Defending Bankruptcy Preference Claims: A Primer

by Brian J. Koenig[1]

As a product of the numerous bankruptcy filings that have occurred over the past few years, creditors have been increasingly faced with demands for the return of pre-bankruptcy payments made by bankrupt debtors on the theory that such payments are "preferences" under the Bankruptcy Code. To many creditors, the demands come as a surprise, and a creditor not familiar with the bankruptcy process may even regard such demand as a cruel "joke." Unfortunately, the demand is certainly not a joke but is merely the start of what could be another unfortunate consequence of the debtor's bankruptcy: the defense of a preference claim.

The typical creditor's experience goes something like this: After initially receiving notice of the debtor's bankruptcy, the creditor files a proof of claim, takes action to recover on its collateral, if any, by filing a motion for relief from stay, writes off the remaining unpaid debt, and goes about its business. Sometime later, usually right before the statute of limitations is about to expire (which can be up to two years or more after the debtor's bankruptcy filing), the creditor receives a letter from the trustee of the debtor's estate, the debtor-in-possession, the creditors' committee, or some other party holding the right to the debtor's preference claims (hereinafter, collectively, the "trustee"), demanding that the creditor return certain payments or transfers that the creditor received during the 90 days *prior to* the debtor's bankruptcy filing.

Confused and usually angry, the creditor turns to counsel for help in evaluating the creditor's exposure and implementing a strategy to successfully resolve the trustee's demand. To help the creditor evaluate the legitimacy of the demand and determine what strategy to implement, creditor's counsel must first determine whether the elements of a preference claim have been met and then evaluate whether any potential defenses are available.

This Article is intended to provide practitioners unfamiliar with preference claims a step-by-step guide to determine whether the elements of a preference claim have been met and what potential defenses are available. But, before exploring the elements and defenses to a preference claim, this Article briefly

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explores the underlying policy reasons behind preference claims to provide some context.

Why Do Preference Claims Exist?

Preference claims exist to ensure that all creditors are treated equally and receive an equal percentage of their claims and to prevent the debtor from preferring one creditor over another by making payments to certain creditors on the eve of bankruptcy. To illustrate this policy, bankruptcy practitioners often ask the creditor a variation of the following question: Would it be fair if you and one of your friends each loaned a debtor $60,000 and the debtor agreed to pay each of you $1,000 per month for five years and did in fact pay each of you $1,000 per month for a year, but during the 90 days prior to the debtor filing for bankruptcy, the debtor failed to pay you anything and paid all the remaining money he owed to your friend because he liked her more than you? Answering "no," the creditor ordinarily then recognizes why, in certain circumstances, the trustee is authorized to bring a preference claim to recover, and then redistribute,[2] payments considered "preference payments."

The Elements of a Preference Claim

A "preference" is defined by Section 547 of Title 11 of the United States Code (the "Bankruptcy Code"), and the following explanatory elements are derived from *Wells Fargo Home Mortgage, Inc. v. Lindquist*, 592 F.3d 838 (8th Cir. 2010) (citing *Buckley v. Jeld-Wen, Inc.* (*In re Interior Wood Prods. Co.*), 986 F.2d 228, 230 (8th Cir. 1993)):

1. A "transfer" of an interest of the debtor in property;

   a. Transfer means "each mode, direct or indirect, absolute or conditional, voluntary of involuntary, of disposing of or parting with -- (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54).

   b. Transfer also includes "involuntary" transfers such as a judgment lien (*In re XYZ Options, Inc.*, 154 F.3d 1276 (11th Cir. 1998)), a garnishment, or an attachment lien (*In re Morehead*, 249 F.3d 445 (6th Cir. 2001)) and the forgiveness or release of a debt owed to the debtor. *In re Dehon, Inc.*, 334 B.R. 71 (Bankr. D. Mass. 2005).

   c. Transfer does not include set-offs. *In re Holyoke Nursing Home, Inc.*, 273 B.R. 305 (Bankr. D. Mass. 2002).

   d. The Bankruptcy Code does not define what constitutes an "interest of the debtor in property." Accordingly, courts ordinarily look to state law to determine whether the debtor had an interest in the property.

