

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ROBERT V. BROWN and
SUE A. BROWN,

Debtors.

Case No. 82-1857-C H

Adv. No. 87-0109

DONALD F. NEIMAN, Trustee,

Chapter 7

Plaintiff,

V.

ANNABEL BROWN, CENTRAL
VETERINARY SERVICE,
FARMERS COOPERATIVE,
DALLAS J. JANSSEN,
JUHL-SON ENTERPRISES,
MASTERCARD/CITIZENS SAVINGS
BANK, THERMOGAS CO. OF
MARSHALLTOWN, a Division of
Mapco Gas Products Inc.,
VISA/FIRST BANKCARD CENTER,
and EUGENE MERCER dba
MERCER LIVESTOCK SUPPLY,

Defendants.

INTERLOCUTORY RULING AND ORDER -
ADJUDICATION OF LAW POINTS

On May 3, 1988, a hearing was held on the Joint Motion for Adjudication of Law Points. The following attorneys appeared on behalf of their respective clients: August B. Landis for Plaintiff Trustee; Paul C. Peglow for Defendant Farmers Cooperative; Dallas J. Janssen as a pro se Defendant; Gregory W. Peterson for Defendant Mastercard/ Citizens Savings Bank; and Donald G. Juhl for Defendant Eugene Mercer, d/b/a Mercer Livestock Supply. At the conclusion of said hearing, the Court took the matter under advisement

upon a briefing deadline of May 11, 1988. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (F). The Court, upon review of the pleadings, arguments of counsel, and briefs submitted, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. The facts have been stipulated to by the parties.
2. On December 27, 1982, Debtors filed a joint voluntary Chapter 13 petition.
3. On October 25, 1983, Debtors' attorney, Dallas J. Janssen, filed an application for allowance of additional fees and expenses. The application covered the period from November 30, 1982, through August 2, 1983, the date of confirmation of the Chapter 13 Plan. This application sought approval of fees in the amount of \$11,445.00, plus advances in the amount of \$1,729.03, less the retainer of \$460.00, for a net amount of \$12,714.03.
4. On November 28, 1983, this Court over the signature of the Hon. Richard F. Stageman, U.S. Bankruptcy Judge, Southern District of Iowa, entered an order allowing the fees and expenses.

5. On November 18, 1986, this case was converted to Chapter 7.

6. Within 90 days of November 18, 1986, Debtors made the following payments:

Central Veterinary Services	\$ 8,000.00
Farmers Cooperative	28,876.73
Dallas J. Janssen	20,861.08
Mercer Livestock Supply	13,736.47
Juhl-Son Enterprises	5,500.00
MAPCO Gas Products	2,223.34

7. On June 8, 1987, Trustee filed a complaint to avoid preferential transfer, as amended on September 3, 1987.

ISSUES

Movants request the Court to enter an order adjudicating the following points of law:

1. When the Debtors' bankruptcy is converted from a Chapter 13 case to a Chapter 7 case, may the Chapter 7 trustee use his avoidance powers under 11 U.S.C. §547 to avoid post-petition, pre-conversion transfers made by the Debtors during the 90 days prior to conversion?

2. When a bankruptcy case is filed as a Chapter 13 case in 1982, and is converted to a Chapter 7 case in 1986, must a payment be made within 45 days after the relevant debt was incurred to qualify as a payment made in the ordinary course of business under 11 U.S.C. §547(c) (2) (A)?

3. Are attorney's fees for legal services rendered by Debtors' attorney post-petition but pre-conversion, if paid prior to Court Order, are entitled to administrative

priority to the same extent as fees paid pursuant to a Court Order?

4. What method of accounting should be employed by the Court in calculating the amount of allegedly preferential payments.

CONCLUSIONS OF LAW

I. Statutory Construction

The first two issues involve a construction and interpretation of the language "date of the filing of the petition" as set forth in 11 U.S.C. §547(b) (4) (A).

In interpreting a disputed statute, the court must begin with the language of the statute. Andrus v. Allard, 444 U.S. 51, 56, 100 S.Ct. 318, 322, 62 L.Ed.2d 210 (1979).

The court must honor the clear meaning of the statute as revealed by its language, purpose and history. Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979).

In ascertaining legislative intent in construing a statute, the court may properly consider not only the language of the statute, but also the subject matter, object to be accomplished, purpose to be served, underlying policies, remedy provided, and consequences of various interpretations. Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325, 1332 (8th Cir. 1985). However, the court cannot interpret a statute in such a manner that the result is neither commanded by the statute nor consistent with its

purpose. Matter of Nickerson & Nickerson, Inc., 530 F.2d 811, 814 (8th Cir. 1976)

II. Avoidance Powers

A preference under 11 U.S.C. §547 is a prepetition transfer in which a creditor gets paid in whole or in part at the expense of another creditor. This violates a basic policy of the Bankruptcy Code which is that there should be equality of treatment among creditors. In re Gulino, 779 F.2d 546, 548-49 (9th Cir. 1985); Deel Rent-A-Car, Inc. v. Levine, 721 F.2d 750, 754-55 (11th Cir. 1983); Matter of Maidman, 2 B.R. 569, 574 (Bankr. S.D. N.Y. 1980). A creditor should not be able to gain an advantage over creditors in the same class by receiving payment from the debtor's estate just before the debtor files for protection under the bankruptcy code. Id.

For a trustee to avoid a transfer as a preference, six elements must be shown:

1. A transfer of the debtor's property;
2. To or for the benefit of a creditor;
3. For or on account of antecedent debt;
4. Made while the debtor was insolvent;
5. Made on or within 90 days before the date of the filing of the petition; and
6. Enabling the creditor who received the transfer to get a greater percentage of its claim than that creditor would have received had the transfer not been made and had the

debtor's assets been liquidated and distributed in a Chapter 7 proceeding.

See 11 U.S.C. §547(b).

The interpretation of Section 547(b) involves the interplay between that Code section and section 348. Section 348(a), as relevant herein, provides:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but... does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

Defendants argue Trustee's section 547 avoidance powers run from the 90 days prior to the date of the filing of the original Chapter 13 petition. Trustee submits the reference period should run from the 90 days prior to conversion.

Facially, it would appear that when section 348(a) is considered with the language "date of the filing of the petition" set forth in section 547(b)(4)(A), the date of filing of the Chapter 13 petition controls. Section 547(b) (4) (A) states that a trustee may avoid a transfer "on or within 90 days before the date of the filing of the petition", and section 348(a) states that conversion of a Chapter 13 case to a Chapter 7 case "does not effect a change in the date of the filing of the petition" except for two exceptions.

Although there is a conflict of authority on this issue, the Court finds the reasoning in In re Hoggarth, 78 B.R. 1000 (Bankr. D.N.D. 1987) to be persuasive. The Hoggarth court held that "the preference period under section 547 commences on the date of conversion as against any post-confirmation transfers of non-plan property to nonplan creditors." Id. at 1002. In reaching its conclusion, the Hoggarth court relied upon Eighth Circuit cases which were interpreting the tension between section 348(a) and other sections. Id. Recognizing that those cases did not address section 547 actions, this Court agrees with the Hoggarth court that the same reasoning does apply under section 547. As a result, the Court concludes the preference period under section 547 is calculated from the date of conversion in order to prevent the depletion of the Chapter 7 estate and the preferential transfer of non-plan assets to non-plan creditors.

III. Payments Within Forty-five Days

Section 547(c) (2) provides a preference exception for payments made in the ordinary course of business. The purpose and intent of said section "is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." In re Bourgeois, 58 B.R. 657, 659 (Bankr. W.D. La. 1986) (quoting 1978 U.S. Code

Cong. & Admin. News 5787, 6329). In addition, section 547(c) (2) encourages creditors to continue short-term credit dealings with troubled debtors in order to forestall bankruptcy rather than encourage it. In re Morris, 53 B.R. 190, 192 (Bankr. D. Or. 1985).

Prior to the enactment of the Bankruptcy and Federal Judgeship Act of 1984 (hereinafter "BAFJA"), a payment had to be made within 45 days after the relevant debt was incurred to qualify as a payment made in the ordinary course of business under section 547(c)(2)(A). The enactment of BAFJA in 1984 eliminated the 45-day requirement from section 547(c)(2)(A) for those cases filed after October 7, 1984. See BAFJA, Pub. L. No. 98-353, §553(a), 98 Stat. 333, 392 (1984)

In determining the purpose of the amendment to section 547(c)(2), the Court will look to legislative history and case law. Legislative history indicates the 45-day requirement was eliminated because it unduly burdened creditors receiving payments under billing cycles greater than 45 days. S.Rep. No. 65, 98th Cong., 1st Sess. 60. Concerning case law, the Bourgeois court noted "the amendment was intended only to eliminate an artificial time limit, and no more. The 45-day limit was eliminated so that the provisions of the Code would comport with normal business policies." Id. at 659. Further, the court in In re Holdway, 83 B.R. 507, 509 (Bankr. E.D. Tenn. 1988),

stated "[t]he 45-day rule effectively left unprotected ordinary course transfers whose customary terms exceeded 45 days."

Given the uniform discontent with the former 45-day component in section 547(c) (2), the Court believes the more reasonable approach is to not apply the arbitrary and artificial 45-day time limit. However, when construing a statute, the Court must begin with its plain language. Here, section 553(a) of BAFJA clearly states the amendment removing the 45-day requirement is effective only for cases filed 90 days after the enactment date. Since BAFJA was enacted on July 10, 1984, the amendment only applies to cases filed after October 7, 1984.

In the case at bar, Debtors filed their original Chapter 13 petition on December 27, 1982, nearly two years before the amendment to section 547(c) (2) became effective. Thus, even though there is little if any reason to believe Congress considered a post-amendment conversion of a preamendment filed case when setting the effective date of the amendment, the Court is bound by the plain language in section 553(a) of BAFJA. As a result, the Court will be applying the 45-day time limit in construing section 547(c) (2).

IV. Attorney's Fees. Post-Confirmation and Pre-Conversion

Claims for administrative expenses specified by section 503(b) are expressly excepted from the operation of section

348(d). Such administrative expense claims will therefore continue to have first priority and distribution as specified in section 507(a). However, the priority is affected because expenses of the Chapter 7 are to be paid in full ahead of the expenses of the failed Chapter 13 case. 11 U.S.C. §726(b).

Counsel for Debtors has represented to the Court that funds paid to said counsel by Debtors are being held in a trust account pending ruling and order by the Court. The Court's position is that upon further application of Debtors' counsel, the Court will address this matter upon further notice and hearing. This will resolve the requirements of sections 330 and 503.

V. Method of Accounting

This issue is not capable of being determined as a matter of law in an adjudication of law points. The resolution of this issue would involve the presentation of facts as to the manner of doing business by and between the Debtor and the respective creditors.

DATED this 7th day of November, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE