



11-1-1990

Derivative Insider Liability under Deprizio: If That Is the Law, Then the Law Is Wrong

Meghan Ann White

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Meghan A. White, *Derivative Insider Liability under Deprizio: If That Is the Law, Then the Law Is Wrong*, 24 Loy. L.A. L. Rev. 239 (1990).

Available at: <https://digitalcommons.lmu.edu/llr/vol24/iss1/8>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

DERIVATIVE INSIDER LIABILITY UNDER *DEPRIZIO*: IF THAT IS THE LAW, THEN THE LAW IS WRONG

I. INTRODUCTION

The primary policy of the Bankruptcy Reform Act of 1978 (the Code)¹ is to distribute equitably debtors' assets among their creditors.² Preference law³ achieves equitable distribution by preventing individual creditors from enhancing their ability to recover debts owed to them at the expense of other creditors.⁴ In order to best effectuate the Code's preference policy, trustees have the power to avoid⁵ certain transfers⁶

1. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1330 (1988)).

2. Seligson, *The Code and the Bankruptcy Act: Three Views on Preferences and After-Acquired Property*, 42 N.Y.U. L. REV. 278, 292 (1967).

3. A detailed account of preference law under the Code is found in Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725 (1984). The Code gives the trustee the power to:

- (b) . . . avoid 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;
 - (3) made while the debtor was insolvent;
 - (4) made—
 - (A) on or within 90 days before the date of the filing of the petition;
 - (B) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such 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.

11 U.S.C. § 547(b) (1988). See also *infra* notes 146-68 and accompanying text for further policy discussion.

4. Individual remedies which exist against the debtor outside a bankruptcy context, are substituted with a collective process of paying claims. See Jackson, *supra* note 3, at 728, 763. The bankruptcy distribution scheme is premised on the notion that rational creditors would privately agree to such a distribution system if they were to bargain together prior to the bankruptcy filing. *Id.* at 728.

5. See 11 U.S.C. § 541 (1988). Avoiding powers enable the trustee to prevent the effective transfer to other entities of debtor and estate properties made prior to bankruptcy. *Id.* These avoiding powers are contained in sections 544 to 548 of the Bankruptcy Code. *Id.* §§ 544-548.

6. The Bankruptcy Code defines "transfer" as: "[E]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." *Id.* § 101(50).

made prior to the debtors' declarations of bankruptcy.⁷

The Code separates into two sections trustees' abilities to avoid preferential transfers and their abilities to recover those transfers.⁸ Section 547(b) of the Code defines the elements of a preferential transfer.⁹ When the creditor to whom the debtor has made transfers is an "outsider,"¹⁰ the trustee may avoid transfers made within ninety days prior to the debtor's declaration of bankruptcy.¹¹ When the creditor is an "insider,"¹² the trustee has a one-year reach-back period.¹³ Once the transfer is deemed avoidable, section 550 identifies from whom the trustee could then recover.¹⁴ Recovery can be from the initial transferee, the party for whose benefit the transfer was made or any mediate transferee.¹⁵ Because both insider- and outsider-creditors can be either initial, benefitted or mediate transferees, the Code's bifurcation of the avoidance and recovery powers creates a situation in which trustees could potentially recover from a party whose status as an outsider would not otherwise render the transfer avoidable.¹⁶

7. With regard to preferences in particular, the trustee's avoiding powers are codified in section 547. *Id.* § 547.

8. *Id.* §§ 547(b), 550(a) (preferential transfers and recovery powers).

9. *Id.* § 547(b). See *supra* note 3 for statutory language.

10. An outsider, or non-insider, is any party who does not fall into the Code's definition of insider. See 11 U.S.C. § 101(30)(B)(i), (ii), (iii), (vi); see also *infra* note 12.

11. 11 U.S.C. § 547(b)(4)(A). See *supra* note 3 for statutory language.

12. An insider is defined by the Code as a director, officer or person who is in control of the debtor, as well as any relative of such persons. See 11 U.S.C. § 101(30)(B)(i), (ii), (iii), (vi).

13. *Id.* § 547(b)(4)(B). See *supra* note 3 for statutory language.

14. See 11 U.S.C. § 550. Section 550 states the liability of a transferee of an avoided transfer as follows:

(a) . . . to the extent that a transfer is avoided under section . . . 547 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under subsection (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

Id. § 550(a), (b), (c).

15. *Id.* § 550(a)(1), (2). See *supra* note 14 for statutory language.

16. This situation arises when the trustee seeks to recover from the outsider-creditor, who is likewise considered an initial transferee. The trustee is permitted to do so under section 550(a)(1), even though the transfer is not actually avoidable as against that initial transferee because the time period requirement of section 547(b)(4)(A) has not been satisfied. The prime example of this situation occurs when a non-insider lender obtains an insider guaranty. Such an occurrence has come to be known as the *Deprizio* situation after the Seventh Circuit's opin-

In the past, divergent schools of thought developed regarding the issue of recovering transfers from an outsider-creditor not responsible for the avoidance. The majority of cases prevented the trustee from recovering from this non-responsible party,¹⁷ while the minority permitted recovery.¹⁸ In April 1989, however, the Seventh Circuit Court of Appeals decision, *Levit v. Ingersoll Rand Financial Corp. (Deprizio)*,¹⁹ greatly influenced judicial and scholarly perception of the bifurcation of preferential avoidance and recovery.²⁰ The court extended the one-year time period of section 547(b) to avoid transfers made to non-insider lenders who obtained insider guaranties.²¹ This holding allows trustees to recover from non-insider lenders who are initial transferees²² of transfers

ion in *Levit v. Ingersoll Rand Financial Corp. (Deprizio)*, 874 F.2d 1186 (7th Cir. 1989). The sections below will discuss how and why this situation arises. See *infra* notes 29-63 and accompanying text.

17. See, e.g., *Block v. Texas Commerce Bank Nat'l Assoc. (In re Midwestern Co.)*, 96 Bankr. 224 (Bankr. W.D. Mo. 1988), *aff'd*, 102 Bankr. 169 (W.D. Mo. 1989); *Levit v. Melrose Park Nat'l Bank (In re V.N. Deprizio Constr. Co.)*, 58 Bankr. 478 (Bankr. N.D. Ill. 1986), *rev'd sub nom. Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 874 F.2d 1186 (7th Cir. 1989); *In re Aerco Metals, Inc.*, 60 Bankr. 77 (Bankr. N.D. Tex. 1985); *Bakst v. Schilling (In re Cove Patio Corp.)*, 19 Bankr. 843 (Bankr. S.D. Fla. 1982).

18. See, e.g., *Lowrey v. First Nat'l Bank (In re Robinson Bros. Drilling)*, 97 Bankr. 77 (W.D. Okla. 1988), *aff'd sub nom. Manufacturer Hanover Leasing Corp. v. Lowrey (In re Robinson Bros. Drilling)*, 892 F.2d 850 (10th Cir. 1989); *Coastal Petroleum Corp. v. Union Bank & Trust Co. (In re Coastal Petroleum Corp.)*, 91 Bankr. 35 (Bankr. N.D. Ohio 1988); *Mixon v. Mid-Continent Systems, Inc. (In re Big Three Transp., Inc.)*, 41 Bankr. 16 (Bankr. W.D. Ark. 1983).

19. 874 F.2d 1186 (7th Cir. 1989).

20. Since the *Deprizio* opinion was issued, the Sixth and Tenth Circuits have followed the Seventh Circuit's holding. See, e.g., *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490 (6th Cir. 1990); *Robinson Bros.*, 892 F.2d 850. Furthermore, several commentaries have been written. See, e.g., Katzen, *Deprizio and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guarantees, and Other Perils of Initial Transferee Liability*, 45 BUS. LAW. 511, 516-29 (1990) (commentator summarizes *Deprizio* and highlights difficulties which flow from decision); Lurey & Beckham, *Insider Preferences, Indirect Preferences, and Section 550 of the Code*, in CURRENT PROBLEMS IN CHAPTER 11 PRACTICE AFTER ALLIED, FEDERATED AND DREXEL: THE PLAYERS, THE POWERS AND THE PLAN 253, 276-78 (1990) (commentators disagree with *Deprizio* holding); Pitts, *Insider Guaranties and the Law of Preferences*, 50 AM. BANKR. L.J. 343, 344 (1981) (commentator supports *Deprizio*'s reading of sections 547(b) and 550(a) and its extended liability time period); Note, *The Interplay Between Sections 547(b) and 550 of the Bankruptcy Code*, 89 COLUM. L. REV. 530, 531-40 (1989) (questions *Deprizio* holding and suggestions use of section 550(a)(2) instead of section 550(a)(1) for purposes of recovery). While the *Deprizio* court essentially adopted the minority school of thought's perspective, the overwhelming significance of the case is that it was the first time a circuit court had done so.

21. *Deprizio*, 874 F.2d at 1200-01; see 11 U.S.C. § 547(b)(4)(B). See *supra* note 3 for statutory language.

22. See 11 U.S.C. § 550(a)(1).

made outside the ninety-day time period but within one year of the bankruptcy filing.

This Note first discusses the *Deprizio* court's analysis of the Code's current language.²³ It agrees with the court's conclusion that as the Code is now written recovery is permitted from a party, even though the party's status as a non-insider, would not permit avoiding the transfer as a preference.²⁴ Furthermore, such non-insiders cannot benefit from the bankruptcy court's equity powers since the Code's language is unambiguous.²⁵ The Note then addresses each argument which the creditors in *Deprizio* advanced and the court rejected. It disagrees with the court's reasoning that extended liability does not threaten Code policy²⁶ and demonstrates that the application of the one-year liability period to outsider-creditors penalizes outsider-creditors who have not manipulated the debtor's situation for their own benefit.²⁷ The Note then proposes that, while the wisdom of the results reached by the interplay between sections 547(b) and 550 is questionable, it is not the courts' function to advance policy at the expense of the written scheme.²⁸ Therefore, the author suggests an amendment to the Code.

II. STATEMENT OF THE PROBLEM

Unlike the majority of courts,²⁹ the Seventh Circuit in *Levit v. Ingersoll Rand Financial Corp. (Deprizio)*³⁰ refused to invoke its equitable powers to avoid holding the outsider-lender liable for the recovery of the transfer.³¹ It determined that the Code's language was unambiguous,

23. See *infra* notes 98-120 and accompanying text.

24. The *Deprizio* court held that when a payment to an outside creditor benefits an inside creditor, including a guarantor, then the recovery period is one year. *Deprizio*, 874 F.2d at 1200-01.

25. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* at 1197 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Many of the courts in the majority line of cases, on the other hand, acknowledge the Code's language yet refuse to allow recovery due to equitable considerations. See, e.g., *Midwestern Co.*, 96 Bankr. at 226; *Aerco Metals, Inc.* 60 Bankr. at 82; *Cove Patio Corp.*, 19 Bankr. at 844.

26. See *infra* notes 141-68 and accompanying text.

27. See *infra* notes 169-201 and accompanying text.

28. See *Pitts*, *supra* note 20, at 361.

29. See *supra* note 17 for a list of cases which follow the majority school of thought.

30. 874 F.2d 1186 (7th Cir. 1989).

