BEST PRACTICES REPORT ON ELECTRONIC DISCOVERY (ESI) ISSUES IN BANKRUPTCY CASES IS NOW AVAILABLE

Electronic discovery is a current hot topic in the litigation world, but surprisingly little has been written about it from a bankruptcy perspective in both the caselaw and commentary. An ABA Working Group, comprised of attorneys, judges and academics from across the country, was formed by the Bankruptcy Court Structure and Insolvency Process Committee of the Business Law Section of the ABA to study and prepare a report on electronic discovery and electronically stored information (ESI) issues in bankruptcy cases. The Working Group has prepared a Best Practices Report, which you can view here. It is anticipated that the final draft of this report, expected to be in substantially the form attached subject to final editing, will be published in the August issue of The Business Lawyer.

The Best Practices Report covers both debtor and creditor obligations to preserve electronically stored information (ESI) not only in connection with adversary proceedings, but also contested matters and the bankruptcy case itself. The Report is divided into six sections. The first three sections discuss ESI principles and guidelines in large chapter 11 cases, middle market and smaller chapter 11 cases, and chapter 7 and chapter 13 cases. Those sections are followed by sections discussing ESI issues in connection with filing proofs of claim and objections to claims, creditors' obligations in connection with electronically stored information, and rules and procedures applicable to ESI in adversary proceedings and contested matters in bankruptcy cases.

It is the hope of the Working Group that the Report will be a helpful resource guide for attorneys and judges in considering and addressing electronic discovery and ESI issues in bankruptcy cases. View a copy of the report here.

ESI Working Group:
Chair, Richard L. Wasserman, Venable LLP, Baltimore, Maryland
Featured Articles

Deconstructing Preference Claims in Bankruptcy: The Maine Bankruptcy Court Sheds Light on a Subcontractor's Preference Exposure When the Contractor Files for Bankruptcy

By Fred W. Bopp, Ill and Shawn K. Leyden, Perkins Thompson, P.A., Portland, Maine

The world of bankruptcy is often referred to as the land of broken promises. For the uninitiated and even the non-bankruptcy practitioner, bankruptcy practice can be counterintuitive. One of the most difficult concepts for creditors to understand is that they may have to return a payment to the bankruptcy trustee when the business that paid them files for bankruptcy. The creditor often grapples with why, after being paid for work performed, its payment is deemed a preference and must be returned. This seemingly curious result is compounded when multiples players are involved, which is typically the case in commercial construction projects, where there are often subcontractors, contractors, project owners, and real estate owners. A recent Maine Bankruptcy Court decision shines some much-needed light on these issues and is important reading for anyone involved in commercial construction projects going forward.

More...

Legislative Update

By Judith Greenstone Miller, Jaffe Rait Heuer & Weiss, P.C., Southfield, Michigan; My Chi To, Debevoise & Plimpton LLP, New York, New York

The most recent legislative update was prepared by Lynn Hinson, Contributing Editor from Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., on H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013, introduced by Representative Blake Farenthold (R-TX) on March 6, 2013. The Bill requires public disclosure by trusts created under 11 U.S.C. §524(g) of quarterly reports containing detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos. The Bill was co-sponsored by Representative Jim Matheson (D-UT).

To view a copy of the update, please click here.

This legislative update, along with prior updates and postings of recently proposed and enacted legislation prepared by the Legislation Subcommittee on the ABA Business Bankruptcy Committee, has also been posted to the ABA Business Bankruptcy Committee web page, under the heading "Legislative News."

Coming Up At The ABA Annual Meeting, August 9-11, 2013, San Francisco, California

Programs Sponsored by the Business Bankruptcy Committee

August 9, 8:00 - 10:00 AM
Program: All That You Can't Leave Behind: Law Firm Insolvencies, the Unfinished Business Rule and its Impact on Business Lawyers
Sponsored by the LLCs, Partnerships and Unincorporated Entities Sub-Committee of the Business Bankruptcy Committee
Co-chairs: Jessica D. Gabel, Georgia State University School of Law,
August 10, 10:30 AM - 12:30 PM  
**Program:** IP in the World of IOUs: Intellectual Property Licenses in Domestic and Cross-Border Insolvency Proceedings  
Sponsored by the Intellectual Property Subcommittee of the Business Bankruptcy Committee  
Co-chairs: Christopher Combest, Quarles & Brady LLP, Chicago, Illinois and David Fournier, Pepper Hamilton LLP, Wilmington, Delaware

