

**REVOLVING CREDITS AS FRAUDULENT
CONVEYANCES:
IS *RUBIN V. MANUFACTURERS HANOVER TRUST
COMPANY STILL GOOD LAW?***

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This article analyzes a 1981 decision made by the U.S. Court of Appeals for the Second Circuit, Rubin v. Manufacturers Hanover Trust Co., its consequences to lenders, and the considerations underlying a Florida Bankruptcy Court's recent rejection of the doctrine, with the goal of articulating a roadmap for lenders forced to litigate claims for avoidance where conveyance dates may prove dispositive.

When a company declares bankruptcy, the Bankruptcy Code permits the trustee of the estate to avoid “transfers” made or “obligations” incurred by the debtor within two years of the petition date if the elements of a fraudulent conveyance claim, such as the debtor’s insolvency at the time of the conveyance, are present.¹ Lenders to the bankrupt institution are a frequent target of such proceedings.² Bringing an adversary proceeding against a lender to avoid the transfer of payments made on a loan or the obligation to repay the outstanding debt can bring a windfall to unsecured or later-priority creditors.

The outcome of these proceedings often turns on *when* the relevant con-

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veyance was made, because only conveyances made within the limitations period and while the debtor was insolvent (or otherwise undercapitalized)³ are avoidable. But this timing issue is not always clear-cut. When the obligation in question is a term loan — a loan of a specific size with a fixed repayment schedule — the borrowing and repayment dates are unlikely to be controversial. When the obligation is a line of credit or other revolving credit arrangement — where the debtor can access the credit line and make repayments discretionarily — the issue becomes more complicated. In 1981, the Second Circuit added to the confusion in this area by holding, in *Rubin v. Manufacturers Hanover Trust Co.*, that an obligation of repayment is incurred not at the time a loan agreement is executed and security pledged, but each and every time the debtor accesses such a credit line.⁴

If applied beyond its specific facts, the consequences of the *Rubin* decision on lenders can be severe. A credit agreement made with all due diligence into the debtor's solvency can be rendered a fraudulent conveyance *ex post* if the debtor becomes insolvent and continues to draw on the line. *Rubin* thus imposes on lenders the costly, perhaps prohibitive, obligation to ascertain the debtor's solvency not only when the credit line is first extended, but with every subsequent draw. Moreover, under *Rubin*, a credit agreement formed outside the limitations period for fraudulent conveyance claims can give rise to such claims with each draw within the limitations period.

Citing these public-policy concerns, on September 17, 2008, Bankruptcy Judge John K. Olson of the United States Bankruptcy Court for the Southern District of Florida rejected *Rubin's* rationale in ruling on a motion to dismiss a fraudulent conveyance claim arising out of a revolving credit agreement.⁵ This article analyzes *Rubin*, its consequences to lenders, and the considerations underlying the Florida Bankruptcy Court's rejection of the doctrine, with the goal of articulating a road map for lenders forced to litigate claims for avoidance where conveyance dates may prove dispositive.

THE SECOND CIRCUIT'S DECISION IN *RUBIN v. MANUFACTURERS HANOVER TRUST CO.*

The debtors in *Rubin* were an array of affiliated companies engaged in the business of selling money orders and cashing checks.⁶ John M. Trent and

Eugene Skowron were the controlling shareholders of two holding companies, International Express Co. (“International”) and Empire Small Business Investment Corp. (“Empire”).⁷ International, in turn, was the corporate parent of two affiliated firms, U.S.N., Inc. (“USN”) and Universal Money Order Co., Inc. (“UMO”), whose bankruptcies gave rise to the litigation.⁸ Empire was the corporate parent of two other firms, National Payroll Services Ltd. (“National”) and TWO Check Cashing Corp. (“TWO”).⁹ International’s subsidiaries, USN and UMO, were sellers of money orders.¹⁰ Empire’s subsidiaries, National and TWO, owned check cashing outlets which were sales agents for USN’s money orders.¹¹ Another sales agent, Propper Demonstration Sales Corp. (“Propper”), handled UMO’s money orders but was not otherwise affiliated with the Trent and Skowron enterprises.¹²

