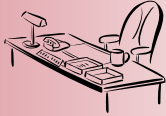


THE ADVOCATE

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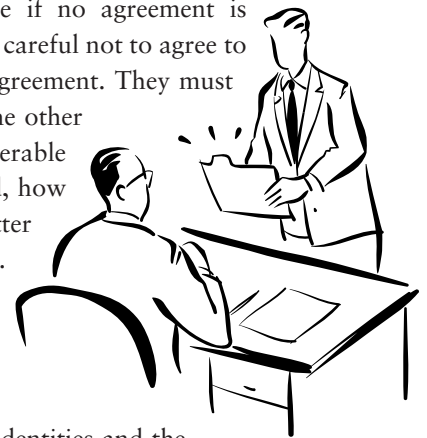


The Negotiation Process

By Charles B. Craver

Most attorneys view negotiations as unstructured interactions. From the time they begin to the time they achieve an agreement, they wing it. If they appreciated how structured the process is and understood what to do in each stage, they would be more effective negotiators.

The first stage is the most important – Preparation. There is no substitute for thorough preparation, because knowledge is power. What are the factual, legal, economic, and political issues? Once attorneys have gathered this information, they must ask themselves three critical questions. First, what happens to their side if no agreement is achieved? This defines their “bottom line,” and they must be careful not to agree to terms that are worse than what they would have with no agreement. They must also look across the table and ask what would happen to the other side if they failed to reach an accord. Whichever side has preferable nonsettlement options has greater bargaining power. Second, how good a deal do they hope to achieve? People who want better deals generally do better than those with modest aspirations. Third, where do they plan to begin? They should start far enough away from where they hope to end up to give themselves some bargaining room and allow them to determine how much the other side may be willing to give to them.



During the Preliminary Stage, the parties establish their identities and the tone for the interaction. It helps to establish personal relationships and positive bargaining environments. It is difficult to be rude to someone you know on a first-name basis, and people who begin bargaining encounters in positive moods behave more cooperatively, and achieve more agreements and more efficient accords, than individuals who begin in negative moods. During this part of the interaction, the participants exchange small talk.

Questioners should listen for verbal leaks that disclose hidden objectives. What items does the other side “have to have,” “really want to have,” or “would like to get?”

When the small talk ends and the parties begin to ask each other what they hope to achieve, they enter the Information Stage. During this stage, the parties are trying to discover what is available to be divided between them. The best way to obtain such information is to ask questions – preferably open-ended questions that force the other side to talk for a minute or two. Questioners should listen for verbal leaks that disclose hidden objectives. What items does the other side “have to have,” “really want to have,” or “would like to get?” The first group of items is “essential,” the second group “important,” and the third group “desirable.” Questioners should go behind stated objectives to look for underlying interests. Why does the other side want a particular item? What are they trying to accomplish through that demand? Are there ways this side can satisfy opponent needs and interests at minimal cost to themselves? If the parties can expand the pie, they can improve their respective returns.

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EDITORS NOTE: In the last issue of The Advocate, Volume 20.2, we featured an article on same-sex marriage entitled "Marriage is more than 'I Do.'" This article was written by a respected member of the Maryland State Bar and demonstrates why he is in favor of same-sex marriage. Over the past several months, we have attempted to solicit an article from the community to provide the other side of this debate, to no avail. We are asking you, our readers for assistance. If you, or any one you know, would like to submit an article, please do so by emailing us at ylsadvocate@msba.org. We thank you in advance. Please note that any article expressing an opinion is, as always, the opinions of the author and should not be construed to represent the opinions or policies of the YLS or the MSBA.

From the Chair

In the Malpractice Debate, Charges Against Lawyers Don't Add Up

Colleagues:

In the last weeks and months, my inbox has been filled with press-clippings on the topic of the rising costs of medical malpractice insurance. As members of the General Assembly rushed back from their holidays for a rare special session in January to address this apparent crisis, the insurance industry and many physicians groups publicly assaulted the legal profession as the cause of the problem.

In light of the recent public attention to this issue, the Young



Rachel Cohen, Esq., Chair

Lawyers Section is hosting a panel discussion on medical malpractice and tort reform on March 14, 2005 (more details elsewhere in this issue). Among the speakers that we have invited to participate are State Senator Sharon Grosfeld and

Delegate Bobby Zirkin, each of whom offers a different perspective on this issue.

Although attorneys may differ in their views regarding tort reform, one point on which we can all agree is that our profession has unfairly been made the scapegoat of this debate. The relentless attack on the legal profession, in my opinion, is not only unfair, but wrong. Consider a few facts gathered by MSBA Executive Director Paul Carlin:

- More than 98,000 people die each year from medical errors – more than auto accidents, breast cancer or AIDS. Hundreds of thousands more are harmed by medical malpractice. (Source: The Institute of Medicine – *AARP Bulletin*)
- Of 20 medical malpractice cases yielding more than \$1 million, only 3 were decided by juries. (Source: Medical Mutual Liability Insurance Society of Maryland – Med Mutual)
- Since 1996, the number of malpractice claims has been flat. (Source: *The Baltimore Sun*) The National Center for State Courts found in a study of 30 states that the number of tort filings decreased by 10% between 1991 and 2000.

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Preference Actions and How to Protect Yourself Against Them

by Jan I. Berlage

I. Introduction

Just because your client has finally been paid a long outstanding debt does not necessarily mean that your client will be able to keep that money. Welcome to the world of preferences. The Federal Bankruptcy Code as well as Maryland state law provide for preference actions, i.e., causes of action by which a trustee or a debtor-in-possession (collectively, the “Trustee”) may avoid payments made to creditors. Section 547 of the Bankruptcy Code allows the Trustee to avoid certain property transfers made by a debtor within 90 days before bankruptcy. In the case of insiders, this period may be extended to within one year. Although not as commonly used as its federal counterpart, Maryland state law also provides an independent basis for such actions. See MARYLAND CODE, COMM. LAW § 15-101 (2004). Thus, it is possible to receive payment for a past debt only to be forced to return that payment to the very party who owes you even more money. This can make for a truly unpleasant conversation with a client. But defenses exist and steps can be taken to protect your client against such actions.

