11 U.S.C. § 547(b)(1)
11 U.S.C. § 547(b)(2)
11 U.S.C. § 547(b)(5)
constructive trust
equitable estoppel
plan of reorganization -
interpretation
res judicata
trust

In re Beaver Coaches, Inc., Case No. 393-36114-elp11
Continuing Committee v. Hogue, Adv. No. 95-3547

3/11/96 ELP Unpublished

Defendants moved to dismiss plaintiffs' claims for contribution and avoidance of preferential transfers. The court granted the motion. A copy of that ruling is titled "Ruling on Motion to Dismiss Original Complaint" and is attached to the Memorandum re: Motion to Dismiss First Amended Complaint.

Defendants were the co-guarantors with debtor of a debt owed by BDC, Inc., to creditor Deere. Plaintiffs seek contribution from defendants for amounts debtor has paid on account of BDC's debt. Plaintiffs also seek to avoid as preferential transfers "pass-through" payments that were made by debtor to Deere. In the original motion to dismiss, defendants asserted that the claim for contribution should be dismissed, because plaintiffs do not own it. The language of the Chapter 11 plan, which defendants assert shows that the claim for contribution was not acquired by plaintiffs, is ambiguous. There is a factual issue regarding who owns the claim, so the claim cannot be dismissed.

Defendants also sought to dismiss a claim for preference with

relation to payments that debtor made to Deere on account of BDC's debt to Deere. The court determined that defendants had pleaded that they are creditors of debtor, because as co-guarantors, defendants have a right of contribution from defendants. That right arises at the time the guaranty agreements are entered into. 11 U.S.C. § 547(b)(1).

The court also held that the complaint does not allege that the payment was on account of an antecedent debt owed to defendants. 11 U.S.C. § 547(b)(2). Although the factual allegations would allow evidence to be introduced that would show that debtor owed a debt to defendants, albeit on a contingent claim, before any transfers were made, the specific allegation is that the transfers were made on account of an antecedent debt owed by debtor to Deere. The complaint was dismissed with leave to replead.

The court also held that the complaint adequately alleges that there was a transfer of an interest in the property of the debtor, and that the complaint did not show that the payments were made from funds held in trust for the benefit of Deere. Nor are there allegations that would justify a constructive trust. The court did not address the arguments regarding whether the transfers allowed the creditor to receive more than it would have received in a Chapter 7 distribution, because that was not the basis for defendants' motion to dismiss.

After plaintiffs repleaded and cured the pleading defects,

defendants moved to dismiss the first amended complaint. The ruling on that motion is contained in the Memorandum re: Motion to Dismiss First Amended Complaint. As to the issues raised for the first time in this motion to dismiss, the court held that the complaint does not establish as a matter of law that plaintiffs are equitably estopped or barred by res judicata from pursuing the claim for contribution.

The court held that the preference claim should not be dismissed for failure to allege that the prepetition transfers, if validated, would allow the defendants to receive more than they would have in a Chapter 7 liquidation. 11 U.S.C. § 547(b)(5). Although a payment that is merely a return of the creditor's collateral would not meet the requirements of § 547(b)(5), that is not what the complaint alleges. Instead, it alleges that proceeds received from the sale of collateral in which Deere had a security interest was deposited into an account that was "swept" daily into debtor's general account, where they were commingled with other funds. The complaint also alleges that the payments made to Deere from this general account cannot be traced once they were swept into the general account. Therefore, the complaint does not show that the payments were made from proceeds in which Deere had a security interest. The court did not address plaintiffs' argument that was based on a consignment theory.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Case No. 393-36114-elp11
	)	
BEAVER COACHES, INC.,	)	
	)	
Debtor.	)	
_____	)	
	)	
CONTINUING COMMITTEE OF BEAVER COACHES, INC. and EDWARD HOSTMANN, INC.,	)	Adversary No. 95-3547
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM RE: MOTION TO DISMISS FIRST AMENDED COMPLAINT
JAMES D. HOGUE and FRANK J. STORCH,	)	
	)	
Defendants.	)	

Defendants' motion to dismiss plaintiffs' First Amended Complaint or, in the alternative, to strike certain allegations of a preferential transfer came on for hearing on February 29, 1996. Both parties appeared through counsel. After considering the memoranda submitted and hearing the arguments of the parties, I deny the motions.

