UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

G. V. LEWELLYN & CO., INC., and GARY VANCE LEWELLYN,

Debtors.

Case No. 82-162-C H
(Consolidated with Case No. 82-766-C H

Chapter 7

PAUL R. TYLER, Trustee,

Plaintiff,

vs.

Adv. No. 86-0050

SWISS AMERICAN SECURITIES, INC.,:

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 THE JUDGMENT of the Court that the defendant, Swiss American Securities, Inc., have judgment against the plaintiff, Paul R. Tyler, Trustee, dismissing the Complaint, as amended.

Dated this 13th day of April, 1989.

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

By:_____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated: April 13, 1989

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of G. V. LEWELLYN & CO., INC., and GARY VANCE LEWELLYN,	Case No. 82-162-C H (Consolidated with Case No. 82—766—C H
Debtors.	Chapter 7
PAUL R. TYLER, Trustee, Plaintiff, vs.	Adv. No. 86—0050
SWISS AMERICAN SECURITIES, INC.,: Defendant.	

FINDINGS AND CONCLUSIONS--TRUSTEE'S COMPLAINT TO AVOID PREFERENTIAL TRANSFER

On June 20 and 21, 1988, a trial was held on Trustee's complaint to recover an alleged preferential transfer of 425,000 shares of stock made by Debtors to Defendant, Swiss American Securities, Inc. (hereinafter "Swiss American"). The following attorneys appeared on behalf of their respective clients: Brent R. Appel and Richard A. Malm for Plaintiff/Trustee (hereinafter "Trustee"); Matthew Gluck, John Sullivan, and F. L. Burnette, II, for Defendant Swiss American; and William W. Graham and Julie Johnson McLean for the Federal Deposit Insurance Corporation (hereinafter "FDIC"). The Trustee, Paul R. Tyler, also appeared. At the conclusion of the trial, the Court took the matter under advisement under a briefing schedule. 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) (F). The Court, upon review of the pleadings, arguments of counsel, evidence presented, and briefs, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. The Trustee in this adversary proceeding seeks to recover the value of 425,000 shares of Safeguard Scientifics, Inc. (hereinafter "Safeguard") stock which Gary Vance Lewellyn (hereinafter "Lewellyn") transferred to Swiss American on March 4, 1982.

2. This case was originally commenced by the filing of an application for relief with respect to G. V. Lewellyn & Co., Inc. (hereinafter "GVL") by the Securities Investor Protection Corporation (hereinafter "SIPC") under the Securities Investor Protection Act (hereinafter "SIPA"), 15 U.S.C. §78aaa et seq. On April 15, 1982, SIPC's application was granted and Paul R. Tyler was appointed Trustee.

3. GVL filed a voluntary Chapter 7 petition on April 8, 1982. On May 24, 1982, Lewellyn filed a voluntary Chapter 7 petition.

4. On October 29, 1982, the Lewellyn and GVL bankruptcy cases were substantively consolidated because their assets and liabilities were extensively comingled and it was impossible to separate the estates.

5. Swiss American is a broker—dealer registered with the Securities and Exchange Commission (hereinafter "SEC") and is a

member of the National Association of Securities Dealers. Swiss American provides clearing and investment services for its parent, Credit Suisse, and other European clients. Swiss American also performs clearing services for domestic American broker—dealers.

6. These services include: 1) execution of orders for the purchase and sale of securities as such orders are transmitted to Swiss American by its broker—dealer customers; 2) clearance and settlement of contracts and transactions in securities; and 3) preparation and delivery of confirmations evidencing the purchase or sale of securities, monthly statements of account, and similar records required by Swiss American's broker—dealer customers in connection with their various accounts.

7. At all times relevant to this case, Swiss American was not a member of the New York Stock Exchange (hereinafter "NYSE"), but was a member of smaller regional exchanges.

8. Lewellyn was a registered securities representative employed in Des Moines, Iowa, from January 1973 to November 1980.

9. On February 6, 1980, an Exchange Hearing Panel of the NYSE entered a decision on charges brought against Lewellyn based on his execution of an unauthorized transaction for a client. Lewellyn was suspended from employment in any capacity with member firms of the NYSE for the three-month period commencing September 1, 1980, and was suspended from employment in any supervisory capacity with any NYSE member for the two-year period beginning March 28, 1979. On October 29, 1980, the Iowa Superintendent of Securities, based on the findings of the Exchange Hearing Panel,

issued an Order suspending Lewellyn's Iowa Securities Agent's license from that date through November 30, 1980, and suspending him from employment in any supervisory capacity through December 31, 1980. Lewellyn consented to the order. He re—registered as a broker-dealer with the SEC effective March 30, 1981, and was approved for membership in the National Association of Securities Dealers on July 23, 1981. Swiss American knew of this suspension at the time it entered into business with Lewellyn.

10. GVL was incorporated in December 1980 as a securities brokerage firm in Des Moines, Iowa. Lewellyn was its President, sole officer, and sole shareholder.

11. Lewellyn executed a clearing agreement with Swiss American on behalf of GVL on or about June 29, 1981. The clearing agreement provided that Swiss American would provide clearing services for GVL and accounts of its customers. GVL agreed to abide by applicable laws and regulations and gave Swiss American complete discretion in matters involving extension of credit. Swiss American was granted a general lien on all monies, securities, and property which Swiss American held for GVL or its customers.

12. On or about July 6, 1981, Lewellyn entered into a trading agreement with Swiss American and opened cash and margin accounts in his own name. Lewellyn agreed to abide by all applicable laws and regulations. Swiss American was granted a general lien upon all monies, securities, commodities, or other property held by Swiss American for Lewellyn. Swiss American was also authorized,

without notice, to transfer all monies, securities, and other property between accounts, except the regulated commodity accounts. In practice, however, Lewellyn's cash and margin transactions were all recorded in the same account and appeared to Lewellyn in a single monthly statement.

13. Lewellyn made large purchases of Safeguard stock in late 1981 and early 1982. Initially, almost all of Lewellyn's Safeguard purchases were made in his margin account. By December 31, 1981, Lewellyn had accumulated 496,700 shares of Safeguard in his margin account and 300 shares in his cash account. The closing trading price of the stock on the NYSE at that time was $9.00 per share.

