Manufacturing
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The Update Report

The Aviation Suppliers Association

Volume 12, Issue 11 November 24, 2004

COMMERCIAL UPDATE

Bankruptcy Tips

Your air carrier customer recently declared bankruptcy, leaving you with a significant volume of unpaid receivables that will probably never be collected. To add insult to injury, yesterday you received a letter from a collection agency saying that you need to the return to the bankruptcy trustee all of the payments that the air carrier made to you within 90 days before it filed for bankruptcy.

Does this scenario sound familiar? If so, read on for strategies and solutions.

This is part two of a multi-part article on bankruptcy. In last month's installment, we addressed strategies for protecting your right to get paid when dealing with a company that is threatening to seek bankruptcy protection. This month's article focuses on two key issues: 1) how to file a lien against an aviation asset (a follow-up to last month's discussion of security interests) and 2) what is a preference and how can we respond to a preference letter.

Filing Liens

Last month's article in this bankruptcy series introduced the concept of security interests as a means of protecting your right to be paid for the aircraft parts that you sell on credit. Retaining a security interest in the goods being sold (or in some other valuable asset used as collateral) can be a useful strategy to protect some of your interest. When you retain a security interest in goods, it allows you to be paid from the sale of those particular goods in the event of a buyer's insolvency.

In most cases, a security interest is retained in aircraft parts that are sold by creating a security agreement and a financing statement. These should be signed by the customer that owes the money and is taking possession of the assets in question. The signed agreement becomes a contract between you and your customer. This contract can be effective between you and your customer without doing more; however, if you want the contract to be effective when it competes with the rights of others (as is often the case in bankruptcy situations), then you need to *perfect* the security interest.

"Perfecting the security interest" means taking some step designed to establish the security interest rights against third parties who are not part of the contract. The most common way of perfecting a security interest is to file it with an appropriate government office. This gives the world constructive notice that the lien exists. Constructive notice means legal notice – even if a third party fails to check for liens, the fact that the lien is filed means it is effective to the full extent of the law (in next month's article we will discuss competing liens).

Make sure that you perfect your lien in

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Congratulations to the following companies:

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For their Accreditation, and

International Technical Consultants, Inc.
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Tracer Corporation
Milwaukee, WI

Trade Air, Inc.
Miami, FL

For their re-accreditation to the ASA-100 standard in accordance with the FAA's AC 00-56A Voluntary Industry Distributor Accreditation Program

A Message from ASA's President

As the Update Report goes to press, we have just learned that the FAA has denied our petition for rulemaking. The petition very simply would permit exporters to obtain the export 8130-3 tag for class III parts. This should not have been a major problem for the FAA. They already issue the tag for domestic purposes, and in fact many of ASA's members have happily used the domestic tag to support exports by simply explaining to the customer the legal similarities between the domestic tag and the export tag (unless there are special conditions issued against the class III part—something that practically never happens-there is no legal difference between the airworthiness findings on the two tags for a class III part).

In 8130.21C, though, the FAA began to require the language "for domestic shipments only" on 8130-3 tags issued for inventory belonging to a distributor, and the D revision to that document, issued less than two months ago, strengthened that language by stating that domestic 8130-3 tags may not be used for export purposes.

We have received many phone calls from members who have already experienced problems in exporting class III parts because of these restrictions.

Rather than throw a monkey wrench into the FAA's internal workings by demanding the rescission of 8130.21C, ASA asked for the most logical change—a spot amendment, adding two words to the regulations, to permit distributors and other exporters to apply for export 8130-3 tags for otherwise eligible class III parts.

I should point out that this petition was the remedy suggested to ASA by FAA Manager Frank Paskiewicz.

The denial letter states that the FAA plans to issue a NPRM to revise Part 21 in February 2006. The letter suggests that we renew our petition at that time as a suggested change to Part 21.

Does Ron Wojnar and Frank Paskiewicz really think it is ok to destroy a company's business, when there is no safety justification? Do they really think resolving a problem by starting to analyze it in 18 months is acceptable? The FAA is a funny group to work with. When we filed the petition all we kept being told is don't worry we make sure to respond to petitions within 90 days. The FAA obviously did not make sure to resolve the issue, but rather that they push the document through to make their filing deadline. Well maybe when you are not held accountable to anyone but when you work in a commercial setting that kind of work ethic gets you fired. ASA's Board is committed to ensuring that distributors are afforded the opportunities they deserve and will not stop fighting this issue.