The nature of the check-cashing business created unpredictable patterns in its short-term liquidity needs, so the enterprise entered into a credit agreement with Manufacturers Hanover Trust (“MHT”) beginning in 1964.¹³ This credit agreement had several distinct features. First, the repayment schedule called for loans to come due “three days from the date on which the loan was made.”¹⁴ Second, the credit ceiling fluctuated based on the available collateral.¹⁵ Finally, borrowings could only be drawn “[t]o the extent that the loans were approved...by MHT.”¹⁶ In 1972, the arrangement was modified to make USN and UMO guarantors of the debts to MHT.¹⁷ Each pledged collateral beginning in 1972 to support these guarantees,¹⁸ with UMO pledging additional collateral in 1975¹⁹ and again on September 21, 1976 when it executed additional guarantees.²⁰

The principal borrowers under the line of credit were National, TWO and Propper, since cash needs were generally restricted to the check cashing arm of the business.²¹ The pertinent borrowings included:

- \$500,000 borrowed by National and TWO on September 16, 1976;²²
- \$1.55 million borrowed by National on December 24, 1976;²³
- \$390,000 borrowed by TWO on December 24, 1976;²⁴
- \$1 million borrowed by “the individual check cashing concerns owned by National and TWO” (in connection with which “a further guarantee of the obligations of National and TWO to MHT was executed by

USN” on December 31, 1976);²⁵ and

- \$472,000 in principal debt, plus unspecified interest, borrowed by Propper around December 1976.²⁶

The enterprise collapsed in early 1977, resulting in MHT’s enforcement of USN’s and UMO’s guarantees.²⁷ On January 11, 1977, MHT seized approximately \$375,000 in USN’s and UMO’s bank accounts and applied the funds to partial repayment of National’s debt.²⁸ UMO and USN filed for bankruptcy protection on January 12, 1977 and January 20, 1977, respectively.²⁹ Post-petition, MHT sold \$1.387 million in collateral from UMO and applied the proceeds to partial repayment of the debts of National, TWO and Propper.³⁰

The trustees of USN’s and UMO’s estates brought claims against MHT for fraudulent conveyance under Section 67(d) of the Bankruptcy Act in force at the time, the predecessor to Section 548 of the current Bankruptcy Code. Following a bench trial, the district court dismissed these claims principally on the grounds that the trustees failed to prove “a lack of fair consideration for the transfer” and “insolvency or insufficient capital at the time of the transfer.”³¹ In holding that UMO’s trustee had not established UMO’s insolvency at the time of the alleged transfer, the district court deemed the evidence marshaled by the trustee “unhelpful in ascertaining the solvency of UMO at the time (months, even years earlier) when the guarantees were made, or even as of December 1976, when the loans in question were made.”³² Thus, arguably implicit in the district court’s reasoning was a holding that, for purposes of the fraudulent conveyance statute, a guarantor incurs an obligation to repay a loan on the date it executes the guarantees, not the date the loan is taken.

In vacating the district court’s judgment, the Second Circuit held otherwise:

The district court stated that UMO’s trustee had failed to prove that UMO was insolvent “at the time the guarantees were made.”... [H]owever, UMO’s incurring of obligations as guarantor must also be tested as of December 1976, when the loans for which it was charged were made. Accordingly, the question for decision was whether UMO was, or was rendered, insolvent or insufficiently capitalized as of December 1976,

not just as of September 1976, when it executed its third guarantee...or as of any earlier time.³³

In support of this holding, the Second Circuit reasoned as follows:

Whenever National, TWO, and Propper borrowed under the loan lines, they of course incurred an obligation of repayment under the terms of their financing agreements with MHT. At the same time,... USN and UMO, as secondary guarantors, became contingently liable.... Undoubtedly, therefore, USN and UMO “incurred” an “obligation” of repayment, although admittedly a contingent one, whenever National, TWO, and Propper borrowed under the loan line, as they did in September and December 1976.³⁴

THE REACTION TO *RUBIN*

Since the *Rubin* decision in 1981, scores of decisions have relied on the Second Circuit’s holding with respect to the separate issue of whether USN and UMO gave fair consideration for the transfers. Few, however, have chosen to follow *Rubin* for its more troubling holding that a debtor’s obligation under a line of credit is incurred at the time of the draw.³⁵ Indeed, the consequences of this holding on lenders have garnered significant academic criticism and resulted in the doctrine’s being rejected at the legislative level by most states. *Rubin*’s failure to gain much traction in the case law on the transfer-date issue is fortunate for credit market participants. If followed, it would impose significant transaction costs on lenders and borrowers alike.

