

## CASE COMMENTS

### THE EFFECTIVE DATE OF A TRANSFER BY CHECK UNDER SECTION 547(b) OF THE BANKRUPTCY CODE: TRANSFER UPON DELIVERY OR HONOR?

*Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir.),  
*cert. granted*, 112 S. Ct. 48 (1991)

Section 547(b) of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code")<sup>1</sup> allows a trustee<sup>2</sup> to avoid "preferential" transfers occurring within ninety days before the filing of a bankruptcy petition.<sup>3</sup> In *Johnson v. Barnhill (In re Antweil)*,<sup>4</sup> the Tenth Circuit concluded that under section 547(b) a transfer occurs when the drawee bank honors the check.<sup>5</sup>

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1. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

2. When the court has not appointed a trustee under a Chapter 11 reorganization case, a debtor in possession may act in lieu of the trustee. 11 U.S.C. § 1107 (1988).

3. Section 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made-
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer (i) was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if-
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (1988).

4. 931 F.2d 689 (10th Cir.), *cert. granted*, 112 S. Ct. 48 (1991).

5. Section 547 of the Bankruptcy Code governs preferences and has three goals. First, it attempts to lessen the chance of a "scramble among creditors" for preferential treatment by the debtor on the eve of bankruptcy. Second, it seeks to distribute property of the debtor's estate pro rata among creditors. Third, it eliminates a creditor's desire to make unwise loans to obtain a preferential payment or security. REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE U.S., H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 202 (1976). See also 4 WILLIAM M. COLLIER, COLLIER ON BANKRUPTCY, ¶ 547.01, at 547-11 & n.18 (15th ed. 1991) (summarizing the preference section's first two purposes); JAMES A. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 247, at 284 (1956) (elaborating on the third, least obvious purpose). The scope of this Case Comment is limited to the question of when a court must deem a check transferred for the purposes of § 547(b)(4)(A) of the Bankruptcy Code. For a general discussion of voidable preferences in bankruptcy, see Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L.

On November 18, 1985, the debtors<sup>6</sup> tendered a check<sup>7</sup> to certain creditors.<sup>8</sup> The drawee bank honored the check on November 20, 1985, the first day of the ninety-day preference period.<sup>9</sup> Subsequently, the debtors filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code on February 18, 1986.<sup>10</sup> Soon thereafter, the trustee for the debtors' estate filed an adversary proceeding against the creditors and sought to recover the transfer as an avoidable preference under section 547(b).<sup>11</sup> The bankruptcy court dismissed the case and held the transfer occurred when the debtors delivered the check to the creditors, prior to the beginning of the preference period.<sup>12</sup>

The District Court for the District of New Mexico affirmed the bankruptcy court's decision.<sup>13</sup> The Tenth Circuit reversed and held that the date on which the drawee bank honors the check constitutes the effective date of transfer for the purposes of the preference period.<sup>14</sup>

For a trustee to avoid a payment under section 547(b), the debtor must have transferred her property within ninety days preceding her petition

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REV. 713 (1985); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 29 STAN. L. REV. 3 (1986).

6. The debtors included Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris R. Antweil. 931 F.2d at 691.

7. *Id.* The debtors postdated the check to November 19, 1985. After the trustee filed suit to recover the alleged preferential transfer, he unsuccessfully attempted to amend the complaint to allege that the debtor delivered the check to the creditor on November 18, 1985, but postdated it to November 19, 1985. *Id.* The trustee sought leave to amend his complaint arguing that the date of delivery rule does not apply to postdated checks. The bankruptcy court denied the trustee's motion, noting that even an amended complaint would not survive a motion to dismiss because the date of delivery rule applies to postdated checks, and the date to which the debtors postdated the check, November 19, 1985, was still outside the 90-day preference period. *Johnson v. Barnhill (In re Antweil)*, 97 B.R. 69, 70 (Bankr. D.N.M. 1989), *aff'd*, 111 B.R. 337 (D.N.M. 1990), *rev'd*, 931 F.2d 689 (10th Cir.), *cert. granted*, 112 S. Ct. 48 (1991). Nevertheless, the bankruptcy court and the Tenth Circuit assumed as fact that the delivery occurred on November 18. 931 F.2d at 691.

8. The creditors included William Barnhill, Bravo Energy, Inc., the Estate of Murray Cash, and the Estate of Sol Litt IV. 931 F.2d at 691.