II. Policy Considerations

At first blush, preference law may seem patently unfair. Upon deeper reflection, through, one finds that such actions are derived from sound policy considerations. First, by allowing a Trustee to avoid pre-bankruptcy trans-

fers that occur within a short period before bankruptcy, preference claims discourage creditors from racing to the courthouse to dismember the debtor during its slide into bankruptcy. Second, the power to avoid preferential transfers facilitates the prime bankruptcy policy of equality of distribution among creditors. Finally, preference actions help discourage “secret liens” upon the debtor’s collateral when those liens remain unperfected until just before the debtor files a bankruptcy petition. In the gap period between attachment and perfection, other creditors might extend credit on the assumption that the collateral is free and clear.

At first blush, preference law may seem patently unfair. Upon deeper reflection, though, one finds that such actions are derived from sound policy considerations.

III. Elements

Section 547(b) of the Code sets forth the essential elements of a preference, which are as follows:

1. any transfer;
2. of any interest of the debtor in property;
3. to or for the benefit of a creditor;
4. for or on account of an antecedent debt;
5. made while the debtor was insolvent;
6. made on or within 90 days before the filing the petition, or between 90 days and one year of the petition’s filing if such creditor was an “insider;” and
7. that enables such creditor to receive more than it would otherwise receive in a chapter 7 liquidation case.

The Trustee bears the burden of establishing each of these elements.

A. Transfer

Pursuant to § 101(54), of the Bankruptcy Code transfer “means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption.” “The definition of Transfer is as broad as possible.” “Under this definition, any transfer of any interest in property is a transfer, including transfer of possession, custody or control even if there is no transfer of title, because possession, custody, and control, are interests in property.” Section 101(54) includes involuntary as well as voluntary dispositions of an interest in property in the definition of “transfer.”

B. Debtor’s Property

The Code does not define “an interest of the debtor in property,” but the United States Supreme Court has interpreted the term to mean “property that would have been part of the estate had it not been transferred before the commencement of [the] bankruptcy [case].” Under Section 541(a)(1) of the Bankruptcy Code, property of a bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” Although bankruptcy law defines what property interests are part of the bankruptcy estate, state law determines the nature of the debtor’s interest in the property at the time of the bankruptcy filing. Accordingly, Section 541 does not give the debtor any greater rights to property than the debtor had under State law before fil-



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Preference Actions and How to Protect Yourself Against Them

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ing for Chapter 11: “To the extent that an interest is limited in the hands of the debtor, it is, therefore, equally limited in the hands of the estate.”

C. Benefit of Creditor

Section 101(5) of the Bankruptcy Code defines creditor to include “only holders of pre-petition claims against the debtor.” Section 101(10) of the Bankruptcy Code defines a claim as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

In other words, if the transferee is a pre-petition creditor and receives a transfer, this element is satisfied.

D. Antecedent Debt

Pursuant to § 101(12) of the Bankruptcy Code, a “debt” is defined by the Bankruptcy Code as a “liability on a claim.” An “antecedent debt” is one that was incurred prior to the transfer in question. Consequently, if, for example, payment by the debtor to the creditor is a prepayment for goods or services, the payment is not subject to a preference attack because the payment was not on account of an antecedent debt.

E. Insolvency

An essential element of the Trustee’s case is that the debtor was insolvent during the preference period. The Bankruptcy Code defines the term

“insolvent,” as it applies to a corporation, as follows: “[F]inancial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation.” A fair valuation of an entity’s property refers to the amount of cash that could be realized from a sale of property “... during a reasonable period of time.” A reasonable period is such time as “... a typical creditor would find optimal: not so short a period that the value of the goods is substantially impaired via a forced sale, but not so long a time that

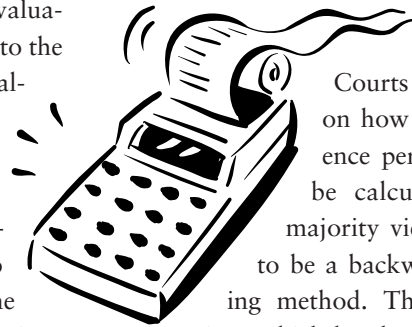
An essential element of the Trustee’s case is that the debtor was insolvent during the preference period. The Code defines the term “insolvent,” as it applies to a corporation, as follows: “[F]inancial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation.”

a typical creditor would receive less satisfaction of its claim, as a result of the time value of money and typical business needs by waiting for the possibility of a higher price.”

F. Made Within a Certain Time

Section § 547(b)(4) of the Bankruptcy Code provides that a trustee can “avoid any transfer of an interest of the debtor in property ... made on or within 90 days before the date of the filing of the petition.” In the case of insiders, this period is extended to “between 90 days and one year before the date of the filing of the petition.” A “transfer” is subsequently defined in 11 U.S.C. § 547(e)(2)(B), which states that “a transfer is made ... at the time such transfer is perfected.” Perfection occurs “when a creditor on

a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.” A more precise definition of “perfection” is left to state law.



Courts are divided on how the preference period should be calculated. The majority view appears to be a backward-counting method. The minority view, which has been followed by certain courts within the Fourth Circuit, uses a forward-counting method, i.e., counting ninety days from the date of the transfer.

G. Enables Creditor to Receive More Than Creditor Would Have Received Under Specific Circumstances

Section 547(b)(5) of the Bankruptcy Code requires the Trustee to demonstrate that the creditor received more money during the preference period than it would have received if (1) the transfer had not been made, (2) the case was a chapter 7 proceeding, and (3) it received payment on its claims as provided for in the Bankruptcy Code. In essence, the court must compare what the creditor received during the preference period with what it would have received if the debtor had been liquidated under chapter 7 of the Code.

The first step in this test is relatively straightforward. The court simply “returns” the transfer to the estate. The second and third parts of the test, determining how much the creditor would have received in a chapter 7 proceeding, are more complicated. First, the court must assign a value to the transfers and to the bankruptcy estate. This valuation must be made as of the time the Debtor filed its bankruptcy petition. Next, the court must determine whether the creditor would have been paid in full if the

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THE ACTIVITIES COMMITTEE

*Meredith O'Conner and
Michael Siri, Co-Chairs*

On September 20, 2005, the Activities Committee for the Maryland State Bar Young Lawyers Section presented the Maryland Mentoring Partnership with a donation in the amount of \$4,000, which were the proceeds generated from Novemberfest 2004. A special thanks to all the sponsors, including bronze level sponsors Goodell, DeVries, Leech, & Dann, LLP; Miles and Stockbridge; and OberlKaler; friends-in kind sponsors, Council, Baradel, Kosmerl and Nolan, P.A.; Franklin & Prokopik; Gore Brothers Reporting; and Corbin & Hook Reporting. Without the help of each of the sponsors the event would not have been as successful as it was.

