UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

THE CENTRAL STEEL TUBE COMPANY,	Case No. 83-856-D H Chapter 11
Debtor.	
THE CREDITORS COMMITTEE OF THE CENTRAL STEEL TUBE COMPANY, Assignee of The Central Steel Tube Company,	Adv. No. 86-0215
Plaintiff,	
V.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	
Defendant.	

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment is denied.

Defendant's motion for summary judgment is sustained and the defendant, The Mutual Life Insurance Company of New York, shall have judgment against the Plaintiff, The Creditors Committee of Central Steel Tube Company, Assignee of the Central Steel Tube Company, dismissing all counts of the complaint, and for its costs.

Defendant's motion for summary judgment on the counterclaim is denied.

Dated this 8th _day of February, 1989.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court

By:_____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated: February 8, 1989

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

THE CENTRAL STEEL TUBE COMPANY,

Debtor.

Case No. 83-856-D H
Chapter 11

THE CREDITORS COMMITTEE OF THE CENTRAL STEEL TUBE COMPANY, Assignee of The Central Steel Tube Company,

Plaintiff,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

Adv. No. 86-0215

ORDER--MOTION FOR SUMMARY JUDGMENT

On June 2, 1988, a hearing was held on Plaintiff's and Defendant's motions for summary judgment. The following attorneys appeared on behalf of their respective clients: Jerrold Wanek and Allan W. Gilbert for Plaintiff, and Julie Johnson McLean for Defendant. At the conclusion of said hearing, the Court took the matters under advisement and now considers them fully submitted.

This is a core proceeding pursuant to 11 U.S.C. §157(b)(2)(F). The Court, upon review of the pleadings, arguments of counsel and briefs submitted, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACTS

1. Defendant issued a group life and major medical insurance policy for and on behalf of Central Steel's insured employees and dependents, effective January 1, 1982.

2. Said policy provided in relevant part as follows:

   a. The premiums were due on the date of issue and "on the first day of each policy month thereafter."

   b. A grace period of 31 days was "granted for the payment of each premium falling due after the first premium."

   c. The amount of each premium was to be computed by the sum of (i) the premium changes specified by table in the policy, and by (ii) the amounts required by any additional benefit rider.

   d. The amounts and rates of the premiums and premium components were subject to change by Defendant upon 31 days notice.

3. Central Steel filed its Chapter 11 petition on June 14, 1983.

4. The policy was terminated at Central Steel's request, effective August 30, 1984.

5. During the period from January 1, 1982, through August 30, 1984, Central Steel prepared monthly premium

billing statements and remitted monthly premium payments to Defendant on a self-administered basis.

6. During the period from January 1, 1982, through August 30, 1984, Central Steel submitted to Defendant health and death claims on behalf of its employees and dependents.

7. The following table sets forth the three payments made by Central Steel to Defendant within the 90-day period prior to June 14, 1983, the date of filing of the Chapter 11 petition:

Policy Month	Check Date	Date MONY Rec'd Check	Date Cleared	Amount of Central Steel's Check
3/1/83	3/31/83	4/14/83	4/18/83	$29,388.15
4/1/83	5/3/83	5/20/83	5/23/83	24,303.49
5/1/83	5/27/83	6/08/83	6/10/83	26,706.11
				$80,397.75

8. Defendant paid health claims from March 14, 1983, through December 31, 1983, in the amount of $184,663.88, and from January 1, 1984, through August 31, 1984, in the amount of $215,740.99. Defendant paid a death claim in the amount of $8,000.00 for a death which occurred on August 4, 1984. The total of the above amounts is $408,404.87.

9. From March 14, 1983, through June 13, 1983, Defendant paid $49,184.11 in health claims.

10. During the policy period some premium payments were not received by Defendant before expiration of the grace period. During this period Defendant continued to provide insurance coverage and pay claims. The parties

expected that insurance coverage would be provided notwithstanding the late premium payments.

11. Central Steel has failed to pay the insurance premium in the amount of $39,847.27 for insurance coverage provided by Defendant to Central Steel for the period from August 1, 1984, through August 31, 1984.

12. Central Steel was insolvent during the 90-day period before the date of filing of the bankruptcy petition.

13. The transfer of $80,397.75 to Defendant enabled Defendant to receive more than it would have received in a Chapter 7 proceeding if the transfers were not made and if Defendant had received payment of its debt to the extent provided by the provisions of the Bankruptcy Code.

14. Central Steel and Defendant intended the insurance premium payments to be a contemporaneous exchange for continued insurance coverage.