9. *Id.* Because the debtor delivered the check to the creditor prior to the first day of the 90-day preference period, the trustee could avoid the transfer under § 547(b) only if the court ruled the date of transfer to be no earlier than November 20, 1985. The drawee bank honored the check on that date. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Johnson v. Barnhill (In re Antweil)*, 111 B.R. 337 (Bankr. D.N.M.), *aff'd*, 111 B.R. 337 (D.N.M. 1990), *rev'd*, 931 F.2d 689 (10th Cir.), *cert. granted*, 112 S. Ct. 48 (1991).

14. 931 F.2d at 695. The court also reversed the denial of the trustee's motion to amend. The district court had affirmed the bankruptcy court's denial of this motion because the court's adoption of the date-of-delivery rule mooted any need to amend the complaint. *Id.*

in bankruptcy.<sup>15</sup> However, section 547(b) is silent regarding the effective date of a transfer when the debtor pays by check.<sup>16</sup> The confusion only arises when the debtor delivers a check prior to the ninety-day period's commencement but the drawee bank honors it within the preference period. Some courts faced with this situation have held that the transfer occurs when the debtor delivers the check to the creditor, while others have held that the transfer occurs when the drawee bank honors the check.<sup>17</sup>

With the Bankruptcy Reform Act of 1978<sup>18</sup> Congress repealed the Bankruptcy Act of 1898.<sup>19</sup> The new act changed the period for preferential payment recovery from four months to ninety days.<sup>20</sup> However, the legislative history of section 547(b) of the amended Bankruptcy Code does not address when a transfer occurs in the event the debtor pays by check.<sup>21</sup> The only relevant legislative history that addresses the effective date of a transfer by check specifically relates to section 547(c),<sup>22</sup> which

15. See *supra* note 3 and accompanying text.

16. The statutory definition of "transfer" helps little in determining when a transfer occurs if the debtors pay by check. Section 101 of the Bankruptcy Code provides that "'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C. § 101(50) (1988).

17. See Lisa R. Reid, Note, "Transfers by Check": *The 90-Day Rule of Preference Recovery Under Section 547(b) of the Bankruptcy Code*, 1987 DUKE L.J. 712 (examining the split among circuits and arguing in favor of the date of honor rule); Kenneth D. Ferguson, *Does Payment by Check Constitute a Transfer Upon Delivery or Payment?*, 64 AM. BANKR. L.J. 93 (Winter 1990) (same).

18. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). Congress amended the Bankruptcy Code again in 1984. However, the 1984 amendments did not alter § 547(b)'s 90-day preference period and are therefore irrelevant to the discussion in this Comment.

19. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). Congress overhauled the substantive law of bankruptcy to modernize it. This was necessary because of changes in the law of debtor-creditor relations since bankruptcy law's last overhaul in 1938, the adoption of the Uniform Commercial Code (U.C.C.) in the early 1960s, and the increased reliance on consumer credit. H.R. REP. NO. 595, 95th Cong., 1st Sess. 3-4 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 5965.

20. H.R. REP. NO. 595, *supra* note 19.

21. See Reid, *supra* note 17, at 715 ("The legislative history of the Code does not address the determinative date of a transfer by check for purposes of section 547(b).") (citing Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275 (1980)). See, e.g., H.R. REP. NO. 595, *supra* note 19, at 6138-40.

22. Sections 547(c)(1) and (c)(2) provide:

The trustee may not avoid under this section a transfer-

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

outlines exceptions to the trustee's section 547(b) avoidance power.<sup>23</sup> This history indicates that under section 547(c) a transfer by check occurs when the debtor delivers the check to the creditor.<sup>24</sup>

Notwithstanding Congress' failure to comment on the timing of section 547(b) transfers, some courts apply section 547(c)'s legislative history to section 547(b).<sup>25</sup> To determine section 547(b)'s transfer date, other courts rely on the Uniform Commercial Code (U.C.C.),<sup>26</sup> or on

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- (2) to the extent that such transfer was-
- (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
  - (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
  - (C) made according to ordinary business terms.

11 U.S.C. § 547(c)(1), (2) (1988).

23.

The first exception [§ 547(c)(1)] is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. Normally, a check is a credit transaction. However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous," and if the check is presented for payment in the normal course of affairs . . . that will amount to a transfer that is "in fact substantially contemporaneous."

The second exception [§ 547(c)(2)] protects [transfers in the] ordinary course of business. . . . The purpose of this exception is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy.

