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Purchase Money Security Interests in the Preference Zone: Questions Answered and Questions Raised by the 1994 Amendments to Bankruptcy Code § 547

Timothy R. Zinnecker*

I. INTRODUCTION

In October 1994, Congress approved the Bankruptcy Reform Act of 1994,¹ which revised various provisions of the United States Bankruptcy Code.² The revisions included two amendments to the preference statute, 11 U.S.C. § 547. Historically, a creditor generally could preserve from preference attack an otherwise voidable purchase money security interest if the creditor perfected its security interest no later than the tenth day after the debtor first possessed the collateral.³ In an attempt to conform the Bankruptcy Code to state law, most notably Article Nine of the Uniform Commercial Code ("U.C.C."), the Reform Act doubled the post-possession perfection period from ten to twenty days by revising 11 U.S.C. § 547(c)(3)(B).⁴ The Reform Act also amended 11 U.S.C. § 547(e)(2), the provision that dictates when the alleged preferential transfer occurred. In

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1. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4106 (codified in various sections of 11 U.S.C.) [hereinafter "Reform Act"].

2. The United States Bankruptcy Code is codified at 11 U.S.C. § 101 *et seq.* (1994), as amended by the Reform Act. Unless otherwise indicated, or unless referenced in a discussion of any case decided under the pre-revised version of the Bankruptcy Code, citations are to the Bankruptcy Code as amended by the Reform Act.

3. *See* 11 U.S.C. § 547(c)(3)(B) (pre-Reform Act).

4. Reform Act § 203(1). *See also* H. R. REP. NO. 103-835, at 45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354:

Section 547(c)(3) of the Bankruptcy Code provides that a trustee may not avoid the perfection of [a] purchase-money security interest as a preference if it occurs within 10 days of the debtor receiving possession of the property. This section conforms bankruptcy law practices to most States' practice by granting purchase-money security lenders a 20-day period in which to perfect their security interest.

general, the pre-revised provision stated that a transfer in the form of a security interest occurred on the date of attachment if the security interest became perfected no later than the tenth day thereafter; if perfection occurred more than ten days following attachment, then the transfer was deemed to occur on the perfection date.⁵ For no apparent reason, the Reform Act revised 11 U.S.C. § 547(e)(2) by inserting at the end of subsection (A) an innocuous cross-reference to 11 U.S.C. § 547(c)(3)(B), the other preference provision impacted by the Reform Act.⁶

After first discussing the basics of a preference attack on an Article Nine security interest, this article summarizes the leading cases that prompted Congress to amend 11 U.S.C. § 547(c)(3)(B), suggests that the amendment fails to completely eliminate the possibility of continuing conflict between state commercial law and the Bankruptcy Code, and offers an analytical road map for courts that continue to confront the dilemma. Finally, the article raises possible interpretive problems created by the amendment to 11 U.S.C. § 547(e)(2) and proposes a statutory construction of the amendment that may render those problems moot.

II. A PREFERENCE PRIMER

Section 547(b) describes the seven elements of a preference. The bankruptcy trustee bears the burden of proving each element by a preponderance of the evidence.⁷

First, the action being challenged by the trustee must constitute a transfer,⁸ which the Bankruptcy Code defines as:

every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption[.]⁹

5. 11 U.S.C. § 547(e)(2)(A), (B) (pre-Reform Act).

6. Reform Act § 203(2).

7. 11 U.S.C. § 547(g) (1994); *Lawson v. Ford Motor Co.* (*In re Roblin Indus., Inc.*), 78 F.3d 30, 34 (2d Cir. 1996); *In re Prescott*, 805 F.2d 719, 726 (7th Cir. 1986); *P.A. Bergner v. Bank One, Milwaukee, N.A.* (*In re P.A. Bergner & Co. Holding Co.*), 187 B.R. 964, 972-73 (Bankr. E.D. Wis. 1995).

8. 11 U.S.C. § 547(b) (1994) (prefatory language).

9. 11 U.S.C. § 101(54) (1994).

Two forms of transfer most likely to be attacked by the trustee in any collateralized lending transaction are (i) the conveyance of the property interest in the collateral and (ii) any repayment of the secured debt.¹⁰

Second, the property transferred must be the debtor's property.¹¹ Property interests conveyed by other non-bankrupt parties, such as a loan payment made by a guarantor or a security interest granted by an affiliated entity, cannot be challenged.¹²

Third, the transfer must be "to or for the benefit of a creditor[.]"¹³ The Bankruptcy Code defines "creditor" as including any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."¹⁴ A "claim" includes any right to payment, "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]"¹⁵ The transfer may, but need not, be both *to*, and

10. See 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 32-4, at 253 (4th ed. 1995 [Practitioner's Edition]) [hereinafter WHITE & SUMMERS] ("[T]he most common [voidable preference] is the payment of a debt within the 90 days preceding the filing of a petition in bankruptcy. . . . Of greater importance for the users of this book is the second common form of preference, namely the transfer of security in the debtor's property within the 90 days prior to the petition."); *id.* at 256 ("Since the creation and perfection of a security interest is a conveyance of rights in the debtor's property to the creditor in the most basic sense, these acts fall within the definition [of 'transfer']."); *id.* at 259 ("The usual preference is a direct transfer from the debtor to the creditor in the form of the payment of a debt, transfer of a security interest in the debtor's property, or the transfer of some other property interest.") (footnote omitted).

11. 11 U.S.C. § 547(b) (1994) (prefatory language). State law dictates whether the property transferred belonged to the debtor. See *In re Smith*, 966 F.2d 1527, 1530 (7th Cir.), *cert. denied*, 506 U.S. 1030 (1992).

12. See, e.g., *Tolz v. Barnett Bank of South Florida, N.A. (In re Safe-T-Brake of South Florida, Inc.)*, 162 B.R. 359, 363 (Bankr. S.D. Fla. 1993) ("The law is clear that if a third party chooses for whatever reason to use its own property, in which the debtor has no interest, to pay one or more of the debtor's creditors, even if the other [six] elements of a voidable preference are established, the transfer cannot be recovered by the trustee."); *Hood v. Brownyard-Sharon Park Ctr., Inc. (In re Hood)*, 118 B.R. 417, 419 (Bankr. D.S.C. 1990) ("A transfer of money or property by a third person to a creditor of debtor, when the money or property does not issue from the property of the debtor, is not a preference.").

13. 11 U.S.C. § 547(b)(1) (1994).

14. 11 U.S.C. § 101(10)(A) (1994).

15. 11 U.S.C. § 101(5)(A) (1994). "Whether an entity holds a right which falls within the definition of a 'claim' under § 101(5) is determined by state law." *Hostmann v. First Interstate Bank of Oregon, N.A. (In re XTI Xonix Technologies, Inc.)*, 156 B.R. 821, 827 (Bankr. D. Or. 1993).

for the benefit of, the same creditor. For example, a borrower's repayment of guaranteed debt is a transfer to the lender and for the benefit of each guarantor.¹⁶

Fourth, the debtor must make the transfer for pre-existing debt.¹⁷ Proving this element requires the trustee to establish and compare two dates: (i) the date when the debtor incurred the debt, and (ii) the date of the transfer. Section 547(e) of the Bankruptcy Code states that a transfer occurs:

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.¹⁸

Paraphrased (and postponing discussion of the "except" clause in clause (A) until later¹⁹), a transfer occurs when it takes effect between the parties if it is perfected within ten days thereafter; otherwise, the transfer occurs at the moment of perfection. If perfection does not occur by the tenth day following the petition date, the transfer is deemed to occur immediately before the petition date.²⁰

16. See, e.g., *Levit v. Ingersoll Rand Fin. Corp. (In re V. N. Deprizio Constr. Co.)*, 874 F.2d 1186, 1190 (7th Cir. 1989).

17. 11 U.S.C. § 547(b)(2) (1994).

18. 11 U.S.C. § 547(e)(2) (1994). In no event, however, may a transfer occur before the debtor acquires rights in the transferred property. *Id.* (introductory clause making clauses (A), (B), and (C) subject to paragraph 3); 11 U.S.C. § 547(e)(3) (1994) ("For the purposes of [section 547], a transfer is not made until the debtor has acquired rights in the property transferred.").

Without 11 U.S.C. § 547(e)(2)(C) (1994), the trustee would find itself in the unusual position of being unable to attack an *unperfected* security interest as a voidable preference. But what is meant by the subsection's opening language, "immediately before the date of the filing of the petition"? For an interesting commentary, see David Gray Carlson, *Security Interests in the Crucible of Voidable Preference Law*, 1995 U. ILL. L. REV. 211, 222-23.

19. See *infra* Part IV.

20. Generally, the filing of the bankruptcy petition prevents a creditor from taking subsequent action to perfect a security interest transfer. See 11 U.S.C. § 362(a)(4) (1994). However, the filing of the petition does not prohibit a creditor from taking "any act to perfect . . . an interest in property to the extent that the trustee's rights and

To illustrate, Debtor borrows \$1,000,000 from Lender on May 1. To secure repayment of the loan, Lender obtains an Article Nine security interest in two major pieces of Debtor's equipment. The Bankruptcy Code does not state when the security interest "takes effect" between Debtor and Lender, but instead defers to other applicable law.²¹ An Article Nine security interest

powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title[.]” 11 U.S.C. § 362(b)(3) (1994). The bankruptcy trustee acquires certain rights and powers “as of the commencement of the case.” 11 U.S.C. § 544(a) (1994). *See also* 11 U.S.C. §§ 301, 302, 303 (1994) (indicating that a case commences upon the filing of the petition). Included within these rights and powers is the status of a hypothetical judicial lien creditor. 11 U.S.C. § 544(a)(1) (1994). Generally, the property interest of a lien creditor is greater than the competing unperfected property interest of a secured party. *See* U.C.C. § 9-301(1)(b). Therefore, the trustee, as a hypothetical lien creditor, usually can void any security interest that is unperfected on the petition date. However, the rights and powers of the trustee “are subject to any generally applicable law that—(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection[.]” 11 U.S.C. § 546(b)(1)(A) (1994). One such “generally applicable law” permits an unperfected security interest to enjoy priority over the pre-existing rights of a lien creditor if (1) the security interest attaches (becomes enforceable) under U.C.C. § 9-203(1) before the rights of the lien creditor arise, (2) the security interest qualifies as a purchase money security interest, and (3) the secured party perfects its interest by filing a financing statement within ten days after the debtor first possesses the collateral. *See* U.C.C. § 9-301(2). *See also* S. REP. NO. 95-989, at 86 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5872 (expressly referring to U.C.C. § 9-301(2) in discussing phrase “generally applicable law”). For example, Secured Party obtains a security interest in Debtor's equipment that attaches on May 1, the same day that Debtor takes possession of the equipment. Unsecured Creditor obtains the status of a lien creditor on May 5. Secured Party perfects its security interest by filing a proper financing statement with the appropriate recording office on May 9. If the security interest enjoys purchase money status under U.C.C. § 9-107, Secured Party's interest enjoys priority over the competing interest of Unsecured Creditor under U.C.C. § 9-301(2), even though Unsecured Creditor's interest arose before Secured Party perfected its interest. If Debtor had filed its bankruptcy petition on May 5 (at which time the bankruptcy trustee would become a hypothetical lien creditor), 11 U.S.C. §§ 362(b)(3) (1994) and 546(b)(1)(A) (1994) working together would allow the same result by permitting Secured Party to take timely post-petition steps to perfect its security interest without violating the automatic stay. Secured Party can achieve the same result even if its security interest does not qualify for purchase money status. *See* 11 U.S.C. § 362(b)(3) (1994) (permitting post-petition acts to perfect a security interest if those steps are “accomplished within the period provided under section 547(e)(2)(A)"); 11 U.S.C. § 547(e)(2)(A) (1994) (generally referring to a ten-day period between attachment and perfection).

21. *See* DAVID G. EPSTEIN ET AL., *BANKRUPTCY* § 6-11, at 297 (1993) [hereinafter

"takes effect," or becomes enforceable, between Debtor and Lender upon "attachment."²² Lender's security interest "attaches" as soon as Debtor has rights in the collateral (the equipment), Debtor executes a written security agreement that describes the collateral (the equipment), and Lender gives value (the \$1,000,000 loan).²³ If the security interest has attached, it becomes "perfected" when Lender files its financing statement.²⁴ If attachment occurs

EPSTEIN] ("Nonbankruptcy law determines when a transfer is effective between the parties and against third persons[.]").

22. See *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 591 (5th Cir. 1987), *reh'g granted*, 835 F.2d 584 (5th Cir. 1988) ("The phrase 'takes effect' is undefined in the Bankruptcy Code, but under Uniform Commercial Code Article 9 law, a transfer of a security interest 'takes effect' when the security interest attaches."); *Ford Motor Credit Co. v. Ken Gardner Ford Sales, Inc. (In re Ken Gardner Ford Sales, Inc.)*, 10 B.R. 632, 643 (Bankr. E.D. Tenn. 1981), *aff'd*, 23 B.R. 743 (E.D. Tenn. 1982) ("The transfer of a security interest takes effect between the parties when the debtor acquires rights in the collateral, or in U.C.C. terminology, when the security interest attaches."); Thomas M. Ward & Jay A. Shulman, *In Defense of the Bankruptcy Code's Radical Integration of the Preference Rules Affecting Commercial Financing*, 61 WASH. UNIV. L.Q. 1, 66 n.215 (1983) ("The phrase in § 547(e) 'at the time such transfer takes effect' is not defined in the Code and apparently refers to effectiveness under applicable state or federal law. For an Article 9 security interest, this occurs at attachment.").

Legislative history indicates that Congress did not use the term "attachment" in the preference statute because not all transfers involve Article Nine security interests; nevertheless, when the challenged transfer involves an Article Nine security interest the phrase "becomes effective between the parties" is synonymous with "attachment." See REPORT OF THE COMMITTEE ON COORDINATION OF THE BANKRUPTCY ACT AND THE UNIFORM COMMERCIAL CODE, *reprinted in* H.R. REP. NO. 95-595, at 204, 213 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6164, 6173.

23. See U.C.C. §§ 9-203(1), 9-105(1)(l) (defining "security agreement"), 1-201(44) (defining "value"). A security interest can attach absent a written security agreement if the secured party either possesses the collateral or controls investment property. See U.C.C. §§ 9-203(1), 9-115(1)(e) (defining "control"), 9-115(1)(f) (defining "investment property").

24. Under the U.C.C., "[a] security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken." U.C.C. § 9-303(1). One of the "applicable steps" is the filing of a financing statement. *Id.* (indicating that "such steps" are specified in various provisions, including U.C.C. § 9-302); U.C.C. § 9-302(1)(a) (requiring a secured party to file a financing statement in order to perfect a non-possessory security interest in equipment). If the creditor elects to file its financing statement before attachment exists, then the security interest becomes perfected not at the moment of filing but at the time of attachment. See U.C.C. § 9-303 Official Comment 1 ("If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected

on May 1 and Lender files its financing statement on May 7, then the transfer takes place on May 1 under clause (A) because attachment and perfection occurred within a ten-day period. If attachment occurs on May 1 and Lender files its financing statement on May 13, then the transfer takes place on May 13 under clause (B) because the security interest was perfected more than ten days after it attached. If attachment occurs on May 1 and Lender never perfects its security interest, the transfer takes place on the filing date of the bankruptcy petition under clause (C). In each instance, the transfer date is compared to the date when Debtor incurred the debt to determine whether the transfer was made for antecedent, or pre-existing, debt. If, under the applicable facts, clause (A) dictates that the transfer date is the attachment date, then the trustee may have difficulty proving that the transfer was made to secure repayment of antecedent debt. Generally the difficulty disappears if Lender files its financing statement more than ten days after attachment, for then clause (B) (or, in rare circumstances, clause (C)) will dictate a transfer date after the debt date.

The fifth element requires the trustee to prove that the transfer occurred when the debtor was insolvent.²⁵ Whether the debtor is insolvent is a question of fact,²⁶ but the trustee's burden is eased somewhat by the statutory presumption of insolvency during the 90 days immediately preceding the filing date of the bankruptcy petition.²⁷

automatically when it attaches.").

Under the preference statute, a security interest becomes perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(B) (1994). Generally a creditor that perfects its Article Nine security interest enjoys priority over the competing claim of a subsequent lien creditor. *See* U.C.C. § 9-301(1)(b). Therefore, a creditor perfected for Article Nine purposes should be perfected for preference purposes.

25. 11 U.S.C. § 547(b)(3) (1994). The Bankruptcy Code has three definitions of insolvency: one for municipalities, another for partnerships, and a third for all other types of debtors (e.g., individuals and corporations). 11 U.S.C. § 101(32) (1994).

26. *In re Roblin Indus., Inc.*, 78 F.3d 30, 35 (2d Cir. 1996).