DISCUSSION

Three issues are presented in this case. The first issue is whether the three insurance premium payments in question amounted to an avoidable preference under §547(b). The second issue is whether said payments meet any of the preference exceptions under §547(c). The final issue is whether Defendant is entitled to payment of its counterclaim for an unpaid insurance premium for insurance coverage provided to Central Steel post-petition in August of 1984 as an administrative expense under §§503(a), (b)(l)(A) and

507(a)(l). The Court will address each of these issues individually, but before doing so will set out the standards for summary judgment.

A. Summary Judgment

Bankruptcy Rule 7056 provides that Federal Rule of Civil Procedure 56, which governs motions for summary judgment, applies in bankruptcy adversary proceedings. The Eighth Circuit Court of Appeals has set for the following standard:

> Summary judgment is appropriate only when the moving party satisfies its burden of showing the absence of a genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the opposing party and must give that party the benefit of all reasonable inferences to be drawn from the facts. This court often has noted that summary judgment is "an extreme and treacherous remedy" and should not be entered "unless the movant has established its right to a judgment with clarity as to leave no room for controversy and unless the other party is entitled to recover under any discernable circumstances."

Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 391-92 (8th Cir. 1986) (citations omitted).

The purpose of summary judgment is to enable a party to obtain judgment without the unnecessary delay and expense of trial where there is no genuine issue of material fact present. Anderson v. Viking Pump, 545 F.2d 1127, 1129 (8th Cir. 1979); Lyons v. Board of Education of Charleston, 523

F.2d 346, 347 (8th Cir. 1975); Fed. R. Civ. P. 56. Once a motion for summary judgment has been made and properly supported, the party opposing summary judgment may not rest upon the mere allegations or denials of its pleadings but his or her response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial. Burst v. Adolph Coors Co., 650 F.2d 930, 932 (8th Cir. 1981); Security Nat'l Bank v. Belleville Livestock Comm'n Co., 619 F.2d 840, 848 (10th Cir. 1980). Where a moving party establishes the absence of any genuine issue of material fact and the opposing party submits no evidence in rebuttal, summary judgment is justified. Stovall v. City of St. Louis, 614 F.2d 619, 621 (8th Cir. 1980) ; Willman Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 293 (8th Cir. 1975)

In the case at bar, both parties argue no material facts are in dispute and that each is entitled to judgment as a matter of law. The Court finds there is an absence of any genuine issue of material fact. The dispute is purely legal. As a result, upon the resolution of the legal issues, one party will be entitled to summary judgment.

B. Preference Under §547(b)

Bankruptcy Code §547(b) sets out the five elements of a preference and provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made-
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if——
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. §547(b). Plaintiff has the burden of proving the transfers are preferential. In re Saco Local Dev. Corp, 25 B.R. 876, 878 (Bankr. D. Maine 1982). As a result, Plaintiff must prove each of the five elements by a fair preponderance of the evidence. Id.

In the case at bar, the Court finds Plaintiff has met its burden of proof on elements (b)(l), (3), (4), and (5). The remaining element is (b) (2)--payment for or on account

of antecedent debt. A debt is antecedent if it is incurred before the transfer. In re AOV Industries, Inc., 85 B.R. 183, 185 (Bankr. D. Cob. 1988). In an insurance context, if the policy expressly provides premium payments are due on the first day of each month, the debt is incurred each new month, not on the date the policy was entered into originally. Matter of Advanced Glass Mfg. Co., 761 F.2d 249, 250 (6th Cir. 1985); AOV Industries, 85 B.R. at 185-188. However, the AOV Industries court determined the debt in that case was antecedent because each monthly debt was incurred prior to the subsequent payment by 2-4 weeks. Id. at 185; see also In re Hartwig Poultry, Inc., 75 B.R. 748, 751 (Bankr. N.D. Ohio 1987) (debt was antecedent because it arose six weeks before payment was tendered).

In the case at bar, the Court concludes the debts were antecedent because payments were not delivered for 5-7 weeks after the debts were incurred on the first of each month. However, Plaintiff did not argue this. Instead, Plaintiff made the simple argument that since the policy was entered into in 1982, the debt was created then so it was antecedent. As a result, Plaintiff argued the right result for the wrong reason. Therefore, the Court concludes Plaintiff has not met its burden of proof under §547(b), thus entitling Defendant to summary judgment.

B. Exceptions to Preference Under §547(c)

Assuming arguendo Plaintiff met its burden of proving the three insurance premium payments were preferential under §547(b), the next issue is to determine whether they meet any of the exceptions under §547(c). The first relevant exception is found in §547(c)(2) which provides that a trustee may not avoid a transfer:

> (2) to the extent that such transfer was --
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made not later than 45 days after such debt was incurred
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms....