14. On October 13, 1981, the order room at Swiss American noted that Lewellyn's holdings in Safeguard were approaching 5% of outstanding stock. On October 15, 1981, Swiss American sent Lewellyn a letter noting that he may have a 5% interest in Safeguard and alerting him to federal reporting requirements. On or about October 26, 1981, Lewellyn filed with the SEC, Safeguard, and the NYSE Schedule 13D disclosing that as of October 2, 1981, he had acquired 272,000 shares of Safeguard.

15. In November 1981, Swiss American learned that Lewellyn was making additional significant purchases of Safeguard. On November 18, 1981, Lewellyn held 287,400 shares of Safeguard in his margin account. On November 19, 1981, Swiss American advised Lewellyn that the maintenance requirement in his margin account was being increased from 35% to 50%.

16. In December l98l, although Lewellyn's margin account was fully margined, Swiss American became concerned about Lewellyn's large accumulation of Safeguard stock. Safeguard's annual report was reviewed and a determination was made that Safeguard was a speculative company. A credit check was made on Lewellyn, but this did not reveal any negative information. Lewellyn was placed on a cash only basis with respect to further purchases of Safeguard, and Lewellyn accepted this treatment.

17. In January and February of 1982, Lewellyn opened margin accounts with Swiss American in the names of Kathryn Barakat, Margaret Turner, and Beth Vermie. Lewellyn used these accounts as nominee accounts to enable him to continue purchasing Safeguard on margin, and to circumvent Swiss American's prior restriction on Lewellyn's account requiring him to either diversify his margin account or pay cash for additional purchases of Safeguard stock. On February 23, 1982, Swiss American decided that no further purchases of Safeguard stock on margin would be allowed in the accounts of Barakat, Turner and Vermie. Lewellyn's use of these nominee accounts was not known to Swiss American until this time.

18. In February of 1982, Lewellyn continued to purchase Safeguard stock in his cash account. The trading price of the stock steadily increased on the NYSE and as of February 28, 1982, was trading on the exchange at $15.125 per share.

19. Between February 2 and February 24, Lewellyn withdrew 425,000 shares of Safeguard from his cash account. Swiss American

had a valid security interest in these shares until the shares were withdrawn.

20. Between January 6, 1982 and March 2, 1982, Lewellyn had made over $3,000,000 in cash payments in his personal account. Lewellyn made a cash settlement payment on March 2, 1982, in the amount of $615,000.00 and had timely settled all cash transactions prior to March 4, 1982.

21. During the week prior to March 4, 1982, Lewellyn had ordered over $8,000,000 worth of Safeguard stock at Swiss American. Over $3,225,000 was coming due on March 4, 1982; almost $2,500,000 was coming due on March 5, 8, and 9; and, over $2,225,000 was coming due on March 10 and 11, 1982.

22. Lewellyn requested the March 4, 1982, meeting when he realized he would be unable to pay for the shares purchased in his cash account. Lewellyn specifically brought the 425,000 shares of Safeguard stock to the meeting as payment for the stock purchases. Lewellyn told Swiss American he was temporarily without cash but expected to receive cash within a short time from a pending real estate transaction. Lewellyn offered the 425,000 shares to Swiss American as payment. Using the quoted price on the NYSE of approximately $16.00 per share on that date, the value of the 425,000 shares was approximately $6,800,000. On March 4, 1982, using the same quoted prices, the value of securities in Lewellyn's accounts, excluding the 425,000 shares, was approximately $17 million.

23. Swiss American agreed to take the stock as collateral for Lewellyn's obligation and placed the shares in Lewellyn's margin account. It had previously done so with other institutions. Cash account settlements can be settled with something other than full payments in cash, despite the fact cash is generally more desirable than securities. Swiss American also transferred all other Safeguard shares in Lewellyn's cash account to his margin account. The transfer was made for or on account of antecedent debt owed by Lewellyn to Swiss American before the transfer was made.

24. Lewellyn and GVL were insolvent, individually and on a consolidated basis, at the time of the transfer of 425,000 shares from Lewellyn to Swiss American on March 4, 1982. Prior to said transfer and at all times thereafter, the antecedent indebtedness of Lewellyn and GVL, individually and collectively, to Swiss American was undersecured in an amount equal to or greater than the value of the Safeguard shares transferred to Swiss American on March 4, 1982.

25. At the March 4 meeting, Lewellyn was informed that Swiss American would execute no further trades for his personal account or the accounts of Barakat, Vermie, and Turner. Swiss American also told Lewellyn to move his account to another brokerage house.

26. Before and after said meeting, Lewellyn proceeded to purchase shares of Safeguard through other brokerage houses. On about January 12, 1982, Lewellyn opened a margin account at Merrill Lynch Pierce Fenner & Smith. Lewellyn used this account to purchase additional Safeguard stock on margin. Between January 12,

1982, and January 29, 1982, Lewellyn purchased 236,700 shares of Safeguard. Between February 22, 1982,and March 11, 1982, Lewellyn purchased an additional 218,300 shares of Safeguard. On or about February 25, 1982, Lewellyn opened cash and margin accounts with Drexel Burnham Lambert. Lewellyn used this account to purchase additional Safeguard stock on margin. Between March 8, 1982, and March 17, 1982, Lewellyn purchased 41,100 shares of Safeguard in his cash account and 95,500 shares in his margin account. On or about March 8, 1982, Lewellyn opened an account with Morgan Stanley & Co. Lewellyn used this account to purchase additional Safeguard stock. Between March 9, 1982, and March 15, 1982, Lewellyn purchased 34,500 shares of Safeguard in this account. On or about March 16, 1982, Lewellyn opened an account with Shearson/American Express, Inc. Lewellyn used this account to purchase additional Safeguard stock on margin. On March 16, 1982, Shearson purchased 6,500 shares of Safeguard for Lewellyn’s account.

27. On March 17, 1982, the price of Safeguard common stock on the NYSE dropped from $14.50 to $11.00 per share. Late on March 17, and on March 18, 1982, the NYSE halted trading in Safeguard securities for a ten-day period. On March 17, 1982, maintenance calls of $378,400, $213,300, and $107,100 were sent to Barakat, Turner, and Vermie, with no response. On March 17, 1982, a maintenance call was sent to Lewellyn seeking $578,976. A second call was sent after the market closed, seeking payment of $3,432,000 by March 19, 1982.