31. *Id.* at 1200. The court suggests that the exceptions which exist in Bankruptcy Code section 547 (both the affirmative defenses in subsection (c) as well as the requirements in subsection (b)) provide adequate assurances to lenders; hence reliance on "equity" or "policy" arguments are not needed. *Id.* It states that "[i]f these exclusions and exemptions are not 'enough,' creditors should complain to Congress." *Id.* This Note argues that the provisions

and therefore the court "simply read and applied" it.³² Such a literal reading of the Code could have wide-ranging and socially undesirable effects.³³ This uncertainty surrounding the extent of the court's holding creates enormous policy problems and adds a significant economic burden to the business community.³⁴

The classic *Deprizio* situation involves three parties: the debtor, the insider guarantor and the lender.³⁵ The lender receives a guaranty from an insider of the debtor.³⁶ Between ninety days and one year before the debtor files a bankruptcy petition, the debtor either has paid down or extinguished the loan.³⁷ Upon filing for bankruptcy, the trustee then seeks to recover the payments as preferential.³⁸

In the first of the two-part analysis, the transfer is found to be preferential *as to the insider-guarantor*.³⁹ The argument centers on the insider-guarantor as the party who is benefited by the transfer, rather than the outsider-lender as the party to whom the transfer was made.⁴⁰ Because a guarantor has a contingent right to payment from the debtor, he is a "creditor" according to section 101(9) of the Code.⁴¹ The requirement of section 547(b)(1) that the transfer be "for the benefit of a creditor" is satisfied, and because an insider is involved in the transfer, the applicable time period for recovering transfers is one year.⁴²

Having found the transfer to be preferential, and therefore avoidable, the recovery aspect of the analysis is then activated.⁴³ Section

upon which the *Deprizio* court relied are far from "enough," thus mandating Congressional intervention to amend the Code. See *infra* notes 202-53 and accompanying text.

32. See *Deprizio*, 874 F.2d at 1197-98. The *Deprizio* court noted that "[s]ection 547(b) defines which transfers are 'avoidable'. No one doubts that a transfer to Lender produces a 'benefit' for Guarantor. After [section] 547 defines which transfers may be avoided, [section] 550(a) identifies who is responsible for payment: 'the initial transferee of such transfer or the entity for whose benefit such transfer was made.'" *Id.* at 1194. Furthermore, "[m]ore than language lies behind this approach. The trustee's power to avoid preferences . . . is essential to make the bankruptcy case a *collective* proceeding . . ." *Id.*

33. See *infra* notes 196-231 and accompanying text.

34. See *infra* notes 169-95 and accompanying text.

35. See *Deprizio*, 874 F.2d at 1187.

36. See *id.* at 1187-88.

37. See *id.* at 1188.

38. *Id.* The Code empowers the trustee to avoid any transfer the debtor made to a creditor as preferential if all five elements of section 547(b) have been satisfied. 11 U.S.C. § 547(b) (1988). See *infra* note 3 for statutory language.

39. *Deprizio*, 874 F.2d at 1190-91, 1195-96.

40. See *id.* at 1194. When the transfer is made to the lender, the guarantor's potential liability is reduced. *Id.* at 1190.

41. *Id.* at 1189; 11 U.S.C. § 101(9) (1988).

42. 11 U.S.C. § 547(b)(4)(B).

43. See *Deprizio*, 874 F.2d at 1196.

550(a)(1) of the Code provides for recovery from *either* the initial transferee (the lender) *or* the party for whose benefit the transfer was made (the insider-guarantor whose status rendered the transfer avoidable).⁴⁴ If the section 547(b)(1) "for the benefit of a creditor" provision is utilized in order to render the transfer voidable, then the lender, as the "initial transferee" under section 550(a)(1), becomes liable to the debtor's estate for the value of the property transferred.⁴⁵

A less apparent, but nonetheless logical derivation of the classic scenario, emerges from the connection between sections 547(b)(1) and 550(a)(1). This derivation involves more than the three parties found in the original *Deprizio* case. The lender is secured party number one (SP₁). SP₁ is *over-secured*⁴⁶ but *does not* obtain a guaranty. Another creditor, SP₂, takes a junior security interest⁴⁷ in the same collateral as SP₁. SP₂ is *under-secured* and *does* receive a personal guaranty from an insider of the borrower. Upon payment to SP₁, the collateral is "freed up" for use by SP₂.⁴⁸ As SP₂'s security position improves, the insider-guarantor's liability is reduced. Any payment to SP₁ is thus "for the benefit of a creditor."⁴⁹ Furthermore, because the benefited creditor is an insider, the liability time period is one year.⁵⁰ Therefore, although SP₁ did not obtain the guaranty, as the initial transferee it may be liable for the amount of the transfer.⁵¹ Accordingly, where *subsequent* creditors obtain security interests and guaranties in the same previously encumbered property, SP₁ could be liable.⁵²

44. See 11 U.S.C. § 550(a)(1) (1988). While section 547(b)(4) specifies the liability time period of the basis of whether or not the creditor was an insider, according to section 550(a), the trustee's ability to recover the preference is not similarly dependent. *Deprizio*, 874 F.2d at 1190; see 11 U.S.C. §§ 547(b)(4), 550(a). See also Lurey & Beckham, *supra* note 20, at 13-18 for a discussion of how the two sections are combined in order to extend the one-year time period of section 547(b)(4) to include outside creditors in possession of inside guaranties.

45. *Deprizio*, 874 F.2d at 1190; see 11 U.S.C. §§ 547(b)(1), 550(a)(1).

46. "An oversecured creditor is a holder of an allowed secured claim which is secured by collateral of greater value than the allowed secured claim." *Farmers Home Admin. v. Farmers State Bank*, 68 Bankr. 282, 285 (D. S.D. 1986).

47. The holder of a junior security interest takes a subordinated position to other secured parties and is entitled to recovery only after the superior claims have been satisfied. *Securities & Exch. Comm'n v. Central-Illinois Sec. Corp.*, 338 U.S. 96, 107 (1949) ("the preferred claims . . . were entitled to absolute priority and that what remained to junior security holders after satisfying this priority was necessarily their fair share").

48. As the debt owed to SP₁ is paid down, SP₁ needs less of the security interest in order to protect its position. As its needs are lessened, more funds become available to satisfy SP₂'s debt. Thus, the funds are "freed up."

49. 11 U.S.C. § 547(b)(1).

50. *Id.* § 547(b)(4)(B).

51. *Id.* § 550(a)(1).

52. The *Deprizio* court discounted the possibility that this situation might occur in an

The drafters of the Code determined that *two* liability periods were needed to deal with the different concerns raised by insider and non-insider groups.⁵³ Insiders, by their very characterization under the Code, have potentially greater opportunities than non-insiders to manipulate the distribution of the debtor's assets.⁵⁴ The imposition of a longer time period was an attempt to impede such manipulation.⁵⁵ While extending the insider's preferential liability time period may accomplish the goal of reducing the insider's ability to manipulate the situation, it does so in an inequitable manner. The interplay between sections 547(b) and 550 penalizes the outsider-creditor in order to punish the insider by allowing the trustee to recover a transfer which is, according to section 547(b)(4), only preferential to the insider.⁵⁶

The insider has the presumption of control by virtue of the fact that the Code defines an insider as a "person in control of the debtor."⁵⁷ Therefore, only the insider poses a definite threat to the goal of equitable distribution during the period ninety days to one year after the bankruptcy filing. Absent proof of actual control, the outsider-lender should retain the protection afforded by the Code, confronting only the ninety-day liability period.⁵⁸

Certain commercial consequences further illustrate the undesirability of extending liability.⁵⁹ Extending the liability time period contributes to inefficient lending⁶⁰ and increased bankruptcy filings.⁶¹ The

attempt to soothe the anxieties of lenders. *Deprizio*, 874 F.2d at 1200. However, the court's reasoning is faulty. See *infra* notes 212-14 and accompanying text. Accordingly, its discussion of the defensive use of section 547(c)(2) does little to constrain the effects of its holding. See *Deprizio*, 874 F.2d at 1200.

53. Section 547(b)(4)(A) provides a ninety-day reach-back period for non-insiders, while (4)(B) sets forth a one-year limit for insiders. See 11 U.S.C. § 547(b)(4)(A), (B). Ninety days is a sufficient period for reasonably alert lenders to recognize that one creditor is being preferred over another and to protect themselves by propelling the debtor into bankruptcy. *Deprizio*, 874 F.2d at 1194-95.

54. See 11 U.S.C. § 101(30)(B)(i), (ii), (iii), (vi). Through their control of the debtor, insiders will be the first to recognize that the debtor is ailing. *Deprizio*, 874 F.2d at 1195. Accordingly, they will be in the advantageous position of making preferential payments to themselves. The *Deprizio* court believed that "[o]utside creditors, aware of this risk, would monitor more closely, or grab assets themselves . . . or precipitate bankruptcy at the smallest sign of trouble . . ." *Id.*

55. Because of the "long period for insiders, even the prescient managers who first see the end coming are unlikely to be able to prefer themselves in distribution." *Id.*

56. See 11 U.S.C. §§ 547(b)(4), 550(a). The argument "for extended recovery from outside creditors flows directly from these interlocked provisions." *Deprizio*, 874 F.2d at 1190.

57. 11 U.S.C. § 101(3)(B)(iii).

58. See *infra* notes 154-68 and accompanying text.

59. See *infra* notes 169-95 and accompanying text.

60. See *infra* notes 173-77 and accompanying text.

61. See *Deprizio*, 874 F.2d at 1198.

outsider-lender has no real recourse against the insider,⁶² and section 547(c)'s exceptions to liability do little to help.⁶³

III. *LEVIT V. INGERSOLL RAND FINANCIAL CORP. (DEPRIZIO):* STATEMENT OF THE CASE

A. *Facts of the Case*

In 1980, V.N. Deprizio Construction Co. (the Company) was awarded a major Chicago subway extension contract.⁶⁴ By 1982, the Company was experiencing financial difficulties.⁶⁵ The Company attempted to ease its financial predicament by borrowing money from the City of Chicago, and several other sources.⁶⁶ The Company's president, Richard Deprizio, and his brothers, Robert and Edward, all insiders, personally guaranteed some of the Company's debts to these lenders.⁶⁷

The Company made payments to several creditors more than ninety days before, but within one year of, filing a Chapter 11 bankruptcy petition.⁶⁸ Thereafter, the debtor's trustee filed suit in order to declare the payments avoidable preferences under section 547 and to recover the value for the benefit of the estate according to section 550.⁶⁹ The trustee claimed that the payments to these non-insider creditors were "for the benefit" of insider-guarantors "because every dollar paid to the outside

62. See *infra* notes 196-201 and accompanying text.

63. See *infra* notes 225-31 and accompanying text. Section 547(c) lists a series of situations which, if met, prevents the trustee from avoiding the transfer, although technically it would still be considered preferential. 11 U.S.C. § 547(c). The exceptions are popularly referred to as: the contemporaneous exchange exception, *id.* § 547(c)(1); the ordinary course of business exception, *id.* § 547(c)(2); the purchase money security interest exception, *id.* § 547(c)(3); the net-result exception, *id.* § 547(c)(4); and the inventory and accounts receivable exception. *Id.* § 547(c)(5).

64. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1187 (7th Cir. 1989).

65. *Id.*

66. *Id.*

67. *Id.* The record is devoid of detail regarding the personal guarantees given. The parties, however, acted under the assumption that "one or more of Deprizio's insiders personally guaranteed some of Deprizio's debts to its creditors." *Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545, 549 (N.D. Ill. 1988) (footnote omitted), *aff'd in part and rev'd in part*, 874 F.2d 1186 (7th Cir. 1989).

68. *Deprizio*, 874 F.2d at 1188. In addition to those debts, the corporation was indebted to an employee pension and welfare plan and to the United States for delinquent withholding taxes. *Id.* The trustee contended that the insiders had also executed personal guaranties in favor of these creditors and that payments had likewise been made to them within one year, but outside ninety days, of filing. *Id.*

69. *Id.* The Bankruptcy Code gives the trustee broad avoiding powers in order to prevent the transfer of debtor and estate properties. See 11 U.S.C. §§ 544, 545, 547, 548, 549(a), 550 (1988). Section 550 allows the trustee to recover the property, once it has been avoided under one of these sections. *Id.* § 550.

creditor reduced the insider's exposure by the same amount."⁷⁰

B. Case History

1. The bankruptcy court

Upon being confronted with the issue of extended preference liability, the bankruptcy court followed the two-transfer theory set forth in *Goldberger v. Davis Jay Corregated Box Corp. (In re Mercon Industries, Inc.)*.⁷¹ As stated by the *Mercon* court, the two-transfer theory divided the payments made to the creditors into two categories so that two separate transfers were found to exist.⁷² The transfers which were found to have been made from the debtor to the *insider-guarantors* in satisfaction of their contingent liability, were avoidable since the allowable time period under section 547(b)(4)(B) is one year.⁷³ The transfers to the *outsider-creditors*, however, were not avoidable since they had occurred more than ninety days prior to bankruptcy.⁷⁴ Accordingly, the *Deprizio* bankruptcy court held that the transfers to the outsider-creditors were not avoidable.⁷⁵

The *Deprizio* bankruptcy court supported its holding with an equitable argument⁷⁶ advocated by the bankruptcy commentator, Collier,⁷⁷ and utilized by other majority courts.⁷⁸ The *Deprizio* court stated that "a literal application of section 550(a) would permit the trustee to recover from a party who is innocent of wrongdoing and deserves protection. In such circumstances the bankruptcy court should use its equitable powers to prevent an inequitable result"⁷⁹ The court further stated that

70. *Deprizio*, 874 F.2d at 1188.

71. 37 Bankr. 549 (Bankr. E.D. Pa. 1984); see also *Levit v. Melrose Park Nat'l Bank (In re V.N. Deprizio Constr. Co.)*, 58 Bankr. 478, 480 (Bankr. N.D. Ill. 1986), *rev'd sub nom. Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 874 F.2d 1186 (7th Cir. 1989).

72. *Mercon*, 37 Bankr. at 552.

73. *Id.*

74. *Id.* at 552-53; see also 11 U.S.C. § 547(b)(4)(B) (1988).

75. *Deprizio*, 58 Bankr. at 480. The *Deprizio* bankruptcy court held that "the payments to the creditors herein made by the debtor more than [ninety] days but within one year prior to the commencement of the case constitute two transfers. . . . Therefore, the trustee herein is limited to recovery under section 550(a) as against the insider-guarantors only." *Id.*

76. *Id.* at 480-81.

77. See 4 COLLIER ON BANKRUPTCY ¶ 550.02 (L. King 15th ed. 1979 & Supp. 1987).

78. See *supra* note 17 for a list of cases following the majority line of thought.

79. *Deprizio*, 58 Bankr. at 480-81. The non-insider lender is an innocent party because the lender does not anticipate being subject to the one-year preference period because section 547(b)(4)(B) states that his status should only trigger the ninety-day period. See 11 U.S.C. § 547(b)(4)(B). The non-insider lender is thus penalized, by being forced to return the value of the transfer to the debtor's estate, so that the truly culpable party, the insider-guarantor, is

even if the payments constituted only one transfer, there still could not be any recovery from the non-insider creditors because the result would be inequitable; the party least responsible for rendering the transfer preferential would be the party who would be forced to account for the transfer.⁸⁰

2. The district court

The district court reversed the bankruptcy court's holding⁸¹ and instead adopted the minority viewpoint as expressed by *Mixon v. Mid-Continent Systems, Inc. (In re Big Three Transportation)*.⁸² *Big Three Transportation* stated that both the two-transfer theory⁸³ and the equitable argument⁸⁴ advanced by the majority school were erroneous in light of the statute's plain language.⁸⁵ Following the court's approach in *Big Three Transportation*, the district court attacked both the bankruptcy court's determination that one payment could result in two transfers and its use of equity.⁸⁶

The district court reexamined the nature of "transfer."⁸⁷ While the bankruptcy courts in both *Mercon* and *Deprizio* defined the term from a creditor's point of view,⁸⁸ the district court reasoned that the Code does so from the debtor's point of view.⁸⁹ The court stated that:

The Code says that a transfer occurs when someone "dispos[es] of or part[s] with property or an interest in property." This definition clearly looks from the payer's vantage point. . . . If Congress had wanted a transfer to occur whenever someone receives a benefit, it could have defined "transfer" as "receiving or acquiring property or an interest in property."⁹⁰

punished. See *infra* note 146-72 and accompanying text for a further discussion of the penalizing effect of extending liability.

80. *Deprizio*, 58 Bankr. at 481. The court felt that "[t]o hold otherwise would make a guarantee on a debt more of a liability than an asset." *Id.*

81. *Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545, 552 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 874 F.2d 1186 (7th Cir. 1989).

82. 41 Bankr. 16 (Bankr. W.D. Ark. 1983); see also *Deprizio*, 86 Bankr. at 552.

83. See *supra* notes 71-74 and accompanying text for discussion of the two-transfer theory.

84. See *supra* notes 77-80 and accompanying text for discussion of the equitable argument advanced by the majority school.

85. *Big Three Transp.*, 41 Bankr. at 20-21.

86. *Deprizio*, 86 Bankr. at 550-53.

87. *Id.* at 550.

88. *Deprizio*, 58 Bankr. at 551; *Mercon*, 37 Bankr. at 552. A single transfer to an outside lender "effected two transfers under the Code, due to the secondary liability of the guarantors." *Id.* (footnote omitted).

89. *Deprizio*, 86 Bankr. at 551.

90. *Id.* (citation omitted).

In addition to finding that only one transfer had occurred, the district court read section 550 literally,⁹¹ finding that it clearly provides an "either/or" source of recovery.⁹² Thus, the trustee could choose to recover from the non-insider lender, as the initial transferee, even though the non-insider lender does not satisfy the requirements of section 547(b).⁹³ Lastly, the district court expressed its unwillingness to use equitable powers in order to tamper with what it perceived to be an unambiguous and comprehensive statutory scheme.⁹⁴

3. The Seventh Circuit Court of Appeals

The court of appeals affirmed the district court's adoption of the minority view, stating that "the preference-recovery period for outside creditors is one year when the payment produces a benefit for an inside creditor, including a guarantor."⁹⁵ If the trustee establishes that insiders benefited by a transfer to an outsider and thus, are "creditors,"⁹⁶ then any such transfer made within one year of the bankruptcy filing is avoidable as a preference and recoverable from the non-insider lenders.⁹⁷

IV. THE *DEPRIZIO* DECISION IS LEGALLY CORRECT

A. *No Helpful Legislative History Exists*

The majority point of view, as expressed by one court, contended that:

Section 550(a)(1) was not intended to expand the trustee's right to recover preferences as provided in [section] 547, but was intended only to facilitate his recovery of transfers avoidable under [section] 547, regardless of whether the transfer was effected through a number of parties or effected indirectly for the benefit of the party who actually benefited from the preference.⁹⁸

91. *Id.* at 551-52; see 11 U.S.C. § 550 (1988).

92. *Deprizio*, 86 Bankr. at 551.

93. See 11 U.S.C. §§ 547(b), 550(a).

94. *Deprizio*, 86 Bankr. at 552.

95. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1200-01 (7th Cir. 1989).

96. See 11 U.S.C. § 101(4)(A), (9) (1988). A guarantor is not a "creditor in the colloquial sense, but under [section] 101(9) of the Code any person with a 'claim' against [the debtor] is a 'creditor,' and anyone with a contingent right to payment holds a 'claim' under [section] 101(4)(A). [Because a] guarantor has a contingent right to payment from the debtor . . ." a guarantor is a creditor. *Deprizio*, 874 F.2d at 1190.

97. *Deprizio*, 874 F.2d at 1200-01.

98. *Bakst v. Schilling (In re Cove Patio Corp.)*, 19 Bankr. 843, 844 (Bankr. S.D. Fla. 1982).

While this court professed to state the Code's "true" intent, scarce evidence exists in the Code's legislative history supporting its claims.⁹⁹ In addition, no clear congressional intention emerges with regard to the relationship between insider-guaranties and the recovery of preferential transfers.¹⁰⁰ In fact, the parties in the *Deprizio* action agreed that no helpful legislative history existed.¹⁰¹

Different inferences can be drawn from the lack of historical references. As in *Deprizio*, creditors can argue that congressional silence should be interpreted as preserving the Bankruptcy Act's practice of only recovering payments from those parties to whom the transfer represented a preference,¹⁰² otherwise such a momentous change would have elicited some type of response.¹⁰³ On the other hand, silence could imply that Congress simply did not intend the sections' language to operate any less than literally.¹⁰⁴ Both arguments can be supported logically; accordingly, legislative interest in a trustee's ability to recover from both the non-insider creditor, as well as the insider guarantor, is equivocal at best.¹⁰⁵

B. *The Literal Reading of the Code*

1. The meaning of "transfer"

The *Deprizio* bankruptcy court had attempted to circumvent the Code's language by finding that one payment created two transfers.¹⁰⁶ Given the current language of the Code,¹⁰⁷ however, the appeals court was correct in rejecting this two-transfer approach.¹⁰⁸ In the two-transfer approach, "transfers" are equated with the "benefits re-

99. Nutovic, *The Bankruptcy Preference Laws: Interpreting Code Sections 547(c)(2)(1), 550(a)(1) and 546(a)(1)*, 41 BUS. LAW. 175, 188 (1985); Pitts, *supra* note 20, at 347.

100. Pitts, *supra* note 20, at 344.

101. *Levit v. Ingersoll Rand Fin. Co. (Deprizio)*, 874 F.2d 1186, 1196 (7th Cir. 1989).

102. *Id.* at 1196.

103. *Id.* For a discussion of the recovery practices under the Bankruptcy Act of 1898 see *infra* text accompanying notes 123-26.

104. See Pitts, *supra* note 20, at 347.

105. *Id.* One commentator argues that legislative history is irrelevant in determining Congress' intent regarding recovery under section 550(a)(1). See Note, *supra* note 20, at 542.