11 U.S.C. §547(c)(2) (emphasis added). The 45-day requirement (§547(c)(2)(B)) was eliminated from §547(c)(2) by the Bankruptcy Amendments and Federal Judgship Act of 1984, Pub. L. No. 98-353. Section 543(a) of the 1984 amendments states that "the amendments made by this title shall become effective to cases filed 90 days after the date of the enactment of this act." October 8, 1984, was the cut-off date 90 days after the enactment date. In the case at bar,

Central Steel filed its Chapter 11 petition on June 14, 1983. Thus, the prior provisions of §547 continue to be applicable to the case at bar because it was pending prior to October 8, 1984.

Defendant has the burden of proving all four elements of §547(c) (2) are met. In re H. & A. Const. Co., Inc., 65 B.R. 213, 218 (Bankr. D. Mass. 1986). In the case at bar, the only element in dispute is the second--whether the transfer was made within 45 days of when the debt was incurred. Two issues are raised: 1) when was the transfer by check made?; and 2) when was the debt incurred?

Concerning when the transfer was made, the vast majority of courts hold that the date of delivery of a check, as opposed to the date the check is honored, is the date of transfer for purposes of §547(c)(2). In re White River Corp., 799 F.2d 631, 633 (10th Cir. 1986); O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35, 38 (1st Cir. 1985); In re American Intn'l Airways, Inc., 68 B.R. 326, 333 (Bankr. E.D. Pa. 1986); Matter of Georgia Steel, 58 B.R. 153, 158 (Bankr. M.D. Ga. 1984); In re Thomas W. Garland, Inc., 19 B.R. 920, 928 (Bankr. E.D. Mo. 1982).

The next issue is determining when the debt was incurred. Although Congress has not defined when a debt is incurred, many courts have held that a debt is incurred on the date upon which the debtor first becomes legally bound to pay. White River Corp., 799 F.2d at 632; Advanced Glove

Mfg. Co., 761 F.2d at 250; In re Emerald Oil Co., 695 F.2d 833, 837 (5th Cir. 1983); In re Iowa Premium Service Co.. Inc., 695 F.2d 1109, 1111 (8th Cir. 1982); Barash v. Public Finance Corp., 658 F.2d at 504, 511 (7th Cir. 1981); H.& A. Const., 65 B.R. at 218.

In an insurance context, two cases have addressed the issue of when debt for premium payments is incurred. In Advanced Glove, supra, the Sixth Circuit affirmed the district court and held that debt for insurance premiums was incurred on the first day of each month-—the day payment was due under the express language of the policy. In that case, the debtor company had purchased group term life, accident, and health policies for its employees. Under the express language of the policies, the debt for policy premiums was due on the first day of each month.

In Georgia Steel, supra, the court held that a debt for insurance premiums was incurred at the close of the policy period on January 1, 1981. In that case, the debtor obtained a composite insurance policy which ran from February 1, 1980, until the expiration date on January 1, 1981. Under the policy's terms, the debtor was required to pay an advance premium. At the end of the policy period, the insurer would calculate an earned premium based on an audit of the debtor's sales. The debtor was entitled to a refund if the advance premium exceeded the earned premium, but would be billed for the difference if the earned premium

exceeded the advance premium. The debtor paid an advance premium but then was billed for the difference. The court held the debt was incurred on January 1, 1981, and found §547(c) (2) inapplicable because the debtor did not deliver the checks within 45 days of January 1, 1981.

In the case at bar, the express terms of the policy provide the premiums are due on the first day of each policy month. Therefore, the Court concludes the debts for premium payments were incurred on the first day of each month. As for the date of transfer of the checks as payment for each premium, the Court concludes the date of delivery of the check is the date of transfer. Applied to the facts, Central Steel's premium payments for the policy months of March and May of 1983 were made not later than 45 days after the debts were incurred (March: incurred 3/1, check delivered 4/14--44 days; May: incurred 5/1, check delivered 6/8--38 days). However, the April payment does not meet (c)(2) (April: incurred 4/1, check delivered 5/20--49 days). Thus, under §547(c)(2), the March and May payments are excepted from being voided as preferences, but the April payment is not.

Although the April payment does not meet the requirements of §547(c) (2), Defendant argues it can protect that payment under §547(c) (1) which provides that the trustee may not 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[.]