**Programs Co-Sponsored by the Business Bankruptcy Committee**

August 9, 10:30 AM - 12:30 PM  
**Program:** How Law Firms Can Better Serve Their Corporate Clients - and Get and Keep Their Business  
Sponsored by the Corporate Counsel Committee; Co-sponsored by the Business Bankruptcy Committee

August 9, 2:30 PM - 4:30 PM  
**Program:** Venture Lending: I've Got "the Next Big Thing," Can Somebody Loan Me a Dime?  
Sponsored by the Commercial Finance Committee; Co-sponsored by the Business Bankruptcy, Business Financing, Middle Market and Small Business, Private Equity and Venture Capital, and Uniform Commercial Code Committees

August 10, 8:00 AM - 10:00 AM  
**Program:** The 1-2-3's of Valuation  
Sponsored by the Business Law Education Committee; Co-Sponsored by the Business Bankruptcy, Business and Corporate, Litigation, Business Financing, Corporate Counsel, and Private Equity and Venture Capital Committees

August 10, 8:30 AM - 10:00 AM  
**Program:** The Basics of Individual Chapter 11's: What you need to know and the differences/nuances in dealing with and/or representing individuals in Chapter 11. Statutory and case law updates that apply to individuals in Chapter 11  
Sponsored by the General Practice Division; Co-Sponsored by the Business Bankruptcy Committee

August 10, 2:30 PM - 4:30 PM  
**Program:** Keeping Cool when Betting the Company: the Ethical Counsel in Corporate Litigation  
Sponsored by the Business and Corporate Litigation Committee; Co-sponsored by the Business Bankruptcy, Corporate Governance, and Government Affairs Practice Committees

August 10, 3:45 p.m. to 5:15 p.m.  
**Program:** Emergency Manager Laws as an Alternative to Bankruptcy in Local Government  
Sponsored by the State and Local Government Law Committee; Co-sponsored by the Business Bankruptcy Committee

Watch Recent Business Bankruptcy Committee Webinars

The Business Bankruptcy Committee has presented multiple webinars available for viewing online. Below is a link to the full webinars and to the slide show presentations.  
[Business Bankruptcy Committee Webinars](http://apps.americanbar.org/buslaw/committees/CL160000pub/newsletter/201307/)
Materials from the Business Bankruptcy Section 2013 Spring Meeting

At the Spring Meeting of the ABA Section of Business Law Business Bankruptcy Committee in Washington D.C., members of the Committee presented a number of informative and interesting programs. Below is a link to all of the materials provided at these programs. (Access to some of the articles requires your ABA password.)

Materials from the Business Bankruptcy Section 2013 Spring Meeting

Submit Articles for the Business Bankruptcy Committee Newsletter

The Business Bankruptcy Committee invites you to submit articles for possible publication in future issues. The articles do not need to be long or in-depth, and it is a great way to get involved in the Business Bankruptcy Committee. Articles can survey the law nationally or locally, discuss particular business bankruptcy issues, or examine a specific case. If you are interested in submitting an article, please contact Newsletter Editor-in-Chief Marvin Ruth at m ruth@lr law.com or Editor Natalie Daghbandan at natalie.daghbandan@bryancave.com.
Deconstructing Preference Claims: The Maine Bankruptcy Court Sheds New Light on the Limits to a Subcontractor’s Preference Exposure When the Contractor Files for Bankruptcy

Authors: Fred W. Bopp III, Esq. and Shawn K. Leyden, Esq. – Perkins Thompson, P.A.

The world of bankruptcy is often referred to as the land of broken promises. For the uninitiated and even the non-bankruptcy practitioner, bankruptcy practice can be counterintuitive. One of the most difficult concepts for creditors to understand is that they may have to return a payment to the bankruptcy trustee when the business that paid them files for bankruptcy. The creditor often grapples with why, after being paid for work performed, its payment is deemed a preference and must be returned. This seemingly curious result is compounded when multiples players are involved, which is typically the case in commercial construction projects, where there are often subcontractors, contractors, project owners, and real estate owners. A recent Maine Bankruptcy Court decision shines some much-needed light on these issues and is important reading for anyone involved in commercial construction projects going forward.