H.R. REP. NO. 595, *supra* note 19, at 6329. See also 124 CONG. REC. 32,400 (1978) (statement of Rep. Edwards) ("Contrary to language in the House Report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2).").

24. See, e.g., *Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805, 808 (5th Cir. 1989) ("the date of delivery of a check is the date on which the transfer occurs for the purposes of section 547(c)(2)."); *Bernstein v. RJL Leasing, (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986) ("we hold that a transfer occurs upon delivery of the check . . . finding it supported by legislative history, policy considerations and pragmatic concerns.").

25. The legislative history primarily addresses timing questions arising under § 547(c)(2)(B). Prior to 1984, § 547(c)(2)(B) provided that a trustee could not avoid a transfer "to the extent such transfer was made not later than 45 days after such debt was incurred." 11 U.S.C. § 547(c)(2)(B) (1982) (repealed 1984). In 1984, Congress amended § 547(c) and removed the 45-day requirement. Although the question of timing for the purposes of the 45-day requirement is no longer relevant, the question of timing under § 547(c) is still at issue based on § 547(c)(1)(A), which prevents the trustee from avoiding a transfer when it is a contemporaneous exchange for new value. For a general discussion of the effect of the 45-day requirement's repeal, see, Howard N. Gorney, *Elimination of the 45-Day Rule: Amendment of Section 547(c)(2) Requires a New Look at Preferences*, 91 COM. L.J. 364 (1986); Sharon Malchar Easley, Note, *Bankruptcy: Eliminating the 45-Day Rule From the "Ordinary Course of Business" Exception to Section 547(b) May Have Resulted in a Significant Abrogation of the Trustee's Avoidance Powers*, 41 OKLA. L. REV. 703 (1988). See *infra* notes 29-45 and accompanying text.

26. See *infra* notes 52-79 and accompanying text.

section 547(e), which deals with perfection of security interests.<sup>27</sup> The circuit courts reflect the lower courts' different analyses of the effective date of section 547(b) transfers.<sup>28</sup>

In holding that a section 547(b) transfer by check occurs upon delivery to the creditor, the Ninth and Sixth Circuits rely almost exclusively on section 547(c)'s legislative history. The Ninth Circuit, in *Shamrock Golf Co. v. Richcraft, Inc.*,<sup>29</sup> was the first court to do so.<sup>30</sup> In *Shamrock*, the

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27. See *infra* notes 46-51 and accompanying text. See generally Reid, *supra* note 17, at 720-24.

28. Aside from the Tenth Circuit decision in *Antweil*, only the Seventh and Eleventh Circuits hold that, for the purposes of an avoidable preference, a transfer occurs when the drawee bank honors the check. The Seventh Circuit adopted the date of honor rule in *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974). The court held, without discussion, that in the better view, transfer occurs on the date the drawee bank honors the check. *Id.* at 1293 (citing 3 COLLIER ON BANKRUPTCY, *supra* note 5, at 820-23). In a similar case, the Second Circuit held that when a creditor tenders a check to the person who will become the debtor, until the potential debtor cashes the check, she has no obligation to the creditor for the sum of the check because the debt does not yet exist. *Klein v. Tabatchnick*, 610 F.2d 1043, 1049 (2d Cir. 1979) ("The check itself was merely a request to the drawee bank to pay [the debtor]; it did not operate as an assignment of these funds.") (citing *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137, 141-42, *aff'd*, 223 N.E.2d 566 (N.Y. 1966)). Although the Seventh and Eleventh Circuits decided the cases under the 1898 Bankruptcy Act, the current majority view in the bankruptcy and district courts is that a transfer occurs when the drawee bank honors the check. Ferguson, *supra* note 17, at 94 nn.2, 3 (listing the courts that have adopted the date of honor and the date of transfer rule, respectively). See also *Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.)*, 127 B.R. 722 (Bankr. W.D.N.Y. 1991) (adopting date of honor rule); *Kellman v. P.S.E. & G. (In re Jolly "N," Inc.)*, 122 B.R. 897 (Bankr. D.N.J. 1991) (same); *Lill v. Bricker (In re Lill)*, 116 B.R. 543 (Bankr. N.D. Ohio 1990) (same); *Global Distribution Network, Inc. v. Star Expansion Co. (In re Global Distribution Network, Inc.)*, 114 B.R. 157 (Bankr. N.D. Ill. 1990) (transfer occurs when check clears debtor's account); *F.E. Agnew III v. Carter Org., Inc. (In re Sharon Steel Corp.)*, 111 B.R. 534 (Bankr. W.D. Pa. 1990) (adopting date of honor rule); *Ellenberg v. Mercer (In re Home Co.)*, 108 B.R. 357 (Bankr. N.D. Ga. 1989) (same); *Boatman v. Connecticut Brass & Copper, Inc. (In re Bristol Indus.)*, 117 B.R. 44 (D. Conn. 1989) (same). *But see* *Counts v. Wang Lab., Inc. (In re Va. Info Sys. Corp.)*, 932 F.2d 338 (4th Cir. 1991) (adopting date of transfer rule); Official Unsecured Creditors Comm. of *Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (6th Cir. 1990) (same); *Miniscribe Corp. v. Keymarc, Inc. (In re Miniscribe Corp.)*, 123 B.R. 86 (Bankr. D. Colo. 1991) (same).

29. 680 F.2d 645 (9th Cir. 1982).

30. Subsequent Ninth Circuit cases decided under the 1978 Bankruptcy Code have affirmed the *Shamrock* rule that transfer occurs upon the check's delivery. In *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987), the court recognized that the *Shamrock* formulation applied legislative history from the amended Bankruptcy Code to a case that the 1898 Bankruptcy Act governed. *Id.* at 791 n.1. However, the court upheld the *Shamrock* rule, noting that Congress had made no pertinent changes in the Bankruptcy Code to suggest a different result. *Id.* In *Kupetz v. Elaine Monroe Associates, Inc. (In re Wolf & Vine)*, 825 F.2d 197 (9th Cir. 1987), the Ninth Circuit again upheld the *Shamrock* date of delivery rule, with the conditions that the bank does not dishonor the check and the check holder presents the check for payment within a reasonable time. *Id.* at 201. Significantly, the court looked to the U.C.C. in conjunction with § 547(c)'s legislative history to determine that 30 days is a reasonable time. *Id.* at 201-02 (construing U.C.C. § 3-503(2)(a) (1977)).

debtor delivered the checks three days prior to the beginning of the preference period, and the drawee bank honored the checks on the first and second days of the period.<sup>31</sup> Shamrock argued that payment occurred on the date the debtor delivered the checks, which would render the payment outside the avoidance period.<sup>32</sup> The court agreed and held that a transfer by check occurs on the delivery date as long as the creditor presents the check for payment within a reasonable time and the bank does not dishonor it.<sup>33</sup> The court grounded its holding on section 547(c)'s legislative history, which states that, "[p]ayment is considered to be made when the check is delivered for purposes of section 547(c)(1) and (2)." <sup>34</sup> The *Shamrock* court applied the amended Bankruptcy Code's legislative history notwithstanding that the 1898 Act's preference section governed the case.<sup>35</sup>

In *Official Unsecured Creditors' Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*,<sup>36</sup> the Sixth Circuit was the first to question the applicability of section 547(c)'s legislative commentary to the timing of a section 547(b) transfer. In *Belknap*, the creditor received the debtor's check prior to the beginning of the ninety-day preference period, but the drawee bank honored the check within that period.<sup>37</sup> The *Bel-*

31. 680 F.2d at 646. The parties stipulated that the Bankruptcy Act of 1898's preference section rather than the amended Bankruptcy Code governed. *Id.* The only substantive difference in the preference section was the change from a four-month preference period to a 90-day preference period. See *supra* note 20 and accompanying text.

The debtor filed for bankruptcy October 20, 1977. The preference period began on June 20, 1977. 680 F.2d at 646. On June 17, the debtor delivered the checks to the creditor. On June 20 and 21, the creditor presented the checks to the drawee bank for payment. *Id.*

32. 680 F.2d at 646.

33. *Id.*

34. *Id.* (quoting 124 CONG. REC. 32,400 (1978) (statement of Rep. Edwards)). See also Engstrom v. Wiley, 191 F.2d 684, 686 (9th Cir. 1951) (payment by check constituted a cash sale when the creditor presented the check within a reasonable time and the bank did not dishonor it); Kupetz v. Elaine Monroe Assocs., Inc. (*In re Wolf & Vine*), 825 F.2d 197 (9th Cir. 1987) (same; a reasonable time constitutes 30 days).

35. Now repealed § 21(a)(2) of the Bankruptcy Act of 1898 governed. Section 21(a)(2) provided that: "Acts of bankruptcy by a person shall consist of his having . . . (2) made or suffered a preferential transfer, as defined in subdivision (a) of section 96 of this title." 11 U.S.C. § 21(a)(2)(1976) (repealed 1978). Section 96 of the 1898 Bankruptcy Act is the precursor to current preference § 547(b) of the amended Bankruptcy Code. See *infra* note 48.

