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## EXTRATERRITORIAL APPLICATION OF AVOIDANCE STATUTES IN THE UNITED STATES BANKRUPTCY CODE

*Due to the global nature of the economy, parties may need to analyze the avoidance provisions of the United States Bankruptcy Code in the context of prepetition transfers involving multinational debtors and creditors or international financial institutions. Courts are divided on whether the avoidance provisions apply extraterritorially. This article addresses the strict presumption against extraterritoriality established by the Supreme Court and the division in authority amongst courts in applying such a presumption to the avoidance provisions in the context of prepetition transfers.*

By Lynn P. Harrison III and Rebecca Wicks \*

The avoidance provisions of the United States Bankruptcy Code<sup>1</sup> — specifically sections 544,<sup>2</sup> 547,<sup>3</sup> 548,<sup>4</sup> and 550<sup>5</sup> (collectively, the “Avoidance Provisions”) empower a trustee or debtor-in-possession to claw back transfers that generally would otherwise not be recoverable outside of bankruptcy. Section 547(b) permits the trustee to avoid “preferences,” which are transfers made to a creditor on account of an antecedent debt within 90 days of a bankruptcy filing while the

debtor was insolvent. Similarly, under section 548, “fraudulent transfers”<sup>6</sup> made within two years of a bankruptcy filing may be avoided. If a transfer is avoided pursuant to one of the Avoidance Provisions, under section 550, the trustee or debtor in possession “may recover, for the benefit of the estate, the property transferred . . . from the initial transferee of such transfer or the entity whose benefit such transfer was made; or any immediate or mediate transferee of such initial

<sup>1</sup> All references to “section” (or “sections”), or “§” (or “§§”) are to sections of Title 11 of the United States Code, 11 U.S.C. § 101-1532 (the “Bankruptcy Code”).

<sup>2</sup> 11 U.S.C. § 544.

<sup>3</sup> 11 U.S.C. § 547.

<sup>4</sup> 11 U.S.C. § 548.

<sup>5</sup> 11 U.S.C. § 550.

<sup>6</sup> A ‘fraudulent transfer’ is a transfer “of an interest of the debtor in property, or any obligation . . . incurred by the debtor, . . . if the debtor voluntarily or involuntarily made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or received less than a reasonably equivalent value in exchange for such transfer or obligation [ . . . ]” 11 U.S.C. § 548(a).

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