28. On March 19, 1982, a meeting was held with Lewellyn and representatives of Swiss American, Merrill Lynch, Drexel Burnham Lambert, and Safeguard in attendance. Lewellyn advised the parties he could not meet his obligations for his purchases of Safeguard stock. Swiss American notified GVL of the termination of the clearing agreement because of alleged breaches of representations and warranties by GVL. Swiss American further demanded full payment of all indebtedness due from Lewellyn and advised him of its intention to foreclose on any and all property held by Swiss American for Lewellyn's account.

29. On March 19, 1982, Swiss American filed a complaint against Lewellyn in United States District Court for the Southern District of New York. At the time the complaint was filed, Lewellyn owed Swiss American an amount in excess of $16 million. The indebtedness was a result of transactions in Lewellyn's cash and margin accounts that occurred on or before March 4, 1982. Swiss American held 1,546,200 shares of Safeguard as collateral for such indebtedness.

30. On March 19, 1982, the SEC commenced an investigation of Lewellyn and his trading in Safeguard securities. On April 2, 1982, the SEC commenced a civil action against Lewellyn in United States District Court for the Southern District of New York alleging, inter alia, that Lewellyn misappropriated millions of dollars of funds and securities from customers of GVL and violated securities laws. On April 2, 1982, the district court entered a

temporary restraining oraer against Lewellyn and on April 12, 1982, issued a preliminary injuction against Lewellyn.

31. On or about March 22, 1982, Swiss American demanded full payment of all indebtedness due from Barakat, Turner, and Vermie, and advised them of its intention to foreclose on any and all property held by Swiss American for their accounts.

32. Toward the end of March, 1982, Lewellyn's unusual activity in Safeguard stock was published. The Chairman of the Board of Directors of First National Bank, Humboldt, Iowa, became suspicious and initiated an independent audit.

33. On April 2, 1982, First National Bank in Humboldt was adjudged insolvent. Securities with an aggregate par value of over $16,000,000 were deemed to have been misappropriated. Lewellyn had converted these funds to his own use.

34. On April 5, 1982, Swiss American purchased for its own account the 2,000,200 shares of Safeguard common stock held as collateral for debts owed to Swiss American by the Lewellyn, Barakat, Turner, and Vermie accounts. Of that number, 1,546,200 shares were held in Lewellyn's personal account, including the 425,000 shares transferred by Lewellyn to Swiss American on March 4, 1982. The purchase price at this private sale was $5.625 per share (the NYSE closing price as of April 2, 1982), for a total purchase price of $11,251,125.00. The purchase price of the 425,000 shares was $2,390,625.00.

35. On April 8, 1982, the Securities Investor Protection Corporation ("SIPC") filed a Complaint and Application for

protection of the customers of GVL under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa et seq. ("SIPA") in the United States District Court for the Southern District of Iowa. On April 15, 1982, SIPC's Application for the issuance of a protective decree was granted and, pursuant to Section 5(b) (4) of SIPA, the liquidation proceeding was removed to the United States Bankruptcy Court for the Southern District of Iowa, No. 82-162-C.

36. On May 24, 1982, Lewellyn filed a voluntary Chapter 7 petition in this Court. On October 29, 1982, the Court entered an Order consolidating the bankruptcies of GVL and Lewellyn. On January 23, 1983, Swiss American filed a proof of claim in the consolidated bankruptcy proceedings for $16,000,000 minus the value of the Safeguard stock it held as collateral for Lewellyn's obligations.

37. On July 1, 1983, Swiss American executed a share purchase and option agreement with Safeguard. Contemporaneously with the execution of this agreement, Swiss American sold and delivered to Safeguard 400,200 shares of Safeguard common stock for a price of $4.50 per share. Pursuant to the option provisions in the agreement, on September 1, 1983, Swiss American sold and delivered to Safeguard 1,600,000 shares of Safeguard stock at a price of $4.50 per share.

38. The Trustee of the consolidated bankruptcy proceedings collected $1,288,935.08 in assets as of June 1, 1987, of which $18,604.57 has been allocated to the general estate and $1,270,330.51 has been allocated to customer property. The face

amount of claims to customer property total approximately $18,385,197. The face amount of claims to general estate property total approximately $51,447,000 without including a claim for punitive damages filed by the FDIC.

39. Prior to March 4, 1982, Lewellyn had embezzled in excess of $14,000,000 from the First National Bank in Humboldt and others by converting funds and securities to his own use. Proceeds of Lewellyn's embezzlements were used to acquire Safeguard stock, including the 425,000 shares of Safeguard transferred to Swiss American on March 4, 1982. Such transfer was made with the actual intent by Lewellyn to defraud the customers from whom Lewellyn embezzled funds.

40. Lewellyn had gathered approximately 58% of Safeguard by the end of March 1982. 2,400,000 shares of stock dropped from $16.00 to $5.00 a share after Lewellyn's activities were disclosed. Wall Street losses were approximately $22,000,000.

41. In November, 1982, Lewellyn was convicted of five counts of bank fraud, embezzlement, and mail fraud in federal court, in connection with his dealings with the First National Bank in Humboldt, where his father was the president.

42. Prior to the time that Swiss American allowed Lewellyn to withdraw 425,000 shares of Safeguard stock from his cash account, Lewellyn did not disclose to Swiss American and Swiss American had no knowledge of any of his activities regarding the diversion of funds from the First National Bank of Humboldt, nor any misappropriation or misuse of Lewellyn's customer funds.

43. At all times relevant to the March 4 transfer, Swiss American had no knowledge of Gary Lewellyn's activities with respect to the diversion of funds from the First National Bank of Humboldt, nor the misappropriation or misuse of funds of Lewellyn's customers.

44. Trustee filed the original complaint on March 7, 1986, and alleged a preferential transfer pursuant to 11 U.S.C. §547. Said complaint was amended on July 23, 1987 to add Count II which alleged a fraudulent conveyance pursuant to 11 U.S.C.
§548 (a) (2) (A).

