

RECORD NUMBER: 09-1209

United States Court of Appeals
for the
Fourth Circuit

UNITED RENTALS, INC.,

Appellant,

– v. –

**JAMES B. ANGELL,
CHAPTER 7 TRUSTEE FOR PARTITIONS PLUS OF WILMINGTON,
INC., d/b/a PARTITIONS, INC., d/b/a STORM PROTECTIONS SYSTEMS,**

Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH**

OPENING BRIEF OF APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1209 Caption: United Rentals, Inc. v. James B. Angell, Chapter 7 Trustee

Pursuant to FRAP 26.1 and Local Rule 26.1,

United Rentals, Inc. who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? [X] YES [] NO
2. Does party/amicus have any parent corporations? [] YES [X] NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? [] YES [X] NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? [] YES [X] NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) [] YES [X] NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? [X] YES [] NO
If yes, identify any trustee and the members of any creditors' committee:
To our knowledge, James B. Angell is trustee for the debtor and there is no creditors' committee.

CERTIFICATE OF SERVICE

I certify that on this date I served this document on all parties as follows:

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March 6, 2009
(date)



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STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION

This Appeal was timely filed within the Federal Rules of Appellate Procedure on February 20, 2009. This Court of Appeals has subject matter and appellate jurisdiction to hear this matter under 28 U.S.C. § 158(d). *See* 28 U.S.C. § 158(d) (2009). This is an appeal from a final order and judgment entered on January 23, 2009 in the District Court for the Eastern District of North Carolina pursuant to 28 U.S.C. § 158(a). *See* 28 U.S.C. § 158(a) (2009). According to 28 U.S.C. § 158(d), the Court of Appeals has jurisdiction to review “final decisions of district courts reviewing bankruptcy court decisions...” *See* 28 U.S.C. § 158(d) (2009); *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 276 (4th Cir. 2008); *Tidewater Finance Co. v. Kennedy*, 531 F.3d 312, 315 (4th Cir. 2008). An appeal as of right from a district court to the Court of Appeals shall be taken if filed within 30 days after the judgment or order appealed from is entered. *See* FED. R. APP. P. 3, 4 (2009).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Did the alleged preferential transfers (“Transfers”) allow United Rentals to receive more than it would have in a hypothetical Chapter 7 and had the Transfers not been made? Did the Transfers diminish the Debtor’s estate in any manner that made the Transfers preferential? Did the Trustee have the burden of proof on these issues?
 1. Did United Rentals have an inchoate Lien on Funds pursuant to North Carolina state law, making United Rentals a secured creditor in property of the Debtor at the time of the Transfers, such that the Transfers were not preferential?
 2. Did United Rentals have Payment Bond Rights making United Rentals a secured creditor such that the Transfers were not preferential?
 3. Did United Rentals have inchoate Mechanic’s Lien Rights on the Mayfaire Town Center real property pursuant to North Carolina state law, making United Rentals a secured creditor such that the Transfers were not preferential?
 4. Did the Bankruptcy Court err in holding United Rentals had the burden to prove that it did or would have timely filed a claim against the Payment Bonds or to enforce Mechanic’s Liens Rights?

- II. Did United Rentals meet any burden under 11 U.S.C. § 547 (c) to prove that the Transfers constitute a contemporaneous exchange for new value to the Debtor pursuant to 11 U.S.C. § 547 (c)?
 1. Did United Rentals have inchoate Lien on Fund rights discharged by the Transfers, constituting new value under 11 U.S.C. § 547?
 2. Did the Transfers discharge United Rentals’ rights against the U.S. Fire Payment Bond that contemporaneously discharged U.S. Fire’s equitable lien subrogation rights against the Debtor’s account receivables held by the General Contractors, constituting new value under 11 U.S.C. § 547?

3. Did United Rentals have inchoate Mechanic's Lien rights on the Mayfaire Town Center real property discharged by the Transfers that contemporaneously discharged the Mayfaire owner's claims against Debtor, thereby creating new value to the Debtor?
 4. Did the Bankruptcy Court err in holding United Rentals had the burden to prove that it did or would have timely filed a claim against the Payment Bonds or to enforce Mechanic's Liens Rights in order to establish a new value defense under 11 U.S.C. § 547?
- III. Did the Trustee/Appellee meet his burden under 11 U.S.C. § 547 (b) in Plaintiff's Motion for Summary Judgment dated March 30, 2007 sufficiently to satisfy the Bankruptcy Court's entry of Summary Judgment in favor of the Trustee?

STATEMENT OF THE CASE

This is a Bankruptcy Preference action arising under 11 U.S.C. § 547. The Plaintiff, James B. Angell (hereinafter referred to as "Trustee"), as Chapter 7 Trustee for Partitions Plus of Wilmington, Inc., dba Partitions, Inc. dba Storm Protection Systems (hereinafter referred to as "Debtor") filed this action in the U.S. Bankruptcy Court for the Eastern District of North Carolina. The Trustee's Complaint sought to recover \$75,849.40 in alleged preferential payments (hereinafter "Transfers") from Debtor to United Rentals, Inc. (hereinafter "United Rentals") during the ninety days prior to Debtor's Voluntary Petition (the "Petition") on September 1, 2005.

On March 12, 2007, United Rentals filed a Motion for Summary Judgment. The Trustee filed a Cross Motion for Summary Judgment. On June 14, 2007, the

Court granted the Trustee's Motion for Summary Judgment and found that the Trustee had met its burden under 11 U.S.C. § 547. The Court also partially granted United Rentals' Motion for Summary Judgment to the extent of new value credit in the amount of \$8,885.66.

The case was tried on February 28, 2008 with U.S. Bankruptcy Court Judge the Honorable J. Rich Leonard presiding. The Trustee sought to recover the remaining Transfers in the amount of \$66,963.74. On March 31, 2008, the Court entered an Order and Judgment in favor of the Trustee and against United Rentals in the amount of \$66,963.74. The Court then amended its Order to include prejudgment interest and entered its final Judgment Order on April 30, 2008.

United Rentals filed its Notice of Appeal with the United States District Court for the Eastern District of North Carolina on May 9, 2008. On January 23, 2009, District Court Judge Terrence W. Boyle filed and entered an Order and Judgment affirming the Bankruptcy Court's decision, without oral argument.

United Rentals filed its Notice of Appeal with the U.S. Court of Appeals for the Fourth Circuit on February 20, 2009. United Rentals seeks a finding that the Transfers are not avoidable by the Trustee under 11 U.S.C. § 547 and that the District Court erred in affirming the decision of the Bankruptcy Court.

STATEMENT OF FACTS

- A. Debtor subcontracted for the construction of seven construction projects (hereinafter referred to as “Projects”). Joint Appx. at 17(*Dickes Aff.*, at ¶ 6-7); Joint Appx. at 88 (*Dickes Aff.*, at Ex. D-Project Information Sheet).
- B. United Rentals supplied rental equipment to Debtor for use on the Projects. Joint Appx. at 17 (*Dickes Aff.* at ¶ 6-7.)
- C. United Rentals supplied rental equipment to Debtor through June 1, 2004 on the J. Arthur Doshier Memorial Hospital Project in Southport, NC (hereinafter the “Doshier Hospital Project”) and after the Petition until September 22, 2004 on the Mayfaire Town Center Project in Wilmington, NC (hereinafter the “Mayfaire Project”). Joint Appx. at 211 (*Trial Trans.*, Febr. 28, 2008, pp. 18:3-16.)
- D. The Petition was filed September 1, 2004. Joint Appx. at 5-8 (Plaintiff’s Complaint.)
- E. Payment and Performance Bonds (“Bonds”) were executed between Debtor and U.S. Fire Insurance Company (“U.S. Fire”) for the construction of several of Debtor’s projects (hereinafter referred to as “Bonded Projects”), including the Mayfaire and the Doshier Hospital Projects. Joint Appx. at 231(*Trial Trans.*, Febr. 28, 2008, pp. 38:7-23); Joint Appx. at 299(Def. Ex. 6-*Foxhall Aff.* at ¶ 4); Joint Appx. at 309-319(Def. Ex. 7-Doshier Payment Bond, Def. Ex. 8-Mayfaire Payment Bond); Joint Appx. at 357-358 (Def. Ex. 14-*Martin Depo. Trans.*, pp. 18:21-19:3).

