

NEWS & DEVELOPMENTS

DE Bankruptcy Court: Pre-BACPA Burden of Proof on Ordinary Course of Business Defense No Longer Applies

Under [an opinion](#) dated October 14, 2014, the Delaware Bankruptcy Court denied opposing motion for summary judgment in a proceeding initiated by the plaintiff-trustee to avoid and recover alleged preferential transfers.

The defendant (a pre-petition creditor of the debtor) moved for summary judgment on the ordinary course of business defense, arguing that the payments to it were made in the ordinary course of business under 11 U.S.C. § 547(c)(2). The trustee similarly moved for summary judgment, arguing that the defendant could not establish the ordinary course of business defense because the debtor's payments to it were late and the defendant only engaged in business with the debtor during the preference period. The court denied both motions in part because the record before it was insufficient and there appeared to be material factual issues in dispute regarding the parties' payment practices. However, the court also addressed the somewhat novel issue of whether a defendant with limited payment history must—in accordance with certain long-standing, pre-BACPA case law—establish an industry norm to demonstrate that the parties' payment practices were ordinary.

The court noted that pre-BACPA case authority (in certain circumstances) imported industry analysis into the proof of the parties' payment history and was developed when the relevant statute required a defendant to establish ordinariness of the payments as compared to the parties' actual payment history and also industry standards. The statute, however, was amended to provide that the defendant could benefit from the defense if it established either the ordinariness of the payments in the parties' actual payment history or industry standards. Accordingly, the court held that "[t]o require a defendant to show that transfers were made under industry norms to establish that the transfers were made in the ordinary course of the parties' relationship would be to rewrite the statute to its pre-2005 terms. To be consistent with the current statutory structure, the Court cannot import the industry practice into its review of the parties' business relationship. The Court must do the best it can with the evidence before it as to the parties' relationship. Moreover, under the current statute it would be inappropriate to subject the evidence of industry norms to stricter scrutiny because the parties' business relationship has been for a relatively short time."

—[Marcos Ramos](#) and [Alexander G. Najemy](#), *Richards, Layton & Finger, P.A.*, in *Wilmington, DE*