45. Swiss American filed an answer to the amended and substituted complaint on August 19, 1987. Along with admissions and denials, Swiss American alleged the following defenses: the transfer of the 425,000 shares was a contemporaneous exchange for new value pursuant to 11 U.S.C. §547(c) (1); the transfer was in the ordinary course of business pursuant to 11 U.S.C. §547(c) (2); the transfer did not diminish Debtor's estate at the time the transfer was made; the transfer was a margin payment pursuant to 11 U.S.C. §546(e); and, the 425,000 shares are not property of the estate as they were fraudulently obtained from Swiss American by Lewellyn. Swiss American has abandoned the ordinary course of business exception and the defense that the transfer did not diminish Lewellyn' s estate.

46. In June 20, 1988, the Court sustained Swiss American's motion for summary judgment filed on June 2, 1988, as to Count II of the complaint, as amended. In addition, the Court overruled

Trustee's motion to amend the amended complaint to add an additional ground for fraudulent conveyance under § 548 (a) (1).

DISCUSSION

Three issues are presented in this case. The first is whether Lewellyn's transfer of 425,000 shares of Safeguard to Swiss American was a preference. If so, the second issue was whether any of the preference exceptions are applicable. The final issue is the amount of damages, if appropriate.

A. Preference

A trustee may avoid a transfer of property of the debtor under §547(b) if the trustee shows the transfer was:

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; . . 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). Pursuant to §547(g), the trustee has the burden of proving the preferential nature of the transfer.

Initially, the Court must determine whether the 425,000 shares of Safeguard stock are property of the debtor for purposes of §547.

In SIPA liquidations, customer property is considered "property of the debtor" for purposes of §§547 and 548. See 15 U.S.C. §78 fff-2 (c) (3). Customer property includes:

> [C]ash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.

15 U.S.C. §78111(4) (emphasis added). In the case at bar, the evidence clearly indicates the funds for the purchase of the 425,000 shares of Safeguard stock came from property Lewellyn unlawfully converted from customers. Therefore, the Court concludes the 425,000 shares of Safeguard stock are Lewellyn's property for purposes of §547.

Upon review of the facts, the Court finds Trustee has met his burden of proving the preferential nature of Lewellyn's March 4, 1982, transfer of 425,000 shares of Safeguard to Swiss American for the following reasons. First, the transfer was to or for the benefit of Swiss American, was for or on account of an antecedent debt owed by Lewellyn to Swiss American, and was made while Lewellyn and GVL were insolvent. Second, the March 4, 1982, transfer was made on or within 90 days before the filing of both the GVL bankruptcy petition (April 8, 1982) and the Lewellyn bankruptcy petition (May 24, 1982). Finally, the transfer enabled Swiss American to obtain more than it would have received in a Chapter 7 liquidation because Swiss American realized $1,912,500 by sale of the 425,000 shares of Safeguard at issue. If the

transfer had not occurred and the 425,000 shares were left as part of the bankruptcy estate, Swiss American, as with other general creditors, would have received no distribution. As a result, the Court concludes Lewellyn's transfer of 425,000 shares of Safeguard to Swiss American is an avoidable preference under §547(b).

B. Exceptions to Preference Avoidance

In order to escape the avoidance of Lewellyn's preferential transfer, Swiss American alleges a number of defenses including: 1) §547(c) (l)——contemporaneous exchange for new value; and 2) §546(e)--margin payment. The Court will address each defense individually.

1. **§547(c) (1)--Contemporaneous Exchange for New Value**

§547(c) (1) prevents the trustee from avoiding a preferential transfer to the extent it 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 substantial contemporaneous exchange [.]

11 U.S.C. §547(c)(l). This subsection was designed to exempt transfers "where the debtor acquires new property and pays for it at or about the same time, with cash or the equivalent of cash," In re Davis, 22 B.R. 644, 648 (Bankr. M.D. Ga. 1982), or gives security to the creditor. In re Burnette, 14 B.R. 795, 802 (Bankr. E.D. Tenn. 1981) (citing 11 U.S.C. §101(40)); In re Martella, 22 B.R. 649, 653 (Bankr. D.Colo. 1982).

Pursuant to §547(g), the creditor has the burden of proof on its §547(c) (1) defense. Three elements must be proven to invoke the "substantially contemporaneous" exception under §547(c) (1): 1) intent by the parties at the outset that the exchange be contemporaneous; 2) giving of new value by the creditor; and 3) transfer was in fact a substantially contemporaneous exchange. See 11 U.S.C. §547(c)(l). The Court will separately address each element.

a. Transfer Was Intended to be a Contemporaneous Exchange

Swiss American argues the parties mutually intended the transfer would be settled on a contemporary basis based on agreements and course of performance between the parties. The Court agrees.

Concerning agreements, federal regulations require that all trades be settled within seven days of the trade date. See 12 C.F.R. §§220.3(b), 220.4(c)(2) (1982). Said requirement was imposed in the agreements between Swiss American and Lewellyn defining the rights and obligations of the parties concerning Lewellyn's account. These agreements are substantial evidence of intent. See Matter of Advance Glove Mfg. Co., 42 B.R. 489, 493 (Bankr. E.D. Mich. 1984) (court looked to agreement between parties as proof of intent); Restatement (Second) of Contracts, intro, note to ch.9; §§200 et seg. (1981) (terms of a written agreement supersede other manifestations of intent).

In addition to the agreement, Swiss American argues the course of performance between the parties evidences their intention that

the trades would be settled within the required seven-day period. In the months prior to March 4, 1982, Lewellyn executed millions of dollars in transactions with Swiss American. In every single case (including a cash payment of $615,000 as late as March 2, 1982), Lewellyn settled his trades on a timely basis. This performance demonstrates the parties' intent. See Advance Glove, 42 B.R. at 493 (court looked at course of performance as proof of contemporaneous intent); In re Schmidt, 26 B.R. 89, 91 (Bankr. D. Minn. 1982) (court found intent from course of dealing).