I. PROCEDURAL HISTORY

Plaintiffs filed a complaint for contribution and for avoidance of preferential transfers. Defendants filed a motion to dismiss. Before the hearing on the first motion to dismiss, I circulated to the parties a copy of a draft ruling that proposed to dismiss the first claim for relief and to deny the motion to dismiss the second claim for relief. At the conclusion of the hearing on the motion, I adopted the draft ruling except that I dismissed both claims with leave to replead. A copy of that ruling, which incorporates the changes that were discussed at the hearing, is attached to this memorandum and is hereby made a part of the record. As the ruling explains, I dismissed the contribution claim because the complaint did not allege that defendants were officers or directors of debtor. I dismissed the preference claim as well because, although the factual allegations could be read to plead that the transfers were on account of an antecedent debt owed by debtor to defendants, the specific allegation in paragraph 30 of the complaint is that the transfers were "on account of an antecedent debt owed by Debtor to Deere." Plaintiffs then filed a First Amended Complaint, in which they cured both of the pleading deficiencies that resulted in dismissal of the original complaint.

Defendants now move to dismiss the First Amended Complaint. Specifically, they move to dismiss the first claim

for relief, which is for contribution, the second claim for relief, which is for preferential transfers, and in the alternative move to strike allegations in the second claim relating to certain "pass-through" payments.[1] Most of the arguments raised in support of dismissing the two claims are the same as were raised and ruled on in the initial motion to dismiss. I reaffirm my ruling on those issues and will discuss only those issues that differ from the ones raised in the first motion to dismiss. The background facts for this motion are set out in the ruling on the first motion to dismiss.

II. DISCUSSION

1. Motion to Dismiss First Claim for Relief -- Contribution.

Defendants move to dismiss the claim for contribution, arguing that the claim does not belong to plaintiffs. As I ruled in the first motion to dismiss, there is a question of fact whether the claim was purchased by Newco pursuant to the plan of reorganization. Plaintiffs have cured the defect in the original complaint by alleging that defendants were officers and/or directors of debtor.

Defendants raise for the first time in their reply brief the argument that plaintiffs cannot pursue the claim for contribution, because the existence of such a claim was not

[1] The "pass-through" payments are described on pages 9 and 10 of my ruling on the motion to dismiss the original complaint.

disclosed before confirmation of the plan, and therefore plaintiffs are equitably estopped or are precluded by res judicata from pursuing the claim after confirmation. Plaintiffs argue first that I should not consider the argument, because it was not raised until defendants' reply brief on the motion to dismiss. I have allowed plaintiffs an opportunity to respond to the argument, which they have done. Therefore, I will address the argument.

Plaintiffs argue that they are not barred from pursuing the claim by either equitable estoppel or res judicata, because the complaint does not show that the elements of either equitable estoppel or res judicata are met here. I agree.[2]

In ruling on a motion to dismiss for failure to state a claim, I must accept as true all of the allegations in the complaint and construe them in the light most favorable to the plaintiff. NL Industries, Inc. v. Kaplan, 792 F2d 896, 898 (9th Cir 1986). I will not grant the motion to dismiss unless it appears beyond doubt that the plaintiff can prove no set of facts

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[2] Plaintiffs also argue that defendants should be estopped from raising the defenses of equitable estoppel and res judicata because of defendants' breach of fiduciary duty in making payments to Deere. That assertion is a matter of proof; there is nothing in the complaint that would support it. Accordingly, I will consider defendants' arguments.

In addition, plaintiffs argue that they are not barred by judicial estoppel from bringing the contribution claim. I will not address that argument, because defendants have not sought to dismiss on that basis.

in support of the claim that would entitle the plaintiff to relief. Hall v. City of Santa Barbara, 813 F2d 198, 201 n 9 (9th Cir 1986).

A debtor must disclose in its schedules and disclosure statement any litigation likely to arise in a nonbankruptcy contest. 11 U.S.C. §§ 521; 1125(b). The result of failure to disclose such claims triggers application of the doctrine of equitable estoppel, barring a later attempt to prosecute the actions. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F2d 414, 417 (3d Cir 1988). A defendant must show four elements to establish equitable estoppel: "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the conduct to his injury." In re Heritage Hotel Partnership I, 160 BR 374, 378 (9th Cir BAP 1993).

There is nothing in the complaint that would establish, as a matter of law, the elements of equitable estoppel. The only allegation in the complaint relating to the plan is that, pursuant to the confirmed plan, plaintiff committee "was assigned the Debtor's rights to pursue claims arising under 11 U.S.C. §§ 157 [sic] and 547." There is nothing in that allegation that shows that plaintiffs knew facts that were different from what

was represented in the plan, that plaintiffs made any representations with the intent that defendants act on them, that defendants were ignorant that plaintiffs intended to pursue the claim for contribution, or that defendants detrimentally relied on any representations.

Nor is there anything in the portions of the confirmed plan to which the parties direct me that establish equitable estoppel as a matter of law. The confirmed plan merely provides that Newco will purchase all of the assets of debtor except, among other things, third party claims. Third party claims are defined in the plan as "any pre-petition claims of the Debtor against . . . Debtor's officers and directors for professional malpractice, breach of fiduciary duty, and/or other claims." As I have already ruled, there is a question of fact regarding whether "and/or other claims" includes the claim for contribution that plaintiffs assert here. Even assuming that that definition does not adequately disclose plaintiffs's intent to pursue a claim for contribution against defendants, there is nothing in the complaint or the plan that shows that plaintiffs knew of the existence of the contribution claim at the time the plan was confirmed, or that defendants did not know of the existence of such a claim. Defendants are not entitled to dismissal of the contribution claim on the basis of equitable estoppel. That is not to say that the defense is not appropriate to be tested on

summary judgment.

Defendants also argue that they are entitled to dismissal on the basis of res judicata. They assert that the order confirming the plan constitutes a "binding, final order, accorded full res judicata effect," which "precludes the raising of issues which could or should have been raised during the pendency of the case." In re Heritage Hotel Partnership I, 160 BR at 377. Defendants' res judicata argument fails for the same reason their equitable estoppel argument fails: the complaint and the plan do not show as a matter of law that res judicata precludes the claim.

Res judicata requires the showing of four elements: "(1) the parties are identical in the two actions; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) there was a final judgment on the merits; and, (4) the same cause of action was involved in both cases." In re Heritage Hotel Partnership I, 160 BR at 376-77. (Footnote omitted.) "[C]onfirmed plans of reorganization are binding on all parties, and issues that could have been raised pertaining to such plans are barred by res judicata." Id. at 377. Plaintiffs argue that they were not parties to the confirmation order, because the reorganization trustee did not exist until the effective date of the plan; that there was no final judgment on the merits because the plan did not adjudicate the contribution claim on the merits;

and that the contribution claim is not the same cause of action as the claims adjudicated in the plan.

Even considering the confirmed plan, which is the only document outside the complaint to which the parties direct me, it does not establish as a matter of law that plaintiffs are barred by res judicata from pursuing their contribution claim. Although I would hold that plaintiffs should be bound by the confirmation order, because the reorganization trustee is a successor in interest to the debtor, see In re Heritage Hotel Partnership I, 160 BR at 376 n 4, there is nothing in either the complaint or the confirmed plan that establishes as a matter of law that this claim for contribution is not one of the claims reserved for later determination as a "third party claim." Again, whether "third party claims" include this claim for contribution is a question of fact that cannot be determined on a motion to dismiss. Accordingly, at least at this stage of the proceedings, defendants are not entitled to dismissal on the basis of res judicata.

2. Motion to Dismiss Second Claim for Relief -- Preferential Transfer.

Defendants also move to dismiss the second claim for relief for failure to state a claim. They argue that the complaint does not allege that the pass-through payments involved a transfer of an interest in debtor's property, that defendants

are creditors of debtor, or that the payments were made on account of an antecedent debt owed by debtor to defendants. Those arguments were raised in the original motion to dismiss, and I reaffirm my rulings on those issues. Plaintiffs have cured the defect with regard to pleading an antecedent debt owed to defendants. Paragraph 30 of the First Amended Complaint now alleges that the transfers were "made on account of an antecedent debt owed by Debtor to Deere and to Defendants[.]" In this motion to dismiss, defendants specifically raise the issue of whether the complaint adequately alleges that the pass-through payments allowed the creditor to receive more than it would have under a Chapter 7 distribution. I did not address that argument in the ruling on the original motion to dismiss.

Defendants argue that plaintiffs' complaint does not allege that the pass-through payments would enable defendants to receive more than they would have received under a Chapter 7 distribution. They argue that the complaint alleges that Deere had a security interest in the coaches that debtor sold, and that debtor sold the coaches and paid the proceeds to Deere on account of BDC's debt. Plaintiffs respond that they do adequately allege the requirement of section 547(b)(5), by alleging that each of the prepetition preferential transfers, which include the pass-through payments, if validated, "would enable Defendants to receive more than they would have received had the Transfers not

been made and had Defendants received distribution from the estate pursuant to the Bankruptcy Code."

Plaintiffs' argument is not persuasive, because defendants' argument is that the specific factual allegations contradict the conclusory allegation stated in the language of the statute. The conclusory pleading of an element, using the statutory language, cannot withstand a motion to dismiss if the specific factual allegations of the complaint contradict that conclusory allegation. See Wright and Miller, Federal Practice and Procedure, § 1357 at 319-320 (1990).

I agree with defendants that, if plaintiffs' complaint alleged the facts as defendants characterize them, it would fail to state a claim for a preference with regard to the pass-through payments. A prepetition payment to a creditor, which is merely the return of collateral securing the debt to the creditor, does not diminish the fund to which creditors of the same class can legally resort for the payment of their debts, and does not constitute a preference. Kapela v. Newman, 649 F2d 887 (1st Cir 1981). If there is no preference as to the creditor, neither is there a preference as to the guarantor. Id.

However, I do not agree that the complaint alleges what defendants assert it alleges. The complaint alleges that Deere financed BDC's purchase of motor coaches from defendant, and took a security interest in the coaches BDC purchased. BDC then

consigned its inventory to Sunset for sale. When Sunset went into receivership, pursuant to an agreement between debtor and Deere, debtor took possession of the BDC coaches that had been consigned to Sunset and resold them. It obtained the proceeds of the sales, which it deposited into a sweep account. Each day the balance in that account was swept into debtor's general account, which was used to pay debtor's general obligations and its obligation to the bank that held the account. The complaint specifically alleges that the proceeds cannot be traced once they were swept into the commingled general account. The pass-through payments were made to Deere from this general account. Therefore, under the allegations of the complaint, the payments were not made from proceeds of the collateral, but were made from a commingled general account. If the payments were not made from proceeds in which Deere had a security interest, under the allegations of this complaint plaintiffs could show that the payments from the commingled account enabled defendants to receive more than they would have received under a Chapter 7 distribution. That is sufficient to withstand a motion to dismiss.

Plaintiffs raise an additional argument, which I will not address because I have decided that the complaint is sufficient to withstand the motion to dismiss. Plaintiffs argue that the funds paid to Deere in the pass-through payments are subject to

the claims of general creditors because, under the allegations of the complaint, they could introduce evidence that would show that BDC transferred the coaches to debtor for resale, which constituted a consignment, and under the UCC the consigned goods are subject to the claims of the consignee's creditors. Defendants' argument that plaintiffs' consignment theory is not supported by the complaint appears to have merit because the Forbearance Agreement appears to be inconsistent with the allegations of the complaint.[3] If plaintiffs choose to pursue their consignment theory, the apparent inconsistency should be resolved through the pretrial order.

3. Motion to Strike.

Defendants move, in the alternative, to strike the allegations of the complaint relating to the pass-through payments, for the same reasons as support their motion to dismiss the preference claim as to those payments. Plaintiffs argue that defendants waived this argument by failing to raise it in their motion to dismiss the original complaint. Defendants are not entitled to an order striking the allegations relating to the pass-through payments for the same reasons they are not entitled

[3] Defendants argue at page 5 of their reply memorandum that the Forbearance Agreement, Ex. D to the First Amended Complaint, "notes that BDC, not [debtor], recovered and was selling the BDC motorcoaches at issue." They cite paragraphs 2 and 13 of the Forbearance Agreement. Paragraph 14 of the complaint does appear to be inconsistent with paragraphs 2, 12 and 13 of the Forbearance Agreement.

to dismissal of the claim that those payments constitute preferential transfers.[4] Because I deny the motion on its merits, I will not address plaintiffs' waiver argument.

III. CONCLUSION

For the reasons set out above, I will deny defendants' motions to dismiss and to strike.

_____
ELIZABETH L. PERRIS
Bankruptcy Judge

[4] Defendants do not move to strike the allegations that appear to be inconsistent with plaintiffs' consignment theory.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Case No. 393-36114-elp11
	)	
BEAVER COACHES, INC.,	)	
	)	
Debtor.	)	
_____	)	
	)	
CONTINUING COMMITTEE OF BEAVER COACHES, INC. and EDWARD HOSTMANN, INC.,	)	Adversary No. 95-3547
	)	
Plaintiff,	)	
	)	
v.	)	RULING ON MOTION TO DISMISS ORIGINAL COMPLAINT
JAMES D. HOGUE and FRANK J. STORCH,	)	
	)	
Defendants.	)	

Plaintiffs filed a complaint for contribution and for recovery of preferential transfers. Defendants have moved to dismiss both claims for failure to state a claim. FRCP 12(b)(6). The matter came on for hearing on December 13, 1995. For the reasons explained below, I grant the motion.

BACKGROUND

Plaintiffs are the Continuing Committee that was formed under 11 U.S.C. § 1102 and Hostmann, the reorganization trustee. Debtor (referred to in the pleadings and memoranda as Beaver) is a manufacturer of motorcoaches. Defendants Hogue and Storch are alleged to be the sole shareholders of debtor and of BDC, Inc., a retail dealer of debtor's coaches. The complaint seeks contribution from defendants as co-guarantors with debtor of debts of BDC, Inc. for amounts debtor has paid on account of BDC, Inc.'s debt, and for alleged preferential transfers.

FIRST CLAIM FOR RELIEF -- CONTRIBUTION

Defendants seek to dismiss the claim for contribution. They argue that, pursuant to the plan, debtor's right of contribution, which plaintiffs allege they own by virtue of the plan, was an asset that was purchased by Beaver Motor Coaches, LLC, and therefore does not belong to plaintiffs. Plaintiffs assert that, under the plan, Beaver Motor Coaches, LLC did not purchase this claim, and therefore they can assert it.

When examining a motion to dismiss for failure to state a claim, I must accept as true all of the allegations in the complaint and construe them in the light most favorable to the plaintiff. NL Industries, Inc. v. Kaplan, 792 F2d 896, 898 (9th Cir 1986). The motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to

relief. Hall v. City of Santa Barbara, 813 F2d 198, 201 n 9 (9th Cir 1986).

The complaint alleges that "Beaver has a right of contribution, which claim now belongs to Plaintiffs pursuant to the Plan, against Storch and Hogue" for certain payments. The Second Modified Plan of Reorganization, Section 2.2, provides:

> "Newco [Beaver Motor Coaches, LLC] will purchase all of the Debtor's assets other than (a) assets being surrendered to the secured creditors, (b) Avoidance Rights, and (c) Third Party Claims."

"Third Party Claims" are defined in section B, page 2 of the Order Confirming Debtors' Second Modified Plan of Reorganization, as:

> "'Third Party Claims' means any pre-petition claims of the Debtor against Coopers & Lybrand and other professionals, including, but not limited to, accountants, appraisers, attorneys, brokers, business/other consultants, and Debtor's officers and directors for professional malpractice, breach of fiduciary duty, and/or other claims."

Defendants argue that plaintiffs' claims do not fit into any of the three categories of assets that were retained by the debtor. They argue in particular that the language regarding third party claims, "was clearly not intended to cover any state law contribution claims that Beaver could have against" defendants. They assert that any right of contribution belongs to the new entity, Beaver Motor Coaches, LLC. Plaintiffs respond that the claim for contribution was retained by the debtor as a

"pre-petition claim of the Debtors against * * * Debtor's officers and directors for * * * other claims." They assert that, to the extent the language could be interpreted in the way that defendants assert, that is a factual question of the parties' intentions, and does not provide a basis for dismissal under FRCP 12(b)(6).

I generally agree with plaintiffs. The issue that defendants raise regarding the interpretation of "other claims" is a question of interpretation of the plan language, which turns on the intent of the parties. See In re L & V Realty Corp., 76 BR 35, 37 (Bankr EDNY 1987). If defendants are able to produce evidence to support their argument, that will merely raise a factual issue. Because the language of the plan could be intended to mean what plaintiffs assert that it means, defendants are not entitled to dismissal of this claim.

There is a problem with the complaint as drafted. The complaint alleges that defendants are the sole shareholders of debtor (¶ 9); it does not contain an allegation that they are officers or directors of the debtor. Therefore, plaintiffs have not stated a claim that fits within the third party claim definition. I will grant the motion to dismiss this claim with leave to replead to add the allegation that defendants were officers and/or directors.

SECOND CLAIM FOR RELIEF -- PREFERENTIAL TRANSFER

Defendants also move to dismiss plaintiffs' second claim for relief, for preferential transfer under section 547(b). In that claim, plaintiffs allege that, as relevant at this point, in 1992, BDC, Inc. entered into an agreement with Deere Credit, Inc. for financing of motor coaches that debtor sold to BDC. BDC granted Deere a security interest in the motor coaches. Defendants and debtor entered into agreements to co-guaranty BDC's obligation to Deere. There is no allegation that defendants made any prepetition payments pursuant to these guaranties.

Defendants argue first that the complaint fails to state a claim, because defendants are not creditors of debtor. Under section 547(b), the trustee may 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 * * * (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 the case were a case under chapter 7, the transfer had not been made, and the creditor received payment of the debt to the extent provided by the provisions of title 11.

"Creditor" is defined as "an entity that has a claim against the

debtor that arose at the time of or before the order for relief * * *." 11 U.S.C. § 101(10). A "claim" includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A). Whether an entity holds a right that falls within the definition of "claim" is determined by state law. In re XTI Xonix Technologies, Inc., 156 BR 821, 827 (Bankr D Or 1993). Contrary to defendants' suggestion on page 3 lines 23-25 of their brief, the statute contains no requirement that the creditor have filed a proof of claim.

Defendants argue that they are not creditors because they have no claim against the debtor. The issue is whether a co-guarantor of the debtor can be a creditor of the debtor by virtue of the co-guaranty.

In In re XTI Xonix Technologies, Inc., Judge Higdon considered whether a guarantor of the debtor's obligations was a creditor of the debtor by virtue of the guarantor's subrogation rights. She considered the nature of the subrogation right and when such a right arose, and found that, upon execution of a contract obligating one to pay the debt of another, the surety

> "has, upon execution of that contract, a right, equitable in nature, which he did not have previously. It is imperfect, partial, incomplete, not ripe, or, in legal parlance, inchoate. This right will not become complete or ripen into enjoyment until all the enumerated conditions have been met. * * * But if the

> conditions to the exercise of the right of subrogation are met the surety is free, in that exercise, to demand payment from the debtor."

156 BR at 829. Recognizing that Congress intended to adopt the broadest definition of "claim" under section 101(5), see Johnson v. Home State Bank, 501 US 78, 111 S Ct 2150, 2154 (1991), she concluded that the right of subrogation constitutes a right of payment, which is contingent, and constitutes a "claim" under section 101(5).

I reach the same result with regard to the right of contribution between co-guarantor, one of which is the debtor. In Oregon, co-guarantors have a right of contribution from other co-guarantors to force payment of their share of the principal's obligation to the creditor. Mansfield v. McReary, 263 Or 41, 497 P2d 654, 655 (1972). There is conflicting language in the cases as to when the right of contribution arises. In Durbin v. Kuney, 19 Or 71, 23 P 661, 663 (1890), the court said that the "right to contribution arises as soon as [the co-guarantor] pays more than his share of [the] debt." In Mansfield v. McReary, the court said, "The right to contribution comes into existence upon the payment of the common debt." 497 P2d at 657 n 4. On the other hand, the court in Durbin also said:

> "'The right of action for contribution among co-sureties accrues when one has paid more than his proportion of their liability. * * * It is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his portion of

the debt' for which they were bound."

23 P at 663 (citations omitted). In McCallister v. Jones, 208 Or 365, 300 P2d 973, 974 (1956), the court reiterated its understanding that "[t]he right of contribution arises when the relation of co-obligors is entered into; it then continues to exist as a present inchoate right, which will ripen into a cause of action when and if one of the parties pays more than his just share."

I am convinced that the law of Oregon is that the right of contribution among co-guarantors arises at the time the guaranty agreements are entered into. The language in Durbin to the contrary was in the context of deciding when a cause of action for contribution accrued, and was contradicted two sentences later by the court's recognition that the right "springs up" at the time the relationship of the co-guarantors is entered into. The statement in Mansfield similarly relates to when the cause of action accrued. It had nothing to do with when the right came into existence.

This understanding of the law is also consistent with the treatises. See, e.g., James L. Elder, Stearns The Law of Suretyship Ch 11, § 11.18, p 481 (1951); 10 Williston on Contracts § 1278, p 886 (3d ed 1967); Laurence P. Simpson, Handbook on the Law of Suretyship, Ch 2, Pt. 2, p 240 (1950); Edward W. Spencer, The Law of Suretyship § 154, p 213 (1913). As

with the right of subrogation considered in In re XTI Xonix, the right is inchoate, but it is a right of payment that fits within the broad definition of "claim" contained in the Bankruptcy Code. Because the complaint shows that the guaranty agreements were entered into before the bankruptcy petition was filed, the claim arose before bankruptcy, and defendants are creditors under section 101(10). Accord In re Sprague, 104 BR 352 (Bankr D Or 1989).

Defendants next argue that the complaint does not and cannot allege that the alleged transfers were made on account of an antecedent debt owed by debtor to defendants, as required under 11 U.S.C. § 547(b)(2). They argue that, because defendants had not paid any amount on their guaranties, debtor did not owe them any debt, and the transfers therefore could not be on account of an antecedent debt. Plaintiffs respond that, because the right of contribution arises the moment the guaranties are given, debtor owed a debt to defendants from March, 1992, when the guaranties were signed. That debt preceded any of the transfers alleged in the complaint.

A "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). An "antecedent debt" is one incurred before the transfer in question. 4 Collier on Bankruptcy ¶ 547.05 (1995). Because "claim" is defined extremely broadly as including contingent claims, the liability that constitutes a

debt includes liability on a contingent right to payment. Applying the same analysis as I applied to determining whether defendants are "creditors" of debtor, I also conclude that, under the allegations of the complaint, debtor owed a debt to defendants, albeit on a contingent claim, before any of the alleged transfers were made.

Nonetheless, the claim must be dismissed with leave to replead. Although the specific factual allegations of the complaint could be read to allege that the transfers were on account of an antecedent debt owed by debtor to defendants, the specific allegation of paragraph 30 of the complaint is that the transfers "were on account of an antecedent debt owed by Debtor to Deere." I will grant the motion to dismiss with leave to replead to allege that the antecedent debt was owed to defendants.

Defendants next argue that they are entitled to dismissal of the preference claims as to what plaintiffs have called the "Pass-Through Payments," because those payments do not constitute the transfer of an interest of the debtor in property, as required by section 547(b).

With regard to the pass-through payments, the complaint alleges that BDC, a dealer of debtor's coaches, obtained financing from Deere for its inventory of coaches it received from debtor. Deere had a security interest in the coaches. In

1992, BDC consigned its inventory to Sunset, another dealer of debtor's coaches. When Sunset went into receivership, debtor took possession of the 7 coaches that had been consigned by BDC and resold them. This was pursuant to an agreement debtor had with Deere that debtor would repurchase dealer's inventory that was financed by Deere, if the dealer defaulted and Deere repossessed. Plaintiffs allege that debtor sold the seven coaches and deposited the proceeds into a "sweep" account at USNB. Each day that account would be swept into debtor's general account. Debtor then made payments on its general obligations as well as payments to Deere. Plaintiffs claim that the payment from the general account constitute a transfer of property of the debtor.

Defendants argue that debtor did not have any equitable or legal interest in the money transferred to Deere out of the general account. Although their theory is not entirely clear, it appears they assert that the proceeds of the sale of coaches either were the subject of a trust for the benefit of Deere, or that the security interest in the coaches continued in the proceeds received from the coaches and continued when the proceeds were deposited in the general account.

Although "property of the debtor" is not defined in the Bankruptcy Code, the Supreme Court has held that property of the debtor subject to a preferential transfer is property that would

have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings. Begier v. IRS, 496 US 53 (1990). Thus, if the funds paid to Deere were funds that would have been part of the estate when the petition was filed, they are part of the property of the debtor and are subject to a preference action.

The allegations of the complaint do not show that the proceeds from the sale of BDC coaches gave rise to a trust that debtor held for the benefit of Deere. Begier, on which defendants rely, is inapposite. That case involved a tax fund trust expressly created by the Internal Revenue Code. In this case, there is nothing in the pleading that would give rise to any federally created trust.

It may be that defendants are arguing that, because the complaint alleges that debtor converted the proceeds by depositing them into its sweep account, a constructive trust should arise for the benefit of Deere. However, there are no allegations in the complaint that would support imposition of a state law constructive trust and satisfy the requisite tracing requirements. Matter of Esgro, Inc., 645 F2d 794 (9th Cir 1981).

Defendants next argue that debtor did not have any interest in the transferred funds, relying on Kapela v. Newman, 649 F2d 887 (1st Cir 1981). In that case, a guarantor of the debt of the debtor corporation to the bank paid over to the bank

a portion of the debt the guarantor owed to the debtor. The bank had a security interest in the debt that the guarantor owed the debtor. The court held that the payment was not a preference because the payment was actually a return to the bank of its collateral for its loan to the debtor, and because the bank had a security interest in it, it would not have been available to the other creditors as property of the estate.

From defendants' reliance on that case, I understand them to argue that the payments to Deere in this case were not property of the debtor, because Deere had a security interest in the coaches, which also applied to the proceeds of the coaches, and that the security interest continued in the proceeds through their repayment to Deere. Because Deere had a security interest in the proceeds, those proceeds would not have been available to other creditors with the bankruptcy petition was filed.

That argument relates not to whether the debtor had an interest in property that was transferred to Deere, but rather relates to whether the transfer enabled the creditor to receive more than it would have in a Chapter 7 distribution as required by section 547(b)(5). Although I realize that there are cases that talk about the transfer of collateral as not being a transfer of property of the debtor, in my opinion, those cases erroneously confuse the two issues.

Plaintiffs' arguments under the UCC also relate to whether

the transfer enabled the creditor to receive more than it would have under a Chapter 7. Because the argument on the motion to dismiss is based solely on the proposition that the complaint does not allege that there was a transfer of the property of the debtor, I will not address the § 547(b)(5) in ruling on this motion. The complaint alleges facts from which plaintiffs could show that there was a transfer of an interest of the debtor in property.

Because the complaint does not adequately plead a transfer on account of an antecedent debt owed by debtor to defendants, I will grant defendants' motion to dismiss.

cc: Robert J Vanden Bos
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