Maine Law Review

Volume 45 | Number 1 Article 4

June 1993

Payments by Check as Voidable Preferences: The Impact of Barnhill v. Johnson

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PAYMENTS BY CHECK AS VOIDABLE PREFERENCES: THE IMPACT OF *BARNHILL v. JOHNSON*

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I. Introduction

Under the Bankruptcy Reform Act of 1978 (the Code)[1], the trustee in bankruptcy has the duty to seek to avoid "preferential" transfers of the debtor's property made ninety days or less before the date of the filing of the bankruptcy case.[2] Because of the delay that may occur between the time a check in payment of a debt is delivered by the debtor and when it is honored by the drawee bank, determining when the transfer was made to the payee-creditor has been a difficult issue for courts to resolve.[3]

The Supreme Court recently addressed this problem when it ruled, in *Barnhill v. Johnson*, that the date of honor of the check is the transfer date for purposes of preference law.[4] The Court's decision, however, has the potential to create significant practical problems because it frustrates general bankruptcy policy, it creates a conflict with existing preference exceptions law, and it is inconsistent with general commercial practice.[5]

In explaining these conclusions, this Article first considers the policies and goals of bankruptcy preference law. It then explores the language of the preference statute and analyzes the application of

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

2. 11 U.S.C. § 547(b) (1988). For the full text of § 547(b), see *infra* note 13. For a discussion of other code sections discussing the right to avoid preferential transfers, see *infra* note 20. For a discussion of the goals of preference law, see *infra* text accompanying notes 9-29. For a discussion of the preferential time periods, see *infra* note 15 and accompanying text.

3. For a discussion of circuit court cases deciding this issue see *infra* note 78. For a thorough analysis of those cases see Susan E. Bindler, Comment, *The Effective Date of a Transfer by Check Under Section 547(b) of the Bankruptcy Code: Transfer upon Delivery or Honor?*, 70 Wash. U. L.Q. 209 (1992); Kenneth D. Ferguson, *Does Payment by Check Constitute a Transfer upon Delivery or Payment?*, 64 Am. Bankr. L.J. 93 (1990); 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; Azita Gorton, Note, *Timing of Payments by Check Under Section 547 of the Bankruptcy Code*, 7 Cardozo L. Rev. 887 (1986); Nan S. Ellis, *Preferential Payments by Check: At What Point Is Payment Made?*, 16 UCC L.J. 46 (1983).

4. Barnhill v. Johnson, 112 S. Ct. 1386 (1992).

5. *See infra* text accompanying notes 107-29.

the statute to transfers by check. Next, this Article examines the recent Supreme Court opinion deciding the issue of the transfer date for payments by check and the dissenting opinion of Justice Stevens, with whom Justice Blackmun joined. This Article then discusses the potential problems that the Court's decision creates. Finally, this article recommends that Congress revise the Bankruptcy Code to adopt the "date of delivery" rule for the effective date of check transfers in view of the problems that the "date of honor" rule will create.

A. Bankruptcy Preferences

A preferential transfer under the Bankruptcy Code is a transfer of a debtor's property made by the debtor to or for the benefit of a creditor that has the effect of favoring or preferring that creditor over other creditors similarly situated. It is quite common for debtors to make preferential transfers, and outside of bankruptcy they are generally acceptable and not avoidable.[6]

Preferential transfers are not avoidable under the common law[7] primarily because the debt collection process under the common law is based on a "first in time, first in right" principle.[8] This principle is not upset by a debtor's decision to prefer certain creditors over others. Under the common law, creditors are expected to handle their own debt collection and are not expected to act with consideration for how their actions may affect other creditors.[9]

The "first in time, first in right" approach to debt collection encourages creditors to put pressure on their debtors to pay them first. Financially strapped debtors, who otherwise might decide to pay

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6. *See, e.g.*, Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 715 (1985); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 756-58 (1984). Under some state statutes, certain transfers may be avoidable because they are preferential. *See, e.g.*, ALA. CODE § 27-32-27 (1975); ARIZ. REV. STAT. ANN. § 20-636 (1990); ARK. CODE ANN. § 23-68-125 (1987); DEL. CODE ANN. tit. 18, § 5925 (1974).

7. *See, e.g.*, DOUGLAS G. BAIRD & THOMAS H. JACKSON, BANKRUPTCY 417-18 (2d ed. 1990) (quoting Shelly v. Boothe, 73 Mo. 74 (1880)) (discussing the nonbankruptcy rule of debt collection); 2 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 376-84 (rev. ed. 1940) (contrasting the roles of fraudulent conveyance law and preference law in the debt collection process); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986) (noting that preference law did not evolve out of prebankruptcy law).

8. *See generally* DAVID G. EPSTEIN ET AL., DEBTORS AND CREDITORS 705 (3d ed. 1987) (discussing the differences between bankruptcy law and state debtor-creditor laws); THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 122-23 (1986) (discussing the differences between an individual collection system and a collective collection system); JAMES J. WHITE, BANKRUPTCY AND CREDITORS' RIGHTS 5 (1985) (discussing the Anglo-American rule of priority).

9. *See, e.g.*, EPSTEIN, *supra* note 8 at 705; Countryman, *supra* note 6 at 715; JACKSON, *supra* note 8 at 8-9.

each of the creditors some portion of the debt owed, may decide to pay the creditors with the greatest leverage all of what is due and to pay none of what is due to other creditors. This debt collection process encourages that kind of pressure from creditors and does not discourage preferential payments from debtors.

One result of this "first in time, first in right" system is the hastened demise of the financially weak debtor.[10] In addition, it assures the demise of other similarly vulnerable debtors who might otherwise have become financially solvent after a period of time. As soon as each creditor realizes that the debtor is having financial trouble and may have more debts than assets, the creditor pressures the debtor for payment of its debt. Under this system, the creditor cannot afford to waste any time in making its demand because the debtor's assets may be exhausted before the debt is paid. As a result, the debtor is besieged with creditor demands for payment, each one wanting to be paid ahead of the others and before the "roof falls in." With all of the collective demands for payment being made at virtually the same time, it is not long before the individual debtor is completely penniless and the business debtor's firm has totally collapsed.

One of the fundamental purposes of the Bankruptcy Code[11] is the elimination of incentives for creditors to demand and receive preferential transfers on the eve of bankruptcy.[12] Often, financially troubled debtors who may have had a chance at survival suffer a premature demise or dismantling of assets because their creditors put pressure on them for immediate payment as soon as they learn of the financial difficulty. It seems that these creditors often learn of the debtor's financially precarious condition almost simultaneously. When their demands for payment cannot be met, the creditors, all at virtually the same time, stop doing business with the financially embarrassed debtor. As a result, the debtor's business immediately fails. If payment of antecedent debts made during the period when the debtor is having financial trouble are made risky to receive because they are subject to subsequent avoidance, creditors will be less likely to put pressure on the debtor during that vulnerable period

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10. *See generally* JACKSON, *supra* note 8 at 11-19 (discussing various effects of the "first in time, first in right" system on debtors' assets and on creditors).

11. 11 U.S.C. §§ 101-1330 (1988) [hereinafter Bankruptcy Code or Code]. For a general discussion of the 1978 Bankruptcy Code and its legislative history see Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275 (1980).

12. *See, e.g.*, Countryman, *supra* note 6; Jackson, *supra* note 6; Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 U.C.L.A. L. REV. 953 (1981); C. Robert Morris, *Bankruptcy Law Reform: Preferences, Secret Liens and Floating Liens*, 54 MINN. L. REV. 737 (1970); Charles Seligson, *The Code and the Bankruptcy Act: Three Views on Preferences and After-Acquired Property (pt. 3)*, 42 N.Y.U. L. REV. 292 (1967).

for payment.

Another reason for the elimination of preferential transfers under the Bankruptcy Code[13] is the basic difference between its approach to the debt collection process and that found under state law. The debt collection process of the Bankruptcy Code is based on a collective asset distribution system that seeks to maximize payment to creditors as a group through their cooperative efforts rather than through their individual efforts.[14] The Bankruptcy Code replaces the "first in time, first in right" scheme, found under state law, with an orderly process of gathering and liquidating all of the non-exempt assets of the debtor for the benefit of all of the debtor's creditors. The Bankruptcy Code's process seeks to treat the creditors in an equitable manner consistent with their original bargain with the debtor and without regard to any last-minute grabs on the debtor's property made in anticipation of the bankruptcy filing.

"Last minute," for purposes of determining which transfers are the objectionable "last minute grabs" of the debtor's property that should be avoided, has been determined to be ninety days before the date of the filing of the bankruptcy petition.[15] Bankruptcy preference law traditionally has chosen *per se* rules rather than general standards in determining what transfers are objectionable and subject to avoidance.[16] The ninety day period is one of those rules. It is designed to be broad enough to capture all of the transfers held to

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13. 11 U.S.C. § 547(b) (1988) provides for the avoidance of certain preferential transfers:

> (b) 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 date of the filing of the petition, if such creditor at the time of such transfer 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.

14. *See, e.g.*, BAIRD & JACKSON, *supra* note 7, at 39-43; EPSTEIN ET AL., *supra* note 8, at 705; WHITE, *supra* note 8, at 29-30; Note, *Preferential Transfers and the Value of the Insolvent Firm*, 87 YALE L.J. 1449 (1978).

15. 11 U.S.C. § 547 (b)(4)(B) (1988), increases the time period to one year in the case of a person determined under the Code to be an "insider," a defined term at 11 U.S.C. § 101(30) (1988).

16. *See* DOUGLAS G. BAIRD & THOMAS H. JACKSON, SECURITY INTERESTS IN PERSONAL PROPERTY 509-10 (2d ed. 1987).

be objectionable, *i.e.*, those transfers made in anticipation of the debtor's bankruptcy filing that have the effect of improving a particular creditor's status within the Bankruptcy Code's established scheme of distribution. Transfers made prior to the ninety day period preceding the date of filing of the bankruptcy petition are thought to be less objectionable, and thus less apt to affect the Bankruptcy Code's distribution scheme because they are likely to have been made without any effort to be paid ahead of other creditors.[17] For although the intent of the parties regarding the transfer is unimportant under the Bankruptcy Code, efforts by creditors to evade its distribution scheme remain a concern.[18]

Congress recognized that not all transfers that meet the technical requirements under its preference rule are subject to avoidance. To deal with the overbroad effect of the general preference rule, provisions were added to except those transfers that are not objectionable.[19] The transfers found unobjectionable are those that have the effect of providing additional goods or services to the debtor or that have the effect of encouraging creditors to continue doing business with an insolvent debtor.[20]

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17. *See generally* Countryman, *supra* note 6, at 716-18.

18. *See generally* Jackson, *supra* note 8, at 122-38; Countryman, *supra* note 6, at 725; John C. McCoid, II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249, 257-59 (1981).

19. *See* 11 U.S.C. § 547(c) (1988). For a general discussion of the preference exceptions see also Countryman, *supra* note 6, at 758-816; Michael A. Bloom, Richard D. Gorelick, Heather A. MacKenzie, *Exceptions to Bankruptcy Preferences: Countryman Updated*, 47 The Business Lawyer 529 (1992).

20. The following briefly describes the purpose of the seven preference exceptions provided for under § 547(c):

(c)(1) is referred to as the contemporaneous exchange rule because it excepts transfers that were not intended as credit transactions but which became such because of a delay between the time the payment was made and the goods or services were delivered. This provision is often applied to except payments by check which were given as the goods or services were delivered but because of the delay between the delivery of the check and the honoring of the check created a preferential transfer which was subject to avoidance;

(c)(2) is referred to as the ordinary course of business exception because it provides a safe harbor for transfers made in accordance with usual business terms such as the payment of utility service bills which are technically preferential because the services were rendered and became due and owing prior to the payment;

(c)(3) is referred to as the purchase money exception because it excepts transfers that enable debtors to acquire additional assets;

(c)(4) is referred to as the new value exception because it provides a safe harbor for creditors who after receiving a preferential transfer gave new value on an unsecured basis to the debtor but only to the extent of the new value given;

(c)(5) provides an exception for preferential transfers of inventory or accounts except to the extent that they cause an improvement of the creditor's position as measured on the date of the filing of the petition and the ninetieth day pre-petition;

(c)(6) provides an exception for statutory liens that are unavoidable under other conditions and which therefore are considered unobjectionable;

When creditors receive preferential transfers, the equitable distribution process is disturbed and the preferential payments must be recovered to ensure the fulfillment of the Bankruptcy Code's goal of equal sharing of the debtor's non-exempt assets among the classes of creditors.[21] The trustee's power to avoid preferential transfers[22] is designed to deny particular creditors any incentive to take action on their own to the detriment of creditors as a whole.[23] Thus, bankruptcy preference law seeks to eliminate any incentive for creditors to seek an advantage over other creditors or for debtors to give an advantage to some creditors over others on the eve of bankruptcy. Preference law is designed to promote the equal distribution of assets among creditors with similar status and to decrease, in general, the frantic activity among the debtor's creditors on the eve of bankruptcy.[24]

Under the Bankruptcy Code, for persons who are not insiders,[25] a transfer will be a voidable preference if certain statutory conditions are met. There must be a transfer of an interest of the debtor in property that was made to or for the benefit of a creditor during the ninety day period before the date of the filing of bankruptcy on account of an antecedent debt at a time when the debtor was insolvent. In addition, the transfer must have enabled the creditor to receive more than it would have received without the transfer had the debtor filed a Chapter 7 case.[26]

(c)(7) provides an exception for transfers of less than $600 in value where the debtor is an individual with primarily consumer debts.

21. *See supra* note 12 and accompanying text.

22. 11 U.S.C. § 547(b) (1988) provides the trustee with the power to avoid preferential transfers. 11 U.S.C. § 1107(a) (1988) provides that a debtor in possession in a reorganization case, Chapter 11, under the Bankruptcy Code shall have all of the rights and powers of a trustee, thus enabling a debtor in possession to avoid preferential transfers in a reorganization case. A debtor in possession is simply the debtor in a reorganization case in which no trustee has been appointed. 11 U.S.C. § 1101(i) (1988). A debtor who is not a debtor in possession does not have the power to avoid preferential transfers except when the property may be exempt. *See* 11 U.S.C. § 522(h) (1988); 4 William M. Collier, Collier on Bankruptcy, ¶ 547.21[3], at 547-91 (Lawrence P. King et al. eds., 15th ed. 1992).

The creditors' committee in a reorganization case may have the power to pursue the avoidance of preferential transfers in cases in which the trustee or debtor in possession wrongfully refuses to do so. *See* 4 Collier, ¶ 547.21[4] (collecting cases).

23. *See supra* note 10 and accompanying text.

24. *Id.*

25. 11 U.S.C. § 547(b)(4)(B) provides an extended reach-back period of one year for transfers to insiders. Insiders may have access to information about the debtor's financial condition at an earlier time than non-insiders and are likely to receive preferential transfers earlier. *See, e.g.*, Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989); John Tuskey, Note, *The Term Insider Within Section 547(b)(4)(B) of the Bankruptcy Code*, 57 Notre Dame L. Rev. 726 (1982). 11 U.S.C. § 101(30) defines insiders to include relatives and partners of individual debtors and directors, officers, partners and relatives of those of corporate debtors.

26. For full text of the preference provision, see *supra* note 13.

The preference provision of the Bankruptcy Code seeks to identify any disposition of the debtor's property that has the effect of allowing the preferred creditor to place itself in a different and better position with regard to its debt and to other creditors than it would have been in absent the transfer.[27] The ninety day preference period is an arbitrary number of days but the general time period appears well-suited for the purpose of providing the trustee with the power to avoid transfers made during a time when creditors are likely to suspect that a bankruptcy filing is imminent and are thus likely to put pressure on debtors to make preferential payments to them. It also serves to put creditors on notice that their transactions with debtors on the brink of the debtors filing bankruptcy may be subsequently avoided by the trustee.

The burden is on the trustee to prove the existence of each of the technical elements of an avoidable preference.[28] The trustee usually has little difficulty meeting the insolvency element because insolvency is presumed under the statute during the ninety day period.[29] Generally it is not difficult for the trustee to show that immediately preceding the filing of the bankruptcy petition a creditor received a transfer or benefitted from it. In cases in which the preferred creditor is not fully secured and the debtor cannot pay 100 percent of its debts, the trustee will ordinarily be able to prove that the creditor received more than it would have received without the transfer if there were liquidation under Chapter 7 of the Bankruptcy Code.[30]

It is not always easy, however, for the trustee to identify exactly what property was transferred and when the transfer occurred for purposes of the preference provision. Determining the effective date of the transfer is crucial for the purpose of meeting the ninety day period requirement as well as for purposes of meeting the antecedent debt requirement. It is essential to the trustee's proof that the trustee, *inter alia*, establish that the debtor has transferred some property interest.[31] However, determining whether what was transferred was actually an "interest of the debtor in property" and when

27. *See Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. 1, at 18-19 (1973) [hereinafter Commission Report].

28. 11 U.S.C. § 547(g) (1988). This section provides in pertinent part: "(g) the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section." *See, e.g.*, Moran Bros., Inc. v. Yinger, 323 F.2d 699, 701 (10th Cir. 1963); Brown v. Callaway Bank (*In re* Meritt), 7 B.R. 876, 879 (Bankr. W.D. Mo. 1980).

