

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

January 7, 2013

\_\_\_\_\_  
No. 12-60234  
\_\_\_\_\_

Lyle W. Cayce  
Clerk

STINSON PETROLEUM COMPANY, INCORPORATED

Debtor

\_\_\_\_\_  
THE UNSECURED CREDITORS COMMITTEE

Plaintiff

v.

COMMUNITY BANK, ELLISVILLE MISSISSIPPI, a/k/a Community Bank

Defendant - Appellee

v.

DEREK A. HENDERSON,

Trustee - Appellant

\_\_\_\_\_  
Appeal from the United States District Court  
for the Southern District of Mississippi  
\_\_\_\_\_

1 Before BARKSDALE, DENNIS, and GRAVES, Circuit Judges.

2 PER CURIAM:\*

\_\_\_\_\_  
\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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3 Stinson Petroleum Company (“Stinson”) engaged in a check-kiting scheme  
4 using checking accounts Stinson held with Community Bank (“Community”) and  
5 Bank of Evergreen (“Evergreen”).<sup>1</sup> Stinson perpetrated the kite by depositing  
6 worthless checks into its account with Community that were drawn on its  
7 account with Evergreen while simultaneously depositing worthless checks into  
8 the latter that were drawn on the former. By circulating worthless checks  
9 between the two accounts, and by taking advantage of provisional credits that  
10 both banks extended to deposits not yet collected, Stinson created the impression  
11 of a positive account balance while substantial debt accrued.

12 As kites are prone to do, the scheme eventually collapsed. Evergreen was  
13 the first to uncover the kite, so it did not incur any losses. Community, by  
14 contrast, was not so lucky. Community ultimately determined that, because of  
15 the kite, Stinson accumulated an overdraft of between \$6 and \$7 million in its  
16 account with Community. Community met with Stinson and Evergreen and  
17 agreed to receive two wire transfers worth \$3.5 million from Stinson’s Evergreen  
18 account.

19 Stinson subsequently filed for bankruptcy under Chapter 11, and a  
20 committee of unsecured creditors (“the Creditors”) commenced an adversary  
21 proceeding against Community seeking to avoid the two wire transfers as  
22 avoidable preferences under 11 U.S.C. § 547(b). The bankruptcy was later  
23 converted to Chapter 7, and bankruptcy trustee Derek A. Henderson (“the  
24 Trustee”) was substituted as the plaintiff. Ultimately, both the bankruptcy court

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<sup>1</sup> “Check kiting consists of drawing checks on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Just before the checks are returned for payment to the first bank, the kiter covers them by depositing checks drawn on the account in the second bank. Due to the delay created by the collection of funds by one bank from the other, known as the ‘float’ time, an artificial balance is created.” *United States v. Stone*, 954 F.2d 1187, 1188 n.1 (6th Cir. 1992).

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25 and the district court concluded that the wire transfers were not avoidable  
26 preferences, and the Trustee appealed.

27 At issue is whether Community, because of the wire transfers, improved  
28 its position, meaning that it fared better than it would have fared under  
29 Stinson's Chapter 7 liquidation. The Bankruptcy Code provides that the Trustee  
30 has the burden of demonstrating that Community would have received less  
31 under Chapter 7 than it did via the prepetition transfers. We conclude that the  
32 lower courts did not clearly err in determining that the Trustee failed to satisfy  
33 this burden and therefore AFFIRM the judgment of the district court.

34 **BACKGROUND**

35 Evergreen became suspicious of Stinson's activity sometime around the  
36 weekend of July 4, 2009 and froze the company's account two days later.  
37 Consequently, the kite collapsed. Before Community learned that Evergreen  
38 had uncovered the check-kiting scheme and, by returning checks for insufficient  
39 funds, taken steps to protect itself, Community continued to grant Stinson  
40 provisional credit, of which Stinson availed itself. This resulted in Stinson's  
41 overdraft with Community, which the bank determined to be between \$6 and \$7  
42 million.

43 In light of this debt, Community met with representatives from Stinson  
44 and Evergreen and agreed to receive a direct payment of \$3.5 million via two  
45 wire transfers from Stinson's account with Evergreen. The first wire transfer  
46 totaled \$1,992,863 and included a notation in the written instructions that read,  
47 "payment for checks #2226, 2231, 2229," three checks drawn from Stinson's  
48 Evergreen account and deposited in its Community account on June 30, 2009.  
49 The second wire transfer totaled \$1,507,137 and included a notation in the  
50 written instructions that read, "payment of returned checks." According to  
51 testimony later heard by the bankruptcy court, the purpose of the wire transfers

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52 was to reimburse Community for the eighteen checks Evergreen returned to  
53 Community after the kite collapsed.

54 Stinson later filed for Chapter 11 bankruptcy, at which point the Creditors  
55 commenced their adversary proceeding against Community, the prosecution of  
56 which was eventually charged to the Trustee once the bankruptcy was converted  
57 from Chapter 11 to Chapter 7. Both the Trustee and Community cross-moved  
58 the bankruptcy court for summary judgment, but the court denied both motions.  
59 The parties tried the wire-transfer claims before the bankruptcy court over the  
60 course of two days. Noteworthy here, Community's senior vice president  
61 testified at trial that the bank may have been able to collect the \$3.5 million via  
62 Chapter 7.

63 The bankruptcy court found that the wire transfers were not avoidable  
64 preferences. Specifically, the bankruptcy court found that, because Community  
65 granted provisional credit to Stinson and because Stinson took advantage of this  
66 credit, Community held a perfected, first-priority security interest in the  
67 eighteen returned checks and their proceeds and that the Trustee had failed to  
68 prove that the transfers were not intended to satisfy Community's security  
69 interest. Consequently, the bankruptcy court ruled that the wire transfers did  
70 not deplete Stinson's bankruptcy estate and did not improve Community's  
71 position relative to how the bank would have fared via Chapter 7. The district  
72 court affirmed the bankruptcy court's ruling. The district court observed that  
73 the Trustee had the burden of proving that Community would have received less  
74 than \$3.5 million via Chapter 7 liquidation and concluded that "the record  
75 contains scant evidence to that effect." The Trustee timely appealed.

76 **STANDARD OF REVIEW**

77 We review a bankruptcy appeal from the district court "applying the same  
78 standard to the bankruptcy court's findings of fact and conclusions of law that  
79 the district court applied." *In re Morrison*, 555 F.3d 473, 480 (5th Cir. 2009).

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80 Namely, we review “findings of fact . . . for clear error[] and . . . conclusions of  
 81 law . . . *de novo*.” *Id.* We review mixed questions of law and fact *de novo*. *In re*  
 82 *San Patricio Cnty. Cmty. Action Agency*, 575 F.3d 553, 557 (5th Cir. 2009).  
 83 Whether a transfer constitutes an avoidable preference is a question of law;  
 84 however, we review the fact question underlying any element of the Trustee’s  
 85 preference claim for clear error. *See In re Ramba, Inc.*, 416 F.3d 394, 401-02 (5th  
 86 Cir. 2005).

87 “A finding of fact is clearly erroneous only if on the entire evidence, the  
 88 court is left with the definite and firm conviction that a mistake has been  
 89 committed.” *In re Duncan*, 562 F.3d 688, 694 (5th Cir. 2009) (internal quotation  
 90 marks omitted). If the bankruptcy court’s view of the evidence “is plausible in  
 91 light of the record viewed in its entirety, [we] may not reverse it even though  
 92 convinced that had [we] been sitting as a trier of fact, [we] would have weighed  
 93 the evidence differently.” *In re Martin*, 963 F.2d 809, 814 (5th Cir. 1992)  
 94 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)) (internal  
 95 quotation marks omitted). In fact, “[if] there are two permissible views of the  
 96 evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.*  
 97 (quoting *Anderson*, 470 U.S. at 574) (internal quotation marks omitted).

## 98 DISCUSSION

### 99 A.

100 The Trustee’s preference claim is based on Section 547(b), which provides:

101 (b) Except as provided in subsections (c) and (I) of this section,  
 102 the trustee may avoid any transfer of an interest of the debtor in  
 103 property—

- 104 (1) to or for the benefit of a creditor;  
 105 (2) for or on account of an antecedent debt owed by the  
 106 debtor before such transfer was made;  
 107 (3) made while the debtor was insolvent;  
 108 (4) made—

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- 109 (A) on or within 90 days before the date of the filing  
110 of the petition; or
- 111 (B) between ninety days and one year before the date  
112 of the filing of the petition, if such creditor at the  
113 time of such transfer was an insider; and
- 114 (5) that enables such creditor to receive more than such  
115 creditor would receive if—
  - 116 (A) the case were a case under chapter 7 of this title;
  - 117 (B) the transfer had not been made; and
  - 118 (C) such creditor received payment of such debt to  
119 the extent provided by the provisions of this title.

120 11 U.S.C. § 547(b).

121 “Section 547(b) . . . allows a trustee to recover as a preferential payment  
122 certain transfers made by a debtor to a creditor within the ninety-day period  
123 prior to bankruptcy.” *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030,  
124 1033 (5th Cir. 1987). Its purpose is twofold: (1) it permits a trustee to avoid pre-  
125 bankruptcy transfers occurring on the eve of bankruptcy so as to discourage  
126 creditors “from racing to the courthouse to dismember the debtor during his slide  
127 into bankruptcy”; and (2) it ensures fair distribution among the creditors. *Union*  
128 *Bank v. Wolas*, 502 U.S. 151, 161 (1991) (quoting H.R. REP. NO. 95-595, at 177  
129 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138) (internal quotation marks  
130 omitted).

131 In this case, Community conceded at trial that the Trustee could prove the  
132 first four elements of § 547(b) and disputed only the Trustee’s claims under §  
133 547(b)(5). Accordingly, at issue is “the requirement that before a trustee in  
134 bankruptcy [may] avoid a preferential payment, the trustee must establish that  
135 the payment enabled the creditor to receive more than the creditor would have  
136 received upon liquidation under Chapter 7 of the bankruptcy code.” *Braniff*  
137 *Airways*, 814 F.2d at 1034 (footnote omitted). This test is often referred to as the

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138 “greater percentage test” or the “improvement in position” test. *See, e.g., In re*  
139 *El Paso Refinery, LP*, 171 F.3d 249, 253 (5th Cir. 1999); *In re Clark Pipe &*  
140 *Supply Co.*, 893 F.2d 693, 698 (5th Cir. 1990). Importantly, the Trustee bears  
141 the burden on this point. 11 U.S.C. § 547(g); *Braniff Airways*, 814 F.2d at 1034  
142 n.3.

143 Under this test, the bankruptcy court was required “to construct a  
144 hypothetical Chapter 7 liquidation [based on the evidence that the parties  
145 presented at trial] and determine what the creditor would have received had the  
146 transfers not taken place.” *In re N.A. Flash Found. Inc.*, 298 F. App’x 355, 359  
147 (5th Cir. 2008) (citing *In re ML & Assocs., Inc.*, 301 B.R. 195, 202 (Bankr. N.D.  
148 Tex. 2003)). “If the creditor receives a greater percentage of its debt as a result  
149 of the prepetition transfer than it would have in a bankruptcy distribution, the  
150 transfer is preferential.” *Id.* (citing *In re El Paso Refinery*, 171 F.3d at 253-54).

151 B.

152 In analyzing whether Community received more via the wire transfers  
153 than it would have received under Chapter 7, we must “consider how the debt  
154 would have been treated in a Chapter 7 liquidation.” *Braniff Airways*, 814 F.2d  
155 at 1034. Here, Community’s status as Stinson’s creditor is the locus of the  
156 inquiry because “a fully secured creditor who receives a prepetition payment  
157 does not receive a greater percentage than he would have in a bankruptcy  
158 proceeding.” *In re El Paso Refinery*, 171 F.3d at 254. This is “because as a fully  
159 secured creditor, [Community] would have recovered 100% payment in a  
160 bankruptcy proceeding.” *Id.* Accordingly, “[p]ayments to a fully secured creditor  
161 are not preferential because the creditor does not receive more than he would in  
162 a Chapter 7 liquidation.” *Braniff Airways*, 814 F.2d at 1034 (alteration in  
163 original) (quoting *In re Mason & Dixon Lines, Inc.*, 65 B.R. 973, 977 (Bankr.  
164 M.D.N.C. 1986)) (internal quotation marks omitted).

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165 Relevant here is section 75-4-210(a) of the Mississippi Code, which  
166 provides:

- 167 (a) A collecting bank has a security interest in an item and any  
168 accompanying documents or the proceeds of either:
- 169 (1) In case of an item deposited in an account, to the extent to  
170 which credit given for the item has been withdrawn or  
171 applied;
  - 172 (2) In case of an item for which it has given credit available for  
173 withdrawal as of right, to the extent of the credit given,  
174 whether or not the credit is drawn upon or there is a right of  
175 charge-back; or
  - 176 (3) If it makes an advance on or against the item.

177 MISS. CODE ANN. § 75-4-210(a). The Trustee acknowledges that this provision  
178 means that “a bank that extends provisional credit on a deposited check prior to  
179 actually collecting funds on that check automatically obtains a perfected security  
180 interest in the check and its proceeds” and that this is precisely the situation in  
181 which Community found itself. Nonetheless, and despite case law providing that  
182 a fully secured creditor who receives a prepetition payment has, as a matter of  
183 law, not received a preferential transfer, *see In re El Paso Refinery*, 171 F.3d at  
184 254; *Braniff Airways*, 814 F.2d at 1034, the Trustee argues that Community  
185 could not guarantee when and whether it would have received any payment and  
186 thus faults the district court for improperly assuming that Community would  
187 have received \$3.5 million from Stinson via Chapter 7.

188 We do not accept the Trustee’s argument. The relevant inquiry is whether  
189 Community, because of the \$3.5 million wire transfers, improved its position  
190 relative to how well it would have fared in a hypothetical Chapter 7 liquidation.  
191 Specifically, the Trustee has the burden of showing “that the payment enabled  
192 the creditor to receive more than the creditor would have received upon  
193 liquidation under Chapter 7 of the bankruptcy code.” *Braniff Airways*, 814 F.2d  
194 at 1034 & n.3. Phrased another way, *the Trustee* must prove that Community

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195 would have received less under Chapter 7. Here, the district court did not  
196 improperly assume that Community would have recouped \$3.5 million via  
197 Chapter 7; rather, the district court did not clearly err in concluding that the  
198 Trustee failed to satisfy his burden of proving that Community would not have  
199 received at least \$3.5 million in a Chapter 7 liquidation.

200 Given that the Trustee concedes that Community was a fully secured  
201 creditor by operation of section 75-4-210 of the Mississippi Code, the prepetition  
202 payment Community received is, as a matter of law, not a preferential transfer  
203 avoidable under 11 U.S.C. § 547(b). *See In re El Paso Refinery*, 171 F.3d at 254;  
204 *Braniff Airways*, 814 F.2d at 1034. Moreover, the district court's conclusion is  
205 supported by the record. Community's senior vice president testified that the  
206 bank may have been able to collect the \$3.5 million via Chapter 7. Given "two  
207 permissible views of the evidence, the [bankruptcy courts]'s choice between them  
208 cannot be clearly erroneous." *In re Martin*, 963 F.2d at 814 (quoting *Anderson*,  
209 470 U.S. at 574) (internal quotation marks omitted). We therefore conclude that  
210 the lower courts did not clearly err in determining that the \$3.5 million wire  
211 transfers were not avoidable preferences under § 547(b).

**CONCLUSION**

212  
213 For these reasons, we AFFIRM the judgment of the district court.