the relevant assets as having been perfected prior to the four-month period.

Finally, as previously pointed out, we see no need to create a "special" rule here governing only circumstances in which the corporation's owners are both guarantors and providers

of the relevant collateral. If a note given a corporation by an outsider, when used to satisfy the Bank's Basic Loan, does not create a preference in favor of that Loan's guarantor, why should it do so when given to the corporation by the guarantor itself? To so hold might make it less likely that guarantors will borrow from the corporations whose debts they guarantee, but what public policy favors this result? To the extent that one is concerned about manipulation of assets by a corporation's owners, the provisions of the new Bankruptcy Act, extending the time during which preferences can be created from four months to one year (with appropriate knowledge) [10], would seem to deal with the problem.

[7] We conclude that a guarantor does not receive a preference when a debtor uses a corporate asset to reduce the size of a creditor's loan provided the asset is one in which the creditor held a perfected secured interest and is not available to general creditors. And, the fact that the asset involved consists of a debt that the guarantor owes the corporation makes no difference. For this reason, the judgment of the district court is

Reversed.

Parallel Citations

24 C.B.C. 297, 7 Bankr.Ct.Dec. 1261, Bankr. L. Rep. P 68,072

Footnotes

1 The check was, in fact, a check from **Kapela** to Brovenick, which was then endorsed by Brovenick to the Bank. Neither the parties nor the district court claims that this fact is significant.

2 Section 60(a) of the Bankruptcy Act of 1898 provides in part:

(1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

11 U.S.C. s 96(a). This case arises under the Bankruptcy Act prior to its recent revision.

3 It is well established that guarantors of a loan to a corporation are creditors of the corporation. See, e. g., Cooper Petroleum Co. v. Hart, 379 F.2d 777 (5th Cir. 1967); Collier on Bankruptcy s 60.17 (14th ed. 1977). The theory is that, insofar as the guarantor pays money to the lender on the basis of his guaranty, he obtains a claim against the corporation for reimbursement. He is thus a “contingent creditor” even before payment and he can be benefitted by a transfer that reduces the amount he may have to pay on the guaranty.

4 The district court also ordered Brovenick to pay $3,000 to the corporation on the basis of his note. That Brovenick owes this amount seems undisputed on this appeal.

5 The Supreme Court, in this famous case, feared that making this type of collateral available to secured creditors would be unfair to the general creditors, who may have been unaware of the lien and may have counted on the existence of the future receivables to satisfy their claims. The question of whether a secured creditor, with a perfected security agreement in “after acquired” property can obtain such property ahead of general creditors, when it comes into existence within four months prior to bankruptcy has provoked lengthy debate, with two courts of appeals “deeming” the property to have been transferred before it came into existence, see DuBay v. Williams, 417 F.2d 1277 (9th Cir. 1969); Grain Merchants v. Union Savings Bank, 408 F.2d 209 (7th Cir.), cert. denied, 396 U.S. 827, 90 S.Ct. 75, 24 L.Ed.2d 78 (1969), and an eventual compromise being reached in the new Bankruptcy Act, superceding those cases and giving the secured creditors preferential rights in some types of “after acquired” property (inventory and receivables) but not others. See generally 11 U.S.C. s 547(c); Collier on Bankruptcy ss 547.03, 547.49(7) (15th ed. 1979); Countryman, Bankruptcy Preferences Current Law and Proposed Changes, 11 U.C.C.L.J. 95 (1979); Coogan, Hogan and Vagts, 1B Secured Transactions Under the U.C.C. s 10.03.

6 Olmstead v. Mass. Trust Co., 11 F.2d 410 (D.Mass.1926); Collier on Bankruptcy s 547.25 (15th ed. 1979); Collier on Bankruptcy s 60.26 (14th ed. 1977). See also In re Le Maire Cosmetic Co., 174 F.2d 749 (7th Cir. 1949).

7 Grubb v. General Contract Purchase Corp., 18 F.Supp. 680, 682 (S.D.N.Y.1937), aff'd, 94 F.2d 70 (2d Cir. 1938); Collier on Bankruptcy s 547.25 (15th ed. 1979) at 547-95; Collier on Bankruptcy s 60.26 (14th ed. 1977) at 882-83.

8 See also National Bank of Newport v. National Herkimer County Bank, 225 U.S. 178, 32 S.Ct. 633, 56 L.Ed. 1042 (1912); First National Bank of Clinton v. Julian, 383 F.2d 329 (8th Cir. 1967); Collier on Bankruptcy s 547.22 (15th ed. 1979) at 547-87.

9 The Lineberger court reasoned that the guarantor's debt to the corporation was "offset" by the corporation's debt to the guarantor arising out of the guarantor's payment on the Basic Loan. One could reason similarly here: Brovenick's liability to the Bank as guarantor arose as soon as the corporation defaulted on the Basic Loan probably well before Brovenick made his $21,540 payment. Thus, Brovenick's obligation to the Bank was immediate, not contingent, and Brovenick was also a creditor of the corporation to the same extent he paid the Bank as guarantor of the corporation's debt. On Lineberger's theory, Brovenick could offset his $24,000 debt to the corporation by the amount of the corporation's debt to him. Appellees, however, have raised several objections to the offset theory as applied to this case. Since we do not rest our result upon that theory, we need not discuss those objections.

10 11 U.S.C. ss 547(b)(4)(B), 547(c)(5)(A)(ii).

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371 B.R. 589
United States Bankruptcy Court,
D. New Hampshire.

In re FELT MANUFACTURING CO., INC., f/k/a Foss Manufacturing Co., Inc., Debtor.
Official Committee of Unsecured Creditors, on behalf of the bankruptcy estate of Felt Manufacturing Co., Inc., f/k/a Foss Manufacturing Co., Inc., Plaintiff,
v.
Stephen Foss, Patricia Foss, Jenifer Foss Smyth, Kevin Sexton, Douglas Kinney, Marcella Darling, John Smyth, Dennis Foss, David Rowell, Foss Family LLC I, Foss Family LLC II, Foss Realty, Inc., Business Helicopters, Inc., f/k/a New Hampshire Helicopters, Inc., Foss Family 2004 Irrevocable Trust, and Custom Travel of New Hampshire, Inc., Defendants.

Bankruptcy No. 05–13724–JMD. | Adversary No. 06–1171–JMD. | July 27, 2007.

Synopsis
Background: Official committee of unsecured creditors, acting on behalf of the Chapter 11 estate, filed 51-count complaint against debtor's former officers and directors, some of their family members, and various trusts and other legal entities owned or controlled by them, asserting claims for, inter alia, breach of fiduciary duty, unjust enrichment, equitable subordination, recharacterization, and avoidance. Defendants moved to dismiss.

Holdings: The Bankruptcy Court, J. Michael Deasy, J., held that:

[1] the in pari delicto defense was not a bar to committee's pursuit of breach of fiduciary duty claims against debtor's former officers and directors;

[2] committee had standing to bring claims against former officers and directors for their alleged breach of fiduciary duty owed by them to debtor and its creditors;

[3] allegations against chief financial officer (CFO) stated a plausible claim for breach of fiduciary duty;

[4] as predicted by the court, New Hampshire would recognize the tort of aiding and abetting a breach of fiduciary duty;

[5] committee stated a claim for aiding and abetting a breach of fiduciary duty;

[6] inconsistent alternative theories did not constitute grounds for dismissal of the unjust enrichment claim at this time;

[7] as predicted by the court, New Hampshire would not recognize a cause of action for “deepening insolvency” based on the allegations in the complaint;

[8] complaint sufficiently pleaded insolvency to survive dismissal motion with respect to constructive fraud claims;

[9] complaint's fraudulent transfer claims did not need to allege improper transfers directly to defendants;

[10] complaint adequately alleged that director received the benefit of purportedly fraudulent transfers to or on behalf of herself with respect to improvements to her home and personal travel;

[11] allegations stated a claim of constructive fraud against CFO; and

[12] complaint failed to adequately plead that debtor, in paying a certain director's fee, made a transfer to director without receiving reasonably equivalent value.

Motions to dismiss granted in part and denied in part.

West Headnotes (110)

[1] **Bankruptcy**
Pleading; dismissal

General rule in federal court pleadings is that a plaintiff need only plead a short and plain statement of the claim. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

Cases that cite this headnote

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[2] **Bankruptcy**
Pleading; dismissal

Particularity requirements in allegations of fraud and mistake are satisfied by averments of the who, what, where, and when of the allegedly false or fraudulent misrepresentation. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[3] **Bankruptcy**
Pleading; dismissal

By its terms, the rule setting forth a heightened pleading requirement for averments of fraud or mistake applies only to allegations of fraud or mistake. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[4] **Bankruptcy**
Pleading; dismissal

Purpose of the rule setting forth a heightened pleading requirement for averments of fraud or mistake is to ensure that defendants accused of the conduct specified have adequate notice of what they are alleged to have done, so that they may defend against the accusations; without such specificity, defendants in these cases would be put to an unfair disadvantage, since at the early stages of the proceedings they could do no more than generally deny any wrongdoing. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[5] **Bankruptcy**
Pleading; dismissal

For purposes of determining whether allegation was pled with sufficient particularity, an allegation of a breach of fiduciary duty is not an allegation of fraud, simply because allegations of misrepresentation, nondisclosure, or inaccurate reporting are alleged as components of the overall legal theory that a defendant violated a fiduciary duty. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[6] **Bankruptcy**
Pleading; dismissal

Heightened pleading requirements for averments of fraud or mistake did not apply to unsecured creditors committee's allegations that Chapter 11 debtor's former officers and directors breached their fiduciary duties where, although the complaint contained allegations of fraud and misrepresentation, the subject count of the complaint did not focus on recovery for fraud or misrepresentation but, rather, sought relief for breach of fiduciary duty to debtor based upon certain allegedly fraudulent and improper conduct. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[7] **Action**
Illegal or immoral transactions

"In pari delicto" is both an affirmative defense and an equitable defense that, broadly speaking, prohibits plaintiffs from recovering damages resulting from their own wrongdoing.

1 Cases that cite this headnote

[8] **Action**
Illegal or immoral transactions

Doctrine of in pari delicto is grounded on two principles: first, where the plaintiff and the defendant are both responsible for wrongful actions, courts should not resolve disputes between them arising from the wrongdoing, and second, denying relief to an admitted wrongdoer is an effective means of deterring illegality.

1 Cases that cite this headnote

[9] **Bankruptcy**
Pleading; dismissal

Although motions to dismiss are usually based upon a plaintiff's failure to state an actionable claim in its complaint, a motion to dismiss

may be based upon the inevitable success of an affirmative defense in certain situations.

Cases that cite this headnote

[10] **Bankruptcy**
Pleading; dismissal

Dismissing a case on the basis of an affirmative defense requires that (1) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (2) those facts suffice to establish the affirmative defense with certitude.

1 Cases that cite this headnote

[11] **Action**
Illegal or immoral transactions

Under New Hampshire law, application of the in pari delicto doctrine has been restricted in situations where the public policy supporting protection of the persons harmed by the wrongdoing would be frustrated.

1 Cases that cite this headnote

[12] **Bankruptcy**
In general; standing

Under New Hampshire law, the in pari delicto defense was not a bar to unsecured creditors committee's pursuit of breach of fiduciary duty claims against Chapter 11 debtor's former officers and directors; complaint alleged that defendants breached the fiduciary duty they owed to debtor by, first, defrauding debtor's lender by falsifying financial information, and second, by authorizing, acquiescing in, and failing to monitor the activities of the corporation in connection with payment of excessive salaries, illegal stock dividends, improper expense reimbursement, improper or fraudulent transfers to or for the benefit of themselves and other insiders, such that defendants' acts and omissions were motivated not solely to benefit debtor, but also to benefit various insiders of debtor, including these defendants, their relatives, and affiliated business entities, and so defendants' alleged wrongful conduct could not be imputed to debtor.

1 Cases that cite this headnote

[13] **Bankruptcy**
In general; standing

Debtor's culpability for the actions of its officers and directors, for purposes of the in pari delicto doctrine, is governed by applicable state law.

Cases that cite this headnote

[14] **Action**
Illegal or immoral transactions

New Hampshire recognizes the in pari delicto doctrine.

1 Cases that cite this headnote

[15] **Principal and Agent**
Representation of Principal

Under New Hampshire law, a principal is chargeable with the acts of its agent while acting in its behalf.

Cases that cite this headnote

[16] **Principal and Agent**
Representation of Principal

Although, under New Hampshire law, a principal is chargeable with the acts of its agent while acting in its behalf, representations by an agent not made contemporaneously with the transaction will not to bind the principal.

Cases that cite this headnote

[17] **Action**
Illegal or immoral transactions

If a defendant breaches a fiduciary duty owed to a plaintiff, the defendant's alleged wrongful conduct is not imputed to the plaintiff, for purposes of applying the in pari delicto doctrine.

1 Cases that cite this headnote

[18] Corporations and Business Organizations
Wrongful Acts or Omissions

Wrongful acts on behalf of a corporation are not the same thing as wrongful acts against it, for purposes of applying the in pari delicto doctrine.

Cases that cite this headnote

[19] Bankruptcy
In general; standing

Bankruptcy
Creditors' and equity security holders' committees and meetings

Unsecured creditors committee, standing in the shoes of the debtor, could not recover from third parties, or its officers and directors, for their participation in a scheme that the debtor had itself initiated and joined in.

Cases that cite this headnote

[20] Action
Illegal or immoral transactions

In pari delicto defense denies recovery for damages arising from a wrongful act by a plaintiff equally at fault with a defendant; where the parties are both at fault, but not equally at fault, the trial court must make findings regarding the respective blame and grant relief to the party whose fault is less.

Cases that cite this headnote

[21] Corporations and Business Organizations
Imputed liability in general

When wrongful acts are committed against a corporation by its officers and directors, the wrongful nature of such acts is not imputed to the corporation, for purposes of applying the in pari delicto defense.

Cases that cite this headnote

[22] Bankruptcy
Creditors' and equity security holders' committees and meetings

Unsecured creditors committee appointed in Chapter 11 case had no standing to bring claims belonging to individual creditors.

1 Cases that cite this headnote

[23] Corporations and Business Organizations
Persons entitled to sue; standing

Corporations and Business Organizations
Right to sue or defend; standing

While individual creditors may not have standing to bring claims for breach of fiduciary duty against officers and directors of an insolvent corporation, they do have standing to bring derivative claims against officers and directors for breach of fiduciary duty.

3 Cases that cite this headnote

[24] Bankruptcy
In general; standing

Bankruptcy
Creditors' and equity security holders' committees and meetings

Unsecured creditors committee appointed in Chapter 11 case had standing to pursue claims of the bankruptcy estate, and the fact that recovery on claims of the estate might have benefited creditors of the estate did not affect committee's standing to bring any such claim, so long as debtor could have brought the claim prepetition.

Cases that cite this headnote

[25] Bankruptcy
In general; standing

Bankruptcy
Creditors' and equity security holders' committees and meetings

Unsecured creditors committee appointed in Chapter 11 case had standing to bring claims against debtor's former officers and directors for their alleged breach of fiduciary duty owed by them to debtor and its creditors.

Cases that cite this headnote

[26] **Corporations and Business Organizations**
Fiduciary nature of relation

Under New Hampshire law, officers and directors of a corporation owe a fiduciary duty to the corporation and its shareholders.

2 Cases that cite this headnote

[27] **Corporations and Business Organizations**
Fiduciary nature of relation

Under New Hampshire law, the breach of the fiduciary duty of an officer or a director harms the corporation.

2 Cases that cite this headnote

[28] **Corporations and Business Organizations**
Fiduciary duty to creditors in general
Corporations and Business Organizations
Right to sue or defend; standing

Under New Hampshire law, once a corporation is insolvent, its directors owe a fiduciary duty to the corporation's creditors, and creditors have standing to maintain derivative claims for breaches of fiduciary duty.

5 Cases that cite this headnote

[29] **Corporations and Business Organizations**
Nature and Form of Remedy
Corporations and Business Organizations
Recovery to corporation rather than shareholder
Corporations and Business Organizations
By Creditors

Under New Hampshire law, regardless of whether they are brought by creditors when a company is insolvent, claims for breach of fiduciary duty are derivative, with either shareholders or creditors suing to recover for harm done to the corporation as an economic entity, and any recovery logically flows to the corporation and benefits the derivative plaintiffs indirectly to the extent of their claim on the firm's assets.

Cases that cite this headnote

[30] **Bankruptcy**
In general; standing

While a bankruptcy trustee does not have standing to pursue the claims of individual creditors, or even a class of creditors, the trustee may pursue the interests of the bankruptcy estate and derivatively the interests of its creditors.

Cases that cite this headnote

[31] **Bankruptcy**
Pleading; dismissal

Allegations that individual was Chapter 11 debtor's chief financial officer (CFO), coupled with allegations regarding debtor's financial reporting problems or errors, alleged illegal dividends, and CFO's admissions to other directors stated a plausible claim for breach of fiduciary duty under New Hampshire law.

Cases that cite this headnote

[32] **Bankruptcy**
Pleading; dismissal

Subjective characterizations and unsubstantiated conclusions are not sufficient to support a claim, for purposes of a motion to dismiss.

Cases that cite this headnote

[33] **Bankruptcy**
Pleading; dismissal

When conclusions are logically compelled, or at least supported, by the stated facts, and an inference rises to what experience indicates is an acceptable level of probability, "conclusions" become "facts" for pleading purposes.

Cases that cite this headnote

[34] **Corporations and Business Organizations**
Good faith
Corporations and Business Organizations
Degree of care required and negligence

Directors have a responsibility under New Hampshire law to discharge their duties in good faith, with the care of an ordinary prudent person and in the best interests of the corporation. N.H.RSA 293-A:8.30(a).

Cases that cite this headnote

[35] **Bankruptcy**
Pleading; dismissal

Allegations that defendants, as directors of Chapter 11 debtor, breached their fiduciary duty to the corporation by (1) failing to monitor the financial performance of the corporation or to maintain financial and accounting controls, (2) failing to adequately investigate the operations of debtor after being placed on notice by its chief financial officer (CFO) of irregularities, (3) failing to implement controls or to prevent the misuse of corporate funds for the personal expenses of insiders, including excessive salaries and bonuses, payment of illegal dividends, and payment of personal expenses of officers and directors and their families, and (4) authorizing or permitting transfers of corporate funds and assets to insiders for less than adequate consideration, placed defendants on fair notice of the claims against them and were sufficient to establish a plausible entitlement to relief.

1 Cases that cite this headnote

[36] **Corporations and Business Organizations**
Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members

Under New Hampshire law, the duty of officers and directors to a corporation and its shareholders is viewed as essentially the same as the duty of a trustee to a trust and its beneficiaries.

Cases that cite this headnote

[37] **Action**
Acts or omissions constituting causes of action in general

Under New Hampshire law, recognition of a new cause of action is a two-step process: a court (1) must first determine whether the interest that the plaintiffs assert should receive any legal recognition, and, if so, then it (2) must determine whether the relief that the plaintiffs request would be an appropriate way to recognize it. N.H.Const. Pt. 1, Art. 14.

Cases that cite this headnote

[38] **Fraud**
Persons liable

As predicted by the bankruptcy court, New Hampshire would recognize the tort of aiding and abetting a breach of fiduciary duty. Restatement (Second) of Torts § 876(b).

Cases that cite this headnote

[39] **Conspiracy**
Nature and Elements in General

Conspiracy
Overt act

Conspiracy requires an agreement as well as an overt act causing injury.

Cases that cite this headnote

[40] **Conspiracy**
Nature and Elements in General

Agreement among co-conspirators is not, in and of itself, actionable, but is the mechanism for subjecting all co-conspirators to liability for an act committed by one of them.

Cases that cite this headnote

[41] **Torts**
Aiding and abetting

Act of aiding and abetting is distinct from the primary violation; liability attaches because the aider and abettor behaves in a manner that enables the primary violator to commit the underlying tort.

Cases that cite this headnote

[42] **Bankruptcy**

Pleading; dismissal

Under New Hampshire law, as predicted by the bankruptcy court, unsecured creditors committee appointed in Chapter 11 case stated a claim for aiding and abetting a breach of fiduciary duty by alleging that a defendant officer/director aided a party who breached a fiduciary duty that such party had to the debtor-corporation, that the defendant knowingly and substantially provided assistance to such person, and that debtor suffered damages.

Cases that cite this headnote

[43] **Implied and Constructive Contracts**
Restitution

Under New Hampshire law, the remedy of restitution is available to a plaintiff who can show that there was unjust enrichment either through the wrongful acts of the defendant or through passive acceptance by a defendant of a benefit that would be unconscionable to retain.

Cases that cite this headnote

[44] **Implied and Constructive Contracts**
Unjust enrichment

Under New Hampshire law, a claim of unjust enrichment is based upon a benefit conferred on the defendant, not on the existence of an agreement between the plaintiff and the defendant.

Cases that cite this headnote

[45] **Implied and Constructive Contracts**
Unjust enrichment

Under New Hampshire law, where the remedy sought is for breach of obligations imposed by law, as opposed to obligations arising from the receipt of a benefit which is unjust, a claim of unjust enrichment does not lie.

Cases that cite this headnote

[46] **Bankruptcy**
Pleading; dismissal

Pleading
Particular causes of action

Under New Hampshire law, a plaintiff may seek a damages remedy at law, that is, for breach of contract, and an equitable remedy, that is, for unjust enrichment, in one complaint, so long as the claims are for different damages.

Cases that cite this headnote

[47] **Bankruptcy**
Pleading; dismissal

Unsecured creditors committee's pleading of inconsistent alternative theories at early stage of its adversary proceeding did not constitute grounds for dismissal of its unjust enrichment claim against Chapter 11 debtor's former officers/directors, though, prior to trial, committee might be required to make its election to seek a legal or an equitable remedy, where it appeared that the factual allegations regarding committee's alternative legal and equitable claims were substantially similar, so that no undue burden would be imposed on any defendant during the pretrial discovery and preparation period.

Cases that cite this headnote

[48] **Corporations and Business Organizations**
Damages or amount of recovery

Under New Hampshire law, damages for breach of the statutory duties of a director are established under the New Hampshire Business Corporation Act. N.H.RSA 293-A:8.33.

Cases that cite this headnote

[49] **Corporations and Business Organizations**
Rights and liabilities as to dividends improperly paid

New Hampshire Business Corporation Act provides no statutory basis for recovery of illegal dividends by a corporation from a shareholder. N.H.RSA 293-A:1.01 et seq.

Cases that cite this headnote

[50] Corporations and Business Organizations
Rights and liabilities as to dividends improperly paid

Under New Hampshire law, shareholders may be liable for a claim of contribution by a director who authorized an unlawful distribution if the shareholder accepted the dividend knowing it was illegal. N.H.RSA 293-A:8.33(b)(2).

Cases that cite this headnote

[51] Bankruptcy
Pleading; dismissal

Allegations of sufficient family and financial connections to corporation and the officers and directors of the corporation to plausibly infer that shareholder may have had access to information on the financial condition of the corporation to provide him with knowledge of the condition of the corporation at the time various distributions were made and, therefore, that he knew or should have known that the distributions were unlawful, were sufficient to support a claim for unjust enrichment under New Hampshire law.

Cases that cite this headnote

[52] Implied and Constructive Contracts
Unjust enrichment

Corporation's payment of fees and expenses to a director of the corporation during the time he served as a director, without more, does not state a claim for unjust enrichment under New Hampshire law.

Cases that cite this headnote

[53] Corporations and Business Organizations
Sufficiency of surplus or retained earnings

New Hampshire Business Corporation Act prohibits any distribution to shareholders if, after giving it effect, the corporation would not be able to pay its debts as they became due or it would be insolvent if dissolved. N.H.RSA 293-A:6.40(c).

Cases that cite this headnote

[54] Corporations and Business Organizations
Wrongful payment of dividends

New Hampshire Business Corporation Act provides a safe harbor for directors based upon certain financial statements and asset valuations, for purposes of determining a director's personal liability for authorizing the payment of illegal dividends that would render the corporation insolvent. N.H.RSA 293-A:6.40(d).

Cases that cite this headnote

[55] Corporations and Business Organizations
Wrongful payment of dividends

Under the New Hampshire Business Corporation Act, directors who vote for or assent to an illegal distribution to shareholders are personally liable to the corporation for the amount that such distribution exceeded the amount that could have been legally distributed. N.H.RSA 293-A:8.33.

Cases that cite this headnote

[56] Corporations and Business Organizations
Wrongful payment of dividends

To establish liability for a director's payment of illegal dividends under the New Hampshire Business Corporation Act, a complaint need only set forth allegations under one of the two insolvency standards in the Act, a cash flow test or a balance sheet test. N.H.RSA 293-A:6.40(c).

Cases that cite this headnote

[57] Corporations and Business Organizations
Wrongful payment of dividends

Allegations that corporation had been insolvent since a particular year either because it could not pay its debts as they became due in the ordinary course or because its liabilities exceeded the fair value of its assets, and that corporation had been having difficulties with its major lenders, including the continuing need to obtain overadvances under its credit facility, consideration of bankruptcy, a demand by corporation's lender for a personal guarantee of the overadvance, the necessity of raising as

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much as $2,080,000.00 in subordinated debt capital to continue a revolving credit facility, and the failure to make required contributions to employee benefit plans established a plausible inference that corporation was insolvent within the meaning of the New Hampshire Business Corporation Act, for purposes of determining a director's personal liability for authorizing the payment of illegal dividends that would have rendered the corporation insolvent. N.H.RSA 293-A:6.40(c).

Cases that cite this headnote

[58] **Torts**
Debtor and creditor

"Deepening insolvency" has been described as an injury to the debtors' corporate property from the fraudulent expansion of corporate debt and the prolongation of corporate life.

Cases that cite this headnote

[59] **Corporations and Business Organizations**
Deepening insolvency

Elements of a cause of action for deepening insolvency are (1) fraud, (2) which causes the expansion of corporate debt, and (3) which prolongs the life of the corporation.

Cases that cite this headnote

[60] **Fraud**
Elements of Actual Fraud

Fraud requirement of a cause of action for deepening insolvency requires a plaintiff to allege and prove five elements: a representation of material fact, falsity, scienter, reliance, and injury.

Cases that cite this headnote

[61] **Constitutional Law**
Right of access to the courts and a remedy for injuries in general

Purpose of article of New Hampshire Constitution providing that every subject of state is entitled to recourse to laws for injuries he might receive is to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts. N.H.Const. Pt. 1, Art. 14.

Cases that cite this headnote

[62] **Action**
Acts or omissions constituting causes of action in general

Analytical predicate to any consideration of the recognition of a new cause of action under New Hampshire law must be a determination that the relief sought is not obtainable by other existing remedies. N.H.Const. Pt. 1, Art. 14.

Cases that cite this headnote

[63] **Corporations and Business Organizations**
Deepening insolvency

New Hampshire, as predicted by the bankruptcy court, would not recognize a cause of action for "deepening insolvency" where unsecured creditors committee failed to articulate why its causes of action against Chapter 11 debtor's former directors for breach of fiduciary duty and fraud did not provide it with adequate remedies under existing law. N.H.Const. Pt. 1, Art. 14.