Best Regards
Michele Dickstein

The Update Report
is a monthly newsletter of the Aviation Suppliers Association. Questions/comments should be addressed to:

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The Update Report
provides timely information to help Association members and readers keep abreast of the changes within the aviation supply industry.

The Update Report
is just one of the many benefits that the Aviation Suppliers Association offers members. For information on ASA-100, the ASA Accreditation Program, Conferences, Workshops, FAA guidance like Advisory Circulars, Industry Memos, or services and benefits, contact the Association.

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The Update Report
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FAA Denies 8130-3 Petition — ASA Asks Members for Comments

The ASA petition asking the FAA to change the regulation to permit issuing export 8130-3 tags for class III parts has been denied.

Part of the reason this has become critical is that the most recent revisions to FAA Order 8130.21D state that domestic 8130-3 tags may not be used for export purposes. Our trading partners have taken the FAA at its word and there are already stories coming in of foreign business partners who used to accept the domestic 8130-3 tag but who have begun to refuse to accept domestic tags because of the language in FAA Order 8130.21D.

The grounds for this denial is the FAA's plan to revise Part 21 of the regulations. The denial letter states that the FAA plans to issue this NPRM in February 2006 (which means the earliest relief we can expect to see would be in early 2008). ASA has not yet received the denial letter, but it has already been posted online (we found it while checking the on-line docket).

We know that comments were filed with the FAA on this issue because members sent ASA copies of those comments. Nonetheless, our review shows that none of the ASA member comments were included in the docket.

An electronic docket *has been* opened, and we are asking ASA members to support this petition online in order to create a permanent record of the need for this relief. ASA plans to use this record to lobby for some sort of relief designed to permit exports of class III parts by distributors and other exporters.

At this time, we are asking each ASA member who has experienced problems in exporting class III parts to provide details of these problems in comments to the docket. If you have lost export business or neglected to pursue export business opportunities because you

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Air Carriers Talk PMAs

At a recent meeting of aircraft parts manufacturers, a panel of airline representatives met to discuss their feelings about PMAs.

PMA stands for Parts Manufacturer Approval. A PMA is an FAA design-and-production approval issued to a manufacturer who intends to produce replacement or modification parts for aircraft. A PMA is not issued until the FAA's Aircraft Certification Office is convinced that the design meets all applicable FAA regulations and is safe. Like Production Certificates (issued for production of complete aircraft and engines), PMAs also reflect the FAA's approval of the fabrication inspection system – ensuring that completed parts released from the quality system will, in fact, meet the requirements of the approved design.

Once thought of as "knock-offs," PMAs are now attracting the attention of many people as alternatives – and even as superior alternatives – to Original Equipment Manufacturer [OEM] parts. PMA companies often boast of better prices, better lead times, and even tighter manufacturing tolerances than their OEM competitors.

The air carrier panel was brought together by MARPA – the Modification and Replacement Parts Association. It featured Brian Riffe of America West, John Mitchell of Continental Airlines, Paul Ilenda and Jim Shavrnoch of Delta, and Toshio Sugaya of Japan Airlines.

Brian Riffe of America West explained that they do not use PMAs extensively, but it is an area where they are investigating increased usage. Right now they are using mostly simple parts – non-critical parts – like seals. One reason that America West will choose to use PMAs is if they have had reliability or service issues with the OEM part.

PMA parts purchases have to go through American West's purchasing department first, so cost will be an important factor. Despite the importance of cost, though, America West will stress reliability and quality and ensure that these elements are demonstrable (e.g. through usage history data) before allowing a PMA part into their system.

American West does have significant internal documentation requirements, and this can slow down the acceptance of PMA parts into the America West system.

John Mitchell spoke on behalf of Continental Airlines. He represents Quality Assurance and Quality Control and explained that his goal is to make sure that Continental is receiving the highest quality parts.

Continental has not been aggressive in accepting PMAs in the past but is looking forward to accepting them in the future. He asked the PMA companies to be patient with Continental, as the air carrier is in the process of formalizing a PMA program to ensure that the highest standards of safety are met.