29. 11 U.S.C. § 547(f) (1988) provides in pertinent part: "the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition."

30. *See* Countryman, *supra* note 6, at 736.

31. 11 U.S.C. § 547(b) (1988) ("the trustee may avoid any transfer of an interest of the debtor in property").

it was transferred can be difficult.

B. Transfer of an Interest of the Debtor in Property

To avoid a preference, the trustee must prove that a transfer of an interest of the debtor in property occurred.[32] The preference provision, however, does not define the term "transfer." Either Congress assumed the meaning of the term to be self-evident or intended that the definition provided elsewhere in the Bankruptcy Code should prevail.

The courts have accepted as the proper definition of "transfer" within the preference provision the very broad definition contained in the general provisions section of the Bankruptcy Code.[33] "Transfer" includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . ."[34] That broad definition provides that every possible means of disposing of property will be considered a transfer. The definition seeks to make it clear that the disposition does not have to be of tangible property—it includes an interest in intangible property as well. That definition, with its use of the all-encompassing term "every" and other terms that evidence a desire to include the greatest range of possibilities, such as "direct or indirect," "absolute or conditional," "voluntary or involuntary," is a very broad definition.[35]

This broad definition of "transfer" existed under the Code's predecessor, the Bankruptcy Act.[36] In preference cases under the Bankruptcy Act, courts applied this very broad definition of "transfer."[37]

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32. *Id.*

33. *See, e.g.*, Barnhill v. Johnson, 112 S. Ct. 1386, 1389-91 (1992); Global Distrib. Network, Inc. v. Star Expansion Co., 949 F.2d 910, 912-13 (7th Cir. 1991); Newton Exploration Co., Inc. v. Fredman, 92 B.R. 416, 418-19 (Bankr. 9th Cir. 1988); *In re* Duffy, 3 B.R. 263, 265 (Bankr. S.D.N.Y. 1980).

34. 11 U.S.C.A. § 101(54) (West Supp. 1992). This definition of "transfer" is used to define that term as used in § 547, the preference provision; § 522(f), the lien avoidance provision; § 544, the trustee's avoidance powers through its hypothetical lien creditor and unsecured creditor status; § 548, the fraudulent transfer provision; and § 549, post-petition transactions.

35. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 314 (1977) (Congress intended this term to be "as broad as possible").

36. Bankruptcy Act of 1898, ch. 541, § 1(25), 30 Stat. 545 (1898) (codified as amended at 11 U.S.C.A. § 101(54) (West Supp. 1992)) [hereinafter the Act] provided:

> shall include the sale and every other and different mode of disposing of or parting with property,or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security;. . . .

See 3 WILLIAM M. COLLIER, COLLIER ON BANKRUPTCY, part 2, ¶ 60.07[1] at 786 (14th ed. 1988) (discussing the comprehensive nature of the definition of the term "transfer" under the Act.).

37. *See, e.g.*, National Bank of Newport v. National Herkimer County Bank, 225 U.S. 178, 184 (1912); Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 443-44 (1901); New Jersey Nat'l Bank v. Gutterman (*In re* Applied Logic), 576 F.2d 952, 962 (2d

After appointing a Commission[38] to study, analyze, evaluate, and recommend changes in the Act, Congress adopted the revised Bankruptcy Code.[39] The Bankruptcy Code as finally drafted by Congress contained no separate definition of "transfer" in the preference provision nor was one recommended by the Commission. The definition of transfer in the general provision of the Bankruptcy Code remained a very broad one just as it existed in the Act.[40] Apparently, neither the Commission nor Congress saw a need to change the broad definition of "transfer" for preference purposes. Congress accepted this broad definition of "transfer," effectively deciding to be over-inclusive thereby discouraging creditors from taking preferential transfers.

Congress did add a provision to the Bankruptcy Code under the preference law, now codified as section 547(e)(2) of title eleven of the United States Code, describing *when* a transfer is made.[41] This provision allows creditors a ten day grace period within which they may take any steps needed to protect their interests in property transferred from the debtor.[42] If all necessary steps "to perfect" the transfer are taken within the ten day period, the transfer is deemed to have occurred on the date the transaction or conveyance became effective between the debtor and the creditor.[43] If the steps are taken more than ten days after the effective date, the transfer is deemed to have occurred on the date the steps to perfect the transaction were finally taken.[44]

In section 547(c)(2), the Bankruptcy Code uses the term "perfected" to describe how to determine the time at which the transfer is made. There is, however, no definition of the term "perfection" in the Bankruptcy Code. Under the Uniform Commercial Code, this

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Cir. 1978); Katz v. First Nat'l Bank of Glen Head, 568 F.2d 964, 969 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

38. Bankruptcy Study Commission, Pub. L. No. 91-354, 84 Stat. 468 (1970).

39. 11 U.S.C. §§ 101-1330 (1978). After the Commission completed its study of the Act, it filed a two-part report with its findings, recommendations and a proposed bill which Congress adopted, with major change. Commission Report, *supra* note 27, pts. 1,2 (1973).

40. 11 U.S.C. § 101(40) (1978).

41. 11 U.S.C. § 547(e)(2) provides, in relevant part:

> (2) For the purposes of this section, . . . a transfer is made-
>
> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;
>
> (B) at the time such transfer is perfected, if such transfer is perfected after such 10 days;. . . .

42. *Id.*

43. *Id.*

44. *Id. See also*, Brown v. Callaway Bank (*In re* Meritt), 7 B.R. at 878 (applying § 547(e) to a security interest to determine when the transfer was "made").

term refers to security interests;[45] however, section 547(e) is neither expressly nor implicitly limited to the determination of the transfer date for security interests. Section 547(e) expressly states that it applies to all of section 547, not only those parts applicable to security interests.[46] A cursory review of section 547 reveals that it involves a broader range of transfers than security interests, although many courts have interpreted the section to apply only to security interests.[47]

A reasonable interpretation of the term "perfected" as used in subsection 547(e) is that it refers to the condition that exists when one has an interest in property that cannot be defeated by after-acquired rights of third parties. In subsections 547(e)(1)(A) and (B), the Bankruptcy Code uses just that kind of analysis to identify when a transfer of real property, fixtures, and property other than real property is perfected.[48] In each instance, subsections 547(e)(1)(A) and (B) establish that transfers of those interests are made only when no third party can acquire a superior interest. Under this analysis, "perfection," as used in this provision, may refer to the honoring of a check—the step necessary for a payee on a check to acquire an interest in the debtor's bank account that cannot be defeated by third parties.[49]

Since this broad definition of transfer includes conditional as well as absolute dispositions of property, a transfer may occur while the disposition of the interest in property is still contingent upon the occurrence of some other event. Assuming that the later event occurs, the date of transfer, pursuant to section 547(e), for purposes of the preference avoidance provision, might be deemed to relate back to the date when the disposition was still conditional.

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45. U.C.C. §§ 9-301 to 9-306 (1972).

46. Both §§ 547(e)(1) and (2) begin "For the purposes of *this* section . . ." (emphasis added, referring to *all* of § 547 rather than § 547(c)(3), the only portion of the preference provision that applies exclusively to security interests).

47. *See, e.g.*, O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35, 38 (1st Cir. 1984); Chaitman v. Chicago Boiler Co. (*In re* Almarc Mfg., Inc.), 52 B.R. 582, 584 (Bankr. N.D. Ill. 1985); Franzwa v. Pro Sales, Inc. (*In re* Walker Indus. Auctioneers, Inc.), 45 B.R. 452, 454 (Bankr. D. Or. 1984).

48. §§ 547(e)(1)(A) and (B) provide, in pertinent part:

> (e)(1) For the purposes of this section—
>
> (A) a transfer of real property other than fixtures, . . . is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and
>
> (B) 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.

49. *See* Barnhill v. Johnson, 112 S.Ct. 1386, 1393 (1992) (Justice Stevens, in a dissenting opinion, argued that under § 547(e)(1)(8), a check is perfected when it is honored).

Checks

A satisfactory resolution of the problem of determining when a transfer by check is made, when it is delivered or when it is honored should take into account the legal significance of the use of checks in commercial transactions. This, in turn, requires a careful consideration of the statutory law governing the use of checks and the economic implications of check transactions.

Checks are a form of negotiable instruments and are governed under Article 3 of the Uniform Commercial Code.[50] Under Article 3, checks are drafts—orders directing payment drawn on banks and are payable on demand.[51] A debtor who gives a creditor a check in payment of a debt is using the check as a "mode of . . . disposing of property"[52]—the funds in the debtor's account. The debtor is giving the creditor the means to receive the debtor's funds in the account. After the creditor has accepted the check in payment of the debt, under Article 3, the debtor's liability on the debt is suspended until the check is dishonored or paid.[53] Thus, receipt of the check may be viewed as payment of the debt subject only to the bank's dishonor of the check. A creditor who accepts a check in payment of a debt

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50. UNIFORM COMMERCIAL CODE, 2 U.L.A. 5 (1991) [hereinafter U.C.C.].

51. U.C.C. § 3-104(2)(b) (1896); U.C.C. § 3-104(f) (1991) (same principle stated in slightly different language).

52. 11 U.S.C.A. § 101(54) (West Supp. 1992).

53. *See* U.C.C. § 3-802(1)(b) (1896) and Official Comment 3 which provide, in relevant part:

> (1) Unless otherwise agreed where an instrument is taken for an underlying obligation
>
> . . .
>
> (b) . . . the obligation is suspended pro tanto . . . until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation . . . .

Comment 3.

> It is commonly said that a check or other negotiable instrument is "conditional payment." By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation . . . . On dishonor of the instrument the holder is given his option to sue either on the instrument or on the underlying obligation.

U.C.C. § 3-310(b)(1) (1990) states the same principle, but in more detail:

> (b) . . . if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:
>
> (1) In the case of an uncertified check, *suspension of the obligation continues until dishonor of the check* or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check. (emphasis added)

The underlying obligation is discharged, not suspended, when the check that is delivered is certified, *i.e.*, accepted by the drawee. *See* U.C.C. § 3-802(1)(a) (1896) and U.C.C. § 3-310(a) and (c) (1990). All references to checks in this article are to checks that have not been certified.

must make a demand for payment on the bank and the check must be honored by the bank if the creditor is to actually receive the funds or have its account credited.[54]

Should the bank dishonor the check, the creditor acquires a cause of action against the debtor on the check.[55] The creditor, therefore, acquires a conditional cause of action on the check when it accepts the check for payment with dishonor as the condition.[56]

From a practical perspective, a creditor receives more than a mere conditional cause of action upon delivery of the check. A debtor with severe financial problems may seek temporary relief from the pressure for repayment from a creditor by, for example, delivering a check to the creditor with every intention of making a stop payment order[57] to the bank before the creditor presents the check for payment. If the creditor presents the check and the bank honors it before the stop payment order is made or becomes effective, the creditor will receive the debtor's funds. When the debtor delivers the check to the creditor, the creditor does receive something of value from the debtor: the right to present the check and to make demand for payment from the bank—a mode of obtaining the debtor's property. The debtor gives up something when it delivers the check: plenary control of the funds in the account.

The real question then is whether what the creditor receives and what the debtor gives up is an "interest of the debtor in property" within the meaning of the preference provisions of the Bankruptcy Code.[58] Does the creditor receive something and does the debtor give up something upon delivery of the check that diminishes what is available in the estate for distribution to creditors as a group?[59]

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54. *See* U.C.C. §§ 3-409(1) and 3-501(1)(a) (1896); §§ 3-408 and 3-501(a) (1990) (same principles stated in slightly different terms). A check may serve as an assignment of the debtor's funds where the debtor and its bank expressly agree that the check should serve as an assignment of funds. *See, e.g., In re* Schenck's Estate, 313 N.Y.S.2d 277, 280 (Sur. Ct. 1970) (when bank was both drawee and payee of the check, the giving of the check to the bank was an assignment of funds when the bank and the drawer so intended).

55. *See* U.C.C. § 3-122(3) (1896). Revised Article 3 states the same principle. However, the Revised Article provides the cause of action against the drawer in the section dealing with the obligations of the drawer. U.C.C. § 3-414 (1990).

56. Upon dishonor, the creditor reacquires a cause of action against the debtor on the underlying debt—the cause of action that was suspended when the check was accepted by the creditor in payment of the debt. *See* U.C.C. § 3-802(1)(b) (1896); U.C.C. § 3-310(b)(3) (1990) (there are only minor differences between the two sections).

57. U.C.C. § 4-403 (1990).

58. *See supra* text accompanying notes 29-34. *See also infra* note 59.

59. Although the term "interest of the debtor in property," as used in § 547(b), is not defined in the Code, courts have held that for purposes of the preference provision a debtor does not have an interest in property if the transfer of that property does not diminish the bankruptcy estate so that fewer assets are available for distribution to general creditors. *See, e.g.,* Danning v. Bozek (*In re* Bullion Reserve of N.

When the broad definition of transfer in section 101(58), and when section 547(e), the provision which defines *when* a transfer is made, are applied to transactions made by check, the answer to that question is yes.

Section 547(e) provides that a transfer is made at the time it takes effect between the parties if perfected within ten days of that date. In commercial transactions, payments by check become effective between the parties at the time the check is delivered to the creditor because in those transactions a debt paid by check is treated as paid on the date of delivery of the check provided the check is subsequently honored in due course.[60] Certainly upon delivery of the check the debtor gives up some of its control over the funds to the creditor. Similarly, the creditor receives the means by which it may obtain the debtor's funds in the account. This renders the delivery of the check effective as a transfer between the parties.

In section 547(e), the term "perfection" may be used to refer to the condition that exists when one has an interest in property that cannot be defeated by third parties.[61] With checks, that condition exists when the check is honored; accordingly, a check should be treated as perfected when it is honored.

Since a check becomes effective between the parties upon the delivery of the check, the application of section 547(e) should dictate that the transfer is made on the delivery date if the check is honored within ten days of that date. Section 547(e), with its ten day grace period, has the effect of causing the estate to be diminished as of the date of delivery of the check inasmuch as the transfer is deemed made on that date.[62]

Am.), 836 F.2d 1214 (9th Cir. 1988); Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351 (5th Cir. 1986); Nicholson v. First Inv. Co., 705 F.2d 410 (11th Cir. 1983); O'Connor v. Tappan (*In re* Souder), 449 F.2d 284 (5th Cir. 1971). *See also* JACKSON, *supra* note 8, at 133 ("[A] transfer of property that is indisputably the debtor's (in the sense that title is located in the debtor) should not presumptively be preferential, where the transfer of that property does not diminish the property that the remaining creditors have to enjoy.").

60. *See, e.g.*, Regents of the University of New Mexico v. Lacey, 764 P.2d 873, 875 (N.M. 1988) (quoting Franciscan Hotel Co. v. Albuquerque Hotel Co., 24 P.2d 718, 726 (N.M. 1933)); Lakeway Co. v. Bravo, 576 S.W.2d 926, 928-29 (Tex. Civ. App. 1979); Ogier v. Pacific Oil & Gas Dev. Corp., 288 P.2d 101, 103-104 (Cal. Dist. Ct. App. 1955); 6 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-802:19 (3d ed. 1984) [hereinafter ANDERSON].

61. *See* notes 48-49 and accompanying text.

62. Several courts have addressed the issue of the applicability of § 547(e) to checks. *See, e.g.*, Global Distrib. Network, Inc. v. Star Expansion Co., 949 F.2d 910 (7th Cir. 1991) (applying § 547(e) to checks); O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35 (1st Cir. 1984) (refusing to apply § 547(e) to checks); McClendon v. Cal-Wood Door (*In re* Wadsworth Bldg. Components, Inc.), 711 F.2d 122 (9th Cir. 1983) (applying § 547(e) to checks); Remes v. Acme Carton Corp. (*In re* Fasano/Harriss Pie Co.), 43 B.R. 871 (Bankr. W.D. Mich. 1984), *aff'd*, 71 B.R. 287 (W.D. Mich. 1987) (refusing to apply § 547(e) to checks); Eisenberg v. J L Int'l, Ltd. (*In re* Sider Ventures &

The Seventh Circuit in *Global Distribution Network v. Star Expansion Co.*[63] applied section 547(e) to a transfer by check and held that the creditor's receipt of the check was the date of transfer for bankruptcy preference purposes if the check was honored within ten days.[64] The court reasoned that the broad definition of "transfer" in section 101(58) included conditional transfers and that checks are conditional transfers of funds at the time of the delivery of the check.[65]

Because conditional as well as absolute transfers are included in the Bankruptcy Code's broad definition of transfer, the Seventh Circuit concluded that a date by which the conditional transfer must become absolute should be established[66] and applied the ten day period of section 547(e). It held that section 547(e) governs all of the preference provisions and that "perfection" as used in section 547(e) refers to the honoring of a check. The court reasoned that "[h]onoring a check 'perfects' the transfer because thereafter 'a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.' "[67] Applying section 547(e) in this manner the Seventh Circuit suggested, eliminates any incentive for the advance delivery of checks as well as any incentive to defer the presentment of the check.[68]

The practice of measuring the payment of a debt paid by check from the date of delivery, when the check is subsequently honored, is common in commercial practice[69] as well as in other areas of the law such as securities,[70] real estate,[71] insurance,[72] elections,[73] and taxation.[74] In *Clark v. Commissioner*,[75] the Third Circuit, construing

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Services Corp.), 33 B.R. 708, 711 (Bankr. S.D.N.Y. 1983), *aff'd*, 47 B.R. 406 (S.D.N.Y. 1985) (applying § 547(e) to checks).