2. On account of an "antecedent" debt;

   a. An antecedent debt is a debt that arose prior to the transfer by the debtor. *Laws v. United Missouri Bank of Kansas City, N.A.*, 98 F.3d 1047 (8th Cir. 1996), *cert. denied*, 520 U.S. 1168 (1997).

3. To or for the benefit of a "creditor";

   a. Creditor means "an entity that has a claim against the debtor that arose at the time or before the order for relief concerning the debtor." 11 U.S.C. § 101(10).

   b. Guarantors or sureties are creditors because they may be called upon to pay the debtor's obligations. If they do, they will be subrogated to the obligee, and thus they have a contingent claim against the debtor. *In re Wesley Indus., Inc.*, 30 F.3d 1438 (11th Cir. 1994).

   c. Any party with a contingent right of recourse against the debtor--including co-obligors, endorsers, or co-makers--may be deemed a creditor. *In re M2Direct, Inc.*, 282 B.R. 60 (Bankr. N.D. Ga. 2003).

4. Made while the debtor was "insolvent";

   a. Insolvency means for entities other than partnerships a "financial condition such that the sum of such entity's debts is greater than all such entity's property, at fair valuation. . . ." 11 U.S.C. § 101(32).

   b. A presumption of insolvency exists during the ninety days prior to the bankruptcy filing. 11 U.S.C. § 547(f).

   c. The determination of the value of the debtor's assets and liabilities at the time of the transfer is highly fact-specific, and expert testimony is frequently required. *In re Prime Realty, Inc.*, 376 B.R. 274 (Bankr. D. Neb. 2007).

   d. Typically the debtor's assets should be given their going concern value, and liquidation value should be used only if the debtor was financially moribund at the time of the transfer. *Jones Truck Lines, Inc. v. Full Serv. Leasing Corp.*, 83 F.3d 253 (8th Cir. 1996).

5. To a non-insider creditor, within 90 days of the filing of the bankruptcy;[3]

   a. 11 U.S.C. § 547(e) establishes when a transfer is deemed to have been made in a preference action.

   b. A payment by check is considered to have been made when the drawee bank honors the check, not when the payee receives it. *Barnhill v. Johnson*, 503 U.S. 393 (1991).

   c. If a case is converted, the look-back period is measured from the date of the original petition rather than from the date of conversion. *Vogel v. Russell Transfer, Inc.*, 852 F.2d 797 (4th Cir. 1988).

6. That left the creditor better off than it would have been if the transfer had not been made and the creditor asserted its claim in a Chapter 7 liquidation.

   a. In analyzing whether a transfer meets this requirement, the court must compare the amount

> a creditor received as a result of the transfer with the amount the creditor would have received in a Chapter 7 liquidation of the debtor.
>
> b. Payments made to a fully-secured creditor cannot be preferential. *In re Smith's Home Furnishings, Inc.*, 265 F.3d 959 (9th Cir. 2001).

It is important to note the foregoing six elements do not require that the debtor had the intent to prefer one creditor over another. Section 547 also does not consider whether the creditor knew the debtor was insolvent when it received the payment or transfer.

The burden of proof for establishing the elements of a preference is on the trustee. Thus, if the trustee fails to prove each of the elements by a preponderance of the evidence, the creditor will be able to defend successfully against the claim without having to prove an affirmative defense.

Based on experience, the most common element that a trustee cannot prove is the sixth element: the transfer enables the creditor to receive more on its claim than it would have, had the payment not been made. A good example of this is when a seller of goods provides the debtor goods within the 20 days prior to the debtor filing bankruptcy, making the seller a holder of a 20-day administrative expense claim against the bankruptcy estate.[4] Such claims are often paid in full by the bankruptcy estate.[5] Therefore, so long as all administrative expense claims in the debtor's case have been paid in full, if the trustee makes a preference claim for the return of the payments received by the seller for the goods, the trustee will be unable to satisfy the sixth element and meet its burden of proof since the seller would have received payment for the goods under a liquidation analysis by virtue of its 20-day administrative expense claim. Similarly, the trustee likely will not be able to prove the sixth element of a preference claim in situations where the payment was received in consideration for the release of a fully-secured[6] security interest or lien (*e.g.*, construction lien, mechanic's lien, attorney's lien, etc.), or where the creditor was fully secured at the time it received payment. This is because such claims enjoy a higher priority and are often paid in full in Chapter 7 liquidations.

