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GETTING SOMETHING FOR WHAT YOU GIVE—THE EMERGING TREND IN THE NEW VALUE DEFENSE

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I. Introduction

Sections 547(b) and 550 of the Bankruptcy Code[2] enable a bankrupt debtor to recover payments made to creditors during the 90 days before bankruptcy (the "preference period").[3] The Debtor does not have to show any malfeasance in order to recover; thus, creditors are often forced to return entirely legitimate payments on valid obligations (this arises perhaps most frequently in trade credit arrangements).

Creditors may assert various defenses in response to a preference action, the strongest of which (or at least the most widely accepted and practical to prove) is the "new value" defense, which arises under Section 547(c)(4) of the Bankruptcy Code. Section 547(c)(4) provides that a payment cannot be avoided as a preference to the extent that, after receiving the payment, the creditor provided goods or services ("new value")[4] to or for the benefit of the debtor "on account of which new value the debtor did not make an otherwise unavoidable transfer." Thus, if the creditor provided new value to the debtor after receiving a payment within the preference period, then the creditor is entitled to deduct the value of those goods or services from its potential preference liability.

The question addressed in this article is what happens when the creditor has been paid for the new value, but that payment is itself avoidable as a preference or under some other theory. This issue can have major implications

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[2] References to the "Bankruptcy Code" are to Title 11, United States Code, codified at 11 U.S.C. § 101, *et seq*. (as amended). "Section" or "Chapters" references are to the Bankruptcy Code, unless context requires otherwise.

[3] *See generally* 11 U.S.C. § 547(b) (setting forth the requirements of a preferential transfer; if the creditor is an insider, the preference period extends back one year from the bankruptcy filing).

[4] *See* 11 U.S.C. § 547(a)(2) (defining "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, including proceeds of such property, but does not include an obligation substituted for an existing obligation").

when the debtor and creditor engaged in numerous transactions during the preference period. Given the language of the Bankruptcy Code, one might assume that if the new value was paid with funds that had to be returned (*i.e.*, paid with an avoidable transfer), the creditor's preference exposure would be reduced by the new value provided. As discussed herein, the recent trend in the case law is decidedly towards this more literal and expansive application of the new value defense.[5] However, in the past, courts did not always follow this approach; in fact, the new value defense is often still characterized as limited to situations in which the creditor was never paid for the new value, even if the payment is subject to avoidance.

Courts uniformly agree that new value for which a creditor never received payment constitutes new value reducing the creditor's preference exposure (the "remains unpaid approach"). A close reading of the Bankruptcy Code, however, suggests that the new value defense is broader than the remains unpaid approach, and also arises on account of new value for which the creditor received payment if that payment is itself avoidable (the "subsequent advance approach").[6] With the exception of the Seventh Circuit, courts have generally moved towards following the letter of the Bankruptcy Code, adopting the subsequent advance approach and giving creditors some credit for continuing to engage in ongoing business with the debtor during the period leading up to the debtor's bankruptcy.[7]

As of 2004, according to an influential article by Noah Falk, courts in the Third, Seventh and Eleventh circuits had adopted the remains unpaid approach, holding that creditors were entitled to the new value defense only to the extent the creditor had never been paid for the new value.[8] In contrast, the Fourth, Fifth and Ninth circuits had adopted the subsequent advance approach, giving credit for new value that was paid with transfers that the creditor was forced to return.[9]

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[5] *See* Section III, *infra*.

[6] *See id*; 11 U.S.C. § 547(c)(4)(B).

[7] *See* Section III, *infra*.

[8] Noah Falk, *Section 547(c)(4): The Subsequent New Value Exception Defense To Preferences*, 2004 ANN. SURV. OF BANKR. LAW PART I, § Q (Norton Oct. 2004) (hereinafter "Falk, *New Value*") (citing *In re* New York City Shoes, Inc., 880 F.2d 679 (3d Cir. 1989); *In re* Prescott, 805 F.2d 719 (7th Cir. 1986); *In re* Jet Florida Sys., 841 F.2d 1082 (11th Cir. 1988)).

[9] *Id.* (citing *In re* Meredith Manor, Inc., 902 F.2d 257 (4th Cir. 1990), Laker v. Vallette (*In re* Toyota of Jefferson), 14 F.3d 1088 (5th Cir. 1994), IRFM, Inc. v. Ever-Fresh Food Co., 52 F.3d 228 (9th Cir. 1995)).