In a 1987 journal article urging “that the *Rubin* case should be limited to its facts,”³⁶ Professor Steven L. Schwarcz discussed several practical consequences of the *Rubin* doctrine and proposed a basis on which to distinguish the case. First, in circumstances where “future advances may be made long after the time that the upstream guaranty or security interest was executed,” “[s]ome of these future advances may well be made within a year prior to the filing of the bankruptcy petition” and “a lender would have no assurance that its future advances would obtain the benefit of an upstream guaranty or security interest, to the extent that the subsidiary making such guaranty or

security interest becomes bankrupt within a year of the advances.”³⁷

Professor Schwarcz advised lenders considering making such agreements to “obtain, as a condition to making each future advance, the same representations and warranties as to the subsidiary’s financial condition...as was obtained at the time the loan facility was originally extended.... A lender could gain additional comfort by performing the same level of due diligence regarding these financial tests as was made originally.”³⁸ But such diligence is time-consuming and costly. It typically entails not only the lender’s own diligence into the borrower’s financials but the retention of an outside, independent auditor to issue a solvency opinion. These opinions are costly for the parties to the transaction, and laborious for the auditors themselves.³⁹ Requiring a new solvency analysis with every draw is an immense and unnecessary transaction cost that does not directly serve the purpose of the fraudulent conveyance statute, as articulated in *Rubin*, of preventing “the calculating debtor” from “preferring certain creditors” or “placing his assets in friendly hands where he can reach them but his creditors cannot.”⁴⁰

Fraudulent transfer statutes at the state level have the same policy aspiration and, in light of the practical consequences of the *Rubin* decision, have overwhelmingly rejected its holding and rationale. Forty-four states have adopted the Uniform Fraudulent Transfer Act (“UFTA”) as their statutory regime.⁴¹ In 1984, three years after *Rubin*, the National Conference of Commissioners on Uniform State Laws promulgated an amendment to the UFTA that was explicitly designed “to resolve uncertainty arising from *Rubin*.”⁴² The amendment provides that “an obligation is incurred...when the writing executed by the obligor is delivered to or for the benefit of the obligee.”⁴³ In situations like *Rubin*’s where the writing is a guaranty agreement, this provision dictates that the obligation associated with the guaranty is incurred on the date the agreement is executed, not when funds are actually drawn on the credit line. By making “the relevant time for testing the transfer...the outset of the transaction when the writings are delivered,” the UFTA “assure[s] that with respect to guarantors, a separate fraudulent conveyance analysis will not be made each time an advance is made to the principal debtor — which could be over a period of months or years — but only at the time the guaranty is signed.”⁴⁴

DEFEATING THE *RUBIN* DOCTRINE: A ROAD MAP IN LITIGATION AND EXECUTION

Unfortunately, as Professor Schwarcz pointed out, “even if state law is modified to adopt Section 6 of the UFTA, the *Rubin* case still would raise the timing uncertainty under federal bankruptcy law whenever a subsidiary guaranteeing future advances becomes bankrupt.”⁴⁵ Lenders confronting the threatened avoidance of guaranty obligations must therefore argue for the rejection of *Rubin* on public policy grounds or distinguish *Rubin* on the facts.

Professor Schwarcz’s article identified a key basis for such a distinction. Recall that one of the distinguishing features of the *Rubin* credit agreement was that borrowings could only be drawn “[t]o the extent that the loans were approved...by MHT.”⁴⁶ Professor Schwarcz drew a distinction between agreements like *Rubin*’s where “future advances were discretionary” versus agreements where “a lender is legally obligated to make future advances” — such as a revolving credit line with a fixed ceiling.⁴⁷ In the former case, Professor Schwarcz allows that “[t]he court’s holding in *Rubin* is perhaps understandable,” because “[e]ach time that MHT decided to advance funds to a storeowner, MHT could reassess the credit risk, including whether or not the advance would ultimately be repaid by the storeowner, and whether and when the upstream guaranties supporting the advance would be drawn upon.”⁴⁸ But when the lender has already committed to extend credit up to a certain amount, Professor Schwarcz argued that “the result should be different.”⁴⁹ In such a circumstance, “value is given by the lender, and accordingly the one-year statute of limitations begins running, at the time the loan agreement containing the commitment is executed, rather than the time that the future advance is made.”⁵⁰

