

11 U.S.C. § 547(a)(2)  
11 U.S.C. § 547(c)(4)

Hartvig v. Portland General Electric, Civil No. 94-1537-RE  
Adv. No. 93-3535

In re Floating Point Systems, Case No. 391-36490-P7

3/31/95                      Judge Redden                      unpublished

Affirming Judge Perris

The trustee sought to recover certain payments to PGE under 11 U.S.C. § 547. PGE asserted a subsequent new value defense under section 547(c)(4) seeking reduce the recovery by the value of electrical service provided to the debtor after the payments but before the filing of the petition. The district court affirmed the bankruptcy court's determination that PGE had not established the extent to which new value was provided after the preferential payments.

PGE sought to establish the extent to which the new value was provided during the pertinent time period by a proration analysis under which the electrical usage for a given period of time was prorated to reach a daily usage figure. The district court determined that the bankruptcy court did not commit clear error in finding that PGE had failed to establish that the daily electrical usage of the debtor remained constant over the period between the meter readings which was a necessary evidentiary predicate to the application of the proration analysis.

FILED

3/31/95 Docket on  
DONALD M. CINNAMOND  
Deputy

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CLERK, U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON

MAR 31 1995

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In re:

FLOATING POINT SYSTEMS, INC.  
dba FPS Computing, an Oregon  
Corporation,

Debtor,

DONALD H. HARTVIG, Trustee,  
Plaintiff/Appellee,

vs.

PORTLAND GENERAL ELECTRIC  
COMPANY, an Oregon corporation,  
Defendant/Appellant.

Civil No. 94-1537-RE

Adversary Proceeding No.  
93-3535

OPINION

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REDDEN, Judge:

#### PROCEDURAL BACKGROUND

1           On October 7, 1991, Floating Point Systems, Inc.  
2 ("Systems") filed a voluntary petition under Chapter 11 of the  
3 United States Bankruptcy Code ("Code"). Subsequently, the case  
4 was converted to a Chapter 7 case and a short time later, Donald  
5 H. Hartvig was appointed permanent Trustee. Within ninety days  
6 prior to the date the voluntary petition was filed, Systems made  
7 three transfers to Portland General Electric Company ("PGE") by  
8 checks totalling \$151,903. On May 2, 1994, pursuant to 11 U.S.C.  
9 §§ 547 (b) and 550, Hartvig filed a complaint to recover  
10 preferential transfers. Among other defenses, PGE asserted a  
11 subsequent new value defense under 11 U.S.C. § 547(c)(4).  
12

13           The bankruptcy judge denied Hartvig's Motion for Summary  
14 Judgment on this issue. A trial was held in this matter and the  
15 bankruptcy judge issued an opinion finding for Hartvig. PGE's  
16 Motion for Reconsideration was denied and judgment was entered on  
17 August 3, 1994. This appeal followed.

#### FACTUAL BACKGROUND

18           As stated, Systems filed a Chapter 11 bankruptcy petition  
19 on October 7, 1991. Pursuant to section 547(b)(4) of the Code,  
20 the preference period began on July 9, 1991, and ended on October  
21 7, 1991, the date the bankruptcy petition was filed. During the  
22 preference period, Systems made three transfers to PGE totalling  
23 \$151,903 as payment for utility services provided by PGE for the  
24 benefit of Systems. The first of these payments to PGE was on  
25

1 July 29, 1991, in the amount of \$45,544.02; the second payment to  
2 PGE was made on August 23, 1991, in the amount of \$47,494.62;  
3 and, the third payment was made on October 2, 1991, in the amount  
4 of \$58,864.36. Systems continued to receive electrical services  
5 during the preference period.

6 The amount of electricity used by Systems was determined on  
7 a monthly basis by PGE, which sent an employee to read the meters  
8 at Systems. The meters were read by Ms. Ebright on July 12,  
9 1991, August 14, 1991, and September 13, 1991. At each reading  
10 she was able to read the amount of electrical usage that occurred  
11 since the prior reading. She was not able to determine on which  
12 days the usage had occurred.

13 The electricity consumed by Systems between the August 14  
14 and September 13 meter readings had a value of \$51,343.63. The  
15 bankruptcy court allowed PGE to offset that subsequent new value  
16 against the July 29, 1991 payment of \$45,544.02. With the  
17 exception of the August 14 to September 13 period, the bankruptcy  
18 court concluded that PGE did not prove the amount or value of any  
19 other electricity provided by PGE sufficient to meet the  
20 subsequent new value defense of section 547(c)(4). The  
21 bankruptcy court did not rule for PGE with respect to the other  
22 two preference payments because the meter readings did not  
23 coincide with those preference payments and PGE failed to prove  
24 in any other way that new value was provided after the preference  
25 payments.