Defenses to a Preference Claim

Even when the trustee is able to prove the elements of the preference claim, the creditor may be able to prove certain defenses to a preference claim. The Bankruptcy Code provides a number of defenses to a preference claim. The three most common defenses are found in Section 547(c) of the Bankruptcy Code and are commonly referred to as: (1) the "contemporaneous exchange for new value" defense; (2) the "subsequent new value" defense; and (3) the "ordinary course of business" defense. All three of these defenses are affirmative defenses, meaning that the creditor has the burden of proof.

1. Contemporaneous Exchange for New Value

The "contemporaneous exchange for new value" defense prevents the trustee from recovering payments that were actually intended to be contemporaneous exchanges for new value and were, in fact, substantially contemporaneous with the exchange of new goods, services, credit, or some other new value. The defense is meant to encourage creditors to continue to deal with financially distressed debtors, if only on a COD basis. *In re Jones Truck Lines, Inc.*, 130 F.3d 323 (8th Cir. 1997); *In re Payless Cashways, Inc.*, 306 B.R. 243 (B.A.P. 8th Cir. 2004), *aff'd*, 394 F.3d 1082 (8th Cir. 2005). The defense is embodied in section 547(c)(1)(A)-(B), which provides that a trustee cannot avoid 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.

The purpose of this defense is to protect transactions that do not diminish the bankruptcy estate. *In re Cocolat, Inc.*, 176 B.R. 540, 548 (Bankr. N.D. Cal. 1995). In this regard, it is the intent of the parties that constitutes the most critical element. *See Belfance v. Standard Oil Co.* (*In re Hersman*), 20 B.R. 569, 573 (Bankr. N.D. Ohio 1982). ("The key inquiry, therefore, is whether the parties at the outset intended the exchange to be contemporaneous.").

A check is the perfect example. *See Gover v. Ford Motor Credit Co.* (*In re Davis*), 22 B.R. 644 (Bankr. M.D. Ga. 1982) (holding that the only type of credit transaction which would result in a transfer under the contemporaneous exchange for new value exception is a check transaction, which is for all practical intents and purposes really a cash transaction). A transfer involving a check is "intended to be contemporaneous," and if the check is presented for payment in the normal course of affairs . . . that will amount to a transfer that is "in fact substantially contemporaneous." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 373 (1977), U.S. Code Cong. & Admin. News, p. 5787 (1978). Conversely, a credit card transaction is the perfect bad example. The court in *In re Hersman* explained:

> Where goods are paid for by a check, the payor had funds in the banking institution upon which the check is drawn when he makes the check payable to the person furnishing the goods. The payee need only present the check for payment. . . . When using a credit card to pay for goods, a consumer is generally seeking that which its name implies -- the extension and receipt of credit. By using a credit card, the credit card consumer does not intend a contemporaneous exchange for value.

> Instead, what is generally intended is the receipt of goods or services presently and time to pay for the same in the future. . . .

In re Hersman, 20 B.R. at 573. In other cases, the intent of the parties can be difficult to prove, especially if you have an uncooperative debtor. Nevertheless, the conduct of the parties and any writings and communications between them can be used to establish intent.

A transaction, however, need not only be contemporaneous, but it must create new value as well. While the question of new value is always a question of fact, *Creditors' Committee v. Spada* (*In re Spada*), 903 F.2d 971 (3d Cir. 1990), its form can be virtually anything. New value can include new credit, goods, services or property. 11 U.S.C. § 547(a)(2). However, a creditor's forbearance from foreclosing or otherwise exercising its rights is not "new value," even though forbearance would constitute consideration sufficient to support a contract. *In re ABC-Naco, Inc.*, 483 F.3d 470 (7th Cir. 2007). Similarly, the majority of courts hold that the settlement or dismissal of a lawsuit or claim in return for payment does not constitute new value. *In re Ramba, Inc.*, 416 F.3d 394 (5th Cir. 2005); *In re Energy Co-op., Inc.*, 814 F.2d 1226 (7th Cir.), *cert. denied*, 484 U.S. 928 (1987).

To determine whether this defense is met, the court examines whether the exchange was intended to be substantially contemporaneous and whether new value (not the satisfaction of an old value) was given in exchange for the preferential treatment. If both of these elements have been met, then the creditor has proven the affirmative defense of contemporaneous exchange.

2. Subsequent New Value

The "subsequent new value" defense prevents a trustee from recovering a transfer as a preference where the creditor had extended new value in the form of credit sales of goods or services following the transfer because the creditor has repaid the estate for the preferential transfer. *In re Armstrong*, 291 F.3d 517 (8th Cir. 2002). The policy reasons behind this defense are twofold: (1) it encourages creditors to continue extending credit to the debtor, thereby reducing the risk of the debtor's bankruptcy; and (2) creditors who enhance the debtor's estate by providing new value after receiving a transfer from the debtor should not be penalized, and should instead receive an offset for new value extended following the transfer. This defense is embodied in section 547(c)(4)(A)-(B), which provides that a trustee cannot avoid a transfer:

> (4) 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.

The new value provided can be in the form of goods, services, credit or the release of a lien. Basically, the courts will deduct from the preference amount any subsequent amount of goods and services that were provided to the debtor. In the subsequent new value analysis, it is important to note that (1) the new value is credited against only those transfers (including payments) that occur prior to the new value being given, and (2) in some jurisdictions,[7] the new value must remain unpaid at the time the bankruptcy is filed. *But see Wahoski v. American & Efrid, Inc.* (*In re Pillowtex Corp., et al.*), 416 B.R. 123 (Bankr. D. Del. 2009) (permiting a defendant to assert as a defense new value, even if paid, so long as the new value was not "otherwise unavoidable"). The following chart illustrates the analysis of this defense:

Date	Day	Preference Payment	New Value	Net Preference
03/23/10	Day - 70	$32,000		$32,000
04/02/10	Day - 60		$15,000	$17,000
04/12/10	Day - 50		$20,000	0
04/22/10	Day - 40	$15,000		$15,000
05/02/10	Day - 30		$3,000	$12,000
06/01/10	Day - 0	(Bankruptcy Filing Date)		$12,000

The new value given by the creditor to the debtor on Day 60 and Day 50 (counting backwards from the bankruptcy filing date) is credited against the preference payment that occurred on Day 70. But no credit is carried forward. The preference payment on Day 40 is only offset by the new value given on Day 30. Thus, the creditor's net preference exposure (without taking into account any other potential defenses) is $12,000 (*i.e.*, the $15,000 preference payment made on Day 40 minus the subsequent new value of $3,000 provided on Day 30). As is evident from the above chart, this defense is a mathematical-certainty-type defense that can be proven fairly easily, without hiring an expert. Accordingly, it is ordinarily one of the first preference defenses a creditor's attorney will examine.

3. Ordinary Course of Business

The "ordinary course of business" defense prevents the trustee from recovering a payment as a preference when the payment was received by the creditor in the ordinary business terms of either the debtor and creditor or the debtor's industry and creditor's industry. The essential purpose of this exception is "to leave undisturbed normal financial relations because

it does not detract from the general policy of the section to discourage unusual action by either the debtor or its creditors during the debtor's slide into bankruptcy." *Morrison v. Champion Credit Corp.* (*In re Barefoot*), 952 F.2d 795, 801 (4th Cir. 1991). *See also The Official Plan Committee v. Expeditors Int'l, Inc.* (*In re Gateway Pacific Corp.*), 153 F.3d 915 (8th Cir. 1998). This defense is embodied in section 547(c)(2)(A)-(B), which provides that a trustee cannot avoid a transfer:

(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.

This defense may be asserted under either or both prongs of the two-prong test, which contains a subjective prong concerning the consistency of the parties' course of dealing, and an objective prong concerning the relationship between the parties' course of dealing and industry norms. The creditor can show either that the practice was ordinary between[8] the parties or that it is ordinary in both of the parties' industries. So long as one of those requirements is met, the creditor will have established a defense to the preference claim.