This year's charity, the Maryland Mentoring Partnership provides Maryland youth with quality mentoring relationships with caring adults for the purpose of enhancing academic and career options, raising self esteem and empowering youth toward self sufficiency. If you are interested in becoming a mentor, please contact The Maryland Mentoring Partnership at 410-685-8316 or via email at info@marylandmentors.org.

The Activities committee is already in full gear planning a number of events for this spring, including a baseball game at Camden Yards, and has already started planning for Novemberfest 2005. If you would like to become involved with the Activities committee, please contact Michael W. Siri at siri@bowie-jensen.com.

What We Do, And How to Join Us

*Get Connected with the
Committees of the
Young Lawyers Section*



THE MEMBERSHIP COMMITTEE

*Jan I. Berlage and
Tamara Goorevitz, Co-chairs*

The Membership Committee has continued to sponsor Thirsty Thursdays, which take place the third Thursday of every month. We have had two very successful Thirsty Thursdays—January's took place at Isabella's in Frederick County and February's took place at the Ellicott Mills Brewing Company in Howard County. Thank you to everyone who turned out to help make these events a success! We are currently planning our next Thirsty Thursday for March 17th (that's right, St. Patrick's Day) with the University of Baltimore School of Law, location to be decided. This will be a great way for our members to get to know our future colleagues and a great way for law students to learn about the profession from young lawyers! The details about March's Thirsty Thursday will be published in the near

future. If you would like any additional information, or if you would be interested in participating on the membership committee, please contact Tamara Goorevitz at tgoorevitz@fandpnet.com or Jan Berlage at Berlageji@ballardspahr.com.

THE NOMINATING COMMITTEE

Bradford S. Bernstein, Co-chair

The Nominations Committee held interviews for the positions of President-Elect, Treasurer and Secretary. We had six excellent candidates, each of which would have done a terrific job in any of the positions. The Nomination Slate is as follows:

President-elect—Hughie Hunt
Secretary—Michael Siri
Treasurer—Tamara Goorevitz

Congratulations and thanks to everyone on the Nominations Committee for their excellent work this year.

Petition Against Nomination Slate—At any time after the determination of the Nomination Slate but prior to the last Friday in March, any Qualifying Young Lawyer may submit to the Nominating Committee a petition of nomination which shall be signed by not less than twenty-five (25) members of the Young Lawyers Section and received by the Association headquarters prior to the close of business on the last Friday in March.

If you have any questions regarding the selection process or filing a petition against the nomination slate, please feel free to contact Bradford S. Bernstein at 301-762-1600. ♦

Preference Actions and How to Protect Yourself Against Them

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debtor had originally filed a petition under chapter 7 of the Bankruptcy Code. If the creditor would have been paid in full, then there would be no preference. Finally, the court must compare the amount transferred from the debtor to the creditor to the amount the creditor would have received in a hypothetical chapter 7 liquidation. If the transfers allowed the creditor to receive more than it would have received through the hypothetical liquidation, then the Trustee has satisfied § 547(b)(5) and may avoid the transfer.

As the Maryland Bankruptcy Court has observed: “As a matter of general principle, unless unsecured creditors will receive a one hundred percent distribution, an undersecured creditor who receives a payment during the preference period will receive more than it would have received under a Chapter 7 liquidation if the payment does not release a proportional amount of secured collateral.”

IV. Defenses Under § 547(c)

Creditors may preserve their access to funds falling under § 547(b)'s preference definition by raising the statutory exceptions to preference law, which are set forth in § 547(c)(1)-(8). Those exceptions are as follows:

1. Section 547(c)(1): Contemporaneous exchange for new value (“New Value Defense”);
2. Section 547(c)(2): Payments in the ordinary course of business of debtor and creditor (“Ordinary Course Defense”);
3. Section 547(c)(3): Purchase money security interests (“Enabling Loans Defense”);
4. Section 547(c)(4): Preferences subsequently offset by unsecured credit (“Subsequent New Value Defense”);

5. Section 547(c)(5): Perfected security interest in inventory and receivables (“Floating Liens Defense”);
6. Section 547(c)(6): Statutory liens;
7. Section 547(c)(7): Alimony, maintenance or support;
8. Section 547(c)(8): Consumer debtor minimum.

By far and away, the three most common of these defenses are the: (i)

Although there are no set rules as to how many days, weeks or months will constitute a “contemporaneous exchange,” courts generally require that the transfer occur within 1 to 14 business days of the transfer of new value to the debtor.

New Value Defense; (ii) Ordinary Course of Business Defense; and (iii) Subsequent New Value Defense.

A. Section 547(c)(1): New Value Defense

The new value defense applies where the transfer was intended by the debtor and creditor to be a contemporaneous exchange for new value given to the debtor by the creditor and was in fact a substantially contemporaneous exchange. Although there are no set rules as to how many days, weeks or months will constitute a “contemporaneous exchange,” courts generally require that the transfer occur within 1 to 14 business days of the transfer of new value to the debtor.

B. Section 547(c)(2): Ordinary Course of Business

A transfer in the ordinary course of business qualifies as a preference defense under three conditions: (i) the transfer is in payment of a debt “incurred by the debtor in the ordinary course of business or financial affairs of the debtor and transferee,” (ii) the transfer is made within the “ordinary

course of business of the debtor and the transferee,” and (iii) the transfer was made pursuant to “ordinary business terms.”

For example, a creditor’s arrangement with the debtor is that the debtor pays on 30-day net terms, and this is customary in the industry. Over the course of the prior two years, the debtor made payments to the creditor that was within a 35 to 45 day range. In the 90 days prior to its bankruptcy filing, the debtor made payments to the creditor that were also within the 35 to 45 day range. Although the agreed upon terms were 30 days, because the debtor and creditor established a course of payment which was often 35 to 45 days net, if this occurred frequently enough, and if this was ordinary within the industry, a majority of courts would probably hold that most, if not all, the payments received within 45 days prior the filing were made in the ordinary course and, thus, were not avoidable as preferences.

C. Section 547(c)(3): Enabling Loans

Pursuant to § 547(c)(3) of the Bankruptcy Code, a Trustee may not avoid a transfer that creates a security interest in property acquired by the debtor, (i) to the extent the security interest secures new value that was: (a) given at or after the signing of a security agreement describing such property as collateral; (b) given by or on behalf of the secured party; (c) given to enable the debtor to acquire such property; and (d) in fact was used by the debtor to acquire such property; and (ii) is perfected within twenty days of the date a debtor receives possession of the property.

Federal law mandates that a creditor must perfect its security interest within twenty days of the debtor receiving possession of the subject property. The twenty day period begins to run at the date of possession, not the date the debtor receives title. For purposes of

continued on next page

section 547 and the enabling loan exception, an interest is perfected when the secured party has completed all the steps necessary under state law to perfect its interest. In other words, federal law determines the amount of time, while state law determines whether the interest has actually been perfected.

As a practice point, note that § 547(c)(4) requires that the loan “in fact” be used to enable the debtor to purchase the property in which the secured party took a security interest. If the debtor commingles the funds with its own before purchasing the property, the creditor may have a tracing problem. It has been suggested that the lowest intermediate balance test be used to determine if the funds were in fact used for their intended purpose.

D. Section 547(c)(4): Subsequent New Value

In applicable part, § 547(c)(4) of the Code 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 other wise 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...

Thus, to qualify under the subsequent new value exception the creditor must prove the following: (i) new value was given to the debtor after the preferential transfer; (ii) the new value was unsecured; and (iii) the new value remains unpaid. Many courts also recognize that items for which the debtor has made payment may still qualify as

new value if the payment on those items is itself avoidable.

Moreover, a majority of courts hold that the new value extended could provide a shield for earlier preferences to the extent that the new value is the dollar amount immediately preceding the preference. E.g. *Crichton v. Wheeling National Bank* (In re Meredith Manor, Inc.), 902 F.2d 257 (4th Cir. 1990). While this is the majority rule, a minority of courts hold that new value extended can only be used to shield the immediately preceding preference. See, e.g., *Leather v. Prime Leather Finishes Co.*, 40 B.R. 248 (D. Maine 1984).

E. Section 547(c)(5): Floating Liens Defense

Section 547(c)(5) provides in pertinent part:

- (c) The trustee may not avoid under this section a transfer—
- (5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—
 - (A) ...
 - (ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition...

Thus, by virtue of § 547(c)(5), “[t]he claim of a holder of a perfected security interest in inventory [and/]or receiv-

ables will not be avoidable as a preference unless and ‘to the extent [that] he improves his [secured (i.e., lien)] position during the 90 day period before bankruptcy.’” In other words, the section carves out an exception for inventory or accounts receivable that protects the transfer of a security interest in after-acquired property, i.e., a “floating lien,” provided that the creditor does not improve its position within the vulnerable period prior to bankruptcy.

“This exception permits a creditor with, say, a ‘floating lien’ on the ‘receivables’ of such a company to maintain that lien as the specific accounts receivable are paid off, and replaced by new ones, without fear that a future bankruptcy trustee will mount a preference attack on new accounts receivable arising during the ‘preference’ period.... Insofar as the grant of a security interest in the new collateral (receivables or



inventory that comes into existence during the preference period) improves the creditor’s position (compared to his position at the beginning of the preference period), the grant of security constitutes a preference to the extent of the improvement.”

F. Section 547(c)(6): Statutory Liens

Section 547(c)(6) provides that a Trustee may not avoid a transfer “that is the fixing of a statutory lien that is not avoidable under section 545 of this title.” Section 101(53) of the Code explains that a statutory lien arises “solely by force of a statute on specified circumstances or conditions ... but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.” The legislative history for §

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Preference Actions and How to Protect Yourself Against Them

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101(38) further provides in applicable part:

A statutory lien is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action. Mechanics', materialmen's, and warehousemen's liens are examples. Tax liens are also included in the definition of a statutory lien.

In determining whether a particular lien is statutory under these definitions, a court must look to the state law creating the lien.

G. Section 547(c)(7): Alimony, Maintenance or Support

Section 547(c)(7) of the Code provides:

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

* * *

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt —

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

This section was added to the Code by the Bankruptcy Reform Act of 1994. Under it, payments that are actu-

ally in the nature of alimony, maintenance or support are not subject to avoidance as preferences under § 547. But it is not sufficient that the liability merely be designated as alimony, maintenance or support to escape the tentacles of § 547; it must actually be such a liability.

H. Section 547(c)(8): Consumer Debtor Minimum

Pursuant to § 547(c)(8) of the Code, a trustee may not avoid a transfer “if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$600.” The plain language of § 547(c)(8) precludes a trustee from avoiding a transfer if the transfer is less than \$600. Consequently, “transfers of \$600.00 or more are without the ambit of the § 547(c)(8).” “Consumer debt” means debt incurred by an individual primarily for personal, family, or household purpose.”

“The legislative history reflects that the exception was intended to stop recoveries by bankruptcy trustees of small installment payments made in the ninety days before bankruptcy.” It should also be noted that, if a trustee cannot avoid a preference because of the exception in § 547(c)(7), then a debtor cannot avoid the preference pursuant to § 522(h).

V. Statute of Limitations Under § 546

Section 546(a) of the Code provides the statute of limitations for avoidance actions. As a result of conflicting interpretations by various Circuits, § 546(a) was amended in 1994. Revised § 546(a) of the Bankruptcy Code states:

An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of--

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

If a case began as one type of proceeds, but is converted to another (e.g. a Chapter 11, later converted to a Chapter 7), the term “order for relief” in section 546(a)(1)(A) refers to the initial filing date, and not to the date of conversion.

VI. Standing to Bring Preference Action

A. *General Rule: Only Trustees and Debtors-in-Possession May Avoid Transfers Under 11 U.S.C. § 547*

Under § 547(b), the Trustee alone has the power to avoid preferential transfers. Pursuant to § 1107 of the Code, this power is also conferred on debtors-in-possession, since that section places a debtor-in-possession “in the shoes of a trustee in every way...”

B. *Avoidance by Debtors Not In Possession*

In order to have standing to avoid a transfer, a debtor not in possession must establish the following five elements under § 522(h): (i) the debtor could have exempted the property that is the subject of the alleged preference; (ii) the transfer would have been avoidable by the trustee; (iii) the trustee has not attempted to avoid the transfer; (iv) the transfer was not a voluntary transfer of property by the debtor; and (v) and the property was not concealed by the debtor.

continued on next page

C. Avoidance by Creditors'

Committee or Single Creditor

Although the Code does not expressly authorize a creditors' committee to initiate an adversary proceeding, most courts have found an implied, but qualified, right for creditors' committees to initiate adversary proceedings in the name of a debtor-in-possession. Likewise, many courts hold that a single creditor may be permitted to initiate an avoidance action instead of the debtor-in-possession "if the creditor: 1) has alleged a colorable claim that would benefit the estate, if successful, based on a cost-benefit analysis performed by the bankruptcy court; 2) has made a demand on the debtor-in-possession to file the avoidance action; 3) the demand has been refused; and, 4) the refusal is unjustified in light of the statutory obligations and fiduciary duties of the debtor-in-possession in a Chapter 11 reorganization."

D. Avoidance by Post-Confirmation Representative

In applicable part, § 1123(b)(3)(B) provides that a reorganization plan may permit "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any ... claim or interest" belonging to the debtor or to the estate. Such a delegation of authority should generally be provided in the debtor's plan of reorganization.

VII. Proper Forum

Preference actions under § 547 of the Bankruptcy Code fall within the original jurisdiction of the federal district courts. Plaintiffs may file such actions where the underlying bankruptcy is pending, or in a federal district or state court that would otherwise have jurisdiction. As a practical matter, most preference actions are filed as adversary proceedings in the bankruptcy court

where the underlying bankruptcy case is pending. Even after a plan is confirmed, a bankruptcy court may retain jurisdiction to preside over avoidance actions. Cases seeking less than \$1,000, or less than a \$5,000 consumer debt, must be filed where the defendant resides.

VIII. Right To Jury Trial

In *Granfinanciera, S.A. v. Nordberg*, a fraudulent transfer case, the Supreme Court held that a defendant in an avoidance action has the right to a jury. In *Langenkamp v. Culp*, the Supreme Court recognized that the right to jury trial found in *Granfinanciera* applied in preference actions as well. Defendants waive their rights to a jury trial when they file a proof of claim or otherwise voluntarily submit themselves to the jurisdiction of the bankruptcy court.

A judgment is only as good as the ability to collect upon it. As a preliminary matter, where there is any question about a defendant's ability to satisfy a judgment, it is a good idea to run asset and judgment searches on that party before filing suit; and to educate the client about the possible impact that bankruptcy could have on the case.

IX. State Preference Law

Maryland's preference statute is Maryland Code, Commercial Law Article, § 15-101, which essentially incorporates the federal bankruptcy law: "All preferences, payments, transfers, and obligations made or suffered by the insolvent which are fraudulent, void, or voidable under any act of Congress of the United States relating to bankruptcy are fraudulent, void, or voidable, respectively, under this subtitle to the same extent that they would be fraudulent, void, or voidable under applicable federal bankruptcy law."



The statutory phrase "any act of Congress relating to bankruptcy" is not limited to the federal law existing when the state law was enacted and may include subsequent amendments to federal law. As a practical matter, because of its overlap with federal bankruptcy law, the Maryland preference statute is rarely used.

X. Practical Pointers for Creditors

A. Pre-Petition Pointers

(1) Litigation

A judgment is only as good as the ability to collect upon it. As a preliminary matter, where there is any question about a defendant's ability to satisfy a judgment, it is a good idea to run asset and judgment searches on that party before filing suit; and to educate the client about the possible impact that bankruptcy could have on the case.

Litigation settlements are generally subject to preference claims. Consequently, a plaintiff may settle a lawsuit and then be forced to hand back the proceeds when the defendant files bankruptcy. In such an event, the plaintiff will at least have a claim for the debt in bankruptcy. It is important to warn a client of this possibility. In some circumstances, a plaintiff may be able to avoid the reach of preference law by structuring its settlement to reflect new value. For instance, a settlement could consist of a new loan or some other action on the plaintiff's part. This method is not guaranteed but, at least, presents the plaintiff with an argument in future preference litigation.

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Preference Actions and How to Protect Yourself Against Them

continued from page 9

Every settlement should include a claim preservation clause with language that protects the plaintiff in the event of a subsequent bankruptcy. For example, the following clause can be used:

In the event Defendant shall file for bankruptcy within 95 days after Defendant's settlement check clears the bank, Plaintiff shall not be obligated to file a dismissal of the proceeding unless the Bankruptcy Court having jurisdiction determines that payment of the settlement proceeds does not constitute a preference subject to avoidance. If the Bankruptcy Court determines that the settlement payment is a preference pursuant to 11 U.S.C. § 547, Plaintiff shall not be obligated to dismiss the proceeding and Plaintiff's original claim is reinstated.

The inclusion of a preservation clause is designed to allow the plaintiff to maintain all of its rights should the benefit conferred upon it by the settlement agreement be undone by preference law.

(2) Payments and Payment Terms

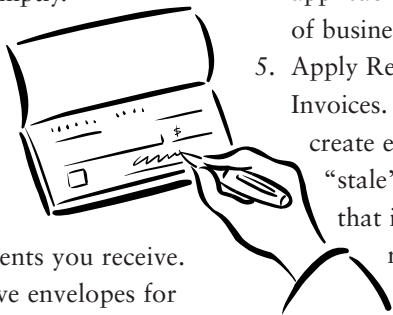
The following are some suggestions as to how to deal with payments and payment terms in situations where a party may be on the verge of filing bankruptcy:

1. Cash checks promptly.

The sooner the check is cashed the sooner the preference period runs.

2. Keep good

records of payments you receive. For example, save envelopes for checks to preserve the postmark dates or routinely record postmark dates on all incoming



checks. Such records will allow you to show at trial when payments were received, which may be used to prove new value and ordinary course defenses.

3. Change Business Terms to COD or Retainer. The easiest way to avoid preference exposure and continue to do business with a troubled company is to require cash on delivery terms or require a deposit/retainer. In both circumstances, the debtor will be unable to prove the existence of an antecedent debt. Further, an exchange of cash for goods will better position the defendant for a contemporaneous exchange defense.

4. Do not Accept Post-Dated/Pre-Dated Checks. The acceptance of a post-dated check will almost always defeat two possible preference defenses. The transfer date for a post-dated check is the clear date, not the check date, so the contemporaneous exchange defense will be lost. The “delayed” date on the check will also likely call the ordinary course of business defense into question as well. Similarly, acceptance of a pre-dated check illustrates a check-holding practice of the debtor that will also call into question the applicability of the ordinary course of business defense.

5. Apply Receipts to Most Recent Invoices. While this practice may create exposure for certain “stale” invoices, the odds are that if a debtor files for bankruptcy, the application of receipts to current invoices will create a situation whereby the timing of the payments with respect to certain

invoices will be “ordinary.” The closer the payment is to the invoice date, the better the chance to take advantage of the ordinary course of business defense (unless, of course, the historical timing matches the application to stale invoices).

6. Be Careful not to Modify “Ordinary-Course-of-Business” Practices. With the exception of putting the debtor on a cash-on-delivery basis, it is unwise to attempt to change your practices concerning the payment of goods. As one commentator notes: *If the invoices say that payment is due within 60 days and the debtor has been paying regularly within sixty days, you are probably safe. If the debtor has regularly been paying 70 days later, you might have a problem, but you will also have a problem if you start badgering the debtor to pay faster. If you leave the status quo alone, you will have, at least, an argument that 70 days was de facto the ordinary course of business. If you make a change in billing procedures, make it for all of your customers, i.e., change your ordinary course of business uniformly.*

In other words, if you force to the debtor pay sooner, the debtor may use that fact to show that its past payments were not made in the ordinary course of business.

7. Make sure that all security instruments are properly recorded as soon as possible.

B. Post-Petition Pointers

The following are some suggestions on how to deal with preference issues after the filing of bankruptcy:

1. It is usually fairly easy to determine whether a preference claim is

continued on next page

meritorious. Spend the time up front tracking the alleged preferential transfers. If you can show a meritorious defense, the debtor may be willing to drop its claims, or settle early for nuisance value. Conversely, if you determine that you owe the money, you may be able to negotiate a better discount from the Trustee prior to the Trustee expending a lot of effort in the case.

2. Review the debtors schedules, the statement of financial affairs and the entire bankruptcy court file. Many times you may be able to find admissions that you can use against the debtor's preference claims.

3. Before filing an answer make sure that you do not have any grounds for moving to dismiss the claim.

XI. Conclusion

Preference actions present a formidable hurdle to collection activities. Counsel should allow be on the lookout against such actions and take steps to protect against them. Sometimes the nature of this particular beast is such that there is little one can do to prevent the future risk that payments will be avoided as a preference. In those circumstances, counsel can only inform his or her client of this risk and eagerly await expiration of the ninety day preference period to expire after receiving payment of a past debt. ❖

Jan I. Berlage is an attorney with the law firm of Ballard Spahr Andrews & Ingersoll, LLP ("Ballard Spahr") in Baltimore, Maryland. Mr. Berlage acknowledges with deep appreciation the helpful suggestions and assistance provided to him by Vincent J. Marriott III of Ballard Spahr's Philadelphia, Pennsylvania office.

EDITORS NOTE: In order to accommodate the text of this article, some citations have been omitted. For the full text, with footnotes, please contact us at ylsadvocate@msba.org or check the YLS website at www.msba.org/sec_comm/yls.

Annual Meeting Notice



Attention Young Lawyers. Don't forget to make plans today for this year's Annual Meeting, June 15th through the 18th, at the Clarion Resort Fontainebleau Hotel in Ocean City, Maryland. This year, the Young Lawyers Section is proud to present programs in association with the Solo and Small Firm Section, as well as the Leadership Academy.

Programs include:

Judicial Nominations: Curious about the judicial nominating process and/or have judicial aspirations of your own? Learn about the process from members of the bench and the MSBA's Judicial Appointments Committee. Featured speakers include the Honorable Clayton Greene, Jr., the Honorable James A. Kenney, III, and Rignal Baldwin, Jr.,

former committee chair and current member, MSBA Committee on Judicial Appointments.

Immigration Consequences of Criminal Convictions: Co-sponsored with the Leadership Academy, this program is an absolute "must attend" for anyone representing non-U.S. citizens in civil or criminal matters. Featured speakers include Rachael Ullman, Esquire, Johnson, Yang & Ullman, P.C., Laura Rhodes, Esquire, Albright & Rhodes, James P. Botluk, Esquire Assistant Bar Counsel, Attorney Grievance Commission, and Mary Holper, Esquire, CAIR – Capital Area Immigrants' Rights Coalition.

Driving Under the Influence: Co-sponsored with the Solo and Small Firm Section, this program will instruct criminal law practitioners on the finer intricacies of trying a criminal DUI case. Featured speakers include Lenny Stamm, Esquire and John Kudel, Esquire.

Disaster Relief Training: An annual event, join members of the Young Lawyers Section Disaster Relief Committee and a FEMA representative to learn more about the invaluable services provided by our Section members.

These programs are just a few of the many highlights for what will prove to be a fun and educational meeting. All members are encouraged to attend the Section's business meeting on Thursday afternoon, following the annual "An Afternoon at Secrets." Other highlights include the President's Reception, the Young Lawyers Annual Sun Run, and Solo Day programming for solo and small firm practitioners. More events are being planned as the Advocate finds its way to your mailbox, so be sure to check out www.msba.org for the latest information and registration details.❖



3RD CIRCUIT

BALTIMORE COUNTY

*Adam T. Sampson,
Circuit Representative*

The Baltimore County Bar Association (BCBA) has been busy this winter celebrating the holiday season and keeping its members on top of the developments in the law.

Social Events

The annual Black Tie Banquet, known as the “Prom,” was once again a huge success with many judges and lawyers from around the state in attendance. Congressman Dutch Rupersberger was the key-note speaker. Only those in attendance know whether the traditional involving rolls lived on.

The Holiday Party was held in early December at the Stil in County Baltimore and was packed with many of the BCBA members celebrating another fine year of practice.

Members of the BCBA gathered with MSBA Young Lawyers’ at the Stil as part of the latter groups “Thirsty Thursdays” initiative in late November. Then newly appointed Baltimore County Judges Mickey Norman, “Swede” Murphy, and Sally Chester were on hand to meet the attendees.

Also making an appearance were Third Circuit Administrative Judge John Grason Turnbull, Circuit Court Judge Bollinger, District Court Administrative Judge Sandy Williams, District Judge Lambdin, and Delegate John Cardin. Thanks to all those who attended.

Charitable Events

The season was not marked by celebration alone as the Young Lawyers’ Committee and the BCBA Bar Library successfully raised money and books for area children in an effort to increase literacy of those who cannot afford to purchase books of their own. For some odd reason again this year, when Santa Clause made an appearance in the library, Judge Daniels was nowhere to be found in the courthouse and his whereabouts were unknown.

CLE’s

Numerous CLE’s are planned for the coming months. Please contact the BCBA for a full list to determine which of are interest to you.

4TH CIRCUIT

HOWARD COUNTY

*Claude de Vastey,
Circuit Representative*

The Howard County Bar Association Young Lawyers Section (HCBA-YLS) hosted a MSBA-YLS Thirsty Thursday on February 17, 2005 at the Ellicott Mills Brewery in Ellicott City, Maryland. Kristen Rompf, Chair, was happy with the kick off event for 2005. Plans have already begun for future events for HCBA-YLS.