Cases that cite this headnote

[64] **Bankruptcy**
Inequitable conduct

Essential purpose of equitable subordination is to undo any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of distribution of the estate. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[65] **Bankruptcy**
Inequitable conduct

To exercise the power of equitable subordination, the bankruptcy court must find that (1) the creditor engaged in some type of inequitable conduct or fraud, (2) such conduct must have resulted in injury to the creditors

of the debtor or conferred an unfair advantage on the creditor, and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[66] **Bankruptcy**
Insiders, stockholders, fiduciaries, and dominant persons

Claims arising from dealings between a debtor and an insider are rigorously scrutinized by the courts, for equitable subordination purposes. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[67] **Bankruptcy**
Inequitable conduct

If a claimant is not an insider, evidence of more egregious misconduct such as fraud, spoliation, or overreaching is necessary in order to apply equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[68] **Bankruptcy**
Inequitable conduct

While fraud and misrepresentation are the most frequent justifications for equitable subordination of the noninsider, something less than actual fraud is sufficient, such as substantial misconduct involving moral turpitude or a breach or misrepresentation where other creditors were deceived to their damage or gross misconduct amounting to overreaching. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[69] **Bankruptcy**
Determination of priority

Allegations regarding director's failure to perform the basic duties of a director, including allegations that she failed to institute adequate financial controls or to monitor the financial condition of Chapter 11 debtor, despite express statements by chief financial officer (CFO) that should have put her on notice of potential problems, while debtor paid many of her personal expenses, such as improvements to her daughter's personal residence, and improper payments for the benefit of entities owned or controlled by her, stated a plausible claim against director for inequitable conduct, the first element of equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[70] **Bankruptcy**
Determination of priority

Allegations that director of Chapter 11 debtor breached her fiduciary duty by failing to institute adequate financial controls or to monitor the financial condition of debtor, despite express statements by chief financial officer (CFO) that should have put her on notice of potential problems, while she improperly received direct or indirect payments from debtor for personal expenses such as improvements to her personal residence and personal travel, stated a plausible claim against director for inequitable conduct, the first element of equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[71] **Bankruptcy**
Determination of priority

Allegations that director of Chapter 11 debtor breached his fiduciary duty by failing to institute adequate financial controls or to monitor the financial condition of debtor, despite express statements by chief financial officer (CFO) that should have put him on notice of potential problems, thereby permitting his stepson and daughter-in-law to receive improper payments from debtor, stated a plausible claim against director for inequitable conduct, the first element of equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[72] **Bankruptcy**
Determination of priority

Allegations that shareholder of Chapter 11 debtor was an insider, that shareholder received direct and indirect payments from debtor for, inter alia, redemption of worthless stock, that shareholder had sufficient information to know that such payments were unlawful, and that shareholder's sole remedy in the event of a default under the subject note was conversion of the then-outstanding balance due back into common stock, a remedy that appeared inconsistent with a debt obligation and more consistent with an obligation subordinated to debt in terms of the remedy for default, stated a plausible claim for inequitable conduct, the first element of equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[73] **Bankruptcy**

Determination of priority

Allegations that shareholder of Chapter 11 debtor was an insider, that shareholder loaned debtor $500,000.00 in order to satisfy a condition by debtor's bank lender for additional investment into debtor, that at the time of the $500,000.00 “loan” debtor was undercapitalized, at least in the opinion of its bank lender, and in light of its general financial condition, and that debtor had filed a proof of claim for the amounts owed to him under the note, stated a plausible claim for inequitable conduct, the first element of equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[74] **Bankruptcy**

Determination of priority

Official committee of unsecured creditors, acting on behalf of the Chapter 11 estate, failed to establish that corporate creditors engaged in inequitable conduct, the first element of equitable subordination; complaint did not allege any wrongful or fraudulent conduct on the part of these creditors, as there were no allegations that the consulting fees which formed the basis for one creditor's claim were fraudulent or wrongful, nor were there any allegations that either of the obligations which constituted the elements of second creditor's claim were fraudulent or wrongful. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[75] **Bankruptcy**

Determination of priority

Allegations that, as a result of the wrongful conduct of Chapter 11 debtor's former officers, directors, and/or shareholders, debtor lost millions of dollars through payment of illegal dividends, excessive compensation and expense reimbursement, wrongful payment of personal expenses for insiders, and wrongful payments to or for the benefit of entities owned by insiders, stated a plausible claim for injury to debtor's creditors or conferment of an unfair advantage on a creditor, the second element of equitable subordination. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[76] **Bankruptcy**

Carrying out provisions of Code

Bankruptcy

Claims by insiders and by attorneys in excess of value

Although the Bankruptcy Code does not expressly authorize the recharacterization of claims as equity rather than debt, recharacterization is well within the broad powers afforded a bankruptcy court in the section of the Code authorizing the court to enter any order necessary or appropriate to carry out the provisions of title 11. 11 U.S.C.A. § 105(a).

1 Cases that cite this headnote

[77] **Bankruptcy**

Claims by insiders and by attorneys in excess of value

Bankruptcy

Inequitable conduct

Although claims for equitable subordination and recharacterization result in similar economic consequences, they are separate and distinct causes of action. 11 U.S.C.A. §§ 105(a), 510(c).

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Cases that cite this headnote

[78] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

In a recharacterization analysis, if the bankruptcy court determines that the advance of money is equity and not debt, the claim is recharacterized and the effect is subordination of the claim as a proprietary interest because the corporation repays capital contributions only after satisfying all other obligations of the corporation.

1 Cases that cite this headnote

[79] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Recharacterization of a claim is appropriate where the circumstances show that an apparent debt transaction was actually an equity contribution ab initio.

1 Cases that cite this headnote

[80] **Bankruptcy**
Inequitable conduct

Equitable subordination is appropriate when, due to the misconduct of a creditor, the creation of their debt is inequitable vis-a-vis other creditors.

Cases that cite this headnote

[81] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Bankruptcy
Inequitable conduct

While a bankruptcy court's recharacterization decision rests on the substance of the transaction giving rise to the claimant's demand, its equitable subordination decision rests on its assessment of the creditor's behavior. 11 U.S.C.A. § 510(c).

Cases that cite this headnote

[82] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Undercapitalization alone is insufficient, without something more, to trigger recharacterization of debt as equity.

3 Cases that cite this headnote

[83] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Regardless of the standard used in determining whether debt should be recharacterized as equity, no one factor is controlling or decisive, and the more a transaction appears to reflect the characteristics of an arm's length negotiation, the more likely such a transaction is to be treated as debt.

Cases that cite this headnote

[84] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Factors to consider in determining whether debt should be recharacterized as equity are as follows: (1) adequacy of capital contributions, (2) ratio of shareholder loans to capital, (3) amount or degree of shareholder control, (4) availability of similar loans from outside lenders, and (5) certain relevant questions, such as (a) whether the ultimate financial failure was caused by undercapitalization, (b) whether the note included payment provisions and a fixed maturity date, (c) whether the note or other debt document was executed, (d) whether advances were used to acquire capital assets, and (e) how the debt was treated in the business records.

2 Cases that cite this headnote

[85] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Complaint stated a plausible claim for recharacterization of promissory note as equity;

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while terms of note, which was issued by Chapter 11 debtor to preferred stockholder, an insider, to amend and restate an obligation relating to a redemption of 55.5 shares of debtor's common stock, were consistent with a debt instrument, the sole remedy for default, namely, conversion of the then-outstanding balance due back into common stock, was inconsistent with a debt instrument.

Cases that cite this headnote

[86] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Allegations that preferred shareholder, an insider, made $500,000.00 loan to Chapter 11 debtor, that promissory note evidencing loan was expressly subordinated to debtor's obligations to its bank lender, that when the loan was made, debtor was undercapitalized and could not obtain additional capital from outside lenders absent infusion of subordinated debt by insiders, that the reasons for the overadvance resulted in the ultimate financial collapse of the corporation, stated a plausible claim that the loan evidenced by the note was viewed as or intended to be treated as equity and, thus, stated a claim for recharacterization of the note.

Cases that cite this headnote

[87] **Bankruptcy**
Claims by insiders and by attorneys in excess of value

Complaint failed to state a claim for recharacterization of the stock dividend portion of preferred stockholder's claim against Chapter 11 debtor as equity; debtor apparently did not pay preferred stock dividends for a number of years prior to the petition date, and there was no allegation that the preferred stock in question was issued at a time that debtor was in default of its obligations, that debtor was insolvent, or that the stock dividend was not a legitimate method of capitalizing the corporation.

Cases that cite this headnote

[88] **Bankruptcy**
Fraudulent conveyances in general

Bankruptcy
Time of making transfer

Bankruptcy Code permits a trustee to avoid a transaction, made within one year before the commencement of the bankruptcy case, that depletes a debtor's assets to the detriment of the bankruptcy estate. 11 U.S.C.A. § 548.

Cases that cite this headnote

[89] **Bankruptcy**
Intent of debtor

Bankruptcy
“Reasonably equivalent value” in general

Bankruptcy Code recognizes as fraudulent those transfers made with actual intent to hinder, delay, or defraud creditors, as well as those that are deemed to be constructively fraudulent because they are made for less than reasonably equivalent value, when the debtor is, or is rendered, insolvent, undercapitalized, or unable to pay its debts as they become due. 11 U.S.C.A. § 548.

Cases that cite this headnote

[90] **Fraudulent Conveyances**
Nature of fraud in transfers of property

Fraudulent Conveyances
Intent

Under New Hampshire's version of the Uniform Fraudulent Transfer Act (UFTA), transfers may be found fraudulent if made with actual intent to defraud, that is, “actual fraud” claims, or if made under circumstances which, in the absence of actual fraud, are deemed fraudulent, that is, “constructive fraud” claims. N.H.RSA 545–A:4(I)(a, b), 545–A:5(I, II).

2 Cases that cite this headnote

[91] **Fraudulent Conveyances**
Nature of fraud in transfers of property

Unlike actual fraud, constructive fraud is essentially unconcerned with intent and instead focuses upon economic effect and involves an analysis of objective factors. N.H.RSA 545–A:4(I)(a, b), 545–A:5(I, II).

1 Cases that cite this headnote

[92] **Bankruptcy**
Avoidance rights and limits thereon, in general

Section of the Bankruptcy Code governing liability of transferee of avoided transfer, which defines the party from whom a trustee may seek to recover the property preferentially or fraudulently transferred or the value or proceeds of such property, enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee. 11 U.S.C.A. § 550(a).

1 Cases that cite this headnote

[93] **Bankruptcy**
Pleading

Avoidance complaint alleging constructive fraud under the Bankruptcy Code and New Hampshire law sufficiently pleaded debtor's insolvency to survive dismissal motion by alleging, inter alia, that, since specified date, debtor had been insolvent either because it was unable to pay its debts as they became due in the ordinary course of business, or because its probable liabilities exceeded the fair value of its assets, or both, that, at all material times, debtor was engaged in business without adequate capital and/or was incurring debts beyond its ability to repay them when due, that debtor sustained itself by operating on credit, in the form of asset-based revolving credit lines and open account trade credit extended by suppliers of goods and services, and that manipulation of debtor's inventory and accounts receivable masked fact that debtor was insolvent and a huge credit risk, and allowed debtor to continue to prolong its business operations far beyond the point of viability. 11 U.S.C.A. § 548(a)(1)(B)(ii)(I, II); N.H.RSA 545–A:4(I)(b)(1, 2), 545–A:5(I, II).

Cases that cite this headnote

[94] **Bankruptcy**
Pleading; dismissal

To survive a motion to dismiss, a plaintiff only has to allege sufficient facts, not prove them.

1 Cases that cite this headnote

[95] **Bankruptcy**
Pleading

In seeking to avoid transfers under both New Hampshire's Uniform Fraudulent Transfer Act (UFTA) and the Bankruptcy Code's fraudulent transfer provision, unsecured creditors committee had to allege that Chapter 11 debtor made transfers of its property to someone; the complaint, however, did not have to allege that the transfers were made directly to defendant officer/directors, nor was it required to contain claims against the parties to whom such transfers were made, such as vendors, service providers, and companies in which these defendants may have held an interest, but, rather, the complaint could assert that there were avoidable transfers under state or federal law and that the committee sought to recover the property transferred, or its value, from defendants pursuant to the section of the Code governing liability of transferee of avoided transfer. 11 U.S.C.A. §§ 544(b), 548, 550(a); N.H.RSA 545–A:4(I)(b), 545–A:5(I, II).

3 Cases that cite this headnote

[96] **Bankruptcy**
Rights of Debtor or Injured Creditors

Bankruptcy
Pleading

While unsecured creditors committee asserting avoidance complaint was required to show that the transfer was voidable under state law by at least one unsecured creditor of the bankruptcy estate who held an allowable claim, a specific creditor did not have to be identified in the complaint. 11 U.S.C.A. § 544(b).

Cases that cite this headnote

[97] **Bankruptcy**
Pleading

Unsecured creditors committee's avoidance complaint adequately alleged that Chapter 11 debtor's former director received the benefit of purportedly fraudulent transfers to or on behalf of herself with respect to improvements to her home and personal travel; while complaint did not explicitly indicate that former director was an entity for whose benefit these purportedly avoidable transfers were made, it did assert that payments totaling $12,874.03 were made by debtor to various vendors on account of improvements made to former director's residence, the court could plausibly infer that improvements made to an asset, in this case a home, benefited the owner of the asset, in this case, the former director, and complaint further outlined payments of more than $1.4 million to company for charges related to personal travel on private jet between former director's residences in New Hampshire and Florida. 11 U.S.C.A. § 550(a)(1, 2).

Cases that cite this headnote

[98] **Corporations and Business Organizations**
Liability for acts and debts of company

Under New Hampshire law, an owner of an interest in a limited liability company (LLC) is not personally obligated for the debts of the company simply because of the ownership interest. N.H.RSA 304–C:25.

1 Cases that cite this headnote

[99] **Bankruptcy**
Pleading

Unsecured creditors committee's avoidance complaint failed to state a claim against Chapter 11 debtor's former director for recovery of transfers for or on account of payments made to limited liability company (LLC) owned in part by former director; while it was possible that transfers of property to the LLC benefited former director, complaint made no specific allegations as to how the payments benefited her, as, under applicable New Hampshire law, she was not personally obligated for the debts of the company simply because of the ownership interest. N.H.RSA 304–C:25; 11 U.S.C.A. § 550(a).

1 Cases that cite this headnote

[100] **Bankruptcy**
Pleading

Unsecured creditors committee's avoidance complaint failed to state a claim against Chapter 11 debtor's former director for recovery of transfers for or on account of payments made to limited liability company (LLC) owned in part by former director; although complaint listed payments totaling $660,000.00 made by debtor to the LLC for the repayment of insider loans, it failed to allege that former director was an entity for whose benefit such transfers were made within the meaning of the Bankruptcy Code. 11 U.S.C.A. § 550(a).

Cases that cite this headnote

[101] **Bankruptcy**
Pleading

Allegations that Chapter 11 debtor made payments totaling at least $21,879.63 for maintaining and improving real property owned by limited liability company (LLC) owned in part by debtor's former director "on behalf of, and for the benefit of," the LLC stated a claim for recovery under the section of the Bankruptcy Code governing liability of transferee of avoided transfer; the payments in question could plausibly have benefited dollar-for-dollar the LLC's owners, including former director, whose equity interests in the LLC were enhanced by the cash payments made toward the LLC's mortgages. 11 U.S.C.A. § 550(a).

Cases that cite this headnote

[102] **Bankruptcy**
Pleading

Unsecured creditors committee's avoidance complaint failed to state a claim against Chapter 11 debtor's former director for recovery of fees that debtor made to company in which former director held an ownership interest; complaint failed to allege that former director was a person for whose benefit these purportedly avoidable transfers were made. 11 U.S.C.A. § 550(a).

Cases that cite this headnote

[103] Bankruptcy
Pleading

Unsecured creditors committee's avoidance complaint adequately alleged that stepson and daughter-in-law of Chapter 11 debtor's former director received the benefit of payments totaling $223,095.13 made by debtor to various vendors on account of improvements made to their residence, payments of more than $4,957.00 for fees related to storage of their personal items during the renovation of their home, and payments totaling $1,452,541.31 for charges related to personal travel between their families' homes; although complaint did not explicitly state that stepson and daughter-in-law were entities for whose benefit these purportedly avoidable transfers were made, the court could plausibly infer that they were. 11 U.S.C.A. § 550(a).

Cases that cite this headnote

[104] Bankruptcy
Pleading

Allegations that Chapter 11 debtor made transfers to its chief financial officer (CFO) that were “extraordinary payments over and above his salary,” that these payments were not “just debts” for wages but, rather, included the forgiveness of the balance of a $30,000.00 personal loan that debtor made to him, a bonus of $24,000.00, “consulting fees” totaling $18,400.00, payment of his country club bills in the amount of $7,544.00, and a “service award” of $25,000.00 given to him upon his resignation, stated a claim of constructive fraud against chief financial officer (CFO). 11 U.S.C.A. § 548(d)(2)(A); N.H.RSA 545–A:3(I).

Cases that cite this headnote

[105] Bankruptcy
Pleading

Under the Bankruptcy Code and under New Hampshire law, unsecured creditors committee's avoidance complaint failed to state a fraudulent transfer claim against Chapter 11 debtor's former director with respect to debtor's payment to him of director's fees and expenses; committee did not allege that director acted in bad faith, that he failed to undertake the duties of a director, or that the compensation paid to him for service as a director was excessive for the undertaking but, instead, committee only alleged that the quality of director's service as a director was not valuable. 11 U.S.C.A. §§ 544(b), 550; N.H.RSA 545–A:4(I)(b), 545–A:5(I).

Cases that cite this headnote

[106] Bankruptcy
Consideration

Where the compensation paid is commensurate with the undertaking and the defendant attempts in good faith to fulfill that undertaking, fair consideration has been given, for purposes of a claim of constructive fraudulent transfer. 11 U.S.C.A. § 548.

Cases that cite this headnote

[107] Bankruptcy
Fraudulent conveyances in general

Bankruptcy
Avoidance rights and limits thereon, in general

Bad business decisions, without more, cannot form the basis for a fraudulent conveyance action seeking recovery of compensation paid to an officer or a director. 11 U.S.C.A. §§ 544(b), 548, 550.

Cases that cite this headnote

[108] Bankruptcy
Pleading
Corporations and Business Organizations
Transfer to or for the benefit of directors, officers, or shareholders

Allegations in unsecured creditors committee's avoidance complaint, that Chapter 11 debtor's payments to shareholder on two promissory notes were in satisfaction of the debt represented by those notes, failed to state a claim for avoidance of constructively fraudulent transfers under New Hampshire law; the transfers made pursuant to those notes were, by definition, made for reasonably equivalent value, provided that the notes were debt instruments. 11 U.S.C.A. §§ 544(b), 550; N.H.RSA 545–A:3(I), 545–A:4(I)(b), 545–A:5(I).

1 Cases that cite this headnote

[109] Corporations and Business Organizations
Transfer to or for the benefit of directors, officers, or shareholders

Redemption of an equity interest by an insolvent corporation provides no value to the corporation, for purposes of a claim of a constructively fraudulent transfer.

Cases that cite this headnote

[110] Bankruptcy
Pleading

Absent allegations that the issuance of stock was fraudulent or that the payments were in violation of the New Hampshire Business Corporation Act, dividends that were paid to shareholder on account of Chapter 11 debtor's antecedent obligation under its preferred stock issue constituted "value," and, thus, unsecured creditors committee's avoidance complaint failed to establish that debtor did not receive reasonably equivalent value in exchange for the transfers. 11 U.S.C.A. §§ 544(b), 550; N.H.RSA 293–A:6.40, 545–A:3(I), 545–A:4(I)(b), 545–A:5(I).

Cases that cite this headnote

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Opinion

604** ***MEMORANDUM OPINION

J. MICHAEL DEASY, Bankruptcy Judge.

I. INTRODUCTION

The Official Committee of Unsecured Creditors (the "Committee" or the "Plaintiff") appointed in the chapter 11 case of **Felt** Manufacturing Co., Inc., f/k/a Foss Manufacturing Co., Inc. ("FMC" or the "Debtor"), acting on behalf of the chapter 11 estate of the above-captioned debtor, filed a fifty-one count complaint against fifteen defendants. The defendants are former officers and directors of FMC, a

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shareholder and brother of an officer and director, a spouse of a director, and various trusts and other legal entities owned or controlled by one or more of the individual defendants. The complaint asserts ten types of claims: (1) breach of fiduciary duty, (2) aiding and abetting breach of fiduciary duty, (3) waste of corporate assets, (4) unjust enrichment, (5) declaration of illegal dividends, (6) deepening insolvency, (7) equitable subordination, (8) recharacterization, (9) avoidance of fraudulent transfers, and (10) avoidance of preferential transfers. Fourteen of the fifteen defendants filed motions seeking to dismiss for failure to state a claim upon which relief can be granted. For the reasons stated in this opinion, the motions to dismiss shall be granted in part and denied in part as set forth below.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. MOTION TO DISMISS STANDARD

In order to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which is made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), [1] the Court must accept the allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with the law, the Court must deny the motion to dismiss. *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (*cited in Boles v. Filipowski (In re Enivid, Inc.),* 345 B.R. 426, 441–42 (Bankr.D.Mass.2006)); *Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir.2001); *Blackstone Realty LLC v. Fed. Deposit Ins. Corp.,* 244 F.3d 193, 197 (1st Cir.2001); *Vartanian v. Monsanto Co.,* 14 F.3d 697, 700 (1st Cir.1994); *Bezanson v. Gaudette (In re R & R Assocs. of Hampton),* 248 B.R. 1, 4 (Bankr.D.N.H.2000). Dismissal is appropriate only if the facts alleged by the plaintiff, taken as true, do not justify recovery. *Redondo Constr. Corp. v. Summertime Dev. Corp. (In re Redondo Constr. Corp.),* Bk. No. 02–02887(GAC), Adv. No. 04–00017, 2006 WL 3898311, at *2 (Bankr.D.P.R. May 22, 2006) *(citing Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir.1996)). In order to survive a motion to dismiss, a plaintiff must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery." *Id.* (*citing Gooley v. Mobil Oil Corp.,* 851 F.2d 513 (1st Cir.1988)).

> ***605** [I]n determining a Rule 12(b)(6) motion, the Court need not credit unsupported conclusions. *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 16 (1st Cir.1989), *overruled on other grounds, Educadores Puertorriquenos en Accion v. Hernandez,* 367 F.3d 61 (1st Cir.2004). The Federal Rules of Civil Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). "To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (*quoting* Fed.R.Civ.P. 8(a)(2)). *See also Stanziale v. Nachtomi (In re Tower Air, Inc.),* 416 F.3d 229, 237 (3d Cir.2005) (under Federal Rule 8, the plaintiff need only plead the "basic facts" necessary to provide the defendant with fair notice of the plaintiff's claims and the general factual background upon which it rests and should not be deprived of the opportunity to pursue claims on a Rule 12(b)(6) motion for lack of detailed facts.).
>
>> Nevertheless, it also is well established that the pleading requirements are "not entirely ... toothless," *Dartmouth Review,* 889 F.2d at 16. The First Circuit has required a minimal level of factual particularity rather than mere allegations of conclusions. *See Fleming v. Lind–Waldock & Co.,* 922 F.2d 20, 24 (1st Cir.1990) ("[T]he necessary factual averments are required with respect to each material element of the underlying legal theory.") (*citing Gooley v. Mobil Oil Corp.,* 851 F.2d 513, 515 (1st Cir.1988)).
>
> *Enivid,* 345 B.R. at 441–42.

In *Conley,* the Supreme Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45–46, 78 S.Ct. 99 (emphasis added). "However, the Supreme Court has recently abrogated *Conley's* rule [in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)]. In referring to *Conley's* 'no set of facts' language, the Court determined that it 'has earned retirement' and that '[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.' " *Mitan v. Feeney,* No. CV 07–3086SVWJWJX, 497 F.Supp.2d 1113, 1124, 2007

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WL 2068106, at *9 (C.D.Cal. July 18, 2007) (*citing Bell Atl.,* 127 S.Ct. at 1969). The Supreme Court stated the accepted pleading standard as "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl.,* 127 S.Ct. at 1969. In discussing the "no set of facts" language in *Conley,* the Supreme Court indicated that "[o]n such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the *possibility* that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1968 (emphasis added). The Supreme Court observed that "a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard." *Id.* at 1969. In support of that observation, the Court cited the decision in *O'Brien v. DiGrazia,* 544 F.2d 543, 546 n. 3 (1st Cir.1976).

Under *Bell Atlantic,* a complaint will survive a motion to dismiss under Rule 12(b)(6) only if the allegations in the complaint cross the line between "possibility ***606** and plausibility of 'entitle[ment] to relief.' " *Bell Atl.,* 127 S.Ct. at 1966 (*citing DM Research, Inc. v. College of Am. Pathologists,* 170 F.3d 53, 56 (1st Cir.1999)). However, a plaintiff need not plead sufficient facts to establish a *prima facie* case. *Swierkiewicz v. Sorema N.A.* 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (cited with approval in *Bell Atl.,* 127 S.Ct. at 1969). Rather, the complaint must only provide the defendants with fair notice of the plaintiff's claims and sufficient facts to provide notice of the grounds upon which such claims rest. *Bell Atl.,* 127 S.Ct. at 1959; *Adelphia Communications Corp. v. Bank of Am., N.A. (**In re** Adelphia Communications Corp.),* 365 B.R. 24, 33 (Bankr.S.D.N.Y.2007).

The decision in *Bell Atlantic* has created some uncertainty over the standard to be used to assess the adequacy of pleadings. *Iqbal v. Hasty,* 490 F.3d 143, 154–55, 157–59 (2d Cir.2007) (interpreting *Bell Atlantic* as not requiring a universal standard of heightened fact pleading, but requiring a flexible plausibility standard). However, the First Circuit Court of Appeals has indicated post-*Bell Atlantic* "that to survive a motion to dismiss, a complaint must allege 'a plausible entitlement to relief.' " *Rodriguez–Ortiz v. Margo Caribe, Inc.,* 490 F.3d 92, 94–96 (1st Cir.2007) *(quoting Bell Atl.,* 127 S.Ct. at 1967). A plaintiff must now plead facts sufficient to allow the necessary inferences to be drawn that the plaintiff may be entitled to relief. *Marrero–Gutierrez v. Molina,* 491 F.3d 1, 9–10 (1st Cir.2007).

It is not clear that the "retirement" of the literal interpretation of *Conley* has changed the standard to be applied by this Court to motions under FRCP 12(b)(6) as in the past, the First Circuit has not literally applied the "retired" language in *Conley. See O'Brien,* 544 F.2d at 546 n. 3 ("[W]hen a plaintiff ... supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional ... action into a substantial one.") (cited with approval in *Bell Atl.,* 127 S.Ct. at 1969). The First Circuit Court of Appeals has previously stated that "[w]hile a complaint need only set out 'a generalized statement of facts,' there must be enough information 'to outline the elements of the pleaders' claim.' " *Kadar Corp. v. Milbury,* 549 F.2d 230, 233 (1st Cir.1977) (*quoting* Wright & Miller, *Federal Practice and Procedure: Civil* § 1357). Accordingly, it appears to the Court that the decision in *Bell Atlantic* has resulted in a rephrasing of the standard under FRCP 12(b)(6) for assessing the adequacy of a complaint's allegations so that it is more in line with the standard adopted by the First Circuit in *O'Brien.*

Therefore, in order satisfy the requirements of FRCP 8(a) and to survive a motion to dismiss under FRCP 12(b)(6), the allegations in a complaint must put defendants on fair notice of the plaintiff's claim and allege sufficient facts to establish a plausible entitlement to relief. *Bell Atl.,* 127 S.Ct. at 1967. The allegations in the complaint must cross the line between the mere possibility of relief to the plausibility of relief. *Id.* at 1966. However, requiring "plausible grounds [for relief] ... does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [to support relief]." *Id.* at 1965. Even if the Court believes that the proof of the facts alleged is "very remote and unlikely," a well pleaded complaint may proceed. *Id.*

"While most Rule 12(b)(6) motions are premised on a plaintiff's putative failure to state an actionable claim, such a motion may sometimes be premised on the inevitable ***607** success of an affirmative defense.... Dismissing a case under Rule 12(b)(6) on the basis of an affirmative defense requires that (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude." *Nisselson v. Lernout,* 469 F.3d 143, 150 (1st Cir.2006) (citations and quotations

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omitted), *cert. denied,* 550 U.S. 918, 127 S.Ct. 2131, 167 L.Ed.2d 863 (2007).

III. DISCUSSION

A. Count I—Breach of Fiduciary Duty

Count I alleges that Stephen Foss ("Foss") and Kevin Sexton ("Sexton") (collectively the "Count I Defendants"), as officers and directors of FMC, (1) breached their fiduciary duties to the corporation including the duties of care, loyalty, honesty, candor, and disclosure through various actions and failures to act specified in the complaint, and (2) breached their fiduciary duties to FMC's creditors because FMC was insolvent or in the "zone of insolvency" at the time of their alleged conduct. The Count I Defendants seek dismissal of Count I on a number of grounds and the Committee opposes their motion. The motions to dismiss Count I filed by the Count I Defendants shall be denied. The Court shall address *seriatim* the grounds advanced by the Count I Defendants for dismissal of Count I.

1. Failure to Plead Fraud with Particularity

[1] **[2]** The general rule in federal court pleadings is that a plaintiff need only plead a "short and plain statement of the claim." FRCP 8(a)(2). However, an exception to this general rule requires in all averments of fraud or mistake that "the circumstances constituting fraud or mistake shall be stated with particularity." FRCP 9(b). The particularity requirements in allegations of fraud and mistake are satisfied by averments "of the who, what, where, and when of the allegedly false or fraudulent misrepresentation." *Rodi v. Southern New England School of Law,* 389 F.3d 5, 15 (1st Cir.2004) (*citing Alternative Sys. Concepts, Inc. v. Synopsys, Inc.* 374 F.3d 23, 29 (1st Cir.2004)). "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." FRCP 9(b); *McCallion v. Lane,* 937 F.2d 694 (1st Cir.1991) (vacating dismissal of a count under 11 U.S.C. § 523(a)(2)(A) because intent need not be pled with particularity but affirming dismissal of a count under 11 U.S.C. § 523(a)(2)(B) due to a failure to allege particular omissions or false information in a written financial statement).

The Count I Defendants contend that Count I should be dismissed because the Committee has failed to plead allegations of fraud and misrepresentation with particularity. [2] The Committee responds that it is not alleging fraud or misrepresentation, but breach of fiduciary duty, a claim which does not require the heightened pleading requirements of FRCP 9(b). In addition, ***608** even if the heightened pleading requirements apply, it argues that it has satisfied the requirement.

[3] **[4]** **[5]** FRCP 9(b), by its terms, applies only to allegations of fraud or mistake. *Concha v. London,* 62 F.3d 1493, 1502 (9th Cir.1995). "The purpose of this rule is to ensure that defendants accused of the conduct specified have adequate notice of what they are alleged to have done, so that they may defend against the accusations. Without such specificity, defendants in these cases would be put to an unfair disadvantage, since at the early stages of the proceedings they could do no more than generally deny any wrongdoing." *Id.* However, an allegation of a breach of fiduciary duty is not an allegation of fraud, simply because allegations of misrepresentation, nondisclosure or inaccurate reporting are alleged as components of the overall legal theory that a defendant violated a fiduciary duty. *Lalonde v. Textron, Inc.,* 369 F.3d 1, 6 (1st Cir.2004); *Enivid,* 345 B.R. at 442.

