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E. F. Corporation V. Smith: Voidable Preference And The Problems Of Antecedent Indebtedness Under § 60(A)

E. F. CORPORATION V. SMITH: VOIDABLE PREFERENCE AND THE PROBLEMS OF ANTECEDENT INDEBTEDNESS UNDER § 60(a)

One of the purposes underlying the Bankruptcy Act[1] is to bring about an equitable distribution of the debtor's estate among his creditors.[2] To implement this purpose, the trustee in bankruptcy has the power under § 60[3] of the Act to void preferential transfers made "to or for the benefit of a creditor for or on account of an antecedent debt."[4] The problem of antecedent indebtedness has arisen recently both in cases involving after-acquired property which secured advances made prior to or contemporaneous with security agreements and in cases where advances were made subsequent to the security agreement but prior to the acquisition of the collateral.[5] Generally, the question in these cases has been when the transfer of the security

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[1] 11 U.S.C. § 1 et seq. (1970).

[2] Sampsell v. Imperial Paper Color Corp., 313 U.S. 215, 219 (1941); 3 W. COLLIER, BANKRUPTCY § 60.01, at 743 (14th ed. 1974) [hereinafter cited as COLLIER].

[3] 11 U.S.C. § 96 (1970).

[4] Section 60 states in pertinent part:

> a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.
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> (2) For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. . . .
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> b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. . . .

11 U. S. C. § 96 (1970).

[5] *See, e. g., In re* Wilco Forest Mach., Inc., 491 F.2d 1041 (5th Cir. 1974); *In re* King-Porter Co. 446 F.2d 722 (5th Cir. 1971); DuBay v. Williams, 417 F.2d 1277 (9th Cir. 1969); Grain Merchants v. Union Bank & Sav. Co., 408 F.2d 209 (7th Cir.), *cert. denied*, 396 U.S. 827 (1969). The "after-acquired" cases have been commented on at

interest by the debtor is made in order to determine whether that transfer is contemporaneous with or after the creation of the debt itself. Since the creation of the debt usually occurs at a fixed time under those circumstances, the time at which the transfer of the security interest by the debtor is deemed to have been made has been dispositive of the antecedent debt issue.

In contrast, in *E. F. Corporation v. Smith*,[6] the issue of antecedent indebtedness arose where collateral, in existence at the time the security agreement was executed, was pledged to secure debts which might result from services subsequent to the security agreement as well as those for past-performed services by the creditor. The Tenth Circuit in *E. F. Corporation* held that since the transfer of the security interest took place at the time the services were performed rather than at the time of the agreement, the transfer was within four months of bankruptcy and thus voidable under § 60. However, the court did not deal with the issue of antecedent indebtedness. Consideration of that question would have compelled a different result in the case.

The creditor in *E. F. Corporation*, Elmer Fox & Company, entered into a security agreement with the bankrupt, Rosen Oil Corporation, in November 1971. Prior to that date, Fox had rendered accounting services to Rosen for which the latter still owed $20,000. In order to secure the old debt and in contemplation of future accounting services, Rosen gave Fox a note for $40,149.44 secured by a mortgage and security interests in certain oil properties. Future services were rendered and the parent of the bankrupt, Rosen Petroleum Corporation, was billed $16,110 on February 28, 1972 and $3,900 on May 25, 1972. The petition in bankruptcy was filed on May 26, 1972.

As the financing and collecting arm of Fox, the E. F. Corporation filed a proof of claim[7] and a reclamation petition[8] alleging secured

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great length. It is not the purpose of this comment to address the problems raised in those cases. An excellent treatment of them is provided in Countryman, *Code Security Interests in Bankruptcy*, 75 COM. L.J. 269 (1970).

[6] 496 F.2d 826 (10th Cir. 1974).

[7] A creditor who has a claim against the bankrupt's estate must file a claim for satisfaction of the debt. Sections 57 (a), (b) of the Bankruptcy Act, 11 U. S. C. § 93 (1970), require that the creditor file a written and signed statement in either the court of bankruptcy where the proceedings are pending or before the referee if the case has been referred. The statement must set forth the creditor's claim and whether any payments have already been made on it. Also, the statement constitutes prima facie evidence of the validity and amount of the claim.

