Consumer Bankruptcy Developments

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by Richard E. Coulson and Alvin C. Harrell*

INTRODUCTION

The 1991-92 term of the United States Supreme Court and the trend of continued, escalating bankruptcy filings reflect the rapid growth in consumer related bankruptcy law developments noted in last year’s Survey. This Article will consider five of the seven cases decided by the United States Supreme Court during the 1991-92 term and related cases.

PROPERTY OF THE ESTATE AND EXEMPTIONS

PATTERSON V. SHUMATE

Conflict and turmoil symbolized the state of the law concerning debtors' pension benefits in bankruptcy since the 1988 decision of the United States Supreme Court in Mackey v. Lanier Collection Agency & Service, Inc. By June 15, 1992 when Patterson v. Shumate was decided, the circuits had split evenly (4-4) on the issue of whether debtors' interests were property of the estate. Other related issues, such as whether such interests were exempt under state or federal law, also di-

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1. Total filings increased 10.5% for year ending June 30, 1992 over the prior year. BNA's Banking Report, 59 BBR 408 (BNA) (Sept. 21, 1992).
5. Patterson, 112 S. Ct. at 2246 n.1.
vided the courts. Substantial scholarly commentary also reflected the controversy.

The issue in *Patterson* was whether benefits in an ERISA qualified pension benefit plan are excluded from the estate. The Court unanimously held that such interests are excluded from the bankruptcy estate by Bankruptcy Code section 541(c)(2). The decision is important for bankruptcy scholarship not only for its holding, but for the analysis the Court used to reach the decision.

The debtor (Shumate) was president and board chairman of a corporation that, like himself, was in bankruptcy. The corporation established a qualified pension benefit plan that included the anti-alienation language required by ERISA. After the corporation declared bankruptcy, the pension benefit plan was terminated by the corporate chapter 7 trustee. Distributions were made to all plan participants except Shumate. The district court held that Shumate’s interest in the plan (i) was not excluded from Shumate’s estate either by ERISA or under Virginia spendthrift trust law, and (ii) was not exempt under section 522(b)(2)(A), which exempts from the property of the bankruptcy estate property that is exempt under federal law, because ERISA, even though federal law, did not govern in this situation. The Fourth Circuit reversed the district court decision, relying on its intervening decision in *Anderson v. Rain (In re Moore)*.

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10. *Patterson*, 112 S. Ct. at 2250. Justice Scalia wrote a separate opinion concurring in the Court’s decision.

11. *Id.* at 2248 (citing 11 U.S.C. § 541(c)(2) (1988)).


15. 907 F.2d 1476 (4th Cir. 1990); see also commentary cited *supra* notes 6-7.
Continuing its commitment to a textual approach to the Bankruptcy Code, the Supreme Court stated that the "natural reading" of section 541(c)(2) was that it entitled "a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." The Court noted this "plain meaning" also was consistent with other provisions of the Bankruptcy Code because where Congress intended to limit a reference to state law, it clearly did so.

The issue became whether ERISA, a nonbankruptcy law, was applicable, that is whether ERISA requires that the transfer restriction be enforced. ERISA requires qualified pension benefit plans to "provide that benefits provided under the plan may not be assigned or alienated." The Court noted that this requirement for anti-transfer provisions was enforced by statutory duties on trustees and administrators to comply with plan provisions, and noted that the provision would be enforced outside of bankruptcy. The trustee relied heavily on legislative history, certain alleged statutory inconsistencies, and policy considerations to support his position. The Court held, however, that recourse to legislative history was inappropriate "given the clarity of the statutory text," and that even if legislative history were considered, it disclosed no "clearly expressed legislative intention" contrary to the Court's plain meaning interpretation.

