



LOWENSTEIN BANKRUPTCY LOWDOWN

Lowenstein Bankruptcy Lowdown Video 11 – The New Value Defense

By [Eric Chafetz](#) and [Phillip Khezri](#)

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Phillip Khezri:

Hello everyone, and welcome to Lowenstein's latest episode of the [Bankruptcy Lowdown](#). I'm Phil Khezri, Counsel in the Bankruptcy group, and with me is Eric Chafetz, Partner in the Bankruptcy group.

The Eleventh Circuit Court of Appeals recently rendered the First Circuit-level decision on whether paid or reserved for Section 503(b)(9) claims for goods received by a debtor within 20 days of a bankruptcy filing reduce a defendant's subsequent new value defense, holding that it does not.

Section 547(c) of the Bankruptcy Code includes defenses, including the new value defense. A valid new value defense requires that the new value must not be secured, and the debtor must have not made an otherwise unavoidable transfer to such creditor on account of the new value.

The specific question presented to the court was whether the post-petition reservation for, or payment of a 503(b)(9) claim, is an otherwise unavoidable transfer that reduces a creditor's new value defense.

The court initially examined its previous decision in *BFW Liquidation*, which only addressed prepetition payments of new value, where it held that nothing in the language of the new value defense indicates that the defense is available only for a new value that remains unpaid.

Eric Chafetz:

The Liquidation Trustee unsuccessfully argued that the holding in *BFW* implies that a transfer that is unavoidable for any reason other than Section 547(c)(4) is an otherwise unavoidable transfer, and there is no temporal limitation excluding post-petition transfers. After identifying three bankruptcy court cases that squarely addressed the issue and reached differing conclusions, the Circuit Court addressed four key points supporting its holding.

The court focused on the absurd result of encouraging a plaintiff to wait until the end of the statute of limitations period to bring preference claims in the hope that a defendant would receive a distribution on account of its claim, thus reducing the new value defense.

Going forward, it'll be interesting to see if other Circuit Courts of the Supreme Court address this issue, and whether they will agree with the Eleventh Circuit. We will continue to monitor further developments on this issue.

Thank you very much for joining us for this installment of the [Lowenstein Bankruptcy Lowdown](#).