In response to these arguments, Trustee cites to National City Bank of New York v. Hotchkiss, 231 U.S. 50 (1913), for the proposition that contemporaneous intent was lacking because Swiss American expected cash but received securities instead. The Court disagrees with this proposition for a number of reasons. First, Swiss American's reliance upon Hotchkiss is misplaced. In Hotchkiss, a bank made an unsecured loan to a broker. When the bank learned the stock market had dropped, it demanded security or repayment from the broker. The broker then delivered securities to the bank. The Supreme Court held the transfer of securities was a preference because the bank did not intend to be a secured lender when it made the loan and subsequently improved its status. Id. at 57—58.

In the case at bar, Trustee does not claim Swiss American ever intended to extend unsecured credit to Lewellyn. Furthermore, Hotchkiss prohibits a creditor from taking more security than was

originally intended; here, Swiss American took less because the securities were not as good as cash.

Second, the evidence clearly indicates Swiss American was well within its legal rights in accepting securities instead of cash on March 4, 1982, and in fact had done so before with other institutions. In addition, the security agreement between Lewellyn and Swiss American expressly provided Swiss American with the discretion to transfer securities and other properties among accounts.

Finally, Trustee's proposition is belied by the terms of §547(c) (1). No where does this section state that to be substantially contemporaneous (either in fact or intent) the transfer must be the same type of consideration that the parties originally intended. Yet, as the "ordinary course" exception in §547(c) (2) demonstrates, Congress knew how to expressly impose limits on the type or quality of payments that are entitled to exception under the preference law. See 11 U.S.C. §547(c) (2). It has not done so in §547(c) (1).

Based on the parties' agreements, course of performance, the terms of §547(c) (1), and Trustee's failure to cite any persuasive authority to the contrary, the Court concludes Swiss American has met its burden of proving the parties' transfer was intended to be a contemporaneous exchange.

b. New Value

New value is defined as "money or money's worth of goods, services or new credit" but does not include "an obligation

substituted for an existing obligation." 11 U.S.C. §547(a)(2). Swiss American argues it gave new value through its purchase of over $8 million worth of securities for Lewellyn and corresponding extention of credit during the seven days prior to March 4, 1982. Trustee, on the other hand, argues Swiss American gave no new value after March 4 and that the stock transfer simply substituted one obligation (margin obligation) for an existing obligation (cash obligation).

Upon review of the arguments, the Court concludes Swiss American did give new value. Section 547(c) (1) applies, by its terms, whether the value precedes the transfer or vice—versa, thus rendering Trustee's distinction between pre-March 4 and post-March 4 transactions irrelevant. Furthermore, there was no substitution of an obligation for a pre—existing obligation because the evidence clearly indicates Swiss American extended $8 million of new credit with the expectation that the securities purchases would be settled on a timely basis, i.e., on the settlement date within seven days. Lewellyn's sole obligation was to timely settle Swiss American's $8 million extension of new credit and he did so by transferring 425,000 shares of Safeguard to Swiss American.

c. Exchange Was in Fact Substantially Contemporaneous

In order to determine whether an exchange was "in fact" substantially contemporaneous, a court can consider an agreement between the parties. See Matter of Fasano/Harris Pie Co., 43 B.R. 871, 876 (Bankr. W.D. Mich. 1984), aff'd, 71 B.R. 287 (W.D. Mich. 1987); Advance Glove, 42 B.R. at 493. Two courts have explicitly

recognized the contemporaneous nature of transactions during the settlement period in the securities industry. See Naftalin & Co. v. Merrill Lynch. Pierce, Fenner & Smith, Inc., 469 F.2d 1166 (8th Cir. 1972); Mardick v. Stover, 392 F.2d 561 (9th Cir. 1968). Moreover, many courts have held delays of periods far greater than seven days to be "substantially contemporaneous." See In re Lyon, 35 B.R. 759, 763 (Bankr. D. Kan. 1982) (20 days); In re Martella, 22 B.R. 649, 653 (Bankr. D. Colo. 1982) (6 weeks); Burnette, 14 B.R. at 803 (20 days).

In the case at bar, Lewellyn's March 4, 1982, settlement occurred within seven days of the trades, as required by law and the agreements between the parties. Applying this fact to the above authorities, the Court concludes Lewellyn's exchange was in fact substantially contemporaneous which precludes Trustee from avoiding Lewellyn's preferential transfer because Swiss American has met its burden of proving all the elements of §547(c) (1) contemporaneous exchange exception.

2. **§547(e)--Margin Payment Exception**

Assuming arguendo Swiss American did not meet its burden of proof under §547(c) (1), it next argues Trustee's recovery is barred by §546(e) which provides:

> Notwithstanding sections 544, 545, 547, 548(a) (2), and 548(b) . . . the trustee may not avoid a transfer that is a margin payment, as defined in section 741(5) or 761(15) . . . or settlement payment, as defined in section 741(8) . . . made by or to a commodity broker, forward contract merchant, stockbroker,

> financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a) (1)

11 U.S.C. §546(e) (emphasis added). The original version of said section applied only to margin payments to or deposits with a commodity broker or forward contract merchant. See 11 U.S.C. §764(c) (1978). In an amendment signed by the President on July 27, 1982, Congress repealed §764(c) and replaced it with §546(d) which extended the margin payment avoidance exception to encompass margin or settlement payments made by or to stockbrokers and securities clearing agencies. 11 U.S.C. §546(d) (1982). This section, with some modification, is now codified at §546(e). Because the Court ruled prior to trial that Trustee could not amend his amended complaint to include an additional ground for fraudulent conveyance under §548(a)(l), this exception to the use of §546(e) is not applicable.

In determining whether §546(e) insulates Lewellyn's transfer of 425,000 shares of Safeguard from avoidance, the Court must address two issues. The first issue is whether §546(e) applies, while the second issue is whether the March 4, 1982, transfer was a margin payment under §546(e).

a. Application of §546(e)

Swiss American contends the 1982 amendment, signed by the President on July 27, 1982, should apply retroactively to the March 4, 1982, transfer. Trustee, on the other hand, argues the

amendment should not apply retroactively, absent clear Congressional intent.

The Court must make two inquiries in determining whether a statutory amendment should be applied to cases pending on the effective date of the amendment. In re Stroop, 47 B.R. 986, 987 (D. Cob. 1985). The first concerns legislative intent in enacting the amendment. Id. The second is whether manifest injustice will result from applying the amendment to the pending case. Id. at 988.