27. 11 U.S.C. § 547(f) (1994). If the trustee is attacking a security interest as a voidable preference, the presumption "imposes on [the secured party] the burden of going forward with evidence to rebut or meet the presumption, but does not shift to [the secured party] the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the [trustee]." FED. R. EVID. 301. *See also* H. R. REP. NO. 95-595, at 178-79 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6139 ("The presumption does not shift the burden of proof on the issue of insolvency away from the trustee. Rather, it is governed by the Federal Rules of Evidence, which state that the presumption merely requires the party against whom it is directed (in this case, the transferee of the preference) to go forward to present some evidence to overcome the presumption. Once he does, the ultimate burden of proof remains with the bankruptcy

The trustee also must establish that the debtor made the transfer within the so-called "preference period." Generally, this period is the 90-day period immediately preceding the filing date of the bankruptcy petition.²⁸ However, this period can extend back one full year from the filing date²⁹ if the creditor to whom or for whose benefit the transfer was made is an "insider."³⁰

trustee.") (footnote omitted). Occasionally the creditor presents sufficient evidence to successfully rebut the presumption, forcing the trustee to prove insolvency by a preponderance of evidence. *See, e.g., In re Roblin Indus., Inc.*, 78 F.3d at 38 (creditor rebutted presumption, but trustee then proved insolvency); *Fokkena v. Winston, Reuber, Byrne, P.C. (In re Johnson)*, 189 B.R. 744, 747 (Bankr. N.D. Iowa 1995) (creditor rebutted presumption and trustee then failed to prove insolvency); *Pembroke Dev. Corp. v. A.P.L. Window (In re Pembroke Dev. Corp.)*, 122 B.R. 610, 612 (Bankr. S.D. Fla. 1991) (creditor rebutted presumption and trustee then failed to prove insolvency).

28. 11 U.S.C. § 547(b)(4)(A) (1994). "Controversy exists on how to count [the 90-day period]." Carlson, *supra* note 18, at 220 n.35. Should one count forward from the transfer date to the petition date, or backward from the petition date to the transfer date? Using an example and Bankruptcy Rule 9006(a), Professor Carlson persuasively argues why "[t]he forward-counting method is the superior view." Carlson, *supra* note 18, at 220 n.35. However, the majority of courts appear to adopt a backward-counting approach. *See Nelson Co. v. Counsel for the Official Comm. of Unsecured Creditors (In re Nelson Co.)*, 959 F.2d 1260, 1266 n.6 (3d Cir. 1992) (citing cases previously addressing the issue). *See generally* Michael T. Andrew, *Computation of the Bankruptcy Preference Period: A Trap for Practitioners*, 90 COM. L.J. 170 (1985).

29. One scholar has noted that "[a]lthough the legislative history contains no clue indicating how Congress selected this period, the length corresponds to the one year period during which prepetition fraudulent conveyances are vulnerable to the trustee's attack under section 548[.]" Vern L. Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 749 (1985).

30. 11 U.S.C. § 547(b)(4)(B) (1994). "Insider" is defined at 11 U.S.C. § 101(31) (1994) and includes relatives of individual debtors (11 U.S.C. § 101(31)(A)(i) (1994)), directors and officers of corporate debtors (11 U.S.C. § 101(31)(B)(i) and (ii) (1994)), and general partners of partnership debtors (11 U.S.C. § 101(31)(C)(i) (1994)). As stated by one authority,

[t]he purpose of the longer preference period is to balance the greater ability of insider creditors, compared to non-insiders, to procure a preference. Because of insiders' close relationships with the debtor, they have greater access to more information about the debtor's financial position; they "can exert greater influence on the debtor, which causes insider transactions to be less vulnerable to the market pressures that help control arm's-length transactions;" and, because of their greater knowledge and influence, insiders may more easily than other creditors "veil a potentially preferential transfer, or may even deliberately conceal the preference."

Finally, the transfer must permit the creditor to receive more than it otherwise would receive in a bankruptcy liquidation if the transfer were ignored.³¹ To illustrate, Bank makes a \$1,000,000 unsecured loan to Debtor on February 1. After Debtor provides Bank with an adverse earnings report, Debtor agrees on July 1 to collateralize the loan by granting a security interest in collateral worth approximately \$1,200,000. Bank perfects its security interest by filing a financing statement on July 12. Debtor files its bankruptcy petition on September 1. To protect its interest in the bankruptcy, Bank will file a proof of claim.³² Absent any objection from an interested party, Bank's claim will be "allowed."³³ Bank then has a "secured claim" equal to "the value of such creditor's interest in the estate's interest in such property" and an "unsecured claim" equal to the balance.³⁴ If Bank's lien on the collateral is senior to all other creditors and the collateral still has a value of \$1,200,000, then Bank holds a secured claim equal to the lesser of its unpaid claim and \$1,200,000. If the collateral value has plummeted to \$600,000, then Bank has a \$600,000 secured claim and an unsecured claim equal to the balance of the unpaid debt. Under the priority and distribution schemes of the Bankruptcy Code, secured claims are paid before unsecured claims.³⁵ If Debtor's financial statements that accompanied the petition reveal that Debtor's liabilities exceed its assets, then the trustee can prove that holders of unsecured claims will not be fully paid. Therefore, the trustee also can prove

EPSTEIN, *supra* note 21, § 6-17, at 301 (citing John Tuskey, *The Term "Insider" Within Section 547(b)(4)(B) of the Bankruptcy Code*, 57 NOTRE DAME LAW. 726, 729-30 (1982)). See also *Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Serv., Inc.)*, 980 F.2d 792, 796 (1st Cir. 1992) ("The one-year preference period is designed to inhibit insiders—entities normally privy to inside financial information long before it becomes available to arm's-length creditors—from influencing the insolvent debtor to deplete its remaining assets for the insider's benefit, to the detriment of non-insider creditors.").

The trustee does not enjoy the insolvency presumption if the transfer to or for the benefit of the insider occurred more than ninety days before the petition date. See 11 U.S.C. § 547(f) (1994); *Orix Credit Alliance, Inc. v. Harvey (In re Lamar Haddox Contractor, Inc.)*, 40 F.3d 118, 121 (5th Cir. 1994); *Thompson v. Jonovich (In re Food & Fibre Protection, Ltd.)*, 168 B.R. 408, 417 (Bankr. D. Ariz. 1994).

31. 11 U.S.C. § 547(b)(5) (1994).

32. 11 U.S.C. § 501(a) (1994).

33. 11 U.S.C. § 502(a) (1994).

34. 11 U.S.C. § 506(a) (1994).

35. 11 U.S.C. § 507 (1994) establishes the priority of expenses and claims, and 11 U.S.C. § 726 (1994) dictates how property of the bankruptcy estate is to be distributed. Neither section expressly references "secured claims" arising from consensual liens. "Nevertheless, secured claims are always given top priority as to the assets subject to the security." EPSTEIN, *supra* note 21, § 7-10, at 461.

that the security interest permits Bank to recover more than it otherwise would in a liquidation as long as the collateral has any value that permits at least part of Bank's claim to be a secured claim.

Even if the trustee proves all seven elements of a preference, a secured creditor may be able to preserve some or all loan repayments or security interests from attack by successfully invoking one or more of the eight exceptions found in 11 U.S.C. § 547(c).³⁶ As one author has noted,

[t]hese exceptions are designed to rescue from attack in bankruptcy those kinds of transactions, otherwise fitting the definition of a preference, that are essential to commercial reality and do not offend the purposes of preference law, or that benefit the ongoing business by helping to keep the potential bankrupt afloat.³⁷

For purposes of this article, only one exception merits more than a passing glance.³⁸ Clause (c)(3), the so-called enabling loan exception, permits a secured creditor to protect a purchase money security interest³⁹ if

36. The preface to 11 U.S.C. § 547(b) (1994) subjects itself to the exceptions in subsection (c).

37. Elizabeth A. Orelup, *Avoidance of Preferential Transfers Under the Bankruptcy Reform Act of 1978*, 65 IOWA L. REV. 209, 233 (1979) (footnote omitted).

38. Readers interested in one or more of the other exceptions may wish to consult a variety of sources, including EPSTEIN, *supra* note 21, §§ 6-23 to 6-37; WHITE & SUMMERS, *supra* note 10, §§ 32-5 to 32-6; Carlson, *supra* note 18, at 279-350; Countryman, *supra* note 29, at 758-816; Orelup, *supra* note 37, at 232-41; Charles J. Young, *Preferences Under the Bankruptcy Reform Act of 1978*, 54 AM. BANKR. L.J. 221, 225-37 (1980).

39. Although 11 U.S.C. § 547(c)(3) (1994) nowhere mentions "purchase money security interest," a term of art defined in U.C.C. § 9-107, most commentators have concluded that the subsection protects those types of security interests. *See, e.g.*, DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY* 472 (2d ed. 1990) ("[Purchase money security interests] are commonly referred to as 'enabling loans,' because they make possible the acquisition of assets that a debtor previously did not own. . . . Section 547(c)(3) reflects . . . special treatment given to holders of purchase money security interests."); EPSTEIN, *supra* note 21, § 6-33, at 337 ("The third exception to section 547(b), section 547(c)(3), protects enabling security interests, better known as purchase-money security interests[.]") (footnote omitted); WHITE & SUMMERS, *supra* note 10, § 32-5, at 274 ("A third exception, in subsection 547(c)(3), applies to purchase money loans."). *See also* General Motors Acceptance Corp. v. Busenlehner (*In re Busenlehner*), 918 F.2d 928, 930 (11th Cir. 1990), *cert. denied sub nom.* Moister v. General Motors Acceptance Corp., 500 U.S. 949 (1991) ("Section 547(c)(3) prevents trustees from avoiding enabling loans[FN#1] that meet certain conditions. FN#1—Enabling loans are essentially equivalent to the U.C.C. Article Nine's purchase money security interests.");

it can prove⁴⁰ by a preponderance of the evidence⁴¹ that all seven elements of the exception are present. First, the security interest must secure repayment of "new value,"⁴² which includes, among other things, "money or money's worth in goods, services, or new credit."⁴³ Second, the secured party must extend the new value no earlier than when the security agreement is executed.⁴⁴ Third, the security agreement must describe the collateral that is subject to the security interest.⁴⁵ Fourth, the creditor must extend the new

Rutledge v. First Nat'l Bank of Sallisaw (*In re Carson*), 119 B.R. 264, 266 (Bankr. E.D. Okla. 1990) (refusing to apply the exception "since the security interest at issue is of a non-purchase money character").

Some scholars believe that 11 U.S.C. § 547(c)(3) (1994) only protects the lender-financed interests described in U.C.C. § 9-107(b) and not the seller-financed interests described in U.C.C. § 9-107(a). See Irving A. Breitowitz, *Article 9 Security Interests as Voidable Preferences*, 3 CARDOZO L. REV. 357, 393-94 n.105, 396 n.108 (1982); Carlson, *supra* note 18, at 299; Countryman, *supra* note 29, at 778. *But see* EPSTEIN, *supra* note 21, § 6-33, at 340. I tend to concur with Epstein's analysis and therefore will not distinguish between the two types of purchase money security interests in this article.

40. The secured party has the burden of proving nonavoidability under subsection (c). See 11 U.S.C. § 547(g) (1994).

41. See *In re P.A. Bergner & Co. Holding Co.*, 187 B.R. 964, 978-79 (Bankr. E.D. Wis. 1995).

42. 11 U.S.C. § 547(c)(3)(A) (1994).

43. 11 U.S.C. § 547(a)(2) (1994).

44. 11 U.S.C. § 547(c)(3)(A)(i) (1994). Failure to comply with this requirement occasionally costs a secured party the benefits of the exception. See, e.g., Roemelmeyer v. D.M.B. Corp. (*In re Berman*), 95 B.R. 833 (S.D. Fla. 1989) (denying availability of enabling loan exception where loan was funded on January 20, 1987, but security agreement was not executed until February 13, 1987); Allison v. First Nat'l Bank & Trust Co. (*In re Damon*), 34 B.R. 627 (Bankr. D. Kan. 1983) (concluding that creditor could not invoke enabling loan exception because security agreements were executed on October 8, 1982, long after loans were funded on August 4, 1982, August 24, 1982, and September 13, 1982).

Cf. U.C.C. § 9-107 (not requiring security agreement to be executed before or simultaneously with loan funding in order to qualify for purchase money status); U.C.C. § 9-203(1)(a) (requiring the debtor, but not the secured party, to execute the security agreement). U.C.C. § 9-107 does not require the purchase money security interest to be evidenced by a written security agreement. However, unless the secured party either retains possession of the collateral or controls investment property, the purchase money creditor has no enforceable security interest absent a written security agreement. See U.C.C. § 9-203(1).

45. 11 U.S.C. § 547(c)(3)(A)(i) (1994). *Cf.* U.C.C. § 9-203(1)(a) (requiring description of collateral in security agreement).

value to the bankrupt debtor under that security agreement.⁴⁶ Fifth, the secured party must extend the new value in order to enable the bankrupt debtor to acquire the collateral.⁴⁷ Sixth, the debtor must use the new value to acquire the collateral.⁴⁸ And seventh, the secured party must perfect its security interest no later than the twentieth day after the debtor first possesses⁴⁹ the collateral.⁵⁰

46. 11 U.S.C. § 547(c)(3)(A)(ii) (1994).

47. 11 U.S.C. § 547(c)(3)(A)(iii) (1994).

48. 11 U.S.C. § 547(c)(3)(A)(iv) (1994).

49. "The term 'possession' in (c)(3)(B) is defined according to its usual and ordinary meaning, that is, physical or manual control." EPSTEIN, *supra* note 21, § 6-33 at 339 n.9. Determining when the debtor first possessed the collateral has been the subject of occasional litigation. See, e.g., *Scott v. McArthur Sav. & Loan Co.* (*In re Winnett*), 102 B.R. 635 (Bankr. S.D. Ohio 1989); *Logan v. Columbus Postal Employees Credit Union, Inc.* (*In re Trott*), 91 B.R. 808 (Bankr. S.D. Ohio 1988).

50. 11 U.S.C. § 547(c)(3)(B) (1994). Before the Reform Act, the statute required the secured party to perfect its security interest within *ten* days after the debtor first possessed the collateral. Before enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-333, 98 Stat. 333 (1984), the statute required the secured party to perfect its security interest before the tenth day following *attachment*.

The secured party occasionally loses the protection afforded by the (c)(3) exception because it failed to timely perfect its security interest. See, e.g., *Gibson v. General Motors Acceptance Corp.*, 104 B.R. 432 (Bankr. N.D. Fla. 1989) (possession on August 28; perfection on October 9); *Bank One, Dayton, N.A. v. Bavely* (*In re Phillips*), 103 B.R. 893 (Bankr. S.D. Ohio 1989) (possession on January 11; perfection on January 27).

Creditors that are unable to preserve their purchase money security interests under the (c)(3) exception after untimely perfecting their interests frequently attempt to invoke the protection afforded by the "contemporaneous exchange" exception of clause (c)(1). However, most courts and scholars agree that clause (c)(1) cannot excuse untimely perfection of a purchase money security interest. See, e.g., *Pongetti v. General Motors Acceptance Corp.* (*In re Locklin*), 101 F.3d 435, 442-44 (5th Cir. 1996); *Wachovia Bank and Trust Co., N.A. v. Bringle* (*In re Holder*), 892 F.2d 29, 30-31 (4th Cir. 1989); *Union Bank & Trust Co. v. Baker* (*In re Tressler*), 771 F.2d 791, 793-94 (3d Cir. 1985); *Gower v. Ford Motor Credit Co.* (*In re Davis*), 734 F.2d 604, 605-07 (11th Cir. 1984); *Valley Bank v. Vance* (*In re Vance*), 721 F.2d 259, 260-62 (9th Cir. 1983); *Westenhoefer v. PNC Bank* (*In re Smallwood*), 204 B.R. 519, 520 (Bankr. E.D. Ky. 1997); EPSTEIN, *supra* note 21, § 6-33, at 338 ("Section (c)(3), with its peculiar procedural requirements, was designed especially for purchase-money security interests, and therefore (c)(1) is inapplicable to them.") (footnote omitted); *id.* at 340 ("[I]f (c)(3) is applicable because the transfer involves an enabling security interest, (c)(1) is not alternatively available should the requirements of (c)(3) not be met."). *But see* *Jahn v. First Tennessee Bank of Chattanooga* (*In re Burnette*), 14 B.R. 795, 802-03 (Bankr. E.D. Tenn. 1981) (*dicta*); *General Motors Acceptance Corp. v.*

If the trustee satisfies its burden of proof under 11 U.S.C. § 547(b) and the secured party cannot successfully invoke any of the exceptions in 11 U.S.C. § 547(c), the trustee "may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property" from the secured party.⁵¹ The usual result of a successful preference attack against a security interest is the removal of the lien from the collateral. The value of the now-unencumbered assets may then become a factor in fashioning an acceptable plan of reorganization. Alternatively, if the debtor is seeking liquidation, the assets will be converted to cash and the proceeds will be distributed in accordance with applicable provisions of the Bankruptcy Code. And in either a reorganization or a liquidation, the victimized creditor will find itself eating table scraps out of the trough with the other unsecured creditors, rather than feasting at the head table with creditors holding secured claims.

II. SAVED BY GRACE: CONFLICT BETWEEN THE BANKRUPTCY CODE AND STATE LAW

A. The Case Law

The transfer date provisions of the preference statute mesh somewhat unevenly with state commercial law principles. In general, a security interest transfer occurs on the date of its perfection, unless the security interest is perfected within ten days after attachment, in which case the earlier attachment date is the transfer date.⁵² For preference purposes, a security interest is perfected when "a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the [secured party]."⁵³ Under state law, a secured party occasionally can perfect its security interest after attachment but still enjoy priority over a competing judicial lien by satisfying local perfection requirements within the grace period provided by the applicable state statute. One question that has arisen is this: If a secured party fails to perfect its security interest within the post-attachment grace period under 11 U.S.C. § 547(e)(2) but timely perfects its interest within a longer grace period under state law, may the secured party rely on the longer state period to prove the

Martella (*In re Martella*), 22 B.R. 649, 651-52 (Bankr. D. Colo. 1982); H. R. REP. NO. 95-595, at 373 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6329 ("Subsection (c) contains exceptions to the trustee's avoiding power. If a creditor can qualify under any one of the exceptions, then he is protected to that extent. If he can qualify under several, he is protected by each to the extent he can qualify under each.").

