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Credit Card Transfers, Preferences or Protected: Survey of a Failed Challenge

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"Transfer your high interest rate credit card debt to THIS card and you will not pay any interest for six months." When the credit card holder accepts that offer, and transfers that balance, one bank gets paid, and the other gets a new credit card customer. But if the credit card customer then files bankruptcy, should the paid bank have to give the customer's bankruptcy trustee the money it received from the paying bank? According to three circuit courts, the answer is "yes." On June 18, 2009, the Eleventh Circuit[1] joined the Sixth[2] and Tenth Circuits[3] holding that credit card balance transfers can be avoided as preferences because a debtor's transfer of a credit card balance from one bank to another constitutes "a transfer of an interest of the debtor in property." Shortly thereafter, the Supreme Court denied a petition for certification of the case from the *Marshall* decision in the Tenth Circuit.[4] These cases reflect a series of defeats for banks seeking to protect their winnings from the game of bankruptcy musical chairs.

I. Preferences in General

A trustee may recover, for the benefit of the estate –
any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

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1 Bank of Am., N.A. v. Mukamal (*In re* Egidi) (*Egidi II*), 571 F.3d 1156 (11th Cir. 2009).

2 MBNA Am. Bank, N.A. v. Meoli (*In re* Wells), 561 F.3d 633 (6th Cir. 2009); Yoppolo v. MBNA Am. Bank, N.A. (*In re* Dilworth), 560 F.3d 562 (6th Cir. 2009).

3 Marshall v. FIA Card Servs. (*In re* Marshall) (*Marshall III*), 550 F.3d 1251 (10th Cir. 2008).

4 *Marshall III*, 550 F.3d 1251, *cert. denied*, 77 U.S.L.W. 3703 (U.S. June 29, 2009) (No. 08-1329).

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of the transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Whether a challenged transfer involves an interest of the debtor in property is a threshold issue that must be resolved prior to reaching any of the elements of, or defenses to, a preference action.[5] The common, or one might speculate, shared, defenses raised by the banks are that a credit card balance transfer does not involve "an interest of a debtor in property;" that a credit card balance transfer does not diminish the bankruptcy estate; that the transfer is protected by the earmarking doctrine; and that a bank-to-bank transfer is really a debt swap agreement and therefore exempt from most of the chapter 5 provisions including § 547. In this article we will explore all these defenses and the reasons why they have been unanimously rejected by each appellate court that has considered the issue.

II. Interest of a Debtor in Property

What constitutes a property interest is generally governed by state law.[6] However, courts must "still look to federal bankruptcy law to resolve the extent to which that interest is property of the estate."[7] While the threshold issue in § 547, whether an interest of the debtor in property has been transferred, is a state law inquiry, the relevancy and extent of that determination in bankruptcy law is focused on that transfer's impact on the bankruptcy estate and is therefore informed by federal law.

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5 McLemore v. Third Nat'l Bank (*In re* Montgomery), 983 F.2d 1389, 1392 (6th Cir. 1993).

6 Barnhill v. Johnson, 503 U.S. 593 (1992).

7 *Marshall III*, 550 F.3d at 1255 (quoting Bailey v. Big Sky Motors, Ltd. (*In re* Ogden), 314 F.3d 1190 (10th Cir. 2002)).

Credit card relationships are governed by state and federal law. There are actually four separate relationships in a credit card transaction—the customer and the issuing bank; the customer and the merchant; the bank and the merchant; and the issuing bank and the merchant's bank.[8] The relationship between the customer and the bank is governed primarily by state and federal consumer protection regulations,[9] as well as state contract law. The relationship between the credit card bank and the merchant's bank is set forth in an interchange agreement,[10] that is, a contract, which, in turn, is also governed primarily by state law.

In order to start this analysis, the property interest must be identified. The property interest is the credit facility made available to a credit card customer from the credit card issuing bank.[11] Each court has identified this property interest—the available credit—as an interest of the debtor in property because the debtor exercised control over the use of the credit. Control is defined in each instance as control of the disposition of the money represented by the credit, not physical possession of the money.

In *Egidi II*, the Eleventh Circuit held that a debtor's control of funds was dispositive of the issue of property.[12] In support, the Eleventh Circuit cited its earlier case on fraudulent transfers, *Nordberg v. Sanchez (In re Chase & Sanborn Corp.)*:[13]

> [A]ny funds under the control of the debtor, regardless of the source, are property deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance.[14]

In *Wells*,[15] the court, referring to an earlier Sixth Circuit case on check kiting,[16] held that a payment received by one credit card bank through convenience checks issued from another credit card bank, was subject to avoidance as a preference because of the debtor's control over the use of the fund:

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8 BARKLEY CLARK & BARBARA CLARK, LAW OF BANK DEP. COLL. & CR. CARDS ¶15.02[4] (A.S. Pratt & Sons 2009).

9 *See, e.g.*, Truth-in-Lending-Act, 15 U.S.C. § 1642 (2006); Regulation Z, 12 C.F.R. § 226.13 (2009); and the Consumer Credit Protection Act, 15 U.S.C. §§ 1601 – 1693r (2006).

10 *Id.*

11 Manchester v. First Bank & Trust Co. (*In re* Moses), 256 B.R. 641, 649 (B.A.P. 10th Cir. 2000) ("Generally, a new creditor's unconditioned promise to loan a debtor money to pay the debtor's antecedent debt is property in which the debtor holds an interest, as are the proceeds of the loan once it is made.").

12 Bank of Am., N.A. v. Mukamal (*In re* Egidi) (*Egidi II)*, 571 F.3d 1156 (11th Cir. 2009).

13 813 F.2d 1177 (11th Cir. 1987).

14 *Egidi II*, 571 F.3d at 1160.

15 Meoli v. MBNA Am. Bank, N.A. (*In re* Wells), 382 B.R. 355 (B.A.P. 6th Cir.2008).

16 McLemore v. Third Nat'l Bank (*In re* Montgomery), 983 F.2d 1389 (6th Cir. 1993).

> While it is true that a debtor's potential credit (i.e., an offer of credit) is not an equitable interest that becomes property of the estate, if the debtor accepts the offer prepetition or exercises a contract right to borrow funds from a credit card account, the debtor then has at least an equitable interest in the funds. This is true even if the debtor never receives the funds but only exercises control over disposition of the funds.[17]

In *Dilworth*,[18] the Sixth Circuit held that a credit card balance transfer was preferential because the debtor decided how the paying bank funds would be used "and the economic result is the same as if Citi had handed (the Debtor) currency that she immediately handed over to MBNA."[19]

The credit card banks argue that control should not be relevant unless the transfer actually diminishes what would otherwise be part of the bankruptcy estate. The banks' support for this argument is found in *Begier v. I.R.S.*[20] In *Begier*, the Supreme Court held that funds collected to pay "trust fund taxes" that is, withheld federal income and FICA taxes and excise taxes, were not property of the estate and therefore the debtor's prepetition payment of those taxes did not constitute an avoidable preference. In making its determination the Court observed that "property of the debtor"[21] is not defined in the Bankruptcy Code, however,

> [B]ecause the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate – the property available for distribution to creditors – "property of the debtor" subject to

17 *In re Wells*, 382 B.R. at 362.

18 Yoppolo v. MBNA Am. Bank, N.A. (*In re* Dilworth), 560 F.3d 562 (6th Cir. 2009).

19 *Id.*; *see also Marshall III* noting:

> Technology masks the processes involved here. Separating them into constituent elements reveals a sequence of events, not just one. Debtors drew on their Capital One line of credit; that draw converted available credit into a loan; Debtors directed Capital One to use the loan proceeds to pay MBNA, and Capital One complied. It is essentially the same as if Debtors had drawn on their Capital One line of credit, deposited the proceeds into an account within their control, and then wrote a check to MBNA. The latter is clearly a preference.

Marshall v. FIA Card Servs. (*In re* Marshall) (*Marshall III*), 550 F.3d 1251, 1256 (10th Cir. 2008).

20 Begier v. I.R.S., 496 U.S. 53 (1990).

21 The phrase "transfer of an interest of the debtor in property" found in section 547(b) is not expressly defined in the Code, but it is "well established that it is broadly defined, and guidance is to be drawn from the definition of 'property of the estate' set forth in § 541(a)." Manchester v. First Bank & Trust Co. (*In re* Moses), 256 B.R. 641, 645 (B.A.P. 10th Cir. 2000). As noted by the Supreme Court in *Begier* the phrase "property of the debtor" was changed in the 1984 amendments to section 547(b) to the phrase "an interest of the debtor in property" for the purpose of creating consistency with the language of 11 U.S.C. § 541(a)(1) which defines "property of the estate," subject to enumerated exceptions, as "all legal or equitable interests of the debtor in property as of the commencement of the case." Thus "an interest of the debtor in property" is "coextensive with 'interests of the debtor in property' as that term is used in 11 U.S.C. § 541(a)(1)." *Begier*, 496 U.S. at 59, n.3.

> the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.[22]

Relying on this language, the credit card banks have argued that the debtor's bankruptcy estate cannot possibly be diminished when a borrower uses one credit card to pay another credit card. Before the bankruptcy the debtor owed a certain amount to one bank and by virtue of the balance transfer merely has substituted one creditor for another but has not otherwise impacted the assets that would otherwise be included in the property of the estate.

Each of the appellate courts has rejected this argument as well. In each case the court has expressed the view that with the available credit the debtor could have used the funds for other purposes, for example, purchasing assets, and therefore, since the money was not used to purchase an asset that would have then become an asset of the bankruptcy estate, the bankruptcy estate has been diminished.[23]

The premise that a borrower's use of available credit is property of the borrower subject to preference recovery is not a new concept. The Sixth Circuit B.A.P., the Sixth Circuit, and the Tenth Circuit each referred to, and relied on, the holdings in *Montgomery*[24] and *In re Smith*,[25] where the debtors obtained "involuntary" credit. *Smith* involved a check kiting scheme. Looking at Article 4 of the Uniform Commercial Code and the Indiana Code, the court held that a debtor's use of loan proceeds constitutes a property interest, and that provisional credit provided by a bank, appropriately or otherwise, is similar to making a loan.[26] The court further opined that "[w]hen, however, the customer has 'withdrawn or applied' the provisionally credited funds, the bank's interest rises to a security interest in the item or proceeds thereof."[27] The court observed that "the Debtor exercised dominion and control over the funds by making actual payment to a creditor.

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22 *Begier*, 496 U.S. at 58.

23 *See* Bank of Am., N.A. v. Mukamal (*In re* Egidi) (*Egidi II*), 571 F.3d 1156, 1161 (11th Cir. 2009) ("Once the credit card companies extended the lines of credit to Egidi, she could have paid other creditors or purchased other assets that would have become part of the estate and been available to other creditors. Because Egidi chose to pay MBNA from the lines of credit, the other creditors were denied payment or an opportunity for payment."); Boeing Wichita Credit Union v. Parks (*In re* Fox), No. 08-1053-EFM, 2009 WL 539921, at *3 (D. Kan. Mar. 4, 2009) ("[A] debtor's transfer of property was a transfer of 'an interest of the debtor in property' if it deprived the bankruptcy estate of resources which would have otherwise been used to satisfy the claim of creditors.").

24 McLemore v. Third Nat'l Bank (*In re* Montgomery), 983 F.2d 1389 (6th Cir. 1993).

25 *In re* Smith, 966 F.2d 1527 (7th Cir. 1992).

26 *Id.* at 1530.

27 *Id.* (internal citations omitted).

The Debtor surely had something of value during the period when the Bank was extending the provisional credit."[28]

In *Montgomery* the bankruptcy trustee also sought to recover an alleged preferential transfer arising in the debtor's check kiting scheme.[29] The defendant bank argued that the funds it received from the payor bank were not the debtor's property because the payor bank had honored a transfer to the defendant bank by giving provisional credit to a deposit that later was dishonored by the bank that issued the dishonored check, in other words, there was never any money that actually belonged to the debtor. The Sixth Circuit rejected the defendant bank's argument that the "property" transferred were funds that belonged to the issuing bank, holding that the debtor's property interest in the, albeit illegally obtained, provisional credit was dependent on the extent to which the debtor exercised control over the proceeds of the credit.[30]

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28 *Id.* at 1531. Article 4 of the Uniform Commercial Code assumes that when a check is deposited for payment, it will be paid by its drawer. NBT Bank, NA v. First Nat'l Community Bank, 393 F.3d 404, 407 n.3 (3d Cir. 2004). When each collecting bank forwards a check, it receives provisional credit from its transferee. See section 4-201(a) of the Uniform Commercial Code which provides, in pertinent part, that

> [u]nless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional.

U.C.C. § 4-201(a) (2005).

Section 4-214 of the Uniform Commercial Code provides:

> If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay.

U.C.C. § 4-214(a) (2005). Thus, the U.C.C. recognizes that even the provisional credit is available for a customer's use. If the item for which provisional credit was given is dishonored, the dishonor creates a debt from the customer to the bank which then must be repaid either by revocation, charge back or, if the funds are no longer in the account, a refund from the customer to the bank. These provisions of the U.C.C. are consistent with the cases' holdings that the use by a debtor of provisional credit, whether through a bad check, or a credit card facility, is a property interest.

29 *In re Montgomery*, 983 F.2d at 1390-92.

30 *In re Montgomery*, 983 F.2d at 1395-96; *see also* Manchester v. First Bank & Trust Co. (*In re* Moses), 256 B.R. 641, 649 (B.A.P. 10th Cir. 2000) ("[T]he transfer diminished the debtor's estate because the trust loan proceeds that would have been available to a pool of creditors were paid to one creditor – the Bank.").

Thus, what is determinative is that the debtor had a resource, the availability of credit, however obtained, which resource was available to all of the debtor's creditors until the debtor directed that resource to the payment of only one particular creditor. That act of direction is the diminution in the estate that the courts have characterized as a "transfer of an interest of the debtor in property."[31]

III. THE EARMARKING DOCTRINE

Another defense that has been raised by the credit card companies is the earmarking doctrine. Early forms of the earmarking doctrine have appeared in the courts since at least 1912.[32] Most courts and commentators have held the view that the earmarking doctrine is essentially a "judicial creation."[33] However, some have speculated that the doctrine was actually subsumed by the Bankruptcy Code and that earmarking is an argument "arising out of the language in § 547(b) which requires that, as an element of the trustee's proof, recovery be based upon a transfer of an interest of the debtor."[34] In fact, at least two scholars have argued that the earmarking doctrine is actually a version of the "contemporaneous exchange" defense codified under § 547(c)(1) of the Code.[35] Carlson and Widen have posited that as long as the debtor and the original creditor intend that a transfer to the original creditor be contemporaneous with new value given to the deb-

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31 *In re Montgomery*, 983 F.2d at 1392. A variation on this theme is the bank to bank transfer defense. The credit card banks argue that the mere substitution of one creditor for another does not diminish the Estate. This argument was expressly rejected by the Eleventh Circuit in *Bank of America, N.A. v. Mukamal* (*In re Egidi*) (*Egidi II)*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Because Egidi directed the payment and the money could have been used to satisfy other creditors . . . the transfers were not bank to bank transfers that amounted to a mere substitutions of creditors outside the control of the debtor.") (citations omitted).

32 The *Bohlen* Court noted that "[e]quivalent language" had existed in the Bankruptcy Act for many years. McCuskey v. Nat'l Bank of Waterloo (*In re* Bohlen Enters.), 859 F.2d 561, 565 (8th Cir. 1988) (citing Nat'l Bank of Newport v. Nat'l Herkimer County Bank, 225 U.S. 178, 182 (1912)).

33 *See* David Gray Carlson & William H. Widen, *The Earmarking Defense to Voidable Preference Liability: A Reconceptualization*, 73 AM. BANKR. L.J. 591 (1999); *see also* Schubert v. Lucent Techs., Inc. (*In re* Winstar Commc'ns, Inc.), 554 F.3d 382, 400 (3d Cir. 2009); Gray v. Travelers Ins. Co. (*In re* Neponsit River Paper Co.), 231 B.R. 829 (B.A.P. 1st Cir. 1999); McCuskey v. Nat'l Bank of Waterloo (*In re* Bohlen), 859 F.2d 561 (8th Cir. 1988).

34 Stingley v. AlliedSignal, Inc. (*In re* Libby Int'l, Inc.), 247 B.R. 463, 467 (B.A.P. 8th Cir. 2000).

35 Carlson & Widen, *supra* note 35, at 592. Section 547(c)(1) provides that:

> (c) The trustee may not avoid under this section a transfer –
>
> (1) to the extent that such a transfer was –
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1) (2009).

tor, such a transfer will be protected by § 547(c)(1).[36] Under this Code-based argument, it is not necessary that the original creditor provide the new value to the debtor, but simply that new value, *from any source*, be provided to the debtor.

Under the earmarking doctrine, funds provided by a third party to a debtor to pay a specific debt to a designated creditor will not be avoided as a preferential payment under 11 U.S.C. § 547(b).[37] Commentators and courts have noted that the theory underlying the earmarking doctrine is essentially that since the transferred funds were never property of the debtor to begin with, the creditors as a whole are not harmed by the transfer and therefore, there has been no diminution of the estate.[38] Originally, the earmarking doctrine was limited to cases in which the new lender who advanced the funds to pay off the existing debt was also obliged to the original creditor as a guarantor or surety.[39] The application of this doctrine was eventually extended to cover cases in which the lender "was not a guarantor or surety but rather provided funds to the debtor for the purpose of paying a specific indebtedness."[40] The apparent trend most courts have followed is to not limit the application of the earmarking doctrine to those situations in which the new creditor is "secondarily liable for the earlier debt," but to also apply it to situations where any third party makes a payment to a creditor on behalf of a debtor and where such payments have no effect on the estate of the debtor.[41]

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36 *In re Bohlen*, 859 F.2d at 593.

37 5 Collier on Bankruptcy, ¶ 547.03[2], at 547-24 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2002).

38 *Id.*; *see also* Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1356 (5th Cir. 1986) ("The earmarking doctrine is widely accepted in bankruptcy courts as a valid defense against a preference claim, primarily because the assets from the third party were never in control of the debtor and therefore payment of these assets to a creditor in no way diminishes the debtor's estate.")

