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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NC-10-1525-PaJuH
)
 BAY AREA GLASS, INC.,) Bk. No. 10-52701-SJ
)
 Debtor.)
 _____)
)
 WESTERN STATES GLASS CORPORATION)
 OF NORTHERN CALIFORNIA,)
)
 Appellant,)
)
 v.) **A M E N D E D**
) **O P I N I O N**
)
 AUDREY J. BARRIS, Chapter 7)
 Trustee,)
)
 Appellee.)
 _____)

Argued and Submitted on June 16, 2011
at San Francisco, California

Filed - June 28, 2011
Amended - June 30, 2011¹

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: _____
 Joseph Patrick Thompson argued for appellant,
 Western States Glass Corporation of Northern
 California.
 Barry Milgrom of Luce, Forward, Hamilton & Scripps
 LLP, argued for appellee, Audrey J. Barris.

Before: PAPPAS, JURY and HOLLOWELL, Bankruptcy Judges.

¹ Amended to delete the word "statutory" at page 6, line 9.

1 PAPPAS, Bankruptcy Judge:
2

3 Creditor Western States Glass Corp. of Northern California
4 ("Western") appeals the decision of the bankruptcy court
5 disallowing its secured claim under § 502(d)² because its
6 judgment lien constituted an avoidable preference under § 547(b).
7 Because § 547(c)(9) does not create an exception to avoidance
8 under these facts, we AFFIRM.
9

10 **FACTS**

11 On January 14, 2010, Western obtained a default judgment for
12 \$5,820.74 against Bay Area Glass, Inc. ("Debtor"), from the
13 California Superior Court.³ To aid in enforcing the judgment,
14 Western obtained an "Order to Appear for Examination" ("ORAP")
15 from the clerk of the state court, on February 19, 2010,
16 directing a representative of Debtor to appear before the court
17 to provide information about its assets. Debtor's agent was
18 served with the ORAP on February 22, 2010.

19 Debtor filed a chapter 7 bankruptcy petition on March 18,
20 2010. Among other property, Debtor listed an \$18,000 bank
21 account on its schedule B. Western initially filed an unsecured
22 proof of claim in Debtor's bankruptcy case on March 29, 2010, for
23

24 ² Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ³ The record in this appeal is sparse. The background
27 information provided to the Panel consists of a copy of the
28 Superior Court's form judgment. No information concerning the
nature of the parties' state court dispute was provided.

1 \$5,845.74.⁴ On April 12, 2010, however, Western amended its
2 proof of claim to assert a secured claim based on Cal. Code Civ.
3 P. § 708.110(d), which provides that, when an ORAP is served on a
4 judgment debtor, a lien is created on the debtor's personal
5 property.

6 On October 13, 2010, the chapter 7 trustee, Audrey J. Barris
7 ("Trustee"), filed an objection to Western's secured claim.
8 Trustee acknowledged that service of the ORAP created a lien
9 against Debtor's personal property under state law, including its
10 bank account proceeds. However, Trustee asserted that Western's
11 secured claim should be disallowed pursuant to § 502(d) because
12 Western's lien constituted an avoidable preference under
13 § 547(b). Western responded to Trustee's objection by conceding
14 that \$370.74 of its secured claim was avoidable and should be
15 disallowed, but arguing that § 547(c)(9) creates an exception to
16 Trustee's power to avoid the balance of its secured claim in the
17 amount of \$5,475.⁵

18 On December 8, 2010, the bankruptcy court conducted a
19 hearing at which it sustained Trustee's objection to Western's
20 claim. An order disallowing Western's secured claim in full was
21 entered on December 10, 2010. Western filed a timely appeal.

22 ///

23 ///

25 ⁴ Western's claim included the judgment amount, plus post-
26 judgment court clerk's fees.

27 ⁵ The § 547(c)(9) dollar limit is subject to periodic
28 adjustment. See § 104(a). It was \$5,475 at the time Debtor's
bankruptcy case was filed.

1 an avoidable transfer. § 502(d);⁶ see generally Comm. of
2 Unsecured Creditors v. Commodity Credit Corp. (In re KF Dairies,
3 Inc.), 143 B.R. 734, 735-37 (9th Cir. BAP 1992).

4 Section 547 of the Code governs preferences. In particular,
5 a trustee may avoid as a preference any prepetition transfer of a
6 debtor's interest in property that meets the requirements of
7 § 547(b).⁷ For preference purposes, a "transfer" includes both

8
9 ⁶ Section 502(d) provides:

10 Notwithstanding subsections (a) and (b) of this
11 section, the court shall disallow any claim of any
12 entity . . . that is a transferee of a transfer
13 avoidable under section . . . 547 . . . of this title,
14 unless such entity or transferee has paid the amount,
15 or turned over any such property, for which such entity
16 or transferee is liable under section . . . 550 . . .
17 of this title.

18
19 ⁷ Section 547(b) provides:

20 Except as provided in subsection (c) and (i) of this
21 section, the trustee may avoid any transfer of an
22 interest of the debtor in property—
23 (1) to or for the benefit of a creditor;
24 (2) for or on account of an antecedent debt owed by the
25 debtor before such transfer was made;
26 (3) made while the debtor was insolvent;
27 (4) made—
28 (A) on or within 90 days before the date of the
filing of the petition; or
(B) between ninety days and one year before the
date of the filing of the petition, if such
creditor at the time of such transfer was an
insider; and
(5) that enables such creditor to receive more than
such creditor would receive if—
(A) the case were a case under chapter 7 of this
title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to

(continued...)

1 "voluntary and involuntary" transfers of an interest in the
2 debtor's property via "the creation of a lien." § 101(54)(A),
3 (D). See Batlan v. Bledsoe (In re Bledsoe), 569 F.3d 1106, 1113
4 (9th Cir. 2009) (explaining definition of "transfer" is extremely
5 broad); Hopkins v. Suntrust Mortg., Inc. (In re Ellis), 441 B.R.
6 656, 662 (Bankr. D. Idaho 2010) (explaining that BAPCPA amended
7 the definition of "transfer" to include "the creation of a
8 lien"). Western does not dispute that, under these facts, its
9 acquisition of the lien satisfied the requirements of § 547(b)
10 and constituted a preference. Instead, Western claims the
11 benefit of an exception to a trustee's power to avoid a
12 preference found in § 547(c)(9), which provides:

13 The trustee may not avoid . . . a transfer if, in a
14 case filed by a debtor whose debts are not primarily
15 consumer debts, the aggregate value of all property
that constitutes or is affected by such transfer is
less than \$5,475.

16 Western reads § 547(c)(9) to except from avoidance as a
17 preference every transfer from a debtor to a creditor in
18 nonconsumer cases to the extent of \$5,475. The bankruptcy court
19 disagreed with Western's construction of this statute, and so do
20 we.

21 Interpretation of the Bankruptcy Code begins with an
22 examination of its language. Ransom v. FIA Card Servs., N.A., ___
23 U.S. ___, 131 S. Ct. 716, 723-24 (2011) (quoting United States v.
24 Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)). If that
25 language, interpreted according to its plain meaning, is

26 _____
27 ⁷(...continued)
28 the extent provided by the provisions of this
title.

1 unambiguous, no further interpretation of the Code by the court
2 is needed. Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004);
3 Bonner Mall P'ship v. U.S. Bancorp Mortg. Co. (In re Bonner Mall
4 P'ship), 2 F.3d 899, 908 (9th Cir. 1993). In other words, an
5 interpretation of the Code's plain language, if not absurd, is
6 sufficient, and courts may not rewrite the statute or insert
7 additional words. Lamie, 540 U.S. at 538.

8 Read plainly, the language of § 547(c)(9) provides a
9 monetary threshold for determining which transfers are avoidable
10 in nonconsumer bankruptcy cases.⁸ Put another way, as applied,
11 § 547(c)(9) protects transfers of less than \$5,475 in amount from
12 recovery by a trustee, even though they may otherwise meet the
13 statutory requirements for a preference. By the same token, the
14 statute provides that transfers of \$5,475 or more are entirely
15 avoidable.

16 When Congress intends to limit avoidance to only a portion
17 of a particular transfer, it knows how to do so. Several
18 § 547(c) avoidance exceptions include "to the extent" language
19 limiting what portion of a particular transfer may be avoided.
20 See §§ 547(c)(1)-(5), (c)(7). Of note, Congress did not include
21 that language in § 547(c)(9). See Hamilton v. Lanning, __ U.S.
22 __, 130 S. Ct. 2464, 2472 (2010) (inferring from Congress'
23 decision not to use particular language in one Code section that
24 it did not intend to achieve the result produced by that language
25 in other Code sections); see also Ray v. Cannon's, Inc. (In re

26
27 ⁸ The parties do not dispute that this was a business
28 bankruptcy case, or, in other words, a case in which the debts
were not primarily consumer debts.

1 Vickery), 63 B.R. 222, 223 (Bankr. E.D. Tenn. 1986) (pointing out
2 the absence of "to the extent" language in § 547(c)(8) while
3 highlighting its presence in many of the other § 547(c)
4 exceptions). We therefore infer that, because it omitted the "to
5 the extent" language in § 547(c)(9), Congress did not intend to
6 limit the avoidance of preferential transfers to the extent of
7 \$5,475. Rather, by not employing the limiting language, Congress
8 expressed an intent to allow trustees to avoid entire transfers
9 when the transferred amount was \$5,475 or more.

10 For small-in-value preferential transfers, the litigation
11 costs to pursue or defend against trustee avoidance actions is
12 typically not justifiable compared to any benefit that may inure
13 to the prevailing party as a result of such actions. See In re
14 Vickery, 63 B.R. at 223 (discussing the likely policy reasons for
15 a similar monetary threshold for avoidance of preferences in
16 consumer debt cases). A policy that discourages litigation over
17 relatively insignificant transfer amounts may promote commercial
18 and judicial efficiency, not only by reducing litigation over
19 nominal amounts, but also by preventing creditors with smaller
20 claims from waiving otherwise meritorious defenses simply because
21 the costs associated with defending against trustees' avoidance
22 actions exceed any anticipated benefits. Christians v. Am.
23 Express Travel Related Servs. (In re Djerf), 188 B.R. 586, 588
24 (Bankr. D. Minn. 1995) (discussing the policy behind
25 § 547(c)(8)'s preference threshold in consumer bankruptcy cases).
26 Interpreting § 547(c)(9) consistently with that policy is not
27 absurd.

28 While Western's interpretation of § 547(c)(9) is also not

1 absurd, it would require the Panel to add to the statute's
2 language to provide, in essence, that "the trustee may not avoid
3 any portion of a transfer, in a case filed by a debtor whose
4 debts are not primarily consumer debts, to the extent the
5 aggregate value of all property that constitutes or is affected
6 by such transfer is less than \$5,475." The Panel declines to
7 adopt such a construction. The statute's language is plain and
8 provides an appropriate result without such additions.

9
10 **II. Decisions interpreting § 547(c)(8) support the bankruptcy
court's interpretation of § 547(c)(9).**

11 Section 547(c)(9) was adopted as part of the Bankruptcy
12 Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").
13 Pub. L. 109-8, 119 Stat. 23 § 409 (Apr. 20, 2005). Few courts
14 have interpreted this provision of the Code, and those that did
15 focused on whether transfers may be aggregated to reach the
16 § 547(c)(9) "monetary floor," rather than analyzing the purpose
17 of the \$5,475 figure. See, e.g., Transcon. Refrigerated Lines,
18 Inc. v. Dantone (In re Transcon. Refrigerated Lines, Inc.), 438
19 B.R. 520, 521-22 (Bankr. M.D. Pa. 2010) (discussing aggregation,
20 noting the Court had "not found any reported cases analyzing
21 [§] 547(c)(9)"). But, while there is a dearth of § 547(c)(9)
22 decisional analysis, our reading of this statute is buoyed by the
23 courts' interpretations of § 547(c)(8), the language of which
24 mirrors § 547(c)(9) with two exceptions: its lower monetary
25 amount, and its application solely to consumer cases. Where
26 Congress employs the same language in sequential subsections of a
27 statute, we may infer that it intended the same meaning for the
28 language in both subsections. See N. Sports, Inc. v. Knupfer (In

1 re Wind N' Wave), 509 F.3d 938, 944 (9th Cir. 2007); Samson v. W.
2 Capital Partners, LLC (In re Blixseth), __ B.R. __, 2011 WL
3 2420999, at *4 (9th Cir. BAP May 25, 2011) (citing Consol.
4 Freightways Corp. of Del. v. Aetna, Inc. (In re Consol.
5 Freightways Corp. of Del.), 564 F.3d 1161, 1165 (9th Cir. 2009)).

6 Section 547(c)(8) provides:

7 The trustee may not avoid . . . a transfer if, in a
8 case filed by an individual debtor whose debts are
9 primarily consumer debts, the aggregate value of all
property that constitutes or is affected by such
transfer is less than \$600[.]

10 One of the first decisions to interpret this language⁹ was a
11 case involving facts very similar to those in the present case.
12 In Vickery, the debtor paid a creditor \$957.45 within ninety days
13 of filing for bankruptcy relief, and the trustee sought to
14 recover the transfer as a preference. 63 B.R. at 222. In
15 defense, the creditor argued that the language of what is now
16 § 547(c)(8) protected all preferential transfers up to \$599.99,
17 such that the trustee could only avoid the excess above that
18 amount. Id. at 223.

19 The Vickery court concluded that \$600 was a threshold,
20 distinguishing transfers that may be avoided from those that may
21 not:

22 The wording of the exception clearly makes \$600 a
23 cut-off point on the trustee's right to recover and
24 more importantly on his decision to bring suit. A
25 [transfer] of \$599 is protected but a [transfer] of
26 \$601 is not. Creditors who have received preferential
[transfers] of less than \$600 can expect not to be sued
by the trustee. Likewise, the trustee is given a good
reason not to bring suit for amounts so small that

27 ⁹ When Vickery was decided, this provision appeared as
28 § 547(c)(7) in the Code. It was renumbered in 1994.

1 litigation costs do not justify bringing suit.
2 In re Vickery, 63 B.R. at 223. Many other decisions have come to
3 the same conclusion. Maus v. Joint Twp. Dist. Mem'l Hosp. (In re
4 Maus), 282 B.R. 836, 840 (Bankr. N.D. Ohio 2002) (“[N]owhere in
5 the statute is it stated or even implied that the recovery of a
6 preference may only be for the amount which is in excess of the
7 [s]ix [h]undred dollar (\$600.00) threshold of § 547(c)(8).”); In
8 re Djerf, 188 B.R. at 588 (“Courts interpreting the exception
9 embodied in § 547(c)(8) . . . have generally concluded that its
10 design is to permit a relatively small in dollar amount or a
11 nominal prepetition transfer to a consumer creditor to withstand
12 attack under § 547(b) notwithstanding its preferential effect.”);
13 Via v. Colonial Am. Nat’l Bank (In re Via), 107 B.R. 91, 95
14 (Bankr. W.D. Va. 1989) (finding § 547(c)(8) does not provide a
15 \$600 “safe harbor” every time a transfer is made, and that, “in
16 light of the [statute’s] clear wording,” transfers greater than
17 \$600 are entirely avoidable); Johnson v. Ford Motor Credit Co.
18 (In re Johnson), 53 B.R. 919, 921 (Bankr. N.D. Ill. 1985)
19 (“[Section 547(c)(8)’s] language clearly and unambiguously
20 expresses Congress’s intent to permit relatively small transfers
21 of the debtor’s property before the filing of the bankruptcy
22 petition to stand regardless of whether they have the effect of
23 preferring one creditor over another.”).

24 Section 547(c)(8) is not implicated in this appeal. But its
25 language, in all relevant respects, is identical to § 547(c)(9),
26 and the two Code provisions should be interpreted in like
27 fashion. Consistent with the decisions construing § 547(c)(8),
28 the Panel concludes that, in nonconsumer cases, § 547(c)(9)

1 clearly and unambiguously expresses Congress' intent to prevent
2 trustees from avoiding transfers of less than \$5,475, even though
3 those transfers are otherwise preferences. Had Congress intended
4 that a safe harbor be established to insulate all transfers from
5 avoidance up to \$5,475, it would have clearly said so.

6
7 **CONCLUSION**

8 The bankruptcy court did not err in its interpretation of
9 § 547(c)(9) or in determining that the transfer by which Western
10 gained its lien was avoidable by Trustee. As a result, the
11 bankruptcy court correctly disallowed Western's secured claim
12 under § 502(d). We AFFIRM the decision of the bankruptcy court.
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