51. 11 U.S.C. § 550(a) (1994).

52. 11 U.S.C. §§ 547(e)(2)(A)-(e)(2)(B) (1994).

53. 11 U.S.C. § 547(e)(1)(B) (1994).

transfer occurred on the earlier attachment date rather than the subsequent perfection date (which may not only frustrate the trustee's ability to prove that the transfer occurred during the preference period⁵⁴ and secured repayment of antecedent debt⁵⁵ but also improve the secured party's ability to satisfy the "timely perfection" requirement of the enabling loan exception⁵⁶)? Or does the secured party's failure to perfect its interest within the shorter grace period of the preference statute result in the transfer occurring on the perfection date, even though by complying with state law the secured party enjoyed priority over a lien creditor as of an earlier date? Several courts have confronted the issue, reaching different results. And even those that reach the same result frequently travel different roads. A summary of the major cases follows—all of which arose before 11 U.S.C. § 547 was amended by the Reform Act.

In *Jahn v. First Tennessee Bank of Chattanooga (In re Burnette)*,⁵⁷ the trustee attacked a purchase money security interest in a pick-up truck that did not become perfected until twenty days after the bankrupt debtor created the security interest and took possession of the vehicle.⁵⁸ The creditor, relying on the twenty-day grace period found in Tennessee's version of U.C.C. § 9-301(2), argued that its perfection related back to the attachment and possession date, and because this date also was the date when the debtor incurred the debt, the trustee could not prove the antecedency requirement of 11 U.S.C. § 547(b)(2).⁵⁹ As phrased by the court, "[t]he problem in this case is determining how the twenty day grace period of U.C.C. § 9-301(2) relates to the preference statute, particularly in light of the preference statute's own ten day grace period."⁶⁰

The bankruptcy court observed that the predecessor preference statute, section 60 of the Bankruptcy Act, made state grace periods expressly relevant, unlike section 547 of the Bankruptcy Code.⁶¹ Furthermore, 11 U.S.C. § 546(b) provides that the rights and powers under certain provisions of the Bankruptcy Code are subject to applicable state grace periods; noticeably absent is any reference to a trustee's rights and powers under 11 U.S.C. § 547.⁶² Therefore, the court concluded that it was "evident that Congress did not intend for state grace periods to be relevant under the preference

54. 11 U.S.C. § 547(b)(4) (1994).

55. 11 U.S.C. § 547(b)(2) (1994).

56. 11 U.S.C. § 547(c)(3)(B) (1994).

57. 14 B.R. 795 (Bankr. E.D. Tenn. 1981).

58. *Id.* at 796.

59. *Id.* at 796-97.

60. *Id.* at 797.

61. *Id.* at 797-800.

62. *Id.* at 800.

statute. There was to be a uniform [ten-day] rule throughout the nation."⁶³ However, the court was not convinced that Congress manifested this intent to the exclusion of other interpretations when it stated in 11 U.S.C. § 547(e)(1)(B) that a security interest is perfected when a creditor cannot acquire a superior judicial lien. In the court's mind, "perfection" could refer either to an act (such as filing a financing statement) or a status enjoyed over a period of time.⁶⁴ On one hand, if "perfection" related to an act, an interpretation that the court admitted was consistent with Congressional intent,⁶⁵ then perfection (and the date of transfer) would not occur until that act happened (thereby enabling the trustee to prove antecedency). On the other hand, if "perfection" referred to any period of time during which a creditor could not obtain a superior judicial lien, then a secured party that timely acted within the state grace period would be "perfected" as of attachment (thereby decreasing the likelihood that the trustee could prove antecedency). The court found both interpretations consistent with the wording of the preference statute but found the latter definition "more reasonable" and "less troublesome" than the former, under which "the court must consider the facts from an earlier perspective, rather than as they turned out."⁶⁶ Therefore, because the secured party had timely perfected its security interest under Tennessee law, the interest was perfected as of the time of attachment, preventing the trustee from proving that the transfer was made to secure repayment of antecedent debt.⁶⁷

Two years later, another bankruptcy court in Tennessee confronted the same issue but reached a different result in *Waldschmidt v. Ford Motor Credit Co. (In re Murray)*.⁶⁸ The court observed that 11 U.S.C. § 546(b) subjects the trustee's rights and powers under certain Bankruptcy Code provisions to applicable state law; yet, 11 U.S.C. § 547 is not one of the referenced provisions. Therefore, the court concluded that Tennessee's version of U.C.C. § 9-301(2) was inapplicable.⁶⁹ To support its conclusion, the court ignored the result of *In re Burnette* but relied on its determination that a comparison of section 60 of the Bankruptcy Act and section 547 of the Bankruptcy Code

63. *Id.* at 801.

64. *Id.* at 801 n.7.

65. *Id.* at 801.

66. *Id.*

67. *Id.* at 802. The court also held that the creditor could preserve the transfer under either the enabling loan exception or the contemporaneous exchange exception. *Id.* at 802-03. This latter holding is a minority view, as most courts have held that purchase money creditors cannot avail themselves of the contemporaneous exchange exception. *See supra* note 50.

68. 27 B.R. 445 (Bankr. M.D. Tenn. 1983).

69. *Id.* at 448.

revealed Congress intended a uniform grace period. The court expressed reluctance to interpret the interplay of state law and the Bankruptcy Code in a manner inconsistent with the uniformity Congress intended. "Although the state legislature has discretion to establish grace periods relevant for determining priorities in ordinary commercial transactions, such grace periods are not controlling in the bankruptcy context for determining whether a preference is avoidable."⁷⁰ Because the creditor did not timely perfect its security interest within ten days following attachment, the creditor could not avail itself of the benefits of 11 U.S.C. § 547(e)(2)(A). This permitted the trustee to prove antecedency, the only disputed element of its preference action.⁷¹

In *In re Scoviac*,⁷² a bankruptcy court held that a purchase money creditor could not rely on the more liberal provisions of Florida law to overcome its failure to perfect its security interest within ten days after attachment. "[The Florida] grace period is not a relation back provision which controls the date of transfer. Rather such date is controlled specifically and solely by § 547 of the Bankruptcy Code. . . . Adoption of the state statutory priority provisions, including [Florida's version of U.C.C. § 9-301(2)] would wreak havoc on the stability engendered by § 547(e)(2)(B) of the Bankruptcy Code."⁷³

A federal appellate court confronted the issue for the first time in *Howard Thornton Ford, Inc. v. Fitzpatrick (In re Hamilton)*.⁷⁴ The court phrased the

70. *Id.* at 451.

71. *Id.* at 447-48. The court also held that untimely perfection prevented the creditor from successfully preserving the transfer under the enabling loan exception. *Id.* at 448. The creditor, relying on *In re Burnette* and other cases, argued that the contemporaneous exchange exception protected its security interest from attack. *Id.* at 448-49. The court disagreed. "The better view and the majority view is that § 547(c)(3) is the exclusive exception available to protect enabling loans from avoidance." *Id.* at 449.

72. 74 B.R. 635 (Bankr. N.D. Fla. 1987).

73. *Id.* at 637-38. Unlike the typical case, in which the creditor relies on state law to challenge the trustee's ability to prove antecedency, the creditor in *In re Scoviac* attempted to use state law to move the transfer outside the 90-day preference period. The debtor filed her Chapter 7 petition on July 17, 1986. The security interest attached, or became enforceable, on April 12, 1986—a date outside the preference period. However, the creditor did not perfect its interest until April 25, 1986—a date within the preference period and more than ten days after attachment but within Florida's statutory 15-day period. *Id.* at 636.

The court also held that the creditor's untimely perfection prevented it from relying on the enabling loan exception, and the purchase money status of its security interest made the contemporaneous exchange exception unavailable. *Id.* at 637.

74. 892 F.2d 1230 (5th Cir. 1990).

question before it as "whether the Texas UCC 20 day grace period or the Federal Bankruptcy § 547(c) 10 day grace period for perfection of a security interest in personal property applies."⁷⁵ The court answered its question with very little original analysis. It noted that the bankruptcy courts in *In re Burnette* and *In re Scoviac* had reached opposite results in similar litigation.⁷⁶ In conclusory fashion, the court then simply stated: "In this choice we prefer *Scoviac* over *Burnette* as do treatises commentators."⁷⁷

Within a year, the issue again presented itself before another federal appellate court in *General Motors Acceptance Corporation v. Busenlehner* (*In re Busenlehner*).⁷⁸ Creditor GMAC conceded that all elements of 11 U.S.C. § 547(b) were present but argued that it could preserve its purchase money security interest in the debtor's vehicle under the enabling loan exception of 11 U.S.C. § 547(c)(3).⁷⁹ The trustee disagreed, contending that because GMAC did not perfect its security interest until April 13, 1988, GMAC could not prove that its security interest was perfected within ten days after the bankrupt debtors purchased and first possessed the car on March 31, 1988, as required by 11 U.S.C. § 547(c)(3)(B).⁸⁰ GMAC responded by citing applicable Georgia law that permitted perfection to relate back to the creation of the interest if the creditor completed the steps for perfection within twenty days of creation.⁸¹ Because GMAC perfected its security interest within the

75. *Id.* at 1230. The court relied on the Texas version of U.C.C. §§ 9-301(2) and 9-312(4) for finding a 20-day period. As the preference statute defines perfection in the context of a priority dispute between a secured creditor and a judicial lien creditor, the court's reliance on U.C.C. § 9-312(4), which resolves priority disputes between two secured creditors (one of which is claiming purchase money status), is misplaced. *Cf.* U.C.C. § 9-301(2) (resolving competing claims between a lien creditor and a purchase money creditor).

76. *In re Hamilton*, 892 F.2d at 1234-35.

77. *Id.* at 1235. More than one article has criticized the *Hamilton* court for its conclusory analysis. *See, e.g.*, Alvin C. Harrell, Note, *Bankruptcy Code Preempts State Law Grace Period*, 46 CONSUMER FIN. L.Q. REP. 60, 69, 75 (1992) (referring to the "skeletal conclusory statements" and "simplistic analysis" in the opinion); Alvin C. Harrell, *et al.*, *Update on U.C.C.-Other Law Conflicts*, 45 CONSUMER FIN. L.Q. REP. 335, 343 (1991) (accusing the court of "ignoring . . . important issues and oversimplifying the nature of the controversy"); *id.* at 343 n.107 ("More significantly, the *Hamilton* opinion as a whole is not a model of clarity of analysis.").

78. 918 F.2d 928 (11th Cir. 1990), *cert. denied sub nom. Moister v. General Motors Acceptance Corp.*, 500 U.S. 949 (1991).

79. *Moister v. General Motors Acceptance Corp.* (*In re Busenlehner*), 98 B.R. 600, 601 (Bankr. N.D. Ga. 1989).

80. *Id.* at 600-01.

81. *Id.* at 601. Rather than rely on Georgia's version of U.C.C. § 9-301, GMAC invoked the Georgia statute governing perfection of security interests in motor vehicles,

twenty-day period, GMAC argued that its security interest was perfected as of March 31, 1988, a date that permitted GMAC to successfully invoke the protection of 11 U.S.C. § 547(c)(3).⁸² The bankruptcy court disagreed with GMAC and granted the trustee's motion for summary judgment.⁸³ The district court reversed on different grounds.⁸⁴ On appeal, the court observed

under which a security interest "is perfected as of the time of its creation if the delivery [of applicable paperwork] is completed within 20 days thereafter; otherwise, as of the date of the delivery [of applicable paperwork] to the commissioner." *Id.*

82. *Id.*

83. The bankruptcy court offered three reasons for its decision. First, it noted that Congress had shortened the grace period from 21 days (under the Bankruptcy Act) to 10 days under the Bankruptcy Code. "Therefore, allowing the twenty-day perfection period found in [the Georgia statute] to control in the context of preference litigation would undermine Congress' intent in setting the ten-day grace period." *Id.* at 602. Second, the court relied on the factually similar *In re Murray*, 27 B.R. 445 (Bankr. M.D. Tenn. 1983), in which the Tennessee bankruptcy court had held that timely perfection under state law did not necessarily protect a creditor from a preference challenge because preference actions operated under different rules. *In re Busenlehner*, 98 B.R. at 602. And third, the court noted that a trustee is subject to state-created, relation-back provisions only in certain situations described in 11 U.S.C. § 546(b) (1988); noticeably absent is any cross-reference to the preference statute. *Id.*

84. The district court, relying on the counting scheme of Bankruptcy Rule 9006(a), held that GMAC had complied with the timeliness requirement of the enabling loan exception. *In re Busenlehner*, 918 F.2d at 929-30. Bankruptcy Rule 9006(a) provides:

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

It is not obvious from reading the rule how the district court concluded that GMAC, by perfecting its interest on April 13 (thirteen calendar days after the debtors purchased and possessed the vehicle), satisfied the 10-day requirement of the enabling loan

that under 11 U.S.C. § 547(e)(1)(B) a security interest transfer is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the secured party. Under Georgia law, GMAC's interest in the automobile enjoyed priority over any judicial lien as GMAC had perfected its interest within twenty days of creation and thus enjoyed the benefits of the relation-back statute. Therefore, GMAC's interest became perfected under 11 U.S.C. § 547(e)(1)(B) as of March 31, which allowed GMAC to qualify for the protection of 11 U.S.C. § 547(c)(3).⁸⁵ The court concluded with comments worth quoting:

This conclusion is supported by the policies underlying preference law. The goal of the drafters of this provision of the 1978 Bankruptcy Reform Act was to bring preference law "more into conformity with commercial practices and the Uniform Commercial Law." Creditors are encouraged by our legal system to secure their loans. The general message to creditors is that should they follow state commercial law their secured loans will be protected in bankruptcy.

By limiting the effect of state relation-back statutes in bankruptcy, legitimate commercial practices are penalized. To hold for the Trustee in this case may be beneficial in that it creates a larger estate to pay administrative expenses and unsecured claims. But this benefit is outweighed in that the original enabling loan increased the size of the estate. The creditor, moreover, lent the money in the expectation that the creditor's compliance with state law was sufficient to protect the loan. Debtors should not be given the ability to surprise and upset established commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest.⁸⁶

In late 1991, two bankruptcy courts from the same Oklahoma district reached contrary results after addressing the interplay between the state's 15-day grace period and the Bankruptcy Code's 10-day grace period. In *Beaumont v. General Motors Acceptance Corporation (In re Power)*,⁸⁷ Chief Judge Covey concluded that the creditor's timely perfection under state law permitted the creditor's perfection to relate back to the time of attachment, preventing the trustee from proving that the security interest had been conveyed to secure repayment of antecedent debt. "The Bankruptcy Code does not say the physical act of perfection has to occur within ten days; it just

exception. The district court's opinion is not reported.

85. *In re Busenlehner*, 918 F.2d at 930-31. Why this conclusion also did not prevent the trustee from proving that the security interest was conveyed for antecedent debt, as required by the statute, is unclear.

86. *Id.* at 931 (citation omitted).

87. 133 B.R. 242 (Bankr. N.D. Okla. 1991).

states that the lien must be perfected within ten days. Here, that requirement was met."⁸⁸ Bankruptcy Judge Wilson disagreed in *Woodson v. City Finance Company (In re Holloway)*.⁸⁹ In his view, "the natural reading of § 547(e)(1)(B) is that perfection occurs when the last act required by State law to acquire the desired status is performed. The contrary interpretation that § 547(e)(1)(B) refers not to the real-world doing of an act but to a fictional period of time is an ingenious, but strained and unnatural, reading of the statute."⁹⁰ Judge Wilson reviewed the contrary holdings of *In re Burnette*, *In re Busenlehner*, and *In re Power* and concluded that those decisions erroneously interpreted the phrase "within 10 days" in 11 U.S.C. § 547(e)(2) to mean "within 10 days plus some variable period of time as may be added thereto by State laws." According to Judge Wilson, "[s]uch a reading is not supported by either the language of the statute or its legislative history; and does not carry out the intent of the statute and Congress. This Court finds such authorities unpersuasive, and declines to follow them."⁹¹

Without citing either *In re Power* or *In re Holloway*, but relying heavily on *In re Busenlehner*, the United States Court of Appeals for the Tenth Circuit, applying Oklahoma law, ruled in favor of the creditor and against the trustee in *Webb v. General Motors Acceptance Corporation (In re Hesser)*.⁹² The appellate court first noted that a security interest becomes perfected under 11 U.S.C. § 547(e)(1)(B) when a creditor on a simple contract cannot acquire a judicial lien that is superior to the secured party's interest, a determination made under Oklahoma law.⁹³ Although the creditor did not take action necessary to complete perfection until May 1, 1990, the governing statute permitted perfection to relate back to the execution date of the security agreement, April 16, 1990.⁹⁴ Therefore, according to the court, this earlier date was the day on which a creditor on a simple contract could not acquire a superior judicial lien and thus was the day of transfer under 11 U.S.C. § 547(e)(2).⁹⁵ As this date also was the purchase date, the transfer did not secure repayment of antecedent debt, as required by 11 U.S.C. § 547(b)(2).⁹⁶

88. *Id.* at 244.