39 Marshall v. FIA Card Servs. (*In re* Marshall) (*Marshall III*), 550 F.3d 1251, 1257 n.5 (10th Cir. 2008).

40 *Id*. This extension of the earmarking doctrine was criticized extensively in *In re Moses*. Observing its judicially-created origin, the *Moses* court noted that a new creditor, who was acting as a guarantor to an existing debt, and who had provided funds to the debtor to pay that debt, might be subject to double liability if the transfer were avoided. Manchester v. First Bank & Trust Co. (*In re* Moses), 256 B.R. 641, 646 (B.A.P. 10th Cir. 2000). Citing *Bohlen*, the *Moses* court noted that "[w]here there is no is no guarantor, the earmarking doctrine does not help either the new creditor or the debtor. In fact the new creditor is harmed . . . [t]he only person aided by the doctrine is the old creditor, who had nothing to do with earmarking the funds." *Id.* at 647 (citing *In re Bohlen*, 859 F.2d at 566).

41 Kaler v. Cmty. First Nat'l Bank (*In re* Heitkamp), 137 F.3d 1087, 1089 (8th Cir. 1998).

Application of the earmarking doctrine is "inherently fact based."[42] In assessing the validity of the earmarking doctrine, the court "must determine the precise agreement between the debtor and the transferor of property in order to determine whether the debtor ever acquired an interest in the property that was transferred."[43] Procedurally, the trustee bears the initial burden of establishing that a transfer is avoidable under § 547(b).[44] However, there appears to be a split among the courts as to which party has the burden of proving whether the earmarking doctrine applies (or does not apply).[45]

One of the seminal cases in the development of the earmarking doctrine is the *Bohlen* case out of the Eighth Circuit.[46] In *Bohlen*, the Chapter 7 trustee brought an adversary proceeding against the debtor to recover allegedly preferential transfers made from borrowed funds. The debtor owed two separate obligations, totaling $189,000 and $125,000 respectively, to the National Bank of Waterloo ("the bank").[47] The debtor applied for a loan in the amount of $200,000 from the John Deere Community Credit Union ("the credit union") to pay off the $189,000 obligation owed to the bank.[48] In his application, the debtor indicated that he would use the loan proceeds to pay off his $125,000 obligation and use the remainder for miscellaneous purposes.[49] In fact, the debtor never mentioned his other $189,000 obligation.[50] Instead of using the loan proceeds to pay the $125,000 obligation, as stipulated, the debtor proceeded to pay off his $189,000 obligation and the interest which had accumulated on the loan.[51] The trustee commenced an adversary proceeding against the bank alleging that the payment of the $189,000 loan constituted a preferential transfer.[52] The bank argued that the moneys advanced to it were protected by the earmarking doctrine and therefore, were never property of the debtor's estate.[53] Both the bankruptcy

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42 Tolz v. Barnett Bank of S. Fla. (*In re* Safe-T-Brake of S. Fla., Inc.), 162 B.R. 359, 363 (Bankr. S.D. Fla. 1993) (holding that the debtor in question had no interest in the loan proceeds provided by the new creditor).

43 *Id.*

44 Metcalf v. Golden (*In re* Adbox, Inc.), 488 F.3d 836, 842 (9th Cir. 2007).

45 Some courts hold that the trustee bears the burden of demonstrating the earmarking doctrine does not apply. *See, e.g.*, *In re Heitkamp*, 137 F.3d at 1089. Others contend that the defendant bears the burden of demonstrating that the doctrine does apply. *See, e.g.*, *In re Adbox, Inc.*, 488 F.3d at 841.

46 McCuskey v. Nat'l Bank of Waterloo (*In re* Bohlen) 859 F.2d 561 (8th Cir. 1988).

47 *Id.* at 562.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 564.

53 *Id.*

court and district court held that a portion of the transfer was not avoidable pursuant to the earmarking doctrine.[54]

The *Bohlen* Court began its analysis by noting that the earmarking doctrine is entirely a judicial creation and that, at its core, all earmarking cases must necessarily involve at least three parties – the "old creditor," the "new lender" and the debtor.[55] The court proceeded to articulate the three-part earmarking test which has subsequently been followed by courts in a number of circuits.[56] To qualify for earmarking, the following requirements must be present:

> (1) the existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt,[57]
>
> (2) performance of that agreement according to its terms, and
>
> (3) the transaction viewed as a whole (including transfer in of the new funds and the transfer out to the old creditor) does not result in any diminution of the estate.[58]

In applying the three-part test, the appellate court noted that the second element was not satisfied, reasoning that "[i]t cannot be disputed that the agreement between the parties was that part of the proceeds of the credit union's new loan would be used to pay the $125,000 obligation."[59]

The *Bohlen* court then turned to the issue of whether of the debtor had "control" over the funds provided by the new lender. Interestingly, the issue of "control," whether constructive or actual, is not a specific element in the *Bohlen* earmarking test. The court briefly addressed the issue by concluding that "[o]ne cannot conceive of greater or more telling 'control' of

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54 *Id.* Judge Wood, in his bankruptcy court decision, focused on the intent of the credit union to have the funds used to satisfy the debtor's $125,000 obligation as the key reason why earmarking applied. Huisinga v. Nat'l Bank of Waterloo, 78 B.R. 556, 559 (Bankr. N.D. Iowa 1987), *rev'd*, 859 F.2d 561 (8th Cir. 1988). Without much analysis, the district court agreed with the bankruptcy court's decision to apply earmarking. McCuskey v. Nat'l Bank of Waterloo, 91 B.R. 486 (N.D. Iowa 1987), *rev'd*, 859 F.2d 561 (8th Cir. 1988).

55 *In re Bohlen*, 859 F.2d at 565.