63. 949 F.2d 910 (7th Cir. 1991).

64. *Id.* at 914.

65. *Id.* at 911.

66. *Id.* at 913.

67. *Id.* at 914.

68. *Id.* at 913.

69. *See* 6 ANDERSON, *supra* note 61.

70. *See, e.g.*, Ogier v. Pacific Oil & Gas Dev. Corp., 288 P.2d 101, 103-104 (Cal. Dist. Ct. App. 1955) (when a check is honored in due course, the payment date relates back to the date of delivery of the check).

71. *See, e.g.*, Wayzata Enterprises, Inc. v. Herman, 128 N.W.2d 156, 158 (Minn. 1964) (real estate contract is deemed paid from delivery of check when check is honored in due course).

72. *See, e.g.*, Texas Mut. Life Ins. Ass'n v. Tolbert, 136 S.W.2d 584, 590 (Tex. 1940) (payment of insurance assessment relates back to date of delivery of check when it is honored).

73. *See, e.g.*, United States v. Hankin, 607 F.2d 611, 614 (3d Cir. 1979) (contribution to candidate for federal office is made for purpose of the Federal Election Campaign Act prior to the time a check is deposited).

74. *See, e.g.*, Clark v. Commissioner, 253 F.2d 745, 748 (3d Cir. 1958); Flint v. United States, 237 F. Supp. 551, 553-54 (D. Idaho) (taxes paid upon delivery of check

the Internal Revenue Code, held that expenses paid by check by a taxpayer on a cash basis are deductible for the year in which the checks are delivered, despite the fact that the checks are still outstanding at the end of that year.[76] In explaining its holding, the court noted the conditional, contingent nature of the transaction. It reasoned that:

> [D]elivery of a check will establish the same right to a deduction as would delivery of cash. It does not matter that the check was not cashed or deposited or the drawer's account charged until the following year. The check is regarded as payment on a condition subsequent, and if the condition of honor on presentment is met the payment is regarded as absolute from the time the check was delivered.[77]

Applying section 547(e) to payments by check has the effect of regarding payments by check as transfers subject to a condition subsequent just as the Third Circuit did in *Clark*. When the check is delivered, the debt is deemed paid as of the delivery date subject to a condition subsequent, the bank's dishonor of the check. The ten day grace period of section 547(e) provides the time period for the occurrence of the condition subsequent. The transfer becomes absolute as of the delivery date, if the condition subsequent does not occur.

II. *Barnhill v. Johnson*

In *Barnhill v. Johnson*,[78] the United States Supreme Court con-

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and not deposit); Treas. Reg. § 1.170A-1(b) (as amended in 1990) (a charitable contribution is deemed made on delivery of a check subsequently honored in due course).

75. 253 F.2d 745 (3d Cir. 1958).

76. *Id.* at 748.

77. *Id.*

78. 112 S. Ct. 1386 (1992). This case affirmed the Tenth Circuit, Johnson v. Barnhill (*In re* Antweil), 931 F.2d 689 (10th Cir. 1991), which had held that the date of honor was the transfer date of checks for preference purposes. The Tenth Circuit gave three reasons for holding the date of honor as the transfer date for checks: conformity with the U.C.C., ease of proof, and fulfillment of the purposes of the preference provision. It cited the Bankruptcy Code's desire for conformity with the U.C.C. and the U.C.C.'s provision at § 3-409(1) that a check does not operate as an assignment of funds as one reason for using the honor date rather than the delivery date. It pointed to the fact that the delivery date rule would serve as an inducement for creditors to lie about the date on which the check was received and that the honor date was less easily altered and simpler to prove. Finally, the Tenth Circuit determined that the purpose of § 547(b) was to facilitate equal distribution of the debtor's assets among all of the creditors, while the purpose of § 547(c) was to encourage creditors to continue doing business with the debtor. In the court's opinion, the purpose of § 547(c) was furthered by the date of delivery rule but the purpose of § 547(c) was not. Therefore, no reason existed to use the date of delivery rule in making the preferential transfer determination.

In deciding the *Barnhill* case, the Supreme Court resolved an issue that had divided many courts of appeals and many lower courts for years. The division centered fronted the issue of whether the date of transfer of a check is for preference purposes, the date of honor, or the date of delivery. The Court held that for the purpose of determining the existence of preferential transfers, the date of effective transfer for a check is the date of honor.

In *Barnhill,* Antweil (the debtor) delivered a check to one of the debtor's creditors in payment of an old debt and the creditor immediately presented the check, which was dated November 19,[79] to the drawee bank for payment. The bank honored the check on November 20, the date which became the first day of the ninety-day preference period. The bankruptcy trustee Johnson sought thereafter the return of the payment from the creditor, Barnhill, arguing, *inter*

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around the date of honor rule versus the date of delivery rule; however, some courts adopted variations of those basic rules. For listings of the cases and commentary, particularly the lower courts that have followed the date of honor rule or the date of delivery rule or some variation thereof, see Susan E. Bindler, Comment, *The Effective Date of a Transfer by Check Under Section 547(b) of the Bankruptcy Code: Transfer upon Delivery or Honor?,* 70 WASH. U.L.Q. 209, 213 (1992); Kenneth D. Ferguson, *Does Payment by Check Constitute a Transfer upon Delivery or Payment?,* 64 AM. BANKR. L.J. 93, 94 (1990).

Among the courts of appeal, only the Tenth Circuit in the *Barnhill* case expressly held the date of honor as the transfer date under § 547(b). Although the Eleventh Circuit in Nicholson v. First Inv. Co., 705 F.2d 410 (11th Cir. 1983), held the date of honor as the transfer date, it did so under the former Bankruptcy Act and not the Code. In New York City Shoes, Inc. v. Bentley Int'l, Inc. (*In re* New York City Shoes, Inc.), 880 F.2d 679 (3d Cir. 1989), the Third Circuit expressed the view that the date of honor should be the transfer date, although that was not the holding of the case.

The Seventh, Fourth, Sixth and Ninth Circuits all held the date of delivery as the transfer date for preference purposes under the Code. *E.g.,* Global Distrib. Network, Inc. v. Star Expansion Co., 949 F.2d 910 (7th Cir. 1991) (the transfer date of checks, for preference purposes, is the date the check is received, if it is honored within ten days); Counts v. Wang Lab. Inc. (*In re* Virginia Info. Sys. Corp.), 932 F.2d 338 (4th Cir. 1991) (a transfer of funds by check is effective on the date of delivery reasoning that a stronger policy argument existed in favor of that date over the date of honor and giving recognition to the commercial practice of dating the end of a transaction from the date a check is given in payment of the debt); Official Unsecured Creditors' Comm., Inc. v. Shaler Corp. (*In re* Belknap, Inc.), 909 F.2d 879 (6th Cir. 1990) (transfer of check occurs on date of delivery, which is when check is received by creditor, if the check is presented within thirty days and honored); Robert K. Morrow, Inc. v. Agri-Beef Co. (*In re* Kenitra, Inc.), 797 F.2d 790 (9th Cir. 1986) (transfer of check is date of delivery if check is presented to bank within a reasonable time and honored).

79. After filing an adversary proceeding to recover the alleged preferential transfer, the trustee attempted to amend the complaint arguing that the debtor delivered the check on November 18, but postdated it to November 19. Johnson v. Barnhill (*In re* Antweil), 931 F.2d 689, 691 (10th Cir. 1991). The trustee argued that the date of delivery did not apply to postdated checks. The bankruptcy court refused to allow the trustee to amend the complaint and stated that the date of delivery controlled for postdated checks as well as for non-postdated checks and that in this case since the check was postdated to a date outside of the preference period, the result would be the same. 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. 1991), *aff'd,* 112 S.Ct. 1386 (1992).

alia, that the payment was an avoidable preference because it was a "transfer" made during the preference period inasmuch as the bank honored the check on November 20.[80]

The creditor argued that the payment was not preferential because, although the check was honored on the ninetieth day prior to the petition, the date on which a check is delivered should be the controlling date for bankruptcy preference purposes and here the check had been delivered prior to the commencement of the preference period.[81] The creditor further argued that the delivery of the check represented a conditional transfer of the debtor's funds and that under the Bankruptcy Code's broad definition of transfer, the delivery date should control.[82]

The Supreme Court ruled that the date of honor should govern.[83] The Court concluded that *only* when a check is honored does the debtor dispose of property or an interest in property when the property is funds in the debtor's bank account.[84] The Court reasoned that the creditor gained only a conditional chose in action upon the delivery of the check, not a conditional right to the funds in the account.[85] Although the Court recognized the Bankruptcy Code's broad definition of "transfer," it was unwilling to hold that a conditional transfer of property could include the delivery of a check.[86]

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80. Barnhill v. Johnson, 112 S. Ct. at 1388.