89. 132 B.R. 771 (Bankr. N.D. Okla. 1991).

90. *Id.* at 774.

91. *Id.* at 775.

92. 984 F.2d 345 (10th Cir. 1993).

93. *Id.* at 348.

94. *Id.* at 347.

95. *Id.* at 348-49.

96. *Id.* at 349. The court's statement may be overbroad because under certain circumstances a trustee might be able to prove antecedency even if the security interest arises on the same date that the debtor incurs the debt. For example, Justice Holmes once concluded that a creditor received a preferential transfer by making an unsecured

And even if the trustee proved antecedency, the creditor could successfully invoke the protection afforded by 11 U.S.C. § 547(c)(3).⁹⁷ The court concluded its opinion by reiterating most of the above-quoted passage from *In re Busenlehner* to support its decision.⁹⁸

The bankruptcy appellate panel of the United States Court of Appeals for the Ninth Circuit entered the fray in 1994 in *Long v. Joe Romania Chevrolet, Inc. (In re Loken)*,⁹⁹ a case in which a purchase money dealer who did not perfect its security interest until twelve days after the debtor purchased and possessed the car argued that 11 U.S.C. § 547(c)(3) preserved its property interest from preference attack because it had timely perfected its interest within the 20-day grace period under Oregon's version of U.C.C. § 9-301(2).¹⁰⁰ The bankruptcy court deferred analysis under 11 U.S.C. § 547(c)(3)¹⁰¹ and, relying on *In re Burnette*, concluded that application of the Oregon statute prevented the trustee from proving that the dealer's property interest secured repayment of antecedent debt.¹⁰² The bankruptcy appellate panel reversed the lower court's decision for two reasons. First, unlike other courts that had struggled with whether the term "perfection" as used in 11 U.S.C. § 547(e) referred to a moment in time or a status, this court found no ambiguity.¹⁰³ It noted that under 11 U.S.C. § 547(e)(1), a security interest is perfected when a judicial lienholder cannot acquire a superior interest; if at any time a judicial lienholder can obtain superior rights, then the security interest is not yet perfected.¹⁰⁴

Essentially, under Section 547(e)(1), the court must determine the moment in time when a judicial lien creditor is barred from obtaining superior rights. . . . We hold that a creditor on a simple contract is barred from acquiring a judicial lien superior to the interest of the transferee when the

loan at 10:00 a.m. and then demanding and accepting securities between 2:00 p.m. and 3:00 p.m. that afternoon following the sudden decline in the market value of the borrower's assets. *See National City Bank of New York v. Hotchkiss*, 231 U.S. 50 (1913). *See also* Breitowitz, *supra* note 39, at 413 (acknowledging that while the contemporaneous exchange exception "somewhat mitigates the rigors of a literal definition of antecedence," the term "[a]ntecedent debt is given no statutory definition and presumably any delay . . . would fit the meaning of the term.").

97. *In re Hesser*, 984 F.2d 345, 349 (10th Cir. 1993).

98. *Id.*

99. 175 B.R. 56 (B.A.P. 9th Cir. 1994).

100. *Long v. Joe Romania Chevrolet, Inc. (In re Loken)*, 156 B.R. 660, 661 (Bankr. D. Or. 1993).

101. *Id.*

102. *Id.* at 664.

103. *In re Loken*, 175 B.R. 56, 61 (B.A.P. 9th Cir. 1994).

104. *Id.* at 60-61.

transferee takes the last step required by state law to perfect its security interest. Until that last step is taken, other creditors could potentially obtain superior rights. Until this last step, it is not possible to say that other creditors "cannot" obtain superior rights.¹⁰⁵

Second, the court believed that the legislative history of preference law, including not-yet-applicable changes made to 11 U.S.C. § 547 by the Reform Act, indicated Congressional intent to create a uniform rule in all jurisdictions. This intent would be frustrated if different state grace periods were relevant under the preference statute.¹⁰⁶

The United States Court of Appeals for the Ninth Circuit traveled a slightly different analytical path to reach the same result in *Fitzgerald v. First Security Bank of Idaho (In re Walker)*,¹⁰⁷ a case in which the creditor took the steps necessary to perfect its security interest outside the ten-day period of 11 U.S.C. § 547(e) but within Idaho's thirty-day statute. The creditor, relying on the state statute, argued that its security interest was perfected as of the date of creation and possession, a fact that prevented the trustee from proving that the property interest secured repayment of antecedent debt and, alternatively, allowed the creditor to exempt the security interest from attack under 11 U.S.C. § 547(c)(3).¹⁰⁸ Unlike the bankruptcy appellate panel in *In re Loken*, the bankruptcy court found the term "perfection" as used in 11 U.S.C. § 547(e) ambiguous and believed the two common constructions—one focusing on a final act, and the other emphasizing status—were both plausible.¹⁰⁹ However, relying on legislative history surrounding 11 U.S.C. § 547, scholarly commentary favoring a uniform grace period, and Bankruptcy Code provisions, the court adopted the former interpretation.¹¹⁰ It reviewed contrary case law but concluded those opinions "ignore legislative intent and engage in inappropriate policy judgments about the operation of the Code."¹¹¹ The court therefore concluded that because the creditor perfected its security interest outside the ten-day period of 11 U.S.C. § 547(e), the trustee could prove antecedency and set aside the interest as a voidable preference.¹¹² The federal district court affirmed the bankruptcy court's

105. *Id.* at 62.

106. *Id.* at 62-63.

107. 77 F.3d 322 (9th Cir. 1996).

108. *Fitzgerald v. First Security Bank of Idaho, N.A. (In re Walker)*, 161 B.R. 484, 487 (Bankr. D. Idaho 1993).

109. *Id.* at 493.

110. *Id.* at 493-97.

111. *Id.* at 500.

112. *Id.* at 501.

decision.¹¹³ The creditor suffered a similar fate on appeal. "The Code gives 10 days, not 30, in which to perfect a transfer. In bankruptcy, the Code trumps the law of the state. The Bank's lien was not perfected in 10 days. The state's relation-back provision cannot save it."¹¹⁴

*B. Congress Responds—And Resolves Most
(But Not All) Of The Conflict*

As illustrated by the foregoing cases, historically a purchase money creditor that perfected its interest more than ten days after the debtor first possessed the collateral but within a longer state grace period often found itself the victim of a preference attack. That likelihood diminished greatly in 1994 when Congress, in an effort to conform the preference statute to the more liberal practice found in most states,¹¹⁵ amended 11 U.S.C. § 547(c)(3)(B) by extending the post-possession period during which purchase money creditors may timely perfect their security interests from ten to twenty days,¹¹⁶ a period that parallels the grace period found in U.C.C. § 9-301(2) as enacted in most states.¹¹⁷ As a result of this amendment, many purchase

113. *Fitzgerald v. First Security Bank of Idaho* (*In re Walker*), 178 B.R. 497 (D. Idaho 1994).

114. *In re Walker*, 77 F.3d at 323.

115. See H.R. REP. NO. 103-835, at 45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354.

116. See Reform Act § 203(1).

117. See U.C.C. § 9-301, 3A U.L.A. 14-15 (1992), 4-5 (Supp. 1996) (indicating that the following states have adopted a 20-day grace period in their respective version of U.C.C. § 9-301(2): Alabama, Arizona, Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming). Florida provides a 15-day period and Arkansas and Idaho provide a 21-day period. *Id.* Three states not mentioned in the above source also provide grace periods longer than 10 days. See CAL. COMM. CODE § 9301(2) (West Supp. 1996) (20 days); GA. CODE ANN. § 11-9-301(2) (1994) (15 days); R.I. GEN. LAWS § 6A-9-301(2) (1992) (20 days).

Article Nine is being redrafted. The drafting committee intends to amend the official text of U.C.C. § 9-301(2), which will be recodified as U.C.C. § 9-315(f), by extending the grace period to 20 days. See *Uniform Commercial Code Revised Article 9—Secured Transactions; Sales of Accounts and Chattel Paper* (February 1997 draft) § 9-315(f) ("Except as otherwise provided in section 9-316 [which protects certain buyers], if a secured party files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the

money creditors now are able to preserve their security interests from attack under 11 U.S.C. § 547(c)(3) even if the trustee proves every element of its case, including the antecedent nature of the debt. Some scholars believe that any continuing conflict between state and federal law has been rendered moot by the amendment.¹¹⁸ Perhaps the number of potential conflicts has been greatly reduced, but the potential for some conflict still exists for various reasons.

First, two jurisdictions—Arkansas and Idaho—have amended their version of U.C.C. § 9-301(2) to provide a purchase money creditor with a 21-day filing period.¹¹⁹ Mindful that a federal appellate court has already held that Idaho's more creditor-friendly motor vehicle statute cannot preempt federal law,¹²⁰ the possibility for any *present* conflict between the federal 20-day period and a more liberal period under a state's version of U.C.C. § 9-301(2) seems to exist only in the unique situation where a purchase money creditor governed by Arkansas law perfects its security interest on the twenty-first day after the debtor takes possession of the collateral. However, the possibility always exists that state legislatures might revise their versions of U.C.C. § 9-301(2) by extending the grace period beyond twenty days, making dissonant the harmony that now exists between federal and state law, just as former amendments to the then-existing ten-day grace period did.

Furthermore, U.C.C. § 9-301 is not the exclusive law that dictates priority between a purchase money creditor and a lien creditor. In many instances, as illustrated by the foregoing cases, the governing law is a state's motor vehicle statute.¹²¹ And the potential for conflict between 11 U.S.C. § 547(c)(3) and motor vehicle law is great for at least two reasons. First, some states provide more than a 20-day grace period to a creditor taking a security interest in a motor vehicle.¹²² Second, in most states the applicable grace period found

collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.").

118. See, e.g., WHITE & SUMMERS, *supra* note 10, § 32-4, at 258 ("The 1994 amendments to section 547 diminished this problem to insignificance.").

119. See ARK. CODE ANN. § 4-9-301(2) (Michie Supp. 1995); IDAHO CODE § 28-9-301(2) (1995).

120. See *In re Walker*, 77 F.3d 322, 322 (9th Cir. 1996).

121. Article Nine expressly states that the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to a certificate of title statute unless the property is inventory in the hands of the debtor. See U.C.C. § 9-302(3)(b).

122. See ARK. CODE ANN. § 27-14-805 (Michie 1994) (30 days); 625 ILL. COMP. STAT. ANN. 5/3-202(b) (West 1993) (21 days); MO. ANN. STAT. § 301.600(2) (West 1994) (30 days); UTAH CODE ANN. § 41-1a-605 (1993) (30 days); VA. CODE ANN. § 46.2-639 (Michie 1996) (30 days); W. VA. CODE § 17A-4A-4(a) (1996) (60 days).

in the motor vehicle statutes begins running on a day other than the date when the debtor receives possession of the vehicle—the trigger date under 11 U.S.C. § 547(c)(3)(B). Of the twenty-nine states that incorporate a grace period into their respective motor vehicle statute, only Florida begins its grace period on the possession date.¹²³ Because Florida's period of fifteen days¹²⁴ is less than the federal period, no conflict will result.¹²⁵ However, potential conflict exists in many of the other twenty-eight states.

The grace period in five states begins on the execution date of paperwork required to be delivered to the appropriate official.¹²⁶ In those transactions where the purchase money creditor is a dealer holding the certificate of title,¹²⁷ the creditor should be able to complete the necessary paperwork before the debtor takes possession of the car and then file the paperwork with the appropriate official within twenty days, avoiding any conflict between state and federal law. However, it is foreseeable that a dealer might fail to submit the paperwork within twenty days of the debtor's possession, yet act within the applicable state grace period, creating a potential conflict between state and federal law.¹²⁸ And the likelihood for a potential conflict is enhanced

Idaho recently amended its grace period from 30 days to 20 days. *See* IDAHO CODE § 49-510 (1994 [30 days] & 1996 Supp. [20 days]).

Presumably, any future conflict involving the Idaho or Missouri statute would be resolved by applying the federal grace period. *See In re Walker*, 77 F.3d at 322 (Idaho law); *Barnes v. General Motors Acceptance Corp.* (*In re Ross*), 193 B.R. 902 (Bankr. W.D. Mo. 1996) (Missouri law); *Fink v. Fidelity Fin. Servs., Inc.* (*In re Beasley*), 183 B.R. 857 (Bankr. W.D. Mo. 1995), *aff'd*, 102 F.3d 334 (8th Cir. 1996) (Missouri law). Occasionally, however, courts examining the same state statute reach inconsistent results. *Compare In re Burnette*, 14 B.R. at 795 (concluding Tennessee grace period trumped federal grace period) *with In re Murray*, 27 B.R. at 445 (holding federal grace period, not Tennessee grace period, applied).

123. *See* FLA. STAT. ANN. § 319.27(3)(b) (West 1990).

124. *Id.*

125. This assumes that the bankruptcy trustee does not advocate adoption of the narrower state period, which no doubt would accelerate the temporary conversion of the creditor into a Bankruptcy Code disciple! For such a case, see *In re Smallwood*, 204 B.R. 519 (Bankr. E.D. Ky. 1997).

126. ALASKA STAT. § 28.10.391(b) (1994); ARIZ. REV. STAT. ANN. § 28-325(E) (1995 & Supp. 1996); ARK. CODE ANN. § 27-14-805 (Michie 1994); OKLA. STAT. ANN. tit. 47, § 1110(A)(2) (West Supp. 1997); UTAH CODE ANN. § 41-1a-605 (1993).

127. A manufacturer that sells vehicles to a dealer on credit can surrender the certificates of title to the dealer and still obtain a perfected security interest in the vehicles by filing a financing statement. *See* U.C.C. § 9-302(3)(b) (making filing provisions applicable to collateral otherwise subject to certificate-of-title laws if the collateral is inventory in the hands of the debtor).

128. The conflict is more likely to occur in Arkansas and Utah, which provide a 30-day grace period, than in Alaska and Arizona, which provide only a 10-day grace

in the many transactions where a non-dealer holds the certificate of title and releases it to the purchase money creditor only after receiving full payment of the seller's loan. In these transactions, a delay may exist between when the buyer takes possession of the car (which commences the federal period) and when the purchase money creditor receives the certificate of title from the seller's creditor and is able to complete the necessary paperwork (which begins the state period). As the delay increases, so, too, does the likelihood that the purchase money creditor will perfect its security interest within the applicable state grace period but outside the twenty-day period of 11 U.S.C. § 547(c)(3)(B).

Three states start their respective grace period on the execution date of the security agreement.¹²⁹ In the normal transaction the creditor requires the debtor to execute the security agreement before surrendering possession of the vehicle. Therefore, the potential for a conflict between state and federal law should be nonexistent because no grace period in any of these states exceeds twenty days.¹³⁰ It is not inconceivable, however, that a debtor occasionally may not execute the security agreement until it has possessed the car for one or more days, because either (i) the seller failed to obtain an executed security agreement before closing the sale or (ii) the buyer possessed the vehicle for one or more days (e.g., a "test drive") before deciding to purchase the vehicle. This reversal of the normal order of activity may increase the possibility that the creditor will timely perfect its interest under state law, yet fail to act timely under federal law.

The purchase date triggers the 30-day grace period in Virginia and the 60-day grace period in West Virginia.¹³¹ Because each state's grace period exceeds twenty days, the possibility exists that a creditor will perfect its interest outside the federal period but within the state period.

And in eighteen states the grace period starts on the attachment date.¹³²

period. See ALASKA STAT. § 28.10.391(b) (1994); ARIZ. REV. STAT. ANN. § 28-325(E) (1995 & Supp. 1996); ARK. CODE ANN. § 27-14-805 (Michie 1994); UTAH CODE ANN. § 41-1a-605 (1993). Because Oklahoma provides a 20-day grace period, the potential for conflict exists only if the debtor receives delivery of the vehicle before the required forms are executed. See OKLA. STAT. ANN. tit. 47, § 1110(A)(2) (West Supp. 1997).

129. See N.M. STAT. ANN. § 66-3-202 (Michie Supp. 1996) (ten days); N.C. GEN. STAT. § 20-58.2 (1993) (twenty days); WASH. REV. CODE ANN. § 46.12.095(2) (West 1987) ("eight department business days").

130. See *supra* note 129.

131. VA. CODE ANN. § 46.2-639 (Michie 1996); W. VA. CODE § 17A-4A-4(a) (1996).

132. See ALA. CODE § 32-8-61(b) (1989) (20 days); CONN. GEN. STAT. ANN. § 14-185(a) (West 1987) (20 days); GA. CODE ANN. § 40-3-50(b) (Michie 1994 & Supp. 1996) (20 days); IDAHO CODE § 49-510 (1994 [30 days] & Supp. 1996 [20

In the typical situation the debtor takes delivery on the same date that the security interest attaches, making it rare that the creditor would satisfy state, but not federal, law except in the two states with grace periods longer than twenty days.¹³³ However, a remote, but not impossible, opportunity for such a scenario to materialize exists in the other sixteen states if the security interest does not attach (e.g., the debtor fails to execute the security agreement¹³⁴) until after the debtor possesses the vehicle.

As Congress did not completely eliminate all possible conflict between state and federal grace periods by amending 11 U.S.C. § 547(c)(3)(B), an analysis of the reasons offered by state law proponents and their federal law counterparts may be helpful to future courts that confront the conflict. Such analysis follows.