[8] To be distinguished from a proof of claim is a petition for reclamation. Such petition seeks the release of particular property held by the bankruptcy receiver or trustee. 2 H. REMINGTON, BANKRUPTCY § 721, at 147 (6th ed. 1953) [hereinafter cited

status and seeking the collateral pledged on the note given to Fox in November 1971. The referee denied secured status to the E. F. Corporation except as to $8,000 which had remained unpaid on the debt pre-dating the November 1971 agreement. Thus, the E.F. Corporation was held to be unsecured as to the entire amount due for accounting services performed within the four-month period preceding the bankruptcy petition.[9] The referee based his denial of secured status upon the finding that Fox had not been bound to perform future accounting services under the November 1971 agreement and that when Fox voluntarily performed the services within the four-month period, it had reasonable cause to know of Rosen's insolvency.[10] Accordingly, the referee held that the claim by the E. F. Corporation for secured status as to the services billed within the four-month period constituted an attempt to create an impermissible preference. The district court affirmed the referee's decision and the E. F. Corporation appealed to the Tenth Circuit Court of Appeals.

On appeal, E. F. Corporation contended that the debt created by the performance of accounting services within the four-month period immediately preceding the bankruptcy petition related back to the November 1971 agreement between Fox and Rosen.[11] The appellant argued that the debt should relate back to the November 1971 agreement because Fox had given value to Rosen on that date in the form of a binding commitment to render future accounting services.[12] E. F. Corporation thus contended that the perfection of Fox's security interest under local law took place outside the four-month period[13] and was therefore not a preference under § 60.

After upholding the lower court's award of $8,000 on the pre-November 1971 debt,[14] the Tenth Circuit rejected E. F. Corporation's

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as REMINGTON]. Accordingly, "[a]nyone who considers himself better entitled to the possession of particular property than the . . . trustee may apply to the court to have such property released to him." 5A REMINGTON § 2474, at 284. Therefore, the reclamation petition filed by the E. F. Corporation sought the release of the collateral which had secured the note given to Fox in November 1971.

[9] The Tenth Circuit focused on the services performed and billed within the four-month period preceding the bankruptcy petition because this is the relevant period in which a preference for creditors arises, if at all, under § 60(a). A finding of a transfer, § 60(a)(2), within the four-month period, coupled with the satisfaction of the other elements of § 60(a)(1) necessitates an analysis of the trustee's power to void transfers to creditors under § 60(b). See note 4 *supra*.

[10] 496 F.2d at 831. Under § 60(b), a creditor's knowledge or reason to know of the debtor's insolvency within the four-month period preceding bankruptcy is an essential requirement in order for the trustee to be able to void a § 60(a) preference. See note 4 *supra*.

[11] 496 F.2d at 830.

[12] *Id.*

[13] See notes 15 & 16 and accompanying text *infra*.

[14] *Id.* at 830.

relation-back contention. The court began its analysis by examining the issue of when the "transfer" from Rosen to Fox took place. Since a transfer, as defined in § 60(a)(2) of the Bankruptcy Act,[15] is made at the time when it becomes "so far perfected" that the transferee's rights are superior to any subsequent liens upon the transferred property, the court turned to state law to determine when the requisite perfection had occurred.[16] The pertinent state law was Article 9 of the Uniform Commercial Code as adopted in Kansas.[17] Under § 84-9-303(1) of the Kansas Code, a security interest is perfected "at the time it attaches." Attachment of a security interest as defined in § 84-9-204(1) does not occur until "value" is given. "Value" is defined in § 84-1-201(44) to include "a binding commitment to extend credit" and "consideration sufficient to support a simple contract."[18] The key issue for the Tenth Circuit, then, was whether value was given by Fox in November 1971 in the form of a binding commitment for future services or whether it was given within the four-month period when the services were actually performed. Relying upon and agreeing with the referee's and district court's findings that Fox had voluntarily performed its accounting services, the Tenth Circuit held that value was not given until the services were performed within the four-month period. Thus, the court held that the security interest attached within four months of bankruptcy and did not relate back to the November 1971 security agreement, and concluded that secured status for Fox as to the value of the accounting services rendered within the four-month period should be denied.[19]

While there is some doubt concerning both the Tenth Circuit's value analysis[20] and its conclusion that the debt accruing from the

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[15] See note 4 *supra*.

[16] The Tenth Circuit, citing McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945), correctly stated the general principle that state law decides when a security interest has been perfected for purposes of § 60 of the Bankruptcy Act. 496 F.2d at 830.

[17] KAN. STAT. ANN. ch. 84, § 1-101 et seq. (1965).

[18] KAN. STAT. ANN. ch. 84, § 1-201(44)(d) (1965).

[19] 496 F.2d at 831.