95% of Continental's parts repairs are sent out to vendors. They are starting to realize that there is a cost factor involved in maintenance, and that in some cases it might be more efficient (in terms of both cost and reliability) in the long run to purchase PMA parts instead of seeking repairs.

Mitchell has already written quality procedures that would permit PMA parts to be received. Continental receiving inspectors will be looking for

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YOUR ASSOCIATION IN ACTION

2004 Workshop Schedule

ASA is taking its show on the road this Fall!

In addition to bringing you the latest changes and standards on regulatory compliance, documentation, traceability and approved/unapproved parts, this year's Workshop will feature units on how to use commercial documents like your invoices and purchase orders to protect your rights, as well as an in depth look at export standards, and changes in export documentation expectations, and how these issues are affecting domestic markets as well.

September 14	Copenhagen, Denmark
September 28	Dallas, TX
October 28	Chicago, IL
November 5	Phoenix, AZ
November 30	Ft. Lauderdale, FL
December 2	Newark, NJ
December 7	Seattle, WA
December 9	Greater Los Angeles Area, CA

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Air Carriers Talk PMAs

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(1) parts that have been accepted by the engineering department (2) a signed statement of conformance to verify that the part was produced by a FAA approved source, (3) proper marking under Part 45 (FAA marking regulations).

Paul Ilenda from Delta explained that when the Engineering Department receives a PMA parts package, they expect to see all of the supporting documentation, including the PMA Supplement, drawings, metallurgical information, test results (including findings and corrective action), failure mode analysis, and list of ADs applicable to the PMA part or the OEM part that it replaces(and discussion of disposition of the AD). If the PMA manufacturer has made significant changes to their production sources or methods, then Delta also wants to see reasons for, and substantiation of, the changes. Providing Delta with a complete package speeds the process of engineering approval of the part for use on Delta aircraft.

Delta also would like to see submissions for an entire higher assembly as one package, rather than multiple packages where each individual package is for a different part that is in the higher assembly.

Ilenda finds that PMA Supplements that list an entire series can be used on an entire series of aircraft, while Delta usually will not use PMA parts on aircraft that are not listed in the eligibility description of the PMA supplement.

If a PMA part can save Delta money while maintaining Delta's high level of safety, then Delta encourages such parts to be presented to them for analysis and eventual purchase.

Jim Shavrnoch from Delta explained that PMA savings is now part of the engineers' performance metrics. He noted that Paul is dedicated to PMAs and does nothing else, so Delta has been able to focus on identifying PMAs that they can use.

If Delta can realize a minimum of $5,000 per year in savings, or if other factors exist (like availability or reliability of OEM parts), then they may be willing to consider the PMA part.

Toshio Sugaya of Japan Airlines explained that quality assurance and technical support are very important to JAL when considering a PMA part. JAL will often perform vendor surveillance before issuing an approval to use the PMA part. He explained that they look for ASA-100 or ISO accreditation among their vendors.

JAL likes to enter in to long term contracts. They see it as a means of accomplishing price stabilization.

Like Delta, JAL has quantified a minimum expected cost savings that helps to offset their internal engineering costs associated with approving a PMA part for use on their aircraft. JAL likes to see at least $1,500 per year in savings for any PMA program.

Improvements in design can be a key issue for JAL acceptance of PMA parts in some cases. There are times when JAL has sought improvements from the OEM and the OEM was unwilling to make such improvements.

Both Jim Shavrnoch from Delta and Toshio Sugaya of Japan Airlines explained that they have a lot of contracts in place. Sheppard of Delta specifically recommended that PMA manufacturers might want to contact Delta directly to discuss and identify likely targets for PMA that Delta might anticipate being able to use.

Export 8130-3 Tags

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could not get export 8130-3 tags for class III parts, then let the government know. If you have had export transactions fall apart because of the inability to obtain export 8130-3 tags for class III parts, then let the government know. If you have had customers tell you they can't do business with you because of the restrictions on export 8130-3 tags, then let the government know.

The government wants details, so please provide, in your comments, specific examples of problems you have faced. It would also be helpful if you could estimate the value of class III parts currently in your inventory that could be exported if export 8130-3 tags were fully available.