11 U.S.C. §547(c)(l). In order to qualify for this exception, a creditor must prove three elements: 1) the creditor must extend new value to the debtor; 2) both the creditor and the debtor must intend the new value and reciprocal transfer to be contemporaneous; and 3) the exchange must in fact be contemporaneous. Cimmaron Oil Co Inc. v. Cameron Consultants. Inc., 71 B.R. 1005, 1009 (N.D. Tex. 1987) . The Code defines "new value" as:

> [Money] or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation [.]

11 U.S.C. §547(a)(2). To avoid confusion and uncertainty, Congress defined "new value" in its ordinary sense. Matter of Georgia Steel, 56 B.R. 509, 522 (Bankr. M.D. Ga. 1985).

Concerning whether insurance premiums are "new value," the Court in In re Dick Henley. Inc., 45 B.R. 693, 699 (Bankr. M.D. La. 1985), determined that except to the extent the debtor received new credit from the insurance company after the payment, no new value was received and the

payment was a preference. In Henley, the debtor was in arrears on three monthly premiums. After the insurance company issued a notice of cancellation, the debtor made a payment to take care of the arrears and reinstate the policy. The court determined the debtor did not receive any new value because the payment was on account of performance by the insurer relating to a period of time already elapsed. Id. Further, the court noted that bringing an account current to obtain the right to do further business was not a contemporaneous exchange. Id.

In the case at bar, each of Central Steel's payments was made to acquire another month's insurance coverage. They were not made to cover any arrears. Therefore, the Court concludes the payments meet the "new value" element of §547(c) (1)

Concerning the other two elements, the legislative history of §547(c)(l) recognizes that a check is the equivalent of cash:

> Normally, a check is a credit transaction. However, for the proposes of [§547(c) (1)], a transfer involving a check is considered to be "intended to be contemporaneous," and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, U.C.C. §3—503(2) (a), that will amount to a transfer that is "in fact substantially contemporaneous."

H.R. Rep. No. 95—595, 95th Cong., 1st Sess. 373, reprinted in 1978 U.S. Code Cong. & Admin. News, 5963, 6329.

In the case at bar, Central Steel and Defendant intended the premiums to be a contemporaneous exchange for continued insurance coverage. In addition, as noted above, the legislative history provides that a transfer involving a check is considered to be "intended to be contemporaneous." On May 20, 1983, Defendant received a check from Central Steel for the policy month of April 1983. Said check cleared on May 23, 1983. Since Defendant presented the check for payment in the normal course of affairs (within 30 days of the transfer, pursuant to U.C.C. §3-503(2)(a)), the transfer is "in fact substantially contemporaneous." Therefore, the Court concludes all three elements under §547(c)(l) are met for the April premium check, thus precluding the trustee from voiding the preferential payment.

In conclusion, Plaintiff did not meet its burden under §547(b) of proving the payments were preferences. Assuming arguendo it did meet its burden, Defendant met its burden of proving the March and May payments come within the §547(c) (2) exception, and the April payment comes within the §547(c) (1) exception. Therefore, Defendant is entitled to summary judgment in its favor on the preference issue.

D. Defendant's Counterclaim

The final issue is whether Defendant is entitled to recover its counterclaim against Plaintiff. In said counterclaim, Defendant seeks payment of its claim as an

administrative expense for the unpaid insurance premium due it for the period from August 1, 1984, through August 31, 1984, in the amount of $39,847.27, for insurance coverage provided to Central Steel after the commencement of its Chapter 11 case.

In the case at bar, assuming without deciding the unpaid insurance premium should be allowed as an administrative expense, the fact remains that Central Steel, not Plaintiff, would be the party liable for payment of the administrative expense. Central Steel is not a party to this adversary proceeding. Pursuant to this Court's Order of May 16, 1985, Plaintiff was assigned all right, title and interest in and to all avoidance actions. However, no Order makes Plaintiff liable for the payment of administrative claims. Section 3.1. of Article III of Central Steel's Second Amended Plan provides for the payment of administrative claims but does not make Plaintiff liable for such. Therefore, the Court concludes the issue of administrative expense must be resolved in the case file, not in this adversary.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Plaintiff has not met its burden under §547(b) of proving Central Steel's three insurance premium payments were preferential.

FURTHER, the Court concludes all three payments meet exceptions to preference under §547(c).

FURTHER, the Court concludes that since Central Steel is not a party to this adversary proceeding, Defendant's counterclaim for an unpaid insurance premium must be resolved in the Central Steel case file.

IT IS ACCORDINGLY ORDERED that Plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment is granted as to the preference issue but denied on the counterclaim.

Dated this 8th day of February, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE