

# Pratt's Journal of Bankruptcy Law

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# Eleventh Circuit Issues Opinion on New Value Defense to a Preference Claim

*By Edward M. Fitzgerald and Alan M. Weiss\**

*In a recent decision, the U.S. Court of Appeals for the Eleventh Circuit held that liability for a preferential transfer may be reduced by the new value given to the debtor regardless of whether the new value was paid prior to the petition date. The authors of this article discuss the case and why it is good news for creditors defending against preference claims.*

The U.S. Court of Appeals for the Eleventh Circuit recently issued an opinion in *William S. Kaye, Trustee of the BFW Liquidating Trust v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*,<sup>1</sup> addressing the subsequent new value defense to a preferential transfer under Section 547(c)(4) of the U.S. Bankruptcy Code. The Eleventh Circuit held that liability for a preferential transfer may be reduced by the new value given to the debtor regardless of whether the new value was paid prior to the petition date. In doing so, the Eleventh Circuit has formally adopted the “subsequent advance” approach to analyzing new value. This is good news for creditors defending against preference claims because the ruling protects those creditors that continued to extend credit to financially troubled entities prior to their bankruptcy filings.

## BACKGROUND

The decision arises from the bankruptcy filing of Bruno’s Supermarket LLC, which operated as a grocery store in Florida and Alabama. Prior to the debtor’s bankruptcy filing, Blue Bell Creameries Inc. was a vendor of the debtor and sold ice cream products to the debtor on credit. Debtor typically paid Blue Bell twice weekly, but as the debtor became financially troubled and approached its bankruptcy filing, the payments became more sporadic. Over the three-month preference period preceding the bankruptcy filing, debtor made 13 payments to Blue Bell. In between those payments, Blue Bell continued to deliver its products on credit.

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<sup>1</sup> *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. Aug. 14, 2018).

On February 5, 2009, the debtor filed its Chapter 11 bankruptcy case. Thereafter, the liquidating trustee appointed by the U.S. Bankruptcy Court for the Northern District of Alabama brought an action against Blue Bell under Section 547(b) of the Bankruptcy Code, seeking to avoid and recover all of the payments as preferential transfers. Blue Bell asserted multiple defenses, including that by continuing to provide products on credit after each of the alleged preferential payments, Blue Bell provided subsequent new value that should be offset against any preference liability. The bankruptcy court analyzed the payment history, and found that the debtor had paid for the majority of the products delivered during the preference period that Blue Bell asserted should constitute new value. The bankruptcy court ultimately sided with the Trustee and held that only “new value” extended to the debtor that remained unpaid as of the petition date could be used to offset the preference liability.

**NEW VALUE: TWO APPROACHES**

Section 547(c)(4)(B) provides that:

The trustee may not avoid under this section a transfer . . . 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 . . . on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

In analyzing the new value defense, bankruptcy courts across the country have adopted two approaches, the “remains unpaid” approach, and the “subsequent advance” approach. Under the “remains unpaid” approach, any new value extended by the creditor must remain unpaid as of the petition date to be used as an offset against any preference liability. Under the “subsequent advance approach,” any new value extended after a preferential payment may be used as an offset, regardless of whether it was later paid by the debtor, unless the payment was an “otherwise unavoidable transfer.”

**THE ELEVENTH CIRCUIT DECISION**

Using the chart below, the Eleventh Circuit illustrated the result of the application of the “remains unpaid” approach against the “subsequent advance” approach.

	<b>Transfer from Creditor to Debtor</b>	<b>Transfer from Debtor to Creditor</b>
Transfer 1	\$1,000 in goods	
Transfer 2		\$1,000 in cash



	<b>Transfer from Creditor to Debtor</b>	<b>Transfer from Debtor to Creditor</b>
Transfer 3	\$1,000 in goods	
Transfer 4		\$1,000 in cash
Transfer 5	\$1,000 in goods	
Transfer 6		\$1,000 in cash
Transfer 7	\$1,000 in goods	
Transfer 8		\$1,000 in cash
Transfer 9	\$1,000 in goods	
Transfer 10		\$1,000 in cash
Debtor's Bankruptcy Filing		

Under the “remains unpaid” approach, the creditor would be obligated to repay \$5,000, as each of the shipments of goods was paid for by the debtor and none of them remain “unpaid.” Under the “subsequent advance” approach, the creditor would be obligated to repay only \$1,000, as transfers 3, 5, 7 and 9 would act as an offset against the payments represented in transfers 2, 4, 6 and 8. The \$1,000 liability from transfer 10 would remain because there was no shipment of goods and/or extension of credit after transfer 10.

With a lengthy discussion regarding Section 547(b) and the policy reasons behind the preference provisions of the Bankruptcy Code, the Eleventh Circuit reversed the bankruptcy court and ruled that Section 547(c)(4) does not require new value to remain unpaid in order to be used as an offset against preference liability. This decision should result in a significant reduction of preference exposure for creditors transacting business with financially troubled entities during the preference period.