American Bankruptcy Institute
Commission to Study the Reform of Chapter 11
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Background and Qualifications

My name is Val Venable. First off, I would like to thank the Commission for this opportunity to testify on this issue of critical importance to trade creditors. I've spent my entire professional career in credit. Currently, I am director of credit with Ascend Performance Materials, a position I've held for over 2 years. Prior to that, I was the CFS Americas Leader for SABIC Innovative Plastics and GE Plastics from 2000 to 2011. I received my degree in Business from Charter Oak College in Connecticut.

I am a Past National Chair of the NACM and have been a co-chair of the Unsecured Trade Creditors Committee of the ABI and a member of the ABI ethics committee. I hold the designation of Certified Credit Executive, which is the highest accreditation granted by the NACM, and am a Certified Expert Witness for Preference Matters. As such, I have been retained by or freely offered my services to various trade creditors to assist them in defending preference claims. I have defended more than 40 preference matters for my employers. Among those cases, there have been times when my company has had to pay nothing as a result of my ability to prove the preference defenses but my company has paid as much as $2.9 million to settle a preference. None of the preference matters with which I have been involved have gone to trial.

In addition, to those preference demands or lawsuits with which I have been personally involved, I have served on more than two dozen creditors' committees, several of which I have chaired.

Bankruptcy Code Section 547 is in need of reform

I strongly feel there must be a reformation to Section 547 of the Bankruptcy Code. One of the major underlying issues is that the preference defenses defined in the Code are open to interpretation and quite frankly are not even interpreted and applied the same way in the same jurisdiction, let along federally. Consequently, this has given birth to an entire industry focused on extracting additional funds from the creditors who supported the debtor while they struggled and tried to survive. The recovered funds for the most part do not benefit the debtor, or even for the creditors. The funds instead are primarily paid to those seeking the recovery.

Credit managers by nature are very analytical and like to make calculated decisions. The preference statute as it stands now is very unpredictable and, as such, defending a preference can be very expensive. There are no firm, fixed guidelines. What is permissible in one jurisdiction is not allowed in another. Even two different bankruptcy practitioners within the same jurisdiction can have opposing views and both be right. How then, can a typical creditor defend against a preference recovery if the rules aren't clear and consistent? This actually serves to discourage a creditor from working with a debtor they might otherwise have been able to help.

The original intent of preference recovery has been lost. The concept of leveling the playing field so those few creditors who received preferential treatment and were paid money when other like creditors did not should surrender those funds back to the creditor pool of like creditors so it can be equally distributed just isn't the reality. Instead, generally speaking, the only parties who benefit from preference recoveries are the professionals handling those matters. In all of the cases I have been involved in, or those where I have closely watched through the filings, I have

never seen any of the trade credit preference recoveries going into the unsecured creditors' pool for distribution. Of the near $3 million I returned in one case, I didn't see three dollars.

Trade Creditors are not trying to grab the Debtor's last cent

I sell raw material, used in manufacturing -- little plastic pellets that go into everything from underwear to carpet to tires. When a customer of mine has financial difficulties, it is not uncommon for me to work out a deal with the debtor which allows them additional time to pay me, either as it sells my goods, or with a repayment plan that allows the debtor funds to run their business through a period of temporary cash flow constraints. This not only helps the debtor keep the lights on, but also allows my company to continue to build a strong business relationship. In all honesty, sometimes this strategy pays off, but sometimes I just end up with a higher balance due or opening myself up for a potential preference exposure should the debtor ultimately fail. Because of the fear that a payment will have to be given back, some creditors, in order to preserve their own company's assets, will make a business decision not to continue to sell to a troubled business rather than try to find a way to get them enough product to keep them in business. This lack of willingness to work with the debtor may protect the creditor, but may also serve as a catalyst to eventual business failure.

Yet, the whole time I am working with the debtor, allowing slower payments, in order to keep the debtor in business, I have to keep weighing the potential impact of a subsequent Chapter 11 or Chapter 7, where a demand for repayment will be made to me because those payments were not "ordinary". Even a formal adjustment of terms for a quantifiable valid business reason has worked against me. When I receive the letter asking for recovery of a preference, or worse, a

notice of a complaint being filed, I am presumed guilty until proven innocent. And to prove my innocence is going to be costly and time consuming and in some cases more risky than selling to the distressed debtor.

