UNDERWOOD

Trustee Litigation-Avoidance Actions

Chapter 5 of the Bankruptcy Code provides trustees and debtors in possession with various remedies that can typically involve assertion of claims against creditors and other third parties. The two primary theories of recovery are:

- Recovery of preferential transfers under Section 547 of the Bankruptcy Code.
- Avoidance of fraudulent transfers under the Bankruptcy Code or applicable state law.

Preference litigation begins with a trustee or Debtor in Possession seeking to recover payments made to a creditor in the 90 days pre-bankruptcy time frame (a year for "insiders"). Affected creditors require counsel familiar with the various nuances of preference litigation and the defenses to such actions, including payments made in the ordinary course of business or the defense known as "subsequent new value."

Fraudulent transfer litigation has seemingly exploded in recent years, both in and out of bankruptcy courts. Claims can be asserted under the Bankruptcy Code or state law, with look-back periods potentially exceeding four years. Fraudulent transfer cases can be asserted not only based on actual fraud, but also so-called "constructive fraud" that may arise out of transfers made while a debtor was insolvent. Cases that arise out of a Ponzi scheme, for example, can be especially challenging, because courts may apply certain presumptions regarding a debtor's presumed insolvency.

The common thread running through all avoidance litigation is the need for experienced counsel.

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