Avoiding the Avoidance Actions:
Where is Your Preference?

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INTRODUCTION

The Bankruptcy Reform Act of 1978 (the "Bankruptcy Code") was expertly crafted to create a system that balanced the competing right of the debtor to a "fresh start" with the right of all creditors to fair and equitable distribution of the estate assets. It is clear that one of the primary goals of the Bankruptcy Code is to provide an orderly legal proceeding pursuant to which a debtor's non-exempt assets and income are equitably distributed to all creditors. This goal is fundamental to the operation of the United States bankruptcy system.[2] To facilitate this goal, the Bankruptcy Code arms the bankruptcy trustee, or debtor-in-possession acting as trustee, with an array of avoidance powers which enable the trustee to maximize the estate distributed by avoiding and recovering certain prepetition transfers to provide a more equitable distribution under the Bankruptcy Code's priority scheme. The trustee's avoiding powers are codified in Chapter 5 of the Bankruptcy Code.

There is a range of avoiding powers available to a trustee. The trustee's strong-arm powers under § 544 create an exception to the general rule that the trustee takes the bankruptcy estate "as is" at the commencement of the case.[3] For example, § 544(a)(3) provides that a trustee has the rights of "a bona fide purchaser of real property" which enables the trustee to avoid any prepetition interest in real property of the debtor that is not perfected under applicable state law as of the commencement of the case.[4] Section 544(a)(1) "confers on the bankruptcy trustee the rights of a hypothetical 'ideal creditor' under state law"[5] with the power to avoid any prepetition transfer of the debtor's property that could be avoided by another judgment lien creditor, whether or not such

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[2] Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 407 (2012).
[3] *Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1151-52 (11th Cir. 2006).
[4] 11 U.S.C. § 544(a)(3).
[5] *Olds v. Bedizel (In re Bedizel)*, 805 Fed. Appx. 841, 844 (11th Cir. 2020).

judgment lien creditor actually exists.[6] While federal law provides the basis for the trustee's strong-arm powers, "the trustee's exercise of those powers is controlled by substantive state law."[7] Thus, if a hypothetical creditor could set aside a prepetition transfer made by the debtor under state law, then the trustee may assert the claim on behalf of the bankruptcy estate and avoid the transfer pursuant to § 544(a)(1).

Section 544(b)(1) further empowers the trustee to avoid any transfer or "obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim[.]"[8] While not limited to fraudulent transfers, § 544(b)(1) is often invoked to avoid transfers that are voidable under applicable state fraudulent transfer laws. Unlike § 544(a)(1), the trustee must prove the existence of an actual unsecured creditor who is entitled to avoid the transaction under applicable law for purposes § 544(b)(1).

Fraudulent transfers are also avoidable without regard to state law pursuant to § 548 of the Bankruptcy Code. Section 548(a)(1)(A) provides that a trustee may avoid a transfer of an interest of the debtor made within two years before the petition date, if the transfer was made with "actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted."[9] Under § 548(a)(1)(B), constructively fraudulent transfers, made within two years before the petition date, may be avoided if the debtor received less than reasonably equivalent value in exchange for the transfer while the debtor was insolvent without regard to the debtor's actual intent.[10] Congress incorporated the law of fraudulent transfers into the Bankruptcy Code through § 548 to protect creditors from transfers that were either designed with actual fraudulent intent or

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[6] *See* 11 U.S.C. § 544(a)(1).
[7] *Estate of Townsend v. Berman* (*In re Fundamental Long Term Care, Inc.),* 81 F.4th 1264, 1328, n. 24 (11th Cir. 2023)(quoting *In re Roman Crest Fruit, Inc.,* 35 B.R. 939, 946-47 (Bankr. S.D.N.Y. 1983)).
[8] 11 U.S.C. § 544(b)(1).
[9] 11 U.S.C. § 548(a)(1)(A).
[10] 11 U.S.C. § 548(a)(1)(B).

which have the effect of diluting the asset pool available for distribution under the Code's priority scheme.[11]

Avoidance actions under §§ 544 and 548 generally involve transactions predicated on either "wrong-doing" or failure to take timely some necessary action. However, under § 547 of the Bankruptcy Code, the trustee also has the power to avoid certain payments made by the debtor on the eve of bankruptcy even though no wrong-doing or failure to take action occurred. Section 547 authorizes the trustee to avoid payments made by an insolvent debtor during the ninety day period before the debtor files for bankruptcy to a creditor for an antecedent debt that enables the creditor to receive more than it would receive if the debtor were liquidated under Chapter 7.[12] "If a transfer is avoided under § 547(b), then the trustee may recover the amount of the transfer from the creditor" under § 550(a) of the Bankruptcy Code and the "creditor will then have only an unsecured claim against the bankruptcy estate for the amount recovered by the trustee."[13]

Since preference actions are the most common type of avoidance actions that may be pursued by trustees, this article will focus primarily on preference actions, including how the concept of preference law has evolved, and current trends in how preference actions are pursued.

I. HISTORICAL OVERVIEW OF PREFERENCE ACTIONS

Prior to enacting the Bankruptcy Code in 1978, Congress formed the Commission on the Bankruptcy Laws of the United States (the "Commission") to study and to recommend changes to the Bankruptcy Act of 1898 (the "Bankruptcy Act").[14] Congress instructed the Commission to consider the basic philosophy of bankruptcy, the causes of bankruptcy, and to suggest alternatives

[11] 5 COLLIER ON BANKRUPTCY ¶ 548.01[1][a] (Richard Levin & Henry J. Sommer eds., 16th ed.).
[12] *See* 11 U.S.C. § 547(b)(1)-(5).
[13] *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1188 (11th Cir. 2018).
[14] Congress established the Commission by Joint Resolution on July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970).

to the system in place under the Bankruptcy Act.[15] With respect to preference actions, the Commission explained that an essential feature of any bankruptcy law is the inclusion of provisions designed to invalidate prepetition transfers made by the debtor on the eve of bankruptcy for the benefit of the estate.[16] To achieve a fair and equitable distribution among creditors, those receiving preferential payments must surrender them for redistribution equally among similarly situated creditors. Otherwise, the Commission recognized that there would be a scramble by the most focused and diligent creditors, those with inside information, and those with the greatest leverage over the debtor to obtain payment immediately before an impending bankruptcy, which would frequently leave nothing for the less favored creditors.[17]

The Commission found that the ability of the trustee to recover transfers under the Bankruptcy Act was frustrated by two requirements. Under the Bankruptcy Act, the trustee had to prove both the debtor's insolvency on the date of transfer, and that the preferred creditor had reasonable cause to believe that the debtor was insolvent at the time of transfer.[18] The Commission found that these two requirements had been a constant source of unnecessary litigation given that "the knowledge of the recipient of the preference has nothing to do with equality of distribution" which is determined instead by the equal treatment of creditors regardless of their knowledge concerning a debtor's insolvency.[19] Thus, to promote the orderly distribution of assets to creditors and avoid the race to the courthouse, the Commission recommended that there be created a

[15] Joint Resolution, Pub. L. No. 91-354, 84 Stat. 468 (1970).
[16]Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973), reprinted in B APP. COLLIER ON BANKRUPTCY, at App. Pt. 4-247, 4-261 (16th ed.).
[17]*Id.* at App. Pt. 4-262, 4-263.
[18]*Id.* at App. Pt. 4-263.
[19] Vern Countryman, *The Concept of Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713,728 (1985).

presumption of insolvency during the preference period, which must be rebutted by the favored creditor in order for him to retain the payment.[20]

Congress accepted the Commission's proposals and revised the preference laws in the 1978 codification of the Bankruptcy Code to omit the requirement that the trustee establish that the creditor had reasonable cause to believe the debtor was insolvent, in exchange for the reduction of the non-insider reach back period from 120 to 90 days and the addition of a 90-day presumption of insolvency.[21] "[T]he trustee could recover payments or property transferred to creditors prepetition to the extent those transfers preferred such creditors over other similarly situated creditors . . . then distribute the recovered value to all similarly situated creditors.[22] Congress sought to include all of the debtor's property in the bankruptcy case by allowing the trustee to easily recover property transferred on the eve of filing bankruptcy, thereby promoting the equitable distribution of assets to all creditors.[23]

The underlying theory behind the avoidance of preferential transfers is that the debtor was already insolvent when the payment to the favored creditor was made. Accordingly, the payment gave preferential treatment to the creditor that was paid to the detriment of similarly situated creditors who were not paid. "[B]y permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy."[24]

Because some creditors, however, receive payments for goods and supplies in the ordinary course of business that enable the debtor to continue doing business, Congress also created several

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[20]Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973), reprinted in B APP. COLLIER ON BANKRUPTCY, at App. Pt. 4-247, 4-263 (16th ed.).
[21]23 Am. Bankr. Inst. L. Rev. 1, *162.
[22]*Id.*
[23]S. REP. NO. 95-989, at 5 (1978).
[24] *Deel Rent-A-Car, Inc. v. Levine (In re Levine),* 721 F.2d 750, 754 (11th Cir. 1983).

affirmative defenses listed in § 547(c). The most common defenses are § 547(c)(1)'s "contemporaneous exchange for new value" defense; § 547(c)(2)'s "ordinary course of business" defense; and § 547(c)(4)'s "subsequent new value" defense. The trustee must prove each of the five elements listed in § 547(b) to avoid a preferential transfer and the creditor against whom the preference action is brought bears the burden of proving one of § 547(c)'s affirmative defenses.[25]

As will be discussed more below, preference law has continued to evolve since Congress originally adopted the Commission's original balanced proposals when it originally enacted the Bankruptcy Code.

II. SBRA AMENDMENTS

The Small Business Reorganization Act of 2019 (hereinafter the "SBRA") amended the Bankruptcy Code to create a new Subchapter V to Chapter 11 for small business debtors. In addition to adding Subchapter V to Chapter 11, the SBRA added two provisions which affect preference actions and appear to be aimed at reducing the number of mass preference actions filed in large cases. First, the SBRA amended § 547(b) to require the trustee or DIP to allege, as part of its burden of proof, that the preference action is based on reasonable due diligence after considering reasonably known affirmative defenses. Section 547(b) states as follows:

> (b) Except as provided in subsections (c), (i) and (j) of this section, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subjection (c), the trustee may avoid any transfer of an interest of the debtor in property – [.]"

Prior to the amendment, the American Bankruptcy Institute established a Commission to study and propose Chapter 11 reforms. In its Final Report and Recommendations, the Commission stated that it had determined that preference actions were subject to abuse in certain cases and

[25] *BFW Liquidating Trust v. Blue Bell Creameries, Inc., (In re BFW Liquidation Trust)*, 899 F.3d 1178, 1189 (11th Cir. 2018).

recommended the change above strengthening the pleading requirements under § 547(b). The Commission stated that "[t]he trustee should be precluded from issuing a demand letter to, or filing a complaint against, any party for an alleged claim under section 547, unless, based on reasonable due diligence, the trustee believes in good faith that a plausible claim for relief exists . . . ."[26]

The SBRA also amended the small claims venue provision in 28 U.S.C. § 1409. Prior to the amendments, § 1409(b) required a trustee who seeks to recover a debt from a non-insider arising in or related to a bankruptcy case to commence the action in the district court where the defendant resides if the amount in controversy was less than $13,650.00. The SBRA increased the amount in controversy requirement to $25,000, adjusted annually for inflation.