Concerning legislative intent, the Court notes Congress' common procedure of expressly making bankruptcy amendments prospective. The Bankruptcy Reform Act of 1978 expressly stated that it applied only in cases filed after October 1, 1979, the effective date of the Act. Bankruptcy Reform Act of 1978, Pub.L. No. 95—598, §§402, 403, 92 Stat. 2549, 2682—83 (1978). In 1984, Congress amended §546, effective 90 days after passage. See 11 U.S.C.A. §546 note (West Supp. 1989). In 1986, Congress amended §546 and, except for certain expressly defined reservations, once again made the amendments prospective in effect. Id. (30 days after passage). By contrast, the 1982 amendment at issue had no similar prospective-only provision. If Congress had intended the 1982 amendments to apply only to cases filed after their effective date, it is reasonable to assume Congress would have expressly stated so as it did in the 1978, 1984, and 1986 legislation. See Stroop, 47 B.R. at 988. Since Congress did no so state, the Court concludes Congress intended the 1982 amendments to apply to all

cases pending as of the effective date, July 27, 1982, which includes both the Lewellyn and GVL cases.

Concerning whether manifest injustice will result if the 1982 amendments are applied to pending cases, the Court must consider three factors: 1) the nature and identity of the parties; 2) the nature of the rights affected; and 3) the impact of the change in law on pre-existing rights. ***Id.*** (citing Bradley v. School Board of Richmond, 416 U.S. 696, 717 (1974)).

In the case at bar, the parties are private and have a private dispute as opposed to a matter of national concern similar to Bradley which involved school desegregation. Id. at 718. Nevertheless, the parties' status by itself does not render application of the 1982 amendment of §546(e) to this case manifestly unjust. Stroop, 47 B.R. at 988.

The second consideration, the nature of rights, is intended to protect personal rights that have "matured or become unconditional." Bradley, 416 U.S. at 720. There are no such rights here because the 1982 amendments were expressly recognized as "clarifying" in many respects, see H.R. Rep. No. 420, 97th Cong., 2d Sess. 1-3 reprinted in 1982 U.S. Code Cong. & Admin. News 583, 583-84, as Congress realized in 1978 that future clarifying amendments would be necessary. See 124 Cong. Rec. S34,019 (1978) (statement of Sen. Leahy). The 1982 amendments adding stockbrokers and securities clearing agencies to the margin payment exception, now codified at §546(e), were an act by Congress to take care of previously acknowledged unfinished business under the 1978

Bankruptcy Reform Act. As such, Trustee did not have any matured or unconditional right under the 1978 Bankruptcy Reform Act to avoid preferential margin payments to or by stockbrokers or securities clearing agencies when Lewellyn transferred the stock to Swiss American.

The final consideration, nature of the impact of the change in law on pre-existing rights, "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." Bradley, 416 U.S. at 720. There is no such problem here for a number of reasons. First, as noted above, the 1982 amendments to what is currently §546(e) did not affect any pre—existing matured or unconditional rights because Congress acknowledged in 1978 that it had more work to do on the Bankruptcy Code, and it did so in 1982 by extending the margin payment exception for the commodity industry to include the security industry as well. Second, "curative" amendments are generally given retroactive effect, Stroop, 47 B.R. at 988; In re Grey, 29 B.R. 286, 289 (Bankr. D. Kan. 1983), so applying the 1982 amendments to the case at bar which was pending on the amendments' effective date could hardly be an unanticipated result.

In conclusion, based on the Congressional intent to make the 1982 amendments applicable to cases pending on their effective date and the lack of any manifest injustice in doing so, the Court concludes §546(e) does apply to Lewellyn's March 2, 1982, transfer to Swiss American.

b. Transfer as a Margin Payment

Because §546(e) does apply, the second issue is whether Lewellyn's transfer of 425,000 shares of Safeguard is a margin payment. Section 741(5) defines "margin payment" to include any payment or deposit "that secures an obligation of a participant in a securities clearing agency." 11 U.S.C. §741(5). The evidence clearly indicates Swiss American accepted the 425,000 share transfer as collateral for Lewellyn's obligation. In addition, Swiss American certainly is a securities clearing agency under 11 U.S.C §101(42). Therefore, the Court concludes Lewellyn's transfer is a margin payment under §741(5) which, when combined with applicability of §546(e), precludes Trustee from avoiding Lewellyn's otherwise preferential transfer to Swiss American.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Lewellyn's March 4, 1982, transfer of 425,000 shares of Safeguard to Swiss American was an avoidable preference under 11 U.S.C. §547(b) but such avoidance is precluded because said transfer was a contemporaneous exchange under §547(c) (1) and a margin payment under §546(e).

FURTHER, the Court concludes the non-avoidability of Lewellyn's transfer to Swiss American makes the issue of damages moot.

IT IS ACCORDINGLY ORDERED that Trustee's complaint to avoid preferential transfer is dismissed.

Dated this *13th* day of April, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA – CENTRAL DIVISION

PAUL R. TYLER — JUDGMENT IN A CIVIL CASE

V.

SWISS AMERICAN SECURITIES, INC. — CASE NUMBER 89-367-B

☐ Jury Verdict. This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the judgment appealed from is affirmed.

October 30, 1989
Date

JAMES R. ROSENBAUM
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IN RE:

G.V. LEWELLYN & CO., INC. And GARY VANCE LEWELLYN

CIVIL NO. 89-367-B
AFFIRMANCE

Debtors.

Paul R. Tyler, Trustee, plaintiff-appellant, appeals from a judgment entered by the bankruptcy court, the Honorable Russell J. Hill, on April 12, 1989, against the Trustee and in favor of Swiss American Securities, Inc., defendant—appellee, and from some pretrial rulings. After trial, Judge Hill dismissed the Trustee's complaint to avoid a preferential transfer after concluding, in thoroughly prepared findings and conclusions, that the transfer of 425,000 shares of Safeguard Scientifics, Inc. by the bankrupt to Swiss American was a transfer within the meaning of 11 U.S.C. § 547(b), but that avoidance of the transfer is precluded because the transfer was a contemporaneous exchange under section 547(c) (1) and a margin payment under section 546(e).

The appeal has been submitted on well prepared written briefs and oral arguments.

