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## When Is a Creditor a Creditor?

Two of the prima facie elements of a preference action are that the transfer was for the benefit of a creditor and in payment of an antecedent debt. In *Giuliano v. RPG Management (In re NWL Holdings)*, Adv. Pro. 10-53535 (Bankr. D. Del. June 4, 2013), the U.S. Bankruptcy Court for the District of Delaware considered whether late installment payments for future insurance coverage satisfied these two elements.

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The defendant, RPG Management Inc., combined the purchasing power of a number of businesses of the same type to obtain insurance coverage at more favorable rates than if the businesses purchased individual policies. NWL Holdings Inc. and its affiliates (collectively referred to in the opinion as NWL) were members of the Food Merchants Risk Purchasing Group Inc., an RPG client. RPG made the premium payments on behalf of the members, then invoiced the members for ongoing and future insurance coverage. Four installment payments that were paid late by NWL were the subject of the preference action.

In order to prove a preference case, the plaintiff must establish that the transfer (1) was made to or for the benefit of a creditor, (2) was for or on account of an antecedent debt, (3) was made while the debtor was insolvent, (4) was made on or within 90 days of the bankruptcy filing and (5) enabled the creditor to receive more than if the case were a Chapter 7 liquidation case. RPG argued that it wasn't a creditor because if the policy were canceled for nonpayment, they would be owed nothing because no services had been rendered. The trustee argued that RPG was a creditor because it could have canceled the policies for nonpayment, but instead continued to provide coverage. The court agreed with the trustee and focused on the fact that RPG continued to provide coverage and filed a claim for payments that were never paid. As RPG held a claim against NWL that arose prior to the bankruptcy filing, it was a creditor under the Bankruptcy Code.

The court also considered whether the payments satisfied antecedent debts. Again, RPG argued that because the payments were for future insurance coverage, the transfers weren't on account of outstanding indebtedness. The court again agreed with the trustee and held that because the payments were made after the invoice due date, they were on account of antecedent debt regardless of the applicable coverage period. Interestingly, the court did not consider, possibly because RPG did not offer evidence, whether at the time the installments were eventually paid if

RPG was providing insurance coverage related to those payments. If it wasn't, then arguably the transfers weren't on account of an antecedent debt. As two of the four challenged payments were installments 14 out of 17 and the coverage continued for seven or eight months after the payments, it would appear that the installments were still in advance of the coverage. If considered from a different perspective, if RPG had canceled the policies before the coverage period began, would it have been able to collect the amount due on the invoice just because the invoice was due? Not likely.

Although RPG lost its attack on the prima facie case, it did successfully assert the contemporaneous exchange for new value defense. The trustee argued that because the payments were late, that they couldn't be contemporaneous. However, the court noted that courts have generally found that insurance premiums paid within a month of the due date are contemporaneous. Accordingly, as three of the four payments were made within a month of the due date, they were not subject to avoidance.

Finally, the discussion of the new value defense is worthy of note. Both RPG and the trustee focused their positions on whether the last remaining transfer, occurring seven days before the bankruptcy filing, provided the debtors with new value. That position seems to be somewhat misplaced. It isn't clear from the opinion whether this transfer was for pre-petition or post-petition insurance coverage. If pre-petition, the only relevant new value would be for the seven days of insurance coverage between the transfer and the bankruptcy filing. If post-petition, it simply wouldn't be new value because the bankruptcy filing cuts off not only preference exposure, but also preference defenses. But regardless of whether it was for pre- or post-petition coverage, RPG would still be entitled to assert new value for seven days of insurance coverage because it was undisputed that the debtors were insured during this period, and in Delaware, new value can be paid and still provide a defense.

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