[20] The Tenth Circuit's "value" analysis was simply that because Fox was not bound to perform the future accounting services for Rosen, there was no value given within the meaning of § 84-1-201(44)(a) of the Kansas Code which states that a person gives value for rights if he acquires them "in return for a binding commitment to extend credit . . . ." Thus, the argument goes, the converse of § 84-1-201(44)(a) is that a person does not give value when he makes only a voluntary or optional commitment. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 35.6, at 937 (1965). The apparent simplicity of the court's value argument is deceptive, however, when § 84-1-201(44)(d) is examined. Under the sub-section, a person gives value for rights if he

performance of accounting services could not relate back to the 1971 security agreement,[21] other indicia, not relied upon by the court, could nevertheless support the court's holding. Specifically, the intent of Fox and Rosen as reflected in the terms of the security agreement and the rights of Fox to the collateral for the note prior to the four-month period lend support to the court's value analysis.

The intent of Fox and Rosen that value was not to be given by the former until the accounting services were actually performed is apparent from the terms of their security agreement.[22] The note from

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acquires them "in return for any consideration sufficient to support a simple contract." The question of whether sufficient consideration was given in return for a chattel mortgage received by a creditor was analyzed in *In re* Schindler, 223 F. Supp. 512 (E.D. Mo. 1963). There, the court held that the antecedent debt which the mortgage was to cover was sufficient consideration for the giving of the mortgage. *Id.* at 519. Therefore, there is at least a legitimate question as to whether the taking of the mortgage by Fox from Rosen to secure past and future indebtedness was value under § 84-1-201(44). The court in *E. F. Corp.*, however, did not address that aspect of the "value" question.

[21] Although apparently argued by the E. F. Corporation, the Tenth Circuit did not consider the value and relation back ramifications of § 9-204(5) of the U.C.C. which provides: "Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

Since *E. F. Corp.* involved the future performance of services and not advances of credit or loans of money, the future advance thrust of § 9-204(5) is arguably applicable only by analogy. However, the "or other value" language of that section clearly indicates that more than loans or advances are to be considered. The importance of § 9-204(5) with regards to *E. F. Corp.* is two-fold. First, the question as to whether Fox was bound to provide future accounting services or whether, as held by the Tenth Circuit, Fox merely performed them voluntarily within the four-month period is irrelevant. As one commentator has pointed out: "The obligation covered by a security agreement may include future advances or other value *whether or not the advances or value are optional or obligatory.*" 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-204:15, at 188 (2d ed. 1971) (emphasis added) [hereinafter cited as ANDERSON]. Secondly, and more importantly, case law decided under § 9-204(5) supports the argument that value given subsequent to a perfected security agreement relates back to the original agreement. *See, e.g.*, John Miller Supply Co. v. Western State Bank, 55 Wis. 2d 385, 199 N.W.2d 161, 163 (1972); Friedlander v. Adelphi Mfg. Co., 5 U.C.C. REP. SERV. 7, 10 (N.Y. Sup. Ct. 1968). Under that interpretation of § 9-204(5), the original loan or other giving of value and all subsequent value give rise to only one security agreement as opposed to the view that each future giving of value gives rise to a new or additional security agreement. 4 ANDERSON § 9-204:17, at 190.

[22] Although not present on the facts in *E. F. Corp.*, it is likely that the written terms of the security agreement may indicate an intent to secure subsequent indebtedness. A mortgage which stated that it was to cover "this or any other advances" was held to permit recovery by the creditor from the trustee in bankruptcy for funds advanced subsequent to the mortgage. *In re* Upton, [1973-1975 Transfer Binder] BANKR. L. REP. ¶ 65,399 (N.D. Ala. 1974). Deference to the terms of the security agreement is clearly envisioned by § 9-201 of the U.C.C. which states: "Except as

Rosen to Fox in November 1971 was for approximately twice the amount of the debt then owed by Rosen. Because there would be no reason to obtain a note and collateral securing twice the amount of a debt unless later debts were contemplated, it is clear that value, in the form of future accounting services to be rendered by Fox, was to be given subsequent to the security agreement and that the debts thus created were to be covered by the note given in November 1971. Furthermore, the Tenth Circuit's finding that Fox was not bound under the terms of the security agreement to perform future accounting services indicates that value was to be given upon performance of services in the future. That the parties could have made the terms of the security agreement binding, and thus determinative of when value was given under § 84-1-201(44)(a), supports the court's rationale. Therefore, the intent of Fox and Rosen as evidenced by the terms of the security agreement itself indicates that full value was not given in November 1971. Rather, the giving of value was to be completed upon performance of future accounting services.

