Bluebell and the Melting Away of the Requirement for Unpaid New Value

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In *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, Inc.)*, 899 F.3d 1178 (11th Cir. 2018), the Eleventh Circuit attempted to clarify application of the subsequent new value defense to a preferential transfer, but perhaps muddied the waters on the interplay of the various defenses found in section 547(c) of the Bankruptcy Code.

The facts of the case are those of your typical preference: creditor Blue Bell received a series of payments from the Debtor in the 90-day period preceding the Debtor's bankruptcy filing, but during that same time period, also provided new goods to the Debtor on credit. For purposes of this article, assume the following simplified version of the 90-day transaction history between the Debtor and Blue Bell:

Date/Time Period	**Invoices/Deliveries from Blue Bell to the Debtor**	**Payments the Debtor Made to Blue Bell**
Day 80	Invoice A: $20,000	
Day 70		$40,000 (Paid Invoice A)
Day 60	Invoice B: $100,000	
Day 50		$60,000 (Paid 50% of Invoice B)
Day 40	Invoice C: $30,000	
Day 30		$50,000 (Paid 50% of Invoice B)
Day 20	Invoice D: $10,000	
Day 10		$30,000 (Paid Invoice C)
Day 5	Invoice E: $5,000	
PETITION DATE		

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Blue Bell asserted the subsequent new value defense found in section 547(c)(4) of the Bankruptcy Code. The trustee argued (and the Bankruptcy Court ultimate ruled) that Blue Bell was entitled to an offset against its preference liability only to the extent that any new value it extended to the Debtor remained unpaid as of the petition date. Thus, in the example above, Blue Bell would only be entitled to a new value credit in the amount of $30,000 (Invoices D & E), and Blue Bell's net preference liability would be $150,000. The Bankruptcy Court based its ruling on a prior statement by Eleventh Circuit in *Charisma Inv. Co., N.V. v. Airport Sys., Inc. (In re Jet Florida Sys., Inc.)*, 841 F.2d 1082 (11th Cir. 1988), that the Bankruptcy Code requires new value to "remain unpaid." Blue Bell appealed directly to the Eleventh Circuit.

"[C]onstruing section 547(c)(4) anew," the Eleventh Circuit held that its prior statement in *Jet Florida System* was dictum; the plain and unambiguous language of section 547(c)(4) does not require that new value remain unpaid. *BFW Liquidation*, 899 F. 3d at 1183. Rather section 547(c)(4) requires only that (1) any new value given by the creditor must not be secured by an otherwise unavoidable security interest, and (2) the debtor must not have made an otherwise unavoidable transfer to or for the benefit of the creditor on account of the new value given. *Id.* at 1189. "By its plan terms, then, the statute only excludes 'paid' new value that is paid for with 'an otherwise unavoidable transfer' . . . . Therefore, so long as the transfer that pays for the new value is itself avoidable, that transfer is not a barrier to assertion of § 547(c)(4)'s subsequent new value defense." *Id.* This is in contrast to section 60(c) of the Bankruptcy Act, which did require that new value remain unpaid as of the petition date. The Court reasoned that Congress intended to change the meaning of the statute when it repealed the Bankruptcy Act and replaced it with the Bankruptcy Code, replacing the "remaining unpaid" language with the requirement that the debtor "not make an otherwise unavoidable transfer to or for the benefit of" the creditor who gave new

value. Moreover, requiring new value to "remain unpaid" would hinder the policy objective of the subsequent new value defense: encouraging vendors to continue extending credit to financially troubled debtors.

The *BFW Liquidation* opinion widens a pre-existing circuit split on the subsequent new value defense. The Fourth, Fifth, Eighth, Ninth, and now Eleventh Circuits have rejected the idea that section 547(c)(4) requires new value to remain unpaid, unless the debtor repays the new value by a transfer which is otherwise unavoidable. *See Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545, 551-52 (4th Cir. 2005); *Jones Truck Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund (In re Jones Truck Lines, Inc.)*, 130 F.3d 323, 329 (8th Cir. 1997); *Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228, 231-33 (9th Cir. 1995); *Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1090-93, 1093 n.2 (5th Cir. 1994).

The Seventh and Third Circuits, however, have both held, albeit in a conclusory fashion, that section 547(c)(4) does require new value to remain unpaid. *See In re Prescott*, 805 F.2d 719, 727-28 (7th Cir. 1986); *P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1121 (7th Cir. 1998); *N.Y.C. Shoes, Inc. v. Bentley Int'l, Inc. (In re N.Y.C. Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989).