Your comments can be filed on line with the FAA at:

http://dmses.dot.gov/submit/

Docket ID: 18989
Operating Administration: FAA
Docket Existence: Does Exist
Document Title: Comments in Support of ASA Petition

If you sent comments earlier, we thank you and ask that you send them again—this time directly to the electronic docket on the internet so that they will not be 'misplaced' between the FAA's fax machine and the docket.

The denial letter can be found at:

http://dmses.dot.gov/docimages/pdf90/305575_web.pdf

ASA will be reviewing the denial letter over the Thanksgiving holiday and intends to have a plan of action available soon after the holiday.

ASA FEATURED MEMBER *Written by Jeanne Meade*

"CSI" - AVNET Electroair

In 1921, Jimmy Doolittle flew under the command of General Billy Mitchell and demonstrated the potential of air power in an explosive demonstration off the Virginia coast. That same year, Donald Douglas flew his first plane the "Cloudster" in California while transcontinental mail delivery began linking both coasts through the air. In New York City's "Radio Row," Charles Avnet began selling surplus radio parts. Just as aviation has grown far beyond its beginnings, Avnet too has grown.

Avnet today is one of the world's leading technology marketing companies, with sales in excess of $10 billion. With locations worldwide, Avnet distributes electronic components and computer products to both OEM and aftermarket customers across a broad spectrum of industries. But as large as Avnet may be today, it also recognizes the particular needs of specific industry segments and how necessary specialization can be.

Avnet began serving the airframe and airline aftermarket back in 1957 with its ElectroAir business unit in Georgia. Originally located on Antone Street a few minutes away from the production lines of Lockheed and the growing operations at Atlanta's Hartsfield, ElectroAir provided connectors, switches, relays, and other products tailored to the needs of the aerospace industry. From the MD80 to the 767, from the C-130 to the Space Shuttle, Avnet ElectroAir parts are on board. Now located a few miles away from its original building, Avnet ElectroAir continues to offer its unique boutique approach to distribution.

As a franchised value-add distributor, Avnet ElectroAir stocks component parts from leading connector manufacturers and can assemble over 50,000 different connector assemblies per numerous mil or industry specifications. This flexibility allows Avnet to assemble and ship more circular (Cannon-type plugs) and rectangular (rack and panel type) connectors than any other supplier on the planet. While some common connectors are pre-built, most are built to order quickly and efficiently. Of course, AOG service is available to their airline customers to ensure that the mail (and now passengers) continues to get through, just like it did back in 1921, but with a lot more speed!

So what has changed since ElectroAir's beginnings? Names like Pan-Am, Eastern, Braniff, and Allegheny aren't going to be found in Avnet's customer files today, but there remains a long list of hub and spoke, point to point, commuter, and national flag carriers that all face similar pressures. Each is interested in quality parts, competitive pricing, and shortened supply chains. No one can afford to carry too much inventory, but everyone needs to have the right inventory.

ASA spoke with Jim Ferry who is Avnet's District Manager in the Atlanta Facility. According to Jim, one of the biggest challenges facing distributors today, including Avnet is; "What is the right inventory? Where Avnet supplies direct to the airframe manufacturers, they can also plan for aftermarket demands. But each manufacturer deals with a variety of suppliers and their specific part numbers may vary quite a bit. Electronic/electrical consumables often are industry standard or mil-spec components which are many times not specifically designed for usage in the commercial airframe industry. This can lead to some confusion as number call outs vary quite a bit by airline, which puts a premium on the knowledge at the inside sales desk." Jim also added, "At Avnet ElectroAir, the average tenure of salespeople is twenty four years servicing the airline aftermarket, ensuring that Avnet knows their product extremely well."

In order to thrive, Avnet knew they had to do more to take advantage of tomorrow's market and find ways to add more value today. Avnet's approach is in their ISA (Integrated Supplier Alliance). Jim explained, that the program was derived from an air carrier's RFP. "The ISA is a joint venture which offers a variety of value added programs in partnership with several other consumables suppliers, such as Wencor Corp., Dixie Aerospace, LaSalle Electric Supply Co. and M&M Aerospace Hardware. While each is expert in their own commodity, ISA members act as one supplier in an automated fashion to enable its customers to realize both hard and soft savings on their aggregate demand."

When asked how Avnet continues to foster their business, Jim's reply was simple, "Three letter's: "CSI" – Customer Service Initiative, are the cornerstone of Avnet's mission. Avnet strives to be the distributor of choice based on service excellence. This philosophy is practiced both internally within the corporate structure as well as externally."