C. Resolving Future Conflicts: Who Has The Better Argument?

As noted by several courts, the legislative history of the preference statute indicates that Congress intended for the single, uniform period of 11 U.S.C. § 547(e) to control.¹³⁵ The predecessor statute to 11 U.S.C. § 547, section

days]); 625 ILL. COMP. STAT. ANN. 5/3-202(b) (West 1993) (21 days); KY. REV. STAT. ANN. § 186A.195(5) (Banks-Baldwin 1995) (10 days); ME. REV. STAT. ANN. tit. 29-A, § 702(3) (West 1996) (20 days); MD. CODE ANN. TRANSP. § 13-202(b)(2) (1992) (10 days); MASS. GEN. LAWS ANN. ch. 90D, § 21 (West 1993) (10 days); MINN. STAT. ANN. § 168A.17(2) (West 1986) (10 days); MO. ANN. STAT. § 301.600(2) (West 1994) (30 days); N.H. REV. STAT. ANN. § 261:24(II) (1993) (20 days); N.Y. VEH. & TRAF. LAW § 2118(b)(1)(B) (McKinney 1996) (10 days); R.I. GEN. LAWS § 31-3.1-19(b) (1995) (20 days); S.C. CODE ANN. § 56-19-630 (Law. Cop. 1991) (10 days); TENN. CODE ANN. § 55-3-126(b)(2) (Supp. 1996) (20 days); VT. STAT. ANN. tit. 23, § 2042(b) (1987) (20 days); WIS. STAT. ANN. § 342.19(2) (West 1991) (10 days).

133. See 625 ILL. COMP. STAT. ANN. 5/3-202(b) (West 1993) (21 days); MO. ANN. STAT. § 301.600(2) (West 1994) (30 days). Idaho recently amended its grace period from 30 days to 20 days. See *supra* note 122. As noted earlier, precedent suggests that a dispute involving federal law and Idaho or Missouri law will be resolved in favor of federal law. See *supra* note 122. The trustee also has precedent on its side in Alabama. See *In re Locklin*, 101 F.3d 435 (5th Cir. 1996). Nevertheless, courts have been known to depart from precedent. See *supra* note 122.

134. See U.C.C. § 9-203(1) (requiring, as a predicate to attachment, the debtor to execute a security agreement unless the secured party either possesses the collateral or is in control of investment property).

135. See, e.g., *In re Locklin*, 101 F.3d 435, 442 (5th Cir. 1996); *In re Loken*, 175 B.R. 56, 62-63 (B.A.P. 9th Cir. 1994); *In re Walker*, 161 B.R. 484, 493-94 (Bankr. Idaho 1993); *In re Holloway*, 132 B.R. 771, 774-75 (Bankr. N.D. Okla. 1991); *In re Burnette*, 14 B.R. 795, 797-801 (Bankr. E.D. Tenn. 1981). See also *In re Beasley*, 102 F.3d 334, 335 (8th Cir. 1996) (finding the analysis in *In re Loken* "persuasive").

60 of the Bankruptcy Act, stated that a transfer of personal property occurred "when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."¹³⁶ However, this general rule was subject to the following exception:

Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.¹³⁷

This exception allowed the transfer to occur on the attachment date, rather than the perfection date, if the creditor timely perfected its security interest within the grace period under state law. However, in no event could the grace period extend beyond twenty-one days after the security interest attached. A creditor that perfected its interest more than twenty-one days after attachment—even if perfection was timely under state law—would lose the relation-back benefits in a preference action, and the transfer of the security interest would be deemed to occur on the perfection date rather than the attachment date.¹³⁸

The above provisions were enacted in 1950, when the drafting process of Article 9 was still in its infancy.¹³⁹ The first draft of Article 9 that received widespread acceptance by the states was the 1962 Official Text.¹⁴⁰ Perceiving a need to re-examine the validity of security interests in bankruptcy

136. Bankruptcy Act § 60(a)(2), 11 U.S.C. § 96 (1968).

137. Bankruptcy Act § 60(a)(7), 11 U.S.C. § 96 (1968).

138. *See also In re Burnette*, 14 B.R. at 798 ("Section 60(a)(7) referred to grace periods under state law but limited their effectiveness to twenty-one days. A longer grace period provided by state law would not help a transferee who failed to perfect within twenty-one days.").

139. "The drafting of Article 9 commenced in the mid-1940's, principally at the hands of Grant Gilmore and Allison Dunham, working under the general supervision of Karl Llewellyn, and a number of tentative (or proposed) drafts emerged during the late 1940s and early 1950s." DOUGLAS G. BAIRD & THOMAS H. JACKSON, *SECURITY INTERESTS IN PERSONAL PROPERTY* 60 (2d ed. 1987).

140. Only Pennsylvania adopted the 1952 Official Text. The 1957 Official Text doubled in popularity, being adopted by Kentucky and Massachusetts. The 1962 Official Text was the first widely accepted version, being adopted in every state except Louisiana. BAIRD & JACKSON, *supra* note 139, at 65.

proceedings, the National Bankruptcy Conference¹⁴¹ established the "Committee on Coordination of the Bankruptcy Act and the Uniform Commercial Code," chaired by Grant Gilmore, in 1966. In its 1970 report to the National Bankruptcy Conference, the Committee proposed that Bankruptcy Act § 60 be amended to state: "If a transfer is perfected not more than 21 days after the time when it became effective between the parties, perfection dates from that time; otherwise, from the time of perfection."¹⁴² The Committee acknowledged that the only applicable grace period under Article 9 was a 10-day period in U.C.C. § 9-301(2) that protected certain purchase money creditors against prior lien creditors.¹⁴³ Nevertheless, "[w]hile there may be no compelling reason in logic or policy for carrying forward the 21-day period which, for whatever reason, was written into the 1950 version of § 60, that period has become familiar to the bar and is retained."¹⁴⁴ In summary, then, the "only change of substance" to Bankruptcy Act § 60(a)(7) proposed by the Committee was to adopt a fixed 21-day grace period, "without any provision for cutting back the 21-day period if an applicable filing statute uses a shorter period."¹⁴⁵ The Commission on the Bankruptcy Laws of the United States¹⁴⁶ adopted the Committee's recommendation in its report submitted to Congress in 1973, other than proposing (without explanation, but presumably to parallel Article Nine) that the grace period be limited to ten days.¹⁴⁷ Congress followed the Commission's recommendation when it enacted 11 U.S.C. § 547(e) as part of its overhaul of the bankruptcy laws in 1978.¹⁴⁸

141. "The National Bankruptcy Conference is an organization of bankruptcy practitioners, bankruptcy judges, and teachers of bankruptcy law. It was formed in 1932 in connection with the 1938 revision of the Bankruptcy Act and has been active since that time on virtually all amendments to bankruptcy law." Countryman, *supra* note 29, at 727 n.96.

142. REPORT OF THE COMMITTEE ON COORDINATION OF THE BANKRUPTCY ACT AND THE UNIFORM COMMERCIAL CODE, *reprinted in* H. R. REP. NO. 95-595, at 204, 210 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6164, 6169.

143. *Id.* at 6172.

144. *Id.* at 6172-73.

145. *Id.* at 6172.

146. The nine-member Commission was established by Congress in 1970 and charged to "study, analyze, evaluate, and recommend changes" in the substance and administration of then-existing bankruptcy laws. *See* Pub. L. No. 91-354, 84 Stat. 468 (1970), *reprinted in* 1970 U.S.C.C.A.N. 545, 545.

147. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Pt. II, § 4-607(g)(7), *reprinted in* 2 COLLIER ON BANKRUPTCY 168 app. (15th ed. 1996).

148. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 547(e) (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5873-75.

The foregoing legislative history of the preference statute strongly suggests that Congress intended a uniform grace period to apply rather than any longer state grace period. Before being amended in 1978, the preference statute deferred to state grace periods, but only if they were shorter than the 21-day grace period articulated in the preference statute. Professor Gilmore's commission proposed a uniform 21-day grace period, making reliance on, and reference to, state law unnecessary. Congress appeared to appreciate the need for a uniform period¹⁴⁹ but, perhaps in an effort to harmonize the preference statute with U.C.C. § 9-301(2), it reduced the period from 21 days to 10 days. Only once in the statute's history did Congress expressly defer to state law, and then only if the state grace period was less friendly to the secured party than the federal period. If, in amending the preference statute in 1978, Congress intended state grace periods to be relevant, it had a statutory model in place from which it could have borrowed the concept (if not the language). Instead, in what appears to be a manifestation of intent to make state law inapplicable, Congress both deleted any reference to state law and shortened the applicable grace period to more closely parallel the then-existing grace period found in the only applicable provision of Article Nine.

State law proponents may respond with one or more of the following counterarguments. First, Congress reduced the 21-day period to a 10-day period in an attempt to harmonize the preference statute with protection afforded by state law. Therefore, if a state subsequently adopted a period greater than ten days, then this longer period would be incorporated implicitly into the preference statute in order to preserve the harmony Congress intended to exist between federal and state law when it amended the statute in 1978. Second, the legislative history of the 1978 amendments itself suggests that Congress intended state grace periods to be relevant, for, as noted by at least one court, Congress enacted 11 U.S.C. § 547 in an attempt to "modernize [] the preference provisions and bring[] them more into conformity with commercial practice and the Uniform Commercial [Law]."¹⁵⁰ And third (or as an alternative to the previous argument), using legislative history to interpret the meaning of the preference statute is improper.¹⁵¹

149. The United States Constitution grants to Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States[.]" U. S. CONST. art. 1, § 8, cl. 4.

150. See S. REP. NO. 95-989, at 87 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5873, quoted in *In re Busenlehner*, 918 F.2d 928, 931 (11th Cir. 1990). See also *In re Hesser*, 984 F.2d 345, 349 (10th Cir. 1993) (quoting *Busenlehner*).

151. United States Supreme Court Justice Antonin Scalia may be the most vocal critic of using legislative history in statutory interpretation. See, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637, 645 (1996) (Scalia, J., concurring in part and concurring in the judgment):

In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have "intended." The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it. . . . Moreover, even if subjective intent rather than textually expressed intent were the touchstone, it is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the Expedited Funds Availability Act, and the President who signed it, were, when they took those actions, aware of the drafting evolution that the Court describes; and if they were, that their actions in voting for or signing the final bill show that they had the same "intent" which that evolution suggests was in the minds of the drafters.

. . . There is no escaping the point: Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful.

Id. (emphasis in original). See also *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest deficit of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring in the judgment) (castigating the plurality for "resort[ing] to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history."). But see *Bank One Chicago*, 116 S. Ct. at 644 (Stevens, J., concurring) (responding to and disagreeing with Justice Scalia's view on the use of legislative history, stating "I see no reason why conscientious judges should not feel free to examine all public records that may shed light on the meaning of a statute."); *Thompson/Center Arms Co.*, 504 U.S. at 516 n.8 (Souter, J., writing for a three-member plurality) ("Justice Scalia upbraids us for reliance on legislative history, his 'St. Jude of the hagiology of statutory construction.' . . . The shrine, however, is well peopled (though it has room for one more) and its congregation has included such noted elders as Mr. Justice Frankfurter[.]"); Elizabeth A. Liess, Comment, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568, 580-81 (1993) (criticizing Justice Scalia for failing to propose a "reasonable alternative" and suggesting that he "needs to acknowledge that extrinsic material will be utilized and enunciate a test which allows for its use."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (suggesting that "legislative history helps appellate courts reach interpretations that tend to make the law itself more coherent, workable, or fair"); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1006-07 (1992) (contending that "Justice Scalia's hostility toward legislative history is too narrow in its *result*" and "too broad in its *justification*") (emphasis in original); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306 (1990) ("If we are serious about respecting the will of Congress, how can we ignore Congress' chosen methods for expressing that will? . . . [L]egislative history is the authoritative product of the

These arguments, perhaps attractive at the initial glance, lose their luster upon more careful examination. It is conceded that Congress borrowed the federal ten-day period from the state law of U.C.C. § 9-301(2).¹⁵² However, if Congress intended any subsequent extension to govern, it easily could have built some flexibility into the statute by referring to state law generically rather than to a fixed period of time under prevailing state law. Its conscious decision to adopt a specific period, rather than to refer to an unstated period found in a specific law (either then in effect or as amended from time to time), reduces the likelihood that Congress intended to preserve federal-state harmony at the expense of uniformity.¹⁵³

Additionally, the quotation from the legislative history¹⁵⁴ is from an introductory comment to 11 U.S.C. § 547 generally, rather than an explanation of 11 U.S.C. § 547(e) specifically.¹⁵⁵ And elsewhere, the legislative history surrounding the replacement of Bankruptcy Act § 60 with 11 U.S.C. § 547

institutional work of the Congress.").

152. See *supra* text accompanying note 143; *In re Loken*, 175 B.R. 56, 62 (B.A.P. 9th Cir. 1994) ("Congress set the grace period at ten days to correspond with the grace period provided under the Uniform Commercial Code."); *In re Burnette*, 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981) ("Ten days was picked apparently because it corresponded to state law[.]"); 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 25-7, at 447 (3d ed. 1988 [Practitioner's Edition]) ("Presumably the 10 day period in 547(e) was chosen to correspond with the 10 day period in UCC 9-301 and 9-312."); Young, *supra* note 38, at 230-31.

153. One response is that Congress may not have foreseen any need for flexibility when it adopted the Bankruptcy Code in 1978 because the 10-day period selected was borrowed from the 1972 Official Text of U.C.C. § 9-301(2). Most states did not adopt longer grace periods until after 1978. However, if Congress had looked beyond the "official text" of Article Nine and examined what changes states were enacting, it would have noted that at least two states had already adopted 20-day grace periods before 11 U.S.C. § 547 became law. See IOWA CODE § 554.9301 (1995) (enacting a legislative amendment in 1977 that extended the grace period to 20 days, effective January 1, 1978); ME. REV. STAT. ANN. tit. 11, § 9-301 (West 1995) (extending the grace period to 20 days in 1969). If Congress was aware that at least two states had adopted longer grace periods before the Bankruptcy Code was enacted in 1978, then its decision to adopt a fixed, 10-day period suggests that Congress believed state grace periods were irrelevant. On the other hand, if Congress had no knowledge that states were adopting longer grace periods when it enacted the Bankruptcy Code, even though such knowledge was readily available, then its lack of foresight resulted from misplaced reliance on a model version of a statute rather than an examination of the versions enacted by the states.

154. See *supra* text accompanying note 150.

155. See *In re Walker*, 161 B.R. 484, 498 (Bankr. Idaho 1993) (indicating that while the quotation "is certainly correct," it is "directed at the preference statute in general, not the specific subsections of Section 547 here in issue.").

evidences a Congressional desire to bring uniformity and coherence to a preference statute that was hopelessly complex and the subject of varying interpretations.¹⁵⁶ This expressed desire for uniformity and coherence potentially would be greatly undermined if resolution of critical elements of a preference attack turned on deviations in protection afforded by the fifty states. Furthermore, even after enactment of 11 U.S.C. § 547, some nonconformity still remains between the preference statute and the U.C.C.¹⁵⁷—suggesting that Congress itself realized some dissonance would continue to exist between the two bodies of law.

Also, the United States Supreme Court has held that "a court appropriately may refer to a statute's legislative history to resolve statutory

156. See H. R. REP. NO. 95-595, at 179 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6140. See also REPORT OF THE COMMITTEE ON COORDINATION OF THE BANKRUPTCY ACT AND THE UNIFORM COMMERCIAL CODE, *reprinted in* H. R. REP. NO. 95-595, at 204, 213 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6164, 6170 ("Present § 60, as even its dearest friends will concede, is, as a matter of language, intolerably and unnecessarily complex. . . . It is believed that the proposed revision of § 60 has succeeded both in clarifying the opaque language of present § 60 and in clearing up unnecessary areas of confusion[.]"). Several courts have stated their belief that Congress adopted the 10-day period in 11 U.S.C. § 547(e) for uniformity. See, e.g., *In re Loken*, 175 B.R. at 62 ("Congress made the change to create a uniform rule throughout the country[.]"); *In re Walker*, 161 B.R. at 500 (concluding that "Congress intended that creditors be allowed a uniform ten day grace period within which to perfect security interests"); *In re Murray*, 27 B.R. 445, 451 (Bankr. M.D. Tenn. 1983) ("The fixing of the 10-day grace periods in §§ 547(c)(3) and (e)(2) was an effort to establish a national uniform perfection period for enabling loans in bankruptcy cases."); *In re Burnette*, 14 B.R. at 801 ("It is evident that Congress did not intend for state grace periods to be relevant under the preference statute. There was to be a uniform rule throughout the nation.").