The trustee also argued that because Bankruptcy Code section 522(d)(10)(E) permits a debtor to exempt his or her right to receive "a payment under a stock bonus, pension, profitsharing, annuity or similar plan or contract," there would be surplusage if ERISA qualified pension

16. See, e.g., Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says.").
17. 11 U.S.C. § 541(c)(2) (1988) ("A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.").
18. Patterson, 112 S. Ct. at 2246.
19. Id.
21. Patterson, 112 S. Ct. at 2247 n.3 (citing Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990), and noting the position of the Internal Revenue Service that a transfer to the bankruptcy trustee disqualifies the plan from favorable tax treatment).
22. Id. at 2248 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).
23. Section 522(d)(10)(E) provides:

[A] payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that
benefit plans were excluded from the estate. Because the section 522(d)(10)(E) exemption is broader than the ERISA qualified plan exclusion, the Court disagreed. The Court noted that ERISA does not regulate all such plans, e.g., pension plans created by governmental and church entities or individual retirement accounts. The Court believed that its interpretation was superior policy because it “ensures that the treatment of pension benefits will not vary based on the beneficiary’s bankruptcy status,” gives “effect to ERISA’s goal of protecting pension benefits,” and furthers ERISA’s policy of providing “uniform national treatment of pension benefits.”

Justice Scalia’s concurrence scathingly criticized those courts that reached a contrary result on statutory interpretation:

When the phrase “applicable nonbankruptcy law” is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for “state law” is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, “state law”), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of “a government of laws, not of men.”

TAYLOR V. FREELAND & KRONZ

Under Bankruptcy Code section 522(l), a “debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section.” Absent an objection by a party in interest “the property claimed

employed the debtor at the time the debtor’s rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).


24. Patterson, 112 S. Ct. at 2249. Cf. Connecticut Nat’l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (“Redundancies across statutes are not unusual events in drafting, and so long as there is no ‘positive repugnancy’ between two laws” a court must give effect to both.).


26. Patterson, 112 S. Ct. at 2249.

27. Id. at 2250.

28. Id.

29. Id. at 2250-51 (Scalia, J., concurring).

as exempt on such list is exempt." A trustee or creditor "may file objections to the list of property claimed as exempt within 30 days after the conclusion of the" section 341 meeting, "unless, within such period, further time is granted by the court." If an objection is filed, "the objecting party has the burden of proving that the exemptions are improperly claimed." In *Taylor v. Freeland & Kronz*, the United States Supreme Court addressed a situation where a groundless exemption was claimed, but the trustee failed to timely object. The Court ruled that the trustee could not seek turnover of the asset.

In *Taylor*, the debtor claimed that her interest in an employment discrimination lawsuit that was pending in state court was exempt under section 522 of the Bankruptcy Code. At the time of the bankruptcy filing, a state intermediate appellate court had reinstated an agency finding of liability, and a further appeal to the state supreme court was in process. At her section 341 meeting in January 1985 the debtor and her counsel indicated a possible recovery of $90,000. The trustee took the position that the cause of action was property of the estate, but neither filed an objection to the exemption, nor sought additional time within which to object. The trustee apparently doubted that the claim had any value. The debtor received a discharge in October 1985. In October 1986 the state supreme court affirmed the intermediate appellate court decision in the employment discrimination suit, and in September 1987 a settlement agreement was executed in that case. The trustee then filed an adversary action against the debtor and her lawyers. The bankruptcy and district courts held for the trustee but the Third Circuit reversed. The Supreme Court, by an eight-to-one vote, affirmed the circuit court.