[6] The allegations in the complaint provide the Count I Defendants with fair notice of the nature of the claimed breaches of fiduciary duty and are sufficient to establish a plausible entitlement to relief. Although the complaint contains allegations of fraud and misrepresentation, Count I does not focus on recovery for fraud or misrepresentation but rather seeks relief for breach of fiduciary duty to FMC based upon certain allegedly fraudulent and improper conduct by the Count I Defendants as officers and directors. Accordingly, the heightened pleading requirements of FRCP 9(b) do not apply. *Id.* If the Count I Defendants believe that the complaint does not adequately apprise them of the nature of the Committee's claim, a motion for a more definite statement under FRCP 12(e), rather than a motion to dismiss under FRCP 12(b)(6), is more appropriate. *Lalonde,* 369 F.3d at 6 n. 10.

2. *In Pari Delicto* Doctrine

[7] **[8]** The Count I Defendants argue that Count I should be dismissed under the *in pari delicto* doctrine. "*In pari delicto* is both an affirmative defense and an equitable defense. Broadly speaking, the doctrine prohibits plaintiffs from recovering damages resulting from their own wrongdoing." *Nisselson,* 469 F.3d at 151. The doctrine is grounded on two principles. First, where the plaintiff and the defendant are both responsible for wrongful actions, courts should not resolve disputes between them arising from

the wrongdoing. *Id.* Second, denying relief to an admitted wrongdoer is an effective means of deterring illegality. *Id.*

[9] **[10]** **[11]** Motions to dismiss are usually based upon a plaintiff's failure to state an actionable claim in its complaint. However, a motion to dismiss may be based upon the inevitable success of an affirmative defense in certain situations. *Id.* Dismissing a case "on the basis of an affirmative defense requires that '(i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude.' " *Id.* at 150 (*quoting Rodi*, 389 F.3d at 15). The Supreme Court has restricted the *in pari delicto* doctrine to situations in which (1) the plaintiff, as compared to the defendant, bears at least substantially equal responsibility for the wrong he seeks to redress, and (2) preclusion of the suit would not interfere with the purposes of the underlying law or otherwise contravene the public ***609** interest. *Pinter v. Dahl,* 486 U.S. 622, 635–38, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310–11, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985). Similarly, New Hampshire law also restricts the application of the *in pari delicto* doctrine in situations where the public policy supporting protection of the persons harmed by the wrongdoing would be frustrated. *Flags I, Inc. v. Kennedy,* 131 N.H. 412, 416–17, 553 A.2d 778 (1989).

[12] **[13]** **[14]** **[15]** **[16]** In its complaint the Committee alleges numerous acts and omissions by the Count I Defendants that viewed in the light most favorable to the Committee would establish a breach of the fiduciary duties of officers and directors. FMC's culpability for the actions of its officers and directors, for purposes of the *in pari delicto* doctrine, is governed by applicable state law. *Nisselson,* 469 F.3d at 154; *Adelphia Communications Corp. v. Bank of Am., N.A. (In re Adelphia Communications Corp.),* 365 B.R. 24, 46 (Bankr.S.D.N.Y.2007). FMC was a New Hampshire corporation with its principal offices in New Hampshire during the time period that the Count I Defendants allegedly committed the relevant acts and omissions; therefore, New Hampshire law governs. New Hampshire has recognized the *in pari delicto* doctrine. *Witte v. Desmarais,* 136 N.H. 178, 187, 614 A.2d 116 (1992); *Belisle v. Belisle,* 88 N.H. 459, 461, 191 A. 273 (1937). A principal is chargeable with the acts of its agent while acting in its behalf. *Saidel v. The Union Assurance Society, Ltd.,* 84 N.H. 232, 149 A. 78 (1930); *Warren v. Dodge* 83 N.H. 47, 53–54, 138 A. 297 (1927). However, representations by an agent not made contemporaneously with the transaction will not bind the principal. *Cate v. Blodgett,* 70 N.H. 316, 317, 48 A. 281 (1900). If the wrongful conduct of the Count I Defendants is imputed to FMC, then the parties would be *in pari delicto* under New Hampshire law. *Belisle,* 88 N.H. at 461, 191 A. 273.

The Count I Defendants contend that the *in pari delicto* defense applies because the breach of fiduciary duty claims are based upon allegedly fraudulent statements and representations to FMC's lender. They argue that because FMC is bound by the statements of its officers, it would be deemed a participant in any such fraudulent statements, and since it received the benefit of any such fraud in the form of loan advances, the *in pari delicto* doctrine bars any recovery on behalf of the bankruptcy estate of FMC.

If the premise of the Count I Defendants' argument were correct, their contention would have merit. However, the allegations of fraudulent misrepresentations to FMC's lender are only a portion of the allegations supporting the breach of fiduciary duty claims in Count I. The Committee also alleges a breach of the fiduciary duty of the Count I Defendants, as officers and directors, based upon (1) a failure to monitor the activities of other officers and employees involved in the lending relationship and (2) causing or permitting FMC to (a) pay excessive salaries and bonuses (¶¶ 94–98 of the complaint) [3], (b) pay illegal dividends (¶¶ 117–118), (c) misuse corporate funds to pay for personal expenses of officers and directors and their families (¶¶ 99–111), and (d) make transfers to insiders for less than adequate consideration (¶¶ 120–124). The allegations in the complaint, taken in the light most favorable to the Committee, suggest ***610** that the acts and omissions of the Count I Defendants were motivated not solely to benefit FMC, but also to benefit various insiders of FMC, including the Count I Defendants, their relatives and affiliated business entities.

[17] **[18]** If the complaint were seeking recovery against the Count I Defendants for fraud against third parties on behalf of FMC, the *in pari delicto* defense might well be sufficient for purposes of a motion to dismiss. *See Nisselson,* 469 F.3d at 158 (uncontroverted facts sufficient to establish the *in pari delicto* defense are definitively ascertainable from the complaint); *Erricola v. Gaudette (In re Gaudette),* 241 B.R. 491, 500–01 (Bankr.D.N.H.1999) (facts pleaded in complaint established corporation as co-conspirator with defendant). However, in this case the complaint alleges that the Count I Defendants breached their fiduciary duties to

FMC by defrauding FMC's lender by falsifying financial information, but also by authorizing, acquiescing in and failing to monitor the activities of the corporation in connection with payment of excessive salaries, illegal stock dividends, improper expense reimbursement, improper or fraudulent transfers to or for the benefit of themselves or other insiders. The complaint alleges the Count I Defendants breached the fiduciary duty they owed to FMC. If a defendant breaches a fiduciary duty owed to a plaintiff, the defendant's alleged wrongful conduct is not imputed to the plaintiff. Wrongful acts on behalf of a corporation are not the same thing as wrongful acts against it. *Cenco Inc. v. Seidman & Seidman,* 686 F.2d 449, 456 (7th Cir.), *cert. denied,* 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982).

[19] **[20]** **[21]** "The Committee, standing in the shoes of the debtor, could not recover from third parties [or its officers and directors] for their participation in a scheme that the debtor had itself initiated and joined in." *Mediators, Inc. v. Manney (In re Mediators, Inc.),* 105 F.3d 822, 824 (2d Cir.1997); *see also In re Scott Acquisition Corp.,* 364 B.R. 562, 566 (Bankr.D.Del.2007). The *in pari delicto* defense denies recovery for damages arising from a wrongful act by a plaintiff equally at fault with a defendant. Where the parties are both at fault, but not equally at fault, the trial court must make findings regarding the respective blame and grant relief to the party whose fault is less. *Ross v. Bolton,* 904 F.2d 819, 824 (2d Cir.1990) (*citing Pinter* and *Bateman*). However, when wrongful acts are committed against a corporation by its officers and directors, the wrongful nature of such acts is not imputed to the corporation. *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.,* 267 F.3d 340, 359 (3d Cir.2001); *Fed. Deposit Ins. Corp. v. Shrader & York,* 991 F.2d 216, 223 (5th Cir.1993); *Cenco,* 686 F.2d at 456. Therefore, the *in pari delicto* defense is not a bar to the Committee's pursuit of breach of fiduciary duty claims against the former officers and directors of FMC. *Mediators,* 105 F.3d at 826–27.

3. Standing of the Committee

[22] **[23]** **[24]** The Count I Defendants contend that the Committee is basing its claim in Count I, in part, upon a breach of a fiduciary duty to FMC's creditors because the corporation was in the "zone of insolvency" (¶¶ 131, 133–35). The Committee responds that it is not asserting any claims which belong to creditors, but only claims belonging to the FMC bankruptcy estate, all as set forth in ¶¶ 11–13. The Count I Defendants are correct in their assertion that the Committee has no standing to bring claims belonging to individual creditors. ***611** *Caplin v. Marine Midland Grace Trust Co. of New York,* 406 U.S. 416, 434, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972); *Gaudette,* 241 B.R. at 500 *(citing Regan v. Vinick & Young (In re Rare Coin Galleries of Am., Inc.),* 862 F.2d 896 (1st Cir.1988)). Individual creditors may not have standing to bring claims for breach of fiduciary duty against officers and directors of an insolvent corporation, but they do have standing to bring derivative claims against officers and directors for breach of fiduciary duty. *North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla,* No. 521,2006, 930 A.2d 92, 101, 2007 WL 1453705, at *7 (Del. May 18, 2007) (under Delaware law creditors do not have a direct claim against directors of a corporation that is either insolvent or in the zone of insolvency). The Committee in this case is bringing a derivative claim on behalf of the bankruptcy estate. The Count I Defendants do not dispute that the Committee has standing to pursue claims of the bankruptcy estate. The fact that recovery on claims of the estate might benefit creditors of the estate does not affect the Committee's standing to bring any such claim, so long as the Debtor could have brought the claim prepetition. *Mediators,* 105 F.3d at 825–26.

[25] The Committee does not claim to be pursuing claims which belong to an individual creditor or a group of creditors. However, in its complaint the Committee alleges that the Count I Defendants owed fiduciary duties to FMC's creditors as well as to FMC. *See* ¶¶ 131, 133 and 135. In addition, the complaint also alleges harm to FMC's creditors. *See* ¶ 134. The Count I Defendants contend that the Committee does not have standing to pursue such claims on behalf of creditors. The First Circuit Court of Appeals has rejected that argument. *Morley v. Ontos, Inc. (In re Ontos, Inc.),* 478 F.3d 427, 432 (1st Cir.2007).

[26] **[27]** **[28]** **[29]** **[30]** Under New Hampshire law, officers and directors of a corporation owe a fiduciary duty to the corporation and its shareholders. *Bartlett v. Dumaine,* 128 N.H. 497, 513, 523 A.2d 1 (1986) (an officer of a corporation may be liable for a breach of fiduciary duty which causes a diminution in the value of the corporation); *Rosenblum v. Judson Eng'g Corp.,* 99 N.H. 267, 271, 109 A.2d 558 (1954) (officers and directors of a corporation owe a duty to shareholders to reasonably protect and conserve the interests of the corporation). The breach of the fiduciary duty of an officer or a director harms the corporation. *Prod. Res. Group, LLC v. NCT Group, Inc.,* 863 A.2d 772, 792 (Del.Ch.2004). Once a corporation is insolvent, its directors owe a fiduciary

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duty to the corporation's creditors and creditors have standing to maintain derivative claims for breaches of fiduciary duty. *Gheewalla,* 930 A.2d at 101, 2007 WL 1453705, at *7 (creditors may bring derivative claims under Delaware law); *Flags I,* 131 N.H. at 416–17, 553 A.2d 778 (derivative claim exists under New Hampshire law); *Mica Prods. Co. v. Heath,* 81 N.H. 470, 471, 128 A. 805 (1925) (under New Hampshire law creditors of an insolvent corporation have a direct claim against the directors for fraudulent or preferential transfers). "Thus, regardless of whether they are brought by creditors when a company is insolvent, [claims for breach of fiduciary duty] are derivative, with either shareholders or creditors suing to recover for harm done to the corporation as an economic entity and any recovery logically flows to the corporation and benefits the derivative plaintiffs indirectly to the extent of their claim on the firm's assets." *Prod. Res.,* 863 A.2d at 792. While it is correct that a bankruptcy trustee does not have standing to pursue the claims of individual creditors, or even a class of creditors, he may pursue the interests of the bankruptcy estate ***612** and derivatively the interests of its creditors. *Bondi v. Grant Thornton Int'l (**In re** Parmalat Sec. Litig.),* 377 F.Supp.2d 390, 420 (S.D.N.Y.2005); *Gheewalla,* 930 A.2d at 101, 2007 WL 1453705, at *7. Indeed, where the injury from an alleged breach of an officer's or a director's fiduciary duty to a bankrupt corporation is to all creditors, the trustee may be the only person who may bring such a claim. *Official Committee of Unsecured Creditors of Norstan Apparel Shops, Inc. v. Lattman (**In re** Norstan Apparel Shops, Inc.),* 367 B.R. 68, 81–82 (Bankr.E.D.N.Y.2007).

Accordingly, the Committee has standing to bring the claims against the former officers and directors of FMC for their alleged breach of the fiduciary duty owed by them to FMC and its creditors.

4. Discretionary Authority of Officer

Sexton alone seeks dismissal of Count I based upon the failure of the complaint to allege that he exercised "discretionary authority" in violation of NH RSA 293–A:8.42(a), a provision of the New Hampshire Business Corporation Act (the "NH BC Act"). The complaint alleges that Sexton was the Chief Financial Officer of FMC (¶ 18). While the precise duties and qualifications of the chief financial officer ("CFO") of a corporation will vary, the CFO is a senior member of management charged with the overall responsibility for the accounting systems, including the accuracy of the books and records of the corporation, as well as its accounting and fiscal decisions. *Black's Law Dictionary* 253 (8th ed.2004). Sexton has not placed in the motion to dismiss record any provision of FMC's articles of incorporation or bylaws that would tend to establish that the CFO of FMC had no discretionary authority over any of the actions alleged in the complaint. His argument appears to be based upon his view that the Committee failed to allege that he had discretionary authority in his job as CFO of FMC.

[31] [32] [33] Sexton's argument, if correct, is unavailing. Subjective characterizations and unsubstantiated conclusions are not sufficient to support a claim. *Bell Atl.,* 127 S.Ct. at 1966; *Dewey v. University of New Hampshire,* 694 F.2d 1, 3 (1st Cir.1982), *cert. denied,* 461 U.S. 944, 103 S.Ct. 2121, 77 L.Ed.2d 1301 (1983). However, when "conclusions are logically compelled, or at least supported, by the stated facts" and "an inference rises to what experience indicates is an acceptable level of probability ... 'conclusions' become 'facts' for pleading purposes." *Fleming v. Lind–Waldock & Co.,* 922 F.2d 20, 24 (1st Cir.1990) (*quoting Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 16 (1st Cir.1989)). In this case, the allegations that Sexton was the CFO of FMC (¶¶ 2, 4) coupled with the allegations regarding the financial reporting problems or errors of FMC (¶¶ 7, 18, 42, 53, 64–65, 73–78, 131–133), the alleged illegal dividends (¶ ¶ 117–118), and Sexton's admissions to other directors (¶ 8), support a plausible conclusion that Sexton had and exercised discretionary authority as a senior officer of FMC. Sexton is free to rebut that inference at trial, but his argument that he only took orders and never exercised any discretion or decision-making authority need not be considered by the Court on a motion to dismiss. Rather, Sexton must establish this defense through an evidentiary record at trial. The allegations regarding Sexton's position as the CFO of FMC, the actions taken by him, the actions he acquiesced in and his admissions, together taken in the light most favorable to the Committee, state a plausible claim for breach of fiduciary duty under New Hampshire law.

***613 5. Duties of a Director**

[34] Sexton also seeks dismissal of Count I as to the allegations that he breached his fiduciary duty as a director of FMC, on the grounds the complaint fails to allege any action by him as a director in violation of NH RSA 293–A:8.30. Even if Sexton's contention regarding the lack of allegations of any affirmative acts by him as a director is true, directors have a responsibility under New Hampshire law to discharge their duties in good faith, with the care of an ordinary prudent person and in the best interests of the corporation. NH RSA 293–A:8.30(a); *Rosenblum,* 99 N.H. at 271, 109 A.2d 558.

The complaint alleges numerous failures of the directors of FMC to discharge their duties in the required manner including authorizing the payment of illegal dividends (¶¶ 90, 117–118), the failure to implement any system of financial controls (¶¶ 92–93), and the failure to monitor and control the compensation of FMC's officers (¶ 98). Such allegations place Sexton on fair notice of the claims against him and are sufficient to establish a plausible entitlement to relief.

B. Count II—Breach of Fiduciary Duty

Count II alleges that Patricia Foss, Jenifer Foss Smyth, David Rowell ("Rowell"), and Douglas Kinney ("Kinney") (collectively the "Count II Defendants"), as officers and/or directors of FMC, (1) breached their fiduciary duties to the corporation including the duties of care, loyalty, honesty, candor, and disclosure through various actions and failures to act specified in the complaint, and (2) breached their fiduciary duties to FMC's creditors because FMC was insolvent or in the "zone of insolvency" at the time of their alleged conduct. The Count II Defendants each seek dismissal of Count II on a number of grounds and the Committee opposes their motions. The motions to dismiss Count II filed by the Count II Defendants shall be denied.

The Count II Defendants seek the dismissal of Count II based upon the doctrine of *in pari delicto.* Count II in form and substance is identical to Count I except that it does not allege that any of the Count II Defendants falsified financial information or borrowing base certificates, and it does allege that the Count II Defendants failed to investigate allegations by an officer of FMC regarding faulty reporting systems and unethical behavior. For the reasons discussed in section III.A.2 above, the *in pari delicto* defense is not a bar to the Committee's pursuit of claims against the Count II Defendants for breach of the fiduciary duty owed to FMC. For the reasons discussed in section III.A.3 above, the Count II Defendants' motions to dismiss Count II because the Committee lacks standing to pursue a claim for a breach of fiduciary duty owed to FMC's creditors are also without merit.

[35] The complaint alleges that the Count II Defendants, as directors of FMC, breached their fiduciary duty to the corporation by (1) failing to monitor the financial performance of the corporation or to maintain financial and accounting controls (¶¶ 8, 38–68, 75–81), (2) failing to adequately investigate the operations of FMC after being placed on notice by Sexton of irregularities (¶¶ 9, 82–91), (3) failing to implement controls or to prevent the misuse of corporate funds for the personal expenses of insiders (¶¶ 92–93), including excessive salaries and bonuses (¶¶ 94–98), payment of illegal dividends (¶¶ 117–118), payment of personal expenses of officers and directors and their families (¶¶ 99–111), and (4) authorizing or permitting transfers of corporate funds and assets to insiders for less than adequate consideration (¶¶ 120–124). Such allegations place the Count II Defendants on fair notice of the claims ***614** against them and are sufficient to establish a plausible entitlement to relief.

C. Count III—Aiding and Abetting Breach of Fiduciary Duty

Count III alleges that Foss, Sexton and Marcella Darling ("Darling") (collectively the "Count III Defendants") knowingly and willfully aided and abetted the breaches of fiduciary duty described in the complaint because they (1) were aware, or should have been aware of, the breach of fiduciary duty described in the complaint, (2) provided active assistance to the persons committing such wrongful acts, and (3) agreed to, encouraged, assisted, and/or directed the persons to commit such wrongful acts (¶ 145). The Count III Defendants seek dismissal of Count III on a number of grounds and the Committee opposes their motions. Foss and Sexton argue that Count III must be dismissed together with Count I. For the reasons discussed in section III.A above, the motions to dismiss Count I shall be denied. Accordingly, Count III shall not be automatically dismissed. Darling argues that Count III should be dismissed because the Committee lacks standing to bring the claim, and the claim against her is barred by the *in pari delicto* doctrine. For the reasons set forth in sections III.A.2 and III.A.3, her position is without merit. The additional reasons advanced by the Count III Defendants are similarly unavailing and the motions to dismiss Count III filed by the Count III Defendants shall be denied.

1. Cause of Action for Aiding and Abetting Breach of Fiduciary Duty

The Count III Defendants argue that the New Hampshire Supreme Court has not recognized an action for aiding and abetting a breach of fiduciary duty and that aiding and abetting is a criminal concept. New Hampshire has recognized aiding and abetting liability in the context of civil actions. *Plante v. Engel,* 124 N.H. 213, 217, 469 A.2d 1299 (1983) (a person may be liable for damages on a conspiracy theory for combining with another to commit a civil wrong). However, "the New Hampshire Supreme Court has yet to expressly consider whether to adopt the tort of aiding and abetting a breach of fiduciary duty." *Invest Almaz v. Temple–Inland Forest Prods. Corp.,* 243 F.3d 57,

82 (1st Cir.2001) (noting the magistrate judge had ruled that the New Hampshire Supreme Court would recognize the tort and would hold a person liable for harm resulting to a third party from the tortious conduct of another if the person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other" in connection with the breach of duty) (*citing* Restatement (Second) of Torts § 876(b)). The majority of the courts that have considered the doctrine of aiding and abetting liability, as set forth in the Restatement (Second) of Torts § 876(b), permit a claim for aiding and abetting. Richard C. Mason, *Civil Liability for Aiding and Abetting,* 61 Bus. Law 1135, 1139–40 (2006) (indicating 30 of 34 jurisdictions permit a claim for aiding and abetting in some context). New Hampshire has recognized a claim for aiding and abetting in the context of interference with custodial rights based upon important public policy considerations in protecting the parent-child relationship, and the exercise of that relationship through the custody of the child. *Plante,* 124 N.H. at 216–17, 469 A.2d 1299.

[36] Under New Hampshire law, the duty of officers and directors to a corporation and its shareholders is viewed as essentially the same as the duty of a trustee to a trust and its beneficiaries. *Bartlett,* ***615** 128 N.H. at 513–14, 523 A.2d 1; *Rosenblum,* 99 N.H. at 271, 109 A.2d 558; *Mica Products,* 81 N.H. at 471, 128 A. 805. New Hampshire law recognizes the duty of a trustee to act in good faith, act solely in the interests of the beneficiaries, not act for their personal benefit or in situations involving a conflict of interest, and in general to act in a prudent manner. *See* NH RSA 564–B:8–801 to 804. New Hampshire law also protects persons who in good faith deal with a trustee without knowledge that a trustee is not properly exercising the trustee's powers. *See* NH RSA 564–B:10–1012.

[37] **[38]** Under New Hampshire law, the recognition of a new cause of action is a two-step process. A court (1) "must first determine whether the interest that the plaintiffs assert should receive any legal recognition," and (2) "if so, whether the relief that the plaintiffs request would be an appropriate way to recognize it." *Aranson v. Schroeder,* 140 N.H. 359, 364, 671 A.2d 1023 (1995). Based upon the New Hampshire Supreme Court's long-standing view that the duties of officers and directors of corporations are akin to the fiduciary duty of a trustee, its recognition of aiding and abetting claims in civil proceedings protecting important public policies such as child custody, and the requirements imposed on fiduciaries under New Hampshire law, this Court predicts that the New Hampshire Supreme Court would concur with the majority of jurisdictions that have considered the issue and recognize a claim for aiding and abetting in the context of a breach of fiduciary duty under the standards articulated in the Restatement (Second) of Torts § 876(b) and would find that the relief requested by the Committee is an appropriate remedy.

2. Sufficiency of Count III

Even if a claim for aiding and abetting a breach of fiduciary duty exists under New Hampshire law, the Count III Defendants challenge the sufficiency of the allegations in the complaint to state such a claim. Sexton claims that a corporate officer or director is protected from liability as an officer or a director by the provisions of the NH BC Act, NH RSA 293–A:8.42(d) and NH RSA 293–A:8.30(d). Darling claims that the failure of the complaint to allege that she owed any fiduciary duty to FMC requires dismissal of Count III as to her. Foss adopts by reference Sexton's argument. The Committee contends that the complaint alleges the necessary elements of aiding and abetting, namely (1) a breach of fiduciary duty, (2) knowing inducement or participation in the breach, and (3) damages. *Invest Almaz,* 243 F.3d at 83; Restatement (Second) of Torts § 876(b).

[39] **[40]** **[41]** The arguments of the Count III Defendants fail to recognize the nature of the claim for aiding and abetting. Conspiracy and aiding and abetting have similar elements but are different claims. Conspiracy requires an agreement as well as an overt act causing injury. *Beck v. Prupis,* 529 U.S. 494, 501, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). Conspiracy requires the actual commission of a wrongful act giving rise to damages. *Id.* at 501–03, 120 S.Ct. 1608. The agreement among co-conspirators is not in and of itself actionable but is the mechanism for subjecting all co-conspirators to liability for an act committed by one of them. *Id.* In some jurisdictions, a claim for civil conspiracy does not arise unless each conspirator owed the victim a duty not to commit the underlying wrongful act. *Neilson v. Union Bank of California, N.A.,* 290 F.Supp.2d 1101, 1133 (C.D.Cal.2003). However, "the act of aiding and abetting is distinct from the primary violation; liability attaches because the aider and abettor ***616** behaves in a manner that enables the primary violator to commit the underlying tort." *Id.* at 1134 (*citing Halberstam v. Welch,* 705 F.2d 472, 478 (D.C.Cir.1983)).

[42] Therefore, the fact that a particular Count III Defendant may have had no fiduciary duty to FMC, or may not have violated a fiduciary duty that such defendant may have had

to FMC, is not a defense to a civil claim for aiding and abetting. The Committee states a claim if it alleges that a Count III Defendant (1) aided a party who breached a fiduciary duty that such party had to FMC, (2) knowingly and substantially provided assistance to such person, and (3) FMC suffered damages. *Invest Almaz,* 243 F.3d at 83; *Pittman by Pittman v. Grayson,* 149 F.3d 111, 123 (2d Cir.1998); Restatement (Second) of Torts § 876(b). The Committee has made such allegations in ¶¶ 15, 18, 20, 73–78 and 144–146. Such allegations place the Count III Defendants on fair notice of the claims against them and are sufficient to establish a plausible entitlement to relief.

Sexton's motion to dismiss shall also be denied for two additional reasons. First, his reliance on the arguments he raised in seeking dismissal of Count I is misplaced. The claim of aiding and abetting is separate and distinct from any claim against Sexton based upon his actions as an officer or a director of FMC. Second, for the reasons discussed in sections III.A.4 and III.A.5 above, to the extent that Count III of the complaint is based upon Sexton's acts or conduct as an officer or a director of FMC, the complaint alleges that it was his failure to discharge his duties as an officer and a director that caused damage to FMC. Sexton's motion to dismiss Count III based upon provisions in the NH BC Act shall be denied.

D. Count IV—Waste of Corporate Assets

Count IV alleges that the actions of Foss, Patricia Foss, Jenifer Foss Smyth, Sexton, Rowell and Kinney, as directors of FMC, are responsible for the waste of assets of FMC by permitting or causing excessive salaries, bonuses, preferred stock dividends and other expense reimbursements and payments without a fair exchange of value. All of the defendants named in Count IV with the exception of Foss (collectively the "Count IV Defendants") have filed motions to dismiss Count IV. The motions to dismiss are based upon arguments that the Committee does not have standing to bring the claims under Count IV and that such claims are barred by the *in pari delicto* doctrine. For the reasons set forth in section III.A.2 and III.A.3 above, the motions filed by the Count IV Defendants to dismiss Count IV based on a lack of standing and the *in pari delicto* arguments shall be denied.

Sexton also argues that Count IV should be dismissed as to him because it does not allege that he violated the standards of conduct for an officer or a director of a New Hampshire business corporation as established in NH RSA 293–A:8.42(d) and NH RSA 293–A:8.30(d). The Committee opposes the motions to dismiss Count IV based upon several of the arguments it raised in its opposition to the dismissal of Counts I, II and III. For the reasons discussed in section III.A.5 with respect to Count I and section III.C.2 with respect to Count III, Sexton's motion to dismiss Count IV based upon his claim of compliance with the standards applicable to officers and directors under the NH BC Act shall be denied.

E. Count V—Unjust Enrichment

Count V alleges that Foss, Patricia Foss, Jenifer Foss Smyth, John Smyth, ***617** Sexton, Dennis Foss, Kinney, Foss Family LLC I, Foss Family LLC II, Foss Realty, Inc., Business Helicopters, Inc., Foss Family 2004 Irrevocable Trust and Custom Travel of New Hampshire, Inc. (collectively the "Count V Defendants" with the exception of Custom Travel of New Hampshire, Inc.) received property from FMC to which they were not entitled and have benefitted unjustly at FMC's expense. The Count V Defendants seek dismissal of Count V based upon the Committee's failure to state a claim against an individual Count V Defendant for various reasons and because the equitable remedy of restitution for unjust enrichment is not available where a plaintiff has an adequate remedy at law.