36. 909 F.2d 879 (6th Cir. 1990).

37. *Id.* at 881. Originally three checks were at issue. On appeal, however, the court realized that the third check had been mailed, received, and honored within the 90-day preference period, thus making it avoidable under any rule. The second check, which the debtor had mailed before the start of the preference period but the creditor had received and the bank honored within the preference period, raised the issue of whether delivery occurs upon mailing or receipt of the check. Be-

*knap* court observed that although section 547's legislative history indicates a transfer occurs upon delivery, such language refers only to subsections (c)(1) and (c)(2).<sup>38</sup> Nevertheless, the court viewed subsection (b)'s omission from this legislative history as "symptomatic of 'troublesome' Committee Reports" rather than as indicative of Congress' intent to create two definitions of "transfer."<sup>39</sup> The *Belknap* court concluded that to give the word "transfer" two meanings within one section would be "inconsistent, unworkable and confusing."<sup>40</sup> Thus, the court concluded that the date of delivery rule, mandated by section 547(c)'s legislative history, equally controls the timing of a section 547(b) transfer.<sup>41</sup>

Rather than applying section 547(c)'s legislative history directly to section 547(b), the Fourth Circuit, in *Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems Corp.)*,<sup>42</sup> concluded that section 547(c)'s rationale for adopting the date of delivery rule applies with equal force to section 547(b) transfers.<sup>43</sup> The court first noted that Congress adopted section 547(c)'s date of delivery rule to maintain consistency between commercial reality and trade creditors' expectations.<sup>44</sup> The court con-

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cause the court held that the date of receipt constitutes the date of delivery, the second check was "transferred" within the preference period under both the date of delivery rule and the date of honor rule. Thus, the court only considered the issue of timing under § 547(b) with regard to the first check, which the creditor had received before the preference period but the bank had honored within the preference period. *Id.*

38. *Id.* at 883.

39. *Id.* (quoting Countryman, *supra* note 5, at 761).

40. *Id.* The trustee argued that a date of honor rule would best serve the same purposes of consistency, clarity, and simplicity because a neutral third party, the bank, may easily prove the date of honor. The court saw no reason to assume that a bank is more or less accurate in recording the date of honor than a creditor is in recording the date of delivery. *Id.* n.3.

41. *Id.* at 882-83. The court also noted that neither § 547(b)'s policy of equality of distribution among creditors nor § 547(c)'s purpose of encouraging uninterrupted trade in the face of insolvency "necessarily demands a particular answer to the check transfer problem." *Id.* at 883. The court reasoned that, given the number of bankruptcy petitions and the millions of check transactions every year, one rule for both §§ 547(b) and (c) is "of affirmative value" in order to maintain "consistency, clarity and simplicity." *Id.* n.3. See also Nan S. Ellis, *Preferential Payments by Check: At What Point Is Payment Made?* 16 UCC L.J. 46 (1983) (§§ 547(b) and (c) are complementary subparts that logically employ the same definition of "transfer").

42. 932 F.2d 338 (4th Cir. 1991).

43. *Id.* at 341-42.

44. *Id.* In concluding that the date of delivery rule is more consistent with commercial practice for purposes of § 547(c), the court relied on *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986). The Tenth Circuit, in *White River*, stated that the "delivery date view encourages trade creditors to continue dealing with the troubled business by insulating normal business transactions from the trustee's avoiding power," and that "in the commercial world receipt of a check . . . is customarily looked upon as the date of payment of an obligation." *Id.* at 634 (citations omitted).

cluded that this rationale is equally persuasive as to section 547(b) transfers and held that adopting the date of delivery rule for both sections better served the overall purpose of encouraging creditors to continue doing business with a struggling debtor.<sup>45</sup>

In *Nicholson v. First Investment Co.*,<sup>46</sup> the Eleventh Circuit adopted a date of honor rule under a security interest rationale.<sup>47</sup> Rather than looking to section 547(c)'s legislative history, the Eleventh Circuit invoked now-repealed section 96(a)(2) of the amended 1898 Bankruptcy Act.<sup>48</sup> Section 96(a)(2) provided that a transfer takes place when the transaction "is so far perfected" that no subsequent lien could become superior to the transferee's rights.<sup>49</sup> The court reasoned that a debtor does not complete a transfer at the time he delivers the check because a creditor still could prevent collection of the funds by garnishing the bank account.<sup>50</sup> The court concluded that the "so far perfected" language mandates that the effective date of a section 547(b) transfer by check be the date of honor.<sup>51</sup>

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45. 932 F.2d at 342. The court noted that it served the overall purpose of bankruptcy law by "recognizing that in the commercial arena, for most purposes, payment by check is the end of a commercial transaction." *Id.*

46. 705 F.2d 410 (11th Cir. 1983).

