

Pre-Petition “New Value” Counts Toward the Preference Defense; Post-Petition “New Value” Does Not

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By: Hon. Judith K. Fitzgerald (Ret.)

In an opinion that is informative although not precedential, *In re AE Liquidation, Inc.*, No. 17-1794 (May 4, 2018), the Court of Appeals for the Third Circuit considered both the ordinary course and the new value defenses to a preference action. Regarding the ordinary course issue, the appellate court detailed facts of record that established that collection actions taken during the preference period were unilateral pressure tactics that derailed the defense.

Regarding “new value,” the Court of Appeals clarified that only services provided pre-petition can be counted toward the 11 U.S.C. § 547(c)(4) new value defense against a preference attack. The appellate court was asked to determine that the Bankruptcy Court in Delaware should have reopened the record and permitted additional evidence of new value following a remand from the District Court. The Court of Appeals confirmed that the remand had been appropriate because the bankruptcy court failed to distinguish between pre- and post-petition payments in its first ruling. When reviewing the payments, the bankruptcy court refused to reopen the record and reduced the amount of new value, relying on a chart of invoices produced during the initial proceeding. The Court of Appeals noted that the chart included sufficient detail to enable the court to recalculate the value of the services provided before and after the bankruptcy petition date.

The opinion is a good reminder for practitioners that (1) the ordinary course defense requires actions in the preference period to mirror those outside the preference period; and (2) the inclusion, as part of the creditor’s evidence, of a summary chart tracing the services rendered and their corresponding invoices may well enable the court to rule on preference actions more expeditiously than would be required if each transaction had to be described in detail during trial.