
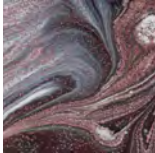





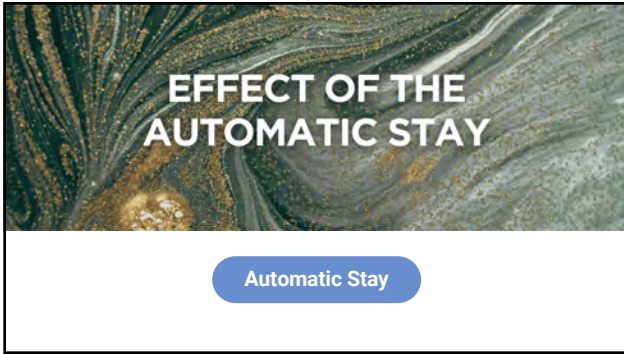
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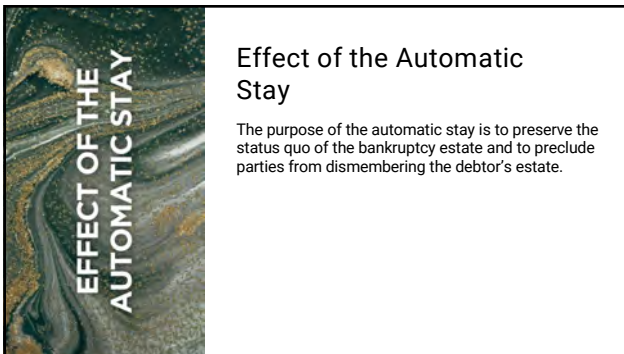
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	<h3>Topics for Discussion</h3> <ul style="list-style-type: none">• Your customer files bankruptcy, how to respond.• Automatic Stay• Claim Preparation• Preference claims?
	
	

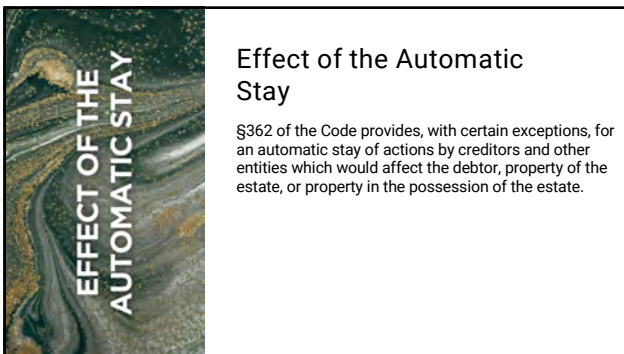
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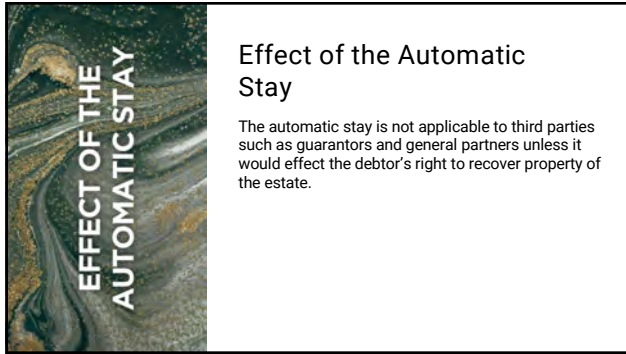
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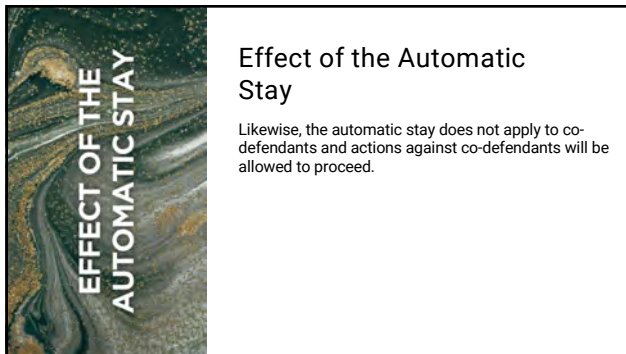


EFFECT OF THE AUTOMATIC STAY

Effect of the Automatic Stay

The automatic stay is not applicable to third parties such as guarantors and general partners unless it would effect the debtor's right to recover property of the estate.

7

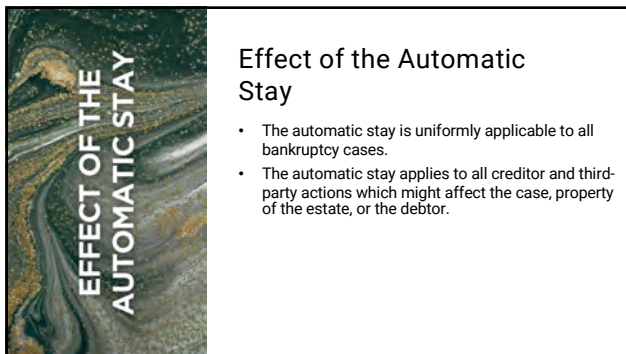


EFFECT OF THE AUTOMATIC STAY

Effect of the Automatic Stay

Likewise, the automatic stay does not apply to co-defendants and actions against co-defendants will be allowed to proceed.