[43] [44] [45] The remedy of restitution is available to a plaintiff who can show that there was unjust enrichment either through the wrongful acts of the defendant or through passive acceptance by a defendant of a benefit that would be unconscionable to retain. *Petrie–Clemons v. Butterfield,* 122 N.H. 120, 127, 441 A.2d 1167 (1982); *Nute v. Blaisdell,* 117 N.H. 228, 232, 374 A.2d 923 (1977). A claim of unjust enrichment is based upon a benefit conferred on the defendant, not on the existence of an agreement between the plaintiff and the defendant. *Presby v. Bethlehem Village District,* 120 N.H. 493, 495, 416 A.2d 1382 (1980) (unjust enrichment found where work done on the property of a third party benefitted the defendant); *Petrie–Clemons,* 122 N.H. at 127, 441 A.2d 1167 (restitution available in addition to damages for breach of contract where wrongful conduct resulted in a benefit to the defendant which was unconscionable to retain). Where the remedy sought is for breach of obligations imposed by law, as opposed to obligations arising from the receipt of a benefit which is unjust, a claim of unjust enrichment does not lie. *Bessette v. Avco Fin. Servs., Inc.,* 230 F.3d 439, 448 (1st Cir.2000) (breach of obligations arising under § 524 of the Bankruptcy Code do not give rise to a claim for unjust enrichment); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.,* 892 F.Supp. 347, 357 (D.N.H.1995) (claims under the Lanham Act and

state unfair competition statutes do not give rise to a claim for unjust enrichment).

[46] **[47]** A plaintiff may seek a damages remedy at law (i.e., for breach of contract) and an equitable remedy (i.e., for unjust enrichment) in one complaint, so long as the claims are for different damages. *Compare Petrie–Clemons,* 122 N.H. at 126–27, 441 A.2d 1167 (contract damages and restitution permitted in one action), *with Pacamor,* 892 F.Supp. at 357 (profits obtained through alleged violations of federal and state statutes on competition were not a benefit for which restitution is appropriate where the statutes in question provided a damages remedy). Simply because the Committee is bringing a claim for recovery on an alleged breach of a contract or statutory obligation, it is not precluded at this early stage of this adversary proceeding from seeking restitution for unjust enrichment in a separate count as an alternate claim. *Cincinnati Gas & Elec. Co. v. General Elec. Co.,* 656 F.Supp. 49, 68–69 (S.D.Ohio 1986); FRCP 8(e)(2). To the extent that Count V is an alternate equitable claim to a legal claim in another count, the Committee may be required prior to trial to make its election to seek a legal or an equitable remedy. *Cincinnati Gas,* 656 F.Supp. at 68–69. It appears that the factual allegations regarding the Committee's alternative legal and equitable claims are substantially similar. Therefore, no undue burden will be imposed on any defendant during the pretrial discovery and preparation period. Inconsistent alternative theories are not ***618** grounds for dismissal of Count V at this time. *Id.* at 69. However, Count V shall be dismissed as to a particular defendant to the extent that the Committee is seeking recovery for a claim that does not give rise to the equitable remedy of restitution under the specific facts as alleged in the complaint. *Pacamor,* 892 F.Supp. at 357.

1. Stephen Foss, Foss Family LLC I, Foss Family LLC II, Foss Realty, Inc. and Business Helicopters, Inc.—Unjust Enrichment

[48] The unjust enrichment claims against Foss, Foss Family LLC I, Foss Family LLC II, Foss Realty, Inc., and Business Helicopters, Inc. (collectively the "Foss Defendants") appear to include authorization and receipt of illegal dividends (¶¶ 4(i), 117–118), insider loan repayments (¶¶ 4(ii), 116(a)), reimbursement for personal expenses (¶¶ 4(iii) and (iv), 104–109, 112–115), improvements to Foss's personal residence (¶ 4(v)), payments to various corporations and entities owned by Foss (¶¶ 4(vi)-(ix), 25–229, 112, 119–124), and excessive compensation (¶¶ 95–96). The Committee may at this stage of the case bring Count V as an alternate claim for an equitable remedy to one or more of its counts seeking legal damages. In addition, it may be able to seek both legal and equitable relief under the proper circumstances, so long as the claims are not duplicitive or based upon alleged breaches of statutory obligations. The allegations regarding authorization of illegal dividends involve a breach of the statutory duties of a director and the damages for any such action is established under the NH BC Act. NH RSA 293–A:8.33. Accordingly, the motion to dismiss Count V as to Foss shall be granted as to any claim regarding authorization of illegal dividends and denied without prejudice to all other claims against the Foss Defendants. They may seek dismissal of Count V as to one or more other claims prior to trial, if the Committee fails to elect a legal or equitable remedy for any such claim prior to that time.

2. Patricia Foss, Jenifer Foss Smyth, John Smyth and Foss Family 2004 Irrevocable Trust—Unjust Enrichment

The unjust enrichment claims against Patricia Foss, Jenifer Foss Smyth, John Smyth and Foss Family 2004 Irrevocable Trust (the "Foss Family Defendants") appear to include authorization and receipt of illegal dividends (¶¶ 4(i), 117–118), improvements to personal residences (¶¶ 4(v), 99–103), and payments to various corporations and entities owned by them (¶¶ 4(vi), (vii) and (ix), 25–29, 112–115, 116, 119–124). For the reasons discussed above, the Committee may at this stage of the case bring Count V as an alternate claim for an equitable remedy to one or more of its counts seeking legal damages. In addition, it may be able to seek both legal and equitable relief under the proper circumstances, so long as the claims are not duplicitive or based upon alleged breaches of statutory obligations. The allegations regarding authorization of illegal dividends involve a breach of the statutory duties of a director and the damages for such action are established under the NH BC Act. NH RSA 293–A:8.33. Accordingly, the motion to dismiss Count V as to Patricia Foss and Jenifer Foss Smyth shall be granted as to any claim regarding authorization of illegal dividends and denied without prejudice to all other claims against the Foss Family Defendants. They may seek dismissal of Count V as to one or more other claims prior to trial, if the Committee fails to elect a legal or equitable remedy for any such claim prior to that time.

3. Kevin Sexton—Unjust Enrichment

The unjust enrichment claims against Sexton appear to include authorization of ***619** illegal dividends (¶¶ 4(i),

117–118) and extraordinary payments beyond authorized compensation (¶¶ 4(vii), 94, 97–98). Sexton contends that the complaint fails to state that the excess payments were made in the absence of a contract or that retention of such payments by him would be unconscionable. The complaint alleges that Sexton received "extraordinary payments" from FMC over and above his salary in the form of debt forgiveness ($30,000.00), a bonus outside of the ordinary time for a bonus ($24,000.00), payment of country club bills ($7,544.03), an unjustified pay raise ($53,601.60), consulting fees ($18,400.00), a service award ($25,000.00) and unused vacation pay ($5,520.00) and that such payments were not properly authorized by FMC's board of directors (¶¶ 97–98). Such allegations, if true, would be sufficient to establish that such transfers or payments were not authorized and that retention of unauthorized transfers totaling $164,065.63 is unconscionable. For the reasons discussed above, the Committee may at this stage of the case bring Count V as an alternate claim for an equitable remedy to one or more of its counts seeking legal damages. In addition, the Committee may be able to seek both legal and equitable relief under the proper circumstances, so long as the claims are not duplicitive or based upon alleged breaches of statutory obligations. The allegations regarding authorization of illegal dividends involve a breach of the statutory duties of a director and the damages for such action are established under the NH BC Act. NH RSA 293–A:8.33. Accordingly, the motion to dismiss Count V as to Sexton shall be granted as to any claim regarding authorization of illegal dividends and denied without prejudice to all other claims. Sexton may seek dismissal of Count V as to one or more other claims prior to trial, if the Committee fails to elect a legal or equitable remedy for any such claim prior to that time.

4. Dennis Foss—Unjust Enrichment

[49] **[50]** **[51]** The unjust enrichment claims against Dennis Foss appear to include receipt of illegal dividends (¶¶ 4(i), 117–118), receipt of additional unlawful distributions of property from FMC through loan repayments (¶ 128), and unlawful or inequitable distributions in connection with the redemption of stock in FMC (¶¶ 125–127, 172). Unlike the claims against former directors of FMC for authorization of illegal dividends, the NH BC Act provides no statutory basis for recovery of illegal dividends by a corporation from a shareholder.[4] The complaint alleges sufficient family and financial connections to FMC and the officers and directors of FMC (¶¶ 22, 125–128) to plausibly infer that Dennis Foss may have had access to information on the financial condition of FMC to provide him with knowledge of the condition of the corporation at the time various distributions were made and, therefore, that he knew or should have known, that the distributions were unlawful. Such allegations are sufficient to support a claim for unjust enrichment at this stage of the case. Accordingly, the motion to dismiss Count V against Dennis Foss shall be denied.

5. Douglas Kinney—Unjust Enrichment

[52] The unjust enrichment claims against Kinney appear to be limited to payment of fees and expenses for services as a director of FMC (¶¶ 19, 111). The complaint alleges that Kinney has been a ***620** director of FMC since July 1, 2004, that he was paid a director's fee on July 22, 2004, and was reimbursed for expenses as a director on August 17, 2004. The complaint alleges that these payments were "ostensible compensation for his services as director" (¶ 111). FMC's payment of fees and expenses to a director of the corporation during the time he served as a director, without more, does not state a claim for unjust enrichment under New Hampshire law. The complaint is devoid of any allegation that Kinney did not serve as a director, that the fees and expenses paid were contrary to FMC's policies or were unauthorized. There is no allegation in the complaint as to what time period or expenses were involved in the reimbursements. Accordingly, the complaint does not state a claim against Kinney for unjust enrichment. *Petrie–Clemons,* 122 N.H. at 127, 441 A.2d 1167; *Nute,* 117 N.H. at 232, 374 A.2d 923. The motion to dismiss Count V against Kinney shall be granted.

F. Count VI—Illegal Dividends

[53] **[54]** **[55]** Count VI alleges that Foss, Patricia Foss, Jenifer Foss Smyth, Sexton, Rowell and Kinney, as directors of FMC (collectively the "Count VI Defendants"), authorized the payment of dividends contrary to the NH BC Act, specifically NH RSA 293–A:6.40. The NH BC Act prohibits any distribution to shareholders if, after giving it effect, the corporation would not be able to pay its debts as they became due or it would be insolvent if dissolved. NH RSA 293–A:6.40(c). The NH BC Act provides a safe harbor for directors based upon certain financial statements and asset valuations. NH RSA 293–A:6.40(d). Directors who vote for or assent to an illegal distribution to shareholders are personally liable to the corporation for the amount that such distribution exceeded the amount that could have been legally distributed under the NH BC Act. NH RSA 293–A:8.33.

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The Count VI Defendants seek dismissal of Count VI on the basis that the Committee seeks recovery for dividends that were paid either when they were not a member of FMC's board of directors or more than two years before the date of filing of FMC's bankruptcy petition, i.e., before September 16, 2003. NH RSA 293–A:8.33(c) (establishing a two-year statute of limitations). The Committee does not dispute this contention. Therefore, the complaint properly seeks recovery of illegal dividends authorized or acquiesced in by the Count VI Defendants during the following time periods:

Defendant	Period as Director	Complaint
Stephen Foss	9/16/2003 to 8/6/2005	¶ 15
Patricia Foss	7/1/2004 to present	¶ 16
Jenifer Foss Smyth	7/1/2004 to present	¶ 17
Kevin Sexton	9/16/2003 to 7/1/2004	¶ 18
David Rowell	9/16/2003 to 7/1/2004	¶ 23
Douglas Kinney	7/1/2004 to present	¶ 19

Accordingly, the motions to dismiss Count VI shall be granted as to each individual Count VI Defendant to the extent that the complaint seeks recovery of dividends authorized outside the time periods the complaint alleges that each such defendant served as a director and the two-year statute of limitations.

Sexton and one or more other Count VI Defendants, by reference to the memorandum of law submitted by him in support of his motion to dismiss, argue that the complaint fails to state that any of the Count VI Defendants failed to perform their duties as a director under NH RSA 293–A:8.30, as required to state a claim under NH RSA 293–A:8.33(a). For the reasons set forth in section III.A.5 above, Sexton's motion to dismiss Count VI on this ground, as well as the motions of any other Count ***621** VI Defendant incorporating such argument by reference, shall be denied.

[56] **[57]** Foss and one or more of the Count VI Defendants, by reference to the memorandum of law submitted by him in support of his motion to dismiss, argue that the complaint fails to allege either equitable insolvency or balance sheet insolvency, at least one of which is required to establish liability under NH RSA 293–A:6.40(c). The Committee relies on ¶¶ 35 through 62 of its complaint for the required allegations of insolvency. Paragraph 36 alleges that the Debtor has been insolvent since 2001 either because it could not pay its debts as they became due in the ordinary course or because its liabilities exceeded the fair value of its assets. Paragraphs 37 through 62 contain allegations regarding FMC's difficulties with its major lenders from 2001 until the petition date, including the continuing need to obtain overadvances under its credit facility (¶¶ 43, 48, 49), consideration of bankruptcy in late 2002 (¶ 44), a demand by FMC's lender for a personal guarantee of the overadvance (¶ 46), the necessity of raising as much as $2,080,000.00 in subordinated debt capital to continue a revolving credit facility (¶¶ 50, 62, 128), and the failure to make required contributions to employee benefit plans (¶¶ 58–59). The complaint need only set forth allegations under one of the two insolvency standards in NH RSA 293–A:6.40(c), a cash flow test (NH RSA 293–A:6.40(c)(1)) or a balance sheet test (NH RSA 293–A:6.40(c)(2)). The complaint contains sufficient allegations to establish a plausible inference that FMC was insolvent within the meaning of NH RSA 293–A:6.40(c). Accordingly, Count VI states a claim under NH RSA 293–A:6.40 for any dividends authorized on or after September 16, 2003, i.e., within the two-year statute of limitations.

G. Count VII—Deepening Insolvency

Count VII alleges that Foss, Patricia Foss, Jenifer Foss Smyth, Sexton, Rowell and Kinney (collectively the "Count VII Defendants") engaged in various breaches of their fiduciary duties to FMC as directors and thereby prolonged the corporation's life, which caused the corporation to incur more debt than if they had taken steps to close FMC's business or file chapter 11 before the corporation's trade credit and working capital availability were cut off. The Committee alleges that the failure of the Count VII Defendants to

take such action has injured the estate and its creditors by dissipating FMC's assets, extending its life beyond viability and increasing its insolvency.

The Count VII Defendants argue that the "deepening insolvency" allegations in Count VII do not state a valid claim because such a cause of action does not exist under New Hampshire law. In addition, even if the cause of action exists, they argue the Committee lacks standing to bring such a claim, the complaint does not adequately state a claim for deepening insolvency and the complaint fails to allege fraud with the specificity required by FRCP 9. The Committee rejects all of the Count VII Defendants' arguments.

[58] **[59]** **[60]** The Court must first address whether a cause of action for "deepening insolvency" exists under New Hampshire law. Deepening insolvency has been described as "an injury to the Debtors' corporate property from the fraudulent expansion of corporate debt and the prolongation of corporate life." *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.,* 267 F.3d 340, 347 (3d Cir.2001). The elements of a cause of action for deepening insolvency are (1) fraud, (2) which causes the expansion of corporate debt, and (3) which prolongs the life of the corporation. *Id.* at 344 ***622** (Pennsylvania would recognize an independent cause of action for deepening insolvency); *see Seitz v. Detweiler, Hershey and Assoc. P.C. (In re CitX Corp.),* 448 F.3d 672, 681 (3d Cir.2006) (only fraudulent conduct will support a deepening insolvency claim under Pennsylvania law); Jo Ann J. Brighton, *Deepening the Blows Against Deepening Insolvency? The Third Circuit's CitX Opinion and Post–CitX Opinions,* 25–SEP Am. Bankr.Inst. J., Sept. 2006, at 24, 68. The fraud requirement of a cause of action for deepening insolvency requires a plaintiff to allege and prove five elements: "a representation of material fact, falsity, scienter, reliance and injury." *In re Oakwood Homes Corp.,* 340 B.R. 510, 534 (Bankr.D.Del.2006) (*quoting Vermeer Owners, Inc. v. Guterman,* 585 N.E.2d 377, 378 (N.Y.1991)). A number of federal courts have questioned the recognition of deepening insolvency as an independent tort. *Oakwood,* 340 B.R. at 528–30 (discussing the history of deepening insolvency); *Kittay v. Atl. Bank of N.Y. (In re Global Serv. Group, LLC),* 316 B.R. 451, 456–59 (Bankr.S.D.N.Y.2004) (examining the historical derivation of the theory of deepening insolvency). If an independent cause of action for deepening insolvency exists, it must be recognized under applicable state law. *Oakwood,* 340 B.R. at 531. None of the parties have cited to any New Hampshire statute or state court decision that either supports or rejects a cause of action for deepening insolvency, and the Court has not found any such authority. Accordingly, the Court "must don the soothsayer's garb and predict how [the state's highest court] would rule if it were presented with the question." *Lafferty,* 267 F.3d at 349.

[61] Part I, Article 14 of the New Hampshire Constitution provides:

> Every subject of this state is *entitled to a certain remedy,* by having recourse to the laws, *for all injuries he may receive in his* person, *property,* or character; to obtain justice freely, without being obliged to purchase it; completely, and without denial; promptly, and without delay; comfortably to the laws.

N.H. Const. pt. I, art. 14 (emphasis added). "The purpose of this provision is to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts." *Town of Nottingham v. Newman,* 147 N.H. 131, 134–35, 785 A.2d 891 (2001) (quotation omitted). New Hampshire's public policy on the recognition of new causes of action, when necessary to provide a remedy, is similar to Pennsylvania's public policy, which was a significant factor in the Third Circuit's prediction that the highest court in Pennsylvania would recognize an independent cause of action for deepening insolvency. *Lafferty,* 267 F.3d at 351. *See also Oakwood,* 340 B.R. at 533 (bankruptcy court predicted that the Delaware Supreme Court would recognize the tort of deepening insolvency); *but see Trenwick Am. Litig. Trust v. Ernst & Young, LLP,* 906 A.2d 168, 204–05 (Del.Ch.2006) (Delaware law does not recognize a cause of action against directors for deepening insolvency).

[62] The Court shall assume, without deciding, that the New Hampshire Supreme Court would apply the two-step test under *Aranson* described above in section III. C.1 and would recognize an independent tort for deepening insolvency pursuant to the analysis in *Lafferty* and *Oakwood* as the interests the Committee asserts in Count VII should receive legal recognition and the relief requested by the Committee is an appropriate way to recognize it. ***623** *Aranson,* 140 N.H. at 364, 671 A.2d 1023. However, under *Aranson,* "[t]he analytical predicate to any consideration of [the recognition of a new cause of action under New Hampshire law] must be a determination that the relief sought is not obtainable by other existing remedies." *Id.*

In other jurisdictions recognizing a cause of action for deepening insolvency, such actions have been brought against officers and director as well as outside corporate advisors. *See, e.g., CitX*, 448 F.3d at 674 (accounting firm and partner in charge); *Lafferty,* 267 F.3d at 344–45 (owner and family, accountant, attorney, independent underwriter and their counsel); *Oakwood,* 340 B.R. at 515 (debtor's banks); *Global Service,* 316 B.R. at 454 (debtor's bank and principals); *Trenwick,* 906 A.2d at 172 (independent directors and CEO director). However, in this case, all of the Count VII Defendants were directors of FMC and are all alleged to have breached their fiduciary duty to FMC as directors in Counts I and II. Causes of action against directors of a corporation, whether solvent or insolvent, for breach of fiduciary duty and fraud already exist. *See Trenwick,* 906 A.2d at 205.

[63] The Committee has failed to articulate why the existing causes of action against former directors of FMC for breach of fiduciary duty and fraud are not sufficient. The Court need not address the issue, which is not before it, as to whether existing causes of action against non-officer or non-director defendants will be sufficient to withstand recognition of a cause of action for deepening insolvency under New Hampshire law when such a claim is made. In this case, the Court finds that the New Hampshire Supreme Court would not recognize a new cause of action for deepening insolvency based on the allegations in the complaint because existing causes of action for breach of fiduciary duty and fraud against the Count VII Defendants appear to provide the Committee with adequate remedies under existing law. Accordingly, the Court need not consider any remaining arguments raised by the Count VII Defendants in support of their motions to dismiss Count VII. *C.f. Boles v. Filipowski (**In re** Enivid, Inc.),* 345 B.R. 426, 453 (Bankr.D.Mass.2006) (granting a motion to dismiss a deepening insolvency claim against officers and directors because the claims were subsumed within the breach of fiduciary duty claims in the same complaint). The motions by the Count VII Defendants to dismiss Count VII shall be granted.

H. Count VIII—Equitable Subordination

Count VIII alleges that all of the conduct of all of the defendants, as alleged in the complaint, has resulted in injury to FMC and conferred unfair advantage on each of the defendants. The Committee contends that any claim filed by any of the defendants against FMC should be equitably subordinated pursuant to 11 U.S.C. § 510(c).[5] All of the defendants, except for Rowell and Custom Travel of New Hampshire, Inc., have moved to dismiss Count VIII on one or both of two grounds. First, several defendants contend that they have not filed any claim against FMC and, therefore, there is no claim to subordinate and no relief available under 11 U.S.C. § 510(c). Second, several defendants contend that the allegations in the ***624** complaint are insufficient to make out a claim for equitable subordination.

The Committee agrees that Foss, Sexton, Darling, John Smyth, Foss Family LLC I, Foss Family LLC II, Business Helicopters, Inc. and Foss Family 2004 Irrevocable Trust (collectively the "Non–Claim Defendants") have not filed claims. In the absence of a claim which can be subordinated, Count VIII fails to state a claim against the Non–Claim Defendants. Accordingly, Count VIII shall be dismissed, without prejudice, as to the Non–Claim Defendants. Defendants Patricia Foss (Claim Nos. 204 and 600), Jenifer Foss Smyth (Claim Nos. 205 and 599), Rowell (Claim No. 472), Kinney (Claim No. 598), Dennis Foss (Claim Nos. 217 and 593), Custom Travel of New Hampshire, Inc. (Claim No. 581) and Foss Realty, Inc. (Claim No. 219) (collectively the "Claim Defendants") have all filed one or more claims. Therefore, their respective motions to dismiss Count VIII may be granted only if the complaint fails to state a claim for equitable subordination against them.

[64] [65] [66] [67] [68] "The essential purpose of equitable subordination is to undo any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of distribution of the estate." ***In re*** *Mid–American Waste, Inc.,* 284 B.R. 53, 68 (Bankr.D.Del.2002) *(citing Burden v. U.S.,* 917 F.2d 115, 117 (3d Cir.1990)). The United States Supreme Court has cited with approval, and the First Circuit Court of Appeals has adopted, the standards for equitable subordination articulated by the Fifth Circuit in *Benjamin v. Diamond (**In re** Mobile Steel Co.),* 563 F.2d 692 (5th Cir.1977). *U.S. v. Noland,* 517 U.S. 535, 538–39, 116 S.Ct. 1524, 134 L.Ed.2d 748 (1996); *Merrimac Paper Co., Inc. v. Harrison (**In re** Merrimac Paper Co., Inc.),* 420 F.3d 53, 59 (1st Cir.2005). In order to exercise the power of equitable subordination, the bankruptcy court must find that: (1) the creditor engaged in some type of inequitable conduct or fraud, (2) such conduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the creditor, and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code.[6] *Noland,* 517 U.S. at 538, 116 S.Ct. 1524; *Mobile Steel Co.,* 563 F.2d 692 at

699–700; *Merrimac Paper Co.,* 420 F.3d at 59; *Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (In re 604 Columbus Ave. Realty Trust),* 968 F.2d 1332, 1359–60 (1st Cir.1992). "Claims arising from dealings between a debtor and an insider are rigorously scrutinized by the courts. On the other hand, if the claimant is not an insider, 'then evidence of more egregious misconduct such as fraud, spoliation or overreaching is necessary.' " *604 Columbus Ave.,* 968 F.2d at 1360 (*quoting In re Fabricators, Inc.,* 926 F.2d 1458, 1465 (5th Cir.1991)). While "fraud or misrepresentation are the most frequent justifications for equitable subordination of the noninsider" something less than actual fraud is sufficient. *Id.* Substantial misconduct involving moral turpitude or a breach or misrepresentation where other creditors were deceived to their damage or gross misconduct amounting to overreaching is sufficient. *Id.*

Upon review of the complaint with respect to each of the three elements of equitable subordination, and for the reasons ***625** discussed below, Count VIII shall be dismissed as to Custom Travel of New Hampshire Inc. and Foss Realty, Inc. (the "Count VIII Corporate Creditors") and shall not be dismissed against Patricia Foss, Jenifer Foss Smyth, Kinney or Rowell. In addition, Count VIII shall be dismissed as to the preferred stock dividend portion of Dennis Foss's claim and not dismissed as to the remaining elements of his claim.

1. Patricia Foss—First Element

[69] The complaint alleges that Patricia Foss breached her fiduciary duty as a director of FMC by failing to institute adequate financial controls or to monitor the financial condition of FMC, despite express statements by the CFO that should have put her on notice of potential problems (¶¶ 8, 9, 16, 82–91). In addition, the complaint alleges that Patricia Foss improperly received direct or indirect payments from FMC for personal expenses such as improvements to her personal residence, personal travel, improvements to her daughter's personal residence, and improper payments for the benefit of entities owned or controlled by her (¶¶ 4(v)-(vii), 4(ix), 99–103, 112–115). It is undisputed that Patricia Foss is an insider of FMC. 11 U.S.C. § 103(31)(B)(i). Accordingly, her dealings with FMC are subject to rigorous scrutiny. The Court finds that the complaint's allegations regarding her failure to perform the basic duties of a director while FMC paid many of her personal expenses states a plausible claim against her for inequitable conduct, the first element of equitable subordination.

2. Jenifer Foss Smyth—First Element

[70] The complaint alleges that Jenifer Foss Smyth breached her fiduciary duty as a director of FMC by failing to institute adequate financial controls or to monitor the financial condition of FMC, despite express statements by the CFO that should have put her on notice of potential problems (¶¶ 8, 9, 17, 82–91). In addition, the complaint alleges that Jenifer Foss Smyth improperly received direct or indirect payments from FMC for personal expenses such as improvements to her personal residence and personal travel (¶¶ 4(v)-(vi), 99–101, 103, 112–115). It is undisputed that Jenifer Foss Smyth is an insider of FMC. 11 U.S.C. § 101(31)(B)(i). Accordingly, her dealings with FMC are subject to rigorous scrutiny. The Court finds that the complaint's allegations regarding her failure to perform the basic duties of a director while FMC paid many of her personal expenses states a plausible claim against her for inequitable conduct, the first element of equitable subordination.

3. Douglas Kinney—First Element

[71] The complaint alleges that Kinney breached his fiduciary duty as a director of FMC by failing to institute adequate financial controls or to monitor the financial condition of FMC, despite express statements by the CFO that should have put him on notice of potential problems (¶¶ 8, 9, 16, 82–91) and thereby permitted members of the Foss family, including his stepson John Smyth and daughter-in-law Jenifer Foss Smyth, to receive improper payments from FMC (¶¶ 19, 99–101, 114, 115). It is undisputed that Kinney is an insider of FMC. 11 U.S.C. § 101(31)(B)(i). The Court finds that the complaint's allegations regarding his failure to perform the basic duties of a director while FMC paid the personal expenses of his stepson and daughter-in-law states a claim against him for inequitable conduct, the first element of equitable subordination.

***626 4. Dennis Foss—First Element**

[72] The complaint alleges that Dennis Foss, Foss's brother, is an insider and received direct and indirect payments from FMC for loan repayments, illegal dividends, redemption of worthless FMC stock and payment of expenses for Foss Realty, Inc., an entity owned or controlled by him (¶¶ 4(i)-(ii), 22, 24, 118, 124(d), 125–128).[7] As discussed in section III.E.4 above, the complaint states a claim that Dennis Foss had information at the time the alleged loan repayments, dividends and stock redemption agreements were made to know that such payments were unlawful. It is undisputed that

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Dennis Foss is Foss's brother, a former officer and director of FMC, and, therefore, is an insider of FMC. 11 U.S.C. § 101(31)(B)(vi).

The complaint does not allege that Dennis Foss breached any fiduciary duty to FMC or its creditors. The complaint does not allege that Dennis Foss undertook any affirmative inequitable conduct or fraud. Dennis Foss entered into a stock redemption agreement with FMC in August 2000, for 22.84% of FMC's common stock (the "Stock Redemption"). The complaint does not allege that at the time the Stock Redemption was first agreed upon, FMC was in default under any of its loan agreements or was in financial difficulty. [8] The complaint does not state a claim that the Stock Redemption agreed upon in 2000, between Dennis Foss and FMC was wrongful or inequitable. However, the complaint does allege that Dennis Foss's sole remedy in the event of a default under the note dated April 25, 2001 (the "2001 Note") is conversion of the then-outstanding balance due back into common stock. In the context of the obligation evidenced by the 2001 Note, such a remedy appears to be inconsistent with a debt obligation and more consistent with an obligation subordinated to debt in terms of the remedy for default. *See Racusin v. Am. Wagering, Inc. (In re Am. Wagering, Inc.),* 465 F.3d 1048 (9th Cir.2006) (claim based upon a final money judgment arising from a breach of contract to issue stock in payment for services is not subject to subordination because the remedy for default is recovery of the unpaid debt). Accordingly, the complaint does state a plausible claim for the first element of equitable subordination regarding the obligations arising from the Stock Redemption.