Challenges? "You bet," Jim commented optimistically, "but no more than those faced by those fledgling aviators or Charles Avnet back in 1921. The opportunity is greater today than ever before– the sky's the limit!"

Avnet employs 9900 people in 268 locations throughout 68 countries. Listed as a Fortune 500 Company, Avnet was also named to Fortune's list of Top 50 Fastest Growing Companies in 2002. Earlier this year, Fortune honored Avnet as one of the Most Admired Companies in its industry. Avnet Electroair has been a member of the Aviation Suppliers Association since January 1995.

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a timely fashion. In some cases, perfecting the lien within ten days after the related transfer means that the transfer is treated as happening on the transfer date for purposes of calculating preferences, but it is considered to happen on the *perfection date* if the lien is not perfected until more than ten days later. So the earlier you can perfect your lien, the better.

Where to File

You should generally file the financing statement in the state where the assets are located (e.g. if you are sending the parts to Atlanta then the financing statement should be filed in Georgia); however there is an exception to this filing rule for certain aviation parts and products.

Liens for certain aviation parts and products are filed with the FAA's Registry Office in Oklahoma City. Such FAA filing is limited to aircraft, aircraft engines (rated for 750 hp or more), aircraft propellers, and certain aircraft parts. The FAA will only accept lien filings for aircraft parts maintained for a U.S. air carriers and operators (those certificated under Part 121, 125 or 135). Note that in each case, there is a certificate (either certificate of airworthiness or air carrier operations certificate) with which the lien may be filed, so that persons seeking information on liens associated with that certificate may easily look them up.

In order to file a lien with the FAA, you should send a check or money order made payable to the United States Treasury in the amount of $5 (U.S. Funds) for each piece of asset and include the document, signed in ink, granting the security interest in the aircraft. If the asset is an aircraft or engine then the document should describe the product by manufacturer, model, serial number, and registration number. The FAA insists that the debtor in the transaction must be the registered owner of the asset (so an air carrier that leases an aircraft may not use the leased aircraft as collateral to secure a debt).

Make sure you check both state and federal law carefully concerning whether filing location - if there is any doubt about where to file, then it is safest to file the lien both in the state and with the FAA.

Make sure you file your lien in the right place! Some liens against aircraft parts must be filed in the state in which the components are located, while some other liens are required to be filed with the FAA

FAA Registry Mailing Address:
Federal Aviation Administration
Aircraft Registration Branch, AFS-750
PO Box 25504
Oklahoma City, OK 73125

FAA Registry Street Address (e.g. for overnight delivery:
Federal Aviation Administration
Aircraft Registration Branch, AFS-750
6425 S. Denning
Registry Building, Room 118
Oklahoma City, OK 73169

FAA Registry Phone Number:
(405) 954-3116

Identifying the State Office With Which to File: Start by calling the Office of the Secretary of State. If they do not control the office in which filling is made, then they probably know who does. If you cannot reach that office, contact a local attorney who specializes in commercial and transactional law, including security interests.

You can find instructions on what information to include in a security agreement filed with the FAA at:
registry.faa.gov/docs/8050-93.pdf
The standard aircraft security agreement (suitable for filing with the FAA) can be found at:
registry.faa.gov/docs/8050-98.pdf

Preferences

Preferences were originally scheduled to be addressed later in this series, but so many ASA members have been asking about preferences in response to preference letters currently being sent out by collection agencies hired by air carrier trustees that we felt it was important to provide some basic guidance right now.

Generally speaking, a preference is a category of debt payment made by the bankrupt company after it has become aware of its insolvency but before the bankruptcy filing (keep reading for a more detailed definition).

Preferences often provide the creditor with more money than he would have obtained if he had waited for the bankruptcy court to divide the bankruptcy estate in an equitable fashion; essentially, the creditor who receives a preference receives more than his fair share of the bankruptcy estate. In order to level the playing field for all creditors, the bankruptcy trustee typically will

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call back all preferential payments.

At least that's how the bankruptcy courts see it.

The way we see it, we got paid fairly for the debt owed to us. And now the bankruptcy trustee is asking us to return the money that we were fairly paid! Most ASA members faced with this scenario want to keep the money if there is a legal way to do so.

