II. General Observations

Defending preference cases is challenging and frustrating for a creditor. What might be a complete defense in one jurisdiction may not be so clear in another. Knowing the law of the circuits is critical to effective counsel and analysis of risk.

Preservation of the creditor's records is essential to defending a preference complaint. Preservation at the inception of a bankruptcy proceeding will keep the cost of future litigation down, reducing the need to search for lost records or records maintained on another computer system. As companies and assets are sold or transferred, parties should remain mindful that preference exposure lasts until the statute of limitations has run, typically two years after the debtor's bankruptcy petition has been filed. (*See* 11 U.S.C. § 546) Thus, buyers of distressed or other assets should consider preference liability as a liability to be retained or transferred. Documents supporting defenses should be preserved by the party with the potential liability. Correspondence, electronic communication, copies of invoices and payments that will not only prove what happened during the 90-day preference period but what happened during the year or more prior to the 90-day period should be preserved. In addition, any other information that would be useful in determining ordinary course in the industry should be retained. Practically speaking, an early analysis of preference liability may color the creditor's positions taken throughout the case and shape the resolution of other issues between debtor and creditor. Timely analysis early in the case will also allow the creditor the ability to establish the appropriate reserves for any exposure.

Creditors with preference exposure seldom do but should review the proposed plan and disclosure statement to determine whether preference causes of actions will be preserved by the

debtor, waived or assigned to a liquidating trust. If the cases will be preserved, has the debtor provided adequate disclosure to the potential defendants in the disclosure statement? Several circuits require a list of the specific causes of action to be retained, and a general reservation of rights is not adequate. *D&K Properties Crystal Lake v. Mutual Life Ins. Co.,* 112 F.3d 257 (7th Cir. 1997); *Browning v. Levy,* 283 F.3d 761 (6th Cir. 2002). *But see Cohen v. TIC Financial Systems (In re Ampace Corp.),* 279 B.R. 145 (Bankr. D. Del. 2002) (where debtor preserved right to pursue "all avoidance actions" in disclosure statement, claims were preserved); *In re Appel Corp.*, 300 B.R. 564 (S.D.N.Y. 2003) (general reservation of rights regarding specific category of claims sufficient); *aff'd.,* 104 Fed. Appx. 199 (2d Cir. 2004).

Creditors should also examine what oversight will apply to the creditor representative who will field and prosecute the cases. Will the creditor representative be paid hourly or on a contingency basis? Will the creditor representative be required to exercise business judgment concerning litigation strategy and settlement? Will the funds recovered actually benefit the unsecured creditors or will the benefit be only for the professionals? After the plan is confirmed and the preference cases are filed, it may be too late to object to those provisions.

Finally, the summaries that follow represent only a statement of present case law. Decisions are rendered constantly. Creditors subject to preference claims should take steps to make sure that the law in their circuit has not changed since publication.