56 *See* Lisa G. Beckerman & Robert J. Stark, *Structuring Workout Settlements Premised on the "Earmarking" Doctrine*, 26 CAL. BANKR. J. 105, 115 (2002) (noting that the Third and Eighth Circuits have adopted the *Bohlen* framework). Courts which have adopted the *Bohlen* standard include the Eighth Circuit in *Kaler v. Cmty. First Nat'l Bank* (*In re Heitkamp*), 137 F.3d 1087 (8th Cir. 1998), the Third Circuit in *Schubert v. Lucent Techs., Inc.* (*In re Winstar Commc'ns, Inc.*), 554 F.3d 382 (3d Cir. 2009), and the Sixth Circuit in *Chase Manhattan Mortgage Corp. v. Shapiro* (*In re Lee*), 530 F.3d 458 (6th Cir. 2008).

57 The court noted that when the guarantor pays the original creditor directly, it is unnecessary that an agreement exist between the new lender and the debtor.

58 *In re Bohlen*, 859 F.2d at 566.

59 *Id.* at 567.

the new funds by the debtor than to have the debtor use them for its own purposes and in violation of its agreement with the new lender."[60]

Ultimately, the court held that earmarking did not apply because the transaction did not satisfy the three-part test and because the debtor exhibited sufficient control to preclude earmarking.[61] In his dissent, Judge McMillan focused on the intent of the credit union when it transferred funds to the debtor. In concluding that earmarking did apply, Judge McMillan noted that the credit union made its check payable to the debtor and the bank jointly and therefore, the funds were never property of the debtor.[62] This "intent" based approach has not been followed by any appellate court.[63]

An alternative earmarking test, focusing on the control element, has been embraced by several courts.[64] An example of the application of the "control test" is *In re Neponset River Co.* decided by the First Circuit Bankruptcy Appellate Panel.[65] The panel affirmed the bankruptcy court's decision to avoid a pre-petition payment to an insurance company for the payment of worker's compensation insurance premiums. In *Neponset*, the parties agreed that all the elements of a preference action under § 547(b) were met except for the requirement that the transfer constituted a transfer of an interest in the debtor's property.[66] The court began its analysis by noting that "[t]he main inquiry in determining whether an alleged preference involved an 'interest of the debtor in property' is whether the property transferred would have been part of the bankruptcy estate had it not been transferred before the petition date."[67] The insurance company creditor receiving the funds contended that the money used to make the payment belonged to a third party who issued the money on the debtor's behalf and consequently,

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60 *Id.*

61 *Id.*

62 *Id.* at 569.

63 *See, e.g.*, Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351 (5th Cir. 1986) (noting that dispositive control, and not lender intent, is the key factor in determining the applicability of the earmarking doctrine). The courts that have adopted the "intent" approach have been subsequently reversed. *See, e.g.*, *infra* note 116.

64 *See, e.g.*, McLemore v. Third Nat'l Bank (*In re* Montgomery), 983 F.2d 1389, 1395 (6th Cir. 1993) (rejecting the earmarking argument because the debtor "exercised significant control" and that the debtor had the power to pay off any number of creditors); *In re* Smith, 966 F.2d 1527, 1531 (7th Cir. 1992) (also rejecting the earmarking argument and concluding that "[t]he real question . . . [was] whether the Debtor was actually able to exercise sufficient dominion and control over the funds to demonstrate an interest in property").

65 Gray v. Travelers Ins. Co. (*In re* Neponsit River Paper Co.), 231 B.R. 829 (B.A.P. 1st Cir. 1999).

66 *Id.* at 832.

67 *Id.* at 833.

the transfer never involved an interest of the debtor in property.[68] The creditor also argued that the debtor had no control over the funds noting that the debtor's majority shareholder exercised control over the disbursement of the monies.[69]

In its earmarking analysis, the *Neponset* court strayed from the traditional *Bohlen* approach by adopting two additional factors in evaluating whether earmarking should apply: (1) the absence of control by the debtor over the disposition of funds, and (2) no diminution of the debtor's estate as a result of the transfer.[70] Although the court acknowledged the general usefulness of the *Bohlen* test, it explicitly added the control element that had been absent under *Bohlen*. Under this new framework, the *Neponset* court held that the funds were not earmarked because the debtor controlled the disposition of the funds and that there no was evidence that the debtor had entered into an agreement with a third party regarding the use of the funds.[71] Moreover, the court concluded that the transfer did result in a diminution of the debtor's estate observing that had the debtor not made the payment in question, the funds "would have been an asset of the debtor's bankruptcy estate and available for payment to other creditors."[72]

This concept of debtor control appears central in most courts' analysis of the applicability of the earmarking defense.[73] In *Coral Petroleum*, the Fifth Circuit undertook a detailed analysis of the control aspect of the earmarking defense in a case where certain collateral pledged by the debtor's subsidiary was set aside for repayment of an existing loan.[74] The creditors' committee argued that the funds were essentially "uncontrolled" by the debtor since the subsidiary and the debtor merely had an "understanding"

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68 *Id.*

69 *Id.* at 834.

70 *Id.* at 834-35.

71 *Id.* at 835.

72 *Id.*

73 Other courts that have placed great emphasis on the "control" determination include Herzog v. Sunarhauserman (*In re* Network 90 Degrees, Inc.), 126 B.R. 990 (N.D. Ill. 1991) (finding it critical that the debtor never had control over the transferred funds in determining that earmarking applied); *In re* Barefoot Cottages Dev. Co., No. 09-50089-LMK, 2009 WL 2842735 (Bankr. N.D. Fla. July 28, 2009) (holding that funds were earmarked in situation where debtor never had any dispositive control over funds and the debtor never posted any money or collateral to secure the loan); and New York City Shoes, Inc. v. Best Shoe Corp. (*In re* New York City Shoes, Inc.), 98 B.R. 725, 730 (Bankr. E.D. Pa. 1989) (concluding that "if the debtor . . . has control over the use of the funds, including the full discretion to retain the funds if it wishes to do so, the payment of funds over to a creditor diminishes the debtor's estate"). *But see* Stingley v. AlliedSignal, Inc. (*In re* Libby Int'l, Inc.), 247 B.R. 463, 379 (B.A.P. 8th Cir. 2000), holding that "control over the [transferred] funds is not dispositive, the net effect of the transfer of the estate is."

