



Bankruptcy & Financial Restructuring ADVISORY ■

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Eleventh Circuit Holds That New Value Need Not Remain Unpaid for Section 547(c)(4) Defense to Apply in Preference Actions

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On August 14, 2018, the U.S. Court of Appeals for the Eleventh Circuit held that a preference defendant may reduce its preference exposure to a debtor or trustee in bankruptcy by the value of the goods or services supplied to the debtor by that supplier after the transfers in question occurred, *regardless of whether the “new value” remains unpaid.*

Under Section 547 of the Bankruptcy Code, a debtor in bankruptcy can avoid a transfer of an interest of the debtor in property made to a creditor within the 90 days before the filing of the debtor’s bankruptcy petition (the “preference period”) if the transfer was (1) made while the debtor was insolvent; (2) made on account of an antecedent debt owed by the debtor to the creditor; which (3) allowed the creditor to receive more than it would have received in a Chapter 7 case had the transfer not been made; *unless* (4) the defendant can show the existence of one of the defenses set out in Section 547(c).

One of the Section 547(c) defenses is the “new value” defense, which holds that a transfer is not avoidable under Section 547 if the creditor provided valuable goods or services to the debtor after the otherwise-avoidable transfer occurred (and before the debtor’s bankruptcy petition was filed) that was “(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” up to the amount of the new value delivered.

Previously, it was argued that in the Eleventh Circuit, new value must remain unpaid for the new-value defense to apply. That argument arose from a statement made by the Eleventh Circuit in dicta in *Charisma Investment Co. N.V. v. Airport Systems Inc. (In re Jet Florida System Inc.)*, 841 F.2d 1082, 1083 (11th Cir. 1988), where the court noted that Section 547(c)(4) had “generally been read to require . . . that the new value must remain unpaid.” Not so, said the Eleventh Circuit in *Kaye v. Blue Bell Creameries Inc. (In re BFW Liquidation LLC)*. Noting that the

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plain language of Section 547(c)(4) contains no such requirement, and finding that “a conclusion that new value need not remain unpaid ... encourag[es] creditors to continue extending credit to financially troubled debtors,” the court held that new value need not remain unpaid, as long as the subsequent payments by which the amounts owed to the creditor on account of the new value are paid are themselves avoidable by the debtor or trustee (for reasons other than pursuant to Section 547(c)(4)). In rendering this decision, the Eleventh Circuit expressly vacated the dicta contained in *Jet Florida Systems*, finding that the statement in that case was not supported by the plain language of the statute.

The *Blue Bell* case is a positive holding for trade vendors and service providers whose counterparties occasionally find themselves in bankruptcy because the decision greatly expands the applicability and scope of the new-value defense in the Eleventh Circuit and will likely significantly reduce those creditors’ preference exposure when the creditors continue to regularly provide goods or services to the debtor on credit during the preference period.

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