

A FRIGID TALE:

A Bankruptcy Court's Recent Rejection of Defendant's Ordinary Course of Business and Contemporaneous Exchange for New Value Preference Defenses

CREDITORS SUPPLYING INVENTORY UNDER CONSIGNMENT ARRANGEMENTS MIGHT ASSUME THAT PREFERENCE RISK CAN BE MITIGATED BY THE BUYER'S PAYMENT OF AN INVOICE FOR CONSIGNMENT GOODS ON THE SAME DAY AS ISSUANCE BECAUSE THAT TRANSACTION CAN BE CHARACTERIZED AS A CONTEMPORANEOUS EXCHANGE FOR NEW VALUE. CREDITORS MIGHT ALSO ASSUME THAT A PAYMENT MADE WITHIN THE PARTIES' CREDIT TERMS IS INHERENTLY ORDINARY AND, THEREFORE, NOT SUBJECT TO RECOVERY AS A PREFERENCE.

Well, in the wise words of Felix Unger of the legendary television show, *The Odd Couple*, "never assume!" In a decision issued in the *CalPlant* chapter 11 cases in Oct. 2025, the United States Bankruptcy Court for the District of Delaware concluded that a same-day payment of an invoice for the debtor's recent use of consigned goods was not protected by the "contemporaneous exchange for new value" or "ordinary course of business" defenses. The bankruptcy court emphasized that the debtor's use of consigned

goods created a "claim" (and, thus, an "antecedent debt") before the issuance of an invoice for the goods. The bankruptcy court also concluded that payments made within terms are not necessarily "ordinary" when they were made early and materially deviated from the parties' payment history. The opinion, from one of the country's most prominent bankruptcy courts, provides clear guidance on the ordinary course of business defense: courts will likely focus on actual course of performance and concrete evidence of industry practice.

PREFERENCE CLAIMS: THE ELEMENTS AND DEFENSES

Pursuant to Section 547(b) of the Bankruptcy Code, a debtor, trustee, or other estate fiduciary, may recover as a "preference" certain transfers by a debtor to a creditor before the bankruptcy filing. The plaintiff must prove all of the following:

1. The debtor had transferred property of the debtor's estate (such as a debtor's payment from its bank account);
2. To or for the benefit of a creditor;
3. On account of an antecedent debt (e.g., an outstanding invoice; so cash-in-advance payments are not preferences!);
4. On or within the 90 days before the bankruptcy filing (or within a year before the filing, if the transfer was to an "insider");
5. While the debtor was insolvent (which is presumed during the 90-day preference period); and
6. The transfer enabled the creditor to recover more than the creditor otherwise would have received in a hypothetical chapter 7 bankruptcy case.

Section 547(c) of the Bankruptcy Code arms creditors with affirmative defenses to minimize or eliminate preference liability where the plaintiff has otherwise proven all of the elements of a preference claim. These affirmative defenses are intended to encourage creditors to continue doing business with and extending credit to financially distressed customers. These defenses also have varying degrees of success depending on the circumstances of a given case and the court where the litigation is pending.

In the *CalPlant* decision, the "ordinary course of business" and the "contemporaneous exchange for new value" defenses were at issue. See the descriptions of these defenses in the "Cheat Sheet" below:

PREFERENCES: THE AFFIRMATIVE DEFENSES CHEAT SHEET	
Affirmative Defense	Description
Contemporaneous Exchange for New Value	Payment was intended to be a contemporaneous exchange and, in fact, was a substantially contemporaneous exchange , for new value (e.g., a COD transaction)
Subsequent New Value	Creditor provided new value (e.g., extensions of credit, such as goods sold on credit) to the debtor after receiving the preferential transfer , thereby entitling the creditor to a dollar-for-dollar reduction in preceding preference liability based on the amount of new value provided.
Ordinary Course of Business (OCB)	Transfer was payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and creditor, and was <ul style="list-style-type: none"> • Made in the ordinary course of business or financial affairs of the debtor and the creditor (the "subjective" prong), or • Made according to ordinary business terms (the "objective" prong).

RELEVANT BACKGROUND REGARDING THE CALPLANT DECISION

CalPlant I, LLC developed and operated a facility that converted rice straw into medium density fiberboard. Industrial Finishes & Systems, Inc. (IFS), supplied materials to CalPlant under a consignment agreement executed in 2019. Title to supplies passed only upon CalPlant's use of the consigned goods; CalPlant periodically reported usage and IFS then invoiced CalPlant, with payment due within 30 days. On Sept. 30, 2021, IFS issued an invoice in the amount of \$72,978.53, reflecting CalPlant's usage of IFS's consigned goods in September 2021. That same day, CalPlant initiated an electronic funds transfer (EFT) for the invoice amount. IFS's bank received the payment on Oct. 1, 2021, and IFS posted the receipt on Oct. 4, 2021.