157. Compare 11 U.S.C. § 547(a)(1) (1994) (including farm products within the definition of inventory) with U.C.C. § 9-109(3) and (4) (excluding farm products from the definition of inventory); compare 11 U.S.C. § 547(a)(3) (1994) (defining a "receivable" as "a right to payment, whether or not such right has been earned by performance") with U.C.C. § 9-106 (defining "account" as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance") (emphasis added); compare 11 U.S.C. § 547(e)(2)(A) (1994) (providing grace period for all secured creditors) with U.C.C. §§ 9-301(2) and 9-312(4) (providing grace period only for secured creditors holding purchase money security interests); compare 11 U.S.C. § 547(e)(2)(A) (1994) (commencing grace period at attachment) with U.C.C. §§ 9-301(2) and 9-312(4) (starting grace period on debtor's possession of collateral). See also *supra* note 44 (discussing technical differences between purchase money security interests under U.C.C. § 9-107 and 11 U.S.C. § 547(c) (1994)).

ambiguity."¹⁵⁸ The ambiguity exists in the meaning of "perfection" as used in 11 U.S.C. § 547(e).¹⁵⁹ Those courts holding that the shorter period of 11 U.S.C. § 547(e)(2) controls have concluded that "perfection" refers to an act taken by the creditor (such as filing a financing statement or complying with the procedural requirements of motor vehicle law),¹⁶⁰ whereas courts that have permitted creditors to successfully invoke the longer state grace periods have done so after concluding that "perfection" refers not to an act, but to the status that the creditor's interest enjoys against the competing interest of a lien

158. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). See also *Patterson v. Shumate*, 504 U.S. 753, 761 (1992) (citing *Toibb*); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (same); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring in the judgment) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history. [FN1: . . . As Judge Learned Hand advised, statutes 'should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.' . . . Legislative history helps to illuminate those purposes.]").

159. See *In re Walker*, 161 B.R. at 493 ("Outside assistance in construing the statutes is mandated in this case . . . because the term 'perfected' is subject to at least two different meanings as used in Section 547 in this context. . . . Both interpretations are plausible, and the use of the term in the statutes creates an ambiguity."); *In re Holloway*, 132 B.R. 771, 774 (Bankr. N.D. Okla. 1991) ("For purposes of this opinion, this Court will concede . . . that the statute is ambiguous."); *In re Burnette*, 13 B.R. at 801 (concluding that the meaning of "perfection" is subject to two interpretations, both of which "are consistent with the wording of the definition"). But see *In re Loken*, 175 B.R. at 61 (acknowledging the arguments supporting the split in authority, but, after "[l]ooking at the plain language of Section 547(e)(1), taken as a whole," concluding "that an ambiguity does not exist").

160. See *In re Loken*, 175 B.R. at 61-62; *In re Holloway*, 132 B.R. at 774 ("In this Court's view, the natural reading of § 547(e)(1)(B) is that perfection occurs when the last act required by State law to acquire the desired status is performed."); *In re Holder*, 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988), *aff'd*, 892 F.2d 29 (9th Cir. 1989) (concluding that, for purposes of 11 U.S.C. § 547(e), the "security interest was perfected by Wachovia filing for notation of a lien with the Division of Motor Vehicles on August 12, 1987"); *In re Murray*, 27 B.R. at 448. See also *In re Beasley*, 102 F.3d at 335 (finding the analysis in *In re Loken* "persuasive"); Breitowitz, *supra* note 39, at 397-98 (suggesting that perfection must refer to an act, rather than a status, because a contrary interpretation renders 11 U.S.C. § 547(e)(2)(C)(ii) surplusage).

creditor.¹⁶¹ Therefore, gleaning Congressional intent from legislative history is appropriate, if not necessary.

Another reason for adopting the shorter federal period over a longer state period is that a trustee's avoiding powers are expressly subject to applicable state law only if those powers arise under the Bankruptcy Code provisions listed in 11 U.S.C. § 546(b)—and 11 U.S.C. § 547 is not one of the listed provisions.¹⁶² Section 546, entitled "Limitations on avoiding powers," states that "[t]he rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection[.]"¹⁶³ This provision effectively subjects a trustee's avoiding powers to a state's more liberal rules on perfection and priority, but only if the trustee is exercising its powers under one of the three referenced provisions.¹⁶⁴ Noticeably absent is any reference to the trustee's avoiding powers under 11 U.S.C. § 547, strongly suggesting that state grace periods are irrelevant in preference analysis.

State law proponents may argue that Congress's failure to reference 11 U.S.C. § 547 was merely an oversight. At least three reasons suggest such an argument is without merit. First, Congress has had several years to correct any such oversight and has never attempted to do so. Second, Congress

161. See *In re Hesser*, 984 F.2d 345, 348-49 (10th Cir. 1993); *In re Busenlehner*, 918 F.2d 928, 930-31 (11th Cir. 1990); *In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991) ("Under Oklahoma law, the lien of GMAC was deemed perfected on Day One even though the physical act of perfection occurred on Day 15."); *In re Burnette*, 14 B.R. at 801 ("The best way of looking at the bank's argument is to consider the definition as referring to a period of time. . . . The court believes this interpretation is the more reasonable of the two.").

162. Several courts have made this argument. See, e.g., *In re Walker*, 161 B.R. at 496-97; *In re Busenlehner*, 98 B.R. at 602; *In re Murray*, 27 B.R. at 448; *In re Burnette*, 14 B.R. at 800.

163. 11 U.S.C. § 546(b)(1) (1994). "The purpose of the subsection is to protect, in spite of the surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection." See S. REP. NO. 95-989, at 86 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5872.

164. Under 11 U.S.C. § 544(a) (1994), the trustee has, as of the commencement of the bankruptcy case, certain rights and powers afforded to holders of judicial liens, holders of unsatisfied executions, and bona fide purchasers of real property (excluding fixtures). Under 11 U.S.C. § 544(b) (1994), the trustee is given the power afforded by applicable law (e.g., the Uniform Fraudulent Transfer Act, as adopted and amended by many states) to unsecured creditors to unwind certain transactions of the bankrupt debtor. Section 545 of the Bankruptcy Code permits the trustee to avoid various statutory liens. And a trustee enjoys the ability to avoid certain post-petition transactions under 11 U.S.C. § 549 (1994).

referenced 11 U.S.C. § 547 numerous times elsewhere in 11 U.S.C. § 546,¹⁶⁵ indicating that Congress intentionally, rather than accidentally, omitted 11 U.S.C. § 547 from those provisions listed in 11 U.S.C. § 546(b)(1).¹⁶⁶ And third, scholars have noted the omission without any suggestion that it was accidental.¹⁶⁷

Those still unconvinced that the federal period should control might be persuaded by the fact that Congress extended the grace period available to purchase money creditors in 11 U.S.C. § 547(c)(3) from ten to twenty days in 1994.¹⁶⁸ Both the 1962 Official Text and the 1972 Official Text of U.C.C. § 9-301(2) permit a purchase money creditor to enjoy priority over the interest of a lien creditor that arises after attachment and before perfection if the purchase money creditor perfects its security interest by filing a financing statement no later than the tenth day after the debtor first possesses the collateral.¹⁶⁹ A majority of states have amended their version of U.C.C. § 9-

165. See, e.g., 11 U.S.C. § 546(c)-(h) (1994).

166. See also S. REP. NO. 95-989, at 86 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5872 ("The trustee's rights and powers under certain of the avoiding powers are limited by section 546.") (emphasis added). But see Harrell, *supra* note 77, at 92 n.25 ("The simple answer to this is that state law grace periods are not incorporated into § 547 via § 546(b) because § 547 has its own incorporation scheme, which adopts state law grace periods for some purposes (§ 547(e)(1)(B)), but not for others (§ 547(e)(2)(A)).").

167. See, e.g., EPSTEIN, *supra* note 21, § 3-18, at 117 ("The related-back perfection that section 546(b) respects, while protecting against sections 544 and 545, does not itself protect against section 547(b), by which the trustee can avoid certain preferential transfers for antecedent debt. . . . This grace period of bankruptcy preference law [codified at section 547(e)(2)(A)] . . . is not extended by the grace period of state perfection and priority law. Also, section 546(b) subjects sections 544, 545, and 549 to this state law, but not section 547.") (emphasis in original; footnotes omitted).

One possible explanation for not subjecting the trustee's preference powers to relation-back grace periods of state law is that the trustee's task in proving the numerous elements of 11 U.S.C. § 547(b), and then surviving one or more of the eight possible defenses of 11 U.S.C. § 547(c), is already sufficiently daunting without introducing the vagaries of state law.

168. Reform Act § 203(1).

169. See 8 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-301, at 879 (1962 Official Text), 882 (1972 Official Text) (1982 & Supp. 1996). All states except Louisiana adopted the 1962 Official Text. See BAIRD & JACKSON, *supra* note 139, at 65. All states subsequently adopted the 1972 Official Text. See HAWKLAND, § 9-301, at 538 (Supp. 1996).

Determining when the debtor initially possesses the collateral (which triggers the commencement of the grace period) is an issue that the courts have repeatedly confronted. See WHITE & SUMMERS, *supra* note 10, § 33-5 at 333-34 n.30 (citing

301(2) by extending the grace period to twenty days.¹⁷⁰ As the legislative history of the Reform Act indicates, Congress acknowledged this state action by extending the grace period in 11 U.S.C. § 547(c) to twenty days in order to "conform[] bankruptcy law practices to most States' practice[.]"¹⁷¹ Yet, as it did in drafting 11 U.S.C. § 547 in 1978, Congress selected a fixed period of time rather than defer to any period applicable under state law. If Congress intended for state law to control, it would have revised the preference statute in a different manner.¹⁷²

The fallacy of this argument, state law advocates may contend, is that it rests on somewhat faulty logic. Rephrased, the premise is that if Congress truly intended for state law grace periods to be relevant in preference analysis, it could have drafted the preference statute in a manner that expressly manifested that intent; because Congress failed to do so in an articulate manner, then one must conclude that state law grace periods are inapplicable. But that conclusion does not necessarily follow from the premise. Maybe Congress actually intended state law grace periods to have an impact. And to belittle that intent solely because Congress failed to clearly express it in the best possible manner is unjustified. Perhaps. But it seems that the amendment process itself strengthens the thought that Congress never intended that a purchase money creditor could successfully invoke the benefits afforded by state grace periods longer than ten days in a preference action. Why? Because if a purchase money creditor could legitimately rely on state law, then Congress wasted ink and paper in revising the preference statute in 1994.¹⁷³

numerous cases). *See also* Citizens Nat'l Bank of Denton v. Cockrell, 850 S.W.2d 462, 464-66 (Tex. 1993) (citing numerous cases).

170. *See supra* note 117.

171. H. R. REP. NO. 103-835, at 45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354.

172. For example, Congress might have amended 11 U.S.C. § 547(c)(3)(B) to read as follows: "(B) that is perfected either (i) when the debtor receives possession of such property or (ii) thereafter but within any period of time under generally applicable law that permits the perfected interest to enjoy priority over the pre-existing interest of a lien creditor."

One court, in dicta, has made a similar argument. *See In re Loken*, 175 B.R. 56, 63 (B.A.P. 9th Cir. 1994) ("Congress could have deferred completely to the states by incorporating each state's own timing into the Code. Instead, it chose to continue having the Code itself dictate the applicable grace period.").

173. One court made a similar observation during the pendency of the bankruptcy reform legislation. *See In re Walker*, 161 B.R. 484, 499 n.18 (Bankr. Idaho 1993). Two other courts have reached the same conclusion since the Reform Act became effective. *See In re Locklin*, 101 F.3d at 442 n.8 ("It is difficult to see why Congress would have passed this amendment if it did not believe that the federal grace period in § 547(c)(3)(B) prevails over conflicting state-law grace periods."); *In re Beasley*,

Those courts that have allowed state grace periods to dictate resolution of preference issues have premised their reasoning on statutory construction, policy, or both. The five-part statutory argument flows from the language of 11 U.S.C. § 547(e). First, a transfer in the form of a security interest occurs upon perfection, unless perfection occurs within ten days of attachment, in which case the transfer occurs at attachment.¹⁷⁴ Second, a security interest is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest" of the secured party.¹⁷⁵ Third, state law, rather than bankruptcy law, dictates priority between lien creditors and secured parties.¹⁷⁶ Fourth, a security interest perfected within a prescribed period of time (which, under either U.C.C. § 9-301(2) or applicable motor vehicle statutes, may exceed ten days) permits a purchase money creditor to enjoy priority over the competing claim of a lien creditor whose interest arose before the purchase money creditor perfected its interest. Fifth, this state law, necessary for determination of perfection under 11 U.S.C. § 547(e)(1)(B), is implicitly incorporated into 11 U.S.C. § 547(e)(2) through its reference to perfection.

State law proponents have found a sympathetic ear to this statutory argument in a handful of cases.¹⁷⁷ This argument is not without critics, however. Some have responded by noting that while state law may determine

183 B.R. 857, 861 (Bankr. W.D. Mo. 1995), *aff'd*, 102 F.3d 334 (8th Cir. 1996) ("The recent amendment to section 547(c)(3)(B) . . . is further support for the Court's conclusion that state law relation-back periods do not apply.").

174. 11 U.S.C. § 547(e)(2)(A), (B) (1994).

175. 11 U.S.C. § 547(e)(1)(B) (1994).

176. This point is undisputed. *See, e.g., In re Hesser*, 984 F.2d 345, 348 (10th Cir. 1993) ("[I]n order to determine the date of perfection, it is necessary to determine when the perfected security interest can beat a judicial lien in a priority battle. . . . This determination is made by reference to state law."); *In re Busenlehner*, 918 F.2d 928, 930 (11th Cir. 1990), *cert. denied sub nom. Moister v. General Motors Acceptance Corp.*, 500 U.S. 949 (1991); *In re Hamilton*, 892 F.2d 1230, 1232 (5th Cir. 1990) ("Since the federal law does not prescribe the circumstances under which or when a creditor on a civil contract cannot acquire a judicial lien superior to the interest of the transferee, the source for such definitive standards must be the state law."); *In re Loken*, 175 B.R. at 60-61 ("[F]ederal law does not provide the answer to how a transferee protects its rights against a judicial lien creditor. We must turn instead to the applicable state law to determine the method for perfecting a security interest as against a judicial lienholder."); *In re Walker*, 161 B.R. at 488 (indicating that "state law controls when Defendant's security interest was perfected as against a hypothetical judicial lien creditor").

177. *See In re Hesser*, 984 F.2d at 348-49; *In re Busenlehner*, 918 F.2d at 930-31; *In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991); *In re Burnette*, 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981).

the date of perfection, the date of transfer is controlled by 11 U.S.C. § 547(e)(2).¹⁷⁸ But it is somewhat difficult to ignore state law under 11 U.S.C. § 547(e)(2) when the definition of its most integral term—"perfection"—is dictated by state law. A more attractive statutory response is framed by Professors White and Summers in their treatise on the U.C.C. They contend that because 11 U.S.C. § 547(e)(2) refers "to the time the transfer takes effect between the transferor and the transferee" and the time the transfer "is perfected," the statute is referring to two different times: the time the security interest attaches, and the time the creditor takes the step necessary to perfect its interest (e.g., by filing a financing statement). But if state relation-back statutes are applicable, then the two events merge into one, leaving "very little for section 547(e)(2)(B) to do."¹⁷⁹ They doubt Congress intended such an outcome, and instead believe that Congress "probably meant perfection as a *status* when they drafted (e)(1)(B), but meant perfection as an *act* when they drafted (e)(2)(A)."¹⁸⁰ According to them, 11 U.S.C. § 547(e)(2)(A) should be read as follows: "At the time such transfer takes

178. See *In re Holder*, 94 B.R. 394, 398 (Bankr. M.D.N.C. 1988) ("[The 20-day] grace period would not govern the date of transfer, but merely the date of perfection under state law. This Court would still be forced to apply section 547(e)(2) to determine the date of transfer."); *In re Scoviac*, 74 B.R. 635, 637 (Bankr. N.D. Fla. 1987) ("This grace period is not a relation back provision which controls the date of transfer. Rather such date is controlled specifically and solely by § 547 of the Bankruptcy Code."); *In re Murray*, 27 B.R. 445, 448 (Bankr. M.D. Tenn. 1983) ("Although Tennessee law is appropriate for determining the *date of perfection*, the *date of transfer* is governed by the provisions of § 547.") (emphasis in original).

179. WHITE & SUMMERS, *supra* note 10, § 32-4, at 258-59 n.13. Implicit in this statement is the understanding that attachment pre-dates the act triggering perfection. If the reverse is true (for example, if the secured party files its financing statement before the security interest attaches), then attachment and perfection occur simultaneously. See U.C.C. § 9-303(1) ("A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken."); *id.* Official Comment 1 ("If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches."). This concept of "pre-filing" is permitted by the U.C.C. See U.C.C. § 9-402(1) ("A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.").

180. WHITE & SUMMERS, *supra* note 10, § 32-4, at 258-59 n.13. Professors White and Summers would not be the first persons to ascribe a different meaning to the same word in two proximately close sentences within the same section of the Bankruptcy Code. See, e.g., *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) ("Were we writing on a clean slate, we might be inclined to agree with petitioner that the words 'allowed secured claim' must take the same meaning in § 506(d) as in § 506(a).") (footnote omitted).

effect between the transferor and transferee, *if filing or possession occurs at, or within, 20 days after such time . . .*"¹⁸¹

This interpretation appears more plausible than reading 11 U.S.C. § 547(e)(2)(A) as, "At the time such transfer takes effect between the transferor and transferee, if such transfer is perfected at, or within *any variable period of time applicable under state law . . .*" It also recognizes the dual meaning of perfection¹⁸² and illustrates that both meanings can co-exist in harmony within 11 U.S.C. § 547(e). Yet, its suggestion that the status of perfection under 11 U.S.C. § 547(e)(1)(B) can pre-date the actual act of perfection under 11 U.S.C. § 547(e)(2) is statutorily incorrect, at least under the U.C.C. Paraphrased, 11 U.S.C. § 547(e)(1)(B) states that a security interest is perfected when the creditor's interest in the collateral is greater than the competing interest of a lien creditor. Under applicable state law, a purchase money creditor that timely acts to perfect its security interest within the grace periods of U.C.C. § 9-301(2), or, alternatively, under applicable motor vehicle laws, does enjoy greater rights in the collateral than does a competing lien creditor. But while the timely act of perfection permits the purchase money creditor to enjoy *priority* over the intervening lien creditor, the status of *perfection* generally does not relate back to an earlier time (e.g., the moment of attachment). With the exception of motor vehicle statutes in just over half of the states, the *status* of perfection commences with, but cannot exist before, the *act* of perfection.¹⁸³ Nevertheless, because Congress

181. WHITE & SUMMERS, *supra* note 10, § 32-4, at 258-59 n.13. Presumably professors White and Summers use "20 days" based on the 1994 amendments and would use "10 days" in all non-purchase money cases and all purchase money cases governed by the pre-amended version of the statute.