As discussed below, since 2004, there has been a definitive trend towards the subsequent advance approach. While courts in the Seventh Circuit remain reluctant to adopt the subsequent advance approach,[10] appellate courts in the Fourth, Fifth, Eighth and Ninth circuits, and lower courts in the First, Third, Sixth and Tenth circuits, have adopted the subsequent advance approach. In the Third Circuit, lower courts have adopted the subsequent advance approach and expressly rejected *dicta* favoring the remains unpaid approach. While the approach in the Second Circuit remains somewhat mixed, importantly, the Bankruptcy Court for the Southern District of New York has also adopted the subsequent advance approach in cases where the distinction was before the court.

II. The Practical Implications Of The Subsequent Advance Approach

Whether a court adopts the remains unpaid or the subsequent advance approach can have a significant impact on a creditor's preference exposure, particularly when the creditor and debtor engaged in multiple transactions during the preference period. Consider the following table:

Transaction #	Transaction Description	Preference Exposure – Subsequent Advance	Preference Exposure – Remains Unpaid
1	Goods or Services Provided – $1,000	$0	$0
	Payment for Goods $1,000 (paid Transaction #1)	$1,000	$1,000
2	Goods or Services Provided – $1,000	$0	$0
	Payment for Goods $1,000 (paid Transaction #2)	$1,000	$2,000
3	Goods or Services Provided – $1,000	$0	$1,000
	Payment for Goods $1,000 (paid Transaction #3)	$1,000	$3,000

[10] *See Prescott*, 805 F.2d at 728 (Although the new value provided by the creditor was secured (thereby rendering Section 547(c)(4) inapplicable), the Seventh Circuit stated that one of the three requirements for a new value defense is that the new value "remains unpaid"); *see also* Allied Cos. v. Broughton Foods Co., 155 B.R. 739, 743-44 (Bankr. S.D. Ind. 1992) ("[T]here is no indication that the 'remains unpaid' element of [*Prescott's*] analysis would be literally and uncritically applied when the payment for the new value was later avoided as a preference."); *In re* Schabel, 338 B.R. 376, 381 (Bankr. E.D. Wis. 2005) (stating that the language of *Prescott* was a "holding, not just a set of extraneous remarks, [so] it cannot be dismissed as mere dicta").

Transaction #	Transaction Description	Preference Exposure – Subsequent Advance	Preference Exposure – Remains Unpaid
Debtor Files For Bankruptcy			

Under the remains unpaid approach, the creditor does not receive any new value credit for the goods or services provided in transactions 2 and 3 because it received payment for this new value (even though the creditor may have to return those payments to the Debtor, unless another defense applies). On the other hand, under the subsequent advance approach, the value of the goods or services provided by the creditor during the preference period is applied to reduce any preference exposure relating to prior payments (so the new value provided in transaction 2 reduces the preference exposure arising from the payment in transaction 1, etc., such that the creditor's exposure is limited to the final payment, which continues only because no goods or services were provided after the payment).[11]

III. Analysis Of Applicable Law

Recent case law shows a clear shift towards the subsequent advance approach, entitling creditors to reduce their preference exposure by the amount of new value provided to the debtor that remained unpaid or was paid with funds that must be returned. With this trend in the case law has come growing acceptance by plaintiffs in settlement negotiations that creditors are entitled to this defense.

Courts confronting the distinction between these approaches cite not only the obvious fact that the subsequent advance approach more closely adheres to the plain language of the statute, but also the policy underlying the new value defense and defenses to preference actions more generally—by permitting creditors to retain payments for the goods and services that they provide during the preference period, the subsequent advance approach encourages continued business relations with troubled companies thereby (hopefully) helping companies avoid the need

[11] *See* 5 A. RESNICK, COLLIER ON BANKRUPTCY ¶ 547.04[4][d] (16th ed. rev'd 2011) (If the amount of new value given exceeds the immediately preceding preference payment, courts generally allow the leftover new value to reduce the creditor's preference exposure on account of previous preference payments); *see also In re* Thomas W. Garland, Inc., 19 B.R. 920 (Bankr. E.D. Mo. 1982); *see generally* Roberds, Inc. v. Broyhill Furniture (*In re* Roberds, Inc.), 315 B.R. 443 (Bankr. S.D. Ohio 2004); *but see* Leathers v. Prime Leather Finishes Co., 40 B.R. 248 (D. Me. 1984) (limiting the new value defense by permitting the creditor to apply a subsequent extension of credit to reduce only the immediately preceding preference payment).