81. *Id.*

82. *Id.* at 1390. In support of its arguments, the creditor cited legislative history that referred not to the general preference provision but to the preference exception provision. *Id.* at 1391. The Court's opinion clearly expressed its failure to be persuaded by the creditor's reference to this part of the legislative history. *Id.*

83. *Id.* at 1390.

84. *Id.*

85. *Id.* at 1390-91.

86. *Id.* The Court did not expand on its refusal to include the delivery of the check as a conditional transfer other than to say that to include what it held was transferred upon the delivery of a check—a conditional chose in action—in the definition of "conditional transfer" of the property "would accomplish a near-limitless expansion of the term 'conditional.' In the absence of any right against the bank or the account, we think the fairer description is that petitioner had received no interest in debtor's property, not that his interest was 'conditional.'" *Id.* at 1391.

Although the Court did not provide any analysis of the term "interest in debtor's property," and although the term "interest of the debtor in property" as used in § 547(b) is not defined in that section, the Court may have interpreted that term to include only property whose transfer diminishes the bankruptcy estate. Many courts and commentators have held that a transfer that technically meets the requirements of § 547(b) but that does not decrease the value of assets available to other creditors is not avoidable because it does not involve "an interest of the debtor in property." Those courts and commentators define the term to include only transfers that cause the diminution of the estate because only transfers that permit one creditor to opt out of the Code's equal distribution process by taking property out of the estate for themselves to the disadvantage of other creditors are objectionable. *See supra* note 59 and accompanying text.

If the Court shared that view of the term and did not find that the check became

The Court purported to apply section 547(e)(2),[87] which describes when a transfer is made, and held that the transfer was not made until the date of honor under section 547(e)(2) because that subsection provides that a transfer is not made until it takes effect between the parties.[88] Under the Court's analysis, the transfer could not have taken effect between the parties before the date of honor because prior to that date the debtor retained sufficient control over the fund to render the check void.[89]

Although the creditor argued that the legislative history provided guidance,[90] the Court determined that there was no reason to resort to the legislative history. The Court cited the lack of "statutory ambiguity" and the reference in the legislative history to section 547(c), the preference exception provisions, rather than to section 547(b), the subsection which determines whether a preferential transfer occurred.[91]

Justice Stevens, dissenting along with Justice Blackmun, argued that the date of delivery should govern when the check is honored within ten days of the delivery date.[92] Justice Stevens looked to section 101(58) to determine *whether* a transfer had occurred and determined that under that subsection's broad definition of transfer, the delivery of a check qualified as a conditional transfer of the right to funds because the check served as a mode of parting with the debtor's property.[93] In his view, section 101(58) provided an answer to whether a transfer occurred but not to *when* the transfer occurred.[94] The answer to that question, according to Justice Stevens, should be determined by applying section 547(e)(2). On the facts of *Barnhill*, that meant that the transfer was made at the time of de-

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effective between the parties at the time of delivery as required under § 547(e) so that the relation back doctrine applies (as it expressly did not find), there is little wonder why it did not hold that an interest of the debtor in property was transferred.

87. Barnhill v. Johnson, 112 S. Ct. at 1391.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* The legislative history of § 547 of the Bankruptcy Code includes an identical statement attributed to Representative Edwards and Senator DeConcini: "[P]ayment 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)." 124 CONG. REC. 32400, 34000 (1978). This statement was made with express reference to the preference exception of the Code and not the general preference provision. See *supra* notes 16-20 and accompanying text for a discussion of the difference between the purposes of § 547(b) and (c).

92. Barnhill v. Johnson, 112 S. Ct. at 1392 (Stevens, J., dissenting). The Seventh Circuit in Global Distribution Network, Inc. v. Star Expansion Co., 949 F.2d 910 (7th Cir. 1991), a case decided only a few months before *Barnhill*, held, as the dissent in *Barnhill* would have held, that the transfer date of a check is the date the check is received if it is honored within ten days.

93. Barnhill v. Johnson, 112 S. Ct. at 1392 (Stevens, J., dissenting).

94. *Id.* at 1392-93 (Stevens, J., dissenting).

livery of the check because the transfer had taken effect between the parties at that time and the check had been perfected (*i.e.*, honored) within ten days.[95] The *transfer* took effect between the parties on the date of delivery, reasoned Justice Stevens, because it was at that point that a conditional transfer of the funds took place. Justice Stevens further reasoned that the general definition of transfer is broad enough to include conditional, as well as absolute transfers, thereby rendering irrelevant any control over the account that the debtor retained.[96]

The Bankruptcy Code uses the term "perfected" within section 547(e) in a different and broader manner than the Uniform Commercial Code, reasoned Justice Stevens[97] who argued that the Bankruptcy Code uses "perfection" in section 547(e) to refer to the time at which a creditor acquires an interest in the debtor's property over which no other creditor can acquire a greater interest. Applying this analysis to checks, that time would occur upon the honoring of the check.[98] Justice Stevens also noted that all of the courts of appeals deciding the check transfer date issue in the context of the preference exception provisions, have concluded that the date of delivery is the controlling date.[99] He argued that no reason existed to apply a different date to the preference provision and that when no reason exists to apply a different meaning to the same term in the Bankruptcy Code, a desire for uniformity should mandate the use of the same meaning.[100]

III. COMMENTARY ON *BARNHILL*

In analyzing when a transfer of the debtor's account occurred, the *Barnhill* majority focused on what the debtor does *not* give up when a check is delivered to the creditor.[101] Viewed from this perspective, especially considering that the debtor retains control over the bank account even after delivering the check, it is not surprising that the Court found that the account was not affected by the delivery of the check and, therefore, that no transfer was made. The Court found that the only thing the debtor gave up upon delivery of the check

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95. *Id.* at 1393 (Stevens, J., dissenting).
96. *Id.* (Stevens, J., dissenting).
97. *Id.* (Stevens, J., dissenting).
98. *Id.* (Stevens, J., dissenting).
99. For a discussion of the analysis used by the courts of appeal in determining that the date of delivery is the transfer date for the purpose of the preference exception provisions, see *infra* notes 116-17 and accompanying text. The Supreme Court had not addressed this issue prior to *Barnhill*. In a note in its *Barnhill* opinion, the Court stated: "We, of course, express no views on that issue, [whether the date of delivery rule should apply to check payments for purposes of § 547(c)] which is not properly before us." Barnhill v. Johnson, 112 S. Ct. at 1391, n.9.
100. *Id.* at 1393-94 (Stevens, J., dissenting).
101. *Id.* at 1390.

was a conditional cause of action against the bank, which could not qualify as an interest of the debtor in property.[102]

Viewed from the other perspective, the creditor, upon the delivery of the check, *receives* the means by which it can obtain funds from the debtor's account—the property here. The delivery of the check is the means by which the debtor gives the creditor access to its bank account—access that it did not have prior to the delivery. After the check is delivered to the creditor, the creditor indeed has the ability to obtain immediately the debtor's funds in the amount of the check, subject only to the bank dishonoring the check. If the check is not dishonored, the debtor's funds are transferred to the creditor. The delivery of the check is a conditional transfer of the debtor's funds. While the debtor retains control over the account even after the check is delivered, it provides the creditor receiving the check with a means of obtaining property of the debtor—it is a "mode . . . of disposing of . . . property."[103]

In addition to taking a narrow view of what the debtor gave up on delivery of the check, the Supreme Court interpreted the term "transfer" too narrowly. The language of section 101(58) is broad, as the Court acknowledged,[104] and unambiguous. Read literally, the provision is expansive enough to include the kind of conditional transfer that is involved in the delivery of a check by the drawer. By refusing to give the language a literal reading, the Court discredited its justification for refusing to examine the legislative history—that is, when a statute is unambiguous, there is no need to resort to the legislative history, and the statute should be applied according to its plain meaning.[105] Instead of construing the statute according to its plain meaning, the Court gave the general definition of transfer a less expansive meaning than the words of that provision, "*every* mode, . . . absolute or conditional, . . . of disposing of or parting with property"[106] would ordinarily have.

