

# THE CREDIT TIMES



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## Common Bankruptcy Preference Defenses

by Bryan Rafferty

As we continue to emerge from the pandemic shutdown, many large and small businesses struggle to attain financial stability. In some cases, bankruptcy is the only solution. We have seen quite a few large company bankruptcies occur earlier in the pandemic, but there has been an uptick in the number of smaller sized companies filing for protection. The vehicle being used by many of these smaller company bankruptcies is The Small Business Reorganization Act (SBRA). The SBRA was signed into law in August 2019 and took effect in February 2020. This Act is a way to allow small businesses to file for the protection of a Chapter 11 Bankruptcy, but in a quicker and much less expensive way. Traditional Chapter 11's were deemed too expensive and complex for small businesses hoping to successfully reorganize and continue operations. With the increase in smaller company bankruptcy filings, comes the increased exposure to creditors for potential preference payments.

As a general definition, a preference is a payment or transfer of property, received by a creditor to pay on an antecedent debt within 90 days of a bankruptcy filing. If you receive a preference demand letter, it is highly recommended that you investigate thoroughly, and identify if you have any defenses to the alleged preference claim. The following are layman explanations of common preference defenses.

The "Contemporaneous Exchange" defense can be utilized when payment is received for the full value of the goods or services at the time those goods or services are provided. For example, you deliver \$10,000.00 worth of widgets to your customer, and the customer hands the driver a check upon delivery of the goods. Based on the fact that there is no antecedent debt accrued, the payment for those goods could be defended using the contemporaneous exchange defense in the event you receive a preference demand for that payment.

The "New Value" defense is used in many cases where a creditor continues to do business with a company after the payment is received. For example, if a creditor received a \$10,000.00 payment on an antecedent debt within 90 days prior of the bankruptcy filing, but subsequently sold the debtor \$10,000.00 worth of goods after the receipt of the payment, this would constitute a possible new value defense to the preference allegation. However, if a creditor received a \$10,000.00 payment on an antecedent debt, and subsequently sold the debtor \$6,000.00 worth of goods, there is a possibility that \$4,000.00 of the \$10,000.00 payment could be deemed as a preference. In essence, the value of the subsequent goods shipped, would be offset against the original amount of the preference payment.

The "Ordinary Course of Business" defense can be utilized to defend a preference action even though the bankrupt entity may have paid outside of your traditional or agreed upon payment terms. For example, your credit terms are net 30 days, but the company that filed bankruptcy, historically paid you within 70 days. Utilizing historical payment data from your system for this customer, and demonstrating that the payment received falls within their historic payment trends, could provide a defense to the alleged preference by illustrating that the payment received was how you and your customer actually conducted business.

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In addition to preference defenses, the bankruptcy laws have dollar thresholds governing the recovery of preference payments.

- Preference payments less than \$6,825.00 can be demanded, but cannot be litigated.
- Preference payments ranging from \$6,825.00 but less than \$25,000.00 can be litigated, but the location for that litigation is supposed to be in the federal district court where the creditor that received the preference payment is located. This is ignored by many bankruptcy trustees.
- Preference payments of \$25,000.00 and more may be litigated in the jurisdiction where the bankruptcy was filed.

Upon receipt of any preference demand, it is recommended that you immediately consult an attorney to obtain expert guidance and representation. However, having a general understanding of the defenses that can protect you, can hopefully assist in finding a path to mitigate your exposure to having to pay back the alleged preference.

*This information contained in this article is for informational purposes only. It is not to be taken as legal advice. Please consult an attorney to obtain legal advice concerning your claims specific circumstances.*

## Believe It or Not

*Below is a list of events CCC of NY has already confirmed that we will be attending in October 2021!*

NACM Credit Congress & EXPO - October 10-13  
ARA - October 17-20  
CRF Forum & Expo - October 25-27

*If you are attending any or all of these events, please let us know by emailing Chad Haynie: [chaynie@commercialcollection.com](mailto:chaynie@commercialcollection.com).*



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