106. See *Levit v. Melrose Park Nat'l Bank (In re V.N. Deprizio Constr. Co.)*, 58 Bankr. 478, 480 (Bankr. N.D. Ill. 1986), *rev'd sub nom. Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 874 F.2d 1186 (7th Cir. 1989); see also *Goldberger v. Davis Jay Corregated Box Corp. (In re Mercon Indus., Inc.)*, 37 Bankr. 549, 552 (Bankr. E.D. Pa. 1984) ("the single transfer of funds to [the creditor] effected two transfers under the Code, due to the secondary liability of the guarantors.").

107. See 11 U.S.C. § 101(50) (1988).

108. The court determined that "[a] single payment . . . is one 'transfer', no matter how

ceived.”¹⁰⁹ The Code, however, defines “transfers” as the *disposing* of or *parting* with property.¹¹⁰ Thus, the Code’s definition is from the debtor’s point of view because it focuses on the *debtor’s* relationship with the property instead of the creditor’s relationship. Furthermore, as determined by the United States Supreme Court, it was the legislature’s intent to define “transfer” as broadly as possible.¹¹¹

While the single transfer approach creates a mix-and-match analysis to sections 547(b) and 550(a)—one party renders the transfer preferential while another party pays—that is the fault of the Code’s language and not the court’s reasoning.¹¹² The two-transfer approach¹¹³ in *Goldberger v. Davis Jay Corrugated Box Corp. (In re Mercon Industries, Inc.)*¹¹⁴ helped remedy this fault, but it did so only by ignoring the plain language of the statute. As written, it is the payments made which must be counted, not the benefits received.¹¹⁵ Because only one transfer occurs under such a scenario, the fact that an insider-guarantor is involved invokes the one-year preference liability time period of section

many persons gain thereby.” *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1196 (7th Cir. 1989) (footnote omitted).

109. *Id.* at 1195; see 11 U.S.C. § 101(50).

110. 11 U.S.C. § 101(50).

111. See *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 444 (1901). One commentator argues that only one transfer occurs. See Note, *supra* note 20, at 535. The commentator states that two transfers do not occur because the property received must be identical to the property disposed. *Id.* In the insider-guarantor scenario, there is no such mutual identity; the debtor disposes of a tangible payment while the guarantor receives only an extinguishment of a contingent debt. Accordingly, “[T]here is no separate and independent transfer from the debtor to the insider guarantor.” *Id.*

While the Note’s reasoning is at first appealing, upon closer examination it is shown to be convoluted. This is because the problem with this argument is that the mutual identity “requirement” does not appear anywhere in the definition of “transfer.” See 11 U.S.C. § 101(50). The definition does not address what must be received. As mentioned above, the definition is stated entirely from the debtor’s point of view. Thus, the definition is conclusive as to the two-transfer theory without the need to resort to this “mutual identity” phrase.

112. Section 550(a)(1) states that both the initial transferee and the entity for whose benefit such transfer was made may be held liable for its recovery. See 11 U.S.C. § 550(a)(1) (1988). Thus, the section envisions that two separate parties could be responsible for a single transfer. See *Nutovic*, *supra* note 20, at 193 for accord.

113. The court in *Mercon* agrees that the insider-guarantor received a preference. *Mercon*, 37 Bankr. at 551. However, it states that section 550(a)(1) should not be applied against the primary creditor who was not liable under section 547(b): “[Section] 550 is not applicable until the trustee has successfully proven a case under one of the provisions stated therein [section] 547. Although a case was successfully advanced against the insiders under [section] 547(b), no cause of action against the primary creditor was found.” *Id.* at 552 n.4.

114. 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

115. See 11 U.S.C. § 101(50). See also Note, *supra* note 20, at 534-36 for a critique of the “two-transfer” theory based upon the grounds that such a theory is logically inconsistent since no independent transfer occurs between the debtor and the guarantor.

547(b)(4)(B), and the transfer is avoidable.¹¹⁶ The first part of the two-part analysis is concluded. The recovery aspect of the analysis then becomes operative.

2. Section 550(a)(1)

Trustees may recover transfers from "the initial transferee of such transfer or the entity for whose benefit such transfer was made"¹¹⁷ When viewed independently from the factual scenario at hand, this language leaves little doubt that trustees may choose from whom they can recover. The *Deprizio* bankruptcy court, however, ignored this clear language. It concluded "that section 550(a)(1) was not intended to expand the trustee's right to recover preferential transfers under section 547 but rather was intended merely to facilitate recovery of those transfers which are avoidable. . . . To hold otherwise would make a guarantee on a debt more of a liability than an asset."¹¹⁸ Yet, there is no legislative history to support this conclusion. As one commentator has stated:

[A]s hard as one searches, one is unable to uncover any material evidence in the Code or the legislative history that Congress intended paragraph 550(a)(1) to operate less than literally merely because [only] one of the potential defendants designated in that paragraph supplies the factual predicate for avoiding a transfer.¹¹⁹

While the bankruptcy court's advocacy of policy is commendable, both the district court and the Seventh Circuit commented that the trial court should be faulted for its manipulation of the clear language of section 550(a)(1).¹²⁰

116. See 11 U.S.C. § 547(b)(4)(B) (1988).

117. 11 U.S.C. § 550(a)(1) (emphasis added).

118. *Deprizio*, 58 Bankr. at 481; accord *Bakst v. Schilling (In re Cove Patio Corp.)*, 19 Bankr. 843, 844 (Bankr. S.D. Fla. 1982).

119. Pitts, *supra* note 20, at 347.

120. See *Deprizio*, 874 F.2d at 1195-96; *Levit v. Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.)*, 86 Bankr. 545, 551 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 874 F.2d 1186 (7th Cir. 1989). Pitts further supports the literal reading of section 550(a)(1) because he feels that it promotes the essential purpose of the insider preference provision. See Pitts, *supra* note 20, at 353. For a criticism of the assumption that extending liability to the non-insider creditor will address these policy concerns, see *infra* notes 146-68 and accompanying text.

A unique but logically impractical response to the court's use of section 550(a)(1) has been advanced by one commentator. See Note, *supra* note 20. The author of that Note states that, while the words of section 550(a)(1) are clear when read in isolation from sections 547 and 550(a)(2), they become ambiguous when read in conjunction with each other. *Id.* at 540-41. This reasoning is flawed from the outset; section 550(a)(1) and (a)(2) must be read to avoid any contradiction in terms. 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION

C. *The Inapplicability of Pre-Code Practice*

A majority of courts addressing the issue of extended liability have advanced the argument that, in the absence of legislative history, courts should follow the pre-Code practice of allowing the trustee to recover only from the party whose status rendered the transfer avoidable as a preference.¹²¹ However, with regard to the connection between sections 547(b) and 550 and the resulting extended liability to non-insider creditors, the pre-Code practice is of little use.¹²²

The *Deprizio* scenario arises because there is no doubt that the guarantor, as a creditor with a contingent claim against the debtor, is benefited whenever a payment is made to the non-insider lender.¹²³ Some doubt existed as to the characterization of a guarantor as a creditor under the Bankruptcy Act of 1898 (the Act).¹²⁴ However, an argument that pre-Code practice is helpful for determining legislative intent still could be advanced. From past practice, Congress must have intended to allow recovery only from the creditor whose status rendered the preference voidable.¹²⁵ Recognizing the Act's separation into two sections of preference liability and recovery power, one commentator acknowledges the argument: preference liability would be disallowed if the requirements of the preference subsection, 57g, were not satisfied; because of the possibility of disallowance, the 1903 amendment to subsection 57g insured that where a creditor's claim was disallowed, a trustee was unable to recover from the recipient; rather, recovery was permitted only from the creditor against whom the transfer was voidable.¹²⁶

§ 53.01, at 549 (Sands 4th ed. 1984). Because the two sections use different words to describe the class of transferee they refer to, they should be read to refer exclusively to those separate classes. Subsection (a)(1) addresses the *initial* transferee, meaning the party who *first* receives the transfer. See 11 U.S.C. § 550(a)(1). The outside lender, having directly received the transfer, can only logically be designated as this party.

121. See *supra* notes 123-26 and accompanying text.

122. See 11 U.S.C. §§ 547(b), 550 (1988).

123. See *supra* note 96.

124. Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). The Act's definition of creditor contained an element of provability. "[I]n defining a 'creditor' and a 'debt,' sections 1(11) and 1(14) of the Act imported the concept of provability." See Pitts, *supra* note 20, at 345 n.17. However, the contingent nature of the insider guarantor's reimbursement claim possibly did not support the required provability element, thus preventing a characterization of the insider as a creditor. *Id.*

125. Pitts, *supra* note 20, at 352.

126. *Id.*

(1) By the terms of subsection 57g since 1903, Bank's claim against Debtor would not be disallowed because although Bank received "technical" preferences, it did not *receive* "voidable" preferences as that provision requires;

(2) The 1903 amendment to subsection 57g was designed to insure a perfect

As the commentator notes, however, the use of this pre-Code argument today would involve convoluted reasoning because it requires the belief that the Code is an extension of prior law rather than an avulsion.¹²⁷ Only by holding such a belief could it be said that this historical perspective continues to be indicative of the intent of Congress under the new regime.¹²⁸ Rather, as expressed accurately by the Seventh Circuit, "When Congress makes wholesale changes in the text and structure of the law, it is fatuous to pretend that a silent legislative history means that existing practices should continue unchanged."¹²⁹

D. *The Equitable Argument Is Not Compelling*

Confronted with an inequitable result due to the literal application of section 550(a), courts in the majority line of opinions¹³⁰ heed Collier's advice that where a trustee demands recovery from a party whose status did not supply the required predicate for avoidance, "the bankruptcy court should exercise its discretion to use its equitable powers under section 105(a) and 28 U.S.C. [section] 1481 to prevent [the] inequitable result."¹³¹ By utilizing equitable arguments, these cases exemplify a result-oriented approach towards the insider-guarantor situation.¹³² These courts look with disfavor upon the possibility that a prudent creditor who obtained a guaranty would be worse off than a creditor who had

correspondence between disallowance under that subsection and recoverability under subsection 60b;

(3) To permit the recovery of these transfers from Bank would introduce in reverse the disuniformity between subsection 57g and 60b by permitting recovery under subsection 60b from a creditor whose claim would have been allowed under subsection 57g even if he did not surrender the transfers; ERGO

(4) Property shall be recoverable under subsection 60b only from the creditor whose "reasonable cause to believe" makes the preference voidable.

Id.

127. *Id.* at 353.

128. *Id.*

129. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1196 (7th Cir. 1989). See Note, *supra* note 20, at 542 for a contrary interpretation of congressional silence. "Since Congress did not indicate any intent to change this interpretation of the existing law in the legislative history of the Code, it is likely that it intended no change." *Id.*

130. See *supra* note 17, for a list of cases which follow the majority point of view.

131. 4 COLLIER ON BANKRUPTCY, *supra* note 77, ¶ 550.02, at 550-6 to -7.

132. See, e.g., *Block v. Texas Commerce Bank Nat'l Assoc. (In re Midwestern Co.)*, 102 Bankr. 169, 173 (W.D. Mo. 1989) (time limit for insiders cannot be applied to non-insiders); *In re Aerco Metals, Inc.*, 60 Bankr. 77, 82 (Bankr. N.D. Tex. 1985) (even if debtor's transfer is preferential for purposes of section 547(b), court will not punish creditor for prudence in obtaining guaranty); *Schmitt v. Equibank (In re R.A. Beck Builder, Inc.)*, 34 Bankr. 888, 894 (Bankr. W.D. Pa. 1983) (creditor should not be penalized for prudence in seeking guarantor of debt).

not.¹³³

The court in *Schmitt v. Equibank (In re R.A. Beck Builder, Inc.)*¹³⁴ justified its result-oriented stance by concluding that no statutory language compelled it to render a literal application of section 550(a)(1).¹³⁵ This conclusion appears to be wrong. As Justice White said in *Norwest Bank Worthington v. Ahlers*,¹³⁶ “[W]hatever equitable powers remain in the bankruptcy court must and can only be exercised within the confines of the Bankruptcy Code.”¹³⁷ In subsequent bankruptcy cases, courts have interpreted “equitable powers” to include the court’s ability to give an equitable interpretation to an unclear statute.¹³⁸ In the *Deprizio* situation, the statute’s language is clear;¹³⁹ hence, as bankruptcy law is now written under the Code, equity has no place.¹⁴⁰

V. DEPRIZIO’S POLICY JUSTIFICATIONS ARE INCORRECT

The *Deprizio* court’s analysis of the current bankruptcy law is correct.¹⁴¹ The result of the analysis, however, is contrary to general equity considerations and specific preference policy.¹⁴² This Comment seeks to expose the Seventh Circuit’s inadequate response to creditors’ arguments against extended liability and illustrate the reasons why their arguments are valid.¹⁴³ The court professes to address a wide-range of concerns, such as: policy objectives, impact on business costs, business practices, remedy opportunities and codified exceptions.¹⁴⁴ The *Deprizio* court however approaches the issue of extended liability without considering

133. See *Midwestern Co.*, 102 Bankr. at 173; *Aerco Metals*, 60 Bankr. at 82; *R.A. Beck Builder*, 34 Bankr. at 894.

134. 34 Bankr. 888 (Bankr. W.D. Pa. 1983).

135. *Id.* at 894.

136. 485 U.S. 197, 206 (1988).

137. *Id.* at 206. But see *Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (cited with approval in *Kelly v. Robinson*, 479 U.S. 36, 49 (1986)). The court stated that it does not “read these statutory words [in the former Bankruptcy Act] with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.” *Id.*

138. See *Edson v. Wisconsin Higher Educ. Corp. (In re Edson)*, 86 Bankr. 141, 144 (Bankr. E.D. Wis. 1988); *In re Charterhouse, Inc.*, 84 Bankr. 147, 154 (Bankr. D. Minn. 1988).

139. See *supra* notes 106-29 and accompanying text.

140. The use of equity to avoid strict construction of statutes is limited and does not support “result-oriented” rereading of section 550(a) as the majority view has done. *Lowrey v. First Nat’l Bank (In re Robinson Bros. Drilling)*, 97 Bankr. 77 (W.D. Okla. 1988), *aff’d sub nom. Manufacturer Hanover Leasing Corp. v. Lowrey (In re Robinson Bros. Drilling)*, 892 F.2d 850 (10th Cir. 1989).

141. See *supra* notes 98-140 and accompanying text.

142. See *infra* notes 146-68 and accompanying text.

143. See *infra* notes 169-231 and accompanying text.

144. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1198 (7th Cir. 1989).

the implication its ruling would have outside the bankruptcy arena.¹⁴⁵

A. Argument One: Insiders Pose Special Problems, and Extended Liability Helps Solve Them

The Bankruptcy Code seeks to ensure that the debtor's asset "pie" is kept whole until it is judicially sliced for a supervised distribution to the creditors.¹⁴⁶ A collective process of claim payments was adopted in order to prevent creditors from indulging in individually advantageous maneuvers.¹⁴⁷ Preference avoidance, in particular, is a creditor misbehavior rule.¹⁴⁸ It is directed at preventing a creditor from taking advantage of its relationship with the debtor¹⁴⁹ by either collaborating with the debtor¹⁵⁰ or forcing the debtor to alter the creditor's existing position vis-a-vis other creditors in anticipation of the debtor's insolvency.¹⁵¹ Accordingly, the Code's preference section 547 is concerned with the amount of control a party has over the debtor.¹⁵² The *Deprizio* court reasons that extended liability will effectively constrain creditors who wrongly wish to control the debtor.¹⁵³

The court's reasoning is at first very persuasive. It is based on the assumption that insiders have special knowledge of the debtor's financial position and management operations, and hence, will first recognize the debtor's descent into bankruptcy.¹⁵⁴ Having given personal guaranties,

145. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditor's Bargain*, 91 YALE L.J. 857, 907 (1982).

Bankruptcy law has, for too long, been molded and interpreted without any systematic questioning or understanding of its nominative role in a larger legal, economic, and social world . . . [W]e would be better able to formulate and apply principled bankruptcy rules if we would give systematic and critical attention to the impact of those rules on non-bankruptcy entitlements.

Id.

146. Jackson, *supra* note 3, at 728-30.

147. *Id.* at 763. This scheme is premised on the notion that rational creditors would privately agree to such a distribution system if they were to bargain together prior to the bankruptcy filing. *Id.* at 728.

148. *Id.* at 759; see also T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 126 (1986).

149. Jackson, *supra* note 3, at 759.

150. *Id.*; see also T. JACKSON, *supra* note 148, at 122-28.

151. Jackson, *supra* note 3, at 759.

152. See 11 U.S.C. § 547 (1988).

153. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1195 (7th Cir. 1989).

154. Jackson, *supra* note 3, at 759; see also T. JACKSON, *supra* note 148, at 122-28. The Code's definition of insider, however, does not require the element of knowledge. See *supra* note 12. Hence it is not impossible to hypothesize about an insider who does not have any special insight, such as a relative. Accordingly, the *Deprizio* court's entire argument rests upon the over-inclusive statement that "[all i]nsiders will be the first to recognize that the firm is in a downward spiral." *Deprizio*, 874 F.2d at 1195.

insiders will be interested in reducing their own liability. The court reasons that insiders will accomplish this self-serving goal by using their special knowledge of the debtor's financial condition.¹⁵⁵ The results will be a concealment of the debtor's true financial picture and an opportunity for the insiders to make out "like bandits."¹⁵⁶ However, the court's argument fails when, in a giant leap of logic, it concludes that by extending the preference liability period of outside creditors who hold insider guaranties, these results will be forestalled.¹⁵⁷

The major problem with this reasoning is the court's focus on the lone insider. Preference liability is justified by the policy of preventing the creditor from altering its position either by collaboration or coercion.¹⁵⁸ Thus, the policy assumes that the creditor has taken an *active* role in dipping into the "pie". The Code provides for this *presumption* by establishing different preference liability time periods for insiders and outsiders.¹⁵⁹ Because the insider's threat is proportionately larger than that of a non-insider, a longer period has been assigned to it.¹⁶⁰ It, arguably, is inequitable to lengthen the outsider's liability period without a further demonstration that the outsider's threat to the distribution of the "pie" has correspondingly increased.¹⁶¹

A focus on the creditor's knowledge, however, can create numerous problems because the door would then be open to a factual inquiry in every case. Congress' systematic elimination of the "reasonable cause to believe" requirement from the Code's preference section¹⁶² evidences its

155. *Deprizio*, 874 F.2d at 1195.

156. *Id.* The court focuses on the overall policy to discourage individually advantageous maneuvers among the creditors. See Jackson, *supra* note 3, at 758-59.

157. See *Deprizio*, 874 F.2d at 1195. "[A]n extended recovery period for payments to outside creditors that benefit insiders could contribute to the ability of the bankruptcy process to deter last-minute grabs of assets." *Id.*

158. See Jackson, *supra* note 3, at 759-60.

159. See 11 U.S.C. § 547(b)(4)(A), (B).

160. *Deprizio*, 874 F.2d at 1195.

161. Should the court really be concerned that the outside lender is attempting personally to control the debtor by "pulling the strings" of the insider-guarantor, the court has an alternative recourse—equitable subordination under section 510. This principle states that all or part of a creditor's claim may be subordinated to other claims. See 11 U.S.C. § 510(c)(1) (1988). See also *Pepper v. Litton*, 308 U.S. 295 (1939) for the scope and general applicability of the principle of equitable subordination.

162. Compare Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 547, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. § 547(b)(4)(A) (1988)) with Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 462(b)(2), 98 Stat. 378 (1984) (codified at 11 U.S.C. § 547(b)(4)(B) (1988)) (the requirement was retained for insider creditors in the 1984 Bankruptcy Amendments). The piecemeal elimination of the requirement suggests both the concern that the longer liability period for insiders should only apply to those creditors guilty of manipulation, and the realism that "reasonable cause" is extremely

will to dispense with such case by case investigation.¹⁶³ Accordingly, the *Deprizio* court was confronted with either the difficult and frowned-upon task of attempting to ascertain the creditor's knowledge, or the inequitable assumption that collusion had occurred.

The *Deprizio* court, however, made reference to neither the outside creditor's own intentional maneuvering nor the creditor's awareness of the insider's activities in any context. Instead, the court simply punished the outsider in order to punish its primary target, the insider-manipulator. Its justification—that inequity does not occur because the outsiders will maintain their contractual entitlements¹⁶⁴—is insufficient to support the result.

The court stated that two separate liability time periods are needed to prevent a chain reaction of grabs led by the insider.¹⁶⁵ By making the preference-recovery period for insiders longer than that for outsiders, the court reasoned that it would be less costly to prevent grabs than if the period were the same.¹⁶⁶ Yet, when confronted by guaranties, as opposed to general loan situations, the court contradicted itself with no further explanation than that an "extended recovery period for payments to outside creditors that benefit insiders *could* contribute to the ability of the bankruptcy process to deter last-minute grabs of assets."¹⁶⁷ A mere possibility of heightened deterrence is inadequate to support the creation of a situation which enables "a creditor who does not demand a guarantor [to] be better off than one who does."¹⁶⁸

B. Argument Two: The Market Theory that Prices Will Adjust

The Practising Law Institute came to the same conclusion that a creditor should not be punished merely for obtaining a guaranty. The Institute stated that:

The majority view is arguably the better *result*. To hold otherwise would place creditors in a difficult position of having to choose between i) not taking a guarantee and risking nonpay-

difficult to prove. The desire to increase the rule-oriented function of preference law, however, won. See Jackson, *supra* note 3, at 765-66 n.119.

163. Sections of the Code are designed to promote "bright line rules" rather than case-by-case analysis in order to be "'consistent with the Code's policy of reducing litigation over difficult questions of fact . . .'" Jackson, *supra* note 3, at 775 & n.158 (quoting Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 340-45 (1982)).

164. *Deprizio*, 874 F.2d at 1195.

165. *Id.*

166. *Id.*

167. *Id.* (emphasis added).

168. 4 COLLIER ON BANKRUPTCY, *supra* note 77, ¶ 550.02, at 550-8 (footnote omitted).

ment or ii) taking a guarantee and risking that the payments made by the debtor will be recoverable under [section] 550(a), risks that should not have to be borne by a creditor.¹⁶⁹

The *Deprizio* court, on the other hand, claimed that the risks of non-payment or an extended preference liability time period rightfully belong to the non-insider creditor.¹⁷⁰ Addressing the lenders' concerns that the result of extending liability is inequitable, the court harshly answered that once a rule is known, loan prices will adjust.¹⁷¹ "A rule may injure debtors and creditors by foreclosing efficient business arrangements and increasing the rate of interest low-risk borrowers must pay, . . . but inefficiency is not inequity."¹⁷² The point raised is whether bankruptcy rules should be allowed to have such a binding and unsettling impact upon business practices. From a common sense approach, courts should not adhere to an inefficient rule merely because it is not "inequitable" in the purest sense of the word.

The court should have been concerned with the effect its holding would have on the fine balance which existed between the desire to give corporations fresh starts¹⁷³ and the cost to the economy of achieving them. The Code, in general, made filing bankruptcy petitions more attractive for debtors.¹⁷⁴ By extending the preference liability time period for outside lenders holding inside guaranties, the court makes bankruptcy filings even more appealing. "From an economic standpoint, it therefore raise[s] the cost of bankruptcy to creditors and future borrowers, who pay for higher default rates in the form of higher interest charges."¹⁷⁵ At some point, the rates could be so high that borrowers will be less able to pay and lenders less willing to lend.¹⁷⁶ Thus, a serious question arises as to the reasonableness of having bankruptcy courts determine such potentially far-reaching economic policies.¹⁷⁷

169. Rosenberg, Smith & Iten, *Avoidance of Preferences and Fraudulent Transfers; Uniform Fraudulent Transfer Act*, in *BANKRUPTCY DEVELOPMENT FOR WORKOUT OFFICERS AND LENDERS COUNSEL* 431, 465 (Practising Law Institute, Commercial Law and Practice Course Handbook No. 507, 1989).

170. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1197 (7th Cir. 1989).

171. *Id.* at 1198.

172. *Id.*

173. Through a Chapter 11 Reorganization Plan, it is hoped that corporations can achieve health and fitness, and once again be able to contribute to the economy. See White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 *IND. L.J.* 1, 2 (1987) [hereinafter White, *Personal Bankruptcy*].

174. *Id.* at 2-3.

175. *Id.* at 3.

176. *Id.* at 2.

177. Judge Easterbrook has rendered other opinions which inspire conservative lending

C. *Argument Three: The Effect on Workouts Is Not Detrimental*

In addition to determining that extended liability is not inequitable, the *Deprizio* court believed that this would not have a negative impact on business practices.¹⁷⁸ It stated that “[w]orkouts often involve guarantees, and if these mean longer preference periods, then workouts may become less common (and formal bankruptcy more common). It is not clear to us that bankruptcy proceedings are more costly than workouts.”¹⁷⁹

The court shrugs at the often devastating social consequences of bankruptcy by stating that “[i]t’s not as though filing of a bankruptcy petition closes the firm and heaves its workers into the streets.”¹⁸⁰ One need only read about the widespread effect that the bankruptcy of Drexel Burnham Lambert Inc. is having not only on the stock brokerage industry but on law firms and other business enterprises as well, to realize that the court’s statement is callous if not outright incorrect.¹⁸¹

Bankruptcies have tangible costs.¹⁸² The *Deprizio* court states that the parties are as free to negotiate in bankruptcy as they are outside

practices. See *In re Ebler Furniture & Appliances, Inc.*, 804 F.2d 87 (7th Cir. 1986) (Easterbrook, J., concurring).

178. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1198 (7th Cir. 1989).

179. *Id.* at 1198. One commentator appears to support Judge Easterbrook’s statement. White, *The Behavior of Firms in Financial Distress: Bankruptcy Costs and the New Bankruptcy Code*, 38 J. FIN. 477 (1983) [hereinafter White, *Bankruptcy Costs*]. Her premise is that the Code increases economic efficiency which is defined as a decrease in aggregate bankruptcy costs. *Id.* at 478. However, this premise is based upon the conclusion that bankruptcy costs have decreased *only because relatively fewer firms are reorganizing under the Code* as opposed to the numbers which had filed under the Bankruptcy Act. *Id.* at 486. Judge Easterbrook, however, projected an *increase* in the number of reorganizations in bankruptcy. *Deprizio*, 874 F.2d at 1198. If one assumes that Easterbrook is correct, then White’s premise loses its necessary predicate and is rendered faulty. Perhaps the most damaging rebuttal to White’s article is her own statement that “the estimates suggest strongly that bankruptcy costs are higher than has previously been thought and that further research and rethinking is needed in this area.” White, *Bankruptcy Costs, supra*, at 487.

180. *Deprizio*, 874 F.2d at 1198.

181. Fanning, *Branded by Drexel, and Still Out of Work*, N.Y. Times, April 22, 1990, § 3, at 29, col. 1.

182. Eisenberg, *Bankruptcy in the Administrative State*, LAW & CONTEMP. PROBS., Spring 1987, at 3, 7.

Judge Easterbrook contends that economic theory is a helpful way to think about legal questions. . . . In order to know[, however,] whether judges use too much or too little economic theory in judicial decisionmaking, judges must decide what the goals of their decisionmaking are. If those goals are broader than simply maximizing economic efficiency or wealth maximization, then the Easterbrook prescription is not helpful enough to judges because it does not provide a blueprint for knowing when to use economics.

Culp, *Forward: Economists on the Bench*, 50 LAW & CONTEMP. PROBS. Autumn 1987, at 1, 10.

bankruptcy.¹⁸³ Corporate bankruptcy, however, is an elaborate set of rules and regulations which are precisely designed to inhibit the parties' ability to freely negotiate for disbursement of the debtor's assets or alterations in management.¹⁸⁴

Outside bankruptcy, parties are free to entertain takeover bids and indulge in "creative" financing in order to maximize shareholders' worth and corporate efficiency.¹⁸⁵ An owner of a share of stock may use or transfer it as the owner pleases.¹⁸⁶ Most importantly, under general corporate law, nothing prevents shareholders from contractually pledging their entire net worth to insure that claims are satisfied.¹⁸⁷ As one scholar has stated, "[i]ndeed, in the case of closely held corporations, individual guarantees of key officers and shareholders make such contracts the rule rather than the exception."¹⁸⁸

While bankruptcy reorganization could be viewed as simply a different kind of collective proceeding in which non-bankruptcy rights are shifted and reallocated, the traditional view is strikingly different.¹⁸⁹ The benefit of the bargain is undercut; the rules exist in order to provide breathing space for the troubled corporation and not to implement the investor's bargain.¹⁹⁰ By further affecting the investor's bargain, *Deprizio's* application of extended liability adds a burdensome weight to loan negotiations. It appears to support the saying that "when the rules of the . . . game become more complicated, the advantages of playing the game decline."¹⁹¹ Losses due to bankruptcies are borne not only by other borrowers in the form of higher interest rates but also by lenders in the form of lost equity.¹⁹² These losses increase the cost of risk-taking, which in turn, cause lenders to reduce their willingness to lend.¹⁹³

While the *Deprizio* court was correct from a legal standpoint to

183. *Deprizio*, 874 F.2d at 1198.

184. See Jackson, *supra* note 3, at 729. "[B]ankruptcy exists at its core to maximize the value of assets in the face of individualized pressures to ignore the collective weal for individual gain." *Id.* In order to achieve this goal, the Bankruptcy Code imposes a scheme to prevent individuals from enjoying rights normally held outside the bankruptcy framework. See *id.* at 727-31.

185. See Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 469.

186. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 128-29 (1986).

187. *Id.* at 142.

188. *Id.*

189. *Id.* at 146.

190. *Id.*

191. Macey, *supra* note 185, at 474.

192. White, *Personal Bankruptcy*, *supra* note 173, at 2.

193. *Id.*

reject the influence of hampered workouts on the ordinary reading of section 550(a)(1), that influence must be computed from a policy standpoint.¹⁹⁴ It has been suggested that:

most debtors and their creditors would and should prefer to work out their problems in a non-bankruptcy setting. Given this preference, bankruptcy rules are often more important outside bankruptcy than in a bankruptcy proceeding. Bankruptcy law, like other law, plays an important role whether or not it is formally applicable. During negotiations outside bankruptcy, perceptions about bankruptcy substantially influence the parties' positions and bargaining strengths.¹⁹⁵

D. Argument Four: The Proper Remedy Is Against the Insider Guarantor

The *Deprizio* court asked: "In what sense is it 'inequitable' to require the outside lenders to pursue the inside guarantors for any shortfall . . . ?"¹⁹⁶ It is inequitable because in most cases, the insider will be bankrupt,¹⁹⁷ thus leaving the outside creditor with no recourse whatsoever. While the outsiders did indeed bargain for the guaranty, and hence chanced the possibility that the guarantor may declare bankruptcy, they did not bargain for the compound effect of guarantor bankruptcy and their own extended liability.

By the end of 1982, the average repayment of liabilities owed by persons filing bankruptcy was approximately one-half of one cent on the dollar.¹⁹⁸ This rough estimate translates into an annual loss to lenders of fifteen billion dollars per year.¹⁹⁹ The loss can be attributed, at least in part, to the fact that a paramount consideration—enabling the debtor to make a fresh start—has made bankruptcy attractive to debtors.²⁰⁰ "[T]here is a high probability of creditors not receiving any payments at all, as well as a high probability of extremely low average payoff rates even when a positive payment is made"²⁰¹ There is little support for the court's statement that the outside creditor could find equity by resorting to a claim against the guarantor.

194. See 11 U.S.C. § 550(a)(1) (1988).

195. Culp, *supra* note 182, at 3.

196. Levit v. Ingersoll Rand Fin. Corp. (*Deprizio*), 874 F.2d 1186, 1198 (7th Cir. 1989).

197. See White, *Personal Bankruptcy*, *supra* note 173, at 1-2.

198. *Id.* at 1.

199. *Id.* at 1-2.

200. *Id.* at 2-3. From 1980 to 1981, there was a 43% increase in the number of personal bankruptcies. *Id.* at 29-30.

201. *Id.* at 39.

E. Argument Five: The Creditor Must Have Been Made Better Off for There to Be a Problem

The creditor does not find solace in the fact that section 547(b) has several elements which must be met before a transfer is considered preferential and, thus, avoidable.²⁰² The section includes the requirement that creditors receive more than they would have had there been a Chapter 7 liquidation of the debtor and the preferential transfer not been made.²⁰³ The court claims that "the tales of woe presented by the [outside] creditors" are exaggerated in light of this "better off" requirement.²⁰⁴ If the outside creditor is over-secured without the guaranty, then there is no risk in obtaining a guaranty. The insider guarantor will never face liability and, hence, while still a contingent creditor of the debtor, the guarantor is not made better off from any payment to the outsider. While this is true, creditors nonetheless face a host of predicaments in which the "better off" requirement will present a very weak shield.

1. The extent of voidability

The *Deprizio* court discounted the concerns expressed by the outside lenders regarding an extended liability period precisely because of the existence of the "better off" requirement.²⁰⁵ It stated that the impact of extended liability will be far less than charged in light of the "fact" that section 547(b)(5) renders a transfer preferential "only to the extent [that] the creditor got more than it would have received in a liquidation . . ."²⁰⁶ This may have been true if only the Code provided for this limitation on the extent of voidability. The truth of the matter, however, is that no such limitation exists.

As with other statutory constructions, subsection (b)(5) should be read in conjunction with the other subsections of section 547(b) so that a total effect is given to the entire provision.²⁰⁷ The preamble of subsection

202. See 11 U.S.C. § 547(b) (1988). See *supra* note 3 for section 547(b) requirements.

203. See 11 U.S.C. § 547(b)(5). The other requirements include (1) a transfer; (2) of an interest of the debtor in property; (3) to or for the benefit of a creditor; (4) for or on account of an antecedent debt owed by the debtor; (5) made while the debtor was insolvent; (6) made within a specified period of time. *Id.* § 547(b).

204. *Levit v. Ingersoll Rand Fin. Corp.* (Deprizio), 874 F.2d 1186, 1198-99 (7th Cir. 1989); see *id.* § 547(b)(5).

205. *Deprizio*, 874 F.2d at 1199-1200.

206. *Id.* at 1199 (emphasis added).

207. See 11 U.S.C. § 547(b). Legislation is neither written, read, nor applied in a vacuum. See 2A N. SINGER, *supra* note 120, § 53.01, at 549 (Sands 4th ed. 1984). Rather, each new act becomes a component in an interwoven system of written laws, whose essence encompasses an

(b) allows for the avoidance of any transfer should five requirements be met: (1) to or for the benefit of a creditor, (2) for or on account of an antecedent debt, (3) made while the debtor was insolvent, (4) on or within 90 days before bankruptcy unless the creditor is an "insider" in which case the time period is one year before bankruptcy, and (5) the creditor receives more than it would receive in a Chapter 7 had the transfer not been made.²⁰⁸ The "to the extent" language referred to by the court merely constitutes the last step which must be satisfied in order to avoid the entire transfer.²⁰⁹

Once a court determines that the creditor received more than it would have under a Chapter 7 liquidation, the *entire* transfer is avoided. The trustee can then recover the value of the transfer for the benefit of the estate and the creditors as a collective group.²¹⁰ While the preferred creditor's claim is not extinguished, it must now wait in line with the rest of the creditors for the disbursement of estate funds. Avoidance of the *entire* preferential transfer is the only reading of section 547(b) which furthers the general bankruptcy goal of equitably distributing the debtor's assets among all the creditors.²¹¹

The district court's reading of section 547(b) would not achieve the same policy objective. Should the transfers only be avoided to the extent that the creditor was made better off, the estate would be recovering only a fraction of the amount the debtor had disbursed immediately prior to bankruptcy. The trustee's efforts to equally distribute the assets to the awaiting creditors would be highly frustrated. The creditor in question would not have to suffer the lengthy process of judicial inquiry and approval of the reorganization plan. Furthermore, the creditor would be assured of at least a partial recovery. Accordingly, the creditor would remain "preferred," and the Code's goal of equitable distribution would have been placed in jeopardy.

The *Deprizio* interpretation of section 547(b) may give the illusion of properly easing creditors' fears. In response to a hypothetical situation posed by creditors—that upon payment a creditor may extinguish his security interest, thus finding himself unsecured when it is subsequently

assumption of consistency. *Id.* "[C]ourts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done." *Id.* at 550 (footnote omitted).

208. 11 U.S.C. § 547(b).

209. *Compare Deprizio*, 874 F.2d at 1199 with 11 U.S.C. § 547(b) (court seemingly isolates phrase "to the extent" from rest of section, thus giving phrase more weight than is warranted).

210. *See* 11 U.S.C. § 550 (1988).

211. Seligson, *supra* note 2, at 292.

avoided²¹²—the court implied that the predicament is *not that severe*.²¹³ Should the security interest have covered ninety percent of the debt, “then only the remaining [ten percent] of the payment is avoidable as a preference.”²¹⁴

Having illustrated the error in the court’s reasoning, the hypothetical now becomes more troubling. Under the correct interpretation of section 547(b), the entire transfer should be avoided and the creditor would be completely unsecured.²¹⁵ The effect of this situation is to force creditors to retain the security interest for an entire year in order to protect themselves from a *Deprizio*-type attack. Security interests would not be extinguished, and the debtor’s property would continue to be encumbered. This could affect the debtor’s attempt to obtain subsequent loans, in that future creditors either would not lend at all, or lend in limited amounts because of the encumbrance. A troubled debtor could thus be pushed into bankruptcy faster and more surely than had creditors not faced the possibility of extended liability.

2. The problem of valuation

The existence of different valuation systems illustrates the complexity of ascertaining the real value of security interests. It is feasible that under various valuation systems, an outside creditor could be shown to be under-, not over-secured. Creditors could find themselves facing preference liability because a court, using hindsight, employs a different valuation system than they did.²¹⁶ Thus, they could be confronted with having been made better off, satisfying the last step of section 547(b) and rendering the transfer voidable. This threat will encourage lenders to obtain very conservative loan-to-value ratios.²¹⁷ By tightening lending

212. *Deprizio*, 874 F.2d at 1199-1200.

213. *Id.* at 1200.

214. *Id.*

215. *See* 11 U.S.C. § 547(b).

216. In another opinion, Judge Easterbrook also sought to encourage conservative lending by decreeing that a wholesale value be used for inventory analysis for purposes of the section 547(c)(5) preferential exception. *See In re Ebler Furniture & Appliances, Inc.*, 804 F.2d 87, 92-93 (7th Cir. 1986) (Easterbrook, J., concurring). However, another line of valuation was presented in *In re Xonics Photochemical, Inc.*, for determining reasonably equivalent value in fraudulent conveyance actions. 841 F.2d 198, 202 (7th Cir. 1988); *see* 11 U.S.C. § 548(a) (1988). In those situations, the guaranty must be discounted by the probability that it would have been called upon in order to determine its value. *Xonics*, 841 F.2d. at 200. Different valuation systems could likewise be employed in preferences, perhaps harming the creditor.

217. A loan ratio is defined as: “The ratio expresses as a percentage of the amount of a loan to the value or selling price of real property. Usually, the higher the percentage, the greater the interest charged.” BLACK’S LAW DICTIONARY 845 (5th ed. 1979).

practices, debtors will face more difficulty in obtaining loans and could face a greater likelihood of failing.

F. Argument Six: The Application of the Extended Liability Time Period Is Narrow

The *Deprizio* court attempted to describe the parameters of extended liability by answering a hypothetical problem advanced by the lenders.²¹⁸ The hypothetical prophesied that outside creditors could be placed in a *Deprizio* situation, regardless of their own secured position, if at any time subsequent creditors are under-secured, granted security interests in the same collateral, and receive guaranties from insiders. The court stated that “we have substantial doubt that the payments to Lender [number one] are avoidable transfers. By assumption Lender [number one] is over-secured, so its position has not been improved relative to a Chapter 7 liquidation, [section] 547(b)(5).”²¹⁹ This conclusion, while it would seemingly appease some worried lenders, is premised upon faulty logic; hence, the worry remains.

The district opinion stated that the trustee would have “an uphill battle” to win such an argument.²²⁰ In truth, under the correct reasoning of section 547(b)—as espoused by the *Deprizio* case—there may not even be a fight.²²¹ Liability is extended because the *insider guarantor receives a benefit* from the transfer to the outsider, thus invoking the one year reach-back period under section 547(b)(4)(B).²²² In the hypothetical situation the court focuses on whether or not the *outsider* received any benefit.²²³ The lender’s benefit, however, is irrelevant under the court’s own previous analysis.²²⁴ Under the *Deprizio* analysis, it does not matter whether “Lender number one” or “Lender number ten” receives the guaranty, because the court’s focus will always be on the insider-guarantor as the party who is benefited. Accordingly, the court does little to confine the implications of its opinion.

G. Argument Seven: The Lender Always Has the Exception of Section 547(c)(2)

In addition to suggesting that lenders could find refuge from the

218. See *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1200 (7th Cir. 1989).

219. *Deprizio*, 874 F.2d at 1200.

220. *Id.*

221. *Id.*

222. See 11 U.S.C. § 547(b)(4) (1988). For a more detailed description, see *supra* notes 106-15 and accompanying text.

223. *Deprizio*, 874 F.2d at 1200.

224. See *supra* notes 106-15 and accompanying text.

effects of extended liability in the "better off" requirement²²⁵ in its "narrow" application,²²⁶ the *Deprizio* court stated that protection from the extended liability time period exists in the "ordinary course of business" exception.²²⁷ According to the court, as long as the payments were being paid on time, the lender would qualify for the preference exception.²²⁸ Section 547(c)(2) was "designed to encourage creditors to deal with a failing business and to protect ordinary business transactions" by preventing the onset of bankruptcy.²²⁹ While preventing avoidability may be the goal of the exception, section 547(c)(2) limits the creditors to the same business practices which have already been proven to be ineffective in preventing the debtor's slide into bankruptcy.²³⁰ The Code requires that the transfer be ordinarily conceived and transacted not only as between the particular debtor and creditor but also within the industry as a whole.²³¹ Accordingly, the exception does not encompass any sort of creative refinancing or new management procedures which could actually be of assistance in reorganizing the debtor prior to bankruptcy. Therefore, subsection (c)(2) does not afford the non-insider lender, who possesses an insider-guaranty, the type and extent of protection the court has suggested.

VI. SOLUTIONS DO NOT EXIST OUTSIDE AN AMENDMENT

A. Drafting Creates Its Own Problems

Some commentators, as well as the *Deprizio* court, have suggested that a *Deprizio* extended liability period could be avoided if the insider-guarantor waived all rights to indemnification from the debtor.²³² Be-

225. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1198-99 (7th Cir. 1989). See 11 U.S.C. § 547(b)(5) for statutory language of "better off" requirement.

226. *Deprizio*, 874 F.2d at 1200.

227. *Id.* at 1199-1200. See 11 U.S.C. § 547(c)(2) for "ordinary course of business" exception.

228. *Deprizio*, 874 F.2d at 1200.

229. *Remes v. Acme Carton Corp. (In re Fasano/Harriss Pie Co.)*, 43 Bankr. 871, 876 (Bankr. W.D. Mich. 1984), *aff'd*, 71 Bankr. 287 (W.D. Mich. 1987).

230. See 11 U.S.C. § 547(c)(2). Section 547(c)(2) will except an otherwise preferential transfer to the extent that it was:

- (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
- (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
- (C) made according to ordinary business terms[.]

Id.

231. See *id.*

232. See *Pitts*, *supra* note 20, at 355; *Katzen*, *supra* note 20, at 529-31. The *Deprizio* opinion also suggests this recourse with its emphasis on the characterization of the insiders as

cause of the waiver, the insider would no longer have a claim against the debtor, the insider's status as a creditor would be nullified, and a necessary predicate of section 547 could not be satisfied, thereby preventing the extended reach-back period.²³³

There are several problems, however, with relying on contractual waivers as a solution. First, guarantors may often be reluctant to waive their rights to indemnification.²³⁴ Second, courts could interpret such waivers as an inequitable means of avoiding legal responsibility. They could invoke their equitable powers,²³⁵ and deem the insider-guarantors creditors of the debtor notwithstanding the "waiver." The waiver theory would therefore fail, and lenders would be liable for the extended time period. Third, waivers could directly encourage the insiders to prefer one creditor over another, which is the very action the extended liability time period was designed to avoid.²³⁶ Removal of all recourse for the guarantors would motivate them to ensure that the debtor pays off the lender, thereby reducing the guarantors' potential liability. Furthermore, waivers could support the notion that lenders had either exercised control over or conspired with the insiders.²³⁷ The lenders could be considered insiders and independently fulfill the requirement for the one-year liability period.²³⁸

In addition, such waivers could potentially create a fraudulent conveyance situation. When no "equivalent value" has been given in exchange for the transfer, that transfer can be adjudged fraudulent.²³⁹ Thus, even if the lender is able to surmount the problems mentioned

"creditors" within its analysis of the tax and pension plan liabilities issues. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1191-94 (7th Cir. 1989). "A person is a 'creditor' only to the extent he holds a 'claim' against the debtor." Accordingly, *all turns* on whether a "person . . . has a contingent right to recover from the debtor in bankruptcy, the *only basis* for calling him a 'creditor.'" *Id.* at 1191 (emphasis added).

233. Katzen, *supra* note 20, at 529; see 11 U.S.C. § 547(b)(1) (1988).

234. Katzen, *supra* note 20, at 530.

235. See 11 U.S.C. § 105 (1988).

236. See *supra* notes 147-50, 158 and accompanying text.

237. Waivers may be obtained through bargaining and negotiations. Accordingly, should insiders consent to waiving their rights to indemnification from the debtor in order to obtain loans from outside creditors, it could appear that the outside creditors used coercion or control over the debtor. In this manner, the outside creditors could be considered insiders.

238. See Katzen, *supra* note 20, at 531.

239. See 11 U.S.C. § 548 (1988). In addition to "actual intent to hinder, delay, or defraud any entity," a fraudulent transfer is created when the debtor receives "less than reasonably equivalent value" and is rendered "insolvent," left with "unreasonably small capital," or has "debts that would be beyond the debtor's ability to pay." *Id.* § 548(a)(1), (2)(A), (2)(B)(i),(ii),(iii). Within the Ninth Circuit especially, there is the unanswered question as to what exactly constitutes "reasonably equivalent value." See *Lawyers Title Ins. Corp. v. Madrid (In re Madrid)*, 21 Bankr. 424, (Bankr. 9th Cir. 1982), *aff'd*, 725 F.2d 1197 (9th Cir.

above,²⁴⁰ the transfer could be avoided as a fraudulent conveyance.²⁴¹ It would not be difficult for the trustee, and the bankruptcy court, to doubt that the waiver was exchanged for equivalent value. Therefore, the insider may not only be liable for a loan to another entity, but after the waiver, the insider may have given up all possible means of recourse if called upon to perform on the guaranty. It may be argued that by giving the guaranty, the insider receives an indirect benefit: if the debtor prospers because of the loan, so will the insider. However, this argument is not acceptable if this indirect benefit is all the insider will ever receive.

B. *The Outsider-Creditor Is Not a Mere Conduit*

Drafting a waiver cannot solve the *Deprizio* problem, nor can re-characterizing the lender as a "mere conduit." Lenders have used the "mere conduit" label as a successful defense to preference liability.²⁴² In *Bonded Financial Services v. European American Bank*,²⁴³ the trustee was prohibited from recovering from a bank because the bank was not the initial transferee under section 550(a)(1).²⁴⁴ In the *Bonded Financial* opinion, Judge Easterbrook relied on the bank's total absence of dominion and control over the applicable transfer concluding that the bank was a "mere conduit."²⁴⁵ The bank was adjudged to be a subsequent transferee²⁴⁶ entitled to a good faith defense.²⁴⁷

A recent article advocates extending this notion of "mere conduit" to "include any initial recipient whose relationship to a transaction is not logically linked to the elements that allow the trustee to avoid the transfer."²⁴⁸ "Fortuitous recipients,"²⁴⁹ such as outside lenders in a *Deprizio* situation, would be relieved of their "initial transferee" status. Absent proof of control over the insider, the logical link between the outside

1984); *Lindsay v. Beneficial Reins. Co. (In re Lindsay)*, 98 Bankr. 983, 986 (Bankr. S.D. Ca. 1989).

240. See *supra* notes 234-38 and accompanying text.

241. See 11 U.S.C. § 548(a).

242. *Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 891 (7th Cir. 1988).

243. 838 F.2d 890 (7th Cir. 1988).

244. *Id.* at 893; see 11 U.S.C. § 550(a)(1) (1988).

245. *Bonded Fin.*, 838 F.2d at 893-94. "[T]he minimum requirement . . . is dominion over the money or other asset, the right to put the money to one's own purposes. When A gives a check to B as agent for C, then C is the 'initial transferee'; the agent may be disregarded." *Id.* The term "mere conduit" was utilized by the district court, which had granted the bank summary judgment without explicitly discussing section 550. *Id.* at 891. Judge Easterbrook used the term "financial intermediary." *Id.* at 893.

246. *Id.* at 898.

247. *Bonded Fin.*, 838 F.2d at 898.

248. Katzen, *supra* note 20, at 526.

249. *Id.*

lenders and the transfer would be broken.²⁵⁰ This expansion of the "mere conduit" notion, however, is insupportable.

In *Bonded Financial*, the court protected the bank from the abusive possibilities under the Code's recovery provision; any entity which *first* touched the funds could otherwise have been labeled an "initial transferee" from whom the trustee could recover.²⁵¹ Far from being a purely equitable response to a potentially bad result, this holding was justified by tangible facts. The bank could not control the flow of the funds and did not receive any benefit from the passage of funds through its grasp.²⁵² By contrast, the outsider-lender in the *Deprizio* situation had complete control of the funds and, accordingly, was benefited. Thus, the factual predicate of *Bonded Financial* is missing and the argument is then reduced to one of equity. Yet as indicated above, equity concerns are not sufficient to overcome the plain reading of unambiguous statutory sections.²⁵³

VII. PROPOSED AMENDMENT TO THE CODE

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under sections 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee or such transfer, *except that a transfer avoidable under section 547 is not avoidable to the extent that:*

(i) *the transferee is liable solely in the capacity as an "initial transferee" under section (a)(1); or*

(ii) *the transferee would have been entitled to assert a defense under section 547(c), had that transferee been*

(a) *the initial beneficial recipient of the transfer in question, or*

(b) the entity for whose benefit such transfer was made;

If enacted these changes would correct the inequity occurring in a *Deprizio* situation under the present Code. The mix-match situation

250. *Id.*

251. *Bonded Fin.*, 838 F.2d at 898. See 11 U.S.C. § 550 for recovery provision.

252. *Bonded Fin.*, 838 F.2d at 893.

253. See *supra* notes 130-40 and accompanying text.

which exists between sections 547 and 550 would be avoided.²⁵⁴ The transfer to the insider-guarantor supplies the necessary predicate for the one-year liability period; thus, after amending the preference section, the insider would be the targeted entity from whom there could be recovery.

Furthermore, such a change would be fair. It would support Congress' clear intention that there be two distinctive recovery periods for insiders and non-insiders.²⁵⁵ It does not rely upon the difficult and disfavored task of inquiring into the outsider's subjective knowledge,²⁵⁶ and therefore it preserves the Code's goal of presenting a concrete preference test based upon observable, calculable transactions.²⁵⁷ In addition, the proposed amendment would reconcile the present practice of recovering preferential transfers with the past practices. Most importantly, it would achieve the policy objective of preventing insiders from exploiting their position and superior knowledge, without unduly influencing commercial practices. Any concern that the outsider-creditors were manipulating the collective process is best handled through the courts' power of equitable subordination.²⁵⁸

VIII. CONCLUSION

At the center of the insider-guarantor and outsider-lender *Deprizio* situation, is the Code's use of a single payment to constitute both a direct and indirect transfer.²⁵⁹ Because in reality only one transfer occurs, the benefit to the insider invokes the one-year liability period, thus enabling the trustee to avoid the transfer. Once avoided, the transfer is recoverable from either the creditor or the inside-guarantor.²⁶⁰ Cases such as *Goldberger v. Davis Jay Corrugated Box Corp. (In re Mercon Industries Inc.)*,²⁶¹ attempt to avoid this situation by adopting the theory that the single payment results in two transfers.²⁶² Others, such as *Bakst v. Schil-*

254. See *supra* notes 106-15 and accompanying text.

255. Judge Easterbrook notes the necessity of two liability periods in his discussion on the special problems posed by insiders. See *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186, 1195 (7th Cir. 1989).

256. See *supra* notes 146-63 and accompanying text.

257. See Jackson, *supra* note 3, at 765.

258. The courts have the power to equitably subordinate creditor claims. See 11 U.S.C. § 105 (1988). The generally recognized test for equitable subordination is found in *In re Mobile Steel Co.* 563 F.2d 692 (5th Cir. 1977).

259. See *supra* notes 106-20 and accompanying text. In one article, the benefit received by the guarantor is referred to as an indirect preference. See Lurey & Beckham, *supra* note 20, at 255-56.

260. See *supra* notes 90-93, 117-20 and accompanying text for a discussion of recoverable transfers.

261. 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

262. See *supra* notes 71-75 and accompanying text.

ling (*In re Cove Patio Corp.*),²⁶³ simply invoke their equitable powers.²⁶⁴ While these cases are convoluted in their interpretation of the Code,²⁶⁵ they present an appealing means by which to resolve the inequity created by *Deprizio*.²⁶⁶ However, only an amendment to the preference section would truly enable "a finding of liability on one transfer [that] is independent of the other, rather than derivative."²⁶⁷

*Meghan Ann White**

263. 19 Bankr. 843 (Bankr. S.D. Fla. 1982).

264. For additional examples see also *Block v. Texas Commerce Bank Nat'l Assoc. (In re Midwestern Co.)*, 96 Bankr. 224, (Bankr. W.D. Mo. 1988), *aff'd*, 102 Bankr. 169 (W.D. Mo. 1989); *In re Aerco Metals, Inc.*, 60 Bankr. 77 (Bankr. N.D. Tex. 1985).

265. See *supra* notes 87-94 and accompanying text.

266. *Levit v. Ingersoll Rand Fin. Corp. (Deprizio)*, 874 F.2d 1186 (7th Cir. 1989).

267. *Mercon*, 37 Bankr. at 552.

* This Note is dedicated to my parents, Dennis and Valerie White, for all their boundless love, encouragement and generosity. The author also wishes to thank Professor Dan Schechter for his guidance and enthusiasm.