In addition to the intent manifested by the terms of their agreement, the full value issue can be analyzed from the standpoint of the rights of Fox in the collateral prior to the four-month period. Regardless of whether Fox's commitment to provide services was voluntary, as held by the Tenth Circuit, or binding, Fox could not have demanded satisfaction of the note prior to the performance of $40,000 worth of accounting services. Since only $20,000 of services had been performed prior to the four-month period, Fox could only have demanded satisfaction to the extent of that indebtedness. Thus, prior to the four-month period, Fox had not given full value to Rosen as contemplated under the security agreement. Value was not fully given until all the accounting services had been performed.

While the Tenth Circuit's value analysis was arguably valid, the court erroneously failed to determine whether the element of antecedent indebtedness necessary for a § 60 preference was present in *E. F. Corporation.*[23] Indeed, the court's holding that full value was

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otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."

[23] The six elements required for a preference under § 60(a)(1) are: (1) a transfer, as defined in § 60(a)(2), of property by the debtor, (2) to or for the benefit of a creditor, (3) for or on account of an antecedent debt, (4) while the debtor is insolvent, (5) within four months of the filing of the petition in bankruptcy, (6) the effect of which will be to enable to creditor to obtain a greater percentage of his debt than another creditor in the transferee's same class. 11 U.S.C. § 96(a)(1) (1970); 3 COLLIER § 60.02, at 758-59. If any of the six elements is absent in a transaction between a creditor and the bankrupt, a preference does not exist. Bumb v. Valley Elec. Co., 419 F.2d 107, 108 (9th

not given until the accounting services were performed within the four-month period compels a finding that the transfer under § 60(a)(2) was for contemporaneous consideration[24] and was therefore a valid transfer that the trustee could not attack under § 60.[25]

The validity in bankruptcy of a security agreement which secured both current and future debts was analyzed by the Second Circuit in *Wolf v. Aero Factors Corporation*.[26] In that case, well before the four-month period the bankrupt and creditor had entered into a factoring agreement whereby the creditor would make loans from time to time with security for those loans supplied by the bankrupt's accounts receivable. Although some of the loans were made within the four-month period, the court held that there was no § 60 preference because the creditor had paid a fair and present consideration.[27] Thus,

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Cir. 1969); Gentry v. Bodan, 347 F. Supp. 367, 371 (W.D. La. 1972); 3 COLLIER § 60.36, at 912.

[24] A transfer is not deemed to have been made under § 60 of the Bankruptcy Act until value has been given. See notes 15-19 and accompanying text *supra*. Since the Tenth Circuit held that value was not given until within the four-month period and that the transfer occurred within that period, the transfer was for contemporaneous consideration.

[25] Interestingly enough, the issue of antecedent indebtedness with regards to past and future services secured in a security agreement may not arise at all under the proposed new Bankruptcy Act. H. R. REP. No. 10792, 93rd Cong., 1st Sess. (1973). Section 4-607(g)(1) of the proposed Act states: " 'Antecedent debt' is a debt incurred more than five days before a transfer paying or securing the debt. 'Antecedent debt' does not include (A) a debt for personal services . . . ." However, Professor Countryman suggests that, if understandable at all, such immunity from preference attack would apply only to the pre-bankruptcy debts owed to workmen such as wages and other compensation claims. He then adds that "what is not understandable is a policy which immunizes the payment of compensation claims of corporate executives, doctors, lawyers and plumbers from preference attack." Countryman, *Some Good and Some Bad Features of the Proposed New Bankruptcy Act*, 7 U.C.C. L.J. 213, 226-27 (1975). In accord with Professor Countryman's view that the new definition of antecedent debt should be narrowly construed is Comment 6 of the Commission on the Bankruptcy Laws of the United States:

> As a result of the definition [antecedent debt], payments to employees (with specified exceptions), utilities, and suppliers in the ordinary course of business are not subject to preference attack. Payments of those debts are payments of antecedent debts under the case law interpreting the Act, but are [now] protected since employees, trade creditors, and utilities ordinarily do not have reasonable cause to believe the debtor insolvent.

H.R. REP. No. 10792 at 169-70. Therefore, it would appear that the satisfaction of debts arising from a security agreement similar to the one in *E. F. Corp.* would not escape preference attack.

[26] 221 F.2d 291 (2d Cir. 1955).