[73] The complaint alleges that Dennis Foss loaned FMC $500,000.00 on February 27, 2004 (the "2004 Note"), in order to satisfy a condition by FMC's bank lender for additional investment into FMC in order to continue honoring corporate checks despite the overadvance under the revolving loan agreement (¶ 50). The complaint also alleges that Foss loaned FMC $1,000,000.00 at the same time for the same reason (¶¶ 48–50, 128). The complaint states a claim that at the time the ***627** $500,000.00 "loan" was made to FMC by Dennis Foss, the corporation was undercapitalized, at least in the opinion of its bank lender (¶ ¶ 48–50). If the corporation were undercapitalized, then the claim represented by the 2004 Note could be equitably subordinated to other debt. *Pepper v. Litton,* 308 U.S. 295, 309–10, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *Mobile Steel,* 563 F.2d at 702. The corporation could be found undercapitalized if, at the time of the 2004 Note, a reasonably prudent person with background knowledge of FMC's business and the risks it faced, would determine that its capitalization was insufficient in February of 2004. *Id.* at 703. The allegations in the complaint regarding the general financial condition of FMC in early 2004, coupled with the allegations regarding the analysis of its condition by its then-primary bank lender are sufficient to support a plausible claim for subordination of the 2004 Note. Dennis Foss has filed a proof of claim (Claim No. 217, amended by Claim No. 593) for the amounts owed to him under the 2004 Note. Accordingly, the complaint does state a plausible claim against him at least for inequitable conduct in connection with the 2004 Note, the first element of equitable subordination.

The complaint does not allege any inequitable conduct by Dennis Foss in connection with his acquisition of the preferred stock of FMC or any allegation regarding actual or attempted control over the decisions of FMC regarding the preferred stock. Accordingly, the complaint does not state a claim for the first element of equitable subordination regarding the preferred stock dividend portion of his claim.

5. Custom Travel of New Hampshire, Inc. and Foss Realty, Inc.—First Element

[74] Custom Travel of New Hampshire, Inc. has filed a proof of claim (Claim No. 581) for $4,200.00 of consulting fees due for the period July 1, 2005, through September 30, 2005. Foss Realty, Inc. filed a proof of claim (Claim No. 219) for $806,377.03 on account of two claims. The first claim is for $663,397.26 representing the balance due for principal and interest, as of the petition date, on a promissory note dated August 16, 2001, for purchase money financing for real estate conveyed to FMC by Foss Realty, Inc. The second claim is for $142,979.77 representing the balance due for principal and interest, as of the petition date, on funds advanced by Foss Realty, Inc. to FMC on August 31, 2001. The purpose of the advance of funds which support the second part of the claim is not disclosed.

The complaint does not allege any wrongful or fraudulent conduct on the part of the Count VIII Corporate Creditors. There are no allegations in the complaint that the fees which form the basis for the claim of Custom Travel of New Hampshire, Inc. were fraudulent or wrongful. There are no allegations that either of the obligations which constitute the elements of the claim of Foss Realty, Inc. were fraudulent or wrongful. Accordingly, the complaint does not state a claim for the first element of equitable subordination against the Count VIII Corporate Creditors.

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6. Remaining Count VIII Defendants—Second Element

[75] The second element of equitable subordination is whether the conduct of the defendant creditor resulted in injury to the creditors of FMC or conferred an unfair advantage on the creditor. The Court's review of the second element shall be limited to those claims for which the complaint has satisfied the first element of equitable subordination. The complaint alleges that as a result of the wrongful ***628** conduct by Patricia Foss, Jenifer Foss Smyth, Kinney, and Dennis Foss, FMC lost millions of dollars through payment of illegal dividends, excessive compensation and expense reimbursement, wrongful payment of personal expenses for insiders and wrongful payments to or for the benefit of entities owned by insiders (¶¶ 1, 2, 4, 8, 92–110, 112–115, 117–118), all of which allegedly damaged FMC. The complaint states a plausible claim for the second element of equitable subordination against the remaining Count VIII defendants.

7. Remaining Count VIII Defendants—Third Element

The third element of equitable subordination is whether subordination would be inconsistent with the provisions of the Bankruptcy Code. None of the defendants contend that subordination of claims held by insiders for breach of fiduciary duty or other inequitable conduct is contrary to the provisions of the Bankruptcy Code. Subordination of claims based upon the alleged conduct of the remaining Count VIII defendants is consistent with the traditional principles of equitable subordination, codified at 11 U.S.C. § 510(c), to the extent that the third element of the *Mobile Steel* test has not been rendered moot by the enactment of § 510(c) of the Bankruptcy Code. The complaint states a plausible claim for the third element of equitable subordination.

I. Count IX—Recharacterization

Count IX alleges that the claim of Dennis Foss should be recharacterized by the Court as equity rather than debt. The claim of Dennis Foss is stated in Claim No. 217, as amended by Claim No. 593, and consists of three parts. The first part is a claim under the 2001 Note for principal and interest in the amount of $5,047,915.36 due, as of the Petition Date. The second part is a claim under the 2004 Note for principal and interest in the amount of $334,384.34 due, as of the Petition Date. The third part is a claim for accrued but unpaid dividends in the amount of $363,412.50 on FMC's Series A Preferred Stock (the "Stock Dividend"). Dennis Foss contends that Count IX must be dismissed as to the 2001 Note and the Stock Dividend claims for one or more of three arguments: (1) the claim for recharacterization is barred by the statute of limitations, (2) the complaint fails to state a claim for recharacterization under the test adopted in ***In re*** *Micro–Precision Techs., Inc.,* 303 B.R. 238 (Bankr.D.N.H.2003), and (3) the NH BC Act, NH RSA 293–A:6:40(f), provides that indebtedness such as the 2001 Note is treated at parity with the corporation's general unsecured debt, unless agreed otherwise. Dennis Foss argues that Count IX must be dismissed as to the 2004 Note for the second reason that it should be dismissed as to the 2001 Note. The Committee disputes the existence of any statute of limitations and contends that the complaint states a claim under the *Micro–Precision* test.

[76] Although the Bankruptcy Code does not expressly authorize the recharacterization of claims, the parties do not dispute that the bankruptcy court has the power to recharacterize claims. Every circuit court that has considered the issue has upheld the power of the bankruptcy court to recharacterize claims. *Fairchild Dornier GmbH v. Official Committee of Unsecured Creditors (**In re** Official Committee of Unsecured Creditors for Dornier Aviation (North Am.), Inc.),* 453 F.3d 225, 231 (4th Cir.2006); *Cohen v. KB Mezzanine Fund II, LP (**In re** SubMicron Sys. Corp.),* 432 F.3d 448, 455 (3d Cir.2006); *Sender v. The Bronze Group, Ltd. (**In re** Hedged–Investments Assoc., Inc.),* 380 F.3d 1292, 1298 (10th Cir.2004); *Bayer* ***629** *Corp. v. MascoTech, Inc. (**In re** AutoStyle Plastics, Inc.),* 269 F.3d 726, 748 (6th Cir.2001); *Estes v. N & D Props., Inc. (**In re** N & D Props., Inc.),* 799 F.2d 726, 733 (11th Cir.1986); *contra Unsecured Creditors' Committees of Pacific Express, Inc. and Pacific Express Holding, Inc. v. Pioneer Comm. Funding Corp. (**In re** Pacific Express, Inc.),* 69 B.R. 112, 115 (9th Cir. BAP 1986). This Court agrees with and adopts the Fourth Circuit's analysis of the Bankruptcy Code's claims allowance and payment provisions. *Dornier,* 453 F.3d at 231–33. Recharacterization "is well within the broad powers afforded a bankruptcy court in § 105(a) and facilitates the application of the priority scheme laid out in § 726." *Id.* at 231. The Fourth Circuit's analysis of the powers of the bankruptcy court to recharacterize a debt as equity under § 105(a) is consistent with the First Circuit's views regarding the use of that section by the bankruptcy courts. *Noonan v. Sec'y of Health and Human Servs. (**In re** Ludlow Hospital Society),* 124 F.3d 22, 28 (1st Cir.1997) (a bankruptcy court may invoke § 105(a) if the equitable remedy utilized is demonstrably necessary to fulfill a specific provision of the Bankruptcy Code).

[77] **[78]** **[79]** **[80]** **[81]** The Committee has brought claims against Dennis Foss for equitable subordination and recharacterization. Although the two claims result in similar economic consequences, they are separate and distinct causes of action. *Aquino v. Black (In re AtlanticRancher, Inc.),* 279 B.R. 411, 433 (Bankr.D.Mass.2002). "In a recharacterization analysis, if the court determines that the advance of money is equity and not debt, the claim is recharacterized and the effect is subordination of the claim 'as a proprietary interest because the corporation repays capital contributions only after satisfying all other obligations of the corporation.' " *Id.* (citations omitted). Recharacterization of a claim is appropriate where the circumstances show that an apparent debt transaction was actually an equity contribution *ab initio. AutoStyle,* 269 F.3d at 747–48. Equitable subordination is appropriate when due to the misconduct of a creditor, the creation of their debt is inequitable *vis-a-vis* other creditors. *Blasbalg v. Tarro (In Hyperion Enters., Inc.),* 158 B.R. 555, 561 (D.R.I.1993). "While a bankruptcy court's recharacterization decision rests on the *substance of the transaction* giving rise to the claimant's demand, its equitable subordination decision rests on its assessment of the *creditor's behavior." Dornier,* 453 F.3d at 232 (emphasis in the original).

1. Statute of Limitations

Dennis Foss contends that the recharacterization of his claim on the 2001 Note is barred by the statute of limitation. However, he fails to cite to any authority for his contention. Since Count IX is a recharacterization claim brought under the Bankruptcy Code, as part of seeking a determination from the Court regarding the proper treatment of the obligations of FMC described in his claims, for purposes of distribution from the bankruptcy estate, this Court discerns no applicable statute of limitations justification for dismissal of Count IX.

2. Failure to State a Claim for Recharacterization

[82] **[83]** **[84]** The Sixth Circuit Court of Appeals has considered recharacterization under a test consisting of eleven factors.[9] ***630** However, the courts in the First Circuit have not utilized that test because in their view it suggests that undercapitalization alone may be sufficient to justify recharacterization of debt as equity. *AtlanticRancher,* 279 B.R. at 434; *Hyperion,* 158 B.R. at 561. This Court concurs with these First Circuit decisions. Undercapitalization alone is insufficient, without something more, to trigger recharacterization of debt as equity. Regardless of the standard used "[n]o one factor is controlling or decisive" and " '[t]he more [a transaction] appears to reflect the characteristics of ... an arm's length negotiation, the more likely such a transaction is to be treated as debt.' " *Micro–Precision,* 303 B.R. at 246–47. This approach is consistent with prior recharacterization decisions in this district.[10] Accordingly, the Court shall focus on the factors employed by the courts in the *Micro–Precision, AtlanticRancher* and *Hyperion* decisions. Those factors are:

1. the adequacy of capital contributions;

2. the ratio of shareholder loans to capital;

3. the amount or degree of shareholder control;

4. the availability of similar loans from outside lenders;

5. certain relevant questions, such as:

a. whether the ultimate financial failure was caused by undercapitalization;

b. whether the note included payment provisions and a fixed maturity date;

c. whether the note or other debt document was executed;

d. whether advances were used to acquire capital assets; and

e. how the debt was treated in the business records.

Micro–Precision, 303 B.R. at 246; *Hyperion,* 158 B.R. at 561; *AtlanticRancher,* 279 B.R. at 434. For the reasons discussed below, the Court shall grant the motion to dismiss Count IX as to the Stock Dividend portion of Dennis Foss's claim and deny the motion as to the 2001 Note and the 2004 Note portions of his claim.

a. The 2001 Note

[85] The 2001 Note amended and restated an obligation originally evidenced by a promissory note dated August 15, 2000, issued in partial payment for a redemption of 55.5 shares of FMC's common stock then held by Dennis Foss, the Stock Redemption. The Stock Redemption apparently redeemed all of the shares of ***631** common stock in FMC owned by Dennis Foss, or approximately 22.84% of all outstanding shares. The original promissory note was issued

at a stated interest rate of 7.5% and was payable over a twenty-four month period in accordance with a payment schedule attached to the note. When FMC was unable to make the payments when scheduled, the 2001 Note was issued to reflect an agreement to amend the terms of the original note. The 2001 Note provided for interest at the stated rate of 7.5%, payable monthly, with scheduled payments of principal beginning July 15, 2001, and ending on October 15, 2004. Under the original obligation, $3,481,600.00 was due and payable by January 15, 2003. Under the 2001 Note, $2,828,799.87 of the $3,981,600.00 in principal owed on April 25, 2001, or 71% of the principal owed, was rescheduled to be due after the original maturity date of January 15, 2003. The purpose of the 2001 Note was to restructure the August 2000 obligation of FMC to Dennis Foss in connection with the complete redemption of his common stock in the corporation. The original promissory note had the apparent effect of converting his equity interest in FMC into debt. However, the complaint does allege that Dennis Foss's sole remedy in the event of a default under the 2001 Note is conversion of the then-outstanding balance due back into common stock. The terms of the 2001 Note are consistent with a debt instrument, but the remedy for default is inconsistent with a debt instrument. The alleged sole remedy renders the redemption effective only to the extent that periodic payments are actually made. In effect, the terms of the 2001 Note could be plausibly construed to amount to a creeping redemption.

The complaint alleges that Dennis Foss is Foss's brother and is a preferred stockholder of FMC. Therefore, he is an insider. However, the complaint does not allege that Dennis Foss had or exercised any control over the operations of FMC. The complaint alleges that in February 2004, FMC was overadvanced on its revolving credit line and that its bank lender refused to extend the revolving credit temporarily to permit FMC to find a new lender without additional investments by FMC's "insiders." In response to that demand, Foss loaned FMC $1,000,000.00 and Dennis Foss loaned FMC $500,000.00 as evidenced by the 2004 Note. In section III.H.4 above, the Court found that the complaint did not allege that at the time of the Stock Redemption in 2000, FMC was in default of any of its obligations or in financial difficulty. The complaint does allege financial difficulties in 2001, and the agreement that resulted in the issuance of the 2001 Note necessarily implies some degree of financial difficulty at that time.

The 2001 Note appears to constitute an indebtedness of FMC to a shareholder in relation to the distributions to Dennis Foss of the Stock Redemption in August 2000. If the distribution of cash and the original promissory note in August 2000 did not render FMC insolvent at that time, the NH BC Act requires that such indebtedness be treated as a general unsecured obligation. NH RSA 293–A:6.40(f). The complaint does not contain any allegation that the rescheduling of FMC's indebtedness by the 2001 Note did anything to alter the nature of the initial distribution. However, the sole remedy in the event of a default under the 2001 Note is conversion of the then-outstanding balance due back into common stock. In the context of the obligation evidenced by the 2001 Note, such a remedy appears to be inconsistent with a debt obligation. *See Racusin v. Am. Wagering, Inc. (**In re** Am. Wagering, Inc.),* 465 F.3d 1048 (9th Cir.2006) (claim based upon a final money judgment arising from a breach of contract to issue stock in ***632** payment for services is not subject to subordination because the remedy for default is recovery of the unpaid debt). In the absence of any allegation that the 2001 Note adversely impacted the financial condition of FMC in April 2001, or any allegation that the original distributions in August 2000 in redemption of Dennis Foss's common stock violated the provisions of NH RSA 293–A:6.40(c), the complaint does not state a claim for recharacterizing the 2001 Note as equity. However, the alleged sole remedy under the terms of the 2001 Note raises a plausible inference that the parties to the 2001 Note viewed the unpaid balance as an equity investment. Accordingly, the complaint states a plausible claim for recharacterization of the 2001 Note.

b. The 2004 Note

The 2004 Note evidences a loan from Dennis Foss to FMC at a time when the corporation was in financial distress and required capital in order to continue the overadvance on its revolving loan agreement with its bank lender. The 2004 Note contains a stated interest rate of 6.0%, payable monthly, with principal payable on demand. The 2004 Note is expressly subordinated to FMC's obligations to its bank lender. The complaint alleges that Dennis Foss was an insider, preferred shareholder and unsecured creditor of FMC at the time he made the $500,000.00 loan evidenced by the 2004 Note. The complaint alleges that the loan was made in response to demands from FMC's bank for additional capital, subordinated to the bank's position, in order to permit further overadvance on FMC's revolving credit facility.

[86] The allegations in the complaint state a claim that, at the time Dennis Foss made the loan evidenced by the

2004 Note, FMC was undercapitalized, could not obtain additional capital from outside lenders absent infusion of subordinated debt by insiders, and that the reasons for the overadvance in 2004 lead to the ultimate financial collapse of the corporation. The terms of the 2004 Note result in its classification, at best, as subordinated unsecured debt and, at worst, as the economic equivalent of preferred stock. When the loan evidenced by the 2004 Note was made, Dennis Foss was a preferred shareholder of FMC. The Court finds that the complaint states a plausible claim that the loan evidenced by the 2004 Note was viewed as or intended to be treated as equity. Accordingly, the complaint states a claim for recharacterization of the 2004 Note.

3. The Stock Dividend

[87] The third part of Dennis Foss's claim arises from cumulative unpaid dividends on preferred stock of FMC, the Stock Dividend. The complaint contains no allegation that the preferred stock in question was issued at a time that FMC was in default of its obligations, that FMC was insolvent or that the Stock Dividend was not a legitimate method of capitalizing the corporation. Accordingly, the obligation for the Stock Dividend incurred by FMC under the terms of its outstanding preferred stock at the date of issuance appears to have been made in compliance with NH RSA 293–A:6.40. The allegations in the complaint and the facts alleged in Dennis Foss's proof of claim suggest that the corporation did not pay preferred stock dividends for a number of years prior to the Petition Date. The allegations in the complaint support a conclusion that the restrictions in NH RSA 293–A:6.60(c) prevented the payment of such dividends. Accordingly, the Court finds that the complaint fails to state a claim for recharacterization of the Stock Dividend portion of Dennis Foss's claim.

***633 J. Avoidable Transfer Counts**

The complaint contains numerous counts seeking to avoid various transfers to or on behalf of various defendants as being preferential and/or fraudulent under 11 U.S.C. §§ 544, 547, and 548, and applicable state law as set forth in NH RSA 545–A:4(I)(b), 5(I), and 5(II). The complaint seeks recovery for such avoidable transfers pursuant to 11 U.S.C. § 550. To establish a preference claim under the Bankruptcy Code, the Committee must prove the following:

1. The Debtor transferred an interest in property of the Debtor;

2. To or for the benefit of a creditor;

3. For or on account of an antecedent debt owed by the Debtor before such transfer was made;

4. Made while the Debtor was insolvent;

5. On or within ninety days of the date of the filing of the petition or between ninety days and one year before the date of the filing of the petition if the creditor was an insider at the time of the transfer; and

6. That enables such creditor to receive more than such creditor would receive if the case were a case under chapter 7, the transfer had not been made, and such creditor received payment of such debt to the extent provided by the provisions of title 11.

11 U.S.C. § 547(b); *Ford v. Skorich (In re Skorich),* 337 B.R. 441, 444–45 (Bankr.D.N.H.2006).

[88] **[89]** The Bankruptcy Code also contains a provision in 11 U.S.C. § 548 for avoiding fraudulent transfers, which permits a trustee to avoid a transaction, made within one year before the commencement of the bankruptcy case, that depletes a debtor's assets to the detriment of the bankruptcy estate.[11] The statute recognizes as fraudulent those transfers made with actual intent to hinder, delay or defraud creditors as well as those that are deemed to be constructively fraudulent because they are made for less than reasonably equivalent value, when the debtor is, or is rendered, insolvent, undercapitalized, or unable to pay its debts as they become due. *Dahar v. Jackson (In re Jackson),* 318 B.R. 5, 22 (Bankr.D.N.H.2004) (*quoting* King et al., *Collier on Bankruptcy* ¶ 548.01 (15th rev. ed.1998)); *see also Max Sugarman Funeral Home, Inc. v. A.D.B. Investors,* 926 F.2d 1248, 1254 (1st Cir.1991) ("The transfer of any interest in the property of a debtor, within one year of the filing of a petition in bankruptcy, is voidable by the trustee in bankruptcy if the purpose of the transfer was to prevent creditors from obtaining satisfaction of their claims against the debtor by removing the property from their reach."); *Richardson v. United States (In re Anton Noll, Inc.),* 277 B.R. 875, 878 (1st Cir. BAP 2002). To establish a fraudulent transfer claim under the Bankruptcy Code, the Committee must prove:

1. The Debtor transferred an interest in property of the Debtor or incurred an obligation, including any transfer

or obligation to or for the benefit of an insider under an employment contract;

2. Within one year prior to the filing of the bankruptcy petition;

3. With actual intent to hinder, delay, or defraud any creditor; or

***634** 4. The Debtor received less than reasonably equivalent value and

a. The transfer was made or obligation was incurred while the Debtor was insolvent or the Debtor was rendered insolvent by the transfer or obligation; or

b. The property remaining with the Debtor was an unreasonably small capital; or

c. The Debtor intended to incur debts that it would be unable to pay as they became due; or

d. The Debtor made such a transfer or incurred such an obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(A) and (B); *see Jackson,* 318 B.R. at 22–23; *Schreiber v. Emerson (In re Emerson),* 244 B.R. 1, 37 (Bankr.D.N.H.1999); *Breeden v. L.I. Bridge Fund, LLC (In re Bennett Funding Group, Inc.),* 232 B.R. 565, 570 (Bankr.N.D.N.Y.1999); *Ferrari v. Bar–Land Corp. (In re Zenox),* 173 B.R. 46, 48 (Bankr.D.N.H.1994). The Committee seeks to apply 11 U.S.C. § 548(a)(1)(B), the constructive fraud provision of the Bankruptcy Code, to avoid FMC's transfers to the various defendants, and not 11 U.S.C. § 548(a)(1)(A), the actual fraud provision of the Bankruptcy Code.

The Plaintiff also asserts claims under 11 U.S.C. § 544(b), the Bankruptcy Code provision permitting the avoidance of transfers that are voidable under applicable law by a creditor holding an unsecured claim that is allowable under 11 U.S.C. § 502 or that is not allowable only under 11 U.S.C. § 502(e). The "applicable law" referred to in 11 U.S.C. § 544(b) includes New Hampshire's version of the Uniform Fraudulent Transfer Act (the "UFTA"), found in NH RSA 545–A. The UFTA is similar to 11 U.S.C. § 548 of the Bankruptcy Code, *Emerson,* 244 B.R. at 38, and it defines transfers that are fraudulent as to present and future creditors as follows:

545–A:4 Transfers Fraudulent as to Present and Future Creditors.

I. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

NH RSA 545–A:4(I)(a) and (b).

[90] **[91]** 545–A:5 Transfers Fraudulent as to Present Creditors.

I. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or ***635** the debtor became insolvent as a result of the transfer or obligation.

II. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

NH RSA 545–A:5(I) and (II). Thus, under UFTA, transfers may be found fraudulent if made with actual intent to defraud (i.e., "actual" fraud claims under NH RSA 545–A:4(I)(a)), or if made under circumstances which, in the absence of actual fraud, are deemed fraudulent (i.e., "constructive" fraud claims under NH RSA 545–A:4(I)(b) and 545–A:5(I) and (II)). Again, the Committee seeks only to avoid constructive

fraud claims under NH RSA 545–A:4(I)(b) and NH RSA 545–A:5(I) and (II), not actual fraud claims under NH RSA 545–A:4(I)(a). Unlike actual fraud, constructive fraud is essentially unconcerned with intent and instead focuses upon economic effect and involves an analysis of objective factors. *Jackson,* 318 B.R. at 13, 18.

[92] Pursuant to 11 U.S.C. § 550(a), the Committee seeks to impose liability upon the transferees of any transfers that are avoidable under 11 U.S.C. §§ 544, 547, or 548. Section 550(a) specifically provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a)(1) and (2). Section 550(a) defines the party *from whom* a trustee, or the Committee in this case, may seek to recover the property preferentially or fraudulently transferred or the value or proceeds of such property. *Anton Noll,* 277 B.R. at 878; *Crafts Plus+, Inc. v. Foothill Cap. Corp. (In re Crafts Plus+, Inc.),* 220 B.R. 331, 334 (Bankr.W.D.Tex.1998). It "enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee." *Crafts Plus+,* 220 B.R. at 334 (*quoting* H.R.Rep. No. 595, 95th Cong., 1st Sess. 375–376 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 90 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5963, 6331, 5787, 5876).

K. Counts X to XIII—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Stephen Foss

The Committee seeks to avoid and to recover various transfers as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count X), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XI), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(II) (Count XII), and 11 U.S.C. §§ 548 and 550 (Count XIII). Foss seeks to dismiss the fraudulent transfer claims in Counts X through XIII on two grounds: (1) the Committee failed to plead any facts to support its assertion that the company was insolvent, and (2) the Committee's allegations of transfers by the Debtor to third-parties do not state a claim against Foss. Foss's motion to dismiss Counts X through XIII shall be denied.

1. Failure to Adequately Plead Insolvency

[93] As described above, the elements of fraudulent transfer claims vary depending ***636** upon the specific statute, but in general, each requires an allegation of a transfer of the debtor's property that was made, while the debtor was insolvent, undercapitalized or unable to pay its debts as they matured, for which the debtor received less than reasonably equivalent value. The "insolvency" requirement is set forth specifically at NH RSA 545–A:4(I)(b)(1) and (2), NH RSA 545–A:5(I) and (II), and 11 U.S.C. § 548(a)(B)(ii)(I), (II), and (III). In the complaint, the Committee alleges in Count X at ¶ 179 that "[a]t the time of each of such transfers, the Debtor (i) was engaged or was about to be engaged in a business or transaction for which the remaining assets of the Debtor were unreasonably small in relation to the business or transaction, or (ii) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due," in Count XI at ¶ 186 that "[t]he Debtor was insolvent at the time that each such transfer was made or became insolvent as a result of the making of such transfer," in Count XII at ¶ 192 that "[a]t the time of each of such transfers, the Debtor was insolvent and Defendant Stephen Foss had reasonable cause to believe that the Debtor was insolvent," and in Count XIII at ¶ 200 that "[a]t the time of each transfer, the Debtor (i) was insolvent or became insolvent as a result of such transfers, (ii) was engaged in business for which its remaining property was an unreasonably small capital, or (iii) intended to incur, or believed it would incur, debts that were beyond its ability to repay as they matured."

Foss argues that such bald assertions of insolvency are not enough to defeat his motion to dismiss for failure to state a claim.[12] Rather, he contends that the Committee was obligated to plead specific facts sufficient to support its allegation of insolvency. *See Prod. Res. Group, L.L.C. v. NCT Group, Inc.,* 863 A.2d 772, 782 (Del.2004) (indicating that to meet the burden to plead insolvency, as required to state a claim for the appointment of a receiver for a corporation, the plaintiff must plead facts that show that the corporation has either (1) a deficiency of assets below liabilities, with no reasonable prospect that the business can be successfully continued in the face thereof, or (2) an inability to meet maturing obligations as they fall due in the ordinary course of business).

In response, the Committee states that the complaint at ¶¶ 35 to 62 details the Debtor's financial difficulties since 2001 and alleges acts that contributed to the Debtor's continued operation beyond the point of insolvency. Specifically, in ¶ 36 the Committee alleges that "[s]ince at least 2001, if not earlier, the Debtor has been insolvent either because it was unable to pay its debts as they became due in the ordinary course of business, or because its probable liabilities exceeded the fair value of its assets, or both. In addition, at all material times hereto, the Debtor was engaged in business without adequate capital and/or was incurring debts beyond its ability to repay them when due." The Committee further alleges in ¶ 37 that "[t]he Debtor sustained itself throughout this time frame by operating on credit, in the form of asset-based revolving credit lines and open account trade credit extended by suppliers of goods and services." The Committee also states in ¶ 60 that "[t]he manipulations of the Debtor's inventory and accounts receivable masked the long- ***637** standing fact that the Debtor was insolvent and a huge credit risk, and allowed the Debtor to continue to prolong its business operations far beyond the point of viability." The Committee contends that FRCP 9(b) does not require detailed statements regarding insolvency for fraudulent transfer claims but, even if it did, the complaint pleads insolvency with particularity. *See Levitt v. Riddell Sport, Inc. (In re MacGregor Sporting Goods, Inc.),* 199 B.R. 502, 514–15 (Bankr.D.N.J.1995).

[94] Without deciding whether FRCP 9(b), rather than FRCP 8(a), applies to the Committee's constructive fraud claims under state law and the Bankruptcy Code, [13] the Court concludes that the complaint sufficiently pleads insolvency to survive Foss's motion to dismiss and to allow discovery to proceed on these counts. "To survive a motion to dismiss, a plaintiff only has to allege sufficient facts, not prove them." *Koppel v. 4987 Corp.,* 167 F.3d 125, 133 (2d Cir.1999) (*cited in Enron,* 2006 WL 2400369, at *4). Foss has been given sufficient notice regarding the Committee's claim of insolvency in Counts X through XIII. *See Sharp v. Chase Manhattan Bank USA, N.A. (In re Commercial Fin. Servs., Inc.),* 322 B.R. 440, 451 (Bankr.N.D.Okla.2003) (concluding that general allegations of insolvency adequately gave fair notice to a defendant of the existence of that element of a fraudulent transfer claim). The Court finds that the complaint alleges sufficient facts to support a plausible finding of insolvency. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, ——, 127 S.Ct. 1955, 1967, 167 L.Ed.2d 929 (2007).