for bankruptcy altogether.[12] Courts have also pointed to the fact that the subsequent advance approach avoids the "inequitable double benefit" that results from creditors being deprived of credit for their new value while allowing a debtor to recover the payment for it.[13]

A. Courts in the First, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits Follow the Subsequent Advance Approach

Courts in the Fourth,[14] Fifth[15] and Ninth[16] circuit remain committed to the subsequent advance approach. For instance, in *In re JKJ Chevrolet*, the Fourth Circuit declared that even if the debtor had paid for the new value, "under the plain terms of the statute whether those payments deprive [the creditor] of its new value defense depends on whether the payments were otherwise unavoidable."[17] Applying the subsequent advance approach, the court held that a "creditor is entitled to offset preference payments through the extension of new value to the debtor so long as the debtor does not make an otherwise unavoidable transfer on account of the new value."[18] The Fourth Circuit noted that "the plain and ordinary meaning of an 'avoidable' transfer is a transfer 'that *can* be avoided.'"[19] Applying the literal language of Section 547(c)(4), the court concluded that a trustee's failure to avoid a payment "does not convert those payments from avoidable to unavoidable transfers."[20]

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[12] *See* Wahoski v. Am. & Efrid, Inc. (*In re* Pillowtex Corp.), 416 B.R. 123, 130-31 (Bankr. D. Del. 2009); *IRFM*, 52 F.3d at 228.

[13] *Allied Cos.*, 155 B.R. at 744.

[14] *See* Circuit City Stores, Inc. v. Mitsubishi Digital Elecs. Am., Inc. (*In re* Circuit City Stores, Inc.), 2010 Bankr. LEXIS 4398, 25-26 (Bankr. E.D. Va. Nov. 30, 2010); Hall v. Chrysler Credit Corp. (*In re* JKJ Chevrolet, Inc.), 412 F.3d 545, 552 (4th Cir. 2005).

[15] *See* G.H. Leidenheimer Baking Co., v. Sharp (*In re* SGSM Acquisition Co., LLC), 439 F.3d 233, 242 (5th Cir. 2006); Williams v. Agama Sys. (*In re* Micro Innovations Corp.), 185 F.3d 329, 335 (5th Cir. 1999).

[16] *See IRFM*, 52 F.3d at 232; Diamond v. Inland Cardiology Med. Assocs. (*In re* Inland Global Med. Grp., Inc.), 2006 Bankr. LEXIS 2463, at *7 (Bankr. C.D. Cal. Sept. 6, 2006); Diamond v. Gemmel Pharm. Grp., Inc. (*In re* Inland Global Med. Grp., Inc.), 362 B.R. 459, 462-63 (Bankr. C.D. Cal. 2006).

[17] *JKJ Chevrolet*, 412 F.3d at 552.

[18] *Id*.

[19] *Id.*

[20] *Id.*

Courts in the First,[21] Third,[22] Sixth,[23] Eighth,[24] and Tenth[25] circuits have also adopted the subsequent advance approach. For instance, in *In re Liberty Livestock Co.*, a Kansas bankruptcy court concluded that the creditor was protected by the new value defenses because "the debtor paid for the new value

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[21] *See* Bogdanov v. Avnet, Inc. (*In re* Amherst Techs., LLC), 2010 Bankr. LEXIS 2753, at *27 (Bankr. D.N.H. Sept. 3, 2010) ("[T]he plain language of the statute does not require new value to remain unpaid in order to qualify under § 547(c)(4).").

[22] *See Pillowtex Corp*., 416 B.R. at 127-28; Shubert v. Mull (*In re* Frey Mech. Grp., Inc.), 446 B.R. 208, 217-18 (Bankr. E.D. Penn. 2011).