[27] *Id.* at 291-92.

the transfer of the bankrupt's accounts receivable upon the making of the loans by the creditor within the four-month period was not for antecedent indebtedness. Subsequent cases have reaffirmed the *Wolf* rationale.[28]

Like that in *Wolf*, the consideration provided by Fox in *E. F. Corporation* in the form of later accounting services for Rosen was contemporaneous with the transfer within the four-month period and was not antecedent thereto. The giving by Rosen of the mortgage and security interests in November 1971 did not change the nature of the debt created by the accounting services performed within the four-month period. As one commentator has pointed out: "A transfer [in the § 1(30) meaning of the word][29] to secure a future advance is in a sense a transfer to a creditor in that it is made in contemplation of becoming a creditor . . . . Manifestly, however, it is not for an antecedent debt."[30] By this view, there was no indebtedness to Fox for the future accounting services until Fox provided consideration within the four-month period.

Since the antecedent debt requirement of § 60(1) had not been fulfilled at the time Rosen transferred the security interest within the four-month period, the question remains whether Fox could have recovered on the basis of possessing a perfected security interest against the trustee's exercise of his powers under § 70(c).[31] As the

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[28] *See, e.g.*, Gentry v. Bodan, 347 F. Supp. 367 (W.D. La. 1972) (a transfer of property to the creditor within the four-month period in exchange for a lease cancellation was a voidable preference only as to past rent due and not to the extent of relieving the paying of future rent); Ackman v. Walter E. Heller & Co., 307 F. Supp. 958 (S.D.N.Y. 1968) (citing *Wolf*, court held that where the creditor loaned money within the four-month period and was assigned accounts receivable and pledges of inventory, the assignments were not preferential under § 60).

[29] Apart from the definition of transfer regarding perfection of a security interest under § 60 of the Bankruptcy Act, see note 4 *supra*, "transfer" in the more physical sense of the actual giving of something as security is defined in § 1(30) of the Bankruptcy Act:

> "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or an interest therein . . . as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise . . . .

11 U.S.C. § 1(30) (1970).

[30] Rhode, *The Voidable Preference in Bankruptcy: The Attack by the Trustee and Defenses of the Creditor*, 37 REF. J. 118, 121 (1963).

[31] Under § 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c) (1970), the trustee has all the powers and rights, as of the date of the petition in bankruptcy, of a judgment or lien creditor of the bankrupt. Therefore, in *E. F. Corp.*, if Fox had not perfected its security interest prior to that date, its unperfected interest would have been subordinate to the interest of the trustee under § 9-301(1)(b)(3) of the Uniform Commercial Code.

Tenth Circuit correctly pointed out, state law determines when perfection of a security interest occurs.[32] The court then considered whether such perfection had occurred prior to the four-month period. However, the relevant inquiry should have addressed the issue of whether perfection occurred prior to bankruptcy because such perfection would have insulated the creditor's secured status from the trustee's attack.[33]

Under the Uniform Commercial Code as adopted in Kansas, § 84-9-303(1) provides that a security interest is perfected when it attaches and other perfection prerequisites have been met.[34] Attachment is defined in § 84-9-204(1) as requiring that there be an agreement that the security interest attach, that value be given, and that the debtor have rights in the collateral. Clearly, Rosen, the bankrupt debtor, had rights in the collateral securing the note at the time of the note's creation in November 1971; it still had those rights within the four-month period.[35] It is also clear that the note and agreement for the $40,000 contemplated that the security interest attach upon performance of the accounting services. The third requirement of § 84-9-204(1) was also met within the four-month period. Fox gave "value" upon performance of its services, since such would have been "consideration sufficient to support a simple contract" under § 84-1-201(44)(d).[36]

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[32] 496 F.2d at 830, *citing* McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945).

[33] Since a trustee under § 70(c) has only the rights of a judgment or lien creditor as of, and following, the date that the petition in bankruptcy is filed, a security interest perfected prior to that date would not be subordinate to the trustee's interest. 4 COLLIER § 70.51, at 617. That result is obvious from the language of § 9-301(1) of the Code which states that an "unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor . . . ." Conversely, a perfected security interest is not so subordinated.

[34] KAN. STAT. ANN. ch. 84, § 9-303(1) (1965). Section 84-9-303(1), in addition to the attachment and filing requirements, also requires that §§ 84-9-304, 305, 306 be complied with in order to perfect a security interest. However, those sections are not applicable to *E. F. Corp.*. Section 84-9-304 deals with filing which was already required of Fox by § 84-9-302(1). Section 84-9-305 refers to the situation where the secured party has possession of the collateral—which was not the case in *E. F. Corp.* Similarly, § 84-9-306, which deals with the security interest in the "proceeds" obtained from a disposition of the collateral, is not applicable in *E. F. Corp.* as there is no indication that Rosen had disposed of the collateral securing the November 1971 agreement.

