

**Fraudulent Transfer Complaint Survives Motion to Dismiss Where Transferee is an Insider and Receives Transfers Within Two Years of Petition Date**

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*By Evan T. Miller*

In *Charys Liquidating Trust and C & B Liquidating Trust v. Growth Management, LLC (In re Charys Holding Company Inc.)*, Bankr. No. 08-10289 (BLS), Adv. No. 10-50204, 2010 WL 2774852 (Bankr. D. Del. July 14, 2010), the United States Bankruptcy Court for the District of Delaware denied Growth Management, LLC's (the "Defendant") motion to dismiss the complaint filed by Charys Liquidating Trust and C & B Liquidating Trust (the "Plaintiffs"), finding that the causes of action were adequately pled. The complaint asserted counts seeking avoidance of certain transfers on actual fraudulent transfer theories pursuant to sections 548(a)(1)(A) and 544 of the Bankruptcy Code; avoidance of certain transfers on constructive fraudulent transfer theories pursuant to sections 548(a)(1)(B) and 544 of the Bankruptcy Code; and recovery of avoided transfers pursuant to section 550 of the Bankruptcy Code.

Prior to its Chapter 11 filing, Charys was engaged in acquiring companies. Unbeknownst to the Charys's board of directors (the "Board"), Debtor hired Michael Thomas ("Thomas") and Defendant as consultants, to which the Debtor paid \$1.35 million following the acquisition of Crochet & Borel Services, Inc. ("C & B"), on September 8, 2006, March 9, 2007, and March 13, 2007. C & B's president was Thomas's brother-in-law, Troy Crochet. On February 14, 2008, Charys and C & B (together, the "Debtors") filed voluntary Chapter 11 petitions.

On the actual fraudulent transfer count, the Court found that the complaint adequately alleged a factual basis for the claim. Citing sections 548(a)(1)(A) (providing a trustee with avoidance powers over transfers of interests in the debtor's property occurring within two years prior to the petition date if the transfer was made with actual intent to defraud any debtor entity) and 544 (authorizing the avoidance of transfers of interests in a debtor's property that are avoidable by unsecured creditors under state law) of the Bankruptcy Code, the Court found that the Plaintiffs properly pled Delaware, New York, and Georgia state laws on fraudulent transfers. Furthermore, the Court held that Plaintiffs had alleged facts constituting the "badges of fraud" required to support a 548 claim, including allegations that Crochet was an insider of C & B, which in turn was an affiliate of Charys, making Crochet an insider of Charys; Thomas was also found to be an insider of Charys by virtue of his relation to Crochet, and that a special relationship existed between the transferor and the transferee. The Court also found the complaint adequately recited insufficient consideration from Crochet, concealment of the transaction from the Board, and that Charys was insolvent at the time of the transfer.



222 Delaware Avenue • Suite 900  
P.O. Box 25130 • Wilmington, DE • 19899  
Zip Code For Deliveries 19801  
[www.bayardlaw.com](http://www.bayardlaw.com)

The Court found that the complaint properly pled constructive fraudulent transfers as well, citing section 548(a)(1)(B). In accordance with section 548(a)(1)(B), the Court held the transfers were within two years of the petition date and that Charys was insolvent at the time. Furthermore, the Court found that Charys did not receive reasonably equivalent value in exchange for the transfers, due to Thomas and Crochet's relationship and the attempted concealment of the transfers.

Finally, the Court concluded that under section 550(a), the complaint adequately stated a claim for recovery of avoided transfers, given that Crochet's company was the initial transferee of avoidable transfers.