

Preferences for Sale? Analyzing the Fifth Circuit's South Coast Supply Co. Opinion

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The Fifth Circuit recently issued an opinion that increases the marketability of estate assets often viewed as untouchable. In *In re S. Coast Supply Co.* ("**South Coast**"), 91 F.4th 376 (5th Cir. 2024), the Fifth Circuit held that a bankruptcy "preference" action may be sold to a third party under section 363 of the Bankruptcy Code even if the buyer is not an estate fiduciary and does not represent the bankruptcy estate. A preference action is an "avoidance" claim arising under section 547 of the Bankruptcy Code. It permits the debtor or trustee to file a lawsuit to recover prepetition transfers made by debtors to non-insiders within ninety days of the petition date, and transfers to insiders within a year of the petition date. Notably, preferences and other avoidance claims have been traditionally viewed as causes of action reserved for prosecution by a bankruptcy fiduciary, like a debtor, trustee, or other court-appointed representative with enhanced duties to the bankruptcy estate. Following *South Coast*, preference claims, and perhaps other avoidance actions, are now more freely marketable, whether as additional collateral to secure a post-petition loan, to provide third parties with adequate protection against diminution in the value of their collateral, or for outright sale to third parties to bring cash into the estate.

I. The Facts

The Debtor issued \$320,000 in checks to its former CFO, resulting in prepetition transfers comprising an asserted \$316,000 preference claim. The Debtor's prepetition secured lender, Briar Capital, filed a \$2.5 million proof of claim secured by a first-priority blanket lien on "all of the Debtor's now owned or hereafter acquired assets, whether tangible or intangible." Briar Capital believed it was oversecured, valuing the collateral at \$3.9 million.

During the case, the Debtor obtained "DIP financing" from a third-party lender (the "**DIP Lender**"). DIP financing is a new loan provided to a debtor-in-possession after the case is filed. Under the order approving the DIP financing, Briar Capital retained its senior liens on property acquired by the Debtor prior to the date on which the DIP Lender advanced DIP financing, and the DIP Lender received senior liens on property acquired after that date. The Debtor also commenced a \$316,000 preference lawsuit against the CFO and filed a plan of reorganization. The plan proposed to sell certain intangible assets to the DIP Lender for \$700,000 cash, earmarking \$200,000 to cover administrative expenses arising during the bankruptcy case and the remaining \$500,000 to pay general unsecured creditors.

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