A preference letter can be very aggravating because it asks you to return money that was paid to you in return for parts/components that you sold – and you don't even get the components back! Oftentimes, though, the demand made by the preference letter may not be enforceable to the extent described in the letter. This is partly because trustees seem to send out letters to anyone who received a payment from the bankrupt company within 90 days before the filing date, regardless of whether the company really received a preference. It is therefore important to understand what is, and what is not, a preference.

Legally speaking, a "Preference" is:

1) Any transfer;

2) Of the debtor's property;

3) To a creditor (or for the benefit of a creditor – e.g. a transfer directly to someone that you owe money, instead of to you);

4) For payment of a prior debt;

5) Made while the debtor was insolvent

6) Made on or within 90 days before the date of the filing of the bankruptcy petition (one year for insiders);

7) Which results in the creditor receiving more than the creditor would have received in a liquidation action absent the transfer.

Transfer

The term transfer is used quite broadly – it can include almost any transfer of an asset or right. Granting a security interest within this time period can reflect a preference (particularly if it was granted after the sale of the good, instead of at the same time as the sale of the good), so be careful about getting your security interest filed as early as possible.

Preferences only apply where the money was transferred to pay or reduce a current debt; this means that C.O.D. or payment-in-advance is not subject to the preference rules

Debtor's Property

If the property transferred did not belong to the bankrupt company, then it is not subject to the preference rule. This means that if a bank or other money source advances money to the creditor specifically for the purpose of paying the debt in question, then it is not a preference. On the other side of this equation, if someone advances the money directly to the creditor and in return takes some asset from the debtor (e.g. the bankruptcy-debtor reimburses the person who made the payment, then this may be considered a preferential payment.

To the Creditor

Transfers for the benefit of a creditor are considered to be transfers to the creditor. Thus if you ask your debtor to pay the money directly to someone to whom *you* owe money, then that is still considered to be a transfer to you (it may be recharacterized as a transfer to you and a subsequent transfer to your creditor).

For Payment of a Prior Debt

This is a very important element of the preference analysis. The payment must be for a prior debt. It does not matter how long the credit terms were. If credit was only extended for a matter of hours, this is still sufficient to reflect a 'prior debt.'

The best way for a company to protect itself against the preference rule is to never extend credit. While this may not be reasonable in today's marketplace, it is certainly reasonable to take great care in extending credit to customers who are in imminent danger of filing for bankruptcy protection. In last month's article, we suggested that one way to protect your company is to insist on cash in advance or cash on delivery. The reason for this advice should now be obvious – cash in advance or on delivery means that there is no antecedent debt and therefore the preference rule does not apply (in addition to the fact that you have the money in your hand). Some lawyers have tried to argue that a check that is provided as part of a C.O.D. transaction reflects antecedent debt, because the debt is not really paid until the check is cashed. The bankruptcy courts have rejected this argument, though, and found that a payment by check is made

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when the check is provided (not when it is ultimately cashed) for preference analysis purposes.

Insolvency

To be a preference, the transfer must occur when the debtor is insolvent. Under the bankruptcy law, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition. Thus, as long as the timing requirement is met, insolvency will generally be presumed (although in rare cases a cataclysmic event that causes the bankruptcy less than ninety days before the bankruptcy filing can provide evidence that the insolvency period was shorter than the ninety day look-back period).

Timing

The 90 day rule is the general rule that most people are familiar with; however transfers to "insiders", like relatives of the debtor, or officers or directors of the debtor, can be avoided when made up to *one year prior to the filing of a bankruptcy*.

The preference period is counted from the day on which the bankruptcy filing is made. It is 90 actual days – you don't have to worry about skipping weekends and holidays when counting.

Preferential Effect

There must also be a preferential effect in order for the preference to be avoidable by the trustee. Thus, if a paid debt was fully secured by an asset that was clearly worth more at auction than the debt, then there is no need to recall the payment as a preference because the payment would have been made out of the proceeds of the sale of the asset, anyway.