2. Failure to Allege Transfer of Property to the Defendant

Foss seeks dismissal of Counts X through XIII to the extent they are based upon allegedly improper transfers to entities other than himself. As grounds for such request, Foss incorporated the memorandum submitted by Patricia Foss, Jenifer Foss Smyth, and John Smyth (the "Foss Family"), which was filed in support of their separate motion to dismiss. The Foss Family argues that the Committee's allegations in the complaint—that the Debtor made transfers or conveyances of property "directly or indirectly" to Patricia Foss, Jenifer Foss Smyth, and John Smyth (and, by incorporation, to Foss) when the Debtor made payments to specific entities in which some of these defendants may have had an interest, and made payments to other third-party vendors or service providers by reason of which these defendants allegedly benefitted—are inadequate and fail as a matter of law.

The Foss Family contends the fraudulent transfer claims fail on their face because the complaint does not demonstrate that they were transferees of "an interest of the debtor in property" as is required under 11 U.S.C. §§ 544(b) and 548. They argue the complaint lacks an allegation that any member of the Foss Family exercised legal dominion or control at any time over any of the Debtor's funds. *See Anton Noll,* 277 B.R. at 879 (explaining that it is well settled that transferee status under ***638** 11 U.S.C. § 550(a) necessitates the transferee's "dominion and control," and that "dominion and control" refers to legal as opposed to mere physical possession of the property transferred); *In re BeaconVision, Inc.,* 340 B.R. 674, 678 (Bankr.D.N.H.2006) (explaining that a transferee is one who has "dominion over the money or other asset, the right to put the money to one's own purposes."). Rather, they argue all of the allegations against the Foss Family, other than a single allegation against Jennifer Foss Smyth relating to illegal dividends, demonstrate that the Debtor's actual funds were transferred to other individuals or wholly separate and distinct entities, in some cases to entities the Committee alleges Foss, Patricia Foss and/or Jenifer Foss Smyth have or may have had an interest in, and, in other cases, to suppliers and service providers whose goods or efforts allegedly provided some benefit to the Foss Family. According to the Foss Family, FMC's payments of charter fees, landing fees, fuel charges, and hangar space, for example, clearly do not represent transfers of an interest in the Debtor's property to them.

The Committee argues, first, that this is a technical argument that relates only to a small subset of the challenged transfers

and does not apply to transfers alleged to have been made directly to the defendants, e.g., more than $900,000.00 in extraordinary payments to Foss denominated as payroll payments, reimbursements paid to Foss for putative business expenses, payment on notes of over $1.7 million to Foss and Foss Family LLC II, and dividends of nearly $900,000.00 paid to Foss, Dennis Foss, the Foss Family 2004 Irrevocable Trust, and Jenifer Foss Smyth. The Committee argues, second, that FMC's purchase of goods or services that were subsequently given to Foss and the Foss Family constitutes "transfers of property" of FMC because Foss and the Foss Family received items, e.g., air transportation, country club services, and bricks and mortar for their homes, for which Foss and the Foss Family never made any payment or otherwise provided any valuable consideration to FMC in return. The Committee argues that the Court could properly "collapse" the purchase of bricks and mortar and other goods and services, and the subsequent gifting of the same to the Foss Family, as a single economic transaction that entailed the transfer of property to the Foss Family, insofar as in reality the Debtor paid the Foss Family's invoices for goods and services supplied to them personally. *See Wieboldt Stores, Inc. v. Schottenstein,* 94 B.R. 488, 502 (N.D.Ill.1988).

[95] In seeking to avoid transfers under both the UFTA and 11 U.S.C. § 548, the Committee must allege that FMC made transfers of its property to someone. However, contrary to the Foss Family's contention, FMC's complaint need not allege that Foss or the Foss Family were the transferees of such transfers nor must the complaint contain claims against the parties to whom such transfers were made, e.g., vendors, service providers, and companies in which theses defendants may have held an interest. Rather, the Court finds it sufficient if the complaint asserts that there are avoidable transfers under state or federal law and the Committee seeks to recover the property transferred, or its value, from Foss and the Foss Family pursuant to 11 U.S.C. § 550(a). *See IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.),* 408 F.3d 689, 706–08 (11th Cir.2005) (holding that 11 U.S.C. § 550(a) does not mandate a plaintiff to first pursue recovery against an initial transferee but, rather, if the plaintiff proves that an avoidable transfer exists he can skip over the initial transferee and recover from those next in line); *Shapiro* ***639** *v. Art Leather, Inc. (In re Connolly North Am., LLC),* 340 B.R. 829, 838 (Bankr.E.D.Mich.2006) (stating in the context of a preference action that "there is no apparent reason why the Trustee *must* sue both the initial transferee and the transfer beneficiary" and "[t]he absence of the initial transferee as a defendant in the action, without more, does not preclude the avoidance of the transfers at issue under § 547(b)"); *Leonard v. Optimal Payments Ltd. (In re Nat'l Audit Defense Network),* 332 B.R. 896, 915–16 (Bankr.D.Nev.2005) (concluding that once a trustee proves that a transfer is avoidable he may seek to recover against any transferee, initial or immediate, or an entity for whose benefit the transfer was made); *Crafts Plus+,* 220 B.R. at 338 (concluding that once it has been established that a qualified transfer has been made, 11 U.S.C. § 550 provides for the recovery against the initial transferee or the entity for whose benefit such transfer was made and there is no need to bring an independent action against or to name both the transferees and entities as a party to the litigation); *but cf. Weinman v. Simons (In re Slack–Horner Foundries Co.),* 971 F.2d 577, 580 (10th Cir.1992) (concluding that the trustee needed to bring suit against the initial transferee before the trustee could seek to recover from a subsequent transferee); *Enron Corp. v. Int'l Fin. Corp. (In re Enron Corp.),* 343 B.R. 75, 80–82 (Bankr.S.D.N.Y.2006) (dismissing claims against mediate transferees because the complaint did not first seek to avoid the transfers as to the initial transferees); *Greenwald v. Latham & Watkins (In re Trans–End Tech., Inc.),* 230 B.R. 101, 105 (Bankr.N.D.Ohio 1998) (granting a motion to dismiss where the trustee failed to either avoid the initial transfer by the debtor or name the initial transferee as a defendant concluding that a trustee must actually avoid an initial transfer as a prerequisite to obtaining recovery from a subsequent transferee); *Brandt v. Hicks, Muse & Co., Inc. (In re Healthco Int'l, Inc.),* 195 B.R. 971, 981–82 (Bankr.D.Mass.1996) ("An avoided 'transfer' is recoverable only from a 'transferee.' If the initial transferee makes a second transfer, the property may be recovered from the later transferee only if the 'transfer is avoided' with respect to the 'initial transferee.' ") (footnotes omitted).

Accordingly, the Court will not dismiss Counts X through XIII on that basis. [14] Additionally, for the reasons explained in the cases cited above, the Court need not engage in an analysis of whether the transactions outlined in the complaint should be viewed as "collapsed transactions," "indirect transfers," or a transfer in which the vendor or supplier were "mere conduits." *See, e.g., Wieboldt,* 94 B.R. at 502 (collapsing leveraged buy out transfers into one transaction stating "a court should focus not on the formal structure of the transaction but rather on the knowledge or intent of the parties involved in the transaction"); *In re Best Prods. Co.,* 157 B.R. 222, 229 (Bankr.S.D.N.Y.1993) ("The ability of a court to collapse a series of steps into one transaction depends upon the facts and circumstances of each case. In reality, collapsing

transactions is little more than effort on the part of the court to focus not on the formal structure of a transaction, ***640** but rather on the knowledge or intent of the parties involved in the transaction."). Rather, as long as the Committee has alleged that there are avoidable transfers under 11 U.S.C. §§ 544(b) and 548 as to third-parties, which it has done, Foss's and the Foss Family's motions to dismiss for failing to allege improper transfers directly to them shall be denied.

L. Counts XV to XVII—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Patricia Foss

The Committee seeks to avoid and to recover various transfers as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XV), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XVI), and 11 U.S.C. §§ 548 and 550 (Count XVII). Patricia Foss seeks to dismiss the fraudulent transfer claims in Counts XV through XVII on three grounds: (1) the Committee's allegations do not demonstrate that Patricia Foss was a transferee of an interest in property but rather indicate that she may have had an interest in an entity to which funds were transferred by FMC, (2) the Committee fails to allege under NH RSA 545–A:4(I)(b) and 5(I) that the alleged transfers were fraudulent as to a particular creditor, and (3) the Committee has not alleged that Patricia Foss was a transferee or entity for whose benefit such transfers were made for purposes of recovery under 11 U.S.C. § 550. Patricia Foss's motion to dismiss Counts XV through XVII shall be granted in part and denied in part.

1. Failure to Allege Transfer of Property to the Defendant

Patricia Foss argues that the Committee's complaint fails to state fraudulent transfer claims against her under either state law or bankruptcy law to the extent it details transfers of FMC's interest in property to third-party entities. For the reasons set forth above in section III.K.2, the Court concludes that the Committee's allegations are sufficient to set forth a plausible claim against Patricia Foss within the meaning of 11 U.S.C. § 550(a), subject to the discussion set forth below in section III.L.3.

2. Failure to Identify Specific Creditor

Patricia Foss contends that the Committee is required to identify a specific creditor with respect to the claims it brought under NH RSA 545–A:4(I)(b) and NH RSA 545–A:5(I) pursuant to 11 U.S.C. § 544(b), i.e., those claims asserted in Counts XV and XVI of the complaint. Having failed to identify a single creditor against whom any transfer was fraudulent, Patricia Foss argues that the Committee has not stated a viable claim. The Committee argues that neither state law nor the Bankruptcy Code requires the identification of the precise name of a creditor against whom the transfers were fraudulent.

[96] The Court agrees with the Committee that a *specific* creditor need not be identified in the complaint. However, the statute is clear that the Committee must show that the transfer is voidable under state law by at least one unsecured creditor of the bankruptcy estate who holds an allowable claim. 11 U.S.C. § 544(b) (providing for the avoidance of "any transfer of an interest of the debtor property ... that is voidable under applicable law by *a creditor holding an unsecured claim* ") (emphasis added); *see Ford v. Blaine (In re Mann),* 2006 BNH 032, 2006 WL 2591066, at *6 *(quoting Williams v. Marlar (In re Marlar),* 267 F.3d 749, 753 (8th Cir.2001)). In addition, NH RSA 545–A:4(I)(b) describes transfers that are fraudulent "as to ***641** a creditor" whose claim arose before or after the transfer and NH RSA 545–A:5(I) describes transfers that are fraudulent "as to a creditor" whose claim arose before the transfer was made. In the Court's view, the Committee can meet the pleading requirements of the federal rules by simply alleging that such a creditor exists; a complainant need not identify a specific creditor in order to survive a motion to dismiss claims brought under 11 U.S.C. § 544(b) and NH RSA 545–A:4 or 5. *See Giuliano v. U.S. Nursing Corp. (In re Lexington Healthcare Group, Inc.),* 339 B.R. 570, 576 (Bankr.D.Del.2006) ("The Trustee need not identify the name of a specific creditor on which the Trustee relies. The Trustee must eventually prove the existence of a specific creditor whose claim existed at the time of the alleged overpayments on the petition date, but is not required to do so at this stage of the process."); *Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.),* 195 B.R. 971, 980 (Bankr.D.Mass.1996) (stating, in the context of ruling on a motion to dismiss fraudulent transfer claims under the Massachusetts fraudulent conveyances act, the "[t]rustee need not name the creditor" because it was enough to allege under the liberal rule of notice pleading that "at least one qualified, unsecured creditor holding an allowable unsecured claim ... existed at the time of the [transfer]").

In Count XVI, at ¶ 218 of the complaint, the Committee alleges "[o]ne or more claims of the creditors of the Debtor arose before each such transfer and conveyance was made." The Committee failed to make a similar allegation in Count

XV. Because the Committee's complaint lacks an allegation regarding a required element under 11 U.S.C. § 544(b) and NH RSA 545–A:4(I)(b), i. e., that there exists an actual unsecured creditor holding an allowable unsecured claim, who could avoid the alleged fraudulent transfers, the Court concludes that the complaint fails to contain sufficient allegations to survive a motion to dismiss with respect to Count XV. *See Mann,* 2006 BNH 032, at *6 (finding in favor of defendants on a fraudulent transfer claim under NH RSA 545–A:5 as the chapter 7 trustee failed to demonstrate the necessary predicate under 11 U.S.C. § 544(b)(1) that a creditor existed at the time of the conveyance who held an allowed unsecured claim on the bankruptcy petition date). For that reason Count XV must be dismissed. Count XVI survives the motion to dismiss on this ground.

3. Failure to Allege Patricia Foss was Either a Transferee or Entity for Whose Benefit the Transfers were Made for Purposes of Recovery under 11 U.S.C. § 550

In addition to the "transfer" argument made by the Foss Family addressed in section III.K.2 above, Patricia Foss also contends that the complaint fails to allege that she was either an initial transferee or a subsequent transferee of an interest in FMC's property, within the meaning of 11 U.S.C. § 550(a)(1) and (2), or that she was "the entity for whose benefit such transfer was made," within the meaning of 11 U.S.C. § 550(a)(1). Rather, the complaint alleges that transfers were made to other entities [15] and, even if Patricia Foss and Jenifer Foss Smyth had an interest in such ***642** entities (e.g., Foss Family LLC I and Foss Family LLC II), that interest cannot be a basis for finding them liable as transferees of an avoided transfer. *See* NH RSA 304–C:25 (indicating no member or manager of a limited liability company shall be obligated personally for any debt of the company); *Turner v. Phoenix Fin. LLC (**In re** Imageset, Inc.),* 299 B.R. 709, 718 (Bankr.D.Me.2003) (stating that individuals' rights as interested holders in an LLC is not *alone* sufficient to qualify them as persons for whose benefit the transfers were made within the meaning of 11 U.S.C. § 550(a)(1)).

The Committee contends that the Foss Family is misguided in their analysis. The Committee states that it is not seeking to hold individual defendants, like Patricia Foss, liable on a strict liability or veil-piercing theory, but rather it seeks to hold them liable pursuant to 11 U.S.C. § 550(a)(1) because the avoidable transfers made to the LLCs are alleged to have been made with the intent of benefitting the members of the LLC, an allegation that must be accepted as true for purposes of a motion to dismiss. As an example, the Committee cites to its allegations in ¶ 23 of the complaint wherein the Committee alleges that FMC made payments totaling $156,950.00 to Foss Family LLC II, a company owned by Foss, Patricia Foss, and Jenifer Foss Smyth. The LLC then purportedly used those funds to pay the mortgage on real estate owned by the LLC. According to the Committee, those payments by FMC were directed by Foss to the LLC for a non-corporate purpose and dollar-for-dollar those payments benefitted the LLC's owners, including Patricia Foss and Jenifer Foss Smyth, whose equity interests in the LLC were enhanced by the cash payments made toward the LLC's mortgage. In response, the Foss Family argues that the complaint fails to allege that the Foss Family were the intended beneficiaries of such transfers by FMC or that they derived a benefit directly from the initial transfers.

Upon review, the Court finds that a fair reading of the complaint demonstrates the Committee has set forth the necessary elements to recover under 11 U.S.C. § 550(a) for some of the allegedly avoidable transfers under 11 U.S.C. §§ 544(b) and 548 but not for others. To establish a right to recovery under 11 U.S.C. § 550(a), the Committee needs to have alleged in the complaint, and will ultimately need to establish with evidence at trial, that Patricia Foss was either:

1. an initial transferee of an avoidable transfer;

2. an entity for whose benefit an avoidable transfer was made; or

3. a subsequent transferee of an initial transferee of an avoidable transfer.

11 U.S.C. § 550(a)(1) and (2); *see Bonded Fin. Servs., Inc. v. European Am. Bank,* 838 F.2d 890, 896 (7th Cir.1988); *Anton Noll,* 277 B.R. at 878. Thus, it is enough to allege that the Patricia Foss and other Foss Family members fall within one of these three categories.

The complaint alleges at ¶¶ 211, 217, and 224 in Counts XV, XVI, and XVII, respectively, that FMC made transfers or conveyances "directly or indirectly" to Patricia Foss and payments to or on behalf of Foss Family LLC I, Foss Family LLC II, and Custom Travel of New Hampshire, Inc. for improvements to Patricia Foss's personal residence, travel on the company jet (and associated hangar fees and jet fuel cots), personal club memberships and house account charges at numerous country clubs in Bermuda, Florida, New York,

and New Hampshire. More specific allegations ***643** are set forth in other portions of the complaint and described below.

a. Payments re: Patricia Foss

[97] The Committee asserts in ¶ 99 that payments totaling $12,874.03 were made by FMC to various vendors on account of improvements made to Foss's and Patricia Foss's Rye, New Hampshire residence. While the complaint does not explicitly indicate that Patricia Foss was an entity for whose benefit these purportedly avoidable transfers were made, the Court can plausibly infer that improvements made to an asset, in this case a home, benefit the owner of the asset, in this case, Patricia Foss. For that reason, the Committee has stated a claim against Patricia Foss for which relief may be granted. Similarly, ¶¶ 112 through 115 of the complaint outline payments totaling over $1.5 million to various entities, including payments totaling $1,452,541.31 that were made by FMC to Business Helicopters, Inc., an entity owned by Foss, for charges related to personal travel on a private jet by Foss, Patricia Foss, Jenifer Foss Smyth, and/or John Smyth for trips between New Hampshire and Naples, Florida, where Foss and Patricia Foss maintained personal residences. Again, while the complaint does not explicitly indicate that Patricia Foss was an entity for whose benefit these purportedly avoidable transfers were made, the allegations are sufficient for the Court to plausibly infer that payments were made so that Patricia Foss could enjoy personal travel between her personal residences resulting in a benefit to Patricia Foss.

b. Payments re: Foss Family LLC I

[98] **[99]** The complaint alleges in ¶ 26 that Foss, Patricia Foss, and Jenifer Foss Smyth are the members of Foss Family LLC I. The Committee further alleges in ¶ 124(a) of the complaint that FMC paid bills, including tax liabilities and costs associated with real property FMC did not own, in the amount of $23,099.77 "all for the benefit of Defendant Foss Family LLC I." The Committee states further in ¶ 93 that "over the course of many years, there were a vast number of improper transfers of the Debtor's funds, as detailed below, which benefitted Company insiders as well as entities in which they had a pecuniary interest." However, the complaint makes no specific allegation as to how the payments made to or on account of Foss Family LLC I benefitted Patricia Foss, as owner of Foss Family LLC I. An owner of an interest in a limited liability company is not personally obligated for the debts of the company simply because of the ownership interest. NH RSA 304–C:25. While it is possible that a transfer of property to an LLC may benefit an owner, the complaint must make allegations sufficient to support a plausible inference that Patricia Foss, as an owner, was benefitted. The Court finds that the complaint does not contain such allegations. Accordingly, the complaint fails to state a claim for recovery against Patricia Foss under 11 U.S.C. § 550(a) for transfers to or on account of Foss Family LLC I, and Counts XV to XVII shall be dismissed with respect to all transfers to that entity.

c. Payments re: Foss Family LLC II

[100] The complaint alleges in ¶ 27 that Foss, Patricia Foss, and Jenifer Foss Smyth are the members of Foss Family LLC II. Further, in ¶ 62, the Committee asserts that Foss Family LLC II, was an entity "created for the benefit of Foss family members" and in ¶ 93, it states that "over the course of many years, there were a vast number of improper transfers of the Debtor's funds, as detailed below, which benefitted Company insiders as well as entities in which they had a pecuniary ***644** interest." The complaint in ¶ 116(b) lists payments totaling $660,000.00 made by FMC to Foss Family LLC II for the repayment of insider loans. The complaint, however, fails to allege that Patricia Foss was an entity for whose benefit such transfers were made within the meaning of 11 U.S.C. § 550(a)(1). For that reason, the complaint fails to state a claim for recovery of $660,000.00 from Patricia Foss.

[101] Paragraph 120 of the complaint states that "the Debtor engaged in a number of real property transactions that resulted in properties and funds being transferred from the Debtor to entities in which various Foss family members had a pecuniary interest without valuable consideration, all to the detriment of the Debtor and its creditors." In ¶ 121, the Committee specifically alleges that FMC transferred a personal residence to Foss Family LLC II in 1997 and then thereafter it funded the mortgage payments on the property, which the Committee believes was occupied by the Foss family's housekeeper. In addition, as alleged in ¶ 122, FMC conveyed two other parcels of real estate to Foss Family LLC II without receiving valuable consideration in exchange for the transfers. As outlined in ¶ 123, during the period from October 15, 2001, to September 2, 2005, FMC forwarded at least $156,950.00 to Foss Family LLC II's bank account from which the mortgage payments for these three properties were withdrawn.

The Committee further alleges in ¶ 124 of the complaint that FMC paid bills, including tax liabilities and costs associated with real property FMC did not own, in the amount of $14,814.42 "all for the benefit of Defendant Foss Family LLC

II." In addition, the Committee alleges FMC made payments totaling at least $21,879.63 for maintaining and improving real estate owned by Foss Family LLC II, "on behalf of, and for the benefit of, Defendant Foss Family LLC II." As argued by the Committee in their response to the motion to dismiss, and as described above, such payments could plausibly have benefitted dollar-for-dollar the LLC's owners, including Patricia Foss and Jenifer Foss Smyth, whose equity interests in the LLC were enhanced by the cash payments made toward the LLC's mortgages. Because the Committee has made an additional allegation of benefit in ¶ 62 with respect to Foss Family LLC II, that it did not make with respect to Foss Family LLC I, and because the Court believes that a plausible inference can be made that Patricia Foss received a benefit by the payment of the company's mortgages and improvements, the Committee has stated a claim for recovery.

d. Payments re: Custom Travel of New Hampshire, Inc.

[102] The complaint alleges in ¶ 29 that Foss and/or Patricia Foss hold an ownership interest in Custom Travel of New Hampshire, Inc. In ¶ 119 of the complaint the Committee alleges that the Debtor paid no less than $64,700.00 in fees to Custom Travel of New Hampshire, Inc., a company owned by Foss and/or Patricia Foss, between November 2001 and June 2005. The complaint fails to allege that Patricia Foss was a person for whose benefit these purportedly avoidable transfers were made. For that reason, the Committee has not stated a claim for recovery of fees paid to Custom Travel of New Hampshire, Inc. from Patricia Foss. Patricia Foss's motion to dismiss on that basis shall be granted.

4. Patricia Foss's Motion to Dismiss Counts XV, XVI, and XVII

For the reasons set forth above, the Court concludes that the complaint adequately ***645** alleges that Patricia Foss has received the benefit of allegedly fraudulent transfers to or on behalf of herself, with respect to improvements to her home and personal travel, and to and on behalf of Foss Family LLC II, except with respect to repayment of insider loans, but the complaint does not adequately allege benefit to Patricia Foss with respect to transfers to or on behalf of Foss Family LLC I or Custom Travel of New Hampshire, Inc. Accordingly, the Court shall grant Patricia Foss's motion to dismiss Count XV in its entirety and Counts XVI and XVII to the extent stated in this subsection.

M. Counts XVIII and XIX—Avoidance of Fraudulent Transfers and Conveyances as to Defendants Jenifer Foss Smyth and John Smyth and Count XX—Avoidance of Voluntary and Involuntary Transfers as to Defendant Jenifer Foss Smyth

The Committee seeks to avoid and to recover various transfers as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XVIII) and 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XIX) as to Jenifer Foss Smyth and John Smyth. The Committee also seeks to avoid and to recover various transfers as being fraudulent under 11 U.S.C. §§ 548 and 550 (Count XX) as to Jennifer Foss Smyth alone. Jenifer Foss Smyth and John Smyth seek to dismiss the fraudulent transfer claims in Counts XVIII and XIX on three grounds: (1) the Committee's allegations do not demonstrate that Jenifer Foss Smyth and John Smyth were transferees of an interest in property but rather indicate that they may have had an interest in an entity to which funds were transferred by FMC, (2) the Committee fails to allege under NH RSA 545–A:4(I)(b) and 5(I) that the alleged transfers were fraudulent as to a particular creditor, and (3) the Committee has not alleged that Jenifer Foss Smyth and John Smyth were transferees or entities for whose benefit such transfers were made for purposes of recovery under 11 U.S.C. § 550. Jenifer Foss Smyth seeks to dismiss the fraudulent transfer claims in Counts XX on the first and third grounds listed above.

1. Failure to Allege Transfer of Property to the Defendants

For the reasons set forth in section III.K.2 above, the motion of Jenifer Foss Smyth and John Smyth to dismiss Counts XVIII and XIX based upon the Committee's failure to allege that they received transfers of property from FMC shall be denied.

2. Failure to Identify Specific Creditor

Like Patricia Foss, Jenifer Foss Smyth and John Smyth contend that the Committee's failure to identify a specific creditor with respect to its claims under 11 U.S.C. §§ 544(b) and NH RSA 545–A:4(I)(b) and NH RSA 545–A:5(I) requires dismissal of Counts XVIII and XIX. For the reasons explained in section III.L.2 above, the Committee was not required to identify a specific creditor in its complaint but rather was required to allege that there existed at least one unsecured creditor of the bankruptcy estate who holds an allowable claim.

Upon review of the complaint, the Court finds that the Committee has alleged in Count XIX at ¶ 236 that "[o]ne or more claims of the creditors of the Debtor arose before each such transfer and conveyance was made" but has failed to make a similar allegation in Count XVIII. Accordingly, for the reasons set forth in section III.L.2 above, Count XVIII shall be dismissed. Count XIX survives the Foss Family's motion ***646** to dismiss on the basis that the Committee failed to identify a creditor.

3. Failure to Allege Jenifer Foss Smyth and John Smyth were Either Transferees or Entities for Whose Benefit the Transfers were Made for Purposes of Recovery under 11 U.S.C. § 550

While Jenifer Foss Smyth acknowledges that the Committee made an allegation that she received funds directly from FMC in the form of dividends, she and her husband, John Smyth, deny that the complaint makes any other allegation that they were either initial or subsequent transferees of an interest in FMC's property or an entity for whose benefit such transfers were made. As previously discussed in section III.L.3 above, the complaint must allege that Jenifer Foss Smyth and John Smyth were either:

1. an initial transferee of an avoidable transfer;
2. an entity for whose benefit an avoidable transfer was made; or
3. a subsequent transferee of an initial transferee of an avoidable transfer.

11 U.S.C. § 550(a)(1) and (2).

a. Payments re: Jenifer Foss Smyth and John Smyth

[103] The complaint asserts in ¶ 99 that payments totaling $223,095.13 were made by FMC to various vendors on account of improvements made to the Smyths' Hamilton, Massachusetts residence. Paragraph 103 lists payments totaling $4,957.100 that were made by FMC to McLaughlin Transportation Systems for fees related to the storage of personal items of the Smyths during the renovation of their home. While the complaint does not explicitly indicate that the Smyths were entities for whose benefit these purportedly avoidable transfers were made, the Court can plausibly infer that improvements made to a home benefit the home's owners, as do payments to store the homeowners' goods. Accordingly, the Committee has stated a claim against both Jenifer Foss Smyth and John Smyth for which relief may be granted.

Similarly, ¶¶ 112 through 115 of the complaint outline payments totaling over $1.5 million to various entities, including payments totaling $1,452,541.31 that were made by FMC to Business Helicopters, Inc., an entity owned by Foss, for charges related to personal travel on a private jet by Foss, Patricia Foss, Jenifer Foss Smyth, and/or John Smyth for trips between New Hampshire and Naples, Florida. Again, while the complaint does not explicitly indicate that Jenifer Foss Smyth and John Smyth were entities for whose benefit these purportedly avoidable transfers were made, the Court can plausibly infer that payments were made so that Jenifer Foss Smyth and John Smyth could benefit from personal travel between their families' homes. Therefore, the Committee has stated a plausible claim for recovery with respect to these transfers.

b. Payments re: Foss Family LLC I

For the reasons outlined in section III.L.3.b above, the Committee has not stated a claim against Jenifer Foss Smyth with respect to payments to or on behalf of Foss Family LLC I. The complaint contains no allegations that John Smyth had an interest in or any involvement with Foss Family LLC I, and, therefore, any claims for recovery against him related to allegedly fraudulent transfers with respect to payments to or on behalf of Foss Family LLC I shall be dismissed.

c. Payments re: Foss Family LLC II

For the reasons outlined in section III.L.3.c above, the Committee has stated a ***647** claim against Jenifer Foss Smyth with respect to all payments to or on behalf of Foss Family LLC II, except the $660,000.00 in repayment of insider loans. The complaint contains no allegations that John Smyth had an interest in or any involvement with Foss Family LLC II, and, therefore, any claims for recovery against him related to allegedly fraudulent transfers with respect to payments to or on behalf of Foss Family LLC II shall be dismissed.

d. Payments re: Foss Family 2004 Irrevocable Trust

The complaint alleges in ¶ 28 that Jenifer Foss Smyth and her children are the beneficiaries of the Foss Family 2004 Irrevocable Trust. Paragraph 118 of the complaint lists $37,429.24 in dividends paid to the Foss Family 2004 Irrevocable Trust between August 16, 2004, and May 17,

2005. The complaint fails to allege that Jenifer Foss Smyth was a person for whose benefit such payments were made. For that reason, the Committee has not set forth a claim for recovery against Jenifer Foss Smyth under 11 U.S.C. § 550(a) and her motion to dismiss on that basis shall be granted. The complaint does not allege that John Smyth had an interest in or any involvement with the Foss Family 2004 Irrevocable Trust, and, therefore, any claims relating to this entity shall be dismissed as to him.