[23] *See Roberds*, 315 B.R. at 472 ("The court adopts the legal interpretation of 11 U.S.C. § 547(c)(4)(B) that 'paid' subsequent new value may be an affirmative defense to a preferential transfer if the subsequent new value is . . . 'otherwise avoidable' by the debtor. The court finds this approach follows the plain meaning of the statutory language and also meets the policy objective of Congress when the affirmative defense was enacted."); Intercontinental Polymers, Inc. v. Equistar Chems., LP (*In re* Intercontinental Polymers, Inc.), 359 B.R. 868 (Bankr. E.D. Tenn. 2005); Phoenix Rest. Grp., Inc. v. Denny's Corp. (*In re* Phoenix Rest. Grp., Inc.), 2005 Bankr. LEXIS 85, at *21-26 (Bankr. M.D. Tenn. Jan. 10, 2005) (stating that "[h]ad Congress intended 'otherwise unavoidable' to mean that new value must remain unpaid, it would simply have said so" and holding that there is no requirement that new value remain unpaid); *In re* Check Reporting Serv., 140 B.R. 425, 434 (Bankr. W.D. Mich. 1992) (rejecting the remains unpaid approach). *See also* Russell v. Jones (*In re* Pro Page Partners, LLC), 151 Fed. Appx. 366 (6th Cir. 2005) (While not deciding the remains unpaid/subsequent advance distinction because the new value was not repaid by the debtor, the Sixth Circuit cited the Ninth Circuit's *IRFM* decision, which established the subsequent advance approach).

[24] *See* Falk, *New Value* ("The issue is seemingly unresolved in the Eighth Circuit where the Court has come down with conflicting opinions at once acknowledging the doctrinal advantages of the 'subsequent advance' approach, while upholding results it reached employing the 'remains unpaid' approach."); Jones Truck Lines v. Central States, Se. & Sw. Areas Pension Fund (*In re* Jones Truck Lines), 130 F.3d 323, 328-29 (8th Cir. 1997) (the uncertainty arises from the court's statement that "remaining unpaid as an adequate shorthand description of § 547(c)(4)." However, the court also stated that "[t]here is no logical reason to distinguish between a creditor that was paid by an avoidable transfer and one that was never paid at all") (citing Official Comm. of Unsec'd Creds. of Maxwell Newspapers v. Travelers Ins. Indem. Co. (*In re* Maxwell Newspapers), 192 B.R. 633, 639 (Bankr. S.D.N.Y. 1996) (which stated that courts employ "the term 'unpaid' not as a statement of law, but rather as a 'shorthand description of § 547(c)(4)(B)); s*ee also* Elliot & Callan, Inc. v. Crofton, 615 F. Supp. 2d 963, 973 (D. Minn. 2009) (interpreting *Jones* to reject explicitly the remains unpaid approach in favor of the subsequent advance approach, describing *Jones*, in *dicta*, as "holding that, under 11 U.S.C. § 547(c)(4), a later payment in exchange for 'new value' only deprives the defendant of the 'new value' defense if the later payment is an otherwise unavoidable transfer"); Michael Cook, Lauren Paris and Alesia Ranney-Marinelli, *Preference Litigation, Nuts and Bolts of Corporate Bankruptcy 2010*, § III(B)(4)(c) (Practicing Law Inst. 2010) (describing *Jones* as explicitly adopting the subsequent advance approach).

[25] *See* Redmond v. Ellis County Abstract & Title Co. (*In re* Liberty Livestock Co.), 198 B.R. 365, 376 (Bankr. D. Kan. 1996) ("§ 547(c)(4) does not require that the new value advance remain unpaid").

advance with an avoidable transfer," even though each loan made during the preference period was repaid in full.[26] The court concluded that the decisions supporting the remains unpaid approach "lack[ed] any meaningful analysis of why the 'remains unpaid' elements should be read back into a statute that expresses no such requirement."[27]