A. *Problems* Barnhill *Creates*

In some respects, the Court's opinion in *Barnhill* is helpful. It settles a longstanding issue and provides a simple and easy rule to apply. As noted above, however, the opinion is a questionable accommodation of legislative intent, and its construction of the legislation and supporting reasoning are weak.[107]

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102. *Id.* at 1390-91.
103. 11 U.S.C.A. § 101(54) (West Supp. 1992).
104. Barnhill v. Johnson, 112 S. Ct. at 1390.
105. *Id.* at 1391.
106. 11 U.S.C.A. § 101(54) (West Supp. 1992) (emphasis added).
107. In many respects, Congress intended that preference law be overbroad so that all objectionable transfers would be caught. It provided the preference exception rule to cull the unobjectionable transfers that were captured. Congress did not in-

Whether the *Barnhill* opinion is a correct construction of the current legislation, it nevertheless has the potential to create problems. Some of the undesirable practical consequences are:

1. After the *Barnhill* decision, the term "date of transfer" has two different meanings within the preference provision, although the Bankruptcy Code actually provides only one definition of that term. This renders the determination of the precise timing of the date of transfer of a check for preference exception purposes unnecessarily difficult and confusing. This decision unsettles prior law, as established by lower federal courts, which had recognized the date of delivery of a check as the date of transfer for purposes of determining whether an exception to the preference provision applies.

2. The opinion frustrates the general bankruptcy policy discouraging creditors from taking action that may hasten the debtor's financial demise and encouraging creditors to work cooperatively with debtors who may still have the ability and means to avoid bankruptcy.[108]

3. *Barnhill* establishes a rule that is inconsistent with general commercial practice and certain aspects of the Uniform Commercial Code.[109]

B. Policies

Despite the Supreme Court's refusal to apply the Bankruptcy Code's literal definition of "transfer" literally, it nonetheless refused to consider the policies of the Bankruptcy Code in interpreting that term. If the Court had examined the underlying policies that the preference provisions were designed to further, it might have held that Congress intended a broad view of "conditional transfers."

The Bankruptcy Code seeks to distribute the assets of the debtor to all creditors in an equitable manner.[110] When creditors remove themselves from this system, that goal of the Bankruptcy Code is frustrated. Preference law is designed to create disincentives for creditors to take action for the purpose of removing themselves from this collective asset distribution system as soon as they recognize that a bankruptcy case is imminent.[111] The Bankruptcy Code seeks to encourage creditors to work with debtors and to discourage them from taking actions that hasten the debtor's financial

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tend, however, to capture preferential transfers that were made outside the preference period that it set. This is the essence of the problem created when payment of a debt is made by check and the check is delivered outside the preference period but honored within the preference period. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 314 (1977).

108. *See supra* notes 11-14 and accompanying text.

109. *See infra* notes 123-33 and accompanying text.

110. *See supra* note 12 and accompanying text.

111. *See supra* note 10 and accompanying text.

dismemberment.[112]

Congress was aware that not all efforts of creditors to "opt-out" of this process would take the form of open and direct transfers of property from the debtor to the creditor. As a result, Congress intentionally chose language designed to frustrate, as much as possible attempts by a creditor to get a head start on the assets of the debtor.[113] In defining transfers, Congress intended to provide language that could be interpreted broadly so that both the obvious and the subtle attempts to capture the debtor's assets, in a manner that would result in preferential treatment for creditors, could be identified and avoided.[114]

In most circumstances, applying a broad interpretation to the terms included within the definition of transfer, including conditional transfer, enables the trustee to recapture more transfers of the debtor's property and thereby furthers the principal goal of bankruptcy law—equal distribution of assets.[115] The very nature of checks—the delivery, presentment, and honor negotiation process—however, changes the usual outcome that is the natural consequence of giving "conditional transfer" its usual broad definition. When the first part of the check negotiation process takes place on a different date from the remaining parts, and when that first part is considered a conditional transfer because of the broad interpretation, the likelihood is greater that the conditional transfer may be outside the preference period. This fact should not alter the consistent application of a broad interpretation of transfer or conditional transfer.

C. Preference Exceptions

For purposes of determining whether an exception to the preference rule applies, all of the courts of appeal that have considered this question have held that the transfer occurs when the check is delivered and not when the check is honored.[116] The courts of ap-

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112. Certain transactions that are preferential but that have the effect of providing services or assets to the debtor are excepted from the avoidance power of the trustee in an effort to encourage creditors to continue this kind of relationship with the debtor. *See, e.g.*, H.R. REP. No. 595, 95th Cong., 1st Sess. 177 (1977); BAIRD & JACKSON, *supra* note 7, at 425.

113. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 178 (1977); *Commission Report*, *supra* note 27, pt. 2 at 201-204 (1973).

114. *See, e.g.*, National Bank of Newport v. National Herkimer County Bank of Little Falls, 225 U.S. 178, 184 (1912); 4 COLLIER ON BANKRUPTCY, ¶ 547.03[A] (Lawrence P. King et al. eds., 15th ed. 1992).

115. *See supra* note 12 and accompanying text.

116. Kroh Bros. Dev. Co. v. Continental Constr. Eng'rs, Inc. (*In re* Kroh Bros. Dev. Co.), 930 F.2d 648, 651 (8th Cir. 1991); Braniff Airways, Inc. v. Midwest Corp., 873 F.2d 805, 807-808 (5th Cir. 1989); Durham v. Smith Metal & Iron Co. (*In re* Continental Commodities), 841 F.2d 527, 530 (4th Cir. 1988); Kupetz v. Elaine Monroe Assocs. (*In re* Wolf & Vine), 825 F.2d 197, 201 (9th Cir. 1987); Bernstein v.

peal have considered the principal policy underlying the preference exceptions—the desire to encourage creditors to continue to do business with financially troubled debtors—and have determined that using the date of delivery rule better fosters that policy.[117] The decisions of the courts of appeal settled the preference exception law on the proper date of transfer of a check and provided certainty to creditors seeking to prove the nonavoidability of a transfer made by check.

In light of the Court's decision in *Barnhill*, it seems that the existing law regarding the transfer date of checks for purposes of the preference provision must operate with two different transfer dates for a single check. The date of transfer of a check, for purposes of determining whether a preferential transfer under section 547(b) occurred, is the date of honor and the date of transfer of the same check, for purposes of determining whether an exception to the preference rule under section 547(c) applies, is the date of delivery. The effect of this analysis is that in one statute a single term, date of transfer, has two different meanings within the same section of that statute despite the fact that the statute contains only one definition for that term. The usual goal of statutory construction is to have each term contained in the statute bear the same meaning unless expressly provided for otherwise.[118] Construing the phrase "date of transfer of a check" as having two different definitions within the same section of the statute without expressly providing so is a confusing and unnecessary inconsistency that is undesirable and, hence, should be avoided.

The Supreme Court did not address this section 547(b)-section 547(c) dichotomy in *Barnhill* except to note that the precise timing of the transfer of a check may be less critical in section 547(c) since Congress eliminated the forty-five day rule for the ordinary course of business preference exception.[119] While precise timing of the

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RJL Leasing (*In re* White River Corp.), 799 F.2d 631, 633 (10th Cir. 1986); O'Neill v. Nestle Libbys P.R., 729 F.2d 35, 37 (1st Cir. 1984).

117. *See supra* notes 16-18, 91 and accompanying text.

118. *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (applying the same meaning to identical words used in different parts of a single statute in accordance with normal rules of statutory construction).

119. Barnhill v. Johnson, 112 S. Ct. at 1392 n.9. As it is currently enacted, 11 U.S.C. § 547(c)(2) provides:

> (c) The trustee may not avoid under this section a transfer—
>
> . . . .
>
> (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. . . .

Prior to 1984, when subsection 547(c)(2) was amended to read as above, that subtransfer date of the check may be less important under sections 547(c)(1) and (2), it remains critical under section 547(c)(4), the new value exception.

Under the "new value" preference exception,[120] a preferential transfer will be excepted from avoidance if the creditor gives new value to the debtor on an unsecured basis after the preferential transfer. This new value must remain unpaid at the time of the filing of the bankruptcy case. The preferential transfer is excepted only if it is *followed* by a transfer of new value, making the timing of the transfer of a payment by check critical in this subsection.[121]

The undesirable consequences of this construction are illustrated by a very basic transaction. Assume that a creditor accepts a check in payment of an outstanding debt on Monday, delivers new goods to the debtor on open account on Tuesday, presents the check to the bank on Wednesday and the bank honors the check on Thursday. The creditor will not be able to use the new value exception based on the delivery of the new goods if the date of honor governs because the new goods *preceded* rather than followed the preferential transfer, *i.e.*, the honoring of the check, and does not meet the section 547(c)(4) requirement. Although this creditor is the kind of

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section provided:

> (c) The trustee may not avoid under this section a transfer—
>
> . . . .
>
> (2) to the extent that such transfer was—
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made not later than 45 days after such debt was incurred;
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms. . . .