I am satisfied that Judge Hill's findings of fact are not clearly erroneous and that he made no legal error in his conclusions. I am also satisfied that Judge Hill did not abuse his discretion in denying the Trustee leave to amend, and he did not err in granting Swiss American summary judgment on the fraudulent transfer claim. Accordingly, the judgment appealed from is affirmed.

DATED this 30th day of October, 1989.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89—2952

In Re: Lewellyn & Co., Inc.,
and Gary Vance Lewellyn,

Debtors.

Paul R. Tyler, Trustee,

Appellant,

v.

Appeal From the United States District Court for the Southern District of Iowa.

Swiss American Inc.,

Appellee.

Submitted: September 13, 1990
Filed: April 1, 1991

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON,* District Judge.

HEANEY, Senior Circuit Judge.

Paul R. Tyler, trustee for the consolidated bankruptcy estates of Gary Lewellyn and G.V. Lewellyn & Co. (GVL), appeals from the district court's affirmance of the bankruptcy court's finding that a transfer of stock by Lewellyn to Swiss American Securities, Inc. (SASI) was a non-avoidable preference under 11 U.S.C. § 547(c). We affirm.

*The Honorable Earl R. Larson, United States District Judge for the District of Minnesota, sitting by designation.

BACKGROUND

GVL was a securities brokerage firm incorporated in 1980 in Des Moines, Iowa. In June 1981, Gary Lewellyn, president and sole shareholder of GVL, entered into an agreement for securities clearing services with SASI, a securities broker-dealer. SASI agreed to provide clearing services for GVL and the accounts of its customers.[1] Under the agreement, GVL promised to comply with Federal Reserve Board Regulation T[2] and other applicable law, gave SASI complete discretion over extensions of credit, and gave SASI a general lien on all cash, securities, and other property in the accounts of GVL and its customers. Lewellyn also opened cash and margin trading accounts in his own name with SASI under the same conditions.

In late 1981, Lewellyn used his personal account to make large margin purchases of shares of highly speculative stock in a company called Safeguard Scientifics, Inc. (Safeguard). In November 1981, concerned about the level of Lewellyn's purchases of Safeguard, SASI increased the maintenance requirement in Lewellyn's margin account from 35% to 50%. Lewellyn continued to buy Safeguard on margin, and in December 1981, SASI required that he make any further Safeguard purchases on a cash basis. Lewellyn continued to

[1]Clearing services included: execution of orders for the purchase and sale of securities; clearance and settlement of contracts and transactions in securities; and preparation and delivery of confirmations evidencing the purchase or sale of securities, monthly statements of account, and similar records. Tyler v. Swiss American Securities, Inc. (In re G. V. Lewellyn & Co. and Gary Vance Lewellyn), Nos. 82-162—C H, 82—766—C H, slip op. at 3 (Bankr. S.D. Iowa Apr. 13, 1989).

[2]Regulation T governs extensions of credit by and to securities brokers and dealers. It imposes, among other obligations, initial margin requirements and payment rules on securities transactions. 12 C.F.R. § 220.1(a) (1990). Under Regulation T, a customer purchasing securities on a cash basis must make the full cash payment within seven business days of the execution of the purchase. 12 C.F.R. § 220.8(b) (1990).

purchase Safeguard through his cash account, and on margin through three accounts he opened with SASI in the names of purported customers who were actually Lewellyn's girlfriend and two relatives. For the next two months, Lewellyn settled all his cash purchases, which amounted to millions of dollars in Safeguard stock, within the seven business days required by Regulation T.

In February 1982, Lewellyn withdrew from his cash account 425,000 shares of Safeguard for which he had fully paid. On March 1, 1982, SASI reviewed Lewellyn's accounts and discovered that the debit balances of Lewellyn and his customers equaled half of SASI's capital. SASI informed Lewellyn that his customers could no longer buy on margin Safeguard or another stock in which Lewellyn traded heavily. Lewellyn requested a meeting with SASI management, which was held on March 4, 1982.

At the meeting, Lewellyn told SASI officials that he had a temporary cash flow problem, and would be unable to settle approximately $8 million in cash stock purchases he had made in the preceding seven business days. He offered SASI the 425,000 shares of Safeguard he had earlier withdrawn from his cash account as collateral for his cash obligation. SASI accepted the shares and placed them in Lewellyn's margin account. SASI also transferred all Safeguard shares remaining in Lewellyn's cash account to his margin account. On March 16, SASI informed Lewellyn that it was terminating the margin accounts of Lewellyn and his customers, and that it would take legal action if the debit balances were not eliminated.

The price of Safeguard dropped from $14.50 to $11.00 per share on March 17. On March 18, the Securities and Exchange Commission (SEC) suspended trading in Safeguard for ten days and began an investigation of Lewellyn. The SEC discovered that Lewellyn's stock purchases had been financed by the embezzlement of $16,705,000 from the First National Bank of Humboldt, Iowa, where

Lewellyn's father was president. The Securities Investor Protector Corporation commenced a bankruptcy proceeding by filing an application for relief against GVL under the Securities Investor Protection Act (SIPA), 15 U.S.C. §§ 78aaa—78111 (1988). The application was granted and a trustee appointed on April 15, 1982. Lewellyn filed a voluntary petition under Chapter 11 on May 24, 1982. The two proceedings were consolidated on October 29, 1982 because the assets and liabilities of Lewellyn and GVL were extensively commingled.

In March 1986, the trustee commenced this action to recover the value of the 425,000 shares of Safeguard that Lewellyn transferred to SASI on March 4, 1982. The trustee alleged that the transfer was an avoidable preference under 11 U.S.C. § 547(b) and a fraudulent conveyance under 11 U.S.C § 548(a)(2)(A). The bankruptcy court granted summary judgment for SASI on the fraudulent conveyance claim and held a trial on the preference claim. The court held that the transfer was a preference under 11 U.S.C. § 547(b) because it was made to a creditor, on account of an antecedent debt, while the debtor was insolvent, within 90 days before the filing of the petition, and it enabled the creditor to receive more than it would have in a Chapter 7 liquidation. The court held that the transfer was not an avoidable preference, however, because it was intended to be, and was, a contemporaneous exchange for new value given to the debtor under 11 U.S.C. §547(c)(l). The court alternatively held that the transfer was a margin payment exempt from avoidance under 11 U.S.C. § 546(e). The district court affirmed the bankruptcy court's decision and the trustee appeals.