In the Third Circuit, lower courts in recent years have adopted the subsequent advance approach and rejected the remains unpaid approach suggested in the Third Circuit's *dicta* in *In re New York City Shoes, Inc.*[28] In *In re Pillowtex Corp.*, the trustee sought to recover $1.8 million in payments made by the debtor to two creditors during the preference period.[29] The Delaware Bankruptcy Court dismissed the Third Circuit's *dicta* in *New York City Shoes*, concluding that "Section 547(c)(4)(B) was not an issue before the Court [in *New York City Shoes*]—as the Court specifically noted—because the parties agreed that the debtor never paid the creditor for the shipment of goods."[30] Given "the absence of controlling law on the discreet issue of the proper interpretation of § 547(c)(4)(B),"[31] Judge Carey undertook his own examination of Section 547(c)(4)(B) in *Pillowtex* and concluded that the plain language of the statute mandated the subsequent advance approach.[32] Similarly, in *In re Frey Mechanical Group, Inc.*, the Bankruptcy Court for the Eastern District of Pennsylvania followed *Pillowtex* and applied the subsequent advance approach.[33] In *In re Frey Mechanical Group, Inc.*, the court reasoned that the language supporting the remains unpaid approach in *New York City Shoes* was *dicta* and held that the new value defense permits a creditor to assert the defense even if the

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[26] *Liberty Livestock*, 198 B.R. at 376-77.

[27] *Id.*

[28] *See generally New York City Shoes, Inc.*, 880 F.2d at 680 (Although the court determined that new value was not given because of the timing of payments, the court summarized the new value defense as arising for any new value "which remains unpaid."); *but see Pillowtex Corp.*, 416 B.R. at 127-28 (explicitly rejecting the remains unpaid approach); *In re* Frey Mech. Grp., Inc., 446 B.R. at 217-18 (same).

[29] *Pillowtex Corp.*, 416 B.R. at 125.

[30] *Id.* at 128.

[31] *Id.*

[32] *Id.* at 129.

[33] *Frey Mech. Grp., Inc.*, 446 B.R. at 218 ("This Court agrees with Judge Carey's analysis in *Pillowtex* and finds that the plain language of § 547(c)(4)(B) permits a defendant to assert as a defense new value, even if paid, so long as the payment was not 'otherwise unavoidable.'").

creditor was paid for the new value, so long as the payment was otherwise avoidable.[34]

B. Some Uncertainty Remains in the Second and Eleventh Circuits

The courts in the Second Circuit that have considered whether the new value must remain unpaid are somewhat split on the issue. In *In re Bruno Mach. Corp.*, the Bankruptcy Court for the Northern District of New York stated that "[t]o prevail on a § 547(c)(4) defense, the Defendants have to prove: (i) the creditor extended new value to the debtor after receiving the preference, (ii) the new value was unsecured, and (iii) the new value remains unpaid."[35] In *In re Bruno Mach. Corp.*, the court held that because the new value represented by the notes in question had been repaid, "none of the transfers are saved by the subsequent new value defense."[36]

In contrast, a number of courts have rejected the remains unpaid approach and instead employed the subsequent advance approach. For instance, in *In re Van Dyck/Columbia Printing*, the debtor paid all but one of the five loans extended by the creditor during the preference period.[37] Although three of the loans had been issued after two preferential payments, the bankruptcy court limited the new value defense under Section 547(c)(4) to the one unpaid loan. On appeal, the Connecticut District Court reversed the bankruptcy court's decision and found that the new value defense was not limited to unpaid new value. Instead, the court held that "the [new value] defense contemplates carrying forward the net balance of prior preferences in determining the effect of subsequent new value on the total preference claimed."[38]

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[34] *Id.* at 218-19 ("there is no precedential decision in [the Third] Circuit on the meaning of § 547(c)(4)(B)").

[35] Bruno Mach. Corp. v. Troy Die Cutting Co. (*In re* Bruno Mach. Corp.), 435 B.R. 819, 847 (Bankr. N.D.N.Y. 2010). *See also* Buchwald Capital Advisors LLC v. Metl-Span I., Ltd. (*In re* Pameco Corp.), 356 B.R. 327, 341 (Bankr. S.D.N.Y. 2006); Savage & Assocs., P.C. v. Level (3) Commc'ns (*In re* Teligent, Inc.), 315 B.R. 308, 317 (Bankr. S.D.N.Y. 2004) (citing *In re* Jet Florida Sys., 841 F.2d at 1083).

[36] *Bruno Mach. Corp.*, 435 B.R. at 847 (noting that because the defendants failed to show that the new value represented by one of the notes "remains unpaid," this transfer was also not saved by the subsequent new value defense).

[37] *In re* Van Dyck/Columbia Printing, 289 B.R. 304, 309 (D. Conn. 2003).

[38] *See id.* at 314-15.