Difficulties with the Ordinary Course of Business Defense

Trying to define "ordinary" is like trying to define "blue". There are many different shades and interpretations. The law should be looking at intent. I totally understand that it's not black and white, but there has to be reasonableness. We have product that takes up to a month to get cross-country by rail cars. In order to protect myself from a potential preference attack, it would require me to demand cash in advance from a troubled customer. However, common sense tells me that my customer can't and shouldn't have to pay us and then wait for us to get product to them weeks later. If that customer has those weeks of extra cash flow they're probably not distressed in the first place. So I ship my goods, I get paid as soon as my customer can pay me, and, then, I receive a preference demand to give the money back. There is nothing in the statute that enables the concept of intention to come into play. There is nothing in the statue that even allows the customer to pay according to their own cash flow improvements without putting those payments at risk of being classified as a potential preference. For example if they pay slow during the summer period, but have improved cash flow in the fall, I have to hope that they don't file for a Chapter 11 in the winter, or their improved cash flow and better payments opens me up for increased preference exposure.

In my experience, a big disconnect in preparing an Ordinary Course defense is trying to present my data so it can be understood by a non-business oriented interpreter, or someone not familiar

with the peculiarities of my industry or billing cycles in general. For example, not all terms are Net 30 days. In some instances we work on something called a "Prox" term. This means that I am paid the same day of each month. I could have invoices paid per terms that are up to 30 days apart in days outstanding. If I am paid on the fifth of the second month following shipment, I will be paid on invoices 35- to 65-days-old. In this case, I evaluate "ordinary" on the number of days beyond terms. Payment terms also frequently use end of month as a measure, meaning payments are due at the end of a particular month or X days from the end of the month. Again, a simple Days to Pay calculation will not work as an Ordinary Course defense.

Also, to add complexity to an already complex environment, if a company like mine sells different products, it is quite possible that each product is sold at a different term because of industry competition. I have some customers to whom I sell three or four different products, and each product at a different term. One definition of "Ordinary" does not work in this situation. Industries that offer seasonal dating have an entirely different definition and profile of "ordinary".

I have to prove that the fluctuation, which appears out of the ordinary to the trustee is, in fact, ordinary in my business and in my industry. Yes, despite the change to the statute in 2005, when I must convince the trustee that my payments were ordinary and there appears to be a fluctuation, I will, ultimately, need an expert to analyze the types of terms and payments in my industry.

Alternatively, if I don't immediately retain an expert but try to cause the trustee to understand my ordinary course of business analysis, I am barraged with requests for more and more documentation. I've had a couple of people tell me it is in the recovery professional's best interest to ask for all this data. Many get paid based on a percentage of what he/she collects. If

they make it difficult enough for me, I will give up the fight and accept their assessment. I view this as harassment.

So, I don't succeed in convincing the trustee to withdraw the preference demand or action. What happens then? I have to weigh the cost of hiring an expert to prove that my ordinary course analysis is correct, or just pay what amounts to a ransom. And, that expert will base his opinion not just on my company history but will analyze the industry. Here's the rub. What's my industry? Are you going to compare my company to the use of plastic pellets in the tire industry? Or are you going to compare my company to the use of plastic pellets in lingerie industry?

It is all extremely subjective and very costly trying to defend if you have to bring in an expert witness and accountants to support your position. The trustee knows it is going to get expensive for me to continue to defend and is counting on a monetary settlement just for me to get rid of him/her.

The New Value Defense also proves problematic

Even the calculation of a new value defense can be problematic. We can spend hours arguing the paid/unpaid new value argument, let alone shipments that may qualify for 503(b)(9) treatment. Suffice to say, there is no consistency in the interpretation or enforcement of the rules.

While a new value defense, on paper, looks like easiest thing to prove, I've had attorneys or firms for recovery go so far as to ask me to provide the time stamp of the exact time the truck left the facility versus the exact time the check hit my bank, totally abusive requests. Was this really

new value? If they left at 9 a.m. with the truck, and the check was deposited at 10 a.m., I'm told that is not new value. The truck would never have been allowed to leave our facility if we did not have a check in hand. Yet, I've lost on that. Nine times out of 10, the personnel at the loading dock doesn't time stamp it immediately or even have time stamps right there. To be more efficient, they often process the shipping tickets in batches at various times of the day, or potentially only once daily. Is it fair for me to give up my preference defense because of this? This stringent interpretation would require us to give up the efficiencies of batch processing or hire additional resources to process each shipment one at a time. Do I have to go to the dock and interview people who stamped the check to determine what the precise time of receipt really was?