182. *See supra* notes 159-61 and accompanying text.

183. *See* U.C.C. § 9-303 (stating that a security interest is not perfected until the interest has attached and the "applicable steps required for perfection have been taken"). *See also id.* § 9-301(2) (awarding priority to a purchase money creditor who timely files a financing statement, but nowhere suggesting that the act of filing makes the security interest perfected before such filing).

Motor vehicle statutes in twenty-four states expressly back-date perfection (usually to the date of attachment) if the creditor timely complies with prescribed statutory requirements (such as delivering certain paperwork). *See* ALA. CODE § 32-8-61(b) (1989); ARK. CODE ANN. § 27-14-805(b)(1) (Michie 1994); CONN. GEN. STAT. ANN. § 14-185(a) (West 1987); FLA. STAT. ANN. § 319.27(3)(b) (West 1990); GA. CODE ANN. § 40-3-50(b) (Michie 1994 & Supp. 1996); IDAHO CODE § 49-510(1) (1994 & Supp. 1996); 625 ILL. COMP. STAT. ANN. 5/3-202(b) (West 1993); KY. REV. STAT. ANN. § 186A.195(5) (Banks-Baldwin 1995); ME. REV. STAT. ANN. tit. 29-A, § 702(3) (West 1996); MD. CODE ANN. TRANSP. § 13-202(b)(2) (1992); MASS. GEN. LAWS ANN. ch. 90D, § 21 (West 1993); MINN. STAT. ANN. § 168A.17(2) (West 1986); MO. ANN. STAT. § 301.600(2) (West 1994); N.H. REV. STAT. ANN.

has borrowed a priority scheme to define "perfection" in 11 U.S.C. § 547(e)(1)(B) and then used the same term in 11 U.S.C. § 547(e)(2), one can plausibly interpret the statute in a manner that effectively creates a fictional period of time where the status of perfection exists before the act of perfection occurs. However, as one court noted, "[s]uch an unreal result should occur only on clear and precise direction by statutory language or on convincing demonstration of legislative intent."¹⁸⁴ As analyzed earlier,¹⁸⁵ the legislative history of the preference statute reveals that such a literal interpretation of its language clashes with the underlying Congressional intent.¹⁸⁶ Therefore, that interpretation should not be adopted, for to do so would frustrate the judiciary's primary function in construing legislation: effectuating legislative intent.¹⁸⁷

Some courts have adopted longer state periods in an effort to avoid upsetting the legitimate commercial expectations of creditors who have protected their security interests by timely complying with local rules.¹⁸⁸ But many legitimate commercial expectations of a secured creditor are

§ 261:24(II) (1993); N.Y. VEH. & TRAF. LAW § 2118(b)(1)(B) (McKinney 1996); N.C. GEN. STAT. § 20-58.2 (1993); OKLA. STAT. ANN. tit. 47, § 1110(A)(2) (West Supp. 1997); R.I. GEN. LAWS § 31-3.1-19(b) (1995); S.C. CODE ANN. § 56-19-630 (Law. Co-op. 1991); TENN. CODE ANN. § 55-3-126(b)(2) (Supp. 1996); VT. STAT. ANN. tit. 23, § 2042(b) (1987); WASH. REV. CODE ANN. § 46.12.095(2) (West 1987); W. VA. CODE § 17A-4A-4(a) (1996); WIS. STAT. ANN. § 342.19(2) (West 1991). Five additional states effectively accomplish a similar result through a concept of constructive notice, rather than perfection. *See* ALASKA STAT. § 28.10.391(b) (1994); ARIZ. REV. STAT. ANN. § 28-325(E) (1995 & Supp. 1996); N.M. STAT. ANN. § 66-3-202 (Michie Supp. 1996); UTAH CODE ANN. § 41-1a-605 (1993); VA. CODE ANN. §§ 46.2-638, 46.2-639 (Michie 1996).

184. *In re Holloway*, 132 B.R. 771, 774 (Bankr. N.D. Okla. 1991). *But see* Carlson, *supra* note 18, at 227 ("This last appeal to the 'reality' of 'perfection' overlooks the fact that 'perfection' is not real at all. It is a figment of a creative legal imagination.") (footnote omitted).

185. *See supra* notes 135-61 and accompanying text.

186. Ironically, at least two courts have allowed state law to control even after recognizing that Congressional intent dictated a contrary result. *See In re Loken*, 156 B.R. 660, 664 (Bankr. D. Or. 1993), *rev'd*, 175 B.R. 56 (B.A.P. 9th Cir. 1994); *In re Burnette*; 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981). One court criticized such willful disregard of Congressional intent as "clear error." *See In re Holloway*, 132 B.R. at 775. *See also In re Walker*, 161 B.R. 484, 497 (Bankr. D. Idaho 1993), *aff'd*, 77 F.3d 322 (9th Cir. 1996) (calling such an approach "quite perplexing").

187. *See Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("Our objective in a case [of statutory construction] is to ascertain the congressional intent and give effect to the legislative will.").

188. *See In re Hesser*, 984 F.2d 345, 349 (10th Cir. 1993); *In re Busenlehner*, 918 F.2d 928, 931 (11th Cir. 1991).

frustrated when a debtor suffers financial hardship and seeks refuge in the federal bankruptcy law. For example, the creditor's security interest may not extend to post-petition assets, even if the secured party included an enforceable after-acquired property clause in the security agreement.¹⁸⁹ Also, a creditor's ability to exercise any contractual or statutory rights and remedies, such as seizing and disposing of the collateral¹⁹⁰ and collecting payments on collateral directly from account obligors,¹⁹¹ upon default are severely constrained by the automatic stay.¹⁹² Additionally, despite any contrary language in any promissory note or other loan document signed by the debtor, the creditor loses its contractual right to receive post-petition interest on the secured obligation unless the creditor is oversecured.¹⁹³ These three situations illustrate that the preference statute is not the only provision of the Bankruptcy Code that can convert legitimate commercial expectations into shattered dreams. Furthermore, they evidence a recognition by Congress that even transactions untainted by illegality, subversive collusion, or evil intent are not immune from attack by the bankruptcy trustee. And to indict a statute in the face of such recognition is to engage in what one court referred to as "unfortunate judicial activism."¹⁹⁴

189. See 11 U.S.C. § 552(a), (b)(1) (generally prohibiting a pre-petition security interest from extending to post-petition assets unless those assets qualify as "proceeds, products, offspring, or profits" of pre-petition collateral). See also U.C.C. § 9-204(1) (allowing a debtor to contractually agree to encumber future assets).

190. See U.C.C. §§ 9-503, 9-504(1).

191. See U.C.C. § 9-502(1).

192. See 11 U.S.C. § 362(a) (1994).

193. See 11 U.S.C. § 506(b) (1994).

194. *In re Walker*, 161 B.R. 484, 498-99 (Bankr. D. Idaho 1993), *aff'd*, 77 F.3d 322 (9th Cir. 1996). See also *Adams v. Pugliese (In re Sevitski)*, 151 B.R. 590, 593 (Bankr. N.D. Okla. 1993) (criticizing courts that "permit avoidance only of those transfers which were created by deliberate overreaching, and fail to realize that the goal of preference law is equality of treatment, not purity of heart"); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 11 (1986) (discussing judicial tendency to either ignore or manipulate the preference statute in order to avoid unwinding normal transactions); Carlson, *supra* note 18, at 217-18 n.23 ("First, bankruptcy is fundamentally about the obliteration of expectations. Any theory that insists upon the exaltation of one person's expectations must explain why the other fellow's expectations should be looted and pillaged to finance such treatment. Second, the argument is entirely circular. Creditors will expect only what the law tells them to expect. It is therefore unsatisfactory to ground legal reform upon those tickling skittish spirits—creditor expectations."); EPSTEIN, *supra* note 21, § 6-3, at 280 ("Congress did not give the courts an open-ended power to save all inoffensive preferences.").

In confronting the issue, no court has examined the policies underlying the preference statute and inquired whether the choice of federal or state law would better further those policies. The policies are twofold.

. . . First is the policy that on the eve of bankruptcy (now 90 days) the debtor should be required to treat equally-situated creditors equally. We do not permit [the insolvent] debtor to pay one particularly favored creditor while failing to pay others.¹⁹⁵ So we have the rule that authorizes the trustee to reach back 90 days to recapture certain transfers made within that period.

The second policy is to discourage secret liens. But for the presence of section 547, a secured creditor could take a security interest in the debtor's collateral and decline to file a financing statement in reliance upon the debtor's promise to let the creditor know if and when the debtor planned to file a petition in bankruptcy (so that the favored creditor could then perfect). The presence of section 547 makes that procedure more risky than would otherwise be true. Since the trustee will be able to reach back 90 days, the creditor who takes a secret lien and files on notice of impending bankruptcy, must keep the debtor out of bankruptcy for at least 90 days after the filing to protect its security from challenge under section 547.¹⁹⁶

Whether a court uses federal or state law to define the contours of the grace period available to purchase money creditors will not advance, and arguably will hinder, the policy of equal treatment for equally-situated creditors. Unlike other creditors, the purchase money creditor has either sold the collateral on credit to the debtor or provided the credit that permitted the debtor to buy the collateral. In the overwhelming majority of purchase money

195. This sentence actually reads: "We do not permit now solvent the debtor to pay one particularly favored creditor while failing to pay others." WHITE & SUMMERS, *supra* note 10, § 32-4, at 253. Obviously a printing error exists in the quoted source.

196. WHITE & SUMMERS, *supra* note 10, § 32-4, at 253. See also EPSTEIN, *supra* note 21, § 6-11, at 297 ("[S]ection 547 is designed to serve a subsidiary purpose beyond its main goal of discouraging discriminatory dismemberment of the debtor's estate on the eve of bankruptcy. The secondary purpose is to discourage secret transfers that could mislead the debtor's creditors as to the true size of the debtor's estate."); BAIRD & JACKSON, *supra* note 139, at 479 ("Modern preference law . . . has two operative policies. The first is a policy against 'last-minute grabs.' . . . A second policy . . . may be described as the 'anti-tardy-perfection' policy."); H. R. REP. NO. 95-595, at 177-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138 (indicating that the two purposes of the preference statute are to discourage creditors "from racing to the courthouse to dismember the debtor during his slide into bankruptcy" and to "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor").

transactions, the creditor acts alone and, as a result, is not "equally situated" with any of the debtor's other creditors.¹⁹⁷ Therefore, permitting the trustee to avoid the purchase money security interest does not advance the policy of equal treatment for equally-situated creditors.¹⁹⁸ In fact, unwinding the transaction arguably has just the opposite effect because the pool of unencumbered assets out of which non-reliance creditors¹⁹⁹ are paid just got deeper, providing them with a windfall at the expense of the purchase money party that either sold the assets to the debtor or extended the credit that enabled the debtor to acquire the assets.

The two policies have independent significance, however, and "[t]he actions of a given creditor may bring one into play but not the other, or one into play far more strongly than the other."²⁰⁰ The latter situation arises here, where the creditor has taken the step necessary to perfect its security interest in a manner that is timely under state law but not under federal law. Both state law (through either U.C.C. § 9-301(2) or relevant motor vehicle statutes) and the Bankruptcy Code have the effect of discouraging secret liens. The Bankruptcy Code does so by pegging the transfer date (which dictates whether the trustee can prove that the transfer was made (i) for antecedent debt,²⁰¹ (ii) when the debtor was insolvent,²⁰² and (iii) during the preference period²⁰³) to the perfection date, or, if that date is within ten days after the attachment date, then to the attachment date.²⁰⁴ Each day that

197. Two exceptions to this normal structure of a purchase money transaction exist. First, the debtor may borrow money from a lender to make any down-payment that the seller requires. Second, the debtor may borrow some or all of the purchase price from multiple lenders. In each situation, more than one party may claim a ratable purchase money security interest in the collateral. In the first situation, the lender will claim a purchase money security interest under U.C.C. § 9-107(b) for the down payment, and the seller will claim a purchase money security interest under U.C.C. § 9-107(a) for the balance of the purchase price. In the second situation, each lender will claim a purchase money security interest under U.C.C. § 9-107(b) for the amount financed.

198. The policy would be furthered if the trustee attacked a *payment* transfer to the purchase money creditor, for in that situation the creditor is equally situated with every other unpaid creditor.

199. With respect to a particular asset, non-reliance creditors include (i) involuntary creditors (*e.g.*, tort claimants) and (ii) voluntary creditors (*e.g.*, lenders) whose decisions to extend value do not hinge on the debtor's rights in that particular asset.

200. WHITE & SUMMERS, *supra* note 10, § 32-4, at 253.

201. 11 U.S.C. § 547(b)(2) (1994).

202. 11 U.S.C. § 547(b)(3) (1994).

203. 11 U.S.C. § 547(b)(4) (1994).

204. 11 U.S.C. § 547(e)(2)(A), (B) (1994).

passes between attachment and perfection increases the likelihood that the trustee can prove these three elements of its preference action. In this manner, the statute discourages secret liens by encouraging the creditor to perfect its security interest as soon as possible. State law, triggered by the definition of perfection codified at 11 U.S.C. § 547(e)(1)(B), also discourages secret liens by providing that a purchase money creditor enjoys priority over the competing interest of a lien creditor if the purchase money creditor has perfected its interest when the lien creditor's interest arises or within a specific period of time thereafter.²⁰⁵ But if the post-attachment grace period for perfection under state law is longer than the grace period in 11 U.S.C. § 547(e)(2), then the shorter period under the preference statute should govern. Why? Because it promotes the anti-secrecy policy better than the state law does by endorsing a shorter period of time during which the purchase money security interest remains a secret lien.

One must not forget that Congress also had a policy in mind when it enacted the enabling loan exception. In many purchase money transactions the debtor acquires the collateral *after* credit has been extended. As a transfer cannot occur until the debtor acquires rights in the collateral,²⁰⁶ the trustee frequently can prove that the transfer secures repayment of antecedent debt. But why should the purchase money lien be the subject of a preference attack? The lien only encumbers those assets acquired by the debtor with the extended credit; the debtor's remaining assets remain intact and available for distribution to other interested parties, including unsecured creditors. Therefore, no plausible reason for unwinding such a transaction exists. On the contrary, the need to preserve such security interests from preference attack is self-evident: unless the encumbrance is protected in bankruptcy, the debtor's credit pool will rapidly evaporate and only accelerate the debtor's descent into bankruptcy. Rather than indirectly encourage such an adverse result by allowing the trustee to unwind a technical preference, Congress enacted the enabling loan exception, which benefits both the purchase money creditor and the borrower without damaging the interests of any other party.²⁰⁷

It would seem that the policy underlying the enabling loan exception would best be furthered if the exception only required the creditor to prove the purchase money status of its interest, i.e., the secured party extended credit to enable the debtor to acquire the collateral, the debtor actually used the credit to purchase the collateral, and the collateral only secures repayment of the unpaid purchase price. Indeed, the creditor must offer such proof under 11

205. See U.C.C. § 9-301(1)(b), (2). See also *supra* notes 123, 126, 129, and 131-32 (citing motor vehicle statutes of 29 states that provide grace periods).

206. 11 U.S.C. § 547(e)(3) (1994).

207. See generally Orelup, *supra* note 37, at 237-38.

U.S.C. § 547(c)(3).²⁰⁸ However, the creditor also must introduce evidence that it timely perfected its security interest.²⁰⁹ But the policy for enacting the enabling loan exception makes perfection irrelevant. Then why would Congress undermine that policy by imposing a perfection requirement? The only logical answer is that Congress's abhorrence of secret liens was a more paramount concern than protecting at all costs the interests of purchase money creditors. And as discussed earlier,²¹⁰ the policy against secret liens is better advanced if the parameters of grace periods are defined by federal, rather than state, law.

In summary, a court that confronts the potential conflict between the contours of federal and state grace periods should resolve the conflict by adopting the former for four reasons: (i) legislative history reveals that Congress intended a single, uniform period to apply; (ii) 11 U.S.C. § 546(b) expressly subordinates the trustee's rights and powers under certain provisions of the Bankruptcy Code to the perfection and priority schemes of state law, but the preference statute is not one of the referenced provisions; (iii) the 1994 amendments to the preference statute were unnecessary if state law dictates the parameters of the applicable grace period; and (iv) the choice of federal law more effectively promotes the anti-secret lien policy of preference law.