A special thanks to Tamara Goorevitz for all her assistance in making the Thirsty Thursday Happy Hour a success here in Howard County.

5TH CIRCUIT

ANNE ARUNDEL COUNTY

Marla Zide, Circuit Representative

Anne Arundel County is planning many fun and exciting events for

Spring 2005. Although, there is not a date, AABA is planning a Golf Tournament. anyone interested they should contact the Anne Arundel County Bar Association.

A CLE on Real Property: Pre-Contract through Settlement is being held on March 24, 2005 at 5:30 p.m. in Annapolis, contact the Anne Arundel County Bar Association for more information.

As the 2005 Anne Arundel County mock trial program winds down and I reflect on how well all of the students competed, I realize I would be remiss if I did not let more young lawyers know about this fantastic program. The Maryland High School Mock Trial program is a great way for young lawyers to get involved. If you have any interest please feel free to contact mzidealanformanlaw@yahoo.com for more information.

6TH CIRCUIT

MONTGOMERY COUNTY

*Bradford S. Bernstein,
Circuit Representative*

The Montgomery County Bar Association is in the process of selecting its Officers and Executive Committee for 2005-2006. Please write to John P. Kudel, Chair, Nominations & Elections Committee, Bar Association of Montgomery County, 27 West Jefferson Street, Rockville, Maryland 20850 for further information.

The nomination process is underway for the MSBA 2005 Board of Governors. For further information please contact the MSBA Executive Director.

Mark your calendars now! The 2005 Annual Meeting & Law Day Celebration will be on Friday, May 6, 2005.

The Montgomery County Bar Foundation will be presenting the following CLE Courses:

Tuesday, March 29, 2005

Commercial Litigation Section Presents: “Electronic Discovery”

continued on next page

Tuesday, April 5, 2005

Pro Bono Committee Presents:
“Dealing with Clients and Mental Health Issues”

Tuesday, April 12, 2005

Immigration Section Presents:
“Immigration Law and Crimes—
A to Z for Criminal and Immigration Lawyers”

Wednesday, April 13, 2005

Criminal Law and Juvenile Law Section Presents: “Crawford and Snowden: What's In, What's Out and What's Happened Since.”

Tuesday, April 19, 2005

Family Law Section Presents:
“Mastering Evidence: How to Present Your Best Case”

Wednesday, April 20, 2005

Estates and Trusts Section Presents:

“Basics of Generation Skipping Tax Planning”

Cost per 3 hour program is \$30.00 for a new practitioner. For more information on these great programs, please contact the Bar Foundation at 301-340-2534.

FREDERICK COUNTY

*Jennifer M. Lichtenfield,
Circuit Representative*

The Frederick Thirsty Thursday was a huge success. Thanks to everyone for the fantastic turn out.

Opening Term of Court was held on Monday, February 7, 2005. The Association recognized those who have been recently admitted to the Maryland Bar.

The Charity Art Auction benefiting The Interfaith Housing Alliance held on March 4, 2005 was also a huge suc-

cess. The auction was at Cutch's Daughter Restaurant in Frederick. There was a great turnout. A special thanks to everyone in attendance. The event would have not been a success without your generosity!

8TH CIRCUIT

BALTIMORE CITY

Jason Hessler, Circuit Representative

The Baltimore City YLD is hard at work implementing a We the Jury, a new program introduced at the ABA conference in Austin, Texas this past October. The Baltimore City YLD will be hosting ABA President Robert Gray for a discussion on We the Jury. The event will be held on the evening of April 6, 2005 at the University of Baltimore. For more information please call 410-539-5936. ❖

From the Chair

continued from page 2

- The median award made by juries in civil cases nationwide has dropped from \$65,000 in 1992 to \$37,000 in 2001. (Source: US Department of Justice)
- Punitive damages are rarely a concern in Maryland or nationwide, since they are awarded in just 6% of all cases. (Source: US Department of Justice)
- One of the nation's largest medical malpractice insurers told regulators that recently enacted caps on non-economic damages in Texas would save it little money. (Source: The Wall Street Journal)
- Med Mutual has added hundreds of doctors to its rolls in recent years without verifying the physicians' histories of repeated malpractice claims. (Source: The Baltimore Sun)
- Med Mutual over the last decade has routinely posted operating profits and returned some of these surpluses to the insured doctors. (Source: The Baltimore Sun)
- Over the past 10 years, Med Mutual has had relatively stable premiums averaging only 1.7% over that period and surpluses have allowed return of dividends which average 25.4% to the insured doctors. (Source: State Senator Jennie Forehand)
- Only one out of 50 malpractice incidents actually results in an injury claim. (American Bar Association Tort, Trial and Insurance Practice Section)

- Doctors' efforts to increase patient safety do more than caps on awards to reduce lawsuits and insurance premiums. (Source: Public Citizens' Congress Watch)

Our profession cannot continue to remain silent in this debate. As defenders of justice, we must stand against any assault on our fundamental right to seek redress through our court system. We must push for a full investigation into the causes of rising malpractice rates in Maryland, and remind the public that patient safety, and the reduction of medical mistakes, is the first and ultimate goal.

We have much to feel proud about our profession, and we should do more to let people know it. The latest report by the Administrative Office of the Courts showed that Maryland attorneys donated over one million hours in volunteer pro bono legal services in 2003. In addition, Maryland attorneys personally donated \$3,812,263 in cash contributions to support legal services. I challenge other professions to show that they do more.

If perception really does become reality, we all need to do more to promote a positive one. Talk to your friends and neighbors about our greatest profession. More than our reputation is at stake.

Kindest regards,

Rachel S. Cohen

Chair

Rachel Cohen is an Assistant Attorney General for the Maryland State Retirement and Pension System, and is Chair of the Young Lawyers Section.

“We the Jury”



By Clint A. Harbour

“...the right of trial by jury shall be preserved...”

With these words the Framers of the United States Constitution guaranteed the right of American citizens to sit in judgment of each other's claims. Jury service is a cornerstone of our participatory democracy, however many look with dread at the summons in their mailbox. The ABA-YLD and the Young Lawyers Section of the Maryland State Bar Association have adopted the “We the Jury” program in order to educate soon-to-be jurors about jury service.