III. WHO HAS STANDING TO PURSUE PREFERENCE AND OTHER AVOIDANCE ACTIONS?

The Bankruptcy Code specifically vests the authority to pursue avoidance actions in the trustee. Section 547(b) states that the "*trustee* may avoid any transfer of an interest of the debtor in property[.]"[27] Similarly, § 548 states that "[t]he *trustee* may avoid"[28] fraudulent transfers and § 544(a) states that the "*trustee* . . . may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable[.]"[29] This grant of authority is consistent with § 323 of the Bankruptcy Code which states that the bankruptcy trustee "is the representative of the estate" and "has the capacity to sue and be sued."[30] As will be discussed in detail below, whether any party other than the trustee has standing to pursue a preference action depends upon the chapter under which the case is proceeding.

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[26] American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 148 (2014).
[27] 11 U.S.C. § 547(b).
[28] 11 U.S.C. § 548(a)(1).
[29] 11 U.S.C. § 544(a).
[30] 11 U.S.C. § 323(a)-(b).

a. CHAPTER 7

Section 704(a)(1) of the Bankruptcy Code confers the power to "collect and reduce to money property of the estate" upon the Chapter 7 trustee.[31] Property of the estate is broadly defined to include "all legal or equitable interests of the debtor in property as of the commencement of the case"[32] which includes causes of action belonging to the debtor such as avoidance actions.[33] Because the power to collect property of the estate is exclusively delegated to the trustee, courts agree that Chapter 7 debtors generally lack standing to pursue avoidance actions, except to the limited extent that they are empowered by § 522(h) of the Bankruptcy Code to exercise the trustee's avoidance powers to protect their exemptions. Section 522(h) states as follows:

> (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if –
>
> (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and
>
> (2) the trustee does not attempt to avoid such transfer.[34]

In the case of *In re Levine,* the Eleventh Circuit held that a Chapter 7 debtor could stand in the shoes of the Chapter 7 trustee pursuant to § 522(h) to avoid a judicial lien on his residence as a preferential transfer where the property would have been exempt had the trustee avoided the lien.[35] The creditor argued that the debtor lacked standing to avoid its lien because the debtor's residence was not exempt under state law against the creditor's pre-marital lien. The Eleventh

[31] 11 U.S.C. § 704(a)(1).
[32] 11U.S.C. § 541(a)(1).
[33] *See Estate of Townsend v. Berman (In re Fundamental Long Term Care Inc.),* 81 F.4th 1264, 1284 (11th Cir. 2023).
[34] 11 U.S.C. § 522(h)(1)-(2).
[35] *Deel Rent-A-Car, Inc. v. Levine (In re Levine),* 721 F.2d 750 (11th Cir. 1983).

Circuit disagreed, finding that § 522(h) gave the debtor standing because it states that a debtor may avoid a transfer to the extent the debtor *could have* exempted property under subsection (g) *"if the trustee had avoided such transfer …."*[36] Read literally, the debtor would have been entitled to the homestead exemption for purposes of § 522(h) had the trustee avoided the creditor's prepetition judicial lien. The Eleventh Circuit stated that its holding served the "central policy of the preference statute: preventing a race to the courthouse by creditors during the last three months before the debtor files a bankruptcy petition."[37]

The Eleventh Circuit further explained that "subsection 522(h) is an integral cog in the . . . fresh start mechanism embodied in the Code" pursuant to which "[t]he debtor is relieved from relying on a trustee who might have little incentive to recover assets which could not go to the creditors."[38] Accordingly, Congress gave Chapter 7 debtors limited avoidance powers under § 522(h) "solely to protect [their] own exemptions."[39]

b. CHAPTER 9

In a case filed under Chapter 9, § 902(5) of the Bankruptcy Code defines the term "'trustee" to mean the debtor "when used in a section that is made applicable in a case under this chapter by section 901 of this title . . . ."[40] In turn, § 901(a) makes §§ 544, 547, and 548 applicable in Chapter 9 municipality cases.[41] Thus, Chapter 9 debtors have standing to pursue avoidance actions such as preference actions.

[36] *In re Levine,* 721 F.2d at 754.
[37] *Id.*
[38] *Id* at 756 (citing *Cf.* H.R.Rep. No. 595, 95th Cong., 1st Sess., 362; S.Rep. No. 989, 95th Cong., 2d Sess., 76–77; *reprinted at* 1978 U.S. Code Cong. & Ad. News 5862–63, 6318; *Comment, supra* at 861).
[39] *Id.*
[40] 11 U.S.C. § 902(5).
[41] 11 U.S.C. § 901(a).

Congress recognized, however, that elected officials may succumb to political pressure to authorize payments be made to certain creditors on the eve of bankruptcy and that "it might be very awkward for those same officials to turn around and demand the return of payments following the filing of the petition."[42] Accordingly, Congress specifically authorized the appointment of a trustee to pursue avoidance actions upon request by a creditor pursuant to § 926 of the Bankruptcy Code which states as follows:

> **Avoiding powers**
>
> (a) If the debtor refuses to pursue a cause of action under section 544, 545, 547, 548, 549(a), or 550 of this title, then on request of a creditor, the court may appoint a trustee to pursue such cause of action.
>
> (b) A transfer of property of the debtor to or for the benefit of any holder of a bond or note, on account of such bond or note, may not be avoided under section 547 of this title.[43]

Chapter 9 also specifically prevents payments on bonds and notes of the municipality from being avoided as a preference.

c. CHAPTER 13

Standing under Chapter 13 to bring preference actions is not as clearly defined because "neither the trustee nor the debtor has explicit authority under Chapter 13 to bring avoidance actions."[44] Nevertheless, courts generally agree that a Chapter 13 trustee has standing under § 547(b) to bring preference actions, despite the omission of § 704(a)(1)'s duty to collect and reduce to money property of the estate from the Chapter 13 trustee's list of enumerated duties set forth in § 1302(b)(1).

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[42] S. REP. NO. 95-989 (1978).
[43] 11 U.S.C. § 926(a)-(b).
[44] *Hansen v. Green Tree Servicing, LLC (In re Hansen)*, 332 B.R. 8, 14 (10th Cir. BAP 2005)(finding Chapter 13 debtors lack statutory authority to exercise the trustee's strong-arm powers).

According to the leading treatise *Lundin on Chapter 13*, the exercise of avoidance powers by a Chapter 13 trustee are instead "consistent with [the] trustee's duty, pursuant to statute, to advise and assist the debtor in performance under the plan."[45] Judge Lundin further explains, however, that Chapter 13 trustees rarely seek to use their avoidance powers because they are "not authorized by the Code to use, sell or lease property of the estate once recovered."[46] Because Chapter 13 debtors are required pursuant to § 1325(a)(4) to distribute "at least what would be paid in a hypothetical liquidation under Chapter 7 – including any hypothetical recovery by the trustee in a Chapter 7 case . . . most Chapter 13 debtors propose to distribute the value of any hypothetical recovery through the plan without actually recovering the property that was transferred."[47] If the debtor is unable to pay the value of the avoidable transfer, Judge Lundin suggests that the trustee may have a duty to exercise its avoidance powers.[48]

There is a split of authority regarding whether Chapter 13 debtors also have standing to pursue preference actions in addition to the authority granted under § 522(h) with respect to exempt property as discussed above in Chapter 7 cases. The majority holds that *only* the Chapter 13 trustee has standing to pursue avoidance actions.[49] These cases generally rely upon the Supreme Court's statutory analysis in *Hartford Underwriters Ins. Co. v. Union Planters Bank,* wherein the Supreme Court held that § 506(c) of the Bankruptcy Code did not provide an administrative claimant an independent right to seek payment of its claim from property encumbered by a secured creditor's lien. Similar to the avoidance provisions, § 506(c) states that "[t]he *trustee* may recover from

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[45] Keith Lundin, Lundin on Chapter 13, § 53.12, at ¶ 1, LundinOnChapter13.com.
[46] *Id.* at ¶ 2.
[47] *Id*.
[48] *Id.* at ¶ 4.
[49] *Cole v. James B. Nutter & Co. (In re Cole)*, 563 B.R. 526, 529 (Bankr. W.D.N.C. 2017)(adopting the approach taken by a majority of courts that Chapter 13 debtors do not have independent standing to bring Chapter 5 avoidance claims). *See also* Lundin on Chapter 13, § 53.12, at ¶ 1, LundinOnChapter13.com(stating that the "debtor has generally been refused avoidance and recovery powers").

property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving . . . such property[.]"[50] The Supreme Court explained that "when 'the statue's language is plain, 'the sole function of the courts' – at least where the disposition required by the text is not absurd- 'is to enforce it according to its terms.'"[51] Because the statute was "quite plain in specifying who may use § 506(c) – '[t]he trustee,'" the Supreme Court concluded that the proper inference was that the trustee was the only party empowered to invoke § 506(c).

The minority of courts that permit Chapter 13 debtors to pursue preference actions emphasize that the one chapter 7 trustee duty that is omitted from the chapter 13 trustee's duties "is the § 704(1) duty to 'collect and reduce to money the property of the estate[]'" which "is the duty that obliges chapter 7 trustees to pursue avoiding actions."[52] Instead, Chapter 13 debtors remain in possession of property of the estate pursuant to § 1306(b) and have "exclusive of the trustee, the rights and powers of a trustee to deal with 'property of the estate' pursuant to § 1303," including property recovered pursuant to the avoiding powers.[53] These courts often note that the best interest of the creditors test forbids "confirmation of a plan that pays unsecured creditors less than what they would receive in a [hypothetical] chapter 7 liquidation."[54] Accordingly, such courts conclude that to require a debtor to propose a plan that "would depend upon the recovery of an avoidable transfer" without permitting the debtor to avoid the transfer would leave a Chapter 13 debtor in an untenable position when the trustee declines to seek avoidance.[55]

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[50] 11 U.S.C. § 506(c).
[51] *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 7, 120 S. Ct. 1942, 147 L. Ed.2d 1 (2000).
[52] *Houston v. Eiler (In re Cohen)*, 305 B.R. 886, 896 (9th Cir. BAP 2004).
[53] *Id.* at 896.
[54] *Id.* at 897.
[55] *Id.*

d. CHAPTER 12

Section 1203 of the Bankruptcy Code tracks language in § 1107(a), stating that "a debtor in possession shall have *all* the rights . . . and powers . . . of a trustee serving in a case under chapter 11 . . . ."[56] Accordingly, courts interpret § 1203 "as authorizing Chapter 12 debtors to exercise the trustee's avoidance powers under Chapter 5."[57] Although a trustee is appointed in each case, the Chapter 12 debtor remains in control of property of the estate.[58] The trustee is not entitled to perform the duties granted to the DIP unless the debtor is removed as the debtor-in-possession for cause, including, "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the commencement of the case."[59]

e. CHAPTER 11

Generally, there is no trustee in a "regular" Chapter 11 case and one will not be appointed unless requested by a party in interest "for cause" or if the court determines that "such appointment is in the best interest of creditors . . . ."[60] Instead, the debtor-in-possession (hereinafter "DIP") typically remains in control of the estate and pursuant to § 1107(a) has "*all* the rights . . . and powers . . . of a trustee serving in [the] case . . . ."[61] Accordingly, the DIP not only has standing but also a fiduciary duty as the representative of the estate to pursue preference actions. A DIP may also assign its right to prosecute preference actions in its Chapter 11 plan to a "representative of the estate" pursuant to § 1123(b)(3)(B) which states that a Chapter 11 plan may provide for the retention and enforcement of avoidance actions "by the debtor, by the trustee, or by a representative

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[56] 11 U.S.C. § 1203 [emphasis added].
[57] *Pierce v. Farm Bureau Bank (In re Pierce)*, 581 B.R. 912, 916 (Bankr. S.D. Ga. 2018).
[58] 11 U.S.C. § 1207(b).
[59] 11 U.S.C. § 1204(a).
[60] 11 U.S.C. § 1104(a)(1)-(2).
[61] 11 U.S.C. § 1107(a).

of the estate appointed for such purpose[.]"[62] As will be discussed more below, if the DIP fails to exercise its duty to pursue preference actions, derivative standing may be granted to the creditors' committee to pursue the cause of action.

Some courts have also held that an examiner with expanded powers may be granted authority to pursue avoidance actions pursuant to § 1106(b), which states that "[a]n examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform."[63] These courts find that "the 'power' to sue to recover preferences or fraudulent conveyances may properly be given to an examiner to enable [it] to fulfill the 'duty' to recover assets" granted to a trustee under § 704(1).[64] Other courts refuse to appoint examiners with expanded powers to prosecute avoidance actions in Chapter 11 cases.[65] These courts find that the grant of authority under § 1106(b) "is most naturally interpreted to authorize only acts relating directly to investigation" which "comports with Congress's evident understanding of the examiner's role" . . . "to proceed on an independent basis" expeditiously.[66]

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[62] 11 U.S.C. § 1123(b)(3)(B). *See also Nordberg v. Sanchez (In re Chase & Sanborn Corp.)*, 813 F.2d 1177, 1180, n. 1 (11th Cir. 1987)(finding plan provision authorizing 'creditor trustee' to purse avoidance action conferred standing on the 'creditor trustee' to assert the claim).

[63] 11 U.S.C. § 1106(b); *See also Busy Bee Disposal v. Robert A. Sweeney Agency (Patton's busy Bee Disposal Service, Inc.)*, 182 B.R. 681 (Bankr. W.D.N.Y. 1995)(finding powers of examiner are similar to those of a creditors' committee) and *Williamson v. Roppollo*, 114 B.R. 127 (Bankr. W.D. La. 1990)(finding the power to sue to recover preferences may be given to an examiner to enable the examiner to fulfill its duty to recover assets).

[64] *Williamson v. Roppollo*, 114 B.R. at 129.

[65] *Off. Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.),* 330 F.3d 548 (3rd Cir. 2003)(finding that an examiner cannot serve as a substitute for either a trustee or creditors committee for the purpose of pursuing avoidance actions); *In re W.R. Grace & Co.*, 285 B.R. 148 (Bankr. Del. 2002)(explaining that although an examiner may be appointed to investigate and determine whether an avoidance action should be brought, examiners do not have standing or authority to prosecute such actions).

[66]*In re Cybergenics*, 330 F.3d at 578.

Thus, generally in regular Chapter 11 cases, avoidance actions may be pursued by the DIP, a trustee if appointed, or possibly by an examiner with expanded powers, and by a fiduciary appointed in a confirmed plan.

f. DERIVATIVE STANDING

"Derivative standing is . . . an implicit exception to the 'general rule' whereby the Bankruptcy Code assigns to the trustee or debtor-in-possession 'the privilege of prosecuting' various actions on behalf of the estate."[67] This applies solely to regular Chapter 11 cases. Some courts do not permit derivative standing in avoidance actions, relying in part on the Supreme Court's decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank* wherein the Supreme Court concluded that the trustee is the only party empowered to invoke § 506(c) based on the plain meaning of the phrase "[t]he *trustee* may" in § 506(c).[68] However, the majority of courts addressing the issue find that derivative suits are permissible under narrow conditions when the trustee or DIP is unwilling or unable to bring an avoidance action.[69]

To establish derivative standing, courts typically require a creditor or creditors' committee to show the following: (1) the creditor petitioned the trustee or DIP to pursue the avoidance action and the trustee or DIP refused; (2) the claim is colorable; (3) the creditor sought permission from the court to pursue the claim; and (4) the trustee or DIP unjustifiably refused to pursue the claim.[70] To determine whether the trustee or DIP unjustifiably refused to pursue an avoidance action, courts

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[67] *Scott v. PAPPG Grantor Trust (In re Baltimore Emergency Servs., II)*, 432 F.3d 557, 560 (4th Cir. 2005).
[68] *United Phosphorus, Ltd. v. Fox (In re Fox)*, 305 B.R. 912 (10th Cir. BAP 2004)(analyzing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 120 S.Ct.. 1942, 147 L.Ed.2d 1 (2000)).
[69] *See PW Enters., Inc. v. Kaler (In re Racing Servs., Inc.),* 540 F.3d 892 (8th Cir. 2008)(approving retroactive grant of derivative standing); *Off. Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.),* 330 F.3d 548 (3rd Cir. 2003)(finding derivative standing was appropriate where the DIP unreasonably refused to pursue avoidance action); *Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.),* 66 F.3d 1436 (6th Cir. 1995)(derivative standing may exist in creditor to maintain avoidance proceeding when DIP's refusal to act is unjustified); *Unsecured Creditors' Comm. v. Noyes (In re STN Enters., Inc.)*, 779 F.2d 901 (2nd Cir. 1985)(finding creditors' committee had implied qualified right to pursue preference action when DIP unjustifiably failed to do so).
[70] *PW Enters., Inc. v. Kaler (In re Racing Services, Inc.),* 540 F.3d 892, 899 (8th Cir. 2008).

will consider the following factors: (1) the probability of success and recovery; (2) the creditor's proposed fee arrangement; and (3) the anticipated delay and expense to the estate.[71] Alternatively, derivative standing may be granted if the trustee or DIP consents and the bankruptcy court finds that allowing the derivation action to proceed is in the best interest of creditors and is necessary and beneficial to the efficient resolution of the case.[72]

In the leading case of *In re Cybergenics*, the Third Circuit found that a creditors' committee had standing to bring an avoidance action after the DIP unjustifiably refused the committee's request to pursue the action. The Third Circuit first determined that the Supreme Court's decision in *Hartford Underwriters* does not prohibit derivative avoidance actions, stating that the question before the Supreme Court was "one of a *nontrustee's right* unilaterally to circumvent the Code's remedial scheme" not "a *bankruptcy court's equitable power* to craft a remedy when the Code's envisioned scheme breaks down" because a trustee or DIP unreasonably refuses to pursue an action for the benefit of the estate.[73] Turning to the Bankruptcy Code, the Third Circuit found the following provisions demonstrated Congress's approval of derivative standing: (i) § 1109(b) which states that a "creditors' committee . . . may raise and may appear and be heard on any issue in a case under [Chapter 11]"; (ii) § 1103(c)(5) which states that "[a] committee appointed under section 1102 of this title may perform such other services as are in the interest of those represented"; and (iii) § 503(b)(3)(B) which "allows for the priority payment of the expense of 'a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor.'"[74] Reading these provisions holistically, the Third Circuit

[71] *Id*. at 901.
[72] *Id.* at 902 (adopting the Second Circuit's standard for establishing derivative standing by consent established in *Commodore Electrs. Ltd. v. Gould (In re Commodore In'l, Ltd.),* 262 F.3d 96 (2nd Cir. 2001)).
[73] *In re Cybergenics*, 330 F.3d at 553.
[74] *Id.* at 562.

concluded that the provisions "evidence a Congressional intent for committees to play a robust and flexible role in representing the bankruptcy estate, even in adversarial proceedings."[75]

The majority in *Cybergenics* further explained that it is better policy to allow creditors to bring such actions to enhance the value of the estate when the DIP violates its "fiduciary duty to maximize the estate's value."[76] The Third Circuit summarized the inherent conflicts that may arise in Chapter 11 cases, stating:

> This situation immediately gives rise to the proverbial problem of the fox guarding the henhouse. . . . [C]ourts and commentators have acknowledged that the debtor-in-possession 'often acts under the influence of conflicts of interest.' . . . . These conflicts of interest can arise even in situations where there is no concern that a debtor's management is trying to save its own skin. For example, a debtor may be unwilling to pursue claims against individuals or businesses, such as critical supplies, with whom it has an ongoing relationship that it fears damaging. . . . Finally, even if a bankrupt debtor is willing to bring an avoidance action, it might be too financially weakened to advocate vigorously for itself. In any of these situations, the real losers are the unsecured creditors whose interests avoidance actions are designed to protect.[77]

Accordingly, the Third Circuit concluded that "derivative suit by a creditors' committee provides a critical safeguard against lax pursuit of avoidance actions."[78]

The Ninth Circuit recently rejected an appeal attacking the principle that creditors' committees may obtain derivative standing to prosecute avoidance actions when the DIP unjustifiably refuses to do so.[79] In *Issa v. Royal Metal Industries, Inc. (In re X-Treme Bullets, Inc.,)*, the bankruptcy court authorized the unsecured creditors' committee to pursue an avoidance action and recover property from the defendant with the debtor's consent. Thereafter, the defendant moved to dismiss the adversary proceeding and sought reconsideration of the grant of

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[75] *Id.* at 566.
[76] *Id.* at 568.
[77] *Id.* at 573.
[78] *Id.*
[79] *Issa v. Royal Metal Industrs., Inc. (In re X-Treme Bullets, Inc.)*, 2024 WL 837043 (9th Cir. 2024).

derivative standing which the bankruptcy court granted. On appeal, the Ninth Circuit summarily rejected the defendant's derivative standing arguments, stating that '"[a]lthough the Bankruptcy Code contains no explicit authorization for the initiation of an adversary proceeding by a creditors' committee, a qualified implied authorization exists under 11 U.S.C. § 1103(c)(5)'"[80] The Ninth Circuit explained that the authority granted to trustees under § 323(a) and (b) does not preclude the grant of derivative standing. Further, the committee was not required to establish Article III standing despite the defendant's argument that the committee had suffered no "injury in fact" because the committee filed suit on behalf of the estate, obviating the requirement that it "demonstrate Article III standing 'in its own right.'"[81]

g. SUBCHAPTER V

Congress created Subchapter V for small business debtors to make the reorganization process "more efficient and economically feasible[.]"[82] To streamline the confirmation process for small business debtors, the SBRA made a number of changes, including (i) eliminating creditors' committees, (ii) mandating that only the debtor may file a Chapter 11 plan, (iii) eliminating the absolute-priority rule, and (iv) permitting the debtor to confirm a plan without any consenting creditors, all "premised on the generalization that 'creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases.'"[83] As one commentator recently noted, these changes have fundamentally altered the delicate balance of power between debtors and creditors created by Congress when it enacted the

[80] *Id.* at *1.
[81] *Id.* at *2.
[82] Marla S. Benedek, Mark E. Felger and Leslie A. Berkoff, *The Quirks of Mediation in Sub V*, ABI Journal 26 (April 2024).
[83] *Id.*

Bankruptcy Code which has substantially weakened "the rights, powers, and protections of creditors to streamline and reel in the costs of the chapter 11 process for small debtors."[84]

Similar to §§ 1107(a) and 1203, § 1184 of Subchapter V of Chapter 11 of the Bankruptcy Code states that "a debtor in possession shall have *all* the rights . . . and powers . . . of a trustee serving in a case under this chapter, including operating the business of the debtor."[85] Unless removed as the debtor-in-possession, or as otherwise provided by a confirmed plan, the Subchapter V DIP remains in control of all property of the estate and has as fiduciary duty to bring preference actions on behalf of the estate.[86]

While a trustee is generally not appointed in a regular Chapter 11 case, a Subchapter V trustee is appointed in every Subchapter V case. The general duties of the Subchapter V trustee are substantially different than the duties of a trustee in a regular Chapter 11 case. The Subchapter V trustee's duties are defined in § 1183(b) of the Bankruptcy Code, which states as follows:

(b) DUTIES. – The trustee shall-

(1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;

(2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;

(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns-

(A) the value of the property subject to a lien;

(B) confirmation of a plan filed under this subchapter;

(C) modification of the plan after confirmation; or

(D) the sale of property of the estate;

[84] *Id.* at 27.
[85] 11 U.S.C. § 1184[emphasis added].
[86] 11 U.S.C. § 1186(b).

(4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter[.][87]

The Subchapter V trustee "occupies a unique position as contrasted with its counterparts in traditional chapter 11 and other cases, who tend to be adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors."[88] Rather, the role of the Subchapter V trustee "is to supervise and monitor the case and to participate in the development and confirmation of a plan."[89]

Interestingly, the Subchapter V trustee does not have standing to pursue avoidance actions even if the debtor is removed as the debtor-in-possession because the duties listed for the trustee if the debtor ceases to be a debtor-in-possession do not include pursuing avoidance actions, including preference actions.[90] Pursuant to § 1185(a), a debtor may be removed as the debtor-in-possession for cause, including "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case . . . ."[91] If the debtor is removed for cause, the Subchapter V trustee's duties are expanded pursuant § 1183(b)(5) to include the following:

(A) perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title; and

(B) be authorized to operate the business of the debtor[.][92]

The duties of the Subchapter V trustee do not include the duties specified § 704(a)(1) of the Bankruptcy Code to collect and reduce to money property of the estate even if the debtor is removed as the debtor-in-possession. Thus, the Subchapter V trustee does not have standing to

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[87] 11 U.S.C. § 1183(b)(1)-(4).
[88] *In re Ozcelebi*, 639 B.R. 365 (Bankr. S. D. Tex. 2022).
[89] 8 COLLIER ON BANKRUPTCY ¶ 1183.03 (Richard Levin & Henry J. Sommer eds., 16th ed.).
[90] *See* § 1183(b)(5).
[91] 11 U.S.C. § 1185(a).
[92] 11 U.S.C. § 1183(b)(5)(A)-(B).

pursue avoidance actions when the debtor has been removed as the debtor-in-possession. The Subchapter V trustee's duties were designed to be less adversarial and more mediational, which prevents any action to pursue avoidance actions. Some courts have held instead held that conversion to Chapter 7 where the trustee is authorized to pursue avoidance actions is the appropriate remedy when a Subchapter V debtor fails to perform its fiduciary duty to pursue obvious avoidance actions.[93]

It is important to note that bankruptcy courts may not appoint examiners in a Subchapter V cases because § 1104 is inapplicable under Subchapter V. Examiners are appointed in regular Chapter 11 cases pursuant to § 1104(c), and § 1181(a) of Subchapter V of Chapter 11 of the Bankruptcy Code makes § 1104 in applicable in Subchapter V cases.[94] Thus, in Subchapter V cases avoidance actions may only be pursued by the DIP.

Derivative actions as discussed previously in this paper cannot exist in Subchapter V cases. The Small Business Reorganization Act of 2019 (hereinafter the "SBRA") basically eliminated creditors' committees in Subchapter V cases. Section 1102(a)(3) of the Bankruptcy Code now states that "[u]nless a court for cause orders otherwise, a committee of creditors *may not* be appointed in a small business case or a case under subchapter v of this chapter."[95] The SBRA sought "to streamline the reorganization process for small business debtors because small businesses have often struggled to reorganize under chapter 11."[96] Unfortunately, this streamlined process has altered the delicate balance that exits between the DIP's fresh start and the traditional

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[93] *In re Exigent Landscaping, LLC,* 2024 WL 559229 *14 (Bankr. E.D. Mich. 2024)(converting Subchapter V case to Chapter 7 to investigate avoidance actions).

[94] *See In re No Rust Rebar, Inc.,* 641 B.R. 412 (Bankr. S.D. Fla. 2022)(finding conversion appropriate where Subchapter V debtor commingled assets with related entity); *In re ComedyMX, LLC,* 647 B.R. 457, 462 (Bankr. Del. 2022)(finding examiners may not be appointed under Subchapter V).

[95] 11 U.S.C. § 1102(a)(3)[emphasis added].

[96] *In re Bonert*, 619 B.R. 248, 252 (Bankr. C.D. Cal. 2020).

safeguards in place in Chapter 11 cases to maximize the value of the estate for equitable distribution to creditors.

In a regular Chapter 11 case, if the DIP fails or refuses to pursue an avoidance action, the creditors' committee can seek derivative standing to pursue such actions for the benefit of all creditors. This safeguard does not exist in Subchapter V cases. Creditors in Subchapter V cases would have to show cause for the appointment of a creditors' committee and then seek standing to bring a derivative action. By eliminating creditors' committees under Subchapter V, Congress overlooked the important safeguard such committees serve by ensuring that the DIP fulfills its fiduciary duty to maximize the estate's value. If the DIP in a Subchapter V case fails to pursue an avoidance action, one of the only remedies available to a party in interest such as the Bankruptcy Administrator or United States Trustee would be to seek to convert the Subchapter V case to Chapter 7 under § 1112(b) so that a Chapter 7 trustee can be appointed to investigate and pursue potential avoidance actions.[97]

IV. CAN AVOIDANCE ACTIONS BE SOLD?

In the recent case of *Briar Capital Working Fund Capital, LLC v. Remmert (Matter of South Coast Supply Co.)*, 91 F.4th 376 (5th Cir. 2024), the Fifth Circuit joined the Eighth and Ninth Circuits, holding "that preference actions may be sold pursuant to 11 U.S.C. § 363(b)(1) because they are property of the estate under 11 U.S.C. §§ 541(a)(1). In this case, the DIP filed a preference action against its former CFO, seeking to avoid and recover more than $300,000.00 of preferential transfers. Pursuant to its plan of reorganization and confirmation order, the DIP sold its interest in the preference action to a secured creditor and the creditor was substituted as assignee of the action. Following withdrawal of the reference, the district court granted the defendant's motion to dismiss,

[97] *In re Exigent Landscaping, LLC,* 2024 WL 559229 at *14 (converting Subchapter V case to Chapter 7 to investigate avoidance actions).

finding that the secured creditor lacked standing to pursue the action as a "representative of the estate" under § 1123(b)(3)(B) given that any recovery would not benefit the bankruptcy estate or its unsecured creditors.