Thus, applying the holding to the earlier example, Blue Bell would get "new value" credit for invoices A, B, C, D, and E, as set forth in the chart below.

However, this application raises another interesting nuance of the Court's opinion: how does one account for new value when determining the total preference exposure? Surprisingly, there is not a consensus on this issue, and calculation methods vary from circuit to circuit. *See In re OneStar Long Distance, Inc.*, 872 F.3d 526 (7th Cir. 2017) (holding bankruptcy court's use of per diem method was reasonable and did not prejudice the trustee; because the supplier advanced

enough subsequent new value to cover all the preferential transfers it received from the debtor, the payments were unavoidable); *In re SGSM Acquisition Co., LLC*, 439 F.3d 233 (5th Cir. 2006) (holding that new value is to be applied against any preceding preference); *In re IRFM, Inc.*, 52 F.3d 228 (9th Cir. 1995) (holding that creditor asserting new value exception may carry forward preferences until they are exhausted by subsequent new value); *In re Meredith Manor, Inc.*, 902 F.2d 257, 259 (4th Cir. 1990) ("This method looks at the 90-day preference period and calculates the difference between the total preferences and the total advances, provided that each advance is used to offset only prior (although not necessarily immediately prior) preferences. [The majority view] permits preferences to be carried forward until exhausted by subsequent advances. In other words, the creditor is allowed to apply the giving of 'new value' against the immediately preceding preference as well as against all prior preferences").

Although the Eleventh Circuit ultimately remanded the calculation of Blue Bell's preference liability to the bankruptcy court, the Court gave a hypothetical wherein it applied the new value credit sequentially, transfer by transfer, rather than netting total new value into total potential preference payments. Thus, in the above example, applying the method utilized by the Court in its hypothetical, Blue Bell would have a net preference of $95,000 (which is consistent with how new value is calculated in the Fifth Circuit):

Date/Time Period	**Invoices/Deliveries from Blue Bell to the Debtor**	**Payments the Debtor Made to Blue Bell**	**Net Preference**
Day 80	Invoice A: $20,000		$0
Day 70		$40,000	$40,000
Day 60	Invoice B: $100,000		$0
Day 50		$60,000	$60,000
Day 40	Invoice C: $30,000		$30,000
Day 30		$50,000	$80,000
Day 20	Invoice D: $10,000		$70,000
Day 10		$30,000	$100,000
Day 5	Invoice E: $5,000		**$95,000**
PETITION DATE			

Finally, the Eleventh Circuit arguably goes beyond the facts of the case to address whether a recipient of an alleged preference can "stack" the defenses found in section 547(c) of the Bankruptcy Code. Section 547(c)(4)(B) prohibits the trustee from undoing a transfer to the creditor where the creditor has subsequently provided new value if, "on account" of this new value, the debtor did not make "an otherwise unavoidable" transfer for the benefit of the creditor. "So, if the debtor paid for the new value with an 'otherwise unavoidable transfer,' then the creditor cannot use that new value as a defense against the trustee's attempt to avoid an earlier preference." *BFW Liquidation*, 899 F.3d at 1197. Thus, even though payments received by a creditor from the debtor on account of an antecedent debt within the 90 days prior to bankruptcy may meet the elements of a preference set forth in section 547(b) of the Bankruptcy Code, not all preferences will ultimately be avoidable by virtue of the defenses set forth in section 547(c). "For example, if the 'creditor' had provided 'new value' to a debtor by selling the latter an item and receiving payment from the debtor in what constitutes a substantially contemporaneous exchange, then that transfer by the debtor to the creditor is not avoidable. . . . In addition, a payment by the debtor of debt incurred in the ordinary course of business, with the payment to the creditor being made according to ordinary business terms, is a type of preference that the trustee is not permitted to avoid." *Id.* at 1197.

Following the Court's logic, a preference defendant may not be able to apply the subsequent new value defense to potential preference payments and then later, seek to apply the ordinary course of business defense to the remaining preferential payments because doing so would render them "otherwise unavoidable." Such interpretation arguably forces preference defendants to choose between the subsequent new value defense and the remaining defenses found

in section 547(c). While a handful of bankruptcy courts have taken this position, to the author's knowledge, no other circuit court have foreclosed a preference defendant's ability to "stack" defenses. However, since Blue Bell was only asserting the subsequent new value defense, the Court's musings about whether the other defenses of section 547(c) can be used in tandem with the subsequent new value defense is effectively dictum.