AVOIDANCE

Avoidance:

> The ability to remove a lien.
>
> The Bankruptcy Code permits the debtor to avoid some kinds of liens that interfere with or imp
> claimed in the bankruptcy. For example, judgment liens attached to the debtor's home can be
> of the liens (mortgages, judgment liens and statutory liens) are greater than the value of the pr
> exemption is claimed. The underlying purpose of the avoidance provisions is equality of distrib
> similarly situated parties.

From the judgment in Re Tousa 10/13/09:

> "In a preference claim under 11 U.S.C. Section 547, the debtor is presumed insolvent during th
> There is no presumption of insolvency in a fraudulent transfer claim. Thus, the burden of proo
> in a preference claim, the defendant must prove solvency; in a fraudulent transfer claim, the pl

Section 548(a)(1)(B) permits the avoidance of any transfer of an interest of the debtor in property, or any o
debtor, that was made or incurred within 2 years before the date of the filing of the petition, if the debtor
received less than a reasonably equivalent value in exchange for such transfer or obligation and

> (A) was insolvent on the date that such transfer was made or such obligation was incurred, or b
> of such transfer or obligation,
>
> (B) was engaged in a business or transaction, or was about to engage in a business or transacti
> remaining with the debtors was an unreasonably small capital; or
>
> (c) intended to incur, or believed that the debtor would incur, debts that would be beyond the
> such debts matured

The "balance sheet" test of insolvency per Section 548(a)(1)(B)(ii)(I) requires proof that the sum of the deb
is greater than the fair value of that subsidiary's property

Fair valuation, in the context of a going concern, "contemplates and estimate of proceeds realizable within
either collection or sale at regular market value." See *Pembroke Dev. Corp. vs. A.P.L. Windwo,* 122 B.R. 610
also *Lawson v. Ford Moto Co. (In re Roblin Indus., Inc.)*, 78 F. 3d 30, 35 (2nd Cir. 1996)

> "Fair valuation for our purposes here is indistinguishable from fair market value. It is the estim
> out of the assets within a reasonable time either through collection or sale at the regular mark
> latter as the amount which could be obtained for the property in question within such period b
> business man from an interested buyer who is willing to purchase under the ordinary selling co
> Valencia (in *re Duque Rodriguez*), 75 B.R. 829, 831 (Bankr. S.D. Fla. 1987)

Because "a fair valuation of assets contemplates a conversion of assets into cash during a reasonable perio
"should be reduced by the value of the assets not readily susceptible to liquidation and the payment of del

Trans World Airlines, Inc. (In re Trans World Airlines, Inc.), 134 F. 3d 188, 194-195 (3d Cir. 1998).

The court may, in reaching conclusions on "fair valuation" adopt the asset values of one party or the other, valuation figure after weighing all of the evidence. *See In re Roblin Indus. Inc.*, 78 F. 3d at 35.

"To decide whether a firm is insolvent within the meaning of S. 548(a)(2)(B)(I), a court shoud ask: What wo for the debtor's *entire package* of assets and liabilities. If the price is positive, the firm is insolvent; if negat *Commercial Nat'l Bank of Peoria*, 960 F. 2nd 657, 660 (7th Cir. 1992).

> Example: "The price that a potential buyer of a homebuilding business would pay would reflect at which the buyer could ultimately sell its individual assets, but a discount to reflect the costs make those sles and the present value of income that would be earned only in the future. *See, Co., Inc.*, 905 F. 2d 166 (7th Cir. 1990) ("going concern" valuation of retailer should reduce retai the retailer's mark-up, which covers retailer's cost of sales); *Syracuse Eng'g Co. v. Haight*, 110 F. would necessarily consider future costs when calculating how much to pay for debtor's assets); *Inc. v. Hollywood, Inc. (In re Emerald Hills Country Club*), 32 B.R. 408, 415 (Bankr. S.D. Fla. 1983) condominium/apartment units for fair valuation because the discounted price acounted for ma year period and the reality that the assets could not be sold immediately); *cf. Samson v. Alton E Ebbler Furniture & Appliances, Inc.*), 804 F. 2d 87, 92 (7th Cir. 1986) (the wholesale cost of inver standard as a rule" because a buyer in the same business or industry as the debtor "would still the goods, costs that would have to be subtracted from the retail price to determine t he 'value

The "fair valuation" standard does *not* "require the taking into account of the sum which could be realized of certain articles 'in the slow process of trade' or through collection from debtors without property 'by pat 1 COLLIER BANKRUPTCY MANUAL PARAGRAPH 101.32[4] (3D ED. 1997)

Two legal doctrines sometimes permit a court to treat otherwise distinct and independent entities as a sing the equitable doctrine of substantive consolidation and the "alter ego" doctrine (sometimes referred to as strict requirements limit the use of these doctrines to disregard corporate form. As Judge Posner explained *Inc.*, 841 F. 2d 198, 201 (7th Cir. 1988). See also *Tryit Enters. Vs. Gen. Elec. Capital Corp. (In re Tryit Enters.)*, Tex. 1990) ("Since the assets of affiliated corporations are not generally treated as a common pool available affiliate, unusual circumstances must be present to so treat them.")

> "When a parent causes one of its subsidiaries to guarantee another's (or the parent's own) deb danger … that creditors of the guarantor … will find themselves, without warning, dealing with debtor. The effect of the guarantee … is similar to that of a rule of law that treats the assets of a common pool available to the creditors of each affiliate. Such rules have sometimes been ad refused to adopt them, for just the reason stated; they make it harder for creditors of an affilia their debtor's creditworthiness. If such rules were in force, "a sign of weakness in any member would lead creditors to descend on each member, strong or weak, to claim their pound of flesh

This is criticial in the context of evaluating solvency --> without asserting substantive consolidation or veil p look at individual debtors individually.

The standard in S. 548(a)(1)(B)(ii)(II) asks whether a company has sufficient capital to support operations in is below expectations.

"An 'unreasonably small capital' would refer to the inability to generate sufficient profits to sus
an inability to generate enough cash flow to sustain operations must precede an inability to pay
due, unreasonably small capital would seem to encompass financial difficulties short of equitab
Security Pacific Business Credit, Inc., 971 F. 2d 1056, 1070 (3d Cir. 1992)."

"Because [a debtor's cash flow] projections tend to be optimistic, their reasonableness must be
standard anchored in the company's actual performance. Among the relevant data are cash flo
profit margins and net profits and losses ... However, reliance on historical data alone is not eno
must also account for difficulties that are likely to arise, including interest rate fluctuations and
downturns, and otherwise incorporate some margin for error."

"Unreasonably small capitalization encompasses financial difficulties which are short of equitab
bankruptcy insolvency but are likely to lead to some type of insolvency eventually." *Official Com
of Toy King Distributors, Inc. v. Liberty Savings Bank (In re Toy King Distributors, Inc.*), 256 B.R. 1

The 'inability to pay debts' prong of section 548 is met if it can be shown that the debtor made the transfer
contemporaneous with an intent or belief that subsequent creditors likely would not be paid as their claim
statute suggests a standard based on subjective intent, the courts have held that the intent requirement ca
facts and circumstances surrounding the transaction show that the debtor could not have reasonably belie
to pay its debts as they matured ..." *WRT Creditors Liquidation Trust v. WRT Bankr. Litig. Master File Defs. (I*
B.R. 343, 415 (Bankr. W.D. La. 2001).

Regarding savings clauses (contractual provisions which purport to reduce the obligations incurred and lien
Conveying Subsidiaries to the extent necessary to prevent their insolvency, *In re Tousa*), see Section 541(c)

"The savings clauses purport to amend liabilities and liens to make them "enforceable to the m
by law. However, because the Conveying Subsidiaries were insolvent even before the July 31 Tr
received no value from that transaction, the liabillities and liens cannot be enforced *at all*. *Any*
a Conveying Subsidiary, and any lien securing that liability, would be avoidable under Section 5
the savings clauses have no effect at all.

If the Conveying Subsidiaries became insolvent only after the July 31 Transaction, the savings cl
under 11 U.S.C. S. 541(c)(1)(B), which provides that an interest of the debtor in property becon
notwithstanding any "provision in an agreement" that is "conditioned on the insolvency or fina
debtor" that "effects or gives an option to effect a forfeiture, modification, or termination of th
property." The savings clauses are "provision[s] in an agreement." They are "conditioned on th
condition of the debtor." And they "effect a forfeiture, modification, or termination of the debt
In particular, the savings clauses, if given the effect claimed by the Defendants, would defeat th
for a fraudulent transfer, and a cause of action is unquestionably property of the debtor. *Unite*
Inc., 462 U.S. 198, 205 n.9 (1983). (Section 541(a)(1) "'includes all kinds of property, including t
[and] causes of action.'" ..."

The savings clauses are unenforceable for the additional reason that efforts to contract around the core pro
Code are invalid. *See, e.g., Glenn v. Sutton (In re Sutton)*, 324 B.R. 624, 627 (Bankr. W.D. Ky. 2005):

"The Debtor cannot contract the prohibition on ipso facto clauses away, nor can a Creditor enfo
if the Debtor agrees to it. Therefore, despite the Creditor's attempt to contract around the juri
Court, this Court has jurisdiction over the dischargeability of the debt owed to the Creditor by t
399 B.R. 388, 389 (Bankr. D. Del. 2009), ***"By allowing parties to contract around the mutuality
creditor or a handful of creditors could unfairly obtain payment from a debtor at the expense
thereby upsetting the priority scheme of the Code and reducing the amount available for dist***

There are two types of benefits to be considered in analyzing reasonably equivalent value: benefits that th
("direct benefits") and those it receives indirectly ("indirect benefits").

"As a general rule, an insolvent debtor receives less than a reasonably equivalent value where i
exchange for consideration which passes to a third party. In such cases, it ordinarily receives lit
Arthur Young & Co. (In re Computer Universe, Inc.), 58 B.R. 28, 30 (Bankr. M.D. Fla 1986).

To make out elements of a fraudulent conveyance claim, a plaintiff must prove that a debtor did not receiv
equivalent to the value which it gave up. If the plaintiff meets the burden, the burden is then on the defen
can) evidence that the debtors indirectly received sufficient, concrete value. *See Welt v. Jacobsen (In re Aq*
361 B.R. 567, 582 (Bankr. S.D. Fla. 2007)

"... once the Trustee has made his *prima facie* case that a transfer constitutes a fraudulent tran
producing evidence shifts to the transferee to demonstrate that the Debtor received a benefit
legitimate purpose for the transfer."

The burden on the Defendants includes a requirement to show that the "indirect benefits" were tangible a
quantif their value with reasonable precision.

First, the benefit must be received, even if indirectly, by "the debtor", i.e. by an individual Conv
benefit received by some other entity does not automatically become a benefit received by *the*
because both entities are engaged in a common business enterprise. Rather, the touchstone o
benefit is whether the "' the debtor's net worth has been preserved' and the interests of the cr
injured by the transfer." The relevant inquiry under Section 548 is whether the Conveying Subs
reasonably equivalent value, not whether TOUSA (or the Defendants) hoped they would receiv

Second, any purported "indirect benefits" defense must also be limited to cognizable "value".
refer to "benefits," whether direct or indirect. It requires reasonably equivalent "value" and in
definition of "value" that encompasses *only* "property" and "satisfaction or securing of a prese
of the debtor."

Third, property must have been received by a Conveying Subsidiary "in exchange for" the trans
"property" that a Conveying Subsidiary would have enjoyed regardless of the July 31 Transactio
as property received "in exchange for" the transfer or obligation."

As a matter of natural usage, legal usage and bankruptcy-law usage, the Conveying Subsidiaries could not r
they obtained some kind of enforceable entitlement too some tangible or intangible article.

Under Section 548(c), a transferee or obligee "that takes for value and in good faith has a lien on or may re

transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee c
the debtor in exchange for such transfer or obligation." To preserve liens and claims under this provision, t
liens for their benefit must prove that they acted in good faith and "gave value to the debtor."

> "A transferee does not act in good faith when he has sufficient knowledge to place him on inqu
> debtor's possible insolvency." *Brown v. Third Nat'l Bank (In re Sherman),* 67 F. 3d 1348, 1355 (8

> "Courts have generally held that it is not necessary to show that the transferee had actual frau
> fraudulent intent on the part of the transferee would clearly establish the lack of good faith." *S*
> *Bradford & Co.*

S. 550(a)(1) provides that the trustee may recover "the property transferred, or, if the court so orders, the v
from … the initial transferee of such transfer or the entity for whose benefit such transfer was made." How
is entitled to only a single satisfaction under this provision of the statutes. Section 550(d).

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; *Emerald Hills Country Club,*
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, 121 B.R. 217, 223 (Bankr. S.D.
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