Burden of Proof

Under the bankruptcy code, the bankruptcy trustee usually has the burden of proving the avoidability of a transfer. Thus, the trustee must show that a prior transfer was a preference in order to call it back – if the creditor disputes this claim then and the trustee cannot meet this burden then the prior transfer is not called back. Because this burden lies on the trustee, it is common for trustees to seek 'voluntary' return of alleged preferences rather than risking failure in court. Normally, the trustee

A "transfer in the ordinary course of business" may be excepted from the preference rules—meaning that the money transferred does not have to be returned to the bankruptcy trustee!

(or a collection agency hired by the trustee) will send out letters to all of the companies and persons who received payments from the bankrupt company during the preference period.

Don't rely fully on the trustee's burden of proof to save you if you don't have justification for disputing the claim – if the trustee can demonstrate that each element of the preference definition is met then the trustee will likely prevail if the matter goes to court.

Some Basic Rules for Preferences

The reason that preferences are important is because the bankruptcy trustee is permitted to demand the return to the bankruptcy estate of property that was transferred under a preference. Those of you who've received preference letters related to the TWA, Vanguard, US Airways or United bankruptcies (to name just a few) know what we're talking about.

The trustee generally *cannot* avoid a transfer if it is a substantially contemporaneous exchange for new value.

The trustee also generally *cannot* avoid a transfer it is a payment of a debt incurred by the debtor in the ordinary course of business of the debtor.

Ordinary Course of Business?

Ordinary course of business, you say? What does that mean?

A transfer (e.g. a payment) is *not avoidable* as a preference if it is the regular payment of a debt incurred in the ordinary course of business. That is, you are not required to return to the bankruptcy estate payments that you received that meet the terms of the "ordinary course of business" exception. This rule was created in order to support routine commercial transactions.

There are three elements to this exception:

1) the debt was incurred in the ordinary course of business;

2) the payment was made in the ordinary course of business; and

3) the payment was made according to ordinary business terms.

There has been a wide disparity in what courts will consider 'ordinary,' and the nature of 'ordinary' will be very fact specific. A customer who pays on terms and meets the requirements of

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those terms has probably paid in the ordinary course of business, unless his ordinary practice was to pay substantially later. Where you can document that a customer has a multi-year practice of paying late but in a regular manner, this can reflect an ordinary practice, too. An example of this might be a customer who has been on 30 day terms for many years but has made a regular habit of always paying net 60 instead.

An air carrier buying aircraft parts from an aircraft parts distributor generally represents an ordinary transaction that is normal and necessary in the aviation industry. It is the payment scheme that is most likely to pose an analytical problem for determination of whether this "ordinary course of business" exception applies. As in all such fact-dependent situation, an attorney's assistance in analyzing your fact pattern and comparing it to existing case law can be invaluable.

Conclusion

The information in this article is designed to help educate ASA members on how to best protect their financial rights, but it is not legal advice about a specific fact pattern. ASA members should use this information to help educate themselves about scenarios that they ought to bring to the attention of their attorneys. ASA members should always rely on experienced bankruptcy counsel before taking steps that may affect their rights vis-à-vis a bankruptcy (or potential bankruptcy) situation.

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UPCOMING EVENTS

**** = Look for ASA Personnel on the speaking program or on the Trade Floor.***
(For additional information on each event, click on the appropriate link below.)

2004

Nov. 30 *** ASA Regulatory Workshop**, Ft. Lauderdale, FL. See http://www.aviationsuppliers.org for details.

Dec. 2 *** ASA Regulatory Workshop**, Newark, NJ. See http://www.aviationsuppliers.org for details.

Dec. 7 *** ASA Regulatory Workshop**, Seattle, WA. See http://www.aviationsuppliers.org for details.

Dec. 9 *** ASA Regulatory Workshop**, Los Angeles Area, CA. See http://www.aviationsuppliers.org for details.

Dec. 10 *** ASA Recurrent Hazmat Training**, Los Angeles, CA. See http://www.aviationsuppliers.org for details.

Dec. 13-14 *** ASA Initial Hazmat Training**, Phoenix, AZ. See http://www.aviationsuppliers.org for details.

2005

June 26-28 ***ASA Annual Conference,** Boca Raton Resort & Club, Boca Raton, FL
See http://www.aviationsuppliers.org for details.

ASA Workshops are coming up this Fall – topics will include supporting the customers' regulatory obligations, documentation, traceability, approved/unapproved parts and export issues.
Have you reserved your seat yet by registering?

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November 24, 2004