74 Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351 (5th Cir. 1986).

that the funds would be used in a certain manner.[75] The court disagreed and noted that the subsidiary's collateral was "at all times restricted for the security and the eventual repayment of [the debtor's] loan."[76] To conclude otherwise, the court reasoned, would be to "elevate form over substance."[77] The court noted that even though the funds were placed in the debtor's general account, the original lender had full legal control over the funds.[78] Furthermore, the court found it unnecessary to inquire into the lender's intent when it was clear that the debtor never had any actual access to the funds because of the simultaneous bookkeeping system employed.[79] Although the *Coral Petroleum* court engaged in a detailed analysis of the control test, it also introduced what is probably the most liberal standard in evaluating the earmarking doctrine—the diminution of the estate test.[80] In arriving at its decision, the court observed that in order for a transfer to be avoided, it is "essential that the debtor have an interest in the property transferred so that the estate is thereby diminished."[81]

Several other courts have also applied the diminution of the estate test.[82] Some courts have applied the earmarking doctrine "when facts demonstrate that the lender dictated the recipient of the funds that would not have otherwise been provided to the debtor but for the agreement to pay the funds to the designated recipient, and where the funds were in fact so paid."[83] The justification for the earmarking doctrine is based on the idea that the funds transferred "never become[] part of the debtor's assets" but

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75 *Id.* at 1359.

76 *Id.*

77 *Id.*

78 *Id.* at 1361.

79 *Id.*

80 Judge Isicoff, in the *In re Egidi* bankruptcy court decision, noted that the *Coral Petroleum* court focused on whether the substitution of one creditor for another diminishes the debtor's estate. Mukamal v. Bank of Am., N.A. (*In re* Egidi) (*Egidi I*), 386 B.R. 884, 891 (Bankr. S.D. Fla. 2008).

81 *Coral Petroleum*, 797 F.2d at 1356.

82 *See, e.g.*, Hansen v. MacDonald Meat Co. (*In re* Kemp Pacific Fisheries, Inc.), 16 F.3d 313, 316 (9th Cir. 1994) (noting that the "diminution of the estate" test had been developed to "test whether a debtor controlled transferred property to the extent that he owned it"); *see also* Manchester v. First Bank & Trust Co. (*In re* Moses), 256 B.R. 641, 650 (B.A.P. 10th Cir. 2000) (holding that a payment a debtor had made to a bank from his employee benefit plan was not subject to earmarking because the debtor's estate was diminished as a result of the transfer).

83 *In re* Barefoot Cottages Dev. Co., No. 09-50089-LMK, 2009 WL 2842735, at *3 (Bankr. N.D. Fla. July 28, 2009); *see also Coral Petroleum*, 797 F.2d at 1359; Tolz v. Barnett Bank of S. Fla. (*In re* Safe-T-Brake of S. Fla., Inc.), 162 B.R. 359, 366 (Bankr. S.D. Fla. 1993) (funds were deemed earmarked since debtor exercised no dispositive control of funds sent to lien claimant); Hood v. Brownyard-Sharon Park Ctr., Inc. (*In re* Hood), 118 B.R. 417, 420 (Bankr. D.S.C. 1999) (mere possession of a check does not necessarily provide debtor with dispositive control of funds).

rather the transfer in question "merely substitutes one creditor for another without diminishing the value of the bankruptcy estate."[84]

In the context of credit card transfers, virtually no courts have held that the earmarking defense applies. As in cases outside the credit card transfer scenario, most of these courts have also focused on the degree of control the debtor exercised over the transferred funds. The Sixth Circuit has held that convenience check payments issued by one creditor and used to pay off the debt owed to another credit card company are not protected by the earmarking defense.[85] In *Wells*, the issue before the court was whether two $5,000 convenience checks issued by the debtor's bank and used to offset the debtor's balance on a different credit card account within ninety days of the date of petition filing constituted a voidable preference under § 547(b).[86] The court affirmed the bankruptcy court's decision that the payments were indeed voidable preferences. The *Wells* court rejected the earmarking argument, observing that the new lender did not in any way restrict the debtor's use of the funds.[87] In arriving at this conclusion, the court observed that the debtor had complete control over the use of the checks and could use them to "[t]ransfer balances, pay bills, make a purchase, [or] get extra cash."[88] Other circuits have held similarly.[89]

IV. Preferences and Swap Agreements

In what can, at best, be described as a throw away argument, in its conclusion of its appellate brief, both filed with the District Court and the Eleventh Circuit, Bank of America concludes "a bank to bank balance transfer is nothing more than a 'debt swap' and the trustee cannot avoid [sic] pursuant to 11 U.S.C. § 546(g)."[90]

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84 *In re Kemp Pacific Fisheries*, 16 F.3d at 316.

85 Bank of Am. Corp., N.A., v. Meoli (*In re* Wells), 561 F.3d 633 (6th Cir. 2009). The Sixth Circuit also held that the earmarking doctrine did not apply in the credit card balance transfer context in *In re Dilworth*. *See* Yoppolo v. MBNA Am. Bank (*In re* Dilworth), 560 F.3d 562 (6th Cir. 2009). The *Dilworth* court concluded that since the debtor controlled how the proceeds of the loan made by the new creditor were to be distributed; the funds were not earmarked for a specific purpose. *Id.* at 565.

86 *In re Wells*, 561 F.3d at 634.

87 *Id.* at 635.

88 *Id.*

89 The Eleventh Circuit has not expressly ruled on which version of the earmarking test it would apply if presented with this issue. *See* Bank of Am., N.A. v. Mukamal (*In re* Egidi) (*Egidi II*), 571 F.3d 1156, 1162 (11th Cir. 2009) (noting that the earmarking doctrine was inapplicable in that case because the debtor and not the lender designated the recipient of the transferred funds). Judge Isicoff, however, in her bankruptcy court opinion suggested that the Eleventh Circuit had indirectly adopted the *Bohlen* test. *See* Mukamal v. Bank of Am., N.A. (*In re* Egidi) (*Egidi I*), 386 B.R. 884, 891 (Bankr. S.D. Fla. 2008) (citing Am. Bank of Martin County v. Leasing Serv. Corp. (*In re* Air Conditioning, Inc.), 845 F.2d 293 (11th Cir. 1988)).