CalPlant filed chapter 11 on Oct. 5, 2021. After confirmation of a liquidating plan, the director of CalPlant's liquidating trust brought an adversary proceeding to avoid and recover prepetition transfers made by CalPlant to IFS, including the payment made on Sept. 30, 2021. Among other things, IFS argued the transfer was protected by the contemporaneous exchange for new value and OCB defenses. The parties filed cross-motions for summary judgment with respect to the \$72,978.53 transfer.

A threshold dispute developed over whether the payment was "on account of an antecedent debt" and whether IFS was a "creditor" at the time of payment. IFS submitted affidavits asserting IFS had no right to payment and, therefore, had no claim on the September 30 payment date, because certain steps in the consignment process had not occurred by then. The court found those assertions inconsistent with deposition testimony and subsequent affidavits acknowledging that CalPlant had used the consigned goods throughout September and reported usage resulted in the September 30 invoice. The court applied the Bankruptcy Code's broad definition of "claim" to conclude that IFS's right to payment arose upon CalPlant's use of consigned goods and not upon IFS's issuance of its invoice. The court, therefore, held IFS was a creditor and the September 30 payment satisfied an antecedent debt, regardless of whether the transfer

occurred upon the initiation of the EFT, bank receipt, or IFS's posting date. Since the other elements of the preference claim were not disputed, the plaintiff proved a *prima facie* preference claim.

THE BANKRUPTCY COURT'S RULING ON THE CONTEMPORANEOUS EXCHANGE FOR NEW VALUE AND OCB DEFENSES

The bankruptcy court granted summary judgment in favor of the trust, rejecting IFS's contemporaneous exchange for new value and ordinary course of business defenses.

Regarding the contemporaneous exchange for new value defense, the court emphasized the statutory focus on whether the transfer *was intended* to be a contemporaneous exchange, and *in fact was*, a substantially contemporaneous exchange, for new value provided at the time of payment. As noted above, the record established the payment satisfied CalPlant's existing obligation for consigned goods previously used in September 2021, which was an antecedent debt. The court concluded that IFS had not provided new value to CalPlant when payment was made. The court rejected IFS's arguments that the parties' invoicing cadence, the consignment transaction, and speculative "benefits" to the debtor from paying early constituted new value that was contemporaneously given in exchange for the payment. The goods had already been used, and the transfer simply paid down existing indebtedness.

The court also held IFS had failed to prove either prong of the OCB defense. The court rejected IFS's subjective OCB defense *even though the transfer was made within the 30-day terms under the parties' agreement*. The payment's timing—on the invoice date (or at most within four days)—was early and materially deviated from the parties' historical pattern of payment roughly 28–30 days after invoice. The court discounted two small finance charge payments made within a week and early outliers at the beginning of the relationship; those anomalies did not alter the median and did not transform an early same-day payment into an ordinary event. IFS's own representative had acknowledged

the early payment was "weird," further supporting the conclusion that the transfer fell outside the parties' ordinary course of business.

Regarding the objective prong of the OCB defense, IFS offered only general statements from company executives that the terms of the business relationship between IFS and CalPlant were like those IFS had with its other customers in that many of IFS's customers were parties to consignment agreements, had paid invoices in varying amounts depending on usage, and had used ECF to make payments. While the court stated that IFS did not have to present expert testimony, the court concluded that IFS could not rely on its employees' statements of IFS's practice or the practices of IFS's other customers. The court also noted that IFS's witnesses did not testify about whether it is normal industry practice to pay a net-30-day invoice on the date of or shortly after its issuance.

The court held that absent admissible, external-facing data on industry payment timing—specifically, whether it is ordinary to pay an invoice due in 30 days on the invoice date, IFS could not meet its burden of proving the objective OCB defense. Echoing Third Circuit guidance, the court required competent evidence tied to the pertinent market practice, not simply descriptions of IFS's own practices with its other customers.

CONCLUSION

The *CalPlant* decision reinforces several practical lessons. First, a debtor's use of consigned goods gives rise to a "claim" before invoicing, supporting the "antecedent debt" element of a preference claim. Second, courts will look past contract terms and payment methods to the parties' actual course of performance when evaluating the applicability of the subjective OCB defense; an early payment made within terms may still be deemed outside the ordinary course of business if it were inconsistent with historical practice and payment history. Third, the objective

OCB defense requires targeted industry evidence on the precise payment behavior at issue. Finally, the contemporaneous exchange for new value defense demands proof of specific, quantifiable new value exchanged for payment—not generalized advantages of the relationship or hypothesized strategic benefits to the debtor. **BC**



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