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Delayed Perfection of Security Interests in Personal Property and the Substantially Contemporaneous Exchange Exception to Preference Attack

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By Richard F. Duncan*.

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I. INTRODUCTION

So long as a debtor has the financial wherewithal to pay all of his or her obligations in full, a transfer made to a particular creditor generally should not offend any principle of public policy, because such a transfer does not impair the debtor's ability to pay others.1 However, when an insolvent debtor makes a transfer to one of his or her creditors, questions of fairness are raised, because the effect of the preference is to deplete the already inadequate estate of the debtor available for satisfaction of other claims.2

The principle objectives of preference policy in bankruptcy are to discourage favoritism and to promote equitable distribution of

* Associate Professor of Law, University of Nebraska College of Law. I wish to thank my colleague, Norman W. Thorson, for his thoughtful suggestions.
2. Id. at 260.
the assets of bankrupt debtors.\textsuperscript{3} Without preference law in bankruptcy, creditors receiving payments or other transfers of property of the debtor shortly before bankruptcy could obtain an unfair advantage over other, equally deserving, claimants.\textsuperscript{4} Preference law permits the trustee to recover certain prepetition transfers from favored creditors thereby maximizing the value of the bankruptcy estate for the benefit of all creditors.\textsuperscript{5}

In order to take into account changing commercial practices and the widespread adoption of the Uniform Commercial Code (U.C.C.), the Bankruptcy Reform Act of 1978\textsuperscript{6} substantially reformed the substantive law of preferential transfers.\textsuperscript{7} Section 547(b) of the New Act provides that the trustee may avoid, as preferential, any transfer\textsuperscript{8} of property of the debtor:

\begin{itemize}
\item[(1)] to or for the benefit of a creditor;
\item[(2)] for or on account of an antecedent debt owed by the debtor before such transfer was made;
\item[(3)] made while the debtor was insolvent;
\item[(4)] made—
  \begin{itemize}
  \item[(A)] on or within 90 days before the date of the filing of the petition;
  \item[(B)] between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer—
  \end{itemize}
\end{itemize}

\textsuperscript{3} See Duncan, Preferential Transfers, the Floating Lien, and Section 547(c)(5) of the Bankruptcy Reform Act of 1978, 36 Ark. L. Rev. 1, 11 (1982).

\textsuperscript{4} Id.

\textsuperscript{5} Id. To the extent that the trustee is able to avoid a preferential transfer of property of the debtor, his recovery will be “for the benefit of the estate.” 11 U.S.C. § 550(a) (Supp. V 1981).


\textsuperscript{8} The term “transfer” is broadly defined in § 101 of the New Act to include any voluntary or involuntary disposition of property or an interest in property. 11 U.S.C.A. § 101(41) (West Supp. 1983). Thus, both absolute conveyances of, and creation of security interests in, the debtor’s property may result in a preferential transfer under section 547(b). See In re Gruber Bottling Works, Inc., 16 Bankr. 348, 351 (Bankr. E.D. Pa. 1982).
DELAYED PERFECTION

(i) was an insider; and
(ii) had a reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(3) 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. 9

The first element, that the transfer be made to or for the benefit of a creditor, should normally be subject to mechanical application. 10 In the typical case, the trustee should be able to satisfy the third requirement simply by resort to section 547(f), which creates a rebuttable presumption that the debtor was insolvent "on and during the 90 days immediately preceding the date of the filing of the petition." 11 Moreover, since a creditor is almost always better off without a prepetition transfer, the fifth element should be met in all cases except those in which the preferred creditor was fully secured before the transfer or the chapter 7 distribution is 100 percent to all general, unsecured claims. 12

12. See D. Epstein & J. Landers, supra note 10, at 468; R. Henson, Handbook On Secured Transactions Under The Uniform Commercial Code 12 (2d ed. Supp. 1979); Henson, The Uniform Commercial Code and the New Bankruptcy Act: Some Problem Areas, 35 Bus. Law. 83, 92 (1979). For example, assume that a creditor has a claim against the debtor of $100,000 and valid-in-bankruptcy collateral of $150,000. If such creditor receives a $10,000 payment within 90 days of bankruptcy no preference results, because the payment has not enabled him or her to receive more than he or she would have received in chapter 7 had the transfer not been made. With the transfer, the creditor receives the $10,000 payment and $90,000 in chapter 7 from the collateral; without the transfer, he or she would receive $100,000 in chapter 7 from the collateral; in either case, the creditor is paid in full and the debtor's bankruptcy estate retains the debtor's equity in the collateral. See Barash v. Public Fin. Corp., 658 F.2d 504 (7th Cir. 1981); In re Conn, 9 Bankr. 431 (Bankr.
The second and fourth elements both involve the chronology of the allegedly preferential transfer, and whether or not they are satisfied in any given case will generally be determined by application of section 547(e) of the New Act, which adopts a clear and exhaustive formulation of the timing of a transfer for purposes of bankruptcy preference analysis.\textsuperscript{13}

Once the trustee succeeds in establishing all of the elements of a section 547(b) preference,\textsuperscript{14} it then becomes necessary to consider the possible application of section 547(c), which enacts a number of exceptions to the general rules of preference law in bankruptcy.\textsuperscript{15} Section 547(c) recognizes that certain transactions constituting technical preferences under section 547(b) should be protected from the reach of the trustee to the extent necessary to effectuate overriding considerations of policy.

The principle purpose of this Article is to consider what happens under the scheme of bankruptcy preference law when a creditor obtains a security interest in the debtor's personal property in exchange for contemporaneous value and fails to promptly perfect it against certain third parties.


\textsuperscript{14} The trustee has the burden of alleging and proving by a fair preponderance of the evidence all of the requisite elements of a preferential transfer. If the trustee fails to meet his or her burden, no preference has been established under section 547(b). \textit{See} Barash v. Public Fin. Corp., 658 F.2d 504, 507 (7th Cir. 1981); \textit{In re} Saco Local Dev. Corp., 25 Bankr. 876, 878 (Bankr. D. Me. 1982); \textit{In re} Camp Rockhill, Inc., 12 Bankr. 829, 831-32 n.3 (Bankr. E.D. Pa. 1981); \textit{In re} Burnham, 12 Bankr. 286, 297 (Bankr. N.D. Ga. 1981); \textit{In re} Conn, 9 Bankr. 431, 434 (Bankr. N.D. Ohio 1981); 4 \textit{COLLIER ON BANKRUPTCY} § 547.55 (15th ed. 1982) [hereinafter cited as \textit{COLLIER}]. Although section 547(f) of the New Act creates a rebuttable presumption that the debtor was insolvent during the 90-day period immediately preceding bankruptcy, the ultimate burden of persuasion on the issue of the debtor's insolvency remains with the trustee. \textit{See supra} note 11 and accompanying text.

\textsuperscript{15} \textit{See generally} \textit{WHITE & SUMMERS}, \textit{supra} note 12, §§ 24-4 to 24-5, at 1005-11; Nimmer, \textit{Security Interests in Bankruptcy: An Overview of Section 547 of the Code}, 17 \textit{HUSTON L. REV.} 289, 296-297 (1980). Since section 547(c) does not create any affirmative avoidance powers in the trustee, it applies only in concert with section 547(b). If the trustee fails to establish a preference under section 547(b), judgment should be rendered for the transferee. It is only after the trustee has met his or her burden under section 547(b) that it becomes necessary to determine whether section 547(c) exempts all or part of the transfer from avoidance. \textit{See} Duncan, \textit{supra} note 3, at 19-20.
II. DELAYED PERFECTION AND PREFERENCE ATTACK

A. Section 547(e)

Few, if any, analysts would argue that a security interest given by an insolvent debtor shortly before bankruptcy to secure a pre-existing, previously unsecured obligation should be protected from the trustee's preference powers. It is difficult to distinguish the creation of such a security interest from the prototypical preference, a payment of an antecedent indebtedness by an insolvent debtor on the eve of bankruptcy. This type of security interest is clearly preferential and should be set aside in bankruptcy without regard to whether or not it is promptly filed or otherwise perfected under applicable state law.

Conversely, the typical extension of new credit on a secured basis does not appear to create any problems under the law of preferences—since the secured party is extending credit to the debtor contemporaneously with the creation of its security interest in the debtor's property, the transfer of the security interest is not being made on account of an antecedent indebtedness and does not deplete the debtor's estate. However, if the secured party does not perfect its security interest promptly, section 547(e) of the Bankruptcy Reform Act may muddy the waters of the preference analysis.

Section 547(e) permits the trustee to rewrite the history of a

16. It is a transfer to a creditor (the secured party), on account of an antecedent debt (the preexisting obligation), made during the preference period ("shortly before bankruptcy") and while the debtor was presumed to be insolvent under section 547(f). Finally, since the creditor was previously unsecured, he or she would receive more in chapter 7 with than without the security, unless the bankruptcy estate is sufficient to pay all general, unsecured claims in full. 11 U.S.C. § 547(b) (Supp. V 1981). See supra notes 9-13 and accompanying text.

17. Section 547(e) provides:

(e) (1) For the purposes of this section—
(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and
(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—
(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;
(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or
transfer of a security interest under preference attack by applying a combination of three distinct, chronological factors to determine the timing of the transfer: (1) the time at which such transfer becomes effective between the debtor and the secured party; (2) the time at which such transfer is perfected against certain third parties; and (3) the time at which the debtor acquires rights in the collateral.

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—
(i) the commencement of the case; and
(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred. 11 U.S.C. § 547(e) (Supp. V 1981).


19. The timing of a transfer under preference attack determines whether it has been made for or on account of an antecedent debt, while the debtor was insolvent, and within the preference period. 11 U.S.C. § 547(b) (2)-(4) (Supp. V 1981). See supra notes 9-13 and accompanying text.

20. 11 U.S.C. § 547(e) (2) (A) (Supp. V 1981). Under the Uniform Commercial Code, a security interest becomes effective, i.e., enforceable, between the parties at the time of attachment. U.C.C. § 9-203(1)-(2) (1972). In general, a security interest does not attach until all of the following have occurred: (1) the debtor has signed an adequate security agreement (or the collateral is in the possession of the secured party pursuant to agreement); (2) the secured party has given “value”; and (3) the debtor has obtained “rights in the collateral.” Id. See generally White & Summers, supra note 12, §§ 23-1 to 23-4, at 901-17; Sandford, Debtor's Rights In Collateral As a Requirement for Attachment of a Security Interest Under the Uniform Commercial Code, 26 S.D.L. Rev. 163 (1981).

Throughout this Article the Uniform Commercial Code shall often be referred to as the Code or U.C.C. All references in this Article to the text and comments of the Code, unless otherwise indicated, are to the 1972 official text of the Code.

21. 11 U.S.C. § 547(e) (2) (B) (Supp. V 1981). A transfer of an interest in personal property is perfected for purposes of section 547 “when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.” 11 U.S.C. § 547(e) (1) (B) (Supp. V 1981). This test is identical in all material respects with the concept of perfection under article 9 of the Code. See U.C.C. §§ 9-201, 9-301(1) (b) (1972). The steps required for perfection are enumerated in sections 9-302, 9-304, 9-305 and 9-306 of the Code. Some security interests, such as purchase money security interests in consumer goods, are perfected automatically at the time of attachment without any additional requirements. U.C.C. § 9-302(1) (d) (1972). However, generally a secured party perfects an article 9 security interest either by filing a financing statement in the proper public office or offices or by taking possession of the collateral. U.C.C. §§ 9-302, 9-304 to 9-305. See generally White & Summers, supra note 12, §§ 23-5 to 23-16, at 918-64.

22. 11 U.S.C. § 547(e) (3) (Supp. V 1981). The principle significance of section 547(e) (3) is with respect to security interests attaching to after-acquired collateral during the preference period. See Duncan, supra note 3, at 17-18.
Under section 547(e)(2)(A), a transfer of a security interest in personal property will be deemed made, for purposes of bankruptcy preference law, at the time it attaches under section 9-203 of the U.C.C., provided it is perfected not later than ten days after attachment.23 In effect, section 547(e)(2)(A) gives the secured party a ten-day grace period following attachment to perfect its security interest. However, if the secured party perfects outside the grace period, the transfer will be deemed made at the time of perfection under section 547(e)(2)(B).24 Finally, if the secured party fails to perfect before the later of the expiration of the grace period and the commencement of the bankruptcy case, the transfer will be deemed to have been made "immediately before the date of the filing of the petition."25

The operation of section 547(e) is best explained by illustration.

23. 11 U.S.C. § 547(e)(2)(A) (Supp. V 1981). Although at first glance this provision appears similar to U.C.C. § 9-301(2), closer inspection reveals significant differences. Thus, the 10-day grace period under the Code is limited to purchase money security interests, while section 547(e)(2)(A) applies broadly to all transfers. Additionally, the 10-day period under the Code begins to run when the debtor "receives possession of the collateral," while under the Bankruptcy Reform Act the grace period starts "at the time [the] transfer takes effect between the transferor and the transferee." Compare U.C.C. § 9-301(2) (1972) with 11 U.S.C. § 547(e)(2)(A) (Supp. V 1981). See also U.C.C. § 9-312(3)-(4) (1972). In a recent article, Professor Hogan criticized this failure of the New Act to conform to the Code:

If delivery is delayed the bankruptcy 10 days may well expire before the UCC period begins. This difference makes no sense. If creditors are misled at all by the delay it is unlikely that they would be misled from the time the transfer takes effect between the parties when the debtor-buyer may not be in possession of the goods. Further the careful secured party may simply contract to make the transfer take effect at the time of delivery and thus get the full 10 days recognized in bankruptcy. The Bankruptcy Reform Act should simply measure the ten day period in purchase money cases from the time of delivery of the goods.

Hogan, supra note 18, at 46. See also 11 U.S.C. § 547(c)(3)(B) (Supp. V 1981); Breitowitz, Article 9 Security Interests As Avoidable Preferences, 3 CARDOZO L. REV. 357, 395-99 (1982). One possible response to Professor Hogan's concern is to argue that a purchase money secured party who perfects after expiration of the 10-day bankruptcy grace period but within an applicable state grace period is protected in bankruptcy under section 547(e)(1)(B), because its security interest was never vulnerable to a lien creditor and therefore "was perfected from the time it attached, both under state law and under the definition of perfection in the preference statute." In re Burnette, 14 Bankr. 795, 802 (Bankr. E.D. Tenn. 1981). But see In re Murray, 27 Bankr. 445, 447-48 (Bankr. M.D. Tenn. 1983).


25. 11 U.S.C. § 547(e)(2)(C) (Supp. V 1981). This section insures that the transfer will be treated as a prepetition transfer for purposes of section 547(b)(4) of the New Act. 11 U.S.C. § 547(b)(4) (Supp. V 1981) (to be preferential, a transfer must be made on, or within certain periods of time before, the filing of the bankruptcy petition).
Suppose, for example, that on January 1, 1982, secured party (SP) makes a loan to debtor (D) and obtains an adequate security agreement creating a security interest in certain items of D’s business equipment. On January 5, 1982, SP duly files a financing statement to perfect its security interest in the equipment, and on April 4, 1982, D files a bankruptcy petition. Under section 547(e) (2) (A), the security interest is deemed to have been transferred on January 1, 1982, because SP perfected within ten days after the security interest attached to the equipment and became enforceable between D and SP.26

Suppose further that instead of filing on January 5, 1982, SP waits until January 15, 1982 to perfect its security interest. Now section 547(e) (2) (B) applies, and the transfer is deemed to have been made on January 15, 1982, the time of perfection, for purposes of preference analysis.27

Finally, suppose that SP neither files a financing statement nor otherwise perfects its security interest before commencement of the bankruptcy case on April 4, 1982. These added facts trigger section 547(e) (2) (C), and the transfer is deemed to have been made “immediately before” the filing of the April 4 bankruptcy petition, because the security interest was not perfected at the time of bankruptcy and the ten-day grace period had already expired.28

Obviously, section 547(e) can have a critical impact on a transfer under preference attack. Under the provision, timely perfected security interests will be tested for preferential effect as of the date of the creation of the security interest; however, security interests perfected outside the ten-day grace period will suffer the test as of the date of perfection.

For example, consider the probable effect of section 547(e) on the three hypotheticals posed immediately above. The first transfer, which was perfected within the ten-day grace period on January 5, 1982, is not a section 547(b) preference. Since it is deemed to have been made on January 1, 1982, when the loan was made and the security interest was created, both the antecedent debt and ninety-day preference period requirements are lacking.29 However, the latter two transfers are probably section 547(b) preferences, because they are deemed to have been made, respectively, on January 15, 1982, and April 4, 1982, and therefore are treated as

29. 11 U.S.C. § 547(b) (2), (b) (4), (e) (2) (A) (Supp. V 1981).
having been given within ninety days of bankruptcy on account of the January 1, 1982 antecedent indebtedness.30

B. Section 547(c)(1) and Substantially Contemporaneous Perfection

1. The Developing Case Law

Under the law of preferences, security interests given in exchange for contemporaneous value and perfected more than ten days after their creation are schizophrenic. Factually, they are not preferential, because they have been transferred for new value and, therefore, not on account of an antecedent debt. However, under the legal fiction authored by section 547(e) of the Bankruptcy Reform Act, their timing is postponed until the date of perfection, and, when bankruptcy ensues within ninety days thereafter, they take on the character of section 547(b) preferences.

The developing case law in bankruptcy reflects the tension that is created by this friction between the factual and fictional personae of these security interests. The focal point of this controversy in the cases is a provision of the Bankruptcy Reform Act that almost certainly was not designed to apply to the problem of delayed perfection, section 547(c)(1).31

Section 547(c)(1) provides an exception from preference attack

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Moreover, the transfer described in the third hypothetical is also avoidable under section 544(a) of the New Act, the so-called “strong-arm clause,” which confers upon the trustee the rights and powers of a judicial lien creditor “as of the commencement of the case.” 11 U.S.C. § 544(a)(1) (Supp. V 1981). Under U.C.C. § 9-301(1)(b), an unperfected security interest is subordinate to the rights of “a person who becomes a lien creditor before the security interest is perfected.” U.C.C. § 9-301(1)(b) (1972). See also U.C.C. § 9-301(2) (1972), 11 U.S.C. § 546(b) (Supp. V 1981). Thus, since in the third hypothetical SP’s security interest was unperfected at the time of bankruptcy, it is subordinate to the trustee’s rights as a hypothetical lien creditor. Conversely, the security interests described in the first two hypotheticals are not subject to avoidance under section 544(a), because they were perfected prior to bankruptcy, and, therefore, prior to the existence of the trustee’s lien creditor status. See Hogan, supra note 18, at 41-42.

31. Section 547(c)(1) provides:

(c) The trustee may not avoid under this section a transfer—
(1) to the extent that such transfer was—
(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
for an otherwise preferential transfer to the extent that such transfer was: (1) intended by the parties to be a contemporaneous exchange for new value, and (2) in fact a “substantially contemporaneous exchange.” The sparse legislative history of this provision indicates that it has a rather limited purpose—protection of persons who transfer contemporaneous value to the debtor in exchange for the debtor’s personal check. However, when section 547(c)(1) is read together with the definitions of the terms “transfer” and “new value,” it is obvious that the substantially contemporaneous exchange exception has a much longer reach than that suggested by its inconclusive legislative history.

For example, section 547(c)(1) appears to codify the holdings of two leading cases decided under the Former Act, Dean v. Davis and National City Bank v. Hotchkiss. In the Dean case, the Supreme Court held that the transfer of a mortgage deed of trust covering most of the debtor’s property was not a preference even though it was not executed and recorded until more than a week after the loan secured thereby had been made. Since the parties had from the outset intended a secured transaction, and the transfer of the mortgage was “substantially contemporary” with the making of the loan, the Court concluded that the transfer had not

32. The term “new value” is defined in section 547(a)(2):

(2) “new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation.

33. See House Report, supra note 7, at 373, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6329. This protection is probably unnecessary, because contemporaneous payment by check is not a true credit transaction and therefore should not be treated as a transfer on account of an antecedent debt for purposes of section 547(b)(2). See 124 Cong. Rec. S.34900 (1978); 124 Cong. Rec. 32,400 (1978); P. Murphy, CREDITOR’S RIGHTS IN BANKRUPTCY § 10.08, ¶ 10-6 (1980).

34. See supra note 8.


36. 11 U.S.C. § 547(a)(2) (Supp. V 1981) (emphasis added) defines the term “new value” as including not only “money or money’s worth in goods, services, new credit,” but also “release by a transferee of property previously transferred to such transferee.” See supra note 32.


38. 242 U.S. 438 (1917).

been made on account of an antecedent debt. Conversely, in *Hotchkiss* the Court held that a preference resulted when a lender made an unsecured loan to the debtor in the morning and, after learning of the debtor's financial difficulties, demanded and received a transfer of security later the same day. Since the parties did not originally intend the loan to be secured, the subsequent transfer of security was on account of an antecedent indebtedness and therefore preferential.

As in *Dean* and *Hotchkiss*, the key inquiry under section 547(c)(1) is whether the parties at the outset intended a contemporaneous exchange. If it is determined that a contemporaneous exchange was intended, the transferee will be protected against the trustee's preference attack, provided the exchange was completed within a reasonable period of time. Thus, a potentially large number of transactions could be protected by section 547(c)(1). For example, in addition to mortgages and security interests created within a reasonable period of time following disbursement of the proceeds of an intended secured loan,

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40. 242 U.S. at 442-43.
41. 231 U.S. at 55-58.
42. See *In re Saco Local Dev. Corp.*, 25 Bankr. 878, 879 (Bankr. D. Me. 1982); *In re Fabric Buys of Jericho, Inc.*, 22 Bankr. 1013, 1016 (Bankr. S.D.N.Y. 1982); *In re Hersman*, 20 Bankr. 569, 572-73 (Bankr. N.D. Ohio 1982). Although interesting questions of proof of the intent element may arise in certain situations, see, e.g., *In re T.L Swartz Clothiers, Inc.*, 15 Bankr. 590 (Bankr. E.D. Va. 1981), the intent of the parties to exchange contemporaneous value should be easy to prove in the typical delayed perfection case. There, the secured party will usually have documentation, delivered at the closing of the loan, such as a note, a loan agreement, and a security agreement, evidencing the parties' intent to enter into a secured transaction.

43. The Bankruptcy Reform Act contains no guidance as to the meaning of "substantially contemporaneous exchange." The better-reasoned bankruptcy cases apply a case-by-case approach and consider all of the factors bearing on the commercial reasonableness of the delay. Compare *In re Arnett*, 13 Bankr. 287, 289 (Bankr. E.D. Tenn. 1981), aff'd, 17 Bankr. 912 (E.D. Tenn. 1982) (delay of 33 days held substantially contemporaneous where, after considering all of the surrounding facts, the court concluded that the transferee had "satisfactorily explained the delay"), with Matter of Christian, 8 Bankr. 816, 818 (Bankr. M.D. Fla. 1981) (delay of 14 days held not substantially contemporaneous because secured party applied for a certificate of title and lien recordation in the usual manner and did not take advantage of "an expedited service for an extra charge"). See infra note 57 and accompanying text.

44. See supra notes 38-41 and accompanying text. Delayed creation of security interests should be distinguished from delayed perfection thereof. A security interest which is created subsequent to disbursement of the proceeds of the loan being secured thereby will always be treated as a transfer on account of an antecedent debt under the timing rules of section 547(e), because the earliest possible date for the transfer is the date of creation, i.e., the date the transfer takes effect between the parties. 11 U.S.C. § 547(e)(2)(A), (a)(2)(B) (Supp. V 1981). For example, suppose *SP* loans *D* $100,000 on January 1, 1982,
substantially contemporaneous substitutions of collateral\textsuperscript{45} and slightly delayed cash payments for goods and services\textsuperscript{46} are probably covered by the exception.

However, the cases are almost evenly split on the question of application of section 547(c)(1) to security interests that are not perfected within the ten-day grace period established by section 547(e). One group of cases adopts a narrow view of the substantially contemporaneous exchange exception and simply refuses to apply it to security interests that are not timely perfected.\textsuperscript{47} The opinion of the bankruptcy court in \textit{Matter of Vance} is typical of the reasoning adopted by these cases. In \textit{Vance}, the secured party, Valley Bank, apparently made a purchase money loan to the debtor on November 18, 1981 to enable him to acquire a utility trailer. At the same time, a security agreement covering the trailer was entered into between the parties. However, it was not until fourteen days later, on December 2, 1981, that the bank's security interest was perfected by recordation on the certificate of title cov-

and that, although the parties have from the outset intended a secured transaction, a formal security agreement covering D's business equipment is not entered into until January 3, 1982. SP then immediately perfects. Under section 547(e)(2)(A), the security interest in the equipment is dated as of January 3, 1982, because it did not attach and become effective between the parties under the U.C.C. until D had signed an adequate security agreement. See 11 U.S.C. § 547(e)(2)(A) (Supp. V 1981); U.C.C. § 9-203(1)(a) (1972). Thus, this transfer is treated as having been made on account of an antecedent debt (the January 1, 1982 loan) under section 547(b)(2). 11 U.S.C. § 547(b)(2) (Supp. V 1981). However, section 547(c)(1) should protect this transfer from the trustee, because the parties intended a contemporaneous exchange for new value and the transfer of the security interest was in fact substantially contemporaneous. 11 U.S.C. § 547(c)(1) (Supp. V 1981). See \textit{supra} notes 38-41 and accompanying text.

\textsuperscript{45} Thus, for example, a creditor with a security interest in an item of business equipment who agrees to release his lien provided that the debtor obtains replacement collateral should be protected, so long as the switch is completed within a reasonable period of time. 11 U.S.C. § 547(a)(2), (c)(1) (Supp. V 1981). See 2 \textit{Norton, Bankruptcy Law and Practice} § 32.13, at 39-41 (1981); P. \textit{Murphy, supra} note 34, § 10.14, at 10-14.


\textsuperscript{48} 22 Bankr. 26 (Bankr. D. Idaho 1982).
Bankruptcy ensued on January 29, 1982, and, when the bank sought relief from the automatic stay in order to foreclose its security interest in the trailer, the trustee counterclaimed seeking to set aside the lien as a preference under section 547(b).

The court began its analysis by citing section 547(e)(2)(B) and noting that, since the security interest had not been perfected during the ten-day grace period following its creation, the transfer of the security interest in the trailer occurred on December 2, 1981, the date of perfection, and, therefore, was made on account of the antecedent loan of November 18, 1981. Since the other elements of section 547(b) were satisfied, a preference had been established.

Next, the court held that the bank's purchase money security interest was not protected by section 547(c)(3), the so-called enabling loan exception, because it was not perfected within ten days after attachment as required by that provision.

Finally, the court considered the bank's argument that the security interest in the trailer "is exempt from avoidance under § 547(c)(1) because it was intended as a contemporaneous exchange for new value and was in fact a substantially contemporaneous exchange." Bankruptcy Judge Young held that section 547(c)(1) does not apply to security interests perfected outside the bankruptcy grace period and explained his reasoning as follows:

To ignore the date of actual perfection of security interests would be to negate the operation of subsection (e) establishing when a transfer occurs for purposes of § 547 as well as to make superfluous the grace periods of § 547(c)(3) and § 547(e)(2)(A). Moreover, such a stance invites litigation over the question when in fact a transfer is "substantially contemporaneous..."
ous." There are no objective standards for determining this fact and the courts are having great difficulty in determining the issue, creating much uncertainty in the law.53

A second group of cases rejects the reasoning of Vance and applies the substantially contemporaneous exchange exception to belatedly perfected security interests that otherwise qualify for its protection.54 For example, in In re Arnett,55 the debtors obtained a loan from Security Mutual Finance Corporation and granted it a security interest in an automobile on December 10, 1980. However, due to circumstances beyond its control, the finance corporation was unable to perfect its security interest in the automobile until January 12, 1981, thirty-three days later. The delay was caused by the holder of a prior security interest in the automobile who, after being paid off by Security Mutual, waited nearly a month before releasing its lien and returning the certificate of title covering the vehicle.56

The court held that the transfer was protected by section 547(c)(1), because Security Mutual and the debtors intended a contemporaneous exchange for new value and, in light of the surrounding facts and circumstances, the exchange was "in fact" sub-

53. Id. Another reason sometimes articulated by courts for not applying the substantially contemporaneous exchange exception to belatedly perfected security interests is the following statement concerning section 547(c)(1) contained in the House Report of the Judiciary Committee accompanying the bill which became the Bankruptcy Reform Act:

The first exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. Normally, a check is a credit transaction. However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous," and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, U.C.C. § 3-503(2)(a), that will amount to a transfer that is "in fact substantially contemporaneous."


55. 13 Bankr. at 268. Security Mutual perfected its security interest immediately upon receiving the certificate of title from the prior lienholder, the American National Bank and Trust Company. Id. at 269.
stantially contemporaneous. Since Security Mutual had “satisfactorily explained the delay” and there was “no risk of fraud or misrepresentation,” the court concluded that “equity demands that Security Mutual prevail against the trustee.”

2. A Proposed Solution

The task of resolving the controversy that has developed in the case law interpreting section 547(c)(1) in the context of belatedly perfected security interests is a demanding one, because both sides offer reasonable interpretations of the statutory design. Moreover, difficult questions of policy concerning the relationship in bankruptcy between secured and unsecured creditors are involved. However, after reconsidering my views on several occasions, I have concluded that the better-reasoned cases are those that adopt a more flexible solution to the problem and apply section 547(c)(1) broadly to security interests, whenever perfected, that meet its requirements.

Bankruptcy preference law is one of the major battlegrounds in the war between secured and unsecured creditors. One of the primary goals of bankruptcy law is to minimize the social costs of bankruptcy by spreading the risk of the debtor's financial collapse among all of his or her creditors. To the extent that security interests are recognized and enforced in bankruptcy, these costs are borne disproportionately by unsecured creditors. However, bankruptcy law is not intended to interfere with the legitimate contractual expectations of creditors who bargain for security against the risk of the borrower’s insolvency. Bankruptcy is the litmus test of security, and to deny protection to secured creditors in bankruptcy would have a potentially disastrous effect on the cost and availability of both consumer and commercial credit.

57. 13 Bankr. at 269. The court summarized the facts and circumstances supporting its ruling:

There was absolutely no delay on Security Mutual's behalf. It took prompt action by calling the bank several times. It filed to perfect its security interest on the day it received the title certificate. It was impossible to file any sooner. Any delay was caused by the United States Postal Service and the bank. It was the Christmas season. Mail was slow. The bank had a number of employees off for the holidays or sickness.

Id.

58. Id.


60. See id.

61. If a trustee in bankruptcy were permitted to use his avoiding powers to nullify, without restriction, the priorities for which the bankrupt's secured creditors have bargained, the use of secured transactions as a financing device would be significantly chilled—perhaps frostbit-
Bankruptcy preference law, and in particular grey areas such as section 547(c)(1), should be construed purposively and with due regard being given to the interests of both secured and unsecured creditors.

Under what circumstances are the purposes of preference law undercut by recognition of security interests in bankruptcy? Let's look at three cases.

Case 1

First, consider the classic example of preferential security, a security interest given during the preference period to secure a pre-existing, unsecured obligation. This transfer offends preference policy because it is the equivalent of a cash payment made on the eve of bankruptcy to a general creditor—assets of the debtor that ought to be included in the bankruptcy distribution to all creditors have been encumbered for the benefit of a favored creditor who had no legitimate expectation of preferential treatment.62

Case 2

In contrast, when a creditor extends new credit on a secured basis to the debtor and immediately perfects its lien, no preference results;63 although the debtor's assets are being tied up for the benefit of a particular creditor, the secured party legitimately expects, and receives, protection in bankruptcy for two reasons: (1) it never intended to extend unsecured credit to the debtor—the security was negotiated in connection with the making of the loan and was an integral factor in the secured lender's calculation of the risk and cost of the credit; and (2) the transaction did not deplete the debtor's estate available for distribution to other creditors, because the debtor received equivalent value, i.e., the proceeds of the loan, contemporaneously with the transfer of the security.

Case 3

Now consider the problem of delayed perfection of a security interest given by the debtor to secure a contemporaneous extension of credit. Is this scenario more like Case 1 or Case 2 above?

*ten. Like contracts of other sorts, secured contracts embody a set of expectations that cannot be ignored without frustrating the very purpose such transactions are designed to serve. Obviously this result would be undesirable from the standpoint of secured creditors; but more importantly, it would also harm debtors by significantly restricting the availability of credit.

62. See supra notes 2 & 16 and accompanying text.
63. See supra notes 17-30 and accompanying text.
Clearly, the answer is the latter—there is no difference in economic effect between Case 2 and Case 3, because in each case contemporaneous exchanges of equivalent value have been made. Yet, it is just as clear that section 547(e) treats Case 3 as a transfer on account of an antecedent debt, if the security interest is not perfected within the ten-day grace period following attachment. What is being accomplished by this employment of section 547(e), and how does section 547(c)(1) figure in the design?

The ten-day rule for perfection of security interests established by section 547(e) is an attempt by Congress to employ preference law to avoid a class of transfers, so-called "secret liens," that are not true preferences. Bankruptcy condemns true preferences because of their economic consequences—the goal of preference law is to prevent a general, unsecured creditor from improving its position, at the expense of other, similarly situated creditors, by a

64. Id. Belatedly perfected security interests were less susceptible to preference attack under the Former Act, because in order to set aside a preference the trustee was required to establish that the transferee had reasonable cause to believe that the debtor was insolvent at the time of the transfer. Bankruptcy Act of 1898, ch. 541, § 60b, 30 Stat. 552 (codified at 11 U.S.C. § 55b (1976)), repealed by, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, title IV, § 401(a), 92 Stat. 2652. See generally 3 COLLIER ON BANKRUPTCY ¶¶ 60.52 to 60.55 (14th ed. 1977). Proof of the "reasonable cause" requirement was all too frequently an insurmountable hurdle for the trustee under the Former Act. See House Report, supra note 7, at 178, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6138-39. As a result of this failure of proof, many transfers that were actually preferential in all other respects escaped invalidation in bankruptcy. Consequently, one of the most fundamental policies of the Former Act, equality of distribution among similarly situated creditors, was compromised severely. Id.; 3 COLLIER, supra, § 60.52, at 1056. Section 547(b) of the Bankruptcy Reform Act eliminates the reasonable cause to believe requirement in the case of the typical, ninety-day preference. 11 U.S.C. § 547(b) (Supp. V 1981). The test is retained only with respect to preferential transfers made to insiders "between 90 days and one year before the date of the filing of the petition." 11 U.S.C. § 547(b)(4)(B) (Supp. V 1981). Thus, fairness to other creditors of the debtor, as demonstrated by the economic impact of the transfer on the debtor’s bankruptcy estate, and not the subjective guilt or innocence of the preferred transferee, is the basic test of a preferential transfer under the Bankruptcy Reform Act. See HOUSE REPORT, supra note 7, at 178, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6138-39. However, the United States Senate has recently passed legislation containing language reinserting the reasonable cause to believe test as an essential element of all avoidable preferences. S. 1013, 98th Cong., 1st Sess. § 511 (1983); S. 445, 98th Cong., 1st Sess. § 211 (1983). See also H.R. 1800, 98th Cong., 1st Sess., § 111 (1983). If enacted into law, this misguided legislation would cripple the policy of equitable distribution and might well render obsolete many of the provisions of section 547. See, e.g., 11 U.S.C. § 547(c),(f) (Supp. V 1981).

65. "The purpose [of section 547(e)(2)(B)] is to protect other creditors who may rely on the public record by punishing the negligent creditor who fails to record his security interest within ten days." In re Hall, 14 Bankr. 186, 187 (Bankr. S.D. Fla. 1981).
bankruptcy-eve transfer of property of the debtor. However, unperfected transfers of security are condemned because of the danger that other creditors dealing with the debtor will be misled by the unencumbered facade of the debtor’s assets. The existence of an antecedent debt, which is at the vortex of preference policy, is, therefore, completely irrelevant to the Bankruptcy Reform Act’s hostility toward secret liens. Since the primary function of section 547(e) is to date transfers for purposes of the antecedent debt requirement, it is an inappropriate tool for dealing with the secret lien problem in bankruptcy. Moreover, it is clear that in at least some cases belatedly perfected security interests that offend neither preference nor secret lien policy are treated as preferential under sections 547(b) and 547(e)(2)(B). It is the thesis of this Article that purposive construction of section 547(c)(1) may aid in the resolution of this breakdown in bankruptcy policy.

As discussed above, the case law has produced competing interpretations of the relationship between section 547(c)(1) and the delayed perfection problem. Each of those views is the result of a reasonable attempt to construe a hopelessly ambiguous enactment. However, only one of those views, that broadly applying the substantially contemporaneous exchange exception to belatedly perfected security interests, is true to both the spirit, as well as the letter, of the relevant provisions of the Bankruptcy Reform Act.

The cases refusing to apply the substantially contemporaneous exchange exception to the delayed perfection problem support their holdings with debatable conclusions concerning the intent of Congress. They take the position that the legislative history of section 547(c)(1) and the enactment of ten-day grace periods for

66. See Nimmer, supra note 15, at 293-94. An exchange of concurrent value between debtor and creditor, such as a transfer of collateral to secure a loan being made at the same time, does not offend this policy, because the secured party has not improved its preexisting position at the expense of other creditors. Id. at 294.
68. See id. at 737, 757-59. Using preference law as a device for invalidation of secret liens presents problems both of overkill and underkill. Thus, overkill occurs when rigid application of the 10-day rule allows the trustee to employ his or her preference powers to avoid security interests that offend neither preference nor secret lien policy. Underkill can result when one or more of the elements of a preference is absent in a case involving a secret lien. Suppose, for example, that a security interest is created on January 1, 1981, perfected on January 1, 1982, and bankruptcy is filed on April 15, 1982. Although this security interest remained a secret lien for a period of one year, it is not avoidable under section 547(b) unless the transferee is an insider, because the transfer did not occur during the 90-day, prepetition preference period. 11 U.S.C. § 547(b)(4)(A), (e)(1)(B), (e)(2)(B) (Supp. V 1981).
69. See supra note 53.
perfection of security interests in sections 547(e) and 547(c)(3) demonstrate that Congress intended the substantially contemporaneous exchange exception to protect only cash or quasi-cash transactions.\textsuperscript{70} This reasoning, although not unreasonable, is ultimately unpersuasive.

As discussed above, the legislative history of section 547(c)(1) is sparse and inconclusive; at most, it suggests that Congress did not have a clear understanding of the potential significance of the substantially contemporaneous exchange exception.\textsuperscript{71} Moreover, the argument that applying section 547(c)(1) to the delayed perfection problem would "make superfluous the grace periods of § 547(c)(3) and § 547(e)(2)(A)" also misses the mark. Since by definition section 547(c) applies only after the trustee has established a section 547(b) preference,\textsuperscript{72} application of section 547(c)(1) will always be in connection with a transfer that has already been determined to have been made on account of an antecedent debt under the timing rules of section 547(e).\textsuperscript{73} Section 547(c)(1) is intended to be inconsistent with section 547(e); its proper role is to protect recipients of substantially contemporaneous exchanges against the sometimes arbitrary lines drawn by the artificial timing rules of section 547(e).

Neither is there a fatal inconsistency between sections 547(c)(1) and 547(c)(3).\textsuperscript{74} Obviously, there is a substantial overlap


\textsuperscript{71} See supra notes 34-37 & 53 and accompanying text.

\textsuperscript{72} See supra note 15 and accompanying text.

\textsuperscript{73} 11 U.S.C. § 547(b)(2), (c)(1), (e) (Supp. V 1981). In fact, the sole function of section 547(c)(1) is to protect intended contemporaneous exchanges that, for one reason or another, are postponed (and, therefore, treated as having been made on account of an antecedent debt) under the timing rules of section 547(e).

\textsuperscript{74} The argument that there is such an inconsistency was articulated by Bankruptcy Judge Bayt in a recent decision:

The explicit reference by Congress in Section 547(c)(3) to enabling loans lends further support to the conclusion that Section 547(c)(1) is not applicable to the instant transaction. Through its enactment of Section 547(c)(3) Congress intended to make that section—not Section 547(c)(1)—applicable to an enabling loan situation. To conclude otherwise would render the provisions of Section 547(c)(3) "redundant and unnecessary."

In re Enlow, 20 Bankr. 480, 483 (Bankr. S.D. Ind. 1982). See also In re Davis, 22 Bankr. 644, 647-49 (Bankr. M.D. Ga. 1982); Matter of Vance, 22 Bankr. 26, 28 (Bankr. E.D. Tenn. 1982); Matter of Christian, 8 Bankr. 816, 819 (Bankr. M.D. Fla. 1981). In Enlow, the result of this reasoning was that a purchase money security interest, acquired on November 1, 1980 and perfected 12 days later on
between section 547(c)(3), which protects purchase money security interests that are perfected "before 10 days after" attachment,75 and a liberal construction of section 547(c)(1), which would protect all security interests created in exchange for new value and perfected within a commercially reasonable time thereafter. However, the several subsections of section 547(c) are intended to be cumulative,76 and there is sufficient room for the coexistence of both the substantially contemporaneous exchange and the enabling loan exceptions in the scheme of preference law in bankruptcy.77

A limited role for the substantially contemporaneous exchange exception is also denied by the extensive sweep of section

November 13, 1980, was set aside in bankruptcy as preferential, because it was not perfected within the 10-day grace periods established by sections 547(e)(2)(A) and 547(c)(3). 20 Bankr. at 481-84. The court's refusal to apply the substantially contemporaneous exchange exception under these circumstances does not serve any principle of sound bankruptcy policy, and, therefore, is needlessly Draconian.


76. The legislative history of section 547(c) makes it clear that the exceptions apply cumulatively: "Subsection (c) contains exceptions to the trustee's avoiding power. If a creditor can qualify under any one of the exceptions, then he is protected to that extent. If he can qualify under several, he is protected by each to the extent he can qualify under each." HOUSE REPORT, supra note 7, at 373, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, 5963, 6329. See In re Martella, 22 Bankr. 649, 651-52 (Bankr. D. Colo. 1982).

77. Thus, section 547(c)(3) provides absolute protection to purchase money security interests perfected within its 10-day grace period without regard to whether the transaction constitutes "in fact a substantially contemporaneous exchange." Consider the following example. On January 1, 1982, SP lends D $100,000 for the purpose of enabling D to purchase an item of business equipment from X. At the closing of the enabling loan, SP and D enter into an adequate security agreement covering the business equipment. However, D and X are unable to conclude their negotiations for the purchase of the equipment until February 10, 1982, when D purchases a specific item of equipment. SP files a financing statement and perfects its security interest in the collateral on February 11, 1982. Under section 547(e), the transfer of the security interest occurs on February 10, 1982, when D first obtained rights in the collateral and SP's security interest attached and became effective between the parties. See 11 U.S.C. § 547(e)(2)(A), (e)(3) (Supp. V 1981), U.C.C. § 9-201(1) (1972); supra notes 17-30 and accompanying text. The transfer of the security interest is therefore on account of an antecedent debt (the January 1, 1982 enabling loan), and apparently preferential under section 547(b). 11 U.S.C. § 547(b) (Supp. V 1981). See supra notes 29-30 and accompanying text. Moreover, section 547(c)(1) may not apply, because, at least arguably, the transaction is not in fact a substantially contemporaneous exchange. However, section 547(c)(3) should protect this purchase money security interest, because it was perfected before expiration of the 10-day grace period following attachment. 11 U.S.C. § 547(c)(3)(B) (Supp. V 1981). See A. COHEN, BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS §22-206.43[1], at 501-02 (1981).
547(c)(1)—the exception protects all “transfers,” including transfers of security interests,\(^7\) that are intended to be given in exchange for “new value,” including the extension of “new credit,”\(^8\) and that satisfy the requirement of substantial contemporaneity.\(^9\) Moreover, both equity and commercial reality\(^10\) demand application of the exception to the delayed perfection problem.

The legitimate contractual expectations of secured creditors who act to protect their interests within a commercially reasonable time should not be disregarded in bankruptcy unless some overriding purpose is served thereby. No such purpose is furthered by an inflexible approach to the delayed perfection problem. Security interests created in exchange for contemporaneous value and perfected within a commercially reasonable time offend neither preference nor secret lien policy in bankruptcy. Such security interests do not deplete the debtor's estate for the benefit of a particular creditor; neither do they create an unreasonable risk of misleading other creditors dealing with the debtor. It follows that they should be recognized and enforced in bankruptcy.

In order to achieve this goal, section 547(c)(1) should be construed to protect security interests transferred during the preference period\(^2\) to the extent that such security interests are

10. For example, the 10-day grace periods of sections 547(c)(3) and 547(e)(2)(A) appear to be particularly burdensome when applied to security interests in motor vehicles, trailers, mobile homes, boats, and other collateral covered by certificate of title legislation. Typically, these security interests are perfected by notation of the lien on the certificate of title covering the collateral, and not by the filing of an article 9 financing statement. See U.C.C. § 9-302(3)-(4) (1972); D. Epstein & J. Landers, supra note 10, at 256. A disproportionate number of the cases decided under the substantially contemporaneous exchange exception involve collateral covered by certificates of title. These cases demonstrate the need for a flexible approach to the delayed perfection problem, because, in at least some cases, moderate delays in perfection can occur in the ordinary course of business. See, e.g., In re Burnette, 14 Bankr. 795, 803 (E.D. Tenn. 1981) (secured party perfected its purchase money security interest 20 days after the sale, when it applied for a certificate of title; the court noted that “as a practical matter it may take a diligent secured party twenty days to perfect”); In re Arnett, 13 Bankr. 267 (Bankr. E.D. Tenn. 1981), aff'd, 17 Bankr. 912 (E.D. Tenn. 1982) (delay of 33 days was caused by the holder of a prior security interest who, after being paid off by the secured party, waited nearly a month before releasing its lien and returning the certificate of title covering the collateral).
(1) created in exchange for contemporaneous new value, and (2) perfected within a commercially reasonable time thereafter.

Under this test, the timing rules of section 547(e) will continue to play an important role in the delayed perfection scenario. Security interests perfected within the ten-day grace period will, in general, be entitled to absolute protection against the trustee, because their transfer will relate back to the date of attachment for purposes of the antecedent debt, preference period, and insolvency requirements of section 547(b). Furthermore, section 547(e) will still serve to help the trustee satisfy his or her burden of establishing a section 547(b) preference when perfection is delayed beyond expiration of the grace period. Thus, security interests perfected more than ten days after attachment will continue to date from perfection for purposes of the antecedent debt, preference period, and insolvency requirements.

However, once the trustee has established a section 547(b) preference, the proposed construction of section 547(c)(1) will permit the secured creditor to defend its belatedly perfected security against the trustee’s preference attack by demonstrating that the delay was within the bounds of commercial reasonableness (and thus, “in fact substantially contemporaneous”). If the transferee is unable to make the necessary showing of substantial contemporaneity, its belatedly perfected security will be set aside. Thus, the policy of protecting unsecured creditors against secret liens is achieved, without interfering with the legitimate contractual expectations of secured creditors, by limiting the trustee’s power to invalidate belatedly perfected security interests to those cases in which delays in perfection unreasonably increase the likelihood that unsecured creditors will be misled.86

85. There seems to be some confusion as to the locus of the burden of proof under section 547(c). Some cases hold that section 547(c) creates affirmative defenses, and that, therefore, the transferee has the burden of pleading and proving that it “is entitled to the benefit of the exceptions.” In re Saco Local Dev. Corp., 25 Bankr. 876, 878 (Bankr. D. Me. 1982). See In re Ken Gardner Ford Sales, Inc., 10 Bankr. 632, 646 (Bankr. E.D. Tenn. 1981). However, another recent case holds that the trustee has the burden of establishing every element of a preference, and that this burden requires the trustee to establish that the transfer was not protected by section 547(c)(5). In re The Music House, Inc., 11 Bankr. 139, 140-141 (Bankr. D. Vt. 1980). See also 4 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 64.08[1], [2][e], at 64-46 to 64-47, 64-52 to 64-53 (1981).
86. In fact, it is open to question whether typical types of unsecured creditors, such as employees and small-scale suppliers, are ever likely to be misled by even lengthy delays in perfection of security interests, because such credi-
Defining substantial contemporaneity in terms of commercial standards softens the rigidity of the ten-day rule by excusing longer delays that are nevertheless reasonable under the circumstances of the particular case. All factors bearing on the reasonableness of the delay should be considered by the courts when making this determination. Typically, these factors will include: (1) the length and cause of the delay; (2) the likelihood that other creditors might have been misled by the delay; and (3) whether the secured party has acted in good faith and with diligence in attempting to comply with the perfection requirements of applicable state law. However, in striving for maximum flexibility, the bankruptcy courts should not lose sight of the ordinary meaning of the phrase "substantially contemporaneous"—lengthy delays in perfection should be tolerated, if at all, only in extreme cases in which the secured party is able to demonstrate that the delay was caused by circumstances beyond its control.

III. CONCLUSION

The Bankruptcy Reform Act's treatment of belatedly perfected security interests in personal property is enigmatic, because it attempts to employ preference law to avoid a class of transfers, so-called "secret liens," that are not true preferences. When a security interest is granted in exchange for contemporaneous value, preference policy in bankruptcy is not offended, because the transaction does not cause a depletion of the debtor's estate for the benefit of a particular creditor. However, the effect the timing rules of section 547(e) of the New Act is to treat most security interests perfected during the preference period and more than ten days after attachment as section 547(b) preferential transfers.

The bankruptcy cases are divided concerning the application of section 547(c)(1), the substantially contemporaneous exchange exception, to the delayed perfection problem. One line of cases applies the exception narrowly and refuses to extend it to security interests that are not perfected within the ten-day grace period established by section 547(e). However, a second line of cases applies the exception broadly to protect security interests that are

(1) created in exchange for contemporaneous new value, and (2) perfected within a commercially reasonable time thereafter.

This Article concludes that the cases broadly applying the substantially contemporaneous exchange exception should be followed, because the flexible approach adopted in those cases allows the courts to protect the legitimate contractual expectations of secured creditors who act to perfect their security interests within a reasonable period of time, without sacrificing the interests of unsecured creditors who might have been misled by unreasonable delays in perfection.