31. Id.
32. FED. BANKR. R. 4003(b).
33. FED. BANKR. R. 4003(c).
35. Id. at 1648.
36. Id. at 1646.
37. Id.
38. The settlement was for lost wages and other tort loses. While partially exempt, the bankruptcy court held, and it was not later disputed, that no colorable exemption existed for payments for tort claims not representing lost wages. *Taylor v. Freeland & Kronz (In re Davis)*, 105 B.R. 288, 293 (Bankr. W.D. Pa. 1989), aff'd, 118 B.R. 272 (Bankr. W.D. Pa. 1990), rev'd, 938 F.2d 420 (3d Cir. 1991), aff'd, 112 S. Ct. 1644 (1992). The bankruptcy court ordered the debtor and defendant law firm to turnover enough money to pay all of the debtor's creditors with interest and the trustee's legal fees. *Id.* at 294.
Because Federal Bankruptcy Rule 4003(b) allows a trustee to object to exemption claims within thirty days of the conclusion of the section 341 meeting, the Court concluded that “by negative implication,” an objection cannot be made after thirty days from the section 341 meeting. If a timely objection is not made, the Court held that “the property claimed as exempt . . . is exempt under section 522(l).” The Court held that the trustee knew about the lawsuit and its potential value, but failed to object or seek an extension within the thirty day period. The Court noted that penalties such as denial of discharge for presenting fraudulent claims exist to discourage baseless claims. Finally, the Court declined to consider whether 11 U.S.C. section 105(a) authorized any basis for judicial intervention because the issue had not been raised below. This is unfortunate because some courts, including the Fourth Circuit, have upheld relief under section 105(a). Thus lower courts must continue without definitive guidance on this issue.

Justice Stevens wrote the only dissenting opinion:

In this case, even if there was no fraud, and even if it is assumed that the trustee failed to exercise due diligence, it remains true that the parties injured by the trustee’s failure to object within the 30-day period are innocent creditors. Moreover, it is apparently undisputed that there was no legitimate basis for the claim of an exemption for the entire award. . . . Under these circumstances, unless the debtor could establish some prejudice caused by the trustee’s failure to object promptly, I would hold that the filing of a frivolous claim for an exemption is tantamount to fraud for purposes of deciding when the 30-day period begins to run.

41. Under § 522 the debtor may exempt from the estate (1) property exempt under federal law other than by § 522(d), and (2) property exempt under state law or exempt under section 522(d), unless the state of the debtor’s domicile “specifically does not . . . authorize” the choice of the section 522(d) exemptions. 11 U.S.C. § 522(b)(1)-(2) (1988); see id. § 541 (property of the estate). These exemptions must be claimed by the debtor filing a list of such property. Id. § 522(l); FED. BANKR. RULE 4003(a) (1985). Section 522(l) provides: “Unless a party in interest objects, the property claimed as exempt on such list is exempt.” 11 U.S.C. § 522(l) (1988).

42. Taylor, 112 S. Ct. at 1648.

43. Id.

44. Section 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

45. Taylor, 112 S. Ct. at 1649.

46. See Ragsdale v. Genesco, Inc., 674 F.2d 277, 278 (4th Cir. 1982).

47. Taylor, 112 S. Ct. at 1650 (Stevens, J., dissenting).
Stevens advocated a rule that allows an objection to be filed at any time prior to closing the case, or only allows an erroneous exemption claim to stand when there was a "good faith statutory basis for the claim."48 Although in the instant case there was no fraud and full disclosure occurred at least by the section 341 meeting, Justice Stevens opined that in the presence of fraud the Court would not find the thirty-day deadline of Bankruptcy Rule 4003(b) a barrier to relief.49

It is hard to agree fully with either the majority or the dissenting decision. In Taylor, the trustee knew the nature of the lawsuit and that the debtor's counsel believed it had value. Prudence should have led to an objection or a request for an extension of the deadline within the thirty days. Justice Stevens felt the debtor had failed to "establish some prejudice caused by the trustee's failure to object promptly."50 The trustee's failure to object to the exemption, however, undoubtedly led debtor's counsel to believe that the trustee consented to the settlement terms. Moreover, the debtor's discharge was granted long before the settlement of the discrimination lawsuit. Surely a fresh start includes going forward with one's exempt property free from discharged debt. The policy behind a thirty-day limitation reflects the desirability of allowing a debtor to know at an early point in the process whether certain matters are going to be formally pursued. The policies of finality and fresh start argue strongly, especially on these facts, for some application of section 522(l). The thrust of section 522(l) that "[u]nless a party in interest objects, the property claimed as exempt . . . is exempt," clearly is to place on the trustee and creditors a duty to object in a timely fashion where, as here, it is possible.

On the other hand, the very shortness of the time period in Bankruptcy Rule 4003(b), while consistent with the normal rapid pace of bankruptcy procedures, also argues against treating it more strictly than a statute of limitations. In the normal statute of limitations case, equity intervenes when a defendant misleads or otherwise contributes to a plaintiff's delay in bringing an action.51 Although there was no factual misrepresentation in Taylor, the Court's opinion prevents a debtor from making an equity argument in a case where there was misrepresentation.

A better approach would be to treat the thirty-day deadline analogously to a failure to bring a timely action. Failure to object or seek an extension within thirty days would bar further objection unless cause justifying the delay could be shown and no prejudice to the debtor would occur by the lateness of the objection. Finally, section 522(l) or perhaps rule 4003(b) should be amended to prohibit delays in objections beyond the date of

48. Id. at 1651.
49. Id. at 1652.
50. Id. at 1650.
51. See, e.g., 51 AM. JUR. 2D Limitation of Actions § 142 (1970); 54 C.J.S. Limitation of Actions § 86 (1987).
discharge. Knowing what property one takes from bankruptcy (or that a formal objection to an exemption claim is pending) seems essential to any reality of a fresh start.

DEWSNUP AND HOME MORTGAGE CRAMDOWNS

The bankruptcy case of greatest interest in 1992 was Dewsnup v. Timm, which held that Bankruptcy Code section 506(a) could not be used in conjunction with section 506(d) to "strip away" the unsecured portion of an undersecured claim in a chapter 7 case. This effectively limited chapter 7 debtors to their traditional alternatives: reaffirmation of the entire debt under section 524 (in order to retain the collateral subject to installment debt), redemption under section 722 (limited to certain personal property), or abandonment of the collateral. As a result of Dewsnup, debtors wishing to "cram down" secured debt (by keeping the collateral subject to restructured debt) are limited to recourse under Bankruptcy Code chapters 11, 12, or 13, which specifically permit cramdowns subject to certain statutory limitations.

While Dewsnup essentially preserved the traditional relationships between the various chapters of the Bankruptcy Code, neither the opinion nor the Bankruptcy Code provisions it deals with are models of clarity. As a result, Dewsnup has been the subject of critical commentary. In addition, the lower courts split on the implications of Dewsnup in chapter 13 cases, with three United States courts of appeal interpreting Dewsnup very narrowly by concluding that it has no applicability to the interpretation of section 506 in chapter 13 cases, while the Fifth Circuit applied the Dewsnup...

52. 112 S. Ct. 773 (1992); see Budnitz, supra note 2, at 1299-1300 (discussion of Dewsnup).
54. Id. § 506(d).
55. Dewsnup, 112 S. Ct. at 778.
57. Id. § 722.
58. See, e.g., General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053 (6th Cir. 1983).
59. As noted in last year's Survey, Toibb v. Radloff, 111 S. Ct. 2197 (1991), concluded that individual debtors may file under chapter 11. See Budnitz, supra note 2, at 1300-01.
60. Chapter 7 was designed to liquidate the debtor's estate, not restructure his or her debts. The latter task specifically was assigned to chapters 11, 12, and 13.
rationale more broadly to prohibit cramdowns utilizing section 506(a) as a means to overcome the statutory limitations of section 1322(b)(2). While section 1322(b)(2) specifically permits modification (cramdown) of secured debt in chapter 13, it does not allow modification of "a claim secured only by a security interest in real property that is the debtor's principal residence." Beginning in the late 1980s, however, some courts began allowing chapter 13 debtors to "strip away" that portion of a home mortgage loan in excess of the value of the collateral under section 506(a), effectively cramming down the home mortgage loan outside the protections of section 1322(b)(2). Section 1322(b)(2) was then said to protect from modification only the home mortgage debt constituting an allowed secured claim after the cramdown.

It was the continuing viability of this rationale after *Dewsnup* that generated such controversy in 1992. While the 1992 courts of appeal decisions might be said to weigh against application of the *Dewsnup* rationale in chapter 13 by a ratio of three-to-one, legal analysis requires consideration of the reasoning in the cases rather than just totaling up these numbers, especially given the history of home mortgage cramdowns in the Third and Ninth Circuits. The Third Circuit's decision in *Sapos v. Provident Institution of Savings* essentially reaffirmed the Third Circuit's pre-*Dewsnup* holding in *Wilson v. Commonwealth Mortgage Corp.*, partly on grounds that the *Dewsnup* prohibition against the use of section 506(a) as an independent cramdown provision in conjunction with section 506(d) did not preclude


64. 11 U.S.C. § 1322(b)(2) (1988). The chapter 13 cramdown procedure does not include many of the creditor safeguards in the equivalent chapter 11 procedure. Cf. 11 U.S.C. § 1129 (1988). As a result the debtor unilaterally can modify secured debt in chapter 13, subject only to the somewhat vague "good faith" and best interests of the creditors tests of § 1325(a) and (b). Apparently the drafters of the home mortgage exception in § 1322(b)(2) intended to protect home mortgage debt from this type of unilateral modification by the debtor.

65. See, e.g., Houghland v. Lomas & Nettleton Co. (In re Houghland), 886 F.2d 1182 (9th Cir. 1988); Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410 (10th Cir. 1991). Gagliant v. First Fed. Sav. & Loan Ass'n, 889 F.2d 1304 (3d Cir. 1989), followed similar reasoning in a chapter 7 case, but this was clearly rejected by *Dewsnup*. The Ninth Circuit later reaffirmed the *Houghland* rationale, limiting application of *Dewsnup* to cases involving § 506(d). See Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992). Other cases have allowed cramdown of home mortgage debt in chapter 13 cases by narrowly restricting the concept of a loan secured only by the debtor's principal residence. See, e.g., Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3d Cir. 1990).

66. *Bellamy, Sapos, and Lomas* rejected use of the *Dewsnup* rationale to limit home mortgage cramdowns in chapter 13 cases, while *Nobleman* followed *Dewsnup* in a chapter 13 case by prohibiting use of § 506(a) to modify home mortgage debt outside § 1322(b)(2). The Supreme Court granted certiorari in *In re Nobleman*, 113 S. Ct. 654 (1992).

67. 967 F.2d 918 (3d Cir. 1992).

68. 895 F.2d 123 (3d Cir. 1990).
use of section 506(a) as an independent cramdown provision in conjunction with section 1322(b)(2). Similarly, the decision in Lomas Mortgage USA v. Wiese essentially reaffirmed the Ninth Circuit’s view in Houghland v. Lomas & Nettleton Co. (In re Houghland), concluding that the use of section 506(a) as a cramdown provision is unaffected by Dewsnup. Although Dewsnup did not deal with this directly, Sapos and Lomas seem clearly inconsistent with the Dewsnup view of the role of section 506. The efforts of the Second Circuit in Bellamy v. Federal Home Loan Mortgage Corp. to draw together sections 506(a) and 1322(b)(2), as part of a grand scheme to allow cramdown of home mortgage debt in chapter 13 cases, also seemingly conflicts with the Dewsnup view that section 506(a) is not a cramdown provision.

Thus, whatever one may think of the reasoning in Dewsnup, that reasoning is in conflict with Bellamy, Sapos, and Lomas, suggesting an interesting series of issues to be dealt with when these matters are revisited by the Supreme Court in Nobleman. In the meantime, while the bankruptcy court decisions continue to be split, some bankruptcy courts are analyzing the Dewsnup decision in opinions that provide in-depth explanations of the relationship between section 506(a) and other relevant code sections.

**PREFERENTIAL TRANSFER ISSUES**

During the past year, the Supreme Court decided two important cases relating to preferential transfers. These cases have broad impact because they may determine whether payments received by creditors during the pre-bankruptcy preference period have to be returned as preferential transfers. Under Bankruptcy Code section 547(b), such payments may be voidable as preferences if they constitute a transfer of value to a creditor by an insolvent debtor during the preference period that enables the creditor to receive more than it would if the debtor were in chapter 7 bankruptcy and the payments were not made, unless one of the exceptions

69. Sapos, 967 F.2d at 924-25.
70. 980 F.2d 1279 (9th Cir. 1992).
71. 886 F.2d 1182 (9th Cir. 1988).
72. Lomas, 980 F.2d at 1282.
73. 962 F.2d 176 (2d Cir. 1992).
74. See, e.g., In re Dyer, 142 B.R. 364, 367 (Bankr. D. Ariz. 1992) (viewing Dewsnup as an extension of Johnson v. Home State Bank, 111 S. Ct. 2150 (1991), which held that § 506(a) bifurcates undersecured creditor claims for purposes of the debtor’s personal liability but does not alter the in rem status of a lien).
75. The preference period is the 90 days prior to the filing of the bankruptcy petition, except that the period is extended to one year prior to the filing if the creditor is an “insider” of the debtor. 11 U.S.C. §§ 547(b)(4) (establishing the preference period), 101(31) (defining insider) (1988).
76. Id. § 547(b).
77. Id.
in section 547(c) applies. Thus, it may be important to determine whether a given transfer is made within the preference period.

In Barnhill v. Johnson, the Supreme Court held that for purposes of section 547(b), a transfer made by check is deemed to occur on the date the check is honored by the bank, not on the date the check is delivered to the payee or other holder. In Barnhill, the check was delivered on November 18, was dated November 19, and was honored by the payor bank on November 20. The drawer later filed bankruptcy and the ninetieth day before the petition date (the day the preference period began) was November 20. Therefore the check was delivered outside the bankruptcy preference period, but was paid within the preference period. Whether the transfer was avoidable depended on the date the transfer was deemed to have been made.

The bankruptcy court held that the transfer occurred on the date of delivery and therefore was outside the bankruptcy preference period. The United States Court of Appeals for the Tenth Circuit, however, reversed on the grounds that under the Uniform Commercial Code (U.C.C.) a transfer of funds occurs only upon payment by the payor bank. The Supreme Court affirmed the Tenth Circuit’s decision.

The Supreme Court’s analysis focused on U.C.C. sections 3-104 (a check is an order to pay money), 3-409 (a check is not an assignment of funds), and 3-802 (the underlying obligation is not discharged until the check is honored by the drawee/payor bank). The Court’s analysis was based on and is consistent with the U.C.C. Justices Stevens and Blackmun dissented, arguing that the delivery date should govern if the check is paid within ten days because Bankruptcy Code section 547(e)(2)(A) provides for a relation-back to the date the transfer became effective between the parties if it is perfected within ten days. As pointed out in the majority opinion,

78. Id. § 547(c).
80. Id. at 1388.
83. Barnhill, 112 S. Ct. at 1392.
84. Barnhill cites U.C.C. Article 3 provisions with reference to the 1991 Uniform Laws Annotated. See 112 S. Ct. at 1389-90 (citing 2A U.L.A. 189, 208, 407, 514 (1991)). The Court’s U.C.C. citations, however, are to the uniform text of U.C.C. Article 3 as it existed prior to the 1990 revisions. This was the applicable law, because the Barnhill transactions took place prior to the 1990 Article 3 revisions. The result under revised Article 3 should be the same, although some of the section numbers and applicable provisions were changed. See U.C.C. §§ 3-104(a), 3-104(f), 3-408 (check is not an assignment of funds), 3-310 (impact on underlying obligation).
85. Bankruptcy Code § 547(e)(2)(A) provides: “[A] transfer is made— (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time . . . .” 11 U.S.C. § 547(e)(2)(A) (1988).
however, no transfer of funds takes place until the check is paid, and therefore the transfer cannot be said to take place between the transferor and transferee until the date of payment. \(^{86}\)

The Court, however, did not address specifically whether the date of payment is dispositive for all purposes under Bankruptcy Code section 547. While *Barnhill* makes clear that the date a check is paid is the date of the transfer of funds for purposes of the test of section 547(b)(4), it does not necessarily follow that the analysis is the same for purposes of the exceptions to the preference rules in section 547(c). For example, there is authority for the view that for purposes of the "contemporaneous exchange for new value" exception in section 547(c)(1), the date of the delivery of the check controls. \(^{87}\) This is consistent with *Barnhill* and the U.C.C. because the question under section 547(c)(1) is one of *value* rather than a transfer of funds. Under the U.C.C., the transfer of an instrument clearly constitutes *value*, \(^{88}\) even though it does not constitute a transfer of the funds in the drawer's bank account.

An interesting case from the Eleventh Circuit illustrates (without discussing) the potential relevance of this point. In *Reynolds v. Dixie Nissan (In re Car Renovators)* \(^{89}\) the debtor used two checks to pay for the purchase of auto parts and supplies. The checks were dishonored by the payor bank and the payee sent the debtor notice of dishonor, along with notice that the checks would be turned over to the district attorney and that payment must be made within ten days. After being informed that warrants had been issued for his arrest, the debtor sent a cashier's check to cover the two dishonored checks within ten days of the original notice from the payee. The debtor then filed bankruptcy within ninety days of both check transactions, and the trustee sought to recover the payment made by cashier's check as a preference. The arguments in *Car Renovators* focused on whether the debt was nondischargeable under Bankruptcy Code section 523(a)(7). \(^{90}\) The court of appeals rejected the district court's conclusion that the payment in question was criminal restitution not subject to avoidance. \(^{91}\) The trustee, therefore, was able to set aside the debtor's payment as a preference under section 547(b).

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86. *Barnhill*, 112 S. Ct. at 1391.
88. See U.C.C. § 3-303(a)(4) (1990); U.C.C. § 3-303(c) (1989).
89. 946 F.2d 780 (11th Cir. 1991).
90. Id. at 782; see 11 U.S.C. § 523(a)(7) (1988) (excepting from discharge a debt resulting from a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit").
91. *Car Renovators*, 946 F.2d at 783.
An alternative argument that the creditor made at the district court level was that the payment was part of a contemporaneous exchange of new value subject to the exception in Bankruptcy Code section 547(c)(1). While the payment by cashier's check may not have been contemporaneous with the purchase of auto parts, the debtor's issuance of two corporate checks at the time of purchase clearly was a contemporaneous exchange of value for the auto parts, arguably not negated by the fact that these checks were later paid by cashier's check rather than a charge to the debtor's bank account.

On a related preference issue, the Supreme Court addressed another exception to the preference rules contained in Bankruptcy Code section 547(c)(2). In Union Bank v. Wolas, the chapter 7 trustee sought to recover interest payments made by the debtor to a bank within ninety days prior to bankruptcy. The bankruptcy and district courts agreed with the bank that these were ordinary course payments protected by section 547(c)(2), but the Ninth Circuit reversed on grounds that section 547(c)(2) does not protect payments on long term debt.

The Supreme Court reversed the Ninth Circuit, noting the lack of any language in the statute restricting section 547(c)(2) to protection of short term debt. The bankruptcy court determined that the payments otherwise met the requirements of section 547(c)(2), and the Supreme Court declined to abandon the plain meaning of the Bankruptcy Code by excluding long term debt from section 547(c)(2). A subsequent United States Court of Appeals decision from a different circuit had no difficulty in following this clear mandate.

These cases generally reflect the Supreme Court's continuing focus on the plain meaning of the statute, at the expense of creative policy arguments. Sometimes, however, this can be a daunting task in the context of modern federal legislation.

92. 11 U.S.C. § 547(c)(1) (1988). The Car Renovators opinion notes that the § 547(c) exceptions were not argued at the circuit court level. Car Renovators, 946 F.2d at 782.
93. Cf. U.C.C. § 4-213 (1990) (use of cashier's check as medium of settlement by banks). Alternatively it can also be argued that the cashier's check was exchanged in payment of the antecedent debt represented by the two dishonored checks.
94. 11 U.S.C. § 547(c)(2) (1988). This provision excepts from the preference rules any "payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee." Id.
96. Id. at 529.
98. Union Bank, 112 S. Ct. at 533.
99. Id. at 531. Justice Scalia's concurring opinion cautions against the use of legislative history to alter the plain meaning of the statutory language. Id. (Scalia, J., concurring).