Respecting this distinction remedies some, but not all, of the problematic practical effects of *Rubin*. Another scholarly criticism went even further than Professor Schwarcz and argued that *Rubin*’s result is indefensible “[e]ven when the future advances are discretionary,” because the high transaction costs of verifying the borrower’s solvency with each draw remain impractical or prohibitive:

To require a lender who has agreed to make discretionary advances to verify that a guarantor of the loan obligation was not only solvent when the original guaranty commitment was assumed but remained so when each and every advance was made may impose a serious transactional burden.⁵³

On the whole, the distinction Professor Schwarcz drew is a sensible one. Even if *Rubin* could be regarded as properly decided on its own facts, there appears to be little reason to extend its holding to cases involving committed credit facilities. For example, a lender that has already agreed to extend credit up to a certain amount risks subjecting itself to liability for breach of contract if it determines, even in good faith, that the borrower poses too significant a risk of insolvency to make good on a requested draw. And in the likely event that such draw was requested for the purpose of enabling the borrower to settle debts to other creditors, the lender's refusal could even plunge an otherwise solvent company into insolvency, a result that the Bankruptcy Code should not encourage.

THE FLORIDA BANKRUPTCY COURT'S DECISION IN *TOUSA*

In *In re TOUSA, Inc.*, the Florida Bankruptcy Court found these policy considerations persuasive in rejecting *Rubin's* applicability. At issue in that case was a claim by a creditors' committee to avoid debtor subsidiaries' repayment and guaranty obligations on a \$700 million revolving credit facility extended to the parent and subsidiaries alike as co-borrowers and co-guarantors. The parent and subsidiaries had also pledged substantially all of their assets as collateral for this debt. Both the execution of the credit facility and the pledge of collateral had occurred before the date of alleged insolvency, but the debtors had proceeded to draw on it after they had allegedly become insolvent until shortly before the petition date. Relying on *Rubin*, the creditors' committee argued that with each such draw, the subsidiaries incurred new repayment and guaranty obligations that were therefore avoidable under Section 548. The administrative agent of the facility moved to dismiss this claim, and the bankruptcy court granted the motion. Ruling from the bench, Judge Olson stated:

I believe it to be the law that transfers under Section 548 occur when a lien granted becomes so perfected that a bona fide purchaser for value could not acquire a superior interest. I am troubled by the notion that the transfer occurs at a time after the granting of the lien.... It certainly is the case that the vast majority of states [that] have adopted the Uniform Fraudulent Transfer Act, which Florida adopted in Chapter 726, intended to overrule *Rubin*.... The parties appear to be arguing only under Section 548 for purposes of this hearing, but Section 548 appears to me to be substantially similar to Florida's version of the Uniform Fraudulent Transfer Act.⁵²

This observation offers one remedy to the problem that even lenders in jurisdictions that have adopted the UFTA provision rejecting *Rubin* risk avoidance claims relying on *Rubin* under the federal bankruptcy laws. State fraudulent transfer statutes are often observed by courts to be analogous "in form and substance" to Section 548.⁵³ If this is the case, in the overwhelming majority of jurisdictions where *Rubin*'s rationale is explicitly rejected by the state fraudulent transfer statute, *Rubin* should be regarded as equally unpersuasive with respect to the construction of the federal statute.

In addition to challenging the application of the *Rubin* doctrine once avoidance claims are brought, lenders can attempt to protect themselves by structuring credit transactions in a way that preserves their interests in the face of a *Rubin*-like challenge to the principal debt or the guaranties. For example, rather than relying solely on subsidiaries' guaranties, lenders can seek to have guarantors also become co-borrowers of the principal debt with joint-and-several liability for its repayment. *Rubin*'s holding that guaranty obligations are not deemed incurred until a borrowing is actually drawn is arguably predicated on the assumption that the debtor, and by extension its guarantor, does not receive value until a draw is made.⁵⁴ But if the guarantor is itself a borrower, and given authority to access credit that would not have been available to it absent its affiliation with its jointly-and-severally liable co-borrowers, authority exists for the proposition that this *access* to credit constitutes a direct benefit obtained by the guarantor/co-borrower immediately on the execution of the credit agreement,⁵⁵ which provides a basis for holding

that the corresponding obligation should be deemed incurred on that date.

