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FRAUDULENT TRANSFERS: RECENT DEVELOPMENTS CONCERNING SUBSEQUENT TRANSFEREES

In this article, the authors discuss a recent opinion of the Tenth Circuit which may sharply limit subsequent transferee liability in certain circumstances. While this holding remains binding precedent in the Tenth Circuit, at least one bankruptcy court in the Southern District of Texas has rejected this reading entirely. The authors explore the different reasoning that the courts applied to reach their conclusions and the implications for trustees and transferees alike.

By Evan Hollander and Nick Sabatino *

The ability to avoid certain pre-petition transfers of a debtor's property is one of the most fundamental tools at the disposal of a bankruptcy trustee or debtor-in-possession to maximize the value of the bankruptcy estate for the benefit of creditors and interest holders.¹ Under title 11 of the United States Code (the "Bankruptcy Code"), not only may the initial transferee be liable when a transfer of the debtor's property is avoided, but a subsequent transferee of the initial transferee may also be held liable.² There are important distinctions between the liability of an initial and subsequent transferee that must be kept in mind, however, when prosecuting or defending a fraudulent

transfer matter. Moreover, it is not always safe to assume that a party will be deemed a subsequent transferee merely because the party was not the initial recipient of the property transferred by the debtor.

Section 548 of the bankruptcy code sets out the grounds on which an initial transfer may be avoided as intentionally³ or constructively⁴ fraudulent by a trustee

¹ For purposes of this article, references to a "trustee" also encompass a debtor-in-possession.

² However, the trustee or debtor-in-possession is entitled to only a single satisfaction in respect of the avoided transfer. 11 U.S.C. § 550(d).

³ Section 548(a)(1)(A) addresses actual fraud and provides that a trustee may avoid a transfer of the debtor's interest in property, or any obligation made within two years before filing the bankruptcy petition if the debtor voluntarily or involuntarily made the transfer or incurred the obligation with *actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted*.

⁴ Section 548(a)(1)(B) addresses constructively fraudulent transfers and provides that a trustee may avoid a transfer of the debtor's interest in property, or any obligation made within two years before filing the bankruptcy petition if the debtor

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