To establish the objective prong of the "ordinary course of business" defense (section 547(c)(2)(B)), the creditor must prove that the parties have not deviated from the ordinary business terms of their industries. Some courts have held that the focus should be on the creditor's industry (*e.g., Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044 (4th Cir. 1994)), while others have held that it should be the debtor's industry (*e.g., In re Accessair, Inc.*, 314 B.R. 386 (8th Cir. B.A.P. 2004), *aff'd*, 163 Fed. Appx. 445 (8th Cir. 2006)). Other courts have held that one must look to both the debtor's and the creditor's respective industries (*e.g., In re Milwaukee Cheese Wis., Inc.*, 112 F.3d 845 (7th Cir. 1997)). Irrespective of whether the focus should be on the debtor's or creditor's industry, showing that such practice is ordinary in the industry usually requires an expert witness or other evidence. Because this prong of the "ordinary course of business" defense can require an expert witness, it is typically the most expensive and difficult defense to establish, even though it is frequently the only defense a creditor has. This results in the "ordinary course of business" defense being the largest area of litigation concerning preferences.

To establish the subjective prong of the "ordinary course of business" defense under section 547(c)(2)(A), the creditor must go back and examine the payment history of the debtor during the entire business relationship it had with the debtor. Many courts have compared the "average" number of days between the invoice date and the date of the debtor's payment of that invoice (*e.g., In re Waccamaw's Homeplace*, 325 B.R. 536 (Bankr. D. Del. 2005)). These courts compare the "average" number of days between the invoice date and payment in the preference period with such average for payments made prior to the 90-day preference period. This test can result in a narrow construction of the "ordinary course of business" defense. Conversely, some courts compare the payments made during the preference period with the "range" (rather than the "average") of the payments made during the pre-preference period (*e.g., In re Tennessee Valley Steel Corp.*, 201 B.R. 927 (Bankr. E.D. Tenn. 1996)). These courts compare the "ranges" between the invoice dates and payments in the preference period with the ranges between invoice dates and payments made prior to the 90-day preference period. As one can imagine, a statistical analysis can usually show what you want it to show by lengthening or shortening the sampling period or making other changes. Thus, presentation can be extremely significant. Providing spreadsheets and charts to illustrate the sophistication and thoroughness of the analysis has the potential to substantially improve the negotiation posture.

In addition to timing considerations, which are usually addressed first, courts can also consider any number of additional factors, including: (1) whether the amount or manner of payment (*e.g.*, check / wire) differed from past practices; (2) whether the debtor or the creditor engaged in any unusual collection or payment activity; (3) whether the creditor took advantage of the debtor's deteriorating financial condition; and (4) whether the subject transfer was in an amount more than usually paid. *In re Allegheny Health, Education and Research Foundation*, 292 B.R. 68 (Bankr. W.D. Pa. 2003); *Central Hardware Company v. The Walker-Williams Lumber Co.* (*In re Spirit Holding*), 214 B.R. 891 (E.D. Mo. 1997), *aff'd*, 153 F.3d 902 (B.A.P. 8th Cir. 1998). The second point considers whether the creditor threatened to cut off services or supply if payment was not made. If the debtor is able to produce these types of communications, the ordinary course of business defense can be even more difficult to prove. The third point usually considers whether the creditor changed any terms to compensate the creditor for the increased payment risk the creditor perceived.

4. Claim Amount

Under 28 U.S.C. § 1409(b), if a preference claim (excluding a consumer debt) against a non-insider is for less than $11,725, the action must be brought in the district in which the creditor resides. And, if the claim is for less than $5,850, and the debtor's debts are not primarily consumer debts, the claim is completely barred under 11 U.S.C. § 547(c)(9).

5. Poverty

Though not technically a defense and not described in the Bankruptcy Code or any case law, the "poverty" defense is

based on practical realities. In some situations, a trustee may agree to settle a preference claim on reduced terms if it receives verifiable evidence that the creditor would be unable to satisfy the judgment.

6. Additional Defenses

A creditor may have additional defenses not described herein. For example, grain sellers and fishermen are afforded special protections, as are commodity brokers, stockbrokers and other participants in certain types of finance-industry transactions. *See* 11 U.S.C. § 546(d), (e), (f), (g). Additionally, if the creditor was named a critical vendor, the debtor may have waived the preference claim as part of the critical vendor order. Other defenses are beyond the scope of this Article, as it is not meant to be an exhaustive examination of all potential defenses to a preference claim.