DISCUSSION

On appeal, the trustee claims that Lewellyn's transfer of Safeguard stock to SASI in lieu of timely cash settlement of his $8 million obligation was not intended to be, and was not in fact, a

contemporaneous exchange for new value. The trustee thus argues that SASI failed to sustain its contemporaneous exchange defense under section 547(c)(l).3 Section 547(c) states:

> The trustee may not avoid under this section 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) (1988). To establish its defense under section 547(c), SASI had to show that the parties intended the transfer of Safeguard shares to be a contemporaneous exchange for new value, that the exchange was in fact contemporaneous, and that the $8 million in cash stock purchases SASI made for Lewellyn constituted new value for the Safeguard shares. The existence of intent, contemporaneousness, and new value are questions of fact. See Creditors' Committee v. Spada (In re Spada), 903 F.2d 971, 975 (3d Cir. 1990). We review the bankruptcy court's findings of fact as approved by the district court under the clearly erroneous standard. See Jennen v. Hunter (In re Hunter), 771 F.2d 1126, 1129 & n.3 (8th Cir. 1985); Bankr. R. 8013.

I. Contemporaneous Intent

"The critical inquiry in determining whether there has been a contemporaneous exchange for new value is whether the parties intended such an exchange." In re Spada, 903 F.2d at 975 (quoting

[3]The trustee also argues that the district court erred in applying the margin payment exception of section 546(e) to defeat the trustee's claim. Because we find that the transfer of the 425,000 shares was a contemporaneous exchange for new value, we need not address the trustee's second claim of error.

Matter of Prescott, 805 F.2d 719, 727 (7th Cir. 1986)). Under the clearing agreement between Lewellyn and SASI, all cash stock purchases were to be settled within the seven business days required by Regulation T. Lewellyn had previously settled all cash transactions within the seven—day period. In the two months preceding March 4, 1982, Lewellyn had made more than $3 million in prompt cash payments for stock purchases through his cash account. In the week preceding March 4, 1982, SASI had purchased $8 million worth of securities for Lewellyn through his cash account. Lewellyn was to settle these transactions by or shortly after March 4.

Both the agreement of the parties and their course of dealing suggest that they intended the transfer of 425,000 Safeguard shares to be a contemporaneous exchange in lieu of cash settlement for the most recent $8 million in purchases SASI made for Lewellyn through his cash account. These considerations are acceptable evidence of contemporaneous intent under section 547(c). See Grogan v. Southwest Textiles. Inc. (In re Advance Glove Mfg. Co.), 42 Bankr. 489, 493 (Bankr. E.D. Mich. 1984) (agreement between parties can evidence contemporaneous intent); Pfau v. First Nat'l Bank (In re Schmidt), 26 Bankr. 89, 91 (Bankr. D. Minn. 1982) (course of dealing between parties can show contemporaneous intent). The bankruptcy court's finding of contemporaneous intent therefore is not clearly erroneous.

II. Contemporaneousness in Fact

Section 547(c) also requires a transfer to be "in fact a substantially contemporaneous exchange" to constitute a non—avoidable preference. 11 U.S.C. § 547(c)(l)(B) (1988). The transfer of the 425,000 Safeguard shares occurred within seven business days of SASI's purchases of $8 million worth of stock through Lewellyn's cash account. Under Regulation T, $3,225,000 of these purchases was to come due on March 4, 1982, $2,500,000 would

come due on March, 5, 8, and 9, and $2,225,000 would come due on March 10 and 11, 1982. This court previously has recognized the contemporaneous nature of securities transactions closed within the seven-day settlement period. See Naftalin & Co. v. Merrill. Lynch. Pierce. Fenner & Smith, 469 F.2d 1166, 1179—80 (8th Cir. 1972) ; see also 4 Collier on Bankruptcy ¶ 764.01[3] n.9 (15th ed. 1987) (quoting legislative history to the effect that settlement payments made to a securities clearing organization are non—avoidable preferences because they constitute contemporaneous exchanges for new value under § 547(c)).

Courts also have looked to the agreement of the parties to determine whether an exchange is substantially contemporaneous in fact. See Remes *V.* Acme Carton Corp. (In re Fasano/Harris Pie Co.), 43 Bankr. 871, 876 (Bankr. W.D. Mich. 1984), aff'd, 71 Bankr. 287 (W.D. Mich. 1987); Advance Glove, 42 Bankr. at 493. The clearing agreement between SASI and Lewellyn incorporated Regulation T's seven-day settlement period for cash transactions, and the transfer of the 425,000 Safeguard shares did occur within seven business days of the $8 million in stock purchases. Under these circumstances, the bankruptcy court's finding that the exchange was substantially contemporaneous in fact is not clearly erroneous.

III. New Value

The final element required to establish a non-avoidable preference is Lewellyn's receipt of new value for the 425,000 Safeguard shares. The agreement between the parties contemplated that stock transactions through Lewellyn's cash account be settled within seven business days for cash, but section 547(c) (1) does not require that a contemporaneous exchange for new value involve the same type of consideration as that originally envisioned by the parties. Section 547 defines "new value" as "money or money's worth in goods, services, or new credit." 11 U.s.c. § 547(a) (2)

(1988). Moreover, section 547(c) (1) applies whether the new value is given before or after the transfer by the debtor; the statute requires only that the exchange be "substantially" contemporaneous.

SASI extended $8 million worth of new credit to Lewellyn in the seven business days preceding the transfer of Safeguard shares. The 425,000 shares had a market value of $6.8 million on March 4, 1982. The clearing agreement gave SASI complete discretion to transfer money, securities, and other property between accounts. SASI had a right to accept the Safeguard shares in lieu of cash, and would not have executed the additional $8 million in stock purchases for Lewellyn had it not expected him to settle the transactions within seven business days as he always had. Under these circumstances, the bankruptcy court correctly found that Lewellyn received new value for the 425,000 shares in the form of $8 million in new credit from SAST.

CONCLUSION

Accordingly, we affirm the judgment of the district court.

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