



Avoidance action report: Bankruptcy codes 547 and 548

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Bankruptcy Code section 547 empowers the debtor to avoid certain transfers made during the 90-day period (one year if the transferee was an insider) immediately before the commencement of a bankruptcy case. A lawsuit initiated to avoid such payments is called a "preference action." The theory behind such actions is that the debtor was already insolvent at the time the payments were made and the payments therefore give preferential treatment to certain creditors over others, hence the names "preferential transfers" and "preference actions."

Bankruptcy Code section 548 allows a trustee to avoid a "fraudulent transfer." A fraudulent transfer is any transfer or obligation made within two years prior to filing for bankruptcy with the actual intent to hinder, delay, or defraud a present or future creditor. Under section 548 of the Bankruptcy Code, the debtor may avoid fraudulent transfers and recover any property of the estate that was fraudulently conveyed to a third party. In the absence of fraudulent intent, a transfer may still be avoidable as "constructively fraudulent" under both the Bankruptcy Code and applicable state law if such transfer was made in exchange for less than reasonably equivalent value and (i) the debtor was insolvent at the time of the transfer, (ii) the debtor was rendered insolvent as a result of the transfer, or (iii) the transfer was made to an insider of the debtor.

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