“We the Jury” is a mock *voir dire* program designed to teach high school and junior high students about the jury process. The curriculum presents background information for the students, and then young lawyer volunteers *voir dire* the class as they would a venire. After a jury is selected the class watches a mock trial on videotape and deliberates on a verdict. The curriculum includes both a civil and criminal mock trial.

“We the Jury” is a flexible program designed to fit lawyer caseloads and teacher class schedules. The curriculum includes lessons on the creation and evolution of the jury system, the right to a trial by jury in America, and

how members of a venire are selected to serve on a jury. Young lawyer volunteers are recommended to attend at least one class session in order to *voir dire* the panel on a set of mock trial facts - a civil case involving a minor car wreck or a possession of marijuana offense in a criminal trial. After *voir dire*, jurors not challenged for cause or removed on a peremptory strike view a videotape of the mock trial and deliberate on a verdict. Generally, those students not on the panel also watch the video and deliberate as a second group. When both verdicts are reached, the two groups discuss their outcomes and deliberations.

The curriculum includes lesson plans, a jury summons and questionnaire, and homework activities for the students. Additionally, general information about jury trials and answers to frequently asked questions about jury service

are included. For the young lawyer volunteers, the curriculum includes tips on *voir dire* and sample questions to use with the class.

Originally created by the Texas Young Lawyers Association (TYLA), the ABA-YLD, and now the MSBA YLS, have adopted “We the Jury”

as one of its national service projects. Information and copies of the curriculum can be obtained from TYLA at <http://www.tyla.org/pdfs/Jury.pdf>, or from the ABA-YLD at <http://www.abanet.org/yld/wethejury/>. “We the Jury” is an excellent opportunity for young lawyers to sharpen their *voir dire* and public speaking skills in addition to providing a valuable service to the community. ♦

Clint A. Harbour is a member of Texas Young Lawyer's Association and American Bar Association Young Lawyer's Division.

“We the Jury” is a flexible program designed to fit lawyer caseloads and teacher class schedules. ...[with] lessons on the creation and evolution of the jury system, the right to a trial by jury...

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The Editors of *The Advocate* are looking for “nuts and bolts” articles on different areas of law to share with the Section and *pro bono* experience pieces to let the Section know that interesting cases are waiting for them as they aspire toward their *pro bono* goals. If you are interested in submitting an article, or would like more information, contact Gwendolyn Tate at YLSAdvocate@msba.org

THE PUBLIC SERVICE COMMITTEE OF THE MARYLAND STATE BAR ASSOCIATION SECTION OF YOUNG LAWYERS
Invites You to Participate in the YLS FIRST ANNUAL STUDENT MENTORING DAY

Who: MSBA Young Lawyers Section

What: 1) Shadow a Baltimore City High School Student at his or her school for a day.
2) Participate in a follow-up evening of fun with your student and colleagues.

Where: A High School in Baltimore City (to be determined based on your selected shadowing date)

When: There are three dates for this

event: 1) Actual Shadow Day (approximately 8:30am–12:30pm):

Choose ONE of the Following Dates:
Monday, April 11, 2005 (Shadow Day);
or Tuesday, April 12, 2005 (Shadow Day); or Wednesday,
April 13, 2005 (Shadow Day)
2) Shadowing Follow-Up Celebration:
Thursday, April 14, 2005 (evening)

Why: 1) Expose students to caring and professional adults.

2) Provide young attorneys with an inside view on how Baltimore City schools function on a daily basis.
3) Demonstrate to students that they have the potential to be leaders in their communities and schools.

RSVP: For more details or to RSVP, contact Susan Wyckoff (wyckoff@cbkn-law.com) or Sarah Andrews (andrews@cbknlaw.com) no later than Friday, March 11, 2005.

The Negotiation Process

continued from page 1

When the questions end and the parties talk about what they “have to have” or are willing to give up, they have entered the Distributive Stage during which they determine how they are going to divide the items they discovered during the Information Stage. Silence and patience are two powerful tools. When someone makes an opening offer or a concession and receives no response from the other side, they often become impatient and bid against themselves by articulating new offers. Parties may threaten negative consequences if their demands are not met, or they may promise positive rewards if they get what they desire. Affirmative promises are more likely to generate position changes than threats, because they are face saving. One side promises to modify its position if the other side makes a new offer. During this stage of the process, the parties trade concessions and move toward agreement. They should continue to look for ways to satisfy each other’s goals at minimal cost to themselves, realizing that they usually value the items being exchanged quite differently.

Near the end of the Distributive Stage, the parties see an agreement on the horizon and they enter the Closing Stage. Individuals like certainty, and

when they see the final terms in front of them, they often move quickly to solidify the deal. As a result, they close most of the gap remaining between the two sides. During the Closing Stage patience is a virtue. The less patient participant almost always closes 75-80 percent of the remaining gap, giving up much of what they accomplished during the Distributive Stage. Negotiators should be especially careful not to bid against themselves during the Closing Stage by making unreciprocated concessions.

During the Closing Stage patience is a virtue. The less patient participant almost always closes 75-80 percent of the remaining gap, giving up much of what they accomplished during the Distributive Stage.

Once the Closing Stage is done, the parties usually have an agreement. They should not depart, however, until they make sure they have maximized the joint return. They should move into the Cooperative Stage and try to exchange the items that may have ended up on the wrong side of the table. Parties have under- and overstated the value of items for strategic purposes, and one side may have given the other something it would really have preferred to retain for itself. It

should offer to trade a term it values less for the term it would prefer. If the other side prefers what it has been offered it should be pleased to make the trade, expanding the overall pie and simultaneously improving their respective positions. Once the parties have concluded the Cooperative Stage, they should briefly review the terms they think have been agreed upon to be certain they have reached a definite accord. If they discover an unexpected misunderstanding, they are both psychologically committed to settlement and are likely to resolve their disagreement amicably.

Negotiators who look for the different stages and know what they should be doing in each are more likely to enjoy their bargaining interactions and to achieve more efficient agreements. Attorneys should not be afraid of negotiations, but should welcome these exchanges as ways to advance client interests. ♦

Charles B. Craver is the Freda H. Alverson Professor at the George Washington University Law School. He is author of Effective Legal Negotiation and Settlement (5th ed. 2005 Lexis Pub.) and The Intelligent Negotiator (Prima/Crown 2002); he is coauthor of Alternative Dispute Resolution: The Advocate’s Perspective (2nd ed. 2001 Lexis Pub.). Over the past thirty years, he has taught negotiating skills to over 70,000 attorneys and business people throughout the United States, and in Canada, Mexico, England, Austria, and the People’s Republic of China.

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