Lenders also gain protection against fraudulent conveyance claims where borrowers and guarantors pledge security for their obligations. Section 548 governs two types of conveyances — transfers and obligations — but *Rubin* only speaks to the date an obligation is incurred, *not* the date a transfer is made. Unlike the obligation to repay or guarantee a debt, the grant of a security interest is a transfer of property. The statutory text of Section 548 is curiously silent on the question of when an obligation is incurred (thus opening the door to cases like *Rubin*), but it speaks very specifically to the question of when a transfer is made, providing that a transfer of property (such as a security interest) occurs “when such transfer is so perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee.”⁵⁶ The date of perfection may post date the execution date of the agreement that pledged the security interest, but it is likely to pre date the draws on the credit agreement that the security was pledged to support. If a court finds obligations incurred on the dates of the draws, this discrepancy may lead to the unusual situation that a guaranty is properly avoided while the security interest supporting it remains valid.

One commentator posed a hypothetical where a lender issues a line of credit to a parent corporation, guaranteed by its subsidiary, on January 1, and the subsidiary remains “solvent from January to May and in November, and insolvent from June through October and in December.”⁵⁷ In that situation, “if the creditor had perfected its security interest in November, when the subsidiary was solvent,” “[t]he *Rubin* rule deems the June through October guaranties fraudulent, but Section 548(d)(1) deems the associated security interests valid, since they were made when the guarantor was solvent.”⁵⁸ If those security interests were also pledged as collateral for the parent’s debt, and that debt is not alleged to be avoidable (either because the parent remained solvent or because the parent received reasonably equivalent value for incurring the debt), the security interests enable the lender to collect on its loan even in the face of a successful avoidance claim on behalf of the subsidiary’s creditors.

CONCLUSION

The *Rubin* doctrine imposes considerable burdens on lenders. It also leaves lenders dealing with the bankruptcy of their debtors faced with the real risk of seeing their secured, prioritized debt negated and allocated to unsecured and lower-priority creditors. The Florida Bankruptcy Court's rejection of the *Rubin* doctrine is an important precedent for lenders forced to litigate such claims, and a signal that case law at the federal level may be catching up to the widespread legislative rejection of *Rubin* by the states and its negative reception in the academic literature. In the meantime, lenders can explore creative solutions to enhance the prospects that their transactions will be found to fall outside the domain of this perilous doctrine.

NOTES

¹ 11 U.S.C. § 548(a)(1) (2008).

² See generally, e.g., Thomas J. Hall & Janice A. Payne, *Defenses to Claims by Bankruptcy Trustees Against Lenders: The In Pari Delicto Defense and the "Wagoner Rule,"* 123 Banking L.J. 3, 3 (2006) ("When fraud or misconduct leave a company insolvent and forced to seek protection under the Bankruptcy Code, with increasing frequency bankruptcy trustees target lenders as defendants to generate recoveries for the benefit of the debtor's estate.").

³ In addition to insolvency, Section 548 permits the trustee to avoid conveyances made when the debtor "was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital," "intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured," or "made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business." 11 U.S.C. § 548(a)(1)(B)(ii)(II)-(IV) (2008).

⁴ 661 F.2d 979, 990 (2d Cir. 1981).

⁵ *Official Committee of Unsecured Creditors of TOUSA, Inc. v. Citicorp North America, Inc. (In re TOUSA, Inc.)*, No. 08-1435 (Bankr. S.D. Fla.).

⁶ See *Rubin v. Manufacturers Hanover Trust Co.*, 4 B.R. 447, 449 (S.D.N.Y. 1980); 661 F.2d at 981-82.

⁷ 661 F.2d at 981-82.

⁸ *Id.* at 980.