IV. UNDERSTANDING THE AMENDMENT TO 11 U.S.C. § 547(e)(2)(A): A PROPOSED INTERPRETATION

In amending the preference statute in 1994, Congress did more than just extend the post-possession perfection period in 11 U.S.C. § 547(c)(3)(B) from ten to twenty days.²¹¹ It also tacked a cross-referencing phrase to the end of 11 U.S.C. § 547(e)(2)(A), making it read in relevant part as follows:

(2) For the purposes of this section . . . a transfer is made (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, *except as provided in subsection (c)(3)(B); . . .*²¹²

The legislative history neither references 11 U.S.C. § 547(e)(2)(A) nor explains why Congress added the italicized phrase.²¹³

208. See 11 U.S.C. § 547(c)(3)(A)(iii), (iv) (1994).

209. 11 U.S.C. § 547(c)(3)(B) (1994).

210. See *supra* text accompanying notes 201-205.

211. Reform Act § 203(1).

212. Reform Act § 203(2) (emphasis added).

213. See *supra* note 4 (quoting legislative history of Reform Act amendments to 11 U.S.C. § 547). Observe that the quote does expressly refer to 11 U.S.C.

Congress may have believed that the reference to the twenty-day period of 11 U.S.C. § 547(c)(3)(B) was necessary to accomplish its goal of greatly reducing, if not completely eliminating, the number of cases in which the choice of either the federal or the applicable state grace period dictated whether a purchase money security interest survived the trustee's preference attack. In fact, no other reason is apparent. Yet, Congress accomplished that goal solely by revising 11 U.S.C. § 547(c)(3)(B). The new language added to 11 U.S.C. § 547(e)(2)(A) does nothing to further that goal. But it does raise some interesting concerns.

Paraphrased, the amended clause states that a security interest transfer occurs at attachment if perfection occurs within a specific period thereafter; if the security interest is perfected after the stated period, then the security interest transfer occurs on the date of perfection. Before the amendment, the prescribed period was ten days in all cases. However, the amended statute no longer provides a uniform period. The period remains ten days in many cases and commences on the attachment date, but if the facts suggest that clause (c)(3)(B) applies because the security interest enjoys purchase money status, then the period expands to twenty days and begins running not on the attachment date but on the date that the debtor first possesses the collateral.

Knowing when a transfer occurred is of paramount importance in determining whether the transfer was made (i) for antecedent debt,²¹⁴ (ii) when the debtor was insolvent,²¹⁵ and (iii) during the preference period²¹⁶—all elements of the trustee's case.²¹⁷ Before the 1994 amendment to clause (e)(2)(A), the purchase money status of a security interest had no impact on the trustee's burden of proof and became relevant only if the creditor satisfied its burden of proving that the protection afforded by clause (c)(3) preserved the security interest from attack.²¹⁸ But because clause (e)(2)(A) (which historically has been within the province of the trustee's case) now cross-references clause (c)(3), the purchase money status of the challenged transfer may raise new post-amendment concerns. For example, in proving when a transfer occurred as part of its case, may a trustee presume that the security interest is not a purchase money security interest? If the answer is no, then the enabling loan exception effectively disappears from clause (c) (where traditionally it was invoked by a creditor in a defensive posture only after the trustee had proved the existence of all of the elements of its case under clause (b)) and becomes an additional element of the trustee's

§ 547(c)(3) and the purpose for revising it.

214. 11 U.S.C. § 547(b)(2) (1994).

215. 11 U.S.C. § 547(b)(3) (1994).

216. 11 U.S.C. § 547(b)(4) (1994).

217. 11 U.S.C. § 547(g) (1994).

218. *Id.*

burden of proof. As this interpretation would create a dramatic shift in existing proof requirements, and no compelling reason can be suggested that would justify such a radical change in course, such a reading probably is not one Congress intended. Yet, if the trustee as part of its case can presume that a security interest does not enjoy purchase money status, then one must wonder what purpose was served by tinkering with clause (e)(2)(A), for such a presumption impliedly existed before the amendment.

Maybe Congress had some motive for amending clause (e)(2)(A), but that motive is not clear—at least from the amendment itself and the legislative history. The United States Supreme Court has stated that "a statute must, if possible, be construed in such fashion that every word has some operative effect."²¹⁹ As suggested in the preceding paragraph, if given its literal operative effect, the amendment would incorporate clause (c)(3) into the trustee's case, leaving the enabling loan exception—as a creditor's defense—redundant and superfluous. This reading would violate the canon that statutes should not be read in a manner that renders words or phrases redundant or superfluous.²²⁰ Therefore, unless one chooses to ignore the amendment on the belief that Congress simply overreacted in its drafting, the task becomes constructing the amendment in a manner that breathes life into it without leaving the enabling loan exception lifeless.

One proposed approach is to limit how much of clause (c)(3)(B) is actually incorporated into clause (e)(2)(A) by the cross-referencing amendment. Clause (c)(3)(B) reads in its entirety: "that is perfected on or before 20 days after the debtor receives possession of such property." The last phrase, "of such property," refers to the property described in clause (c)(3)(A), i.e., property that is subject to a security interest that secures new value (i) given at or after the execution of a security agreement that describes the collateral, (ii) given by or on behalf of the creditor under the security agreement, (iii) given to enable the debtor to acquire the collateral, and (iv) actually used by the debtor to purchase the collateral.²²¹ The last phrase of clause (B), "of such property," effectively incorporates all of these requirements of clause (A). And because clause (e)(2)(A) now references clause (c)(3)(B), a literal reading of the revised statute dramatically alters the

219. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

220. *See Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."); *Connecticut Nat'l Bank v. German*, 503 U.S. 249 (1992) (stating that "courts should disfavor interpretations of statutes that render language superfluous"); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (footnote omitted).

221. 11 U.S.C. § 547(c)(3)(A)(i)-(iv) (1994).

trustee's case by adding to it the various requirements of the enabling loan exception. This significant turnabout can be avoided if the last phrase of clause (c)(3)(B) is omitted and, when reading clause (e)(2)(A), clause (c)(3)(B) is construed as, "that is perfected on or before 20 days after the debtor receives possession of the property subject to the transfer."

There are several advantages to reading clause (c)(3)(B) in this manner when construing what Congress might have intended by cross-referencing the clause in its amendment to clause (e)(2)(A). Before Congress amended the preference statute in 1994 the purchase money status of a security interest had no bearing on the ability of a trustee to satisfy its burden of proof. The proposed interpretation preserves this irrelevance. Also, amended clause (e)(2)(A) references "subsection (c)(3)(B)," not "clause (c)(3)." Arguably, the proposed interpretation is a better expression of Congressional intent because it divorces the numerous requirements of subsection (c)(3)(A) from subsection (c)(3)(B) and incorporates only a grace period into (e)(2)(A), a statute that itself provides only a grace period. Furthermore, the proposal honors the canons of statutory construction by giving operative effect to the amendment in clause (e)(2)(A) in a manner that preserves the enabling loan exception, rather than rendering it redundant or superfluous.

As the transfer date moves closer to the petition date, the trustee enhances its chances of proving that the transfer was made (i) for antecedent debt,²²² (ii) when the debtor was insolvent,²²³ and (iii) during the preference period.²²⁴ Therefore, the trustee (and the other beneficiaries of a successful preference action, including unsecured creditors) hope that any challenged transfer occurs under 11 U.S.C. § 547(e)(2) at perfection, rather than attachment, since a security interest can never be perfected before it attaches.²²⁵ One criticism of the proposed interpretation of amended clauses (e)(2)(A) and (c)(3)(B) is that the transfer date of some security interests previously pegged to the perfection date will, under the proposal, revert back to the attachment date. However, the number of situations that create a transfer date at perfection under pre-amended clause (e)(2)(A) and a transfer date at attachment under the proposed interpretation of amended clause (e)(2)(A) should not pose significant problems for the trustee, as illustrated by the following hypotheticals and summary chart.

222. 11 U.S.C. § 547(b)(2) (1994).

223. 11 U.S.C. § 547(b)(3) (1994).

224. 11 U.S.C. § 547(b)(4) (1994).

225. *See* U.C.C. § 9-303(1) ("A security interest is perfected when it has attached and when all of the applicable steps for required perfection have been taken.").

HYPOTHETICAL #1: Lender advanced \$1,000,000 to Debtor on July 1. To secure repayment, Debtor executed a security agreement that same day that granted to Lender a security interest in Debtor's equipment and inventory, whether then owned or thereafter acquired. Lender filed a financing statement on July 8. Debtor acquired (and, with respect to after-acquired collateral, will acquire) rights in each unit of inventory and each piece of equipment upon delivery.

HYPOTHETICAL #2: Same as Hypothetical #1, except Lender filed a financing statement on July 16.

HYPOTHETICAL #3: Debtor bought equipment on credit from Seller, who retained a security interest in the equipment under a retail installment sales contract executed by Debtor. Debtor acquired rights in the equipment on the contract date, July 1, and received delivery the same day. Seller filed its financing statement on July 8.

HYPOTHETICAL #4: Same as Hypothetical #3, except Seller filed its financing statement on July 16.

HYPOTHETICAL #5: Same as Hypothetical #3, except delivery occurred on July 7 and Seller filed its financing statement on July 8.

HYPOTHETICAL #6: Same as Hypothetical #3, except delivery occurred on July 7 and Seller filed its financing statement on July 20.

HYPOTHETICAL #7: Same as Hypothetical #3, except delivery occurred on July 7 and Seller filed its financing statement on August 3.

HYPOTHETICAL #8: Same as Hypothetical #3, except Debtor did not acquire rights in the equipment until July 3 (two days after the contract date), delivery occurred on July 15, and Seller filed its financing statement on July 8.

HYPOTHETICAL #9: Same as Hypothetical #3, except Debtor did not acquire rights in the equipment until July 3 (two days after the contract date), delivery occurred on July 15, and Seller filed its financing statement on August 3.

<i>Hypo.</i>	<i>Attachment Date</i> ²²⁶	<i>Perfection Date</i> ²²⁷	<i>Transfer Date Under Pre-Amended Clause (e)(2)(A)</i>	<i>Transfer Date Under Proposed Interpretation Of Amended Clause (e)(2)(A)</i>
#1	later of (i) July 1 and (ii) acquisition date	later of (i) July 8 and (ii) acquisition date	Attachment Date	Attachment Date
#2	later of (i) July 1 and (ii) acquisition date	later of (i) July 16 and (ii) acquisition date	Perfection Date (all collateral acquired by Debtor before July 6) Attachment Date (all collateral acquired by Debtor after July 5)	Perfection Date (all collateral acquired by Debtor before June 26) Attachment Date (all collateral acquired by Debtor after June 25)
#3	July 1	July 8	Attachment Date	Attachment Date
#4	July 1	July 16	Perfection Date	Attachment Date
#5	July 1	July 8	Attachment Date	Attachment Date
#6	July 1	July 20	Perfection Date	Attachment Date
#7	July 1	August 3	Perfection Date	Perfection Date
#8	July 3	July 8	Attachment Date	Attachment Date
#9	July 3	August 3	Perfection Date	Attachment Date

226. The attachment date is the date on which all three of the following exist: (i) the debtor has rights in the collateral, (ii) the creditor has extended value, and (iii) the debtor has executed a written security agreement that describes the collateral and creates or provides for a security interest. *See* U.C.C. § 9-203(2) ("A security interest attaches when it becomes enforceable"); U.C.C. § 9-203(1) (describing enforceability requirements); U.C.C. § 9-105(1)(l) (defining "security agreement").

227. The perfection date is the date of filing, unless attachment occurs thereafter, in which case the date of perfection is the date of attachment. *See* U.C.C. § 9-303(1) ("A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken."); U.C.C. § 9-302(1)(a) (stating the general rule that a non-possessory security interest is perfected by filing a financing statement).

As the chart illustrates, in many instances (e.g., Hypotheticals #1, #3, #5, #7, and #8) the proposed interpretation of amended clause (e)(2)(A) renders the same transfer date as determined under the pre-amended clause. However, in those situations where the secured party files its financing statement more than ten days after attachment but within twenty days after the debtor first possesses the collateral (e.g., Hypotheticals #4, #6, #9, and, to some extent, #2), the transfer date under the proposal is not the later perfection date (as determined under the pre-amended clause) but the earlier attachment date. Because an earlier transfer date decreases the likelihood that the trustee can successfully satisfy its burden of proof on three elements of its case,²²⁸ the proposal may not be welcomed with open arms by all bankruptcy constituents. Yet, to use the creditor-friendly results in Hypotheticals #2, #4, #6, and #9 to justify criticism of the proposal is somewhat unwarranted. In some transactions (e.g., Hypotheticals #4, #6, and #9) the transfer date ultimately may be irrelevant because the creditor probably can avoid a preference attack by successfully invoking the enabling loan exception of 11 U.S.C. § 547(c)(3). And in those transactions involving inventory (e.g., Hypothetical #2), it is very possible that the collateral that created the discrepancy in transfer dates will not be the focus of the preference attack because the debtor will have sold and replaced it with new collateral prior to the petition date.²²⁹ Finally, non-

228. *See supra* notes 222-24 and accompanying text. If the debt arose when Debtor executed the contract, then the trustee probably cannot prove that the transfer secures repayment of antecedent debt in Hypotheticals #4 and #6 because the earlier transfer date of July 1 is also the contract date. As illustrated by Hypothetical #9, however, this proof problem disappears if Debtor does not acquire rights in the collateral until after the contract date.

229. For example, in Hypothetical #2, the security interest in collateral owned by Debtor on July 1 attached on July 1 and became perfected on July 16. The security interest in collateral acquired by Debtor after July 1 and before July 6 attached on the acquisition date and became perfected on July 16. The security interest in collateral acquired by Debtor after July 5 and before Secured Party filed its financing statement attached on the acquisition date and became perfected on July 16. The security interest in collateral acquired by Debtor after Secured Party filed its financing statement would attach and be perfected when Debtor acquired rights in the collateral. Under pre-amended clause (e)(2)(A), transfers of collateral acquired by Debtor on or before July 5 would occur on the perfection date of July 16 because more than ten days pass between attachment and perfection. The result might change under the proposed interpretation of amended clause (e)(2)(A). Although more than ten days pass between attachment and perfection, the transfers of collateral acquired by Debtor from June 26 through July 5 would occur on the later of July 1 and the acquisition date because the security interest in that collateral became perfected on July 16, a date within twenty days after Debtor first possessed the collateral. For collateral acquired by Debtor on or after July 6, attachment and perfection of each security interest therein occurred either simultaneously or within ten days of each event. Therefore, the transfer of those

bankruptcy concerns, such as the possible priority of a subsequent creditor, will continue to motivate most secured creditors to timely comply with applicable perfection requirements as soon as practicable after attachment. With the advent of electronic filing and the availability of numerous expedited delivery services, ten days should be more than sufficient to accomplish this task, making the number of cases in which a creditor may create a transfer date discrepancy sufficiently small to preserve adoption of the proposed interpretation of clause (e)(2)(A).

V. CONCLUSION

Before the 1994 amendments to the preference statute, many courts struggled with the tension that existed between the ten-day grace period in 11 U.S.C. § 547 and the longer grace periods in many state statutes. Congress has alleviated much of the tension by changing the grace period in 11 U.S.C. § 547(c)(3)(B) from ten to twenty days, a period adopted by most states. However, the potential for conflict still exists, as a few states still provide more liberal periods or commence running their periods on a different date, and additional conflict may erupt if states make non-uniform amendments to their commercial laws. Analysis of the legislative history of the preference statute, various provisions of the Bankruptcy Code, the 1994 amendments themselves, and the policies underlying preference law combine to suggest that courts should resolve future disputes by adopting the federal period.

One future dispute likely to arise is the intended meaning of the phrase, "except as provided in subsection (c)(3)(B)," that Congress tacked on to the

security interests would occur on the attachment date under both the pre-amended and amended versions of clause (e)(2)(A).

In summary, the transfer date for security interests is the same (the attachment date) under pre-amended and amended versions of clause (e)(2)(A), except for security interests in collateral acquired by Debtor from June 26 through July 5. For security interests in this collateral, the transfer date is the later perfection date (July 16) under the pre-amended version and the earlier attachment date (date of acquisition) under the amended version. Yet, if inventory turns over at least once before Debtor files its bankruptcy petition, the inventory that created the discrepancy in transfer dates will not be the subject of the trustee's preference attack. Rather, the trustee will challenge the security interest in the collateral that Debtor owns on the date of the petition (which, in the case of inventory that rapidly turns over, probably is acquired by Debtor after July 5, the last date that creates a discrepancy in transfer dates). Concededly, the foregoing analysis may not resolve the discrepancy in transfer dates for security interests in (i) equipment purchased from June 26 through July 5, as equipment is not as likely to turn over before the petition date, and (ii) inventory purchased during that time if Debtor files its bankruptcy petition within a period thereafter that is shorter than the normal inventory turnover period.

end of 11 U.S.C. § 547(e)(2)(A). This article has proposed one possible interpretation that not only gives meaning to the phrase but also preserves meaning in the cross-referenced subsection. As proposed, the transfer date under 11 U.S.C. § 547(e)(2)(A) would mirror the attachment date if the creditor perfected its security interest within 10 days thereafter or within 20 days after the debtor first possessed the collateral; otherwise, the transfer date would be the perfection date. Congress may have intended a different meaning altogether, but its failure to provide any guidance in the amendment itself or in the accompanying legislative history leaves the intended construction open to debate. One can only hope that in its next series of amendments to the Bankruptcy Code, Congress will bring the debate to a close.