4. Jenifer Foss Smyth's and John Smyth's Motion to Dismiss Counts XVIII and XIX and Jennifer Foss Smyth's Motion to Dismiss Count XX

Thus, reviewing the complaint in the light most favorable to the Committee, the Court concludes that the complaint fairly alleges plausible claims that (1) Jenifer Foss Smyth and John Smyth have received the benefit of allegedly fraudulent transfers to or on behalf of themselves, with respect to improvements to their home, storage of personal property, and personal travel, and (2) Jenifer Foss Smyth has received the benefit of allegedly fraudulent transfers to or on behalf of Foss Family LLC II, except with respect to repayment of the insider loans, but that (3) neither Jenifer Foss Smyth nor John Smyth has received a benefit with respect to transfers to or on behalf of Foss Family LLC I or the Foss Family 2004 Irrevocable Trust. Accordingly, the Court shall grant Jenifer Foss Smyth's and John Smyth's motion to dismiss Count XVIII in its entirety and Counts XIX and XX to the extent outlined above.

N. Counts XXI to XXV—Avoidance of Fraudulent Transfers and Conveyances and Avoidance of Preferential Transfers as to Kevin Sexton

The Committee seeks to avoid and to recover various transfers to Sexton as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXI), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XXII), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(II) (Count XXIII), and 11 U.S.C. §§ 548 and 550 (Count XXIV), and as being preferential under 11 U.S.C. §§ 547 and 550 (Count XXV). Sexton seeks to dismiss the claims in Counts XXI through XXV on the following grounds: (1) the complaint seeks no recovery against Sexton in Counts XXI and as to him should be dismissed, (2) the money Sexton received was wages in exchange for which he performed services thus making the payments the "just debt" of FMC and not a transfer for less than reasonably equivalent value, (3) recovery under Count XXIII is barred by a one-year statute of limitations, (4) the payment of wages was for a contemporaneous ***648** debt and the complaint fails to allege an antecedent debt, and (5) the payments to Sexton as an employee were made in the ordinary course of FMC's business affairs and the complaint fails to allege that the payments were outside the ordinary course.

1. No Recovery Against Sexton in Count XXI

Sexton is incorrect in stating that the Committee has asserted no claim against him in Count XXI. Count XXI seeks to avoid and to recover various transfers by FMC to Sexton as being constructively fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b). Accordingly, Sexton's motion to dismiss shall be denied with respect to Count XXI.

2. Payment of "Just Debt" and Not Less than Reasonably Equivalent Value

[104] Sexton argues that all of the payments to him described in the complaint are wages within the meaning of NH RSA 275:42(III) and NH RSA 275:43(III) [16] for which Sexton provided services to FMC, and, as an employer, it had an obligation under NH RSA 275:44(IV) [17] to pay such wages to Sexton as and when due. Sexton contends that payments of the amounts set forth in the complaint were payments of a "just debt" and therefore were for reasonably equivalent value under NH RSA 545–A:3(I) and under 11 U.S.C. § 548(d)(2)(A), as these sections provide that value is given for a transfer if the property is transferred in satisfaction of an antecedent debt.

In response, the Committee argues that the challenged payments set forth in ¶ 97 of the complaint were "extraordinary payments over and above his salary," which is an allegation Sexton cannot controvert in his motion to dismiss. The Committee states further that FMC's payments to Sexton were not "just debts" for wages, but rather included forgiveness of the balance of a $30,000.00 personal loan FMC made to him, a bonus of $24,000.00, "consulting fees" totaling $18,400.00, payment of his country club bills in the amount of $7,544.00, and a "service award" of $25,000.00 given to him upon his resignation.

In his reply, Sexton argues that it does not matter whether such payments were ordinary or extraordinary as all payments owing from an employer to an employee whether in the nature of wages, bonuses, severance, or otherwise are "wages" under state statute that must be paid, and, therefore, they

constitute reasonably equivalent value warranting dismissal of the Committee's claim.

The Court agrees with the Committee and concludes that the complaint contains sufficient allegations in ¶¶ 87 and 97 and in Counts XXII and XXIV that, if true, would support a plausible claim for fraudulent transfers. There is no basis to dismiss Counts XXII or XXIV on the grounds that the Committee has failed to state a claim upon which relief can be granted as the complaint plainly states in ¶¶ 255 and 269 that the transfers were for less than reasonably ***649** equivalent value. Sexton is attempting to controvert this fact and argue a defense of reasonably equivalent value. However, an affirmative defense requires that the facts establishing the defense are definitively ascertainable from the complaint and those facts suffice to establish the affirmative defense with certitude. *Nisselson,* 469 F.3d at 150. At this early stage of the case, the Court cannot conclude that Sexton has a complete defense to each transfer. The Committee may be able to establish that these payments to Sexton were not in fact "compensation ... for labor or services rendered by an employee" within the meaning of NH RSA 275:42(III). *See ACAS Acquisitions (Precitech) Inc. v. Hobert,* 923 A.2d 1076, 1093–94 (N.H.2007) (concluding the employee's severance benefits were not wages under NH RSA 275, and, therefore, the employer did not violate NH RSA 275 in refusing to pay them).

3. Recovery under Count XXIII is Limited by Statute of Limitations

In Count XXIII, the Committee seeks to avoid and to recover transfers to Sexton under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(II). Sexton argues that the Committee's claim under this count is limited since recoveries may be had only within one year after the transfer was made or the obligation was incurred. The Committee does not dispute this contention. The Court agrees with Sexton that NH RSA 545–A:9(III) limits the Committee's recovery to transfers that occurred between September 16, 2004, and September 15, 2005, which would exclude recovery for transfers relating to the forgiveness of the balance of the $30,000.00 personal loan FMC made to him, the bonus of $24,000.00, and payment of Sexton's country club bills in the amount of $7,544.00.

4. Failure to Allege Antecedent Debt

The Committee seeks in Count XXIII to avoid and to recover transfers as fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(II) and in Count XXV to avoid and to recover transfers as preferential under 11 U.S.C. §§ 547 and 550. An element of each such claim is that the transfers be made on account of antecedent debt. Sexton argues that the complaint contains only a conclusory allegation of antecedent debt in ¶¶ 264 and 276 of the complaint. He states further that ¶ 97 of the complaint indicates that such payments were made at the same time the debts were incurred and contains no allegation that FMC's payments to Sexton were late, past due, or for bonuses earned earlier. Therefore, according to the Sexton, the payments were not for an antecedent debt but rather were for a contemporaneous debt.

The Committee responds by stating Sexton is essentially attempting to assert the "contemporaneous exchange for new value" defense of 11 U.S.C. § 547(c)(1)(A). The Committee contends Sexton has failed to clear the very high hurdle to have this claim dismissed on the grounds that he has an affirmative defense clearly proven by the allegations in the complaint. The Court agrees with the Committee and concludes that Sexton has not established this defense with certitude. The Committee is entitled to pursue its claim in Count XXIII to the extent not limited by the Court's other rulings.

5. Failure to Allege Outside of Ordinary Course

Sexton argues that the Committee's preferential transfer claim in Count XXV must be dismissed because the complaint ***650** contains no factual allegation that the payments to Sexton were outside the ordinary course of the business financial affairs of FMC and Sexton, as employer and employee. The Committee responds by stating Sexton is essentially attempting to assert the "ordinary course of business" defense of 11 U.S.C. § 547(c)(2), and its allegations in the complaint that the payments to Sexton were "extraordinary" and "improper" are sufficient to overcome Sexton's contention that the claim in Count XXV should be dismissed based on an affirmative defense. The Court agrees with the Committee that Sexton has failed to establish a defense with certitude as required, and, therefore, Sexton's motion to dismiss on that basis must denied.

6. Sexton's Motion to Dismiss Counts XXI to XXV

For the reasons set forth above, the Court shall deny Sexton's motion to dismiss Counts XXI, XXII, XXIV, and XXV, and shall deny the motion to dismiss Count XXIII, except to the extent that recovery shall be limited in this count by the one-year statute of limitations.

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O. Counts XXVI and XXVII—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Douglas Kinney

The Committee seeks to avoid and to recover various transfers to Kinney as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXVI) and 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XXVII). Kinney seeks to dismiss the fraudulent transfer claims in Counts XXVI and XXVII on the grounds that the Committee has failed to plead sufficient facts to establish a prima facie case and has instead only parroted elements of the statute. Like other defendants, Kinney argues that the Committee has (1) failed to adequately plead insolvency, and (2) failed to identify the existence of a specific creditor whose claim arose before the relevant transfers; further, Kinney contends that (3) the Committee has failed to adequately identify the property transferred, the date of the transfer, and the recipient of the transfer if it is anyone other than Kinney. Kinney's motion to dismiss Counts XXVI and XXVII shall be granted.

1. Failure to Adequately Describe Transfers

In Count XXVI at ¶ 281 and in Count XXVII at ¶ 287, the Committee alleges that "[u]pon information and belief, since September 16, 2001, the Debtor made transfers or conveyances of property directly or indirectly to Defendant Douglas Kinney." Kinney contends that the Committee has failed to adequately identify the property transferred, the date of the transfers, and the recipient of the transfers if it is anyone other than Kinney. However, Kinney acknowledges in his motion that the Committee may be referring to payment of director fees and expenses totaling $8,575.30 paid to Kinney in 2004. The Committee indicates in its reply memorandum that indeed it is referring to those transfers. Such transfers are detailed in ¶ 111 of the complaint wherein the Committee alleges that Kinney was paid director fees of $7,500.00 with a check dated July 22, 2004, and director expenses of $1,075.30 with a check dated August 17, 2004. The Court finds that Kinney has fair notice of the transfers at issue.

2. Failure to Adequately Plead Insolvency and Lack of Reasonably Equivalent Value

Kinney, like Foss, contends that the Committee failed to adequately plead the ***651** insolvency requirements of NH RSA 545–A:4(I)(b) and NH RSA 545–A:5(I). For the reasons set forth above in section III.K.1, the Court concludes that the complaint sufficiently pleads insolvency.

[105] [106] [107] Kinney also suggests that the complaint fails to adequately plead that the Debtor made a transfer to Kinney without receiving reasonably equivalent value. The Committee argues that the complaint clearly alleges that Kinney failed to perform his responsibilities as a director and therefore FMC did not receive any valuable services from Kinney in exchange for FMC's payment of director fees and expenses. The Committee has not alleged that the director's fee paid to Kinney was excessive nor has it alleged that Kinney failed to undertake to perform his duties as a director. Rather, the Committee's claim is based upon allegations that Kinney did not provide reasonably equivalent value due to the quality of his performance as a director. The distinction between the quality and the quantity of services provided is critical. *Boyd v. Sachs (**In re** Auto Specialties **Mfg**. Co.),* 153 B.R. 457, 498 (Bankr.W.D.Mich.1993). "Where ... the compensation is commensurate with the undertaking and the [defendant] attempts in good faith to fulfill that undertaking, fair consideration has been given." *Id.* The Committee has not alleged that Kinney acted in bad faith as a director, or that he failed to undertake the duties of a director, or that the compensation paid to him for service as a director was excessive for the undertaking. The Committee only alleges that the quality of his service as a director was not valuable. Bad business decisions without more cannot form the basis for a fraudulent conveyance action seeking recovery of compensation paid to an officer or a director. *Id.* at 499.

The Court finds upon review of the complaint that the Committee has not stated a fraudulent transfer claim against Kinney with respect to FMC's payment to him of director's fees and expenses. Therefore, Kinney's motion shall be granted on that basis.

3. Failure to Identify Specific Creditor

Like the Foss Family, Kinney also contends that the Committee's failure to identify a specific creditor with respect to its claims under 11 U.S.C. §§ 544(b) and NH RSA 545–A:4(I)(b) and NH RSA 545–A:5(I) requires dismissal of Counts XXVI and XXVII. For the reasons explained in section III.L.2 above, the Committee was not required to identify a specific creditor in its complaint but rather was required to allege that there existed at least one unsecured creditor of the bankruptcy estate who holds an allowable claim.

Upon review of the complaint, the Court finds that the Committee has alleged in Count XXVII at ¶ 288 that "[o]ne or more claims of the creditors of the Debtor arose before

each such transfer and conveyance was made" but has failed to make a similar allegation in Count XXVI. Accordingly, for the reasons set forth in section III.L.2 above, Count XXVI shall be dismissed on that basis as well. Count XXVII would survive Kinney's motion to dismiss for failing to identify a specific creditor.

P. Counts XXVIII to XXX—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Dennis Foss

The Committee seeks to avoid and to recover various transfers to Dennis Foss as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXVIII), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) ***652** (Count XXIX), and 11 U.S.C. §§ 548 and 550 (Count XXX). Dennis Foss seeks to dismiss the fraudulent transfer claims in Counts XXVIII through XXX on three grounds: (1) the Committee seeks to recover transfers outside the limitation period for the redemption of common stock, (2) there was reasonably equivalent value both for the repayment of the loan and for the preferred dividend payments, and (3) the complaint lacks factual allegations that would support a conclusion that (a) transfers were made at a time when the company was either engaged in a transaction for which the remaining assets were unreasonably small or was incurring debts beyond an ability to pay, or (b) the transfers would render the company insolvent.

1. Statute of Limitations

According to Dennis Foss, the complaint seeks the avoidance of the Stock Redemption, which took place in August 2000. Dennis Foss contends that the Committee's fraudulent conveyance claim fails with regard to the Stock Redemption because the transfer occurred outside the four-year limitation period contained in NH RSA 545–A:9(II) for claims brought under NH RSA 545–A:4(I)(b) and NH RSA 545–A:5(I). The Committee did not address this argument by Dennis Foss in its memorandum but indicated elsewhere that NH RSA 545–A:9(II) limits recovery to those transfers made within the four years preceding the petition date, which in this case would be transfers made since September 16, 2001.

Paragraph 125 of the complaint details the redemption of Dennis Foss's common stock and indicates that an agreement was made on August 8, 2000, pursuant to which FMC was to purchase Dennis Foss's shares of common stock for approximately $5,841,000.00, with $1,000,000.00 to be paid on August 8, 2000, $1,000,000.00 to be paid on October 1, 2000, and the balance of $3,481,600 to be paid over twenty-four months from February 15, 2001, to January 14, 2003. FMC made a $1,000,000.00 payment on August 8, 2000. FMC did not make the October 1, 2000, payment, but rather paid $500,000.00 on April 25, 2001, and executed the 2001 Note, which amended the original promissory note by increasing the principal amount to $3,981,600.00. According to the complaint, FMC made two $100,000.00 payments on the 2001 Note, for accrued interest, on May 21, 2002, and August 7, 2002.

While not clear from the complaint, it appears that the Committee seeks to avoid only these last two payments totaling $200,000.00, as these are the only transfers in connection with the Stock Redemption that fall within the four-year look-back period under the statute. The Court agrees with Dennis Foss that recovery of the prior payments totaling $1,500,000.00 are barred by the statute of limitations. To the extent the Committee bases its fraudulent conveyance claims in Counts XXVIII and XIX on the $1,500,000.00 in payments FMC made to Dennis Foss, such claims are barred and Dennis Foss's motion to dismiss on that basis shall be granted. To the extent the Committee bases its claims on the $200,000.00 in payments made in 2002, such claims are not barred and Dennis Foss's motion to dismiss on that basis shall be denied.

2. Existence of Reasonably Equivalent Value

Dennis Foss contends that the Committee's allegations in Counts XXVIII and XXIX fail to state a claim with respect to FMC's repayment of loans made by Dennis Foss to FMC. According to Dennis Foss, the complaint does not establish that FMC did not receive reasonably equivalent value in exchange for the transfers, a requirement ***653** of NH RSA 545–A:4(I)(b) and 545–A:5(I). He directs the Court's attention to NH RSA 545–A:3(I), which provides in relevant part that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied." Dennis Foss argues that the $200,000.00 in payments made to him pursuant to the 2001 Note, as described in ¶ 126 of the complaint, and the $200,000.00 in payments made to him pursuant to the 2004 Note, as described in ¶¶ 50 and 128 of the complaint, were made to satisfy antecedent debts.

[108] **[109]** The Committee did not address directly this argument of Dennis Foss. The Court finds it well founded. In general, NH RSA 545–A:4 and 5 provide for the avoidance of transfers as fraudulent only if a debtor does not receive reasonably equivalent value. Because the complaint alleges

that the payments on the 2001 Note and the 2004 Note were in satisfaction of the debt represented by those notes (¶¶ 125–128), the transfers made pursuant to those notes were by definition made for reasonably equivalent value, if the notes are debt instruments. For the reasons discussed in section III.I above, the Court shall deny Dennis Foss's motion to dismiss Count IX which seeks to recharacterize the 2001 Note and the 2004 Note as equity. If the Committee is successful in its recharacterization claims for one or both of the notes, then Dennis Foss's argument on the existence of reasonably equivalent value would likely fail. If either of the notes is recharacterized as equity, then any payments made to Dennis Foss on account of those instruments would be distributions to a shareholder in redemption of an equity interest. Redemption of an equity interest by an insolvent corporation provides no value to the corporation. *Liston v. Gottsegen (In re Mi–Lor Corp.),* 348 F.3d 294, 307 (1st Cir.2003) (citing *Consove v. Cohen (In re Roco Corp.),* 701 F.2d 978, 982 (1st Cir.1983)). For the reasons discussed in section III.P.3 below, the complaint contains allegations which support a plausible inference that FMC was insolvent when the payments in question were made. Accordingly, the motion to dismiss Counts XXVIII and XXIX shall be denied at this time. Dennis Foss may re-file his motion on these counts if and when Count IX is dismissed or resolved in his favor.

[110] Dennis Foss also argues that reasonably equivalent value was provided for the preferred dividend payments made to him. Paragraph 118 of the complaint alleges that Dennis Foss received $528,600.00 in illegal dividends paid to him as a preferred stockholder during the period November 2001, through May 2005. In his motion to dismiss, Dennis Foss explains, without citing to any allegations in the complaint, that the dividend payments were made pursuant to the terms of the Stock Redemption, which were incorporated into the August 2000 note and the 2001 Note. Dennis Foss contends that the preferred dividend payments were a contractual obligation of FMC and therefore an antecedent debt of the corporation for purposes of the state and federal fraudulent conveyance statutes. The Committee counters by stating that no consideration flowed to FMC on account of these obligations and therefore payments on these obligations are recoverable as fraudulent transfers to the extent FMC was insolvent when they were made. In a reply, Dennis Foss suggests that any recovery for the preferred dividend payments must be done in accordance with the NH BC Act, NH RSA 293–A, which contains a specific provision at NH RSA 293–A:8.33 setting forth liability for unlawful distributions, e.g., distributions made in violation of ***654** NH RSA 293–A:6.40 or the articles of incorporation. NH RSA 293–A:8.33 imposes liability on directors who authorize such payments. Shareholders who accept such distributions are liable for contribution to directors in the amount of any distribution they accepted knowing it was made in violation of NH RSA 293–A:6.40. Dennis Foss argues that this purportedly more specific statute controls over the more general fraudulent conveyance statutes.

The Court disagrees. NH RSA 293–A:8.33 creates liability on directors for approving or assenting to the payment of illegal dividends and grants to such directors certain contribution rights. This provision of the NH BC Act does not preempt any other remedy that a corporation may have against a person other than a director. However, in this case, FMC made the payment of preferred stock dividends to Dennis Foss pursuant to the terms of the issued and outstanding shares of preferred stock. As discussed in section III.I.3 above, the complaint does not allege that the issuance of the stock was fraudulent and does not allege that the payments were in violation of the NH BC Act, NH RSA 293–A:6.40. Accordingly, it appears that the dividends were payment on account of FMC's antecedent obligation under its preferred stock issue and, therefore, constitute value under NH RSA 545–A:3(I).

3. Failure to Plead Insolvency and Inadequate Capitalization

Dennis Foss asserts that the complaint lacks factual allegations that would support a conclusion that the specific transfers to him were made at a time when the company was either engaged in a transaction for which the remaining assets were unreasonably small or was incurring debts beyond an ability to pay or would render the company insolvent as a result of the transfers. Dennis Foss argues that bald and wholly conclusory statements are insufficient to withstand a motion to dismiss; rather, the Committee should have provided detailed information regarding FMC's finances during time periods relevant to its fraudulent transfer claims. Dennis Foss contends that the Committee should have used data from the audits referenced in ¶ 81 of the complaint to demonstrate FMC's insolvency at particular points in time. Instead, FMC merely provides information regarding covenant defaults with its lenders, which alone do not demonstrate that FMC was unable to pay its debts as they became due or that its liabilities exceeded its assets. Other than an allegation regarding its failure to pay certain insurance premiums, the Committee failed to allege that FMC did not pay or was unable to pay its trade or unsecured general

creditors. Dennis Foss argues that the complaint therefore fails to state claims for fraudulent transfers under both state and federal bankruptcy law.

For the reasons discussed above in section III.K.1, the Court concludes that the complaint makes sufficient allegations regarding insolvency, undercapitalization, and FMC's inability to pay its debts to meet the pleading requirements of the federal rules.

4. Dennis Foss's Motion to Dismiss Counts XXVIII, XXIX, and XXX

For the reasons set forth above, the Court shall grant Dennis Foss's motion to dismiss Count XXVIII as to any Stock Redemption payments that occurred beyond the four-year statute of limitations period of NH RSA 545–A:9(II) and as to the preferred dividend payments, and the Court shall otherwise deny Dennis Foss's motion to dismiss Counts XXVIII, XXIX, and XXX.

*655 Q. Counts XXXI and XXXII—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Foss Realty, Inc.

The Committee seeks to avoid and to recover various transfers to Foss Realty, Inc. as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXXI) and 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XXXII). Foss Realty, Inc. seeks to dismiss the fraudulent transfer claims in Counts XXXI and XXXII on the grounds that the Committee has failed to plead any facts to support its assertion that the company was insolvent. For the reasons set forth above in section III.K.1, the Court concludes that the complaint contains sufficient allegations, when viewed in the light most favorable to the Committee, to withstand Foss Realty, Inc.'s motion to dismiss. Accordingly, the Court shall deny Foss Realty, Inc.'s motion to dismiss Counts XXXI and XXXII.

R. Counts XXXIII to XXXV—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Foss Family LLC I

The Committee seeks to avoid and to recover various transfers to Foss Family LLC I as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXXIII), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XXXIV), and 11 U.S.C. §§ 548 and 550 (Count XXXV). Foss Family LLC I seeks to dismiss the fraudulent transfer claims in Counts XXXIII through XXXV on the grounds that the Committee has failed to plead any facts to support its assertion that the company was insolvent. For the reasons set forth above in section III.K.1, the Court concludes that the complaint contains sufficient allegations, when viewed in the light most favorable to the Committee, to withstand Foss Family LLC I's motion to dismiss. Accordingly, the Court shall deny Foss Family LLC I's motion to dismiss Counts XXXIII, XXXIV, and XXXV.

S. Counts XXXVI to XXXVIII—Avoidance of Fraudulent Transfers and Conveyances as to Defendant Foss Family LLC II

The Committee seeks to avoid and to recover various transfers to Foss Family LLC II as being fraudulent under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXXVI), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XXXVII), and 11 U.S.C. §§ 548 and 550 (Count XXXVIII). Foss Family LLC II seeks to dismiss the fraudulent transfer claims in Counts XXXVI through XXXVIII on the grounds that the Committee has failed to plead any facts to support its assertion that the company was insolvent. For the reasons set forth above in section III.K.1, the Court concludes that the complaint contains sufficient allegations, when viewed in the light most favorable to the Committee, to withstand Foss Family LLC II's motion to dismiss. Accordingly, the Court shall deny Foss Family LLC II's motion to dismiss Counts XXXVI, XXXVII, and XXXVIII.

T. Counts XXXIX to XLIII—Avoidance of Fraudulent and Preferential Transfers and Conveyances as to Defendant Business Helicopters, Inc.

The Committee seeks to avoid and to recover various transfers to Business Helicopters, Inc. as being fraudulent and/or preferential under 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:4(I)(b) (Count XXXIX), 11 U.S.C. §§ 544(b) and 550 and NH RSA 545–A:5(I) (Count XL), 11 U.S.C. §§ 544(b) and 550 and ***656** NH RSA 545–A:5(II) (Count XLI), 11 U.S.C. §§ 548 and 550 (Count XLII), and 11 U.S.C. §§ 547 and 550 (Count XLIII). Business Helicopters seeks to dismiss the claims in Counts XXXIX through XLIII on the grounds that the Committee has failed to plead any facts to support its assertion that the company was insolvent. For the reasons set forth above in section III.K.1, the Court concludes that the complaint contains sufficient allegations, when viewed in the light most favorable to the Committee, to withstand Business Helicopters, Inc.'s motion to dismiss. Accordingly,

the Court shall deny Business Helicopter, Inc.'s motion to dismiss Counts XXXIX, XL, XLI, XLII, and XLIII.

IV. CONCLUSION

This opinion constitutes the Court's rulings under FRCP 12(b)(6). The Court shall issue separate orders ruling on the defendants' various motions to dismiss.

Parallel Citations

2007 BNH 027

Footnotes

1 In general the Federal Rules of Civil Procedure are made applicable to this adversary proceeding, with some exceptions and additional provisions, by the Federal Rules of Bankruptcy Procedure. The Federal Rules of Civil Procedure shall be referred to as "FRCP" and the Federal Rules of Bankruptcy Procedure shall be referred to as "Rule" or the "Rules" in this opinion.

2 The Court notes that the heightened standards of FRCP 9(b) do not apply to all claims of fraud in this Circuit. In *Pearson v. First NH Mortgage Corp.* 200 F.3d 30 (1st Cir.1999), the First Circuit vacated a bankruptcy court order dismissing a motion to alter or amend an order approving a settlement and allowed a plaintiff to proceed to discovery based upon an alleged fraud where the motion only alleged a "colorable claim." *Id.* at 35. This Court is unable to discern the distinction between a moving paper that alleges a "colorable claim" and one that alleges a "plausible claim" under the standard in *BellAtlantic* applicable to FRCP 8(a).

3 In this opinion, numbers following the "¶ " symbol refer to the corresponding paragraph in the complaint.

4 Shareholders may be liable for a claim of contribution by a director who authorized such distribution if the shareholder accepted the dividend knowing it was illegal. NH RSA 293–A:8.33(b)(2).

5 Unless expressly stated otherwise, in this opinion the terms "11 U.S.C.," "Bankruptcy Code," "section" and " § " refer to title 11 of United States Code, 11 U.S.C. § 101 *et seq.,* prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109–8 ("BAPCPA").

6 The adoption of § 510(c) of the Bankruptcy Code in 1978 may very well have rendered the third element of the *Mobile Steel* test moot. *Blasbalg v. Tarro (In re Hyperion Enters., Inc.),* 158 B.R. 555, 560 (D.R.I.1993); *Diasonics, Inc. v. Ingalls,* 121 B.R. 626, 628 (Bankr.N.D.Fla.1990).

7 In Count IX, the Committee is seeking to recharacterize the two promissory notes which form the basis of Dennis Foss's proofs of claim as equity rather than debt. If either or both of those notes is recharacterized as equity, then equitable subordination of some or all of Dennis Foss's claim is no longer relevant. *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.),* 432 F.3d 448, 454–55 (3d Cir.2006); *Aquino v. Black (In re AtlanticRancher, Inc.),* 279 B.R. 411, 438 (Bankr.D.Mass.2002). In considering Dennis Foss's motion to dismiss Count VIII, the Court shall assume that Count IX is dismissed or that the Committee will not prevail at trial on Count IX. *SubMicron,* 432 F.3d at 455 (recharacterization must be resolved before consideration of equitable subordination).

8 The earliest allegation of financial difficulties in the complaint is that FMC was overadvanced on its revolving loan agreement with its bank lender "no later than calendar year 2001." ¶¶ 40–41.

9 The factors are: (1) the names given to the instruments, if any, evidencing the indebtedness, (2) the presence or absence of a fixed maturity date and a schedule of payments, (3) the presence or absence of a fixed rate of interest and interest payments, (4) the source of repayments, (5) the adequacy or inadequacy of capitalization, (6) the identity of interest between the creditor and the stockholder, (7) the security, if any, for the advances, (8) the corporation's ability to obtain financing from outside lending institutions, (9) the extent to which the advances were subordinated to the claims of outside creditors, (10) the extent to which the advances were used to acquire capital assets, and (11) the presence or absence of a sinking fund to provide repayments. *AutoStyle,* 269 F.3d at 749–50 (*citing Roth Steel Tube Co. v. Comm'r,* 800 F.2d 625, 630 (6th Cir.1986)).

