Cover

New Math, New Value … Nu???

By Pamela Starr

Allow me to introduce myself. I am a left handed, redheaded, mathematically challenged Bankruptcy & Creditors' Rights paralegal. What was I thinking?

I am a member of the "new math" generation. I was never sure what that meant exactly, just that it was different somehow from the arithmetic that my mother learned and taught. While I was struggling with new math in elementary school, Mom was still teaching the "3 R's" in a neighboring rural county. Somehow, I muddled through countless math homework assignments to a chorus of the "I just don't get this new math" blues sung by Mom.

About a year ago I received an animated e-mail from my mother describing "whole math" as part of the new elementary level curriculum. Please allow me to share my mother's thoughts on new-new math:

> Math in the new creative method ... Well, to begin, new-new math manipulates "things" (you know, things you can see and hold — and toss and throw). Forget worksheets — this is hands-on teaching.
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> First we take numerical cubes (i.e.: dice) to add, subtract, multiply and divide. Think of the cute little math games you can play. The teacher just listens and watches the kids take their little cubes and record the results. Just imagine all 22 of these little darlings throwing their cubes.
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> Next they gave us the FLU (don't sneeze, it's not that kind of flu), F=flat, a square piece of paper with a grid to show 100; L=line, a rectangular piece to show 10; and U=unit, a cube that represents one. Lines and cubes are good to throw around the room- this helps teach addition and subtraction or, was it divide and conquer?
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> Remember word problems? Mary wants to buy a toy. She has a quarter, 5 nickels, 5 dimes, and 5 pennies in her pocket. How many ways can she make a $1.00? Complete the chart. "Why?" the children ask, "doesn't Mary have a credit card?"

Her e-mail left me in tears and thanking the powers that be for sparing me from new and greater mathematical challenges in my life. Silly me…

Just a few days later, I was asked to create a chart to support our new value defense in a preference action. New value? Preference? Oh joy …not only a new vocabulary, but the Bankruptcy Code has its very own version of new math. This was not going to be your basic "debits — left, credits — right" exercise.

So now you ask, what is a preference action? Let's begin with the vocabulary of preferences:

- **Antecedent debt:** existing indebtedness owing by the debtor to the creditor
- **Avoid:** to recover certain transfers of property of the debtor, or obligations incurred by the debtor
- **Exposure:** the amount of the payment minus the new value
- **New value:** money or value in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation 11 U.S.C. §547(a)(2)
- **Preferential transfer:** a transfer made by the debtor to the creditor, on account of an antecedent debt, during the 90 days preceding the bankruptcy filing

The Bankruptcy Code

The Bankruptcy Code empowers the Trustee to file an action to avoid payments made by the debtor to the creditor, on account of an antecedent debt, during the 90 days preceding its bankruptcy filing, and that these payments allowed the creditor to receive more on account of that debt than it would have in a Chapter 7 liquidation. *11 U.S.C § 544 (b) (1) and 11 U.S.C §547(b)*

Maybe not so simple. Let's try that again. In order for The Trustee to recover a preference, (s)he must prove the existence of the following elements:

- The debtor transferred property for the benefit of the unsecured creditor;
- The transfer occurred within 90 days of the bankruptcy filing; *(or up to one year if the transfer was made to officers, directors, affiliated companies or shareholders of the Debtor)*
- The transfer was made for existing indebtedness (antecedent debt);
- The debtor was insolvent at the time of the transfer (liabilities exceeded assets), and

- The transfer allowed the creditor to recover more than it would have received in a Chapter 7 liquidation.

In other words, a preferential transfer could conceivably include nearly every transfer by an insolvent debtor during the preference period.

Once the Trustee has identified such transactions, (s)he will file an adversary proceeding against the creditor. At this point, the creditor (creditor's counsel) will review the alleged preferential transfers to determine the potential exposure and choose a defense strategy.

The Code provides several possible defenses to preference actions. Among these is the "new value" defense (also known as the "subsequent new value" defense) and is set forth in 11 U.S.C. §547(c)(4). Under its terms, certain key elements must be satisfied to take advantage of this "new value" or "subsequent value" defense, including: (1) receipt by the creditor of a transfer that is, except for the new value exception, a preference, (2) after receiving the preference, the creditor must advance product to the debtor on an unsecured basis, and (3) the creditor must not have received full payment for the product which was advanced before debtor filed for bankruptcy.

Unraveling the Codes

So, what does that mean? As the creditor, you must prove that the value of the unpaid receivables — those goods and services supplied to the debtor, which remained unpaid for at the time of the bankruptcy filing — can be offset against any potentially preferential payments. This "new value" must be supplied after receipt of the alleged preferential payment.

For example, the debtor, D. Linquent, makes a payment in the amount of $10,000.00 to the creditor, Cyndy Moneyplease, who then delivers $10,000.00 worth of whatchamawhozits. Ms. Moneyplease should be allowed to keep the $10,000.00 payment because she subsequently delivered an amount of product to D. Linquent equal to what she received. If Ms. Moneyplease delivered the whatchamawhozits and had to return the payment, she would be out $10,000.00 worth of whatchamawhozits AND the payment she received from D. Linquent. This inequality is avoided with the subsequent new value defense by allowing the transfer of payment and product to cancel out one another.

But what happens when Ms. Moneyplease receives payment from D. Linquent that exceeds the value of the shipment of whatchamawhozits? For example, if Ms. Moneyplease receives a payment of $10,000.00 but only delivers $5,000.00 worth of whatchamawhozits, then she would have to return $5,000.00 because D. Linquent received whatchamawhozits (new value) for $5,000.00 of the $10,000.00 payment. The remaining $5,000.00 must be returned because no new value was received. If the $5,000.00 were not returned, Ms. Moneyplease would have received a $5,000.00 preference over the other unsecured creditors.

The easiest way to calculate a creditor's new value defense is to create a chart comparing the dates of transfers of money with the dates on which goods or services were provided to the debtor. Such a chart will show the amount of new value and by how much the preference exposure may be reduced.

The chart below begins with the first transfer that D. Linquent is trying to recover. Deduct the amount of whatchamawhozits delivered on or after the date of the payment from the first allegedly preferential transfer or payment – remember, the whatchamawhozits must have been delivered after receipt of the payment. For instance, if D. Linquent delivered three payments to Cyndy Moneyplease during the preference period, on January 1, February 1, and March 1, then only those whatchamawhozits which were delivered on or after January 1 may be deducted from the January 1 payment. If the value of the whatchamawhozits delivered does not exceed the amount of the transfer, then there will be a preference exposure for that difference.

When deducting the value of the whatchamawhozits delivered from the amount of the allegedly preferential transfer, remember to add or subtract additional transfers to or from the amount of exposure after conducting the new value calculations until the exposure is $0.00. The preference exposure can never be below $0.00 because that would allow deliveries to be offset subsequent payments, see chart below.

THE CODE PROVIDES SEVERAL POSSIBLE DEFENSES TO PREFERENCE ACTIONS. AMONG THESE IS THE "NEW VALUE" DEFENSE (ALSO KNOWN AS THE "SUBSEQUENT NEW VALUE" DEFENSE) ...

It is important to note that the new value defense only allows deliveries to be applied to payments made before the delivery. Since there were no other deliveries after March 18, Cyndy Moneyplease's exposure after considering the subsequent new value defense is $500.00.

Not bad for one as mathematically challenged as myself … Mom will be so pleased.

A paralegal since 1983, Pamela Starr began her career as an independent contractor in Houston, working in various areas of law. She is currently a paralegal in the Commercial and Bankruptcy/Creditors' Rights practice groups at Miller & Martin PLLC in Atlanta.

A Texas native, Starr was a member of the Legal Assistants Division of the State Bar of Texas. She has been a member of the Georgia Association of Paralegals since 2000 and is currently serving her second term on its Board of Directors as Vice President of Membership. Starr received a Bachelor of Arts from the University of Texas at Austin and Paralegal Certification from Southwestern Paralegal Institute in Houston, Texas in 1983, and is a candidate for a Master's of Public Administration from Kennesaw State University.

Payment Date	Payment Amount	New Value (Delivery) Date	New Value (Delivery) Amount	Exposure
January 1	$10.000.00	January 08	$5,000.00	$5,000.00
		January 15	$1,500.00	$3,500.00
February 1	$20,000.00			$23,500.00
		February 07	$10,500.00	$13,000.00
		February 16	$6,000.00	$7,000.00
		February 23	$8,000.00	$0.00
March 1	$5,000.00			$5,000.00
		March 05	$1,500.00	$3,500.00
		March 18	$3,000.00	$500.00

Resources

- **www.mathematicallycorrect.com —** New Math: A change in the perspective of mathematics education in the early '60s that emphasized set theory, and has nothing to do with the changes to math education today
- **Whole Math:** The current revolution in mathematics curriculum, akin to the Whole Language experiment, that emphasizes group discussion, essays, calculators and guessing and de-emphasizes basic skills and direct instruction
- *Ibid. New-New Math:* Another term for Whole Math, used in the San Francisco Chronicle.