90 Reply Brief of Appellant, *Egidi II*, 571 F.3d 1156 (No. 08-15958-F).

In its reply brief to the Eleventh Circuit,[91] Bank of America argued that a credit card balance transfer is a "debt swap" and therefore, pursuant to 11 U.S.C. § 546(g), the transfer cannot be avoided as a preference. Arguing that the definition of swap agreement in the Bankruptcy Code includes a "debt swap," ergo "[i]f a debt swap cannot be avoided under Title 11 of the United States Code then a swap of debt should not be avoided either." This argument, such as it is, has no support in the statute.

Transfers made "by or to (or for the benefit of) a swap participant or financial participant under or in connection with any swap agreement" are not avoidable under any Chapter 5 proceedings in the absence of an actual intent to defraud.[92] A swap participant is defined as "an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor."[93] A financial participant is defined as an entity that, pursuant to different kinds of agreements with the debtor or another entity, has entered into certain transactions with a "total gross dollar value of not less than $1,000,000,000, or is a clearing organization."[94] A swap agreement includes a variety of different types of agreements that are used in the commodities and future markets.[95]

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91 Because the debt swap issue was not raised at the bankruptcy court level, and because no legal argument was put forth until the Eleventh Circuit Reply brief, the Eleventh Circuit held that Bank of America had waived this argument. *Id.*

92 11 U.S.C. § 546(g) (2009) provides *in toto*:

> (g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

93 11 U.S.C. § 101(53)(c) (2009).

94 11 U.S.C. § 101(22A) (2009). The full statutory definition of a "financial participant" is –

> (A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) or section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the 15-month period preceding the date of the filing of the petition; or
>
> (B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

95 11 U.S.C. § 101(53B) The term "swap agreement" –

> (A) means –
>
> (i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is –

Congress enacted 11 U.S.C. § 546(g) in 1990 to "clarify the status of swap transactions and forward contracts in the event that a case is commenced under Title 11."[96] As introduced by Mr. Brooks, the purpose of the legislation is to

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(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; (i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is –

(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement;

(III) a currency swap, option, future, or forward agreement;

(V) an equity index or equity swap, option, future, or forward agreement;

(VI) a total return, credit spread or credit swap, option, future, or forward agreement;

(VII) a commodity index or a commodity swap, option, future, or forward agreement;

(VIII) a weather swap, option, future, or forward agreement;

(IX) an emissions swap, option, future, or forward agreement; or

(X) an inflation swap, option, future, or forward agreement;

(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that –

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, option, or spot transaction on one more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into an agreement or transaction referred to in this subparagraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction , measured in accordance with section 562; and

(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.

[96] Act to Amend Title 11 of the United States Code Regarding Swap Agreements and Forward Contracts, Pub. L. No. 101-311 (1990).

> ensure that our financial markets are not destabilized by uncertainties in the application of the Bankruptcy Code. H.R. 4612 deals with the treatment under the Bankruptcy Code of two types of financial instruments which are traded in the United States and international markets. One type of financial instrument is a forward contract sometimes referred to as a futures contract. The other type of financial instrument is a swap agreement, which, for example, allows a corporation or other large borrower to exchange a variable interest rate for a fixed instrument rate, to ensure stability of financial costs in his business.[97]

And as noted by Mr. Fish:

> Today the many financial institutions that engage in exchanges of currencies and interest rates under swap agreements face needless uncertainty about the potential impact of a bankruptcy filing on the right to terminate and net out transactions. The stability of the swap market depends on the ability of a non-defaulting participant to terminate outstanding transactions quickly; rapid changes in currency values and interest rates can make delay very costly . . . .
>
> The swap market serves essential functions today including reducing vulnerability to fluctuations in exchange and interest rates. Explicit Bankruptcy Code references to swap agreements will remove ambiguities that undermine the swap market.[98]

The definitions in the Bankruptcy Code make clear that bank to bank credit card balance transfers, whether by convenience check or otherwise, are not swap agreements entitled to the insulating provisions of § 546(g). To the extent that there is any doubt whatsoever, the legislative history of § 546(g)[99] and its associated definition sections make clear this provision was adopted to promote and preserve the integrity of capital markets, not to supersede provisions of state law already in place that address more traditional banking relationships.

V. THE *PERRY* AND *MARSHALL* LOWER COURT DECISIONS

Only two courts have held that a transfer by a debtor to another creditor using the credit extended by a credit card company does not constitute a transfer of an interest of the debtor in property, and therefore, does not constitute a voidable preference under § 547 of the Bankruptcy Code or a frau-

97 136 Cong. Rec. H 2282 (May 15, 1990).

98 *Id.*

99 Where statutory language is straightforward, there is no need for the courts to look to a statute's legislative history. *See* United States v. Gonzales, 520 U.S. 1, 6 (1997).

dulent transfer under § 548.[100] In *Perry*, the debtor had made a payment to one of his creditors within the ninety days prior to filing for bankruptcy using his MBNA credit card.[101] The Chapter 7 Trustee brought an adversary action seeking to avoid the payment to the creditor as an avoidable preference under § 547.[102] The *Perry* court began its analysis by examining the definition of the term "interest of the debtor in property."[103] The court cited the *Begier*[104] decision to highlight the fact that the term "interest of the debtor in property" should be read to coincide with the definition of property of the estate under § 541.[105] The *Begier* Court specifically limited the scope of § 541(a) by observing "if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated."[106] The *Perry* court reasoned that unless the property in question "would not have reduced to cash available for distribution in bankruptcy," the property is not considered property in which the debtor has an interest.[107] The *Perry* court implicitly rejected the "control" analysis adopted by previous courts by concluding that a debtor's credit constitutes merely "potential wealth" and that credit alone "serves no immediate benefit to the estate." [108] The *Perry* court ultimately relied on the "diminution of the estate" framework in holding that the transfers to MBNA were not avoidable preferences or fraudulent transfers. In arriving at this conclusion, the court noted, "[s]ince the payment was a transfer of mere credit, and did not affect the amount of liquidity or property available for distribution by the estate's creditors, the payment was not a transfer of an interest in the debtor in property."[109] The court briefly addressed and rejected the earmarking argument set forth by the plaintiff because MBNA was not independently obliged to pay the old creditor.[110]

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100 *See* Loveridge v. Ark of Little Cottonwood, Inc. (*In re* Perry), 343 B.R. 685 (Bankr. D. Utah 2005), *overruled by* Marshall v. FIA Card Servs. (*In re* Marshall) (*Marshall III*), 550 F.3d 1251 (10th Cir. 2008); *see also* Parks v. FIA Card Servs. (*In re* Marshall) (*Marshall I*), 372 B.R. 511 (Bankr. D. Kan. 2007), *overruled by Marshall III*, 550 F.3d 1251.

101 *In re Perry*, 343 B.R. at 686-87.

102 *Id.* at 687.

103 *Id.*

104 Begier v. I.R.S., 496 U.S. 53 (1990).

105 *In re Perry*, 343 B.R. at 687.

106 *Id.* (quoting *Begier*, 496 U.S. at 58).

107 *Id.* at 688.

108 *Id.*

109 *Id.*

110 The *Perry* court reasoned that the "earmarking doctrine was created to deal with the injustice resulting where the new creditor was independently obliged to pay the debtor's debt, and thus was required to pay a debt a second time after the original payment was avoided as a preference." *Id.* at 688-89.

The other bankruptcy court that held that credit card transfers were not avoidable was the bankruptcy court in the District of Kansas in *Marshall I*.[111] In *Marshall I*, the bankruptcy court addressed the issue of whether payments made by one credit card company (Capital One) to another (MBNA) at the direction of the debtor constituted a preference under § 547(b) of the Bankruptcy Code. As in *Perry*, the *Marshall I* court began its inquiry by examining whether the transactions in question involved a "transfer of an interest of the Debtors in property."[112] The *Marshall* court held that the transfers did not involve a transfer of the debtors in property because credit is not an interest "available for the satisfaction of creditors' claims in bankruptcy."[113] The court further noted that a "debtor's pre-petition right to receive an extension of credit is not a right which can be utilized for the benefit of creditors of the estate."[114] The United States District Court affirmed the bankruptcy court's decision, observing that Capital One's payments to MBNA did not exhibit "the requisite control on behalf of the debtor to impart a property interest."[115] The *Marshall II* court advanced a curious argument with respect to control, concluding that "an ability to direct where the funds go does not in itself give rise to a property interest."[116] The court proceeded to adopt an intent-based approach which focused on the purpose of the transaction.[117] The district court affirmed the bankruptcy court's decision concluding that the debtor never had control of the payments and that the transfer never resulted in a diminution of the estate.[118]

The Tenth Circuit reversed the district court's and bankruptcy court's decisions.[119] In reversing these decisions, the *Marshall III* court opined that the relevant inquiry was "whether the loan proceeds 'would have been part of the estate had [they] not been transferred before the commencement of the bankruptcy proceedings.'"[120] With respect to the debtor's control over the funds, the court reasoned that the loan proceeds were "an asset of the

111 Parks v. FIA Card Servs., (*In re* Marshall) (*Marshall I*), 372 B.R. 511 (Bankr. D. Kan. 2007).

112 *Id.* at 515.

113 *Id.*

114 *Id.* at 516.

115 Parks v. Card Servs., N.A. (*In re* Marshall) (*In re Marshall II*), No.07-1222-WEB, 05-18216, 2008 WL 544462, at *6 (D. Kan. Feb. 27, 2008).

116 *Id.*

117 *Id.* ("As long as the funds were advanced for the purpose of paying a specific creditor, the debtor does not exercise 'control' for the purposes of earmarking.").

118 *Id.* at *7.

119 Marshall v. FIA Card Servs. (*In re* Marshall) (*Marshall III*), 550 F.3d 1251 (10th Cir. 2008).

120 *Id.* at 1258 (quoting Begier v. IRS, 496 U.S. 53, 58 (1990)).

estate for at least an instant before they were preferentially transferred to [the old creditor]."[121]

In its petition for writ of certiorari, FIA Card Services ("FIA") began by reciting the holding of the *Begier* case. The petitioners repeated the language in *Begier* that "property of the debtor subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceeding."[122] Next, FIA asserted that the Tenth Circuit in *Marshall III* "had created a different legal standard than the one created by [the Supreme Court of the United States] in *Begier v. I.R.S.*"[123] FIA argued that under the *Begier* standard, had the borrowed money not been transferred, the money would not have been property of the debtors, but rather, the property of the lender.[124] This argument appears to be the central theme behind the petitioner's appeal. Additionally, FIA argued that the *Marshall III* decision created a conflict between the Tenth and Fifth Circuits.[125] FIA cited the *Coral Petroleum* decision for the proposition that when one creditor is simply substituted for another in the transfer context, there can be no preference since only the identity of the creditor has changed.[126] Petitioners asserted that resolution of the "split" created by the *Marshall* decision would provide clarification as to whether a "direct bank to bank transfer of funds is a transfer of an interest of the debtor in property."[127]

The Supreme Court denied FIA's petition for writ of certiorari. Presumably, the Supreme Court did not find *Marshall III* to be in conflict with either the *Begier* or *Coral Petroleum* decisions.

VI. CONCLUSION

With this denial of certiorari, the issue of whether credit card transfers can be avoided under § 547 has apparently been settled. The appellate courts have held in no uncertain terms that funds lent by one credit card company to a debtor to pay off the balance owed to another credit card company will be viewed as a transfer of "an interest of the debtor in property" under § 547 of the Code. The recent appellate court decisions indicate that the courts will most likely take a rather expansive view of what consti-

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121 *Id.*

122 Petition for Writ of Certiorari, FIA Card Servs. v. Parks, No. 08-1329, 2009 WL 1390798, at *4 (Apr. 24, 2009).

123 *Id.* at *5.

124 *Id.*

125 *Id.* at *6.

126 *Id.*

127 *Id.*

tutes "an interest of the debtor in property" and serve notice to lenders that provisional credit is an asset when used by the debtor even if the resulting transfer is merely a creditor switch. These decisions are consistent with the Code's underlying goal of promoting an equitable distribution of the estate's assets to creditors, while also providing future lenders with clear guidelines as to what types of transfers will be subject to the avoidable preference provisions in § 547 of the Code.