[35] There is no hint of fraud on Rosen's part in November 1971 as to the actual existence of the property used as collateral for the note given to Fox. Likewise, there is no indication that Rosen parted with that property prior to the litigation.

[36] The Fifth Circuit in *In re* King-Porter Co., 446 F.2d 722 (5th Cir. 1971), held that where the security agreement was executed prior to advances by the creditor, value was given when the subsequent advances were actually made because that was

Once it was determined that Fox's security interest had attached within the four-month period, perfection then depended upon satisfaction of "all the applicable steps" as required by § 84-9-303(1).[37] Section 84-9-302(1) of the Code requires the filing, subject to certain exceptions not applicable in *E. F. Corporation*, of a financing statement in order to perfect a security interest. Because the Tenth Circuit affirmed the referee and district court in awarding the $8,000 still owing on the debt for services prior to November 1971,[38] it is apparent that Fox had perfected its security interest at least as to that portion of the note and accompanying collateral. Such perfection would have required, under § 84-9-302(1), the filing of a financing statement. Since only one note was given by Rosen to Fox for all the debts, past and future, filing as to the past debts should also have sufficed for perfection purposes as to the future debts. To require Fox to file separate financing statements after every service performed in order to meet § 84-9-302(1)'s filing requirement would seem unnecessary.[39] Subsequent creditors would be put on notice by the prior filing. Therefore, regarding the accounting services performed by Fox within the four-month period, the perfection filing requirement should have been deemed to have been met. On the basis of its perfected interest, E. F. Corporation's claim against the trustee as to the services performed within the four-month period should have been allowed.[40]

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when consideration had passed under § 1-201(44)(d) of the Uniform Commercial Code. 446 F.2d at 727 & n.7.

[37] See note 34 *supra*.

[38] 496 F.2d at 830.

[39] The official comments to the Uniform Commercial Code support this point about the prior filing by Fox:

> If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

UNIFORM COMMERCIAL CODE § 9-303, Comment 1.

An example of the notice resulting from filing is provided by *In re* Riss Tanning Corp., 468 F.2d 1211 (2d Cir. 1972). There, an advance clause in the security agreement stated that the collateral was security for a $25,000 note and "any other obligation or liability . . . due or to become due whether now existing or hereafter arising." The court held that the clause was sufficient to put a subsequent creditor on notice even though the debt to which the proceeds of the collateral were eventually applied was one which arose from an entirely different note. *Id.* at 1213. The notice in *E. F. Corp.* would be even more sufficient than that in *Riss* because Fox sought only to collect on the face amount of the note which Rosen's assets originally secured in November.

[40] The E. F. Corporation's claim should have been allowed because it was perfected prior to the date the petition in bankruptcy was filed and thus was not subject

That the Tenth Circuit did not reach this result may have not only serious commercial consequences but also may create doctrinal problems within § 60 of the Bankruptcy Act.

The commercial consequences of the Tenth Circuit's decision in *E. F. Corporation* can be illustrated by examining the after-acquired cases which the opinion attempted to distinguish.[41] Those cases essentially deal with the securing of present and future benefits to the debtor by transferring a security interest in all accounts receivable in existence at the time of the security agreement or which are to come into existence in the future. The cases hold that the transfer occurs at the date the financing statement is filed by the creditor. In all cases the filing takes place prior to the four-month period and the creditors are able to obtain satisfaction on their debts despite the fact that some of the collateral does not come into existence until within the four-month period.

The Tenth Circuit asserted that the after-acquired cases differ from the situation in *E. F. Corporation*, because in the former the debtors had received all benefits under the security agreement prior to the four-month period.[42] While this is true in some of the after-acquired cases, in others it is not.[43] For example, in *Grain Merchants v. Union Bank & Savings Company*[44] the debtor entered into a security agreement with the creditor bank more than one year before the filing of the petition in bankruptcy. Under the agreement, the bank was to make monthly loans to Grain Merchants secured by all of Merchants' accounts receivable in existence at the time of the agreement and all accounts receivable thereafter coming into existence. Monthly loans were made by the bank up to one month prior to the filing of the petition in bankruptcy. It would appear that Grain Mer-

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to the trustee's rights and powers under § 70(c). See notes 31-33 and accompanying text *supra*.

[41] See the cases cited in note 5 *supra*.

[42] 496 F.2d at 831.

[43] The confusion of the Tenth Circuit in *E. F. Corp.* in attempting to distinguish the after-acquired cases resulted from the court's failure to recognize that some security agreements contain both future-advance and after-acquired property clauses. *See, e.g., In re* Mid State Wood Prods. Co., 323 F. Supp. 853 (N.D. Ill. 1971); James Talcott Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972). Thus, under that type of security agreement both benefits and collateral would come into existence in the future. This is a sound transaction under Article 9 of the Code. As the court in *Talcott* stated: "[A] transaction between the parties may involve a combination of both of these. . . . There is nothing exclusive about [§ 336] 9-204 (3,5). Parties may use future-advance and after-acquired clauses, and they are a great convenience." 194 N.W.2d at 784.

[44] 408 F.2d 209 (7th Cir.), *cert. denied*, 396 U.S. 827 (1969).

chants received benefits in the form of loans from the creditor both before and during the four-month period. Thus, the Tenth Circuit's attempt to distinguish the after-acquired cases on this basis is tenuous.

More importantly, by stating that the after-acquired cases sought "to make security transactions conform to the legitimate needs of commerce,"[45] the Tenth Circuit attempted to show by implication that awarding E. F. Corporation its total claim on the Rosen debts would not have conformed to those needs of commerce. However, security agreements such as the one in *E. F. Corporation* conform to legitimate needs of commerce at least as much as the agreements in the after-acquired cases. Unlike the debtor in the after-acquired situation, the debtor in a case like *E. F. Corporation* already has the collateral at the time of the security agreement. It is beyond argument that a creditor is in a more secure position when the collateral is already in existence at the time of the agreement than when the agreement is secured by accounts receivable or other collateral which might later come into existence. Yet, incongrously, under the Tenth Circuit's reasoning only the latter type of creditor is held to be in the position which more conforms to the legitimate needs of commerce even though the former type had done everything possible to secure his position as a creditor.

The commercial alternatives available to a creditor and debtor in a situation like that found in *E. F. Corporation* are restricted by the Tenth Circuit's decision. One possibility is that the debtor could give immediate payment in full or could transfer the property to the creditor at the time of the security agreement. However, that would be unlikely where the debtor has not received all of the benefits at the time of the agreement. Alternatively, the creditor could obtain a note from the debtor secured only to the extent of debts already existing, with the future debts to be paid or secured as they come into existence. It would seem, however, that creditors would not be anxious to embrace this less-than-secured position because it would necessitate the making of a security agreement, in the absence of immediate payment, each time value was given in the form of services rendered. Accordingly, the necessary requirements for perfection under § 84-9-303,[46] and especially the filing under § 84-9-302, would be a much greater burden and inconvenience upon the creditor.[47] And in a

[45] 496 F.2d at 831, *citing* DuBay v. Williams, 417 F.2d 1277, 1289 (9th Cir. 1969).

[46] See note 34 *supra*.

[47] The inconvenience and time-consuming effect of the court's holding is not readily apparent in *E. F. Corp.* because only two debts were created subsequent to the

factual situation such as the one in *E. F. Corporation*, the creditor may choose not to enter into such security agreements at all. Since there existed a substantial unsecured debt owing from Rosen to Fox prior to the November 1971 agreement, it is apparent that Fox felt sufficiently insecure to demand a note and collateral securing that prior debt. Whether a creditor not wanting to deal with a debtor on a less-than-secured basis would be willing to create a string of security agreements in the future with the same debtor is doubtful.[48] In short, the commercial effect of the Tenth Circuit's decision in *E. F. Corporation* is to disfavor the long-term security agreement where all the collateral is in existence and made subject to the agreement but the creditor does not provide all the benefits until some time after the agreement is executed.

In addition to the commercial ramifications of the court's decision in *E. F. Corporation*, the finding that Fox had attempted to create an impermissible preference is unsound when analyzed within the framework of the policy underlying the Bankruptcy Act. The Act seeks to eliminate the ability of secret creditors to obtain satisfaction of their debts immediately before their debtor's bankruptcy.[49] This

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November 1971 security agreement. That was probably due to the nature of outside accounting services which might be performed only on a monthly or quarterly basis for a corporation. However, the inconvenience inherent in the Tenth Circuit's holding is brought into sharp focus by considering the situation where large amounts of shipping, freight, or similar services are provided for a corporation on a weekly or even more frequent basis. Notwithstanding the possibility of immediate payment each time the services are performed, a shipper may want to secure payment for his contemplated services well in advance of their actual performance. Under the court's holding in *E. F. Corp.*, however, the shipper would have to enter into a security agreement each time services were performed in order to secure eventual payment. This would be an intolerable burden on and consumption of the creditor's time and energies.

[48] There is a second alternative for creditors. Because of the results in the after-acquired cases, see note 5 *supra*, creditors could secure their future services by collateral that would later come into existence. While case law supports that type of security agreement, it is doubtful that a creditor would enter into it knowing, as in *E. F. Corp.*, that the debtor already has sufficient collateral to secure the whole agreement.

[49] This problem has long been a concern of the courts: "The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or other reason, among a debtor's creditors, who ought, in fairness, to stand on the same footing." Furth v. Stahl, 205 Pa. 439, 55 A. 29, 30 (1903).

The Bankruptcy Act meets the problem of secret creditors in two ways. Under the perfection requirement of § 60(a)(2), filing is required under the applicable state law in order to perfect a security interest. This puts other creditors on notice. Also, the four-month requirement of § 60(a) helps prevent what Collier refers to as the "scrambling and jockeying for position" by creditors when the debtor's financial position becomes apparent. 3 COLLIER § 60.01, at 750.

problem was not presented in *E. F. Corporation.*[50] Since Fox had adequately perfected the pre-November 1971 debt prior to the four-month period, other creditors were put on notice by his filing that Fox had a secured interest in $40,000 worth of Rosen's assets.[51]

Finally, with regard to developed doctrine under the Bankruptcy Act, *E. F. Corporation* is irreconcilable with cases which have held that where a mortgage on other security is given for both antecedent and future indebtedness, the voidable preference exists only as to the antecedent indebtedness even though the interest was not filed or recorded and the future consideration not given until within the four-month period.[52] *In re Great Lakes Lumber Company*[53] provided a clear example of this principle. There, the creditor gave two loans to the bankrupt, the first of which preceded the giving of a mortgage as security for the initial loan and any which might follow the date of the security agreement. The second loan was given almost one month after the creation of the security interest but within the four-month period. Accordingly, the court held that a preference arose only as to the earlier loan and that the loan subsequent to the security interest was an advance for present consideration.[54] The idea that present or contemporaneous consideration is not a voidable preference, given the satisfaction of the perfection requirements, has been continuously upheld by the courts.[55] In *E. F. Corporation*, contemporaneous consideration was given through performance of the accounting services within the four-month period. Since filing had already occurred, there was no voidable preference as to the collateral which had secured Fox's performance. Therefore, in accord with *Great Lakes Lumber* and other cases,[56] Fox should have been allowed to recover

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[50] See text accompanying notes 37-39 *supra*.

[51] The notice to other creditors would also specifically indicate the assets covered by the security agreement. Section 9-402(1) of the Code states that "A financing statement is sufficient if it . . . contains a statement indicating the types, or describing the items, of collateral." Thus, in allowing Fox to recover the $8,000 on the pre-November 1971 debt, the Tenth Circuit necessarily implied that an adequate financing statement had been filed under §§ 9-302(1) and 9-402(1).

[52] *See, e.g.*, City Nat'l Bank v. Bruce, 109 F. 69 (4th Cir. 1901); *In re* Cable-Link Corp., 135 F. Supp. 277 (E.D. Mich. 1955); *In re* Sutherland Co., 245 F. 663 (D. Mass. 1917).

[53] 8 F.2d 96 (W.D. Pa. 1925).

[54] *Id.* at 97.

[55] *See, e.g., In re* King-Porter Co., 446 F.2d 722 (5th Cir. 1971); Aulick v. Largent, 295 F.2d 41 (4th Cir. 1961); Lake View State Bank v. Jones, 242 F. 821 (7th Cir. 1917); *In re* Dismal Swamp Contracting Co., 135 F. 415 (E.D. Va. 1905); 4 REMINGTON § 1661.3, at 219-20.

[56] *See In re* Bloom, 15 F.2d 392, 393 (W.D. Pa. 1926); *In re* Schindler, 223 F. Supp. 512, 523 (E.D. Mo. 1963); and cases cited in note 52 *supra*.

the $20,000 for services performed within the four-month period.

In *E. F. Corporation*, the Tenth Circuit dealt with the not uncommon situation of existent collateral securing both past and future indebtedness. However, the court did not adequately analyze the effect of a creditor giving value within the four months preceding bankruptcy when the other requirements for the perfection of that creditor's security interest have been satisfied prior to the four-month period. By failing to consider the issue of antecedent indebtedness the court improperly applied the § 60 preference analysis. The Tenth Circuit's failure to analyze the question of antecedent indebtedness may create commercial and doctrinal problems under the Bankruptcy Act. Thus, it is likely that the *E. F. Corporation* decision will be of little precedential value.

SCOTT THOMAS VAUGHN