Conclusion

Attorneys assisting creditors faced with a preference demand should be mindful of the elements of the claim and the affirmative defenses and should respond in detail to the demand with records to substantiate their client's position. Attorneys should also advise their creditor clients to take a proactive approach to avoid preference exposure by being diligent in collecting payments in a timely and routine manner, preserving their records, monitoring their customers' financial status, implementing COD terms when necessary, and applying payments to the most recent invoices. However, if given the choice between accepting a payment that potentially could be considered a preference in the future, creditors generally should accept the payment and take the risk that they might have to defend against a preference claim. If the foregoing elements and affirmative defenses are evaluated properly, attorneys assisting creditors faced with preference demands should be able to effectively evaluate a creditor's exposure and implement strategies to resolve the preference claim in a manner that will lessen this unfortunate consequence of the debtor's bankruptcy.

Endnotes

[1] The author would like to express his sincere appreciation to Matthew J. Speiker for his comments on previous drafts of this Article.

[2] It should be noted, however, that, as a practical matter, the administrative costs of bringing the preference claim usually erode the amount of money that is available for redistribution.

[3] For an insider, as defined in Section 101(31) of the Bankruptcy Code, the look-back period is extended to one year. 11 U.S.C. § 547(b)(4)(B). Whether the creditor to whom or for whose benefit the transfer was made is an insider must be determined as of the date of the transfer. *In re American Eagle Coatings, Inc.*, 353 B.R. 656 (Bankr. W.D. Mo. 2006).

[4] *See* 11 U.S.C. § 503(b)(9) (providing that a creditor who provides the debtor goods 20 days prior to the debtor's bankruptcy shall be entitled to an administrative expense claim against the bankruptcy estate for the value of the goods received by the debtor).

[5] *See* 11 U.S.C. § 507(a)(2) (stating that administrative expense claims are entitled to priority over unsecured claims).

[6] If the creditor holds a security interest or lien that is undersecured (*i.e.*, partially out of the money), the portion of the preference claim paid from the debtor's general funds are conclusively presumed to have been applied first to the unsecured debt, thus making the payments preferential to that extent. *Drabkin v. A.I. Credit Corp.*, 800 F.2d 1153 (D.C. Cir. 1986). However, if the undersecured creditor has merely received its own collateral or the proceeds of its collateral, then the creditor has not received more than it would have obtained in a Chapter 7 liquidation and the transfer is not avoidable. *In re El Paso Refinery, LP*, 171 F.3d 249 (5th Cir. 1999).

[7] The Third, Seventh and Eleventh Circuits have held that new value must remain unpaid. This approach is known as the "remains unpaid" approach. On the other hand, the Fourth, Fifth and Ninth Circuits have held that the plain language of the Bankruptcy Code contains no such restriction. This approach is known as the "subsequent advance" approach, because its focus is on the subsequent new value that the defendant provided. The Eighth Circuit has issued somewhat conflicting opinions on the issue. *Compare In re Jones Truck Lines, Inc.*, 130 F.3d 323 (8th Cir. 1997) (applying the "subsequent advance" approach), *with In re Kroh Bros. Devel. Co.*, 930 F.2d 648 (8th Cir. 1991) (suggesting the "remains unpaid" approach is correct).

[8] Use of the term "between" is not meant to imply that a prior course of dealing is required. *In re Peterson Distributing, Inc.*, 197 B.R. 919, 926 (D. Utah 1996). A one-time transaction may be considered "ordinary" between the parties if it conformed to the payment terms of the underlying agreement. *Warsco v. Household Bank F.S.B.*, 272 B.R. 246, 251 (Bankr. N.D. Ind. 2002). However, conformity to the contract terms is not dispositive, as a payment according to the contract terms may have been outside the normal course of the parties' dealings if the parties had an established practice of departing from the contract requirements prior to the preference period. *In re Hayes Lemmerz Intern., Inc.*, 337 B.R. 49 (Bankr. D. Del. 2006). Further, it has been argued the drafters of BAPCPA meant for Section 547(c)(2)(A) (payment made in the ordinary course of the parties' affairs) to be the norm in most instances and for Section 547(c)(2)(B) (payment made according to ordinary business terms) to be used chiefly, if not exclusively, when there is no baseline or track record of earlier dealings between the parties. Nonetheless, the statute does not, by its terms, limit Section 547(c)(2)(B) to such situations.