A customer, in order to maintain cash flow, needs to get product that goes directly into a machine ready to process it. Although it started with some of the larger manufacturers in the automotive and aerospace industries, now more and more of the smaller manufacturers are using "just-in-time" inventory processes. To wait until their check is in the bank to release their shipment could cause their material to be delayed to the point that their lines are shut down or machines sit idle. Neither condition is beneficial, especially to an already distressed debtor. This customer may always pay me on Fridays, but now needs the product by Thursday. If I refuse to deliver until a payment comes in, the customer could lose time, perhaps a whole production week or lose their own customer.

On top of all this is the timing for bringing a preference action. The Code stipulates that the action must be brought within two years of the date of filing with certain exceptions. Within that two years, some companies change computer or accounting systems, lose records, see people who had first-hand knowledge of the collection practices leave the company or have their

memories fade. In a case like Delphi, where the preference actions were filed under seal and only disclosed to the creditors a year or more later, the ability to recreate accurate data becomes even more difficult and expensive. This coupled with the backwards, guilty-until-proven-innocent approach puts an undue burden on the creditor.

Creditors' Committees can be useful in preference issues

I am a firm believer that an active creditors' committee brings value to the estate and is helpful in bringing a more efficient resolution to the case. I see a strong correlation between the lack of an active creditors' committee and an increase in unjustifiable attempts at recovery of a purported preferential payment. By having the debtor's business practices vetted by the committee, they can usually work with their financial professionals to help identify the truly extraordinary payments to insiders or creditors. This is far more cost effective than the "shotgun" approach that targets everyone in the 90 day ledger and requires extra work and cost to all.

I can only speak from my experience, but in the many cases where there has not been due diligence on the part of the recovery agent or proper regard for "ordinary," they have typically been cases without an active creditors' committee. These business professionals who voluntarily serve on the creditors' committee can bring the voice of reason and reasonableness to the process. They help direct the recovery effort in areas where there may truly be true preferential payments because they are more likely to understand the debtors' businesses and industries. Without the creditors' committee pursing the right decisions, we have businesses out there shot-gunning it and just trying to collect money.

I have served on at least one committee where the committee, upon a thorough analysis, decided to pursue those preferences, essentially deciding "not to beat up the creditors." In one case, the committee looked at a data dump of payments sent out in 90 days and found approximately 200 different recipients. Upon examining the information, everything looked pretty normal. Perhaps one or two guys got paid slightly different from the rest, but those payments were insignificant and could have been due to the negotiated terms. The committee was able to quickly determine that the cost to investigate would have exceeded any potential recovery. To hire a preference recovery firm to go through the debtors' records and attempt to recover all 200 payments, the estate would have spent much more than it would have recovered.

Because the Committee was made up of business professionals who had a working knowledge of the debtor's business, they are frequently able to spot some anomalies with respect to related entities that warranted a second look. This has resulted in a fairly substantial recovery from insider transfers, in my experience. I believe that creditors' committees bring strong business sense and the realization when the costs are not going to be recovered based on what you're going to find. Simply put, those on a good committee are more likely to truly understand the debtor's business. In that instance, the creditors' committee becomes an asset, and the unsecured creditors who have already lost their money, don't have to spend more to defend against any additional claw back.

In one case with an active committee, we were able to market some of the debtor's patents and intellectual property to bring in a sizable recovery to the estate. I served on another where, in our review of the secured lender's documents, we were able to determine they had not been properly filed resulting in the millions that would have gone directly to the secured lender, instead being divided up among the entire unsecured creditor body. Had we not found the error, there would

have been no distribution for the unsecured class. Simply put: committees often add significant benefit to the process.

SUMMARY

The tremendous amount of expenses involved in pursuing and fighting preference actions—attorneys, temporary workers to go through bills of lading to pull time stamp times, getting an expert to testify, writing checks for nuisance value—are among the many factors that drain an already deficient pot during a bankruptcy.

The preference statute should be changed so that the pursuer of preference recoveries (the trustee, committee or debtor) should first prove that the payments were **not** in the ordinary course of business and that new value was **not** given by the creditor.

This would limit the amount of needless and baseless preference actions that are commenced. Preference recoveries would be sought only after a true and realistic analysis has been performed. Most importantly, the trade creditor who has already lost money to the debtor will not be compelled to spend more time and money on these claims.

Again I thank you for your time and consideration and look forward to answering any questions you have for me today.