- ⁹ *Id.* at 982.
- ¹⁰ *Id.* at 981.
- ¹¹ *Id.* at 982.
- ¹² *Id.* at 986.
- ¹³ *Id.* at 982.
- ¹⁴ 4 B.R. at 450 n.5.
- ¹⁵ *Id.* at 450.
- ¹⁶ *Id.*
- ¹⁷ 661 F.2d at 983-84.
- ¹⁸ *Id.* at 990.
- ¹⁹ *Id.*
- ²⁰ 4 B.R. at 455.
- ²¹ *Id.* at 456 n.16.
- ²² *Id.* at 990.
- ²³ *Id.* at 986.
- ²⁴ *Id.* at 986.
- ²⁵ 4 B.R. at 453.
- ²⁶ 661 F.2d at 987.
- ²⁷ *Id.* at 986.
- ²⁸ *Id.* at 986.
- ²⁹ *Id.* at 986.
- ³⁰ *Id.* at 986-87.
- ³¹ 4 B.R. at 454; *see also* 661 F.2d at 987-88.
- ³² 4 B.R. at 457.
- ³³ 661 F.2d at 996.
- ³⁴ *Id.* at 990.
- ³⁵ *See LaRosa v. Pecora*, No. 07-0078, 2007 U.S. Dist. LEXIS 90415 (N.D. W. Va. Nov. 27, 2007); *Silverman v. Paul's Landmark, Inc.* (*In re Nirvana Rest.*), 337 B.R. 495, 502 (Bankr. S.D.N.Y. 2006) (in dicta); *In re Heartland Chems.*, 103 B.R. 1012, 1016 (Bankr. C.D. Ill. 1989) (in dicta); *In re Bob Schwermer & Assocs., Inc.*, 27 B.R. 304, 310 (Bankr. N.D. Ill. 1983).
- ³⁶ Steven L. Schwarcz, *The Impact of Fraudulent Conveyance Law on Future Advances Supported by Upstream Guaranties and Security Interests*, 9 Cardozo L. Rev. 729, 741 (1987).
- ³⁷ *Id.* at 732.
- ³⁸ *Id.* at 740.
- ³⁹ *See generally* Robert F. Reilly, *Procedural Checklist for the Review of Solvency Opinions*, 27-6 A.B.I.J. 50 (2008) (identifying one hundred “analytical procedures typically considered in a solvency opinion”).

⁴⁰ 661 F.2d at 989.

⁴¹ The full text of the UFTA and further information about the Act, including those states that have adopted it or are considering adopting it, is available on the Commission's website at <http://www.nccusl.org/>.

⁴² UFTA § 6 comment 3.

⁴³ UFTA § 6(5), (5)(ii).

⁴⁴ 1-3 Collier Lending Institutions & the Bankruptcy Code ¶ 3.06 (2007). To remove any doubt, the treatise adds that “[t]his provision regarding the time for testing the transfer in connection with a guaranty rejects the approach in *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981).” *Id.*

⁴⁵ Schwarcz, *supra* note 36, at 733.

⁴⁶ 4 B.R. at 450.

⁴⁷ Schwarcz, *supra* note 36, at 734.

⁴⁸ *Id.*

⁴⁹ *Id.* at 738.

⁵⁰ *Id.* at 739.

⁵¹ Frank R. Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C. L. Rev. 655, 669 (1992); see also Kenneth C. Kettering, *The Pennsylvania Uniform Fraudulent Transfer Act*, 65 Pa. Bar Ass'n. Quarterly 68 (1994) (“Under the *Rubin* rule, a lender could rely on an upstream guaranty only by verifying that the subsidiary guarantor is solvent each time the lender makes an advance to the parent, which is a practical impossibility.”).

⁵² Hearing Tr., *In re TOUSA, Inc.*, No. 08-10928 (Bankr. S. D. Fla.), Sept. 19, 2008, at 34.

⁵³ E.g., *Official Comm. of Unsecured Creditors v. State (In re Tower Envtl., Inc.)*, 260 B.R. 213, 222 (Bankr. M.D. Fla. 1998).

⁵⁴ See Schwarcz, *supra* note 36, at 738.

⁵⁵ See *Tryit Enters. v. GE Capital Corp. (In re Tryit Enters.)*, 121 B.R. 217, 223-24 (Bankr. S.D. Tex. 1990).

⁵⁶ 11 U.S.C. § 548(d)(1) (2008).

⁵⁷ Kenneth J. Carl, *Fraudulent Transfer Attacks on Guaranties in Bankruptcy*, 60 Am. Bankr. L.J. 109, 119 (1986).

⁵⁸ *Id.* at 120.