Act of Nov. 6, 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2597-98. The earlier version of § 547(c)(2) with its 45 day rule made determining the exact date of transfer of a check critical. As it currently reads, however, the language of that subsection does not depend upon the precise timing of the transfer date.

120. 11 U.S.C. § 547(c)(4), frequently referred to as the new value exception, provides:

> (c) The trustee may not avoid under this section a transfer—
>
> . . . .
>
> (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
>
> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

New value is a defined term within the preference provision. It is defined at 11 U.S.C. § 547(a)(2) which provides, in part:

> (a) In this section—
>
> . . . .
>
> (2) "new value" means money or money's worth in goods, services, or new credit . . . .

121. 11 U.S.C. § 547(c)(4) (1988).

creditor for whom this safe harbor was designed, it will find no relief despite the added assets that it has given the debtor simply because of the timing of the check transfer. Thus, despite suggestions from the Supreme Court to the contrary, the language of section 547(c)(4) continues to make the need for the precise timing of check transfers extremely important.

D. *Checks in Commercial Transactions*

Among those regularly engaged in commercial transactions, checks given in payment of goods are treated as payments made in cash.[122] When a person engaged in business needs goods for the business, it is commonplace for that businessperson to give the merchant a check in exchange for the goods and for the merchant to treat the transaction as a cash transaction with the creation of no debt. Similarly, debts on open account are regularly treated as fully paid when the debtor delivers a check in the amount of the debt to the creditor.

The drafters of Article 3 of the Uniform Commercial Code recognized that parties in commercial transactions give checks as immediate payment for goods, services and debts and that checks are used as a substitute for cash.[123] The rules of Article 3 are designed to further this practice by making checks as negotiable as possible. Under Article 3, every effort is made to encourage the ease of transferability and ease of negotiability of negotiable instruments such as checks.[124] Article 3 seeks to encourage the commercial practice of accepting checks as cash by placing the holder of a check in the same position as the holder of cash, as much as possible.[125]

For example, the holder in due course principle[126] under Article 3

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122. *See, e.g.*, Official Unsecured Creditors' Comm. of Belknap, Inc. v. Shaler Corp. (*In re* Belknap), 909 F.2d 879, 883-84 (6th Cir. 1990); Quinn Wholesale, Inc. v. Northen, 100 B.R. 271, 275 (M.D.N.C. 1988) *aff'd*, 873 F.2d 77 (4th Cir. 1989), *cert. denied*, 493 U.S. 851 (1989).

123. *See, e.g.*, WILLIAM D. HAWKLAND & LARY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES § 3-104:01, at 44 (1984).

124. *Id.* at 44-46.

125. *Id.* at 46.

126. U.C.C. § 3-302 (Prior Article 3) provides:

> (1) A holder in due course is a holder who takes the instrument
> (a) for value; and
> (b) in good faith; and
> (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

U.C.C. § 3-302 (Revised 1990) provides in pertinent part:

> (a) . . . "holder in due course" means the holder of an instrument if:
> (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
> (2) the holder took the instrument (i) for value, (ii) in good faith, (iii)

provides a holder of a negotiable instrument with certain rights and defenses regarding that instrument against third parties upon the possession of the instrument—*i.e.*, the check.[127] The actual date from which the holder's rights are measured is the date on which the holder received possession—the date of delivery of the instrument.[128]

Other areas of the law in which the date of delivery of a check is the controlling date rather than the date of honor are securities, insurance, real estate, elections and taxation.[129] As the dissent in *Barnhill* noted, under decisions of the United States Supreme Court and the Third Circuit Court of Appeals and under Treasury regulations, the delivery date of a check controls in determining against what year expense and charitable contribution deductions would apply when the check was delivered in one year and cleared in the next year.[130]

Using the date of honor as the effective transfer date for checks under the preference provision of the Bankruptcy Code effectively treats checks as credit transactions. This treatment of checks under the Bankruptcy Code is inconsistent with the manner in which checks are treated in commercial practice. In order to protect themselves against a subsequent trustee in bankruptcy's potential preference action, merchants accepting checks from debtors in financial trouble, even those who accept the check in exchange for new goods, must race to the bank to present the check for payment to beat the start of the preference period. This result is inconsistent with one of the goals of the preference law—stopping the creditors' race to plunder the debtor's assets on the eve of bankruptcy.[131] Instead of furthering the goals of laws of Congress relating to bankruptcy, the Court's holding has the practical effect of encouraging the very behavior that the preference provision was designed, in part, to deter.

IV. PROPOSED CHANGES FOR TREATMENT OF CHECKS

In light of *Barnhill*, Congress should consider amending the cur-

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> without notice that the instrument is overdue or has been dishonored . . ., (iv) without notice that the instrument contains an unauthorized signature or has been altered . . . .

127. The rights and defenses of a holder in due course are provided in U.C.C. § 3-305 (Prior Article 3) and U.C.C. §§ 3-305 and 3-306 (Revised 1990). Those provisions allow the holder in due course to take the instrument free from all claims of ownership as well as all personal defenses of all parties.

128. *See, e.g.*, Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 207 N.W.2d 282, 286 (Minn. 1973); Dobbs-Maynard Co. v. Jumper, 388 So. 2d 879, 880 (Miss. 1980); HAWKLAND, *supra* note 123, § 3-301:06.

129. *See supra* notes 69-74 and accompanying text.

130. Barnhill v. Johnson, 112 S. Ct. at 1392; *See supra* note 75 and accompanying text.

131. *See supra* note 10-14 and accompanying text.

rent bankruptcy law in order to provide for a more realistic treatment for payments by checks. Using the date of delivery as the transfer date for preference purposes has many advantages over the date of honor. The date of delivery rule fulfills the expectation of the parties in a manner consistent with commercial practices, thereby fostering, not inhibiting the growth of commercial transactions. Using the date of honor rule will likely result in creditors refusing to accept checks or at a minimum rushing to the banks in a manner at odds with normal commercial practice.

The use of the date of delivery is consistent with the broad interpretation of conditional transfers intended by Congress and would be an application of the plain meaning of the term transfer as unambiguously defined in the Bankruptcy Code. Although the Court found the statutory definition of the term "transfer" unambiguous, it did not apply that statutory definition according to its plain meaning.

Using the date of delivery rule would avoid creating a situation in which the same term used within the same statute is defined differently despite a single express definition. Under the current state of the law, one must use the date of honor of a check under the technical preference analysis under section 547(b) and the date of delivery of the check for the preference exception analysis under section 547(c), although no compelling reason exists for defining the terms differently.

The dissent in *Barnhill* presents a very practical and analytically sound approach to the matter involving checks and preferences. The dissent of Justices Stevens and Blackmun would have held the date of delivery as the effective transfer date for payments by check when the check is honored within ten days of delivery.[132] Using this rule has several advantages over the date of honor rule. The date of delivery rule applies the plain meaning of the definition of "transfer" as found in the Bankruptcy Code; it applies rather than ignores the part of the statute that defines when the transfer is made by using the ten day period. This limits concern over manipulation by the creditor of the delivery date and it further fosters behavior that is consistent with commercial practice rather than at odds with that practice.

The Supreme Court's date of honor rule provides an answer to the check transfer issue, but it ignores too much of the Bankruptcy Code and commercial practice and creates the potential for several new conflicts.

V. Conclusion

The preference provision of the Bankruptcy Code created consid-

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132. Barnhill v. Johnson, 112 S. Ct. at 1393.

erable disagreement over when a transfer by check occurs for purposes of determining if a preferential transfer was made. In *Barnhill*, the Supreme Court decided that the transfer occurs when the check is honored. Although the Court has now provided a bright-line rule, its decision, unfortunately, does not put to an end the disagreements.

The Supreme Court failed to consider the impact that the date of honor rule would have on the preference exception provisions and on commercial transactions. As a result, the Court's decision has the potential to create more problems and more litigation which runs contrary to the purpose and spirit of the Civil Justice Reform Act of 1990 which seeks to reduce costs and delays in civil proceedings.[133] The date of delivery rule is more consistent with the overall policies and underlying goals of bankruptcy preference law. Using the date of delivery rule would provide a single rule for the transfer date of checks within the preference provision and would comport with established commercial practice.

Accordingly, Congress should legislatively reverse *Barnhill* and revise the Bankruptcy Code to adopt the date of delivery rule to provide a resolution of this issue that will not create additional problems and that will be consistent and in harmony with established preference law and commercial practice.

133. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C.A. §§ 471-82 (West Supp. 1992)).