The Forest and the Trees of Preferential Transfers

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A bankrupt debtor may claw back payments made to creditors in the ninety days before the bankruptcy filing—so-called preferential transfers. The power to do so arises from closely drafted and highly technical statutory text, which subjects some transactions to claw back and not others. Scholars have long debated the reasons for the scope and limitations of preference law and have frequently proposed to expand or contract its coverage. One recent proposal would read the statutory text to exclude payments made to a creditor by check or wire transfer from preference liability. This reading interprets the Bankruptcy Code to limit preference liability to recipients of the debtor's property; in bank and wire transfers, the creditor technically receives the bank's property in the transaction. But even if this proposal's basic premises are accepted, the Code should still hold creditors paid by check or wire transfer liable for preferential transfers on a complete reading of the relevant statutory text and its underlying policy justifications.

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I. INTRODUCTION

Every discipline and every viewpoint within it can benefit from a periodic change in perspective. Having to reconsider previously held beliefs from a different angle may clarify where one's understanding is flawed or incomplete. The experience may lead to a change in opinion or simply point to places where misunderstanding must be corrected. Professor Steven Schwarcz's article on the interaction between commercial law and bankruptcy law in the context of avoidable preferences provides just this sort of welcome perspective shift for those who study bankruptcy. He questions whether a law that permits the recovery of "any transfer of an interest of the *debtor* in property"[1] should encompass transactions made through a bank intermediary. Given current

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[1] 11 U.S.C. § 547(b) (emphasis added).

commercial practice, this is akin to asking whether preference law should apply to most commercial transactions.

Schwarcz's analysis concludes that the applicable statute permits the debtor's bankruptcy estate to recover its property—and only *its* property.[2] In commercial transactions involving a check or wire transfer, this would permit the estate to recover only from the bank that honors the check or wire transfer, on the theory that it is the bank who receives the debtor's property when it subsequently seeks reimbursement. In other words, a creditor who receives an otherwise preferential payment by check or wire transfer would enjoy a safe harbor from preference liability, and the bank would be subject to the avoidance action in the creditor's place. This is effectively the converse of current preference law enforcement: under the law as it stands today, a creditor paid by a check or wire transfer would be subject to preference liability, but not the bank facilitating that transfer.[3]

This reinterpretation of preference law would, according to Schwarcz, involve a mere redistribution of preference liability from creditors who received payments during the preference period to the bank that facilitated those payments.[4] Thus, it would not actually reduce total preference liability and so, in his view, would not undermine the goals of preference law.[5] By substituting bank defendants for other creditor defendants, his interpretation would preserve the bankruptcy estate's ability to recover funds and thus promote the twin goals of equality among creditors and debtor rehabilitation.

Schwarcz builds his argument using the language of § 547 of the Bankruptcy Code and the realities of commercial law.[6] But consideration of other sections of the Code should also inform the analysis. One such provision dictates that the banks Schwarcz would hold liable for avoidable preferences are immunized from preference liability. When a bank honors a check or makes a wire transfer, in all standard cases, it reduces the balance in the debtor's deposit account at the bank by the same amount, thereby setting off its claim for the debtor's funds against the debtor's claim on the bank. Holding the bank liable for this would run contrary to § 553 of the Code, which preserves the bank's right to offset mutual debts. Furthermore, even if Schwarcz's interpretation is correct, the creditors that the bank pays at the debtor's direction would still be liable pursuant to § 550 of the Code. That section permits recovery of the value of preferentially transferred estate property from "the entity for whose benefit

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[2] Steven L. Schwarcz, *Physics Informs Law: Analyzing Legal Issues That Turn on the Scale of Observation*, 85 OHIO ST. L.J. 592, 602 (2025).

[3] *See, e.g.*, *In re* Reeves, 65 F.3d 670, 676 (8th Cir. 1995) (concluding that the bank holding the deposit account was not an "initial transferee" of an avoidable transfer because it lacked dominion and control over the debtor's funds); Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890, 893 (7th Cir. 1988) (same).

[4] Schwarcz, *supra* note 2, at 611–12.

[5] *Id.*

[6] *Id.* at 600–02.

such transfer was made."[7] When all three provisions are considered together, then, the appropriate outcome is to continue the current practice of holding the creditors who receive the bank payment liable for avoidable preferences, notwithstanding Schwarcz's conclusion that they have not received an interest in the debtor's property.

Accordingly, Schwarcz's proposal provides the opportunity to consider interesting technical issues arising between commercial law and the Bankruptcy Code, but it is unlikely to have any meaningful, practical impact. Schwarcz has graciously invited his readers to consider a new perspective on the law, but he may have marched them up a hill only for them to realize that they can safely march back down again.

II. BANK TRANSFERS AND SETOFF RIGHTS

In his article, Schwarcz cleverly distinguishes between the "macro" perspective of bankruptcy law and the "micro" perspective of commercial law.[8] He argues that commercial law more accurately captures a precise understanding of what constitutes the *debtor's* property, as opposed to the debtor's *bank's* property, and that this distinction is important for determining when a transfer constitutes an avoidable preference.[9] He compares his approach to observations of the physical world, which might be made on a macro level through classical physics, and on a micro level through quantum mechanics.[10] Of course, the danger of switching to the micro perspective is that, borrowing an observation from the field of botany, one might end up missing the forest for the trees.

Schwarcz begins his argument with an explanation of how checks and wire transfers function. In both instances, he clarifies, a close look at the transaction reveals two separate transfers. First, the drawer of the check or wire transfer (for our purposes, the debtor) directs its bank to pay a third party (for our purposes, the creditor). Once the bank honors the check or accepts the request, it becomes independently obligated to make the payment to the creditor. The bank makes this payment from its own funds. We know this is true because the draw is inevitably tied to a deposit account, and a deposit account actually reflects an obligation owed by the bank to the depositor, rather than specific property of the depositor that the bank holds as a custodian or bailee. Schwarcz explains that, because the bank uses its own funds, this first transfer is not of estate property and therefore cannot be avoided as a preference.[11] The second transfer is when the bank seeks "reimbursement" (Schwarcz's phrase) from the debtor-

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[7] 11 U.S.C. § 550(a)(1).
[8] Schwarcz, *supra* note 2, at 595.
[9] *Id.* at 601–02.
[10] *Id.* at 593–94.
[11] *Id.* at 602.

depositor for having paid the creditor.[12] According to Schwarcz, it is only the act of providing reimbursement to the bank that entails a transfer of property that could be avoided by the bankruptcy estate.[13]

The point that the bank uses its own funds to pay the third party is crucial to Schwarcz's argument. The reason the bank uses its own funds, and not the debtor's, is thus worth exploring in greater depth. Fractional reserve banking, by which banks physically hold only a small portion of the money deposited with them and lend out the rest, has been the norm in the United States for more than a century.[14] The dollar amount of a deposit account represents an amount the bank owes to the depositor. It thus reflects a debt, not a stockpile of currency. A depositor can draw down on a deposit account by making a cash withdrawal, but he can also do so by writing a check or authorizing a wire transfer. When the depositor draws on the deposit account, he technically incurs a debt to the bank, which uses its funds to satisfy the draw. This makes the bank a creditor of the depositor momentarily. But the depositor's momentary debt to the bank is immediately repaid when the bank reduces the depositor's account balance, thereby reducing the bank's debt to the depositor, by an equal amount. This is a classic example of what is generically called setoff. An illustration may be helpful.

John decides to open a checking account with Bank. He brings $500 in cash to Bank for this purpose. Bank accepts his $500 and records the transaction, providing John with a receipt and confirmation of the deposit.[15] The Bank's records will reflect that John now has a checking account with a $500 balance. But this means only that Bank owes John $500, if and when he should request it. In the meantime, Bank will keep some fraction of the $500 in reserve and loan out the rest.[16] Later, John writes a $100 check to Sam, drawing on his deposit account with Bank. When Sam presents the check, Bank is obligated to honor it. Bank pays Sam the $100 and subsequently credits the payment against Bank's obligation to John, represented by the balance in John's checking account. In other words, Bank sets off the $100 check against its $500 debt to John. Bank owes John $100 less by virtue of the check payment to Sam; John's checking account now has a $400 balance.

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[12] *Id.* at 600.

[13] *Id.* at 611.

[14] For a criticism of fractional banking, see John P. Cochrane, *Fractional Reserve Banking and Central Banking as Sources of Economic Instability: The Sound Money Alternative*, 11 INDIAN J. ECON. & BUS. 543, 544 (2012). This arrangement also explains why we have bank runs and the perceived need for deposit insurance.

[15] John would also be given access to an electronic record through an online account, which would enable him to monitor the amount available in his checking account at any given time.

[16] Reference to the song "Fidelity Fiduciary Bank" from the classic production of *Mary Poppins* (1964) is irresistible here. DICK VAN DYKE, DAVID TOMLINSON & ARTHUR MALET, *Fidelity Fiduciary Bank*, *on* MARY POPPINS (ORIGINAL SOUNDTRACK) (Walt Disney 1964). Although the bank in question there was English, the same model applies to American banks.

Section 553 of the Bankruptcy Code, which deals with setoff rights, is thus precisely on point to Schwarcz's argument. It specifies that the Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the [debtor's bankruptcy case]."[17] That right to offset a mutual debt would squarely cover the mechanisms by which banks reimburse themselves for payments.[18] As a practical matter, a setoff right functions much like a security interest: it enables the creditor to recover in full up to the value of the obligation it owes to the debtor. Unless the amount drawn on the deposit account exceeds the amount available—an overdraft—the bank will always be fully protected against preference liability when obtaining reimbursement for honoring a check or wire transfer. To allow any other section of the Bankruptcy Code—including those covering avoidance and avoidance actions—to create liability for the Bank in this situation would "affect" the Bank's setoff right, which is what § 553 says bankruptcy law cannot do.[19]

Now is a good time to pause and orient ourselves. If we take Schwarcz's interpretation of the Code as a starting point, so that only a transfer of the debtor's property—not the debtor's bank's property—can be recovered as a preference, and then add in § 553's preservation of setoff rights for banks, preference liability is functionally eliminated.[20] When an insolvent debtor makes a payment in the ninety days prior to bankruptcy using a check or wire transfer, the recipient creditor would not be liable for a preference because the creditor would not have received a transfer of the debtor's property. But neither would the bank be liable for a preference, because it would be entitled to its full rights of setoff. If this were where the law ended, all creditors would insist on payment by check or bank wire transfer as an effective safe harbor from

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[17] 11 U.S.C. § 553(a).

[18] There are exceptions in the Code when setoff rights are not honored, but they are unlikely to apply in most banking situations. A setoff right will not be recognized if the mutual obligation owed to the debtor was transferred to the creditor by a third party after the commencement of the case or within the ninety days prior, or if the obligation to the debtor was incurred within the ninety days prior for the purpose of obtaining a right of setoff. 11 U.S.C. § 553(a)(2)–(3). Neither would be true in a typical banking relationship. In addition, if there is an insufficiency in the setoff amount within the ninety days prior to the bankruptcy—meaning that the obligation owed to the debtor was less than the claim against the debtor—the setoff right will be limited to the insufficient amount. *Id.* § 553(b). This would only arise in the event of an overdraft.

[19] *Id.* § 553(a).

[20] There will be lingering preference liability in cases where the bank permits a true overdraft, as exists under current law. *See In re* Agriprocessors, Inc., 547 B.R. 292, 311–12 (N.D. Iowa 2016). Presumably, true overdrafts will continue to be rare. Banks police overdrafts by imposing overdraft fees, which compensate for the risk of potential preference liability. *See* Mary Williams Walsh, *Banks Took $11 Billion in Overdraft Fees in 2019, Group Says*, N.Y. TIMES (June 3, 2020) https://www.nytimes.com/2020/06/03/business/banks-overdraft-fees.html (reporting that 84% of overdraft fees are paid by 9% of account holders, who tend to carry low balances averaging less than $350).

preference liability. The result would be functionally analogous to the limitations on avoiding transfers that constitute "settlement payments" on securities contracts, which are highly controversial.[21] But there is no such safe harbor for creditors, because a separate section of the Code continues to subject them to preference liability, as I explain below.

III. ENTITIES FOR WHOSE BENEFIT THE TRANSFER WAS MADE

As described by Schwarcz, when payments are made to a creditor by check or wire transfer, the bank acts as a conduit to shield the creditor from preference liability.[22] But Congress has anticipated that preferential transfers might be shielded in just such a fashion and has already included an answer to this behavior in the Bankruptcy Code. Under § 550(a), a trustee or debtor in possession may recover not just from a transferee of debtor property, but also from any entity for whose benefit the transfer was made.[23] Moreover, the trustee can recover either the debtor's property itself or the "value of such property."[24] As long as the creditor benefited from a transfer of the debtor's property that can be avoided under preference law, the creditor can be forced to pay back the value of the transfer.

The language of the statute is clear: an entity who enjoys the benefit of a preferential transfer may be liable under § 550.[25] But of course, to reach § 550, we must first have an avoidable transfer—under Schwarcz's argument, a transfer of the *debtor's* property. If the bank cannot be liable for a preference, by virtue of its setoff rights, then one might also expect that the relevant transfer to the bank cannot be avoided. But some rather clever drafting permits a transfer to be avoided even when the direct recipient is not personally liable. Section 547 permits avoidance of a payment "for the benefit" of another entity.[26] This would include a transfer by a debtor to its bank to facilitate payments from the bank to the debtor's creditor. Another illustration is in order.

John, from our earlier example, has a checking account with Bank with a balance of $500. John experiences financial difficulties and is rendered insolvent. John writes the $100 check to Sam to satisfy an outstanding unsecured debt. Bank honors the check to Sam by transferring its own funds to him, and then sets off the payment against John's checking account, which now has a balance of only $400. John files for bankruptcy less than ninety days later. As

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[21] *See* Christopher J. Rubino, *The Ever Expanding Scope of Securities and Commodities Safe Harbors in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 423, 423–24 (2012). For a more general criticism of the special treatment given to derivative contracts in the Bankruptcy Code, *see* Franklin R. Edwards & Edward R. Morrison, *Derivatives and the Bankruptcy Code: Why the Special Treatment?*, 22 YALE J. ON REG. 91, 98 (2005).

[22] *See* Schwarcz, *supra* note 2, at 611-12 .

[23] 11 U.S.C. § 550(a).

[24] *Id.*

[25] *Id.*

[26] *Id.* § 547(b)(1).

we have already seen, Bank cannot be liable for a preference in this instance without violating its right to setoff. However, the transfer of John's property to Bank may nevertheless be avoided, and Sam can be held liable for the return of the $100 payment from John to Bank.

We reach this result by walking carefully through the applicable provisions of the Bankruptcy Code. The transfer of $100 from John to Bank was made "for the benefit of" the creditor, Sam, to facilitate Bank's honoring the $100 check.[27] The transfer was on account of an antecedent debt—John's obligation to Bank for payment of the check—and made while John was insolvent, during the applicable preference period.[28] The transfer enabled Sam, the creditor,[29] to "receive more"—payment in full—than he would have if the transfer had not been made and John's bankruptcy estate had been liquidated in Chapter 7. Sam was unsecured and John was insolvent, and unsecured creditors are entitled only to a pro rata payment in a Chapter 7 liquidation.[30] All elements are therefore satisfied, and the transfer can be avoided.

But as discussed above, Bank cannot be held liable for the avoided transfer under § 553, because to do so would affect Bank's right to offset a mutual debt. This is where § 550 informs us that the trustee may nevertheless recover, if not the property transferred, the value of such property from "the entity for whose benefit such transfer was made."[31] Sam can therefore be held liable for the $100 transfer, even though Sam was not the direct recipient of John's property.

This outcome is comfortably familiar in current practice, and fully consistent with other applications of preference law. Perhaps the most common application of § 550 today is to situations in which a debtor makes a preferential payment on a debt that has been guaranteed by a third party.[32] For example, imagine James is the president of Debtor. Debtor has borrowed $1 million on an unsecured basis from Lender, which also insisted on a personal guarantee from James as a condition of extending the loan. Debtor subsequently flounders. James knows that if Debtor fails to make the $1 million payment to Lender, James will be personally liable because of the personal guarantee. To ensure he will not be liable, James causes Debtor to repay Lender, even though Debtor is insolvent and cannot repay all its creditors in full. James personally benefits from the payment because it relieves his $1 million obligation as guarantor. He is therefore an entity for whose benefit the transfer is made, and he could be

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[27] *Id.*

[28] *Id.* § 547(b)(2)–(4).

[29] The statute references "such creditor," in reference back to the creditor for whose benefit the transfer was made. 11 U.S.C. § 547(b)(5).

[30] *See id.* § 726(b).

[31] *Id.* § 550(a)(1).

[32] *See, e.g.*, Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1187–88 (7th Cir. 1989); Lawrence Ponoroff, *Now You See It, Now You Don't: An Unceremonious Encore for Two-Transfer Thinking in the Analysis of Indirect Preferences*, 69 AM. BANKR. L.J. 203, 204 (1995).

required to return $1 million to the estate as an avoidable preference. James may be liable even though he did not receive any property from the debtor.

Furthermore, as in our earlier example, James may be liable for the preferential transfer even if Lender is not. In this example, James—as president of Debtor—is a statutory insider. For insiders, the preference period extends back a full year, not the typical ninety days.[33] One reason for the extended timeframe is to diminish the insider's ability to game the system. An insider may arrange for its own payment, or payment to a third party under conditions that benefit the insider, and then cause the debtor to file for bankruptcy ninety-one days later. It is less likely that an insider could successfully delay a bankruptcy filing for a full year. The law permitting recovery of a transfer from the entity for whose benefit the transfer was made ensures that payments made outside the ninety-day period but in the year before the filing can also be avoided. In our example, the trustee may still recover the $1 million from the insider James, as the beneficiary of the transfer, even if the payment to Lender is not otherwise an avoidable preference.[34]

Courts have been somewhat divided on the question of whether a trustee needs to provide evidence that the debtor *intended* to prefer the non-transferee beneficiary in order to recover a voidable transfer from that entity.[35] As courts have noted, the statute is at least ambiguous on this point, with no meaningful legislative history providing clarification.[36] But even courts requiring evidence of intent could find it in the situations relevant to Schwarcz's analysis. Using our earlier example, if John writes a check to Sam, that alone is clear evidence that John intended to benefit Sam. Accordingly, when the Bank pays Sam and then sets off its payment against John's deposit account, Sam is the undisputed beneficiary of that transfer. It strains credulity to think that any court would find otherwise, especially given how bankruptcy courts generally look through form to substance in order to realize the Bankruptcy Code's purposes.[37] Accordingly, even if courts agreed that Bank's payment to Sam was not itself a preferential transfer, Bank's subsequent setoff would be avoidable, made for the benefit of

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[33] 11 U.S.C. § 547(b)(4)(B).

[34] *See In re* J&M Sales Inc., 644 B.R. 440, 445 (Bankr. D. Del. 2022) (holding that a trustee is not required to sue the initial transferee and may instead seek recovery directly against the beneficiary of the transfer); Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890, 894 (7th Cir. 1988) (describing a guarantor as liable by virtue of being an entity for whose benefit the transfer was made). If the transfer is made between ninety days and one year before a debtor's filing, only the insider can be held liable pursuant to statute. *See* 11 U.S.C. § 550(c).

[35] *See e.g.*, *In re* Connolly N. Am., LLC, 340 B.R. 829, 833–34 (Bankr. E.D. Mich. 2006) (detailing discussion of the issue in case law).

[36] *Id.* at 834.

[37] Case law indicates that courts would generally be extremely hostile to Schwarcz's interpretation and its ramifications. *See, e.g.*, *Bonded Fin. Servs., Inc.*, 838 F.2d at 893 (7th Cir. 1988) (declining to find a bank intermediary was the "initial transferee" in an alleged fraudulent conveyance by virtue of clearing a check).

Sam and therefore recoverable from him. Preference law was clearly intended to cover transactions the debtor orders through its financial institution, and § 550 ensures that it will.

IV. THE POLICY GOALS OF PREFERENTIAL TRANSFERS

Preservation of the status quo is a good thing for those who believe that the current implementation of preference law has something to offer bankruptcy policy. Schwarcz is clear that he does not intend to eliminate preference liability.[38] Indeed, his understanding of his proposal as merely redistributive of liability reflects his apparent belief that the goals of preference law he identifies—primarily equality among creditors and secondarily rehabilitation of debtors—are worth pursuing through preference law.[39] Not all commentators would agree, at least not without real reservations.[40]

As I have argued above, a more complete reading of the Bankruptcy Code suggests that Schwarcz's interpretation of § 547, even if accepted by courts, would not have the effect of redistributing liability from creditors to banks. But his suggestion that bankruptcy law might be indifferent to the question of who bears the liability of a preferential transfer is still worth examining. As my understanding of the defensible policy goals of preference law has developed, I have come to believe that the identity of the liable parties matters a great deal. This makes it fortunate, in my view, that Schwarcz's proposal would not have the redistributive effect he suggests. This difference of opinion between Schwarcz and I comes primarily from different points of view about the actual goals for preference law, which I would submit are not those Schwarcz has identified.

The core purpose that Schwarcz ascribes to preference law is equality of distribution among creditors.[41] But as has been observed by David Skeel and others, there are too many ways that bankruptcy law gives some creditors payout priority over others to support an argument that bankruptcy law generally, and

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[38] *See* Schwarcz, *supra* note 2, at 612.

[39] *Id.*

[40] *See, e.g.*, Daniel J. Bussel, *The Problem with Preferences*, 100 IOWA L. REV. BULL. 11, 12 (2014) ("When preference targets are those receiving payments within 90 days of bankruptcy in respect of goods or services, redistributing those preference recoveries to unsecured creditors ratably seems like rearranging the deck chairs on the *Titanic*."). Much of my own prior scholarship has been critical of how preference law is currently implemented. *See generally*, Brook E. Gotberg, *Conflicting Preferences in Business Bankruptcy: The Need for Different Rules in Different Chapters*, 100 IOWA L. REV. 51 (2014); Brook E. Gotberg, *Optimal Deterrence and the Preference Gap*, 2018 B.Y.U. L. REV. 559 (2018); Brook E. Gotberg, *Relational Preferences in Chapter 11 Proceedings*, 71 OKLA. L. REV. 1013 (2019).

[41] Schwarcz, *supra* note 2, at 610.

preference law in particular, embraces equality as its primary purpose.[42] The fundamental limitation of preference liability is that the transfer be made while the debtor is insolvent distinguishes between creditors who were paid before and after the threshold of insolvency was crossed. But why not claw funds back from creditors who were preferred when the debtor was solvent? After all, they too end up with more than they would have received in the debtor's bankruptcy proceeding, at the expense of other creditors. Other statutory exceptions to preference liability cut even further against equality as a motivating principle. Payments made "in the ordinary course of business" cannot be avoided even when preferential, nor can transfers that have been followed by a grant of "new value" by the creditor.[43] Both exceptions ensure that some creditors will be treated better than others.

Nor does it make sense to frame preference law as an effort to rehabilitate the debtor, because preferences may be avoided in a Chapter 7 liquidation just as easily as in any other chapter. Indeed, preferences are more frequently pursued in Chapter 7 than they are elsewhere, in part because preference avoidance is permissive, not mandatory.[44] In reorganization cases, the same party that made the transfer pre-bankruptcy typically has the power and the initial discretion to bring avoidance actions.[45] Such actions are exceedingly unpopular among creditors, and a debtor would not likely bring a preference claim against a trade partner, or against any party with which it wishes to maintain a relationship.[46] In chapter 7, by contrast, the trustee is responsible for the liquidation of estate assets and has no similar compunctions against pursuing preferential transfers.

As my co-author Professor Richard Squire and I observe in a forthcoming paper, there is a more logical justification for preference law, one that explains why it applies in both Chapter 7 and chapter 11, and also why it has the exceptions for ordinary course payments, new value, and so on.[47] Like the automatic stay itself, preference law seeks to discourage wasteful, zero-sum competition among creditors for their insolvent debtor's assets.[47] Preference

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[42] *See, e.g.*, David Skeel, *The Empty Idea of "Equality of Creditors*,*"* 166 U. PENN. L. REV. 699, 714 (2018).

[43] 11 U.S.C. § 547(c)(2)–(3).

[44] The statute reads that the trustee or debtor-in-possession *may* avoid a preferential transfer. *Id.* § 547(b).

[45] In Chapter 11, the debtor in possession has all the rights and powers of the trustee. *Id.* § 1107(a). The same rule applies in Chapter 12. *Id.* at § 1203. In Chapter 13, the law is less clear, but it appears that a debtor cannot exercise a trustee's avoidance powers. A Chapter 13 trustee is unlikely to bring preference actions because he will experience no benefit from doing so. *See In re* Wood, 301 B.R. 558, 562 (Bankr. W.D. Mo. 2003).

[46] *See* Brook E. Gotberg, *Relational Preferences in Chapter 11 Proceedings*, 71 OKLA. L. REV. 1013, 1013 (2019).

[47] *See* Brook E. Gotberg & Richard Squire, *The Insecure Creditor's Dilemma* (forthcoming 2025) (manuscript at 2–3) (on file with author).

[47] *Id.* at 5–6.

law does this (admittedly, imperfectly) by forcing preferred creditors to return the fruits of their competitive efforts.[48] A rational creditor who knows he must disgorge any benefit he receives from competing for repayment will not undertake the costs of doing so. If this is indeed the goal of preference law, then we *should* care who is targeted with preference liability, because its function is to deter specific behaviors undertaken by specific actors. Put another way, preference law cannot serve its intended function of deterrence if it scapegoats the wrong people. Even if preference liability could be imposed on banks—and as explained above, it generally cannot because of setoff rights—Schwarcz's proposal would shield creditors from preference liability when they are paid via a bank transfer. This would encourage further strategic behavior by such creditors—which might take the form of dunning a struggling debtor for an early payout or expending time and resources currying favor with the debtor's managers—in direct contradiction to what Squire and I argue is the true policy reason for preference law. Fortunately, as I have demonstrated, § 550 of the Bankruptcy Code prevents this outcome.

V. CONCLUSION

Schwarcz gives his readers the opportunity to think critically about a highly technical area of the law. He writes about the convergence of commercial law and bankruptcy law in the realm of preference avoidance, which involves a complex intersection of rules. Although he has characterized bankruptcy law as being "interpreted [too] broadly" in this area, overlooking crucial details of commercial transactions and therefore neglecting to conduct sufficient analysis,[49] I conclude that both the language and the purpose of preference law support current practice. Creditors who receive preferential payouts via bank transfers are and should continue to be subject to liability, but the banks who serve as the intermediaries are not and should not be liable.

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[48] *Id.* at 7.

[49] *See* Schwarcz, *supra* note 2, at 594.