Importantly, the Bankruptcy Court for the Southern District of New York appears to have followed the subsequent advance approach when the distinction between the two approaches was before the court. For instance, in *In re Baumgold Bros., Inc.*, the court held that the new value exception was not "designed to limit credit for subsequent advances only to advances that remained unpaid . . . such an interpretation would limit the exemption in § 547(c)(4) to one subsequent advance when Congress clearly contemplated its application to more than one exchange."[39] Similarly, in *In re Maxwell Newspapers, Inc.*, the court rejected the remains unpaid approach, declaring that "[t]here is no logical reason to distinguish between a creditor that was paid by an avoidable transfer and one that was never paid at all."[40] While the courts in *In re Pameco Corp.* and *In re Teligent, Inc.*, included the requirement that "such new value remained unpaid," among the elements of the new value defense, in both cases, the court determined that new value was not provided at all. Thus, unlike in *In re Bruno Mach. Corp.,* the distinction between the remains unpaid and subsequent advance approaches was not actually before the courts in these cases.[41]

The Eleventh Circuit included the requirement that new value "remain unpaid" in *dicta* in *In re Jet Florida System, Inc*., concluding that Section 547(c)(4) "has generally been read to require (1) that the creditor must have extended the new value after receiving the challenged payments, (2) that the new value must have been unsecured, and (3) that the new value must remain unpaid."[42] However, the distinction between the remains unpaid and the subsequent advance approaches was not actually before the court; instead, the court merely acknowledged that the "second and the third elements ha[d] concededly been satisfied."[43]

Lower courts within the Eleventh Circuit have rejected the remains unpaid approach and adopted the subsequent advance approach. Five years after *In re Jet Florida System*, the Bankruptcy Court for the Middle District of Florida found in *In re Winter Haven Truss Co.* that *In re Jet Florida System's* remains unpaid language was "purely *dictum*" and rejected the notion that "new value credit is

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[39] *In re* Baumgold Bros., Inc., 103 B.R. 436, 440 (Bankr. S.D.N.Y. 1989); *see also In re* Wingspread Corp., 120 B.R. 8, 9-10 (Bankr. S.D.N.Y. 1990) (stating the rule).

[40] *Maxwell Newspapers*, 192 B.R. at 639.

[41] *Pameco Corp.*, 356 B.R. at 327; *Teligent, Inc.*, 315 B.R. at 317.

[42] *Jet Florida Sys.*, 841 F.2d at 1083.

[43] *Id.*

available only for amounts which remain unpaid."[44] Instead, the court allowed the creditor to claim a defense for new value that had been paid.[45]

Thus, there is some inconsistency in the holdings of courts in the Second and Eleventh circuits. However, the courts have generally adopted the subsequent advance approach when the distinction would impact the result.

IV. Conclusion

Frequently, debtors and trustees argue that the new value defense should only apply if the new value provided by the creditor remains unpaid. However, courts in all jurisdictions other than the Seventh Circuit have moved towards the subsequent advance approach, allowing creditors to deduct new value paid with transfers subject to avoidance, although some uncertainty persists in the Second and Eleventh circuits. Nevertheless, the growing acceptance of the subsequent advance approach by the courts confronting the issue in almost all jurisdictions can significantly reduce the preference exposure of creditors engaging in ongoing business with the debtor during the preference period.

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[44] Hyman v. Stone Lumber Co. (*In re* Winter Haven Truss Co.), 154 B.R. 592, 596 (Bankr. M.D. Fla. 1993); *but see* Braniff, Inc. v. Sundstrand Data Control, Inc., 154 B.R. 773 (Bankr. M.D. Fla. 1993) (relying on *In re* Jet Florida System and applying the remains unpaid approach).

[45] *Winter Haven Truss, Co.*, 154 B.R. at 596; *see also* TI Acquisition, LLC v. Southern Polymer, Inc. (*In re* TI Acquisition, LLC), 429 B.R. 377, 383 (Bankr. N.D. Ga. 2010) ("[t]he issue in *Jet Florida System* . . . did not involve a determination of the meaning of § 547(c)(4)(B), noting that "[d]espite the Eleventh Circuit's categorization by other courts as an adopter of the remains unpaid approach, it is unclear whether the Eleventh Circuit officially has adopted that approach").