8

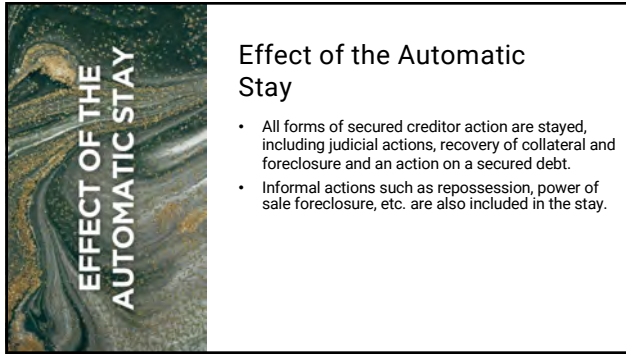


EFFECT OF THE AUTOMATIC STAY

Effect of the Automatic Stay

- The automatic stay is uniformly applicable to all bankruptcy cases.
- The automatic stay applies to all creditor and third-party actions which might affect the case, property of the estate, or the debtor.

9

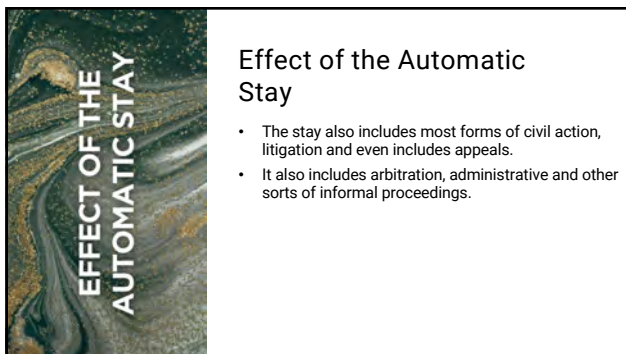


EFFECT OF THE AUTOMATIC STAY

Effect of the Automatic Stay

- All forms of secured creditor action are stayed, including judicial actions, recovery of collateral and foreclosure and an action on a secured debt.
- Informal actions such as repossession, power of sale foreclosure, etc. are also included in the stay.

10

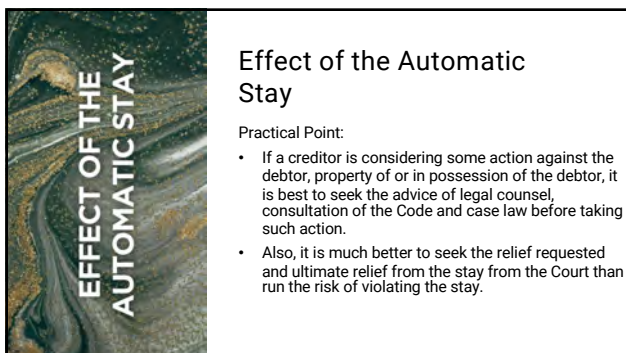


EFFECT OF THE AUTOMATIC STAY

Effect of the Automatic Stay

- The stay also includes most forms of civil action, litigation and even includes appeals.
- It also includes arbitration, administrative and other sorts of informal proceedings.

11



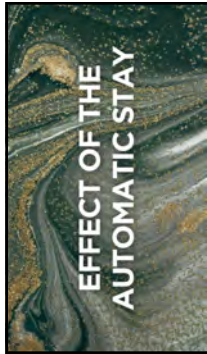
EFFECT OF THE AUTOMATIC STAY

Effect of the Automatic Stay

Practical Point:

- If a creditor is considering some action against the debtor, property of or in possession of the debtor, it is best to seek the advice of legal counsel, consultation of the Code and case law before taking such action.
- Also, it is much better to seek the relief requested and ultimate relief from the stay from the Court than run the risk of violating the stay.

12




Effect of the Automatic Stay

VIOLATION OF THE STAY:

- Violations of the automatic stay are considered to be void and can likewise create serious consequences for the creditor.

13




Effect of the Automatic Stay

VIOLATION OF THE STAY:

- Some Courts have held that actions taken in violation of the stay are voidable, rather than void.
- The Trustee may either seek to have the creditor found in contempt and fined or obtain a specific injunction under §105(a) and likewise seek to recover attorney's fees, costs and damages.

14

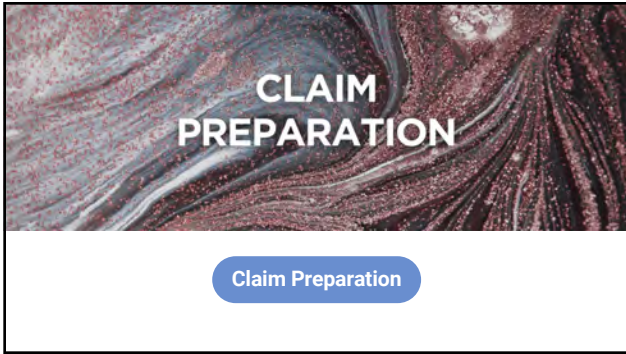


Effect of the Automatic Stay

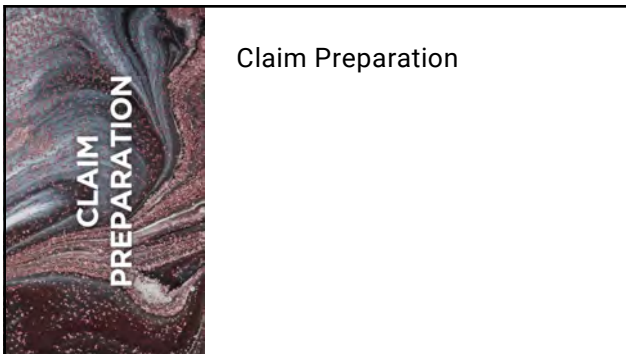
VIOLATION OF THE STAY:

- Where the violation is considered to be willful of the stay, §362(h) provides that the debtor may recover actual damages and where appropriate, punitive damages.