47. *Id.* See generally Reid, *supra* note 17, at 722-23 (courts have applied various subsections of § 547(e) to § 547(b) with inconsistent results); Furgeson, *supra* note 17, at 108-11.

48. Section 96(a)(2) provided that, for the purpose of determining whether a transfer has taken place, "a transfer of property . . . shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." 11 U.S.C. § 96(a)(2) (1976) (repealed 1978). Section 547(e)(1)(B), which replaced § 96(a)(2), provides: "For the purposes of this section- . . . a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(B) (1988).

49. 11 U.S.C. § 96(a)(2) (1976) (repealed 1978).

50. 705 F.2d at 413.

51. *Id.* In addition, the court explained that, in order to be a preference, a transfer must diminish the bankruptcy estate. *Id.* (citing *In re Sounder*, 449 F.2d 284 (5th Cir. 1971)). However, the estate is not diminished until the bank honors the check. *Id.* For cases holding that § 547(e)(1)(B) applies to § 547(b), with the result that the date of honor constitutes a transfer because another creditor can no longer secure a judicial lien on the transferred property, see Reid, *supra* note 17, at 720 n.51; Furgeson, *supra* note 17, at 109 n.83. *But see* O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35, 38 (1st Cir. 1984) (§ 547(e)(1)(B) "deals with perfection of security interests in the debtor's property"; when a creditor does not take the debtor's check as security, § 547(e)'s provisions are inapplicable). H.R. REP. NO. 595, *supra* note 18, at 6139 (indicating that Congress did not intend subsection (e) to apply to check transactions); Furgeson, *supra* note 17, at 109-10 (§ 547(e)'s legislative history shows that Congress did not intend § 547(e) to apply to § 547(b)). For a related theory that applies § 547(e)(2)(A)'s rule that a transfer between two parties is equivalent to, and thus constitutes, a transfer, see, e.g., Eisenberg v. J.L. Int'l, Ltd. (*In re Sider Ventures & Servs. Corp.*), 33

In *Johnson v. Barnhill (In re Antweil)*,<sup>52</sup> the Tenth Circuit concluded that a transfer occurs when the drawee bank honors the check.<sup>53</sup> The court first analyzed the Bankruptcy Code's preference section<sup>54</sup> and recognized that sections 547(b) and 547(c) serve different purposes and therefore need not define "transfer" similarly.<sup>55</sup> Section 547(c) carves out a group of exceptions to a trustee's section 547(b) avoidance powers.<sup>56</sup> According to the court, Congress meant section 547(c) to encourage creditors and other suppliers of goods and services to continue doing business with troubled debtors without fear of the trustee's avoidance powers.<sup>57</sup> Therefore, the parties' commercial expectations should determine the date of transfer under that section.<sup>58</sup> The popular expectation is that the giving of a check is a contemporaneous cash transaction.<sup>59</sup> Just as, under section 547(c), a trustee may not avoid a transfer that is a contemporaneous exchange in the ordinary course of business—such as a purchase of goods for cash—a trustee also ought not be able to

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Bankr. 708 (Bankr. S.D.N.Y. 1983), *aff'd*, 47 Bankr. 406 (S.D.N.Y. 1985). For a comprehensive account of both theories, see Reid, *supra* note 17, at 722-23; Ferguson, *supra* note 17, at 108-11.

52. 931 F.2d 689 (10th Cir.), *cert. granted*, 112 S. Ct. 48 (1991).

53. *Id.* at 691.

54. *Id.* at 692-93.

55. *Id.* at 692. For cases recognizing that the distinct purposes served by § 547(b) and § 547(c) require distinct definitions of "transfer," see Ferguson, *supra* note 17, at 108 n.80.

56. 931 F.2d at 692. For example, under § 547(c), a trustee may not avoid a transfer that is a contemporaneous exchange in the ordinary course of business. 11 U.S.C. § 547(c)(1) (1988). A purchase of goods for cash falls within the § 547(c) exceptions. 931 F.2d at 693.