## STANDARD FOR REVIEW

1 The parties dispute the appropriate standard of review in  
2 this case. PGE characterizes the issue before the court as a  
3 question of law; namely, did the bankruptcy court hold that, as  
4 a matter of law, when relying on a subsequent new value defense  
5 under 11 U.S.C. § 547(c)(4), the creditor must show, as a  
6 prerequisite for recovery, average daily electric usage to  
7 warrant the application of a proration analysis. Alternatively,  
8 Hartvig casts the issue as a factual question; namely, whether  
9 the bankruptcy court erred in concluding that, in an action for  
10 recovery of a preferential transfer under 11 U.S.C. § 547, PGE  
11 failed to prove under section 547(c)(4) that it gave new value to  
12 the debtor after PGE received preference payments.

13 As discussed below, I find that the bankruptcy judge  
14 accepted PGE's legal position that the application of proration  
15 in the context of utility services is appropriate. Rather, in  
16 rejecting PGE's proration analysis she simply determined that PGE  
17 failed to provide a sufficient evidentiary basis at trial to  
18 measure the electrical service provided during the pertinent time  
19 periods under the proration analysis.

20 Accordingly, I am asked to review the bankruptcy court's  
21 findings of fact. The district court reviews the bankruptcy  
22 court's findings of fact under the clearly erroneous standard.  
23 Christensen v. Tucson Estates, Inc., 912 F.2d 1162, 1166 (9th  
24 Cir. 1990). Further, "[a]s long as findings are plausible in  
25 light of the record viewed in its entirety, a reviewing court may

not reverse even if convinced it would have reached a different result." United States v. Gila Valley Irrigation Dist., 961 F.2d 1432, 1434 (9th Cir. 1992) (quotation omitted).

#### ISSUE PRESENTED

Whether PGE offered sufficient evidence to establish under a subsequent new value defense, 11 U.S.C. § 547(c)(4), the average daily electric usage to warrant the application of a proration analysis?

#### DISCUSSION

The Code provides that a debtor or the trustee appointed in the debtor's case may recover, as a preferential transfer, property that the debtor transferred to or for the benefit of a creditor within ninety days before the bankruptcy filing. 11 U.S.C. § 547(b). The Code sets forth a number of exceptions, however, that protect certain preferential transfers from recovery. See 11 U.S.C. § 547(c). The creditor has the burden of proving that the transfers are protected from avoidance by one of these defenses. 11 U.S.C. § 547(g).

Section 547(c)(4) specifically provides:

The trustee may not avoid under this section a transfer--to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--(A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor[.]

11 U.S.C. § 547(c)(4). This new value defense allows a creditor who provides new value to a debtor after receiving payment from the debtor during the preference period, to retain the payment to

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1 the extent of the new value given. New value includes money or  
2 money's worth in goods, services and credit. 11 U.S.C. §  
3 547(a)(2).

4 Two policy considerations have been recognized in support  
5 of the new value exception. First, without the exception, a  
6 creditor who continues to extend credit to a debtor would merely  
7 be increasing his bankruptcy loss. Second, the limited  
8 protection provided by the subsequent advance rule encourages  
9 creditors to continue their revolving credit arrangement with  
10 financially troubled debtors, potentially helping the debtor  
11 avoid bankruptcy altogether. Toyota of Jefferson, Inc. v.  
12 Vallette, 14 F.3d 1088, 1091 (5th Cir. 1994).

13 PGE contends that the new value defense provides for a  
14 proration analysis and that it does not require a showing of  
15 consistent daily electrical consumption. Rather PGE argues that  
16 Systems' electrical consumption during the preference period  
17 should be prorated by computing a per day usage rate during the  
18 periods between preference payments to account for the amount of  
19 new value provided to replenish the estate. Further PGE  
20 maintains that there is ample evidence in the record for the  
21 court to apply proration to calculate new value.

22 The bankruptcy judge in this case accepted PGE's legal  
23 position that the application of proration in the context of  
24 utility services is appropriate. Rather, in rejecting PGE's  
25 proration analysis she simply determined that PGE failed to  
26 provide a sufficient evidentiary basis at trial to measure the

1 electrical service provided during the pertinent time periods  
2 under the proration analysis.

3 The bankruptcy judge determined that in order to adopt  
4 PGE's proration analysis she would have to accept the underlying  
5 premise that the daily consumption of electricity remained  
6 constant within the monthly billing periods. The bankruptcy  
7 judge concluded that there was no evidence to support this  
8 premise. Specifically, the bankruptcy judge stated:

9 PGE did not submit any evidence that the debtor's  
10 consumption of electricity or business practices  
11 remained largely constant within the monthly business  
12 periods. There was no testimony, for example, by the  
13 debtor's employees that the lights and heat were  
14 turned on and the equipment was running on a daily or  
15 even a weekly basis during the billing periods at  
16 issue. If PGE had presented such testimony, I could  
17 conclude that the electricity usage remained constant  
18 during the billing periods and I would have a basis  
19 upon which to utilize proration to estimate the  
20 usage.

21 In her order denying PGE's Motion for Reconsideration the  
22 judge stated:

23 My ruling recognized, however, that not all  
24 businesses consume electricity consistently on a day  
25 to day basis or a week to week basis.... My ruling  
26 sought to avoid the application of a proration  
analysis to such businesses by requiring the  
defendant to present evidence that the debtor's  
electrical consumption remained fairly constant on a  
day to day basis. This did not require the defendant  
to prove the daily electrical usage, but just to  
present evidence that the debtor was open and  
operating at a fairly consistent level during all  
weeks of a given billing cycle.

The following is a summary of the evidence PGE presented at  
trial to establish System's consistent power consumption: Ms.  
Ebright testified that Systems was operating and open for

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1 business on the occasions that she read the meters during the  
2 preference period. The record contains additional evidence in  
3 the form of Exhibit C. Exhibit C is a System's usage sheet  
4 detailing the history of System's kilowatt-hour meter reads,  
5 demand reads, bar reads and time-of-use reads for the four  
6 different System's metered accounts. The exhibit covers the  
7 entire year of 1991, including the pertinent preference months of  
8 July, August, September and October. It lists the 1991  
9 historical billing RKVA total, or billing demand, as well as the  
10 total kilowatt-hours used by Systems in monthly increments.  
11 Exhibit C also contains a column providing the kilowatt-hour and  
12 kilowatt demand history.

13 The record also reflects that the meter reader has a hand-  
14 held computer called a datacap that she takes with her when she  
15 reads a meter; it will bring up both a usage reading and a demand  
16 reading. The reader enters both figures in the datacap and then  
17 resets the demand meter to zero.

18 PGE explains that Exhibit C establishes that the kilowatt-  
19 hour usage for Systems was consistent from month to month during  
20 the preference period. The exhibit indicates not only System's  
21 monthly usage, but also its monthly load. The bankruptcy judge,  
22 however, was concerned that the evidence submitted by PGE did not  
23 provide a way to determine if a circumstance arose where power  
24 consumption ceased for a portion of the month, only to resume  
25 briefly for a week or two. PGE counters this concern and asserts  
26 that if that situation had occurred, it would be reflected in the

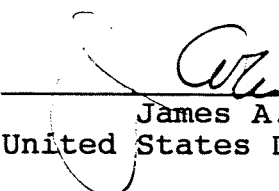
data contained in Exhibit C.

1 In the absence of a definite and firm conviction that a  
2 mistake has been committed, I am bound by the factual  
3 determinations made by the bankruptcy judge. United States v.  
4 Ramos, 923 F.2d 1346, 1356 (9th Cir. 1991). The bankruptcy judge  
5 determined that the evidence presented at trial by PGE did not  
6 confirm the daily or weekly consumption of electricity by  
7 Systems, and could not provide the basis for an extrapolation of  
8 the electrical consumption during the relevant portions of the  
9 preference period. In light of this factual finding, to allow  
10 otherwise, in effect, would be to apply the "net result rule,"  
11 which Congress has overruled. McClendon v. Cal-Wood Door, 711  
12 F.2d 122, 123-24 (9th Cir. 1983) (The net result rule provided  
13 that if there was a running account of credit and payment between  
14 debtor and creditor, all transactions over the preference period  
15 were examined; if more credits than payments occurred, even  
16 though individual payments during the period might comprise a  
17 preference, there was held to have been no preference.).

18 The law is clear in its requirement that the creditor must  
19 establish that the advance to be offset was subsequent to the  
20 preference. Thus, notwithstanding the policy reasons underlying  
21 the new value defense and the unique characteristics of power  
22 consumption, I find that the bankruptcy court's refusal to  
23 calculate prorations following its determination that PGE failed  
24 to establish that the alleged new value was provided after the  
25 preferential transfers and before the filing of the petition was

1 not clearly erroneous. Accordingly, the decision of the  
2 bankruptcy judge is AFFIRMED.

3 Dated this 30 day of March, 1995.

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7 James A. Redden  
8 United States District Judge  
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