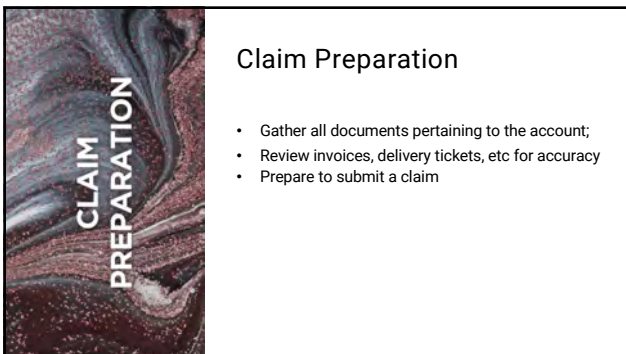
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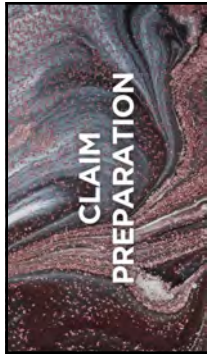
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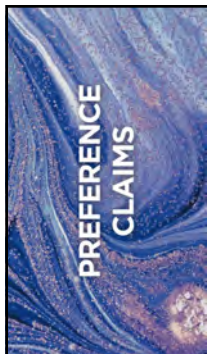


CLAIM PREPARATION

Trustee may avoid a transfer if:

1. Any transfer;
2. Of property of the debtor;
3. To or for the benefit of the creditor;
4. For or on account of antecedent debt owed by debtor;
5. Made while debtor insolvent (presumed)
6. Made on or within 90-days before date of filing (1-year for insiders); and
7. Creditor receives more than it would in a liquidation

19

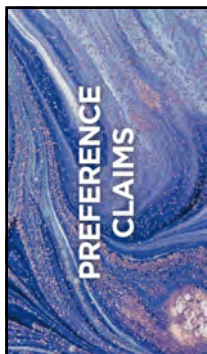


PREFERENCE CLAIMS

Possible Preference

- Knowledge by the creditor that the debtor is insolvent is NOT required.
- Generally, the creditor has no knowledge of the debtor's insolvency.
- Each element must be met for the transfer to be declared a preference payment.

20

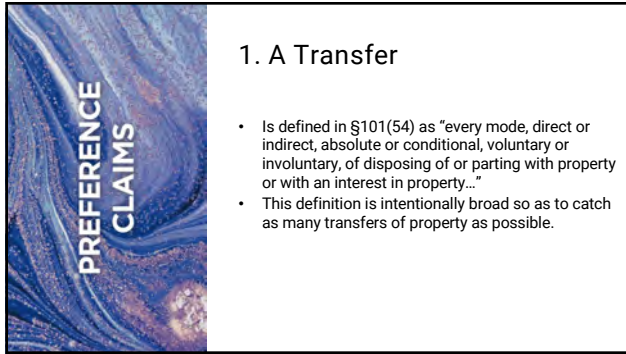


PREFERENCE CLAIMS

Possible Preference

- Let's look at each element to determine what is required...

21

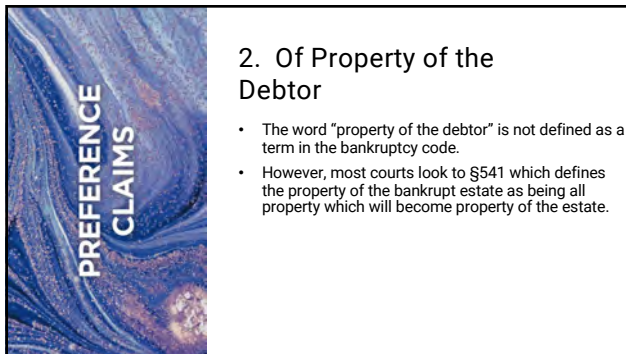


Slide 22 features a vertical decorative image on the left with the text "PREFERENCE CLAIMS" written vertically. The main content area contains the following text:

1. A Transfer

- Is defined in §101(54) as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property..."
- This definition is intentionally broad so as to catch as many transfers of property as possible.

22

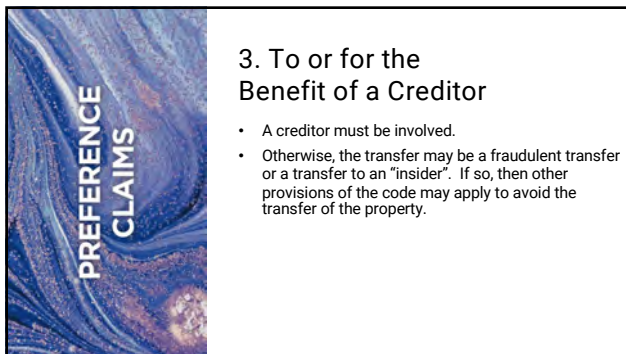


Slide 23 features a vertical decorative image on the left with the text "PREFERENCE CLAIMS" written vertically. The main content area contains the following text:

2. Of Property of the Debtor

- The word "property of the debtor" is not defined as a term in the bankruptcy code.
- However, most courts look to §541 which defines the property of the bankrupt estate as being all property which will become property of the estate.

23

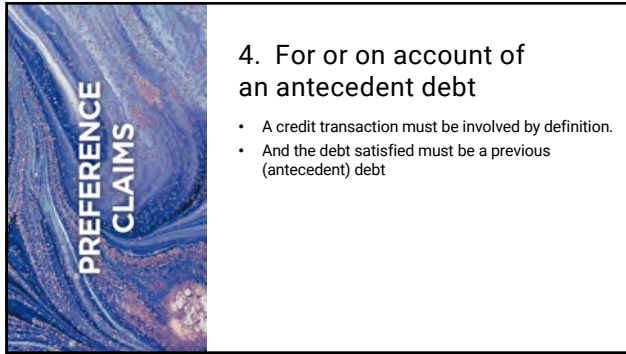


Slide 24 features a vertical decorative image on the left with the text "PREFERENCE CLAIMS" written vertically. The main content area contains the following text:

3. To or for the Benefit of a Creditor

- A creditor must be involved.
- Otherwise, the transfer may be a fraudulent transfer or a transfer to an "insider". If so, then other provisions of the code may apply to avoid the transfer of the property.

24

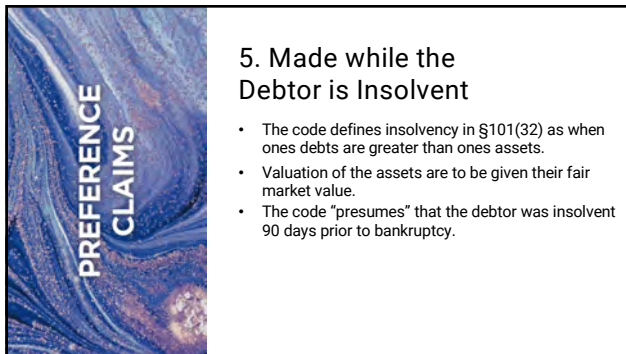


PREFERENCE CLAIMS

4. For or on account of an antecedent debt

- A credit transaction must be involved by definition.
- And the debt satisfied must be a previous (antecedent) debt

25

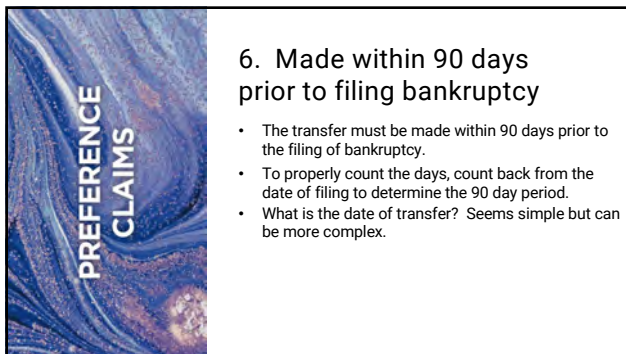


PREFERENCE CLAIMS

5. Made while the Debtor is Insolvent

- The code defines insolvency in §101(32) as when ones debts are greater than ones assets.
- Valuation of the assets are to be given their fair market value.
- The code "presumes" that the debtor was insolvent 90 days prior to bankruptcy.

26

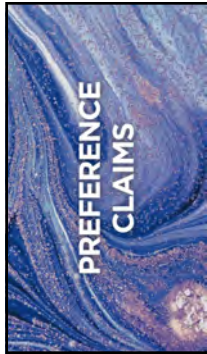


PREFERENCE CLAIMS

6. Made within 90 days prior to filing bankruptcy

- The transfer must be made within 90 days prior to the filing of bankruptcy.
- To properly count the days, count back from the date of filing to determine the 90 day period.
- What is the date of transfer? Seems simple but can be more complex.

27

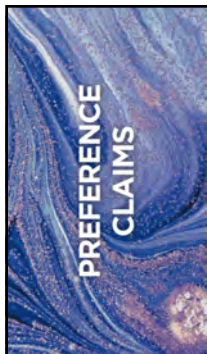


PREFERENCE CLAIMS

6. Made within 90 days prior to filing bankruptcy

- Date of Transfer?
 - State law may impact when the transfer is complete.
 - A transfer of real property is transferred when it is good as against a bona fide purchaser from the debtor.
 - For personal property, the transfer is deemed to occur when it is good against a lien creditor.

28



PREFERENCE CLAIMS

7. Enables a Creditor to Receive More than in a Liquidation

The court must focus on the following:

- the relative distribution between classes of creditors; and
- the amounts that will be distributed to the creditors; as well as
- consider the allow-ability of the claim.

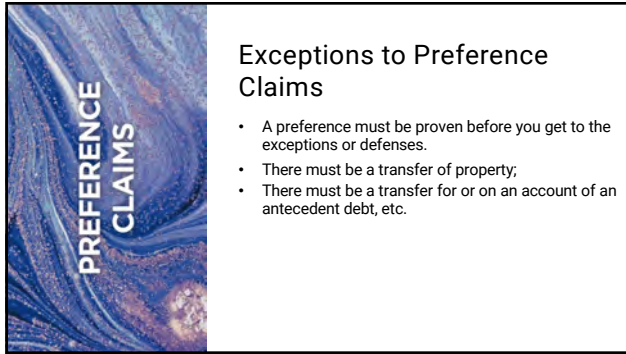
29



PREFERENCE CLAIMS

Let's Now Focus on Defenses or Exceptions to Preference Rules

30



PREFERENCE CLAIMS

Exceptions to Preference Claims

- A preference must be proven before you get to the exceptions or defenses.
- There must be a transfer of property;
- There must be a transfer for or on an account of an antecedent debt, etc.

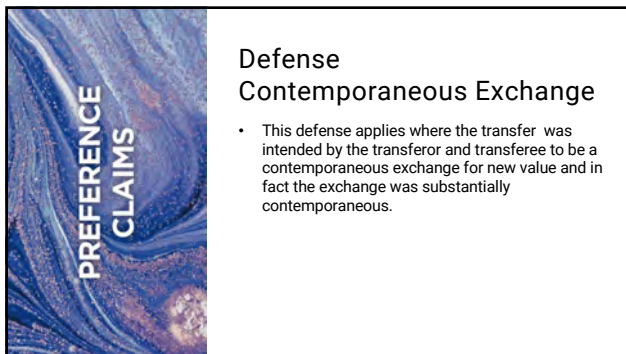
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PREFERENCE CLAIMS

How Can I Defend The Preference Claims?

32

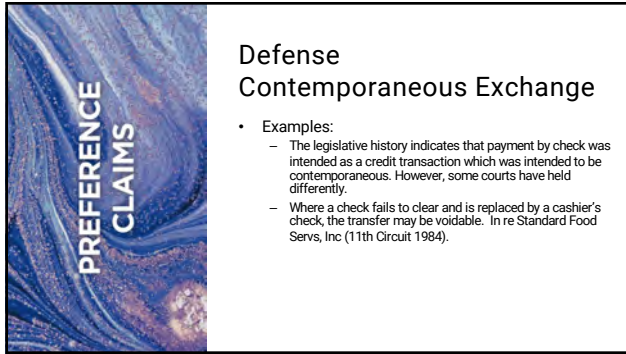


PREFERENCE CLAIMS

Defense Contemporaneous Exchange

- This defense applies where the transfer was intended by the transferor and transferee to be a contemporaneous exchange for new value and in fact the exchange was substantially contemporaneous.

33

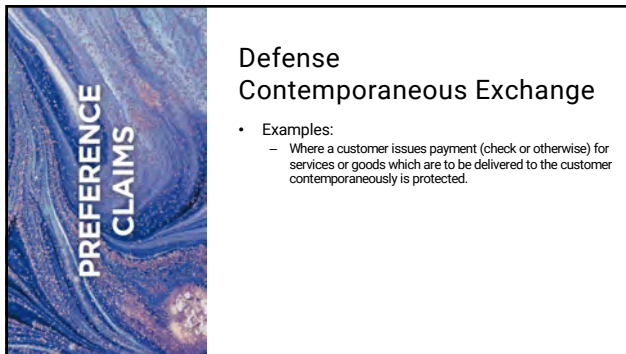


PREFERENCE CLAIMS

Defense Contemporaneous Exchange

- Examples:
 - The legislative history indicates that payment by check was intended as a credit transaction which was intended to be contemporaneous. However, some courts have held differently.
 - Where a check fails to clear and is replaced by a cashier's check, the transfer may be voidable. In re Standard Food Servs, Inc (11th Circuit 1984).

34

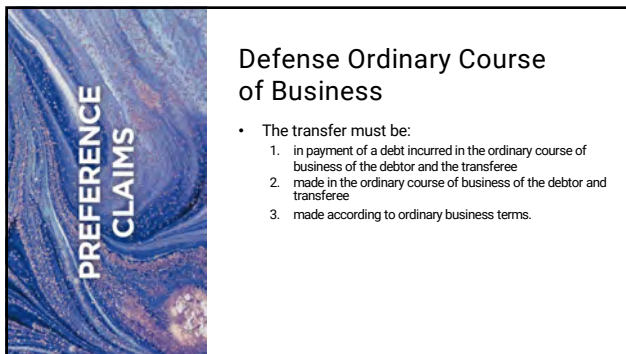


PREFERENCE CLAIMS

Defense Contemporaneous Exchange

- Examples:
 - Where a customer issues payment (check or otherwise) for services or goods which are to be delivered to the customer contemporaneously is protected.

35

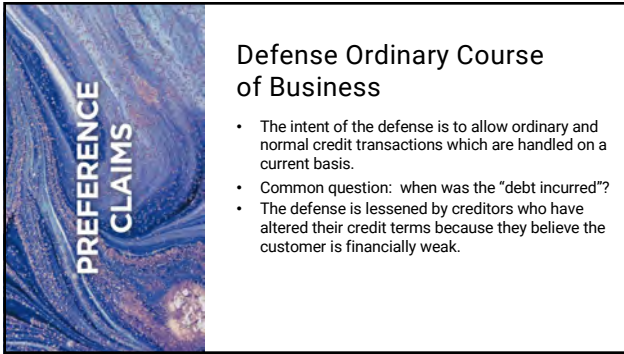


PREFERENCE CLAIMS

Defense Ordinary Course of Business

- The transfer must be:
 1. in payment of a debt incurred in the ordinary course of business of the debtor and the transferee
 2. made in the ordinary course of business of the debtor and transferee
 3. made according to ordinary business terms.

36

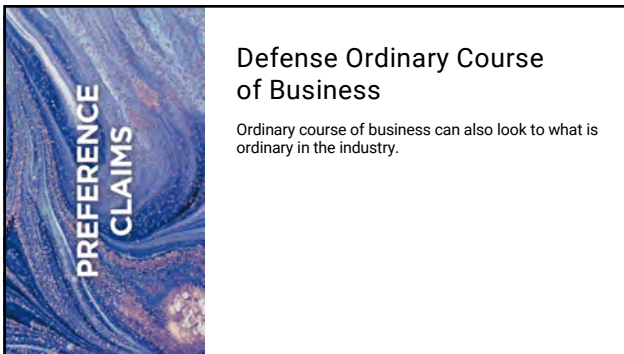


PREFERENCE CLAIMS

Defense Ordinary Course of Business

- The intent of the defense is to allow ordinary and normal credit transactions which are handled on a current basis.
- Common question: when was the "debt incurred"?
- The defense is lessened by creditors who have altered their credit terms because they believe the customer is financially weak.

37

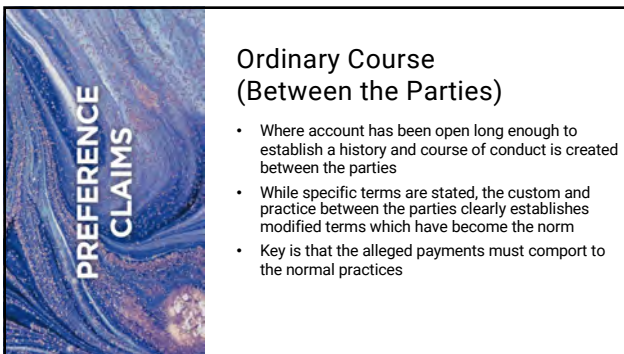


PREFERENCE CLAIMS

Defense Ordinary Course of Business

- Ordinary course of business can also look to what is ordinary in the industry.

38

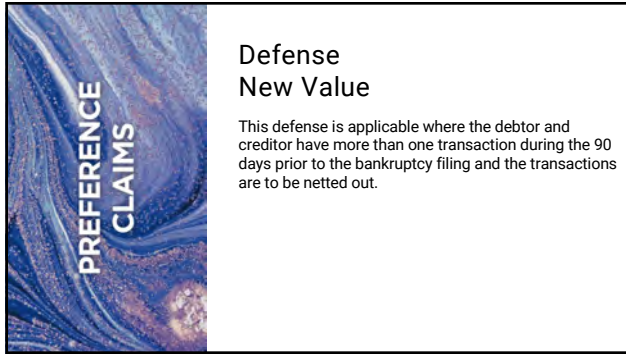


PREFERENCE CLAIMS

Ordinary Course (Between the Parties)

- Where account has been open long enough to establish a history and course of conduct is created between the parties
- While specific terms are stated, the custom and practice between the parties clearly establishes modified terms which have become the norm
- Key is that the alleged payments must comport to the normal practices

39

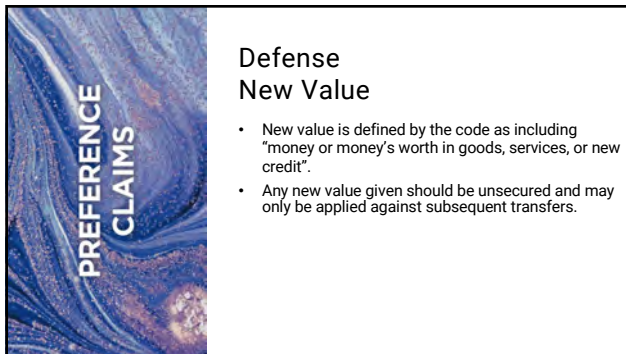


PREFERENCE CLAIMS

Defense New Value

This defense is applicable where the debtor and creditor have more than one transaction during the 90 days prior to the bankruptcy filing and the transactions are to be netted out.

40

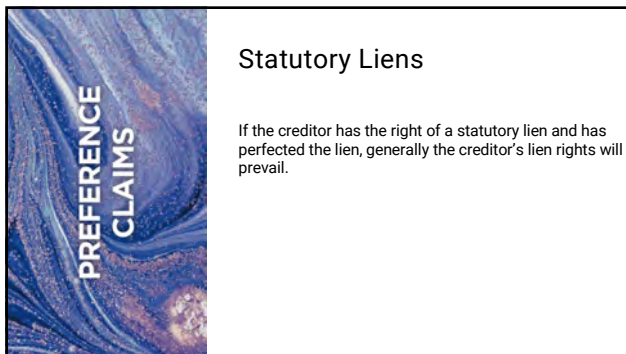


PREFERENCE CLAIMS

Defense New Value

- New value is defined by the code as including "money or money's worth in goods, services, or new credit".
- Any new value given should be unsecured and may only be applied against subsequent transfers.

41



PREFERENCE CLAIMS

Statutory Liens

If the creditor has the right of a statutory lien and has perfected the lien, generally the creditor's lien rights will prevail.

42

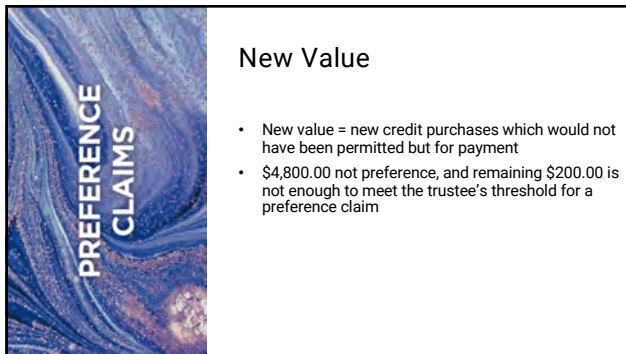


PREFERENCE CLAIMS

Ordinary Course Within the Industry

- Where account history is not lengthy or strong
- Terms - "Net 30"
- Industry norm for payment on accounts is 45-60 days
- Claimed preference payments made 48, 50, and 62

43

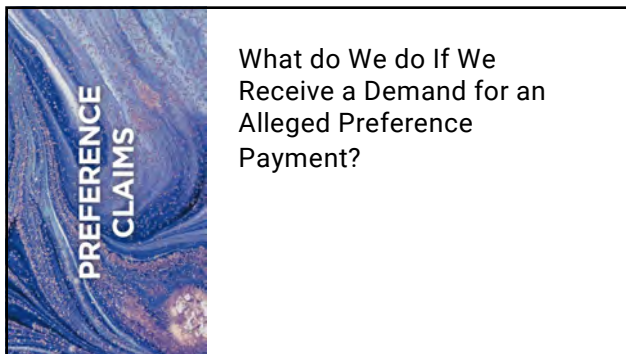


PREFERENCE CLAIMS

New Value

- New value = new credit purchases which would not have been permitted but for payment
- \$4,800.00 not preference, and remaining \$200.00 is not enough to meet the trustee's threshold for a preference claim

44



PREFERENCE CLAIMS

What do We do If We Receive a Demand for an Alleged Preference Payment?

45

A slide with a blue and white marbled background on the left side. The text "PREFERENCE CLAIMS" is written vertically in white on the marbled background. The right side of the slide is white and contains the text "Responding to a Demand; Do Nothing?".

PREFERENCE CLAIMS

Responding to a Demand;
Do Nothing?

46

A slide with a blue and white marbled background on the left side. The text "PREFERENCE CLAIMS" is written vertically in white on the marbled background. The right side of the slide is white and contains the text "Responding to a Demand; Respond to the letter?".

PREFERENCE CLAIMS

Responding to a Demand;
Respond to the letter?

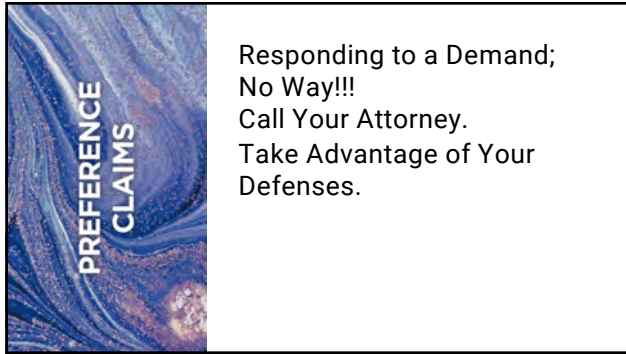
47

A slide with a blue and white marbled background on the left side. The text "PREFERENCE CLAIMS" is written vertically in white on the marbled background. The right side of the slide is white and contains the text "Responding to a Demand; Send a Check?".

PREFERENCE CLAIMS

Responding to a Demand;
Send a Check?

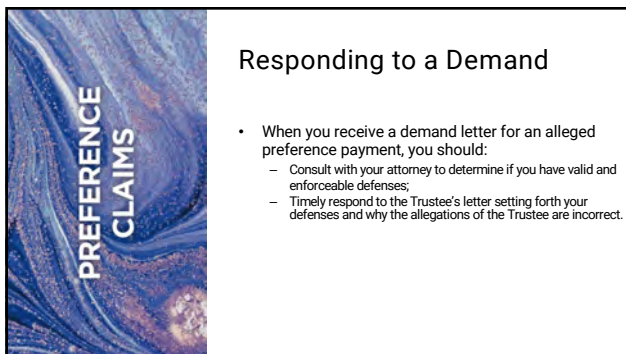
48



Slide 49 features a blue and white abstract background on the left with the text "PREFERENCE CLAIMS" written vertically. The main content area on the right contains the following text:

Responding to a Demand;
No Way!!!
Call Your Attorney.
Take Advantage of Your
Defenses.

49

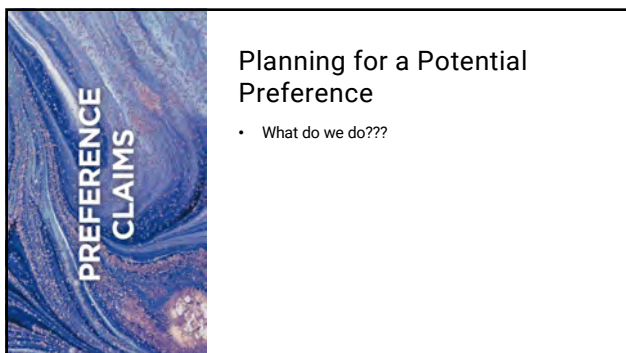


Slide 50 features a blue and white abstract background on the left with the text "PREFERENCE CLAIMS" written vertically. The main content area on the right contains the following text:

Responding to a Demand

- When you receive a demand letter for an alleged preference payment, you should:
 - Consult with your attorney to determine if you have valid and enforceable defenses;
 - Timely respond to the Trustee's letter setting forth your defenses and why the allegations of the Trustee are incorrect.

50

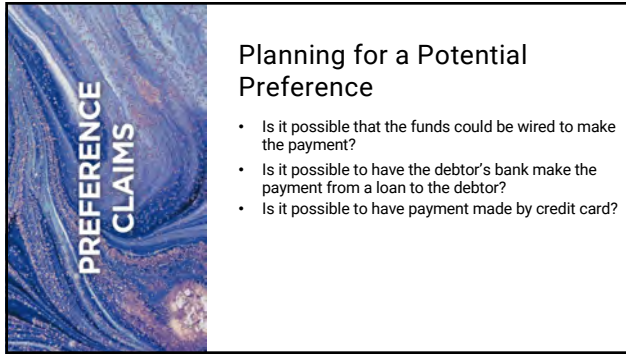


Slide 51 features a blue and white abstract background on the left with the text "PREFERENCE CLAIMS" written vertically. The main content area on the right contains the following text:

Planning for a Potential Preference

- What do we do???

51

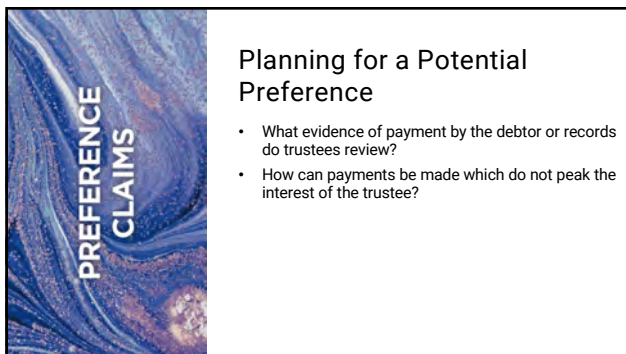


PREFERENCE CLAIMS

Planning for a Potential Preference

- Is it possible that the funds could be wired to make the payment?
- Is it possible to have the debtor's bank make the payment from a loan to the debtor?
- Is it possible to have payment made by credit card?

52

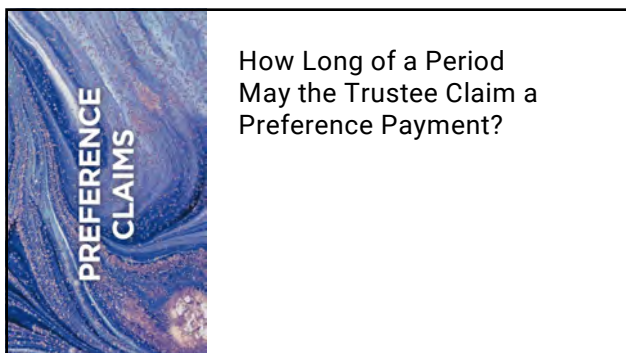


PREFERENCE CLAIMS

Planning for a Potential Preference

- What evidence of payment by the debtor or records do trustees review?
- How can payments be made which do not peak the interest of the trustee?

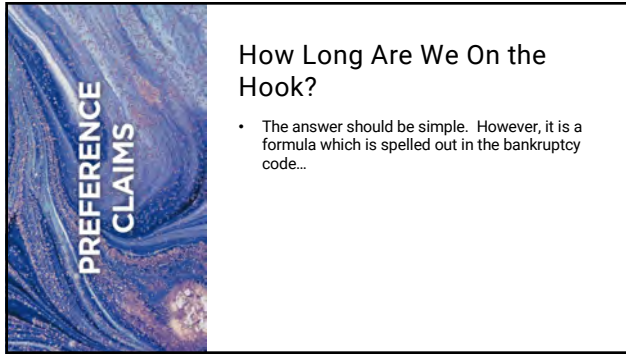
53



PREFERENCE CLAIMS

How Long of a Period May the Trustee Claim a Preference Payment?

54



PREFERENCE CLAIMS

How Long Are We On the Hook?

- The answer should be simple. However, it is a formula which is spelled out in the bankruptcy code...

55

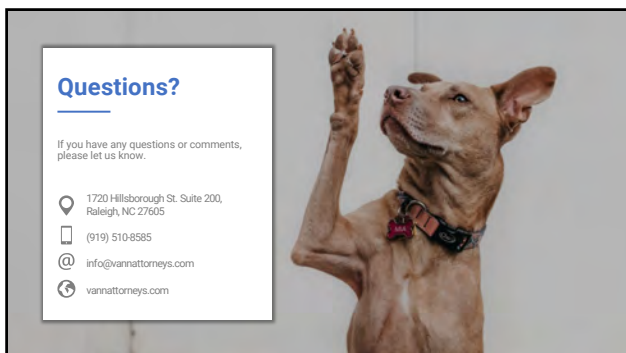


PREFERENCE CLAIMS

How Long Are We On the Hook?

- A rule of thumb: the Trustee may not bring an action to recover an alleged preference 3 years after the bankruptcy petition is filed, unless the case is dismissed or closed.

56



Questions?


If you have any questions or comments, please let us know.

1720 Hillsborough St. Suite 200,
Raleigh, NC 27605

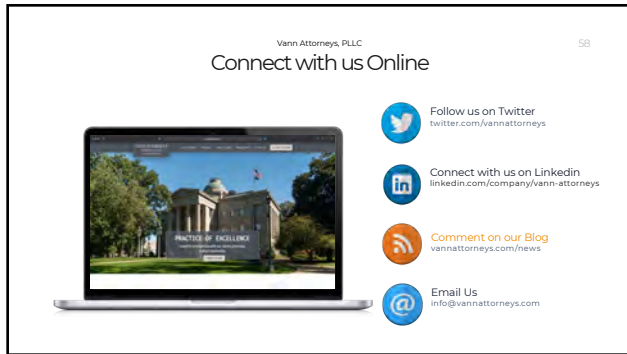
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