57. 931 F.2d at 693.

58. *Id.* The creditor's intent as to the effective date of transfer should control under § 547(c)(2) when, for example, a power company continues to supply a financially troubled company on the condition that the company continues to make timely and regular payments. *Id.* Section 547(c)(2) provides the power company with a defense to the trustee's avoidance powers when the payment of a debt occurs in the ordinary course of business. *Id.* See *supra* note 22. In order to take advantage of this defense, the creditor must insist on timeliness. Thus, the creditor's intent as to the time of the transaction determines whether § 547(c) entitles the creditor to exceptions. 931 F.2d at 693. See Countryman, *supra* note 5, at 78 ("The function of the preference concept is to avoid prebankruptcy transfers that distort the bankruptcy policy of distribution. Transfers that do distort this policy do so without regard to the state of mind of either the debtor or the preferred creditor"); 4 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 547.01, at 547-12. See also John Mayer, *What is a Payment in the Ordinary Course of Business? Preference Defense of Section 547(c)(2) of the Bankruptcy Code*, 94 COM. L.J. 358 (1989).

59. 931 F.2d at 693 (citing H.R. REP. NO. 595, *supra* note 18, at 6329). The court noted that as a general rule, the law views a check as a credit transaction. The court found that § 547(c)'s legislative history clearly indicates that § 547(c)'s rule that a check is a contemporaneous cash transfer is an exception to that general rule. *Id.* But see Ferguson, *supra* note 17, at 107-08 (payment by check is not a credit transaction under the law unless the debtor postdates the check) (citing Countryman, *supra* note 5, at 761).

avoid what is popularly perceived as substantially the same transaction, only by check.<sup>60</sup> Thus, the court reasoned that the date of delivery rule facilitates continuing relations between debtor and creditor by conforming to their intentions.<sup>61</sup>

In contrast, the court reasoned that effectuating the parties' commercial expectations will not advance section 547(b)'s goals.<sup>62</sup> Section 547(b) facilitates equal distribution of the debtor's assets among her creditors by creating an arbitrary time period of ninety days prior to the filing date; the trustee may avoid any transfers the debtor made during this period.<sup>63</sup> The court concluded that in this context, the debtor and creditor's popular expectations are irrelevant because the debtor does not pay an unsecured debt with the intention of possibly filing for bankruptcy ninety days hence.<sup>64</sup> The court reasoned that the date of honor rule better serves section 547(b)'s purpose of facilitating the bankruptcy estate's equal distribution.<sup>65</sup>

Second, the court looked to the legislative history of the amended Bankruptcy Code as a whole.<sup>66</sup> The court noted that one of the reformers' purposes was to harmonize bankruptcy law with commercial practice generally, and with the U.C.C. in particular.<sup>67</sup> Because Congress remained silent as to the timing of a section 547(b) transfer, the court looked to the U.C.C. provision governing the transfer of commercial paper.<sup>68</sup> Under section 3-409(1) of the U.C.C.,<sup>69</sup> no transfer of funds takes place when the payee receives the check.<sup>70</sup> The payor's giving a check

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60. 931 F.2d at 693.

61. *Id.*

62. *Id.*

63. *Id.* at 692 (citing H.R. REP. NO. 595, *supra* note 18, at 6138). *See also* 11 U.S.C. § 547(b)(4)(A) (1988).

64. 931 F.2d at 693.

65. *Id.* at 692. The court never explicitly stated why a date of honor rule is more consistent with the purposes of § 547(b). *See infra* note 80.

66. 931 F.2d at 693.

67. *Id.* "This section [547] is a substantial modification of present law. It modernizes the preference provisions and brings them more into conformity with commercial practice and the Uniform Commercial Code." *Id.* at 694 (quoting H.R. REP. NO. 595, *supra* note 18, at 6328).

68. *Id.* *See also* Ferguson, *supra* note 17, at 95 n.7 (citing cases holding that the U.C.C. supports the date of honor rule).

69. Section 3-409(1) of the U.C.C. provides that "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." U.C.C. § 3-409(1) (1977).