10 "I do not believe however that bankruptcy judges have a warrant from Congress to run roughshod over the economic landscape recharacterizing commercial transactions entered into by sophisticated parties—restating them in terms of their 'economic substance' contrary to their negotiated and agreed form—in the absence of some *triggering factor* permitting such recharacterization, i.e. an actual ambiguity in the documents, a substantial factual dispute as to the intent of the parties, or some 'disguise' or 'misleading' aspect of the transaction." *Chicoine v. OMNE Partners II (In re OMNE Partners II),* 67 B.R. 793, 797 (Bankr.D.N.H.1986) (refusing to recharacterize a sale-leaseback transaction as a mortgage).

11 BAPCPA amended 11 U.S.C. § 548(a) and (b) to extend the coverage of those sections to transfers occurring two years before the petition date for cases commenced on or after April 20, 2006, one year after the date of enactment of BAPCPA.

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12 Foss acknowledges there is a presumption that FMC was insolvent for the 90–day period immediately preceding the date of the Debtor's bankruptcy filing which applies to preference claims pursuant to 11 U.S.C. § 547(f).

13 In *Enron Corp. v. Granite Constr. Co. (**In re** Enron Corp.),* Bk. No. 01–16034(AJG), Adv. No. 03–93172, 2006 WL 2400369, at *5 (Bankr.S.D.N.Y. May 11, 2006), the court explained that while there is authority that claims under 11 U.S.C. § 548(a)(1)(B) need to be plead with particularity under FRCP 9(b), the "better and majority rule" is that a claim for constructive fraud under that section need not be plead with particularity as such a claim is not premised on fraud but on a transfer made for inadequate consideration at the time the transferor was insolvent.

14 The Court will address in section III.L.3 below whether the Committee has made sufficient allegations regarding recovery under 11 U.S.C. § 550(a) with respect to the Foss Family in order to avoid dismissal of the counts against them. Foss has not sought to dismiss on those other grounds. If he had, the analysis set forth in that section would apply to the counts against him.

15 Patricia Foss concedes that the complaint makes out a well-pleaded claim based upon the direct transfer of funds by FMC to entities owned by individual defendants, such as Foss Family LLC I and Foss Family LLC II, which are limited liability companies owned by Foss, Patricia Foss, and Jenifer Foss Smyth, but she argues the complaint does not make out a well-pleaded claim to the extent the Committee seeks to recover directly against the owners of the entities.

16 Wages mean "compensation ... for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation" under NH RSA 275:42(III) and include "vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both" under NH RSA 275:43(III).

17 NH RSA 275:44(IV) sets forth the requirement of an employer to pay an employee's wages upon termination of an employee's employment.

End of Document

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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter IV. Administrative Powers

11 U.S.C.A. § 362

§ 362. Automatic stay

Effective: December 22, 2010
Currentness

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

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(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

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(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless

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such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

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(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

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(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded--

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(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

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(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

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(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless--

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended--

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)--

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b) (22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that--

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)--

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)--

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify--

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b) (23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied--

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)--

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor--

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply--

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if--

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2570; Pub.L. 97-222, § 3, July 27, 1982, 96 Stat. 235; Pub.L. 98-353, Title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub.L. 99-509, Title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub.L. 99-554, Title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub.L. 101-311, Title I, § 102, Title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub.L. 101-508, Title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 103-394,

Title I, §§ 101, 116, Title II, §§ 204(a), 218(b), Title III, § 304(b), Title IV, § 401, Title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub.L. 105-277, Div. I, Title VI, § 603, Oct. 21, 1998, 112 Stat. 2681-886; Pub.L. 109-8, Title I, § 106(f), Title II, §§ 214, 224(b), Title III, §§ 302, 303, 305(1), 311, 320, Title IV, §§ 401(b), 441, 444, Title VII, §§ 709, 718, Title IX, § 907(d), (o)(1), (2), Title XI, § 1106, Title XII, § 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub.L. 109-304, § 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub.L. 109-390, § 5(a)(2), Dec. 12, 2006, 120 Stat. 2696; Pub.L. 111-327, § 2(a)(12), Dec. 22, 2010, 124 Stat. 3558.)

Notes of Decisions (5945)

11 U.S.C.A. § 362, 11 USCA § 362
Current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) approved 3-25-14

End of Document

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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter I. Creditors and Claims

11 U.S.C.A. § 507

§ 507. Priorities

Effective: December 22, 2010
Currentness

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

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(4) Fourth, allowed unsecured claims, but only to the extent of $12,475 [1] for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for--

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan--

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of--

(i) the number of employees covered by each such plan multiplied by $12,475 [1] ; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons--

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility--

but only to the extent of $6,150 [1] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,775 [1] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise--

(i) entered for consumption within one year before the date of the filing of the petition;

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(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2583; Pub.L. 98-353, Title III, §§ 350, 449, July 10, 1984, 98 Stat. 358, 374; Pub.L. 101-647, Title XXV, § 2522(d), Nov. 29, 1990, 104 Stat. 4867; Pub.L. 103-394, Title I, § 108(c), Title II, § 207, Title III, § 304(c), Title V, § 501(b)(3), (d)(11), Oct. 22, 1994, 108 Stat. 4112, 4123, 4132, 4142, 4145; Pub.L. 109-8, Title II, §§ 212, 223, Title VII, §§ 705, 706, Title XIV, § 1401, Title XV, § 1502(a)(1), Apr. 20, 2005, 119 Stat. 51, 62, 126, 214, 216; Pub.L. 111-203, Title XI, § 1101(b), July 21, 2010, 124 Stat. 2115; Pub.L. 111-327, § 2(a)(15), Dec. 22, 2010, 124 Stat. 3559.)

Notes of Decisions (1156)

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Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 507, 11 USCA § 507

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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 547

§ 547. Preferences

Effective: April 1, 2010
Currentness

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(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;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, 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.

(c) The trustee may not avoid under this section a transfer--

(1) 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;

(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;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(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;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,225 [1] .

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, 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 subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

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CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 98-353, Title III, §§ 310, 462, July 10, 1984, 98 Stat. 355, 377; Pub.L. 99-554, Title II, § 283(m), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 103-394, Title II, § 203, Title III, § 304(f), Oct. 22, 1994, 108 Stat. 4121, 4133; Pub.L. 109-8, Title II, §§ 201(b), 217, Title IV, §§ 403, 409, Title XII, § 1213(a), 1222, Apr. 20, 2005, 119 Stat. 42, 55, 104, 106, 194, 196.)

Notes of Decisions (3613)

Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 547, 11 USCA § 547

Current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) approved 3-25-14

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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 548

§ 548. Fraudulent transfers and obligations

Currentness

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

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(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

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(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78***l*** and 78***o***(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, § 5, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub.L. 99-554, Title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-311, Title I, § 104, Title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title V, § 501(b)(5), Oct. 22, 1994, 108 Stat.

4142; Pub.L. 105-183, §§ 2, 3(a), June 19, 1998, 112 Stat. 517; Pub.L. 109-8, Title IX, § 907(f), (o)(4) to (6), Title XIV, § 1402, Apr. 20, 2005, 119 Stat. 177, 182, 214.)

Notes of Decisions (1822)

11 U.S.C.A. § 548, 11 USCA § 548
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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

Effective: June 19, 1998
Currentness

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), 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 that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2596; Pub.L. 98-353, Title III, § 459, July 10, 1984, 98 Stat. 377; Pub.L. 105-183, § 3(b), June 19, 1998, 112 Stat. 518.)

Notes of Decisions (1877)

11 U.S.C.A. § 544, 11 USCA § 544
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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 7. Liquidation (Refs & Annos)
Subchapter II. Collection, Liquidation, and Distribution of the Estate (Refs & Annos)

11 U.S.C.A. § 726

§ 726. Distribution of property of the estate

Effective: December 22, 2010
Currentness

(a) Except as provided in section 510 of this title, property of the estate shall be distributed--

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of--

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is--

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if--

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent

that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

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(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2608; Pub.L. 98-353, Title III, § 479, July 10, 1984, 98 Stat. 381; Pub.L. 99-554, Title II, §§ 257(r), 283(s), Oct. 27, 1986, 100 Stat. 3115, 3118; Pub.L. 103-394, Title II, § 213(b), Title III, § 304(h)(5), Title V, § 501(d)(24), Oct. 22, 1994, 108 Stat. 4126, 4134, 4146; Pub.L. 109-8, Title VII, § 713, Title XII, § 1215, Apr. 20, 2005, 119 Stat. 128, 195; Pub.L. 111-327, § 2(a)(28), Dec. 22, 2010, 124 Stat. 3560.)

Notes of Decisions (265)

11 U.S.C.A. § 726, 11 USCA § 726
Current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) approved 3-25-14

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243 Neb. 359
Supreme Court of Nebraska.

UNIVERSAL ASSURORS LIFE
INSURANCE COMPANY, Appellee,
v.
Bertha **HOHNSTEIN**, Appellant,
and
Elizabeth A. Halstead, Appellee.

No. S-91-047. | April 29, 1993.

Following death of decedent, decedent's mother and decedent's former wife both sought residual proceeds under three separate certificates of **life** insurance. Insurer paid proceeds into court and was dismissed from action. On motions for summary judgment, the District Court for Scotts Bluff County, Alfred J. Kortum, J., sustained former wife's motion for summary judgment. Mother appealed. The Supreme Court, Caporale, J., held that: (1) dissolution decree does not change dissolution party's liability to creditor, and (2) decedent and former wife were co-owners of the certificates, and, thus, decedent could not change beneficiary except by joint act with wife.

Affirmed.

West Headnotes (18)

[1] **Divorce**
Construction and operation in general

After time for appeal has passed, meaning of dissolution decree is determined as matter of law from its language; neither what the parties thought decree meant nor what judge intended is of any relevance.

7 Cases that cite this headnote

[2] **Divorce**
Operation and effect

Dissolution decree does not change dissolution party's liability to creditor.

Cases that cite this headnote

[3] **Divorce**
Operation and effect

Former wife remained personally liable to creditor following dissolution of marriage for marital indebtedness.

Cases that cite this headnote

[4] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Statutory interpretation is matter of law in connection with which an appellate court has obligation to reach an independent, correct conclusion notwithstanding determination made by trial court.

6 Cases that cite this headnote

[5] **Insurance**
By beneficiaries

Phrase "person holding policy" in statute allowing any such person holding **life** insurance policy to sell and surrender policy without consent of beneficiary unless appointment of beneficiary is revocable, describes owner of policy. Neb.Rev.St. § 44-370.

1 Cases that cite this headnote

[6] **Insurance**
Right to change; consent

Right to change beneficiary statute grants owner of **life** policy right to change beneficiary unless appointment of beneficiary was made irrevocable. Neb.Rev.St. § 44-370.

1 Cases that cite this headnote

[7] **Insurance**
Life Insurance

Owner of **life** policy need not be insured, that is, person whose death obligates insurer to pay under policy.

Cases that cite this headnote

[8] **Judgment**
Existence or non-existence of fact issue

Summary judgment is properly granted only when record discloses that there is no genuine issue concerning material fact or ultimate inferences deducible from such fact or facts and that movant is entitled to judgment as matter of law.

Cases that cite this headnote

[9] **Judgment**
Presumptions and burden of proof

Judgment
Weight and sufficiency

Movant for summary judgment makes prima facie case by producing enough evidence to demonstrate that movant is entitled to judgment if evidence is uncontroverted at trial; at that point, burden of producing evidence shifts to party opposing motion.

2 Cases that cite this headnote

[10] **Insurance**
Intention

Insurance policy is to be construed as any other contract to give effect to parties' intention at time contract was made.

Cases that cite this headnote

[11] **Insurance**
Plain, ordinary or popular sense of language

When terms of insurance contract are clear, they are to be accorded their plain and ordinary meaning.

Cases that cite this headnote

[12] **Insurance**
Ambiguity in general

When clause in insurance contract can be fairly interpreted more than one way, there is ambiguity.

Cases that cite this headnote

[13] **Appeal and Error**
Review where evidence consists of documents

Construction of contract is matter of law in connection with which an appellate court has an obligation to reach an independent and correct conclusion notwithstanding determination made by trial court.

6 Cases that cite this headnote

[14] **Insurance**
Persons covered

Former husband and former wife were joint insureds under certificates providing for joint decreasing **life** insurance; husband and wife were joint debtors who purchased decreasing **life** insurance, and master policy provided that when decreasing **life** insurance-joint debtor was provided, the debtors would be “joint insured” debtors.

Cases that cite this headnote

[15] **Insurance**
Right to change; consent

Former husband and former wife, who were joint insureds under certificates providing for joint decreasing **life** insurance, were also joint owners of insurance provided, and, thus, beneficiary could not be changed except by joint act of both owners; bank was named as irrevocable creditor beneficiary on joint debt of husband and wife, and premium for coverage was single. Neb.Rev.St. § 44-370.

Cases that cite this headnote

[16] **Insurance**
Reasonable persons

Resolution of ambiguity in policy of insurance turns not on what insurer intended language to mean, but what reasonable person in position of insured would have understood it to mean at time contract was made.

Cases that cite this headnote

[17] Insurance
Favoring coverage or indemnity; disfavoring forfeiture

In case of ambiguity in an insurance contract, construction favorable to insureds prevails so as to afford coverage.

Cases that cite this headnote

[18] Insurance
Persons covered

Former husband and former wife were insureds under certificate providing level **life**, joint debtor **life** insurance and were co-owners of insurance created by certificate, notwithstanding inconsistencies in master policy definitions; husband and wife paid premiums for joint coverage, foreclosing insurer from denying joint coverage. Neb.Rev.St. § 44-370.

Cases that cite this headnote

****812** ***Syllabus by the Court***

***359** 1. **Divorce: Intent: Appeal and Error.** After the time for appeal has passed, the meaning of a dissolution decree is determined as a matter of law from its language; neither what the parties thought the decree meant nor what the judge intended is of any relevance.

2. **Divorce: Liability: Debtors and Creditors.** A dissolution decree does not change a dissolution party's liability to a creditor.

3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.

4. **Insurance: Contracts: Words and Phrases.** As used in Neb.Rev.Stat. § 44-370 (Reissue 1988), the phrase "person holding a policy" describes the owner of the insurance policy.

5. **Insurance: Contracts.** Neb.Rev.Stat. § 44-370 (Reissue 1988) grants the owner of a **life** insurance policy the right to change the beneficiary unless the appointment of the beneficiary was made irrevocable.

6. **Insurance: Contracts.** The owner of a **life** insurance policy need not be the insured, that is, the person whose death obligates the insurer to pay under the policy.

7. **Summary Judgment.** Summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law.

****813** ***360** 8. **Summary Judgment: Evidence.** A movant for summary judgment has made a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial; at that point, the burden of producing evidence shifts to the party opposing the motion.

9. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.

10. **Insurance: Contracts.** When the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.

11. **Insurance: Contracts.** When a clause in an insurance contract can be fairly interpreted in more than one way, there is ambiguity.

12. **Contracts: Appeal and Error.** The construction of a contract is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the trial court.

13. **Insurance: Contracts: Intent.** The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but on what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.

14. **Insurance: Contracts.** In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.

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HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ.

Opinion

CAPORALE, Justice.

I. STATEMENT OF CASE

The death of the decedent, David A. Halstead, obligated the plaintiff-appellee interpleader, Universal Assurors Life Insurance Company, to pay benefits under the provisions of three separate certificates of credit life insurance it had issued in favor of First State Bank, Scottsbluff, Nebraska, and others. Both the decedent's mother, the defendant-appellant claimant, Bertha Hohnstein, and the decedent's former wife, the defendant-appellee claimant, Elizabeth A. Halstead, demand the residual proceeds, that is, the amount of benefits exceeding ***361** the sums Universal remitted to the bank. Having paid the residual proceeds into court, Universal was dismissed from the action, and the cause then proceeded to adjudication upon the reciprocal motions for summary judgment filed by the two claimants. The district court overruled the mother's motion and sustained the former wife's motion. The mother's three assignments of error merge to assert that the district court erred in so ruling. We affirm.

II. FACTS

On August 10, 1988, the decedent and the former wife indebted themselves to the bank and, for a single premium, purchased the three aforementioned certificates of insurance, which were issued under and pursuant to an agreement between Universal and the bank entitled "Debtor-Creditor Group Master Policy Single Premium Term Life Insurance-Non-Participating." The master policy provides, in pertinent part:

> [Universal] will pay, subject to all terms and conditions of this policy, to the [bank] the amount of insurance in force hereunder on the life of such Debtor at the time of such death, to reduce or extinguish the unpaid indebtedness and where the amount of insurance exceeds the unpaid indebtedness, the excess amount will be paid to a beneficiary other than the [bank], if living, named by the insured Debtor or to the estate of the insured Debtor.

****814** Each of the three certificates named the decedent as "Insured Debtor," the former wife as "Insured Joint Debtor," and the bank as "Irrevocable Creditor Beneficiary." In an area denominated "Second Beneficiary," each certificate reads:

> David A. Halstead-Beneficiary Elizabeth A. Halstead
>
> Elizabeth A. Halstead-Beneficiary David A. Halstead
>
> James D. Halstead.

The last named individual, born January 6, 1986, is the minor child of the debtors.

On November 16, 1989, the former wife filed a dissolution of marriage action which resulted in a decree of dissolution being entered on February 2, 1990. Through incorporating by reference the decedent's and the former wife's property ***362** settlement agreement, the decree provides, in relevant part:

> The [former wife] and [the decedent] will keep all items of personal property currently in their respective possession. Each party will hold the other harmless from any liability upon the personal property in their possession.
>
> [The decedent] shall receive the title and possession of the [marital residence] and [the former wife] will sign a Quitclaim Deed to [the decedent] regarding said property. [The decedent] shall hold [the former wife] harmless from any liability arising from any encumbrance upon said real property.

The decree makes no specific references to the debt owed the bank or to the Universal certificates, nor does it relate the insured debt to the marital residence.

Following the entry of the dissolution decree, the decedent, on August 6, 1990, issued a notarized letter directed to Universal, which referenced the three certificates of

insurance and recited: “Because of my divorce, I hereby authorize you to change the beneficiary designations on the above [certificates] from my [former wife] to my mother....”

The decedent died August 10, 1990, as a result of injuries sustained in an accident. After **Universal** paid the bank the amount of the unpaid debt, there remained benefits totaling $6,067.10 due under the three certificates.

III. ANALYSIS

We begin by noting that although each certificate names the Halstead child as some sort of beneficiary, he was not made a party to this action. As a consequence, this litigation does not affect any interests he may have in the matter.

1. EFFECT OF DISSOLUTION DECREE

The decedent's mother asserts that because the marital residence was awarded to the decedent subject to the liability for any encumbrance thereon, for which liability he was obligated to hold the former wife harmless, the decedent became the sole owner of the insurance certificates and could do with them as he chose. Such, however, is not the case.

[1] In the first place, as noted in part II, the decree in no way ties the insured debt to the marital residence. In reviewing the res ***363** judicata effect of dissolution decrees in later actions, we have declared:

> “[N]either what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.”

*Metropolitan **Life** Ins. Co. v. Beaty,* 242 Neb. 169, 173, 493 N.W.2d 627, 630 (1993). Accord *Neujahr v. Neujahr,* 223 Neb. 722, 393 N.W.2d 47 (1986).

But even if the decree were to have related the debt to the marital residence, it only orders the decedent to hold the former wife harmless from the liability; it does not, nor could it, relieve the former wife of liability to the bank.

[2] **[3]** Although it appears we have not heretofore been called upon to rule on the effect of a dissolution decree upon a dissolution party's liability to a creditor, we have held that a contract for the lease of school land could not be altered by a dissolution decree and made enforceable against ****815** the other parties to the lease. *Kidder v. Wright,* 177 Neb. 222, 128 N.W.2d 683 (1964); *State v. Kidder,* 173 Neb. 130, 112 N.W.2d 759 (1962). Moreover, in *Baker v. Baker,* 201 Neb. 409, 267 N.W.2d 756 (1978), this court held that a dissolution court could not affect the rights of the transferees of gifts who were not before the court. We now specifically adopt the holdings of numerous other jurisdictions that a dissolution decree does not change a dissolution party's liability to a creditor. *Bourdon v. Bourdon,* 119 N.H. 518, 403 A.2d 433 (1979); *Kujawinski v. Kujawinski,* 71 Ill.2d 563, 17 Ill.Dec. 801, 376 N.E.2d 1382 (1978); *Arneson v. Arneson,* 38 Wash.2d 99, 227 P.2d 1016 (1951); *Stevenson v. Stevenson,* 680 P.2d 642 (Okla.App.1984); *Wileman v. Wade,* 665 S.W.2d 519 (Tex.App.1983); *Glasscock v. Citizens Nat. Bank,* 553 S.W.2d 411 (Tex.App.1977); *Branch Banking and Trust Co. v. Wright,* 74 N.C.App. 550, 328 S.E.2d 840 (1985) (review allowed at 314 N.C. 662, 335 S.E.2d 321; however, ex-wife withdrew her appeal as a party to the further appeal to the North Carolina Supreme Court, 318 N.C. 505, 353 S.E.2d 225). Thus, the former wife remained personally liable to the bank.

***364** 2. RIGHT TO CHANGE BENEFICIARY

Neb.Rev.Stat. § 44-370 (Reissue 1988) provides:

> A **life** insurance company may provide that the amount to become due under a policy shall be paid in installments to a beneficiary therein named.... Any person *holding a policy* in any such company may, without the consent of the beneficiary, unless the appointment of such beneficiary be irrevocable, either sell and surrender the same to the company, or pledge or assign the same as security for a debt ... or, with the consent of the company, he may change his beneficiary unless the appointment of such beneficiary be irrevocable.

(Emphasis supplied.)

[4] The task at this point is to determine what is meant by the statutory phrase "person holding a policy." As a question of statutory interpretation, the matter is one of law in connection with which we, as an appellate court, have an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *State v. Saulsbury,* 243 Neb. 227, 498 N.W.2d 338 (1993); *Curry v. State ex rel. Stenberg,* 242 Neb. 695, 496 N.W.2d 512 (1993); *Northern Bank v. Federal Dep. Ins. Corp.,* 242 Neb. 591, 496 N.W.2d 459 (1993).

> The party who enters into the contract of insurance or **assurance** with the insurer or **assurer** is called the "insured" or "**assured**." There is some authority that the person contracting with the insurer is the "insured" while the beneficiary of the policy is the "**assured**." This distinction is not recognized in modern insurance law under which the terms "insured" and "**assured**" are regarded as synonymous except when the particular wording of the policy requires the making of such a distinction. The "insured" in a **life** insurance policy means the person whose **life** is insured and whose death matures the obligation of the insurer to pay.

2A George J. Couch, Cyclopedia of Insurance Law § 23:1 at 769-70 (2d ed. 1984).

The Kansas Supreme Court, after citing from a part of the above-quoted section in Couch's treatise, wrote:

> ***365** The policies, read in their entirety, use the term *insured* to refer to both the one whose **life** is insured and the owner of the policy. The term is thus ambiguous where these entities are two different people. We hold [the deceased wife] purchased the policies of insurance on the **life** of her [deceased] husband ... for the specific purpose of preventing the proceeds of the policies from becoming a part of [his] estate. We therefore hold the [deceased wife's estate] is entitled to the proceeds from the policies of insurance on [the deceased husband's] **life**.

(Emphasis in original.) *Lightner v. Centennial **Life** Ins. Co.,* 242 Kan. 29, 36-37, 744 P.2d 840, 845 (1987).

[5] **[6]** **[7]** We thus determine that as used in § 44-370, the phrase "person holding a policy" ****816** describes the owner of the policy and that § 44-370 therefore grants the owner of a **life** insurance policy the right to change the beneficiary unless the appointment of the beneficiary was made irrevocable. It is also clear that the owner need not be the insured, that is, the person whose death obligates the insurer to pay under the policy.

3. OWNERSHIP STATUS OF DECEDENT AND FORMER WIFE

Although the dissolution decree, without distinguishing between tangible and intangible items, awarded the decedent and the former wife the personal property then in the possession of each, neither claimant established which of the dissolution parties had possession of the certificates when the decree was entered. We therefore need not concern ourselves with what the situation might have been had the record done so.

[8] **[9]** In so saying, we do not overlook that summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.,* 243 Neb. 351, **500** N.W.2d 520 (1993); *First United Bank v. First Am. Title Ins. Co.,* 242 Neb. 640, 496 N.W.2d 474 (1993). However, neither do we overlook that a movant for summary judgment has made a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were ***366** uncontroverted at trial. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal., supra; Overmier v. Parks,* 242 Neb. 458, 495 N.W.2d 620 (1993). At that point, the burden of producing evidence shifts to the party opposing the motion. See, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal., supra; Overmier v. Parks, supra.* As there is no other evidence on the matter, the question of who owned the insurance is answered solely by the language of the certificates and the master policy under which they were issued. There thus can exist no genuine issue of either law or material fact in that regard.

[10] **[11]** **[12]** In studying the relevant language, we also recall that an insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. When a clause can be fairly interpreted in more than one way, there is ambiguity. See, *Thorell v. Union Ins. Co.,* 242 Neb. 57, 492 N.W.2d 879 (1992); *Mahoney v. Union Pacific RR. Emp. Hosp. Assn.,* 238 Neb. 531, 471 N.W.2d 438 (1991).

[13] We must also remember that like the interpretation of a statute, the construction of a contract is a matter of law, which we review in like manner. *Northern Bank v. Federal Dep. Ins. Corp.,* 242 Neb. 591, 496 N.W.2d 459 (1993); *Baker v. St. Paul Fire & Marine Ins. Co.,* 240 Neb. 14, 480 N.W.2d 192 (1992); *Spittler v. Nicola,* 239 Neb. 972, 479 N.W.2d 803 (1992).

[14] The first two certificates provide for joint decreasing **life** insurance, which the master policy defines as insurance on the **life** of the insured debtor, the original amount of which decreases progressively in accordance with a stated formula. The master policy also provides:

> (3) In no case shall more than one person be insured on account of any one indebtedness except where insurance is provided for Decreasing **Life** Insurance-Joint Debtor. If more than one name appears on the Certificate of Insurance as "Insured Debtor", the first named insured debtor be [sic] the insured Debtor.
>
> (a) When Decreasing **Life** Insurance-Joint Debtor is provided, the Debtor and Joint Debtor shall be the "Insured Debtor" jointly.

***367** Consequently, although a wrong or an incomplete form of the verb "to be" is utilized in the above-quoted paragraph (3) of the master policy, the language nevertheless makes clear that as the decedent and the former wife were joint debtors who ****817** purchased decreasing **life** insurance, they were joint insureds.

[15] Moreover, because the bank is named as the irrevocable creditor beneficiary on a joint debt of the decedent and the former wife, and the premium for the coverage was a single one, the decedent and the former wife were not only the joint insureds, they were also joint owners of the insurance provided. Consequently, as to these two certificates, the terms of § 44-370 prevent a change in beneficiary except by the joint act of the two owners.

The third certificate was also issued to the decedent and the former wife as the joint insured debtors, but rather than providing joint decreasing **life** insurance, as do the first two certificates, the third certificate provides level **life**, joint debtor **life** insurance. The master policy defines level **life** insurance as insurance on the **life** of the insured debtor, at all times to be equal to the amount of insurance selected on the certificate. It specifies the rate at which to compute the single premium required for "Level **Life** Insurance Joint Debtor" as follows:

> a product of the rate per $100.00 of the initial amount of such Debtors Level **Life** insurance becoming effective hereunder multiplied by the number of months of the period over which his indebtedness is to be repaid said rates being:

Level **Life** Insurance Debtor Only:	$1.18
Level **Life** Insurance Joint Debtor:	$1.97

Obviously, providing a premium rate for level **life** insurance for joint debtors is inconsistent with the earlier mentioned provision of the master policy which permits joint debtors to obtain only decreasing **life** insurance.

Notwithstanding this inconsistency and resultant ambiguity, the master policy provides for, and the decedent and the former wife were charged, a premium for level **life** insurance as joint debtors. This resulted in a charge somewhat less than twice as high as the premium for level **life** insurance on a single debtor.

[16] **[17]** We have oft held:

> ***368** The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.... In the case of ambiguity

> in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.

Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 869, 468 N.W.2d 105, 115 (1991). See, also, *Central Waste Sys. v. Granite State Ins. Co.,* 231 Neb. 640, 437 N.W.2d 496 (1989); *Polenz v. Farm Bureau Ins. Co.,* 227 Neb. 703, 419 N.W.2d 677 (1988).

[18] Under those rules, the payment of a premium based upon joint insurance would foreclose **Universal** from denying joint coverage to the decedent and the former wife. Since the master policy and the third certificate must be construed to provide joint coverage, we hold that both the decedent and the former wife were insureds and that as joint debtors and joint purchasers of the insurance, they were the coowners of the insurance created by the third certificate.

IV. JUDGMENT

There being no genuine issue concerning any material fact or the ultimate inferences deducible therefrom, and the former wife being entitled to judgment as a matter of law, the judgment of the district court is affirmed.

AFFIRMED.

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