Addressing an issue of first impression, the Fifth Circuit held that § 547 preference actions may be sold pursuant to § 363(b)(1) which provides that a DIP "may use, sell, or lease . . . *property of the estate*."[98] Under § 541(a)(1), property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[99] "[C]laims to avoid allegedly preferential transfers arise with the filing of the bankruptcy petition, making them property that the debtor has an interest in as of the commencement of the case." [100] Accordingly, the Fifth Circuit concluded that "preference actions plainly fit the statutory definition of 'property of the estate' and may validly be sold under § 363(b)."[101] Likewise, the Fifth Circuit found that preference actions clearly qualify as property of the estate under § 547(a)(7) which defines property of the estate to include "any interest in property that the estate acquires after the commencement of the estate."[102]

Finally, the Fifth Circuit rejected the defendant's argument that avoidance powers are unique powers belonging to the trustee that should not be sold to someone who will not exercise the power for the benefit of all creditors. "[T]he trustee's fiduciary duties require it to maximize the value of the estate, which may include and even require the sale of an avoidance action."[103] In the case before it, the Fifth Circuit explained that the secured creditor waived its right to recover administrative expenses and its security interest in $700,000.00 of sales proceeds in exchange for

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[98] *Briar Capital Working Fund Capital, LLC. v. Remmert (Matter of South Coast Supply Co.)*, 91 F.4th 376, 381 (5th Cir. 2024).
[99] 11 U.S.C. § 541(a)(1).
[100] *Id.* at 382.
[101] *Id.*
[102] 11 U.S.C. § 541(a)(7).
[103] *Matter of South Coast Supply Co.*, 91 F.4th at 383.

the right to pursue the preference action. By allowing the sale of preference actions, bankruptcy courts are granted "more flexibility in distributing assets, maximizing the value of the bankruptcy estate, and in turn, allow for more equitable distribution of assets."[104]

V. WHY ARE PREFERENCE ACTIONS NOT PURSUED MORE OFTEN?

It is clear from court statistics that fewer preference actions are being pursued in all chapters today than initially after the passage of the Bankruptcy Code. In 2023, a record ten year low of 1,470 preference actions were filed, down from the 2015 high of 6,112.[105] This represents a 72% drop in preference actions filed since 2014.[106] One commentator has suggested that "the decline could be related to the pandemic-related 'bankruptcy bust' of 2021 and 2022" given that preference actions are primarily filed in Chapter 7 and Chapter 11 cases.[107] However, the commentator further noted that "2020 had the highest yearly total (7,786) in the past decade for business-related Chapter 11 cases," yet preference actions did not increase in 2022.[108]

It should be noted that § 547(b) states that the "trustee *may* avoid any transfer of an interest of the debtor in property[.][109] Thus, trustees are not required to pursue all potential avoidable preferences.[110] In Chapter 7 cases, the trustee has a financial incentive to pursue avoidance actions given that the trustee's compensation is governed by § 330 and treated as a commission under § 326(a) consisting of varying percentages of "all moneys disbursed or turned over in the case by the trustee to parties in interests[.]"[111] Thus, the Chapter 7 trustee more often than other trustees

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[104] *Id.* at 384.
[105] Jeffrey P. Fuller, *ANALYSIS: Where Have All the Preference Lawsuits Gone?,* https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-where-have-all-the-preference-lawsuits-gone?context=search&index=0. (Feb. 20, 2024).
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] 11 U.S.C. § 547(b)[emphasis added].
[110] Brooke E. Gothberg, *Poking at Preference Actions: SBRA Amendments Signal the Need for Change,* 28 Am. Bankr. Inst. L. Rev. 285, 286 (2020).
[111] 11 U.S.C. § 326(a).

will pursue identifiable preference actions, assuming the trustee has the resources to pursue recovery.[112] Yet, preference actions have declined in Chapter 7 cases as in other chapters due to the cost of litigation, the time necessary to pursue, and the current climate regarding avoidance actions.

In Chapter 13 cases, trustees rarely seek to use preference actions because "there is little incentive for the trustee to pursue such actions."[113] Chapter 13 trustees are "not authorized by the Code to use, sell or lease property of the estate once recovered."[114] Instead, as discussed above, "chapter 13 debtors typically propose to distribute the value of any hypothetical recovery through the plan without actually recovering the property that was transferred" which often relieves the trustee from pursuing such actions.[115]

In Chapter 11 cases, the DIP is often hesitant to pursue avoidance actions that will adversely impact its post-confirmation relationship with critical vendors. As discussed above, derivative suits filed by creditors' committees on behalf of the estate provide a critical but seldom used safeguard in traditional Chapter 11 cases when a DIP unjustifiably fails to pursue obvious avoidance actions. Unfortunately, this safeguard is absent in Subchapter V cases, which may be a significant factor contributing to the downturn in preference actions filed in light of the increased filings of Subchapter V cases in recent years.

It is possible that the "due diligence" requirement added by the SBRA has impacted the number of preference actions filed. But it seems equally likely that fewer preference actions are being filed as more cases are filed under Subchapter V given that small business case debtors are

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[112] Brook E. Gothberg, *Poking at Preference Actions: SBRA Amendments Signal the Need for Change,* 28 Am. Bankr. Inst. L. Rev. 285, 288 (2020).
[113] Keith Lundin, Lundin on Chapter 13, § 53.12, at ¶ 2, LundinOnChapter13.com.
[114] *Id.*
[115] *Id.*

less like to pursue preference actions due to insider relationships, the lack of resources needed in smaller cases to pursue such actions, and the fact that the "fox now guards the henhouse" in Subchapter V cases without creditor committee or similar oversight.

In conclusion, it appears that the legislative changes which have been enacted since 1978 have diminished the incentive, the opportunity and the appetite to pursue preference actions, and have altered the original balance between the fresh start and equitable distributions that was part of the basic theoretical underpinning of the Bankruptcy Code as originally enacted, thereby removing a disincentive for debtors to pay favored creditors on the eve of filing bankruptcy to the detriment of other similarly situated creditors.