I. Introduction

Commercial construction projects often encounter difficulties. Those difficulties are typically exacerbated when a contractor on the project files bankruptcy while the project is ongoing. Normally, the contractor would have made payments to its subcontractors before filing bankruptcy. If those payments occurred during the 90-day period prior to the bankruptcy filing, also known as the preference period, then this raises the specter of the bankruptcy trustee in the contractor’s case demanding that the subcontractor return the payments it received from the contractor to the bankruptcy estate as avoidable preferences. All is not lost for the subcontractor, however, as it likely has a number of potential defenses available.
This article focuses primarily on one potential defense. That is, if, as a result of accepting the payments at issue, the subcontractor either released or did not pursue a valid mechanic’s lien claim with respect to the construction project, then the subcontractor should consider defending against the trustee’s preference claim on that basis. If this defense is asserted, is it sufficient if the subcontractor proves, in an effort to retain the payments it received, that the amount of the unspent project budget remaining under the prime contract between the project owner and the contractor exceeds the total of the payments the subcontractor received? Or, must the subcontractor instead prove that the project owner owed the contractor under the prime contract an amount equal to or greater than the total amount of the payments the subcontractor received? These are complicated and critically important questions for the subcontractor in this circumstance. Fortunately, a recent unpublished decision issued by the United States Bankruptcy Court for the District of Maine (the “Bankruptcy Court”) provides helpful guidance on these issues. This article examines that decision and analyzes how the contractual relationship between the contractor and the project owner directly impacts the bankruptcy trustee’s ability to recover payments that the contractor made to the subcontractor during the preference period. Any subcontractor potentially faced with this situation would be well advised to understand the reasoning and import of the Bankruptcy Court’s decision.

II. The Facts

In the summer of 2010, Bill Whorff, Inc. (“Whorff”), an excavation company working in coastal and central Maine, provided Town Fair Tire (“TFT”) with a written estimate to perform site work for a tire store and related improvements to be constructed at the Topsham Fair Mall in Topsham, Maine (the “TFT Project”). Whorff and TFT ultimately agreed that TFT would pay Whorff $348,000 to perform work on the TFT Project (the “TFT Contract”). To assist with its
work under the TFT Contract, Whorff hired Sandelin Foundations, Inc., d/b/a Sandelin Precast Products (“Sandelin”), as a subcontractor.

Thereafter, both Whorff and Sandelin performed work and provided materials at the TFT Project, and TFT made a series of payments under the TFT Contract to Whorff in September and October of 2010. During the same time period, Whorff, in turn, made payments to Sandelin pursuant to their separate, subcontract agreement. Problems soon developed, however, when Whorff failed to pay Sandelin for further work and materials, even though Whorff itself had received payments from TFT under the TFT Contract.

After Sandelin threatened to record a notice of mechanic’s lien against the TFT Project and to notify TFT of its intent, Whorff made two payments by check to Sandelin on October 26, 2010: one in the amount of $10,000, and the other in the amount of $2,012.85. After receiving these two payments, even though Whorff still owed Sandelin additional sums with respect to the TFT Project, Sandelin forbore from recording a notice of mechanic’s lien against the TFT Project until December 2010. Further, at the time that Whorff made these payments to Sandelin, there was a balance due of $89,600 to complete the work under the TFT Contract. Importantly, however, as of October 15, 2010 (prior to Whorff making the payments at issue), TFT did not owe Whorff any more money under the TFT Contract and, thereafter, Whorff did no more work on the TFT Project.

On January 14, 2011, Whorff filed a voluntary bankruptcy petition under Chapter 7 of the Code. As set forth above, during the 90-day preference period, Whorff made payments to Sandelin in the total amount of $12,107.35, which William H. Howison, the Chapter 7 Trustee, demanded that Sandelin return to the bankruptcy estate. Sandelin refused, and the Trustee filed an adversary proceeding complaint against Sandelin, seeking to recover these payments as
avoidable preferences under § 547(b) of the Code. Sandelin filed an answer and asserted a number of affirmative defenses. Thereafter, the parties stipulated to many of the critical facts and filed cross-motions for summary judgment.

III. The Parties’ Positions

A. Sandelin’s Motion for Summary Judgment

In its motion for summary judgment, Sandelin argued that it was entitled to judgment as a matter of law on two independent grounds: (1) that § 547(c)(2) of the Code protected the subject transfers from avoidance because Whorff made them in the ordinary course of business; and (2) that Sandelin’s “release” of its statutory mechanic’s lien rights during the preference period constituted a contemporaneous exchange for new value under § 547(c)(1).

Sandelin’s second argument relied heavily on the reasoning of the case of In re J.A. Jones. Quoting from J.A. Jones, Sandelin argued that, by “releasing” its right to lien the TFT Project, Sandelin “gave commensurate new value to [Whorff]. This ‘indirect transfer’ theory holds that the release of the subcontractor’s lien against the owner causes a coincident release of the owner’s claims against debtor, thereby creating new value to the debtor.” Sandelin asserted that, because there was still a balance of $89,600 to complete the work under the TFT Contract, Sandelin’s forbearance from recording a notice of mechanic’s lien, as it was entitled to do under Maine statutory law, provided new value to Whorff (and therefore to the bankruptcy estate). This was supposedly so because, if Whorff had not made the subject payments to Sandelin, then TFT would have made those payments to Sandelin (either to prevent or to remove Sandelin’s mechanic’s lien), and TFT would have been entitled to claim the amount of those payments as a setoff against the remaining contract balance of $89,600 under the TFT Contract.
B. The Trustee’s Objection to Sandelin’s Motion for Summary Judgment

The Trustee responded to Sandelin’s analysis under § 547(c)(1) by first pointing out the straightforward proposition of law that most courts espouse: namely, that merely forgoing inchoate lien rights is not “new value” within the meaning of the Code. Second, the Trustee contended that the reasoning of *J.A. Jones*, when applied to the present facts, actually led to the opposite conclusion from the one Sandelin attempted to draw. According to the Trustee, the critical issue was not whether there was still a balance due under the TFT Contract, but, rather, whether the project owner, TFT, owed Whorff any money at the time that Whorff made the payments to Sandelin during the preference period. It was only in this circumstance that, if Whorff had not made the subject payments to Sandelin, but TFT had instead made them to Sandelin, that TFT (because of its indemnity rights against Whorff) could have set off the amount of those payments against any amounts it owed to Whorff under the TFT Contract. This right of setoff would have made TFT’s indemnity claim against Whorff, in effect, a secured claim up to the outstanding amount due to Whorff (if any) under the TFT Contract. The Trustee further argued that, since TFT owed nothing else to Whorff under the TFT Contract at the time that Whorff made the subject payments to Sandelin, any potential indemnity claim of TFT against Whorff was wholly unsecured. This meant, therefore, that there could be no benefit to the bankruptcy estate in eliminating that potential unsecured claim unless all unsecured claims were to be paid in full.

In support of his position, the Trustee cited to *J.A. Jones* as follows:

A close reading of the cases reveals that the primary variant in these cases is whether, at the time of the preference payment, the owner still owed sufficient sums to the debtor on the project to permit a setoff against the owner’s payment to the sub. If the owner still owes the debtor, then its indemnity claim can be setoff and is secured. In this context, most courts consider the “indirect transfer” to provide new value. If there is no debt to be
setoff, however, then the owner’s claim for indemnification is simply an unsecured debt and there is no “new value.”20

The Trustee argued that the facts demonstrated that, as of the date of the subject payments to Sandelin, TFT did not owe Whorff any money and it had paid Whorff in full for all the work it had performed under the TFT Contract. Therefore, under Sandelin’s hypothetical, had Sandelin liened the TFT Project instead of accepting the two payments from Whorff, and had TFT then paid Sandelin to release that lien, there would have been no sums owed to Whorff from TFT against which TFT could have offset its indemnity claim against Whorff. Since, under those facts, TFT’s indemnity claim was unsecured, Sandelin’s forbearance from exercising its inchoate lien rights simply prevented TFT from having an unsecured claim against the bankruptcy estate. Finally, since unsecured claims were not being paid in full in Whorff’s bankruptcy case, Sandelin’s forbearance created no new value for the bankruptcy estate, because it merely prevented a potential unsecured claim.

C. The Trustee’s Cross-Motion for Summary Judgment and Sandelin’s Objection

In his cross-motion for summary judgment, the Trustee asserted that he had met his burden of proving the avoidability of the subject transfers under each of the subsections of § 547(b) of the Code.21

In its objection, Sandelin conceded that the Trustee had met his burden under § 547(b)(1)-(4), thereby leaving just § 547(b)(5) in dispute. Sandelin argued that the Trustee failed to meet his burden under § 547(b)(5)22 because the subject payments were secured by Sandelin’s inchoate mechanic’s lien on the TFT Project23 and, as such, Sandelin did not receive more than it would have received in Whorff’s Chapter 7 case had Whorff not made the payments at issue.
In his response, the Trustee reasserted that the proper focus was on whether there were any funds due from TFT to Whorff at the time of the payments to Sandelin. Here, because TFT owed nothing to Whorff under the TFT Contract at the time of the challenged payments, any potential indemnity claim of TFT was unsecured as against the bankruptcy estate, because there were no amounts due from TFT to Whorff against which TFT could have set off its indemnity claim. Therefore, Whorff’s payments to Sandelin depleted the estate dollar for dollar, and, because the Trustee had also established that there would not be a 100% distribution on unsecured claims in the bankruptcy case, Sandelin received more than it would have in a Chapter 7 liquidation, thus satisfying § 547(b)(5) of the Code.24

IV. The Bankruptcy Court’s Decision

The Bankruptcy Court granted the Trustee’s cross-motion for summary judgment with regard to the primary payments in the amounts of $10,000 and $2,012.85, finding that both payments were avoidable and recoverable as preferential transfers. As an initial matter, the Bankruptcy Court “agree[d] with the Trustee that the summary judgment record does not establish defenses based on ordinary course of business or contemporaneous exchange with regard to the two primary payments we are talking about . . . .”

The Bankruptcy Court then agreed with the Trustee that the “real issue” was whether the project owner, TFT, owed Whorff any money at the time that Whorff made the subject payments to Sandelin – such that, if Whorff had not made the payments to Sandelin, and TFT instead had made them, then TFT would have been subrogated to and could have offset any amounts it still owed to Whorff under the TFT Contract by the total amount of TFT’s hypothetical payments to Sandelin. The Bankruptcy Court said that such a subrogation or setoff right would have rendered the payments that Whorff made to Sandelin “in essence, secured, and thus they would not be
avoidable as a preference.” Critical to the Bankruptcy Court’s determination on this point was the undisputed fact, which the Bankruptcy Court found the Trustee had established, that, “from and after October 15, Whorff was owed no more money [from TFT] and did no more work on the [TFT Project]. Thus, . . . [TFT]’s [hypothetical] payments to Sandelin could not be offset to reduce any amount that would otherwise go to Whorff under the [TFT Contract].”

The Bankruptcy Court then turned to Sandelin’s argument that the preference period payments were protected because $86,000 of the TFT Project budget under the TFT Contract had not yet been expended at the time that Whorff made the payments to Sandelin. Quickly dispatching this argument, the Bankruptcy Court held that “[t]he fact that there was $86,000 that had been budgeted for the [TFT Project] that was not expended has nothing to do with it, because none of that $86,000 was owed to Whorff from and after the time that Whorff left the [TFT Project], which was before these payments were made. Whorff was owed nothing more from the owner of the project and thus, there can be no claim that the [payments] were secured by virtue of the subrogation right.”

Lastly, the Bankruptcy Court found Sandelin’s argument that “forbearing [from] filing a mechanic’s lien somehow, which was ultimately filed but not at the time these [payments] were made, that somehow that would change the matter and indicate that these claims were secured, by virtue of that” unavailing. The Bankruptcy Court joined ranks with the majority of other courts on this issue, holding that “just the forbearance is not enough and as the facts existed at that time.”

**VI. Conclusion**

The Bankruptcy Court’s holding makes it clear that, under circumstances similar to these, in order for a subcontractor to successfully defend against preference liability with respect to any
payments it receives during the preference period from a contractor that later files bankruptcy, the contractor must be owed money from the project owner on the prime contract at the time the payments are made. If, however, the contractor has been paid all amounts due under the prime contract with the project owner, then the project owner’s potential indemnity claim against the contractor is merely an unsecured claim (because it cannot be offset against any sums due from the project owner to the contractor). Moreover, as the Bankruptcy Court made clear, the result is the same even if there remain sums left to be expended under the project budget, unless some of those sums are owed to the contractor. If the contractor has been paid in full, then the project owner’s potential indemnity claim against the bankruptcy estate is unsecured and, absent any other viable defenses (or a failure of proof on the part of the Trustee or the debtor, as the case may be), then the payments the subcontractor received during the preference period are avoidable and recoverable for the benefit of the bankruptcy estate.

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1 Adapted and reprinted with permission of the Maine State Bar Association. (Fred W. Bopp III & Shawn K. Leyden, Deconstructing Preference Claims in Bankruptcy, 28 Me. Bar J. 70 (2013)).

2 Section 547 of the United States Bankruptcy Code (the “Code”), entitled “Preferences,” allows a bankruptcy trustee to avoid certain transfers of the debtor of an interest in property that the debtor made to a non-insider transferee during the 90-day period prior to the date of the filing of the debtor’s bankruptcy petition, provided that the trustee can meet certain touchstones. See 11 U.S.C. § 547(b)(1)-(5); see also infra note 20. These avoidable transfers are known as preferences.

3 See 11 U.S.C. § 547(c)(1)-(9).

4 The Bankruptcy Court issued its decision in connection with the following litigation: William H. Howison, Chapter 7 Trustee v. Sandelin Foundations, Inc., d/b/a Sandelin Precast Products, Adv. Proc. No. 11-2079. The Bankruptcy Court’s decision was announced orally from the bench on September 25, 2012, and an audio recording may be available on the Bankruptcy Court’s electronic docket for certain parties and upon payment of the requisite cost.

5 Neither Whorff nor TFT owned the real estate upon which the TFT Project was to be constructed.

6 Subsequently, Whorff and TFT entered into two change orders with respect to the TFT Contract, which increased the total TFT Contract amount to $350,250.

7 During the time period at issue, it is undisputed that Whorff owed Sandelin money for the work that Sandelin had performed and the materials that Sandelin had provided at the TFT Project. Accordingly, Sandelin was entitled to
record a notice of mechanic’s lien against the TFT Project during this time because it had not been paid in full (and did not receive payment in full until January 31, 2011, after Whorff had filed bankruptcy).

8 Both payments cleared Whorff’s bank account, i.e., were transferred for purposes of the Code, on October 26, 2010.

9 Subsequently, on December 21, 2010, Whorff also made a cash payment to Sandelin in the amount of $94.50. The Bankruptcy Court held that Sandelin demonstrated that this payment was a cash purchase of goods over the counter and not on account of an antecedent debt, and, therefore, not avoidable as a preference. See 11 U.S.C. § 547(c)(1).

10 TFT paid Whorff, in total, $260,650.

11 Thereafter, TFT paid an additional $216,468.03 to entities other than Whorff to complete the TFT Project.

12 Sandelin’s affirmative defenses included (a) that it was a secured creditor by virtue of Maine’s mechanics’ lien statute (10 M.R.S. § 3251) and, therefore, was not the recipient of a preference, (b) contemporaneous exchange for new value under § 547(c)(1) of the Code, and (c) subsequent new value under § 547(c)(4) of the Code. Interestingly, Sandelin did not assert an ordinary course of business affirmative defense based on § 547(c)(2) of the Code in its answer.

13 We do not need to analyze this defense in any great detail because, ultimately, the Bankruptcy Court had little trouble holding that this defense was simply unsupported by the summary judgment record.

14 As the above facts reflect, Sandelin never executed a lien release in return for any of the subject payments; rather, at best, it can be said that Sandelin forbore from recording a notice of mechanic’s lien during the preference period.


16 In re J.A. Jones, 361 B.R. at 102.

17 The Maine Law Court has described the inchoate nature of a mechanic’s lien as follows: “It is well established in this jurisdiction that a mechanic’s lien, wholly statutory in origin, arises from the moment the first materials or services are furnished. See Pineland Lumber Co. v. Robinson, Me., 382 A.2d 33, 36 (1978); Witham v. Wing, 108 Me. 364, 373, 81 A. 100, 104 (1911). At that point, however, the lien is merely inchoate in nature, and will not ripen absent further action by the materialman.” Lyon v. Dunn, 402 A.2d 461, 463 (Me. 1979).

18 See, e.g., Hutson v. Greenwich Ins. Co. (In re E-Z Serve Convenience Stores, Inc.), 377 B.R. 491, 501 (Bankr. M.D.N.C. 2007) (“The majority of courts agree that forbearance is generally not new value.”) (citations omitted); Golfview Dev. Ctr., Inc. v. All-Tech Decorating Co. (In re Golfview Dev. Ctr., Inc.), 309 B.R. 758, 774 (Bankr. N.D. Ill. 2004) (holding that forbearance of right to perfect mechanic’s lien is not new value because consideration for payment was original work performed, not forbearance); Buchwald Capital Advisors LLC v. Metl-Span I., Ltd. (In re Pameco Corp.), 356 B.R. 327, 339 (Bankr. S.D.N.Y. 2006) (“However, while it is true that in certain circumstances a third party may provide the requisite new value to a debtor, the value described by Defendant was mere forbearance, which does not meet the statutory test. . . . The fact that BMP, Shamrock and Tropicana might no longer have been able to file hypothetical claims against the Debtor does not constitute new value under § 547(c)(1).”) (footnote omitted); Official Comm. of Unsecured Creditors of 360Networks (USA) Inc. v. AAF-McQuay, Inc. (In re 360Networks (USA) Inc.), 327 B.R. 187, 192 (Bankr. S.D.N.Y. 2005) (“The majority of courts considering this issue have held that such release does not constitute new value. Most of these cases rely on the principle that that the definition of new value in § 547(a)(2) is not merely illustrative but that it is exhaustive, that
forbearance is not listed, and therefore that release of the right to perfect a statutory lien is not new value.”); In re Nucorp Energy, Inc., 80 B.R. 517, 519 (Bankr. S.D. Cal. 1987) (“Congress could have allowed courts to expand upon the doctrine of new value by legislating that new value includes certain transactions. Instead, Congress stated what new value means, which should retard case law expansion.”) (citations omitted); Cimmaron Oil Co. v. Cameron Consultants, Inc., 71 B.R. 1005, 1009 (N.D. Tex. 1987) (“This court concludes that forgoing, by operation of law, the right to perfect a lien is not the exchanging of “new value” with the debtor because it is not money or money’s worth in goods, services, or new credit, nor is it a release of property by the lienor that has previously been transferred to the lienor. Congress carefully defined “new value” in § 547(a)(2). The term includes goods, or the value of them, or the release of property previously transferred. The waiver of an inchoate lien right does not fit within the definition of ‘new value’ as set forth by Congress.”) (internal citations and quotations omitted).

19 In support of his cross-motion for summary judgment and in opposition to Sandelin’s motion for summary judgment, the Trustee submitted an affidavit stating that the expected distribution on general unsecured claims in the case would be significantly less than one hundred percent.

20 In re J.A. Jones, 361 B.R. at 103 (citations omitted).

21 11 U.S.C. § 547(b) provides as follows:

(b) Except as provided in subsections (c) and (i) of this section, 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—

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

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of 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.

22 See supra, note 20 for the text of § 547(b)(5). Sandelin also repeated its contemporaneous exchange for new value defense under § 547(c)(1), but that argument is outlined above.

23 In making this argument, Sandelin ignored the fact that the Debtor, Whorff, did not own the construction project; accordingly, Sandelin’s mechanic’s lien rights did not lie against property of the estate. This made Sandelin an unsecured creditor, a result that the J.A. Jones court itself confirmed, as follows: “The focus of the preference statutes is on the effect of a transfer on the debtor, not on the transferee. In re GEM Construction Corp of Virginia, 262 B.R. 638 (Bankr. E.D. Va. 2000) (“GEM II”). As such, numerous courts, including our own Circuit, view parties holding liens on third party property (but not that of the debtor) to be unsecured creditors for § 547(b)(5) purposes.” In re J.A. Jones, 361 B.R. at 101.

24 In further support, the Trustee cited to Askenaizer v. Seacoast Redimix Concrete, LLC (In re Charwill Constr., Inc.), 2007 U.S. Dist. LEXIS 24632, at *12 (D.N.H. 2007) (emphasis in original), which stated:
Of course, if, in this case, St. Paul Travelers was required, under its bond, to pay Seacoast in full, but had no secured position vis a vis the bankruptcy estate’s assets, then upon payment under the bond it would become merely an unsecured creditor. As an unsecured general creditor St. Paul Travelers would receive (as subrogee of Seacoast) less than full payment on Charwill’s debt. In that circumstance, the preferential payment(s) would provide Seacoast a greater recovery than it would receive in a chapter 7 proceeding. The debtor would have paid out 100% preferentially while the bankruptcy estate would have paid out less than 100% to St. Paul Travelers, as subrogee, for the same antecedent debt.