70. 931 F.2d at 694.

does not guarantee that the transfer of funds will occur.<sup>71</sup> Under the U.C.C., no actual transfer of funds occurs until the drawee bank honors the check.<sup>72</sup> Thus, the court concluded that a date of honor rule under section 547(b) is consistent with the U.C.C.<sup>73</sup>

Finally, the court found that the parties may more easily prove a transfer under the date of honor rule than by way of the date of delivery rule.<sup>74</sup> Under the date of honor rule, a bank statement will prove the controlling date.<sup>75</sup> Under the date of delivery rule, however, no documented proof exists as to when the debtor delivered the check.<sup>76</sup> Accordingly, the court explicitly rejected the Sixth Circuit's decision in *In re Belknap*,<sup>77</sup> which relied on the "simplicity" of having one rule common to all section 547 issues.<sup>78</sup> The *Antweil* court noted that the date of honor rule is capable of much simpler proof and thus better serves the interests of judicial economy.<sup>79</sup>

The *Antweil* court's analysis of the section 547(b) timing issue is persuasive. First, the court correctly analyzed the distinction between sections 547(b) and 547(c), noting that the differing purposes of these sections mandate varying rules for the time of transfer.<sup>80</sup> Furthermore, had Congress intended that the date of delivery rule trump its own presumption that payment by check is a credit transaction and thus completed only upon the date of honor,<sup>81</sup> section 547(b)'s legislative history would have specifically so indicated, as did the legislative history of sec-

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71. *Id.*

72. *Id.*

73. *Id.* Conversely, the court implied that a date of delivery rule directly conflicts with modern commercial practice as manifested in U.C.C. § 3-409(1). *Id.*

74. *Id.* at 694-95.

75. *Id.* at 694.

76. *Id.*

77. 909 F.2d 879 (6th Cir. 1990).

78. *See supra* notes 36-40 and accompanying text.

79. 931 F.2d at 689.

80. *See supra* notes 55-59 and accompanying text. The *Antweil* court never explicitly stated why a date of honor rule is more consistent with § 547(b)'s purposes. Likely, it reasoned that while § 547(c) creates an exception to the trustee's avoidance powers out of concern for the ongoing viability of the debtor's business, § 547(b) is concerned instead with the creditors' welfare. "To be avoidable, a preferential transfer must occur in a credit transaction." Reid, *supra* note 14, at 724. Treating such a transfer as cash would undermine § 547(b)'s goal of avoiding transfers to favored creditors. "Unlike section 547(c), no justification exists for deviating from accepted commercial practice or for deviating from the general rule that a check is not a transfer until it is honored." *Id.* at 724-25. *See also* Ferguson, *supra* note 17, at 111-12.

81. *See supra* note 59.

tions 547(c)(1) and (c)(2).<sup>82</sup>

Second, the *Antweil* court's conclusion that the timing of a section 547(b) transfer ought to be consistent with the U.C.C. is compelling. When enacting the Bankruptcy Code, Congress sought to modernize the law and to make it consistent with commercial practice.<sup>83</sup> The U.C.C. article governing commercial paper therefore should control the effective date of a transfer by check.<sup>84</sup> Under the U.C.C., a check does not operate as an assignment of funds until the drawee bank honors it.<sup>85</sup> To achieve commercial uniformity, the U.C.C.'s date of honor rule should apply equally to section 547(b).

Finally, the *Antweil* court prudently recognized that a date of delivery rule is unworkable, unprovable, and contrary to the interests of judicial economy.<sup>86</sup> A date of delivery rule provides incentives for the creditor to lie about the actual date she received the check.<sup>87</sup> In contrast, as the *Antweil* court observed, under the date of honor rule, a bank statement provides objective, reliable proof of the effective date of transfer.<sup>88</sup>

The *Antweil* court properly concluded that the date of honor should determine the effective date of a transfer by check under section 547(b) of the Bankruptcy Code. In *Antweil*, the Tenth Circuit became the first circuit to analyze the timing provisions of sections 547(b) and 547(c) in conjunction with the distinct purposes each section serves. In adopting a date of honor rule for section 547(b), the Tenth Circuit furthered Congress' intent to modernize bankruptcy law by allowing consistent commercial practice and by facilitating equal distribution of the debtor's estate among unsecured creditors.

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82. See Reid, *supra* note 17, at 724-25. See also *supra* note 59.

83. See *supra* note 67 and accompanying text.

84. See Reid, *supra* note 17, at 717. ("Any deviation from the accepted practice in commercial law as codified by the U.C.C. should be explicitly expressed by Congress or supported by compelling policy"). See also *supra* notes 65-73 and accompanying text.

85. See *supra* note 70 and accompanying text.

86. 931 F.2d at 695.

87. *Id.* at 694.

88. *Id.*