F. Rental equipment supplied by United Rentals to Debtor for use on Bonded Projects accounts for \$67,470.60 of the Transfers. Joint Appx. at 215 (*Trial Trans.*, Febr. 28, 2008, pp. 22:9-14); Joint Appx. at 298 (Def. Ex. 5-Total Amount Paid on Each Project With Each Check).

G. The contract value of rental equipment supplied by United Rentals was \$46,066.69 on the Mayfaire Project and \$19,178.84 on the Doshier Hospital Project. Joint Appx. at 215 (*Trial Trans.*, Febr. 28, 2008, pp. 22:9-14); Joint Appx. at 298 (Def. Ex. 5).

H. Debtor subcontracted with the General Contractor EMJ for the construction of the Mayfaire Project, Joint Appx. at 357-358 (Def. Ex. 14-*Martin Depo. Trans.*, pp. 14:13-20), and the General Contractor Bovis for the construction of the Doshier Hospital Project. Joint Appx. at 221 (*Trial Trans.*, Febr. 28, 2008, pp. 28:5-13.).

I. A chronology of the status of account between Debtor, EMJ and Bovis for the construction of the Mayfaire and Doshier Hospital Project shows that Debtor was owed and paid in excess of the Transfer amounts at the time of and after the Transfers were made and can be summarized as follows:

MAYFAIRE TOWN CENTER

United Rentals received \$46,066.69 in Transfers from Debtor on Mayfaire, which includes:

- \$44,131.45 received on 6/04/04 and cleared on 06/14/04
- \$1,935.24 received on 7/09/04 and cleared on 07/20/04

Debtor was owed no less than \$249,346.85 and as much as \$417,705.85 after the Transfers were received, as shown below:

- \$274,926.85 on 7/14/04
- \$417,705.85 on 7/20/04
- \$289,204.75 on 8/05/04
- \$287,633.75 on 9/24/04
- \$273,355.85 on 10/28/04
- \$249,346.85 on 11/02/04

Debtor was paid \$128,501.10 after the Third Transfer on 8/05/04

Amounts Paid to EMJ:

EMJ was paid a total of \$1,757,300.00 by the Mayfaire owners after the Transfers were made, which includes the following payments:

- \$1,197,622.00 on 6/21/04
- \$98,480 on 7/21/04
- \$461,198 on 10/04/04

Joint Appx. at 245-246 (*Trial Trans.*, Febr. 28, 2008, pp. 52:11-53: 8); Joint Appx. at 369-380 (Def. Ex. 14-*Martin Depo. Trans.*, pp. 30:22-41:16); Joint Appx. at 421-422 (Def. Ex. 15-EMJ Receipts on the Mayfaire Project); Joint Appx. at 423-424 (Def. Ex. 16-EMJ Accounts Payable on the Mayfaire Project); Joint Appx. at 425 (Def. Ex. 17-Summary of EMJ Status of Accounts on Mayfaire Project).

DOSHER HOSPITAL PROJECT

United Rentals received \$19,178.84 in Transfers from Debtor on Doshier, which includes:

- \$1,935.25 received on 6/04/04 and cleared on 06/14/04
- \$3,851.83 received on 6/25/04 and cleared on 06/30/04
- \$13,391.76 received on 7/09/04 and cleared on 07/20/04

Debtor was owed no less than \$204,414.75 and as much as \$212,032.75 after the Transfers were made, as shown below:

- \$212,032.75 on 6/04/04
- \$204,414.75 on 6/25/04
- \$204,414.75 on 7/09/04

Debtor was paid a total of \$110,930.39 after the Transfers, which includes:

- \$8,011.67 on 6/04/04
- \$102,918.72 after 7/09/04

Joint Appx. at 223, 225 (*Trial Trans.*, Febr. 28, 2008, pp. 30:11-19; 32: 1-24); Joint Appx. at 321 (Def. Ex. 10-*Houghton Aff.*, at ¶¶ 7-10); Joint Appx. at 321 (Def. Ex. 12-Partitions Application for Payment with Lien Waivers); Joint Appx. at 426 (Def. Ex. 18-Summary of Bovis Status of Accounts on Doshier Project)

(Hereinafter referred to as “Status of Account Summary”).

SUMMARY OF ARGUMENT

If a construction material supplier could successfully obtain payment after a bankruptcy petition, then receipt of the same payment prepetition cannot be an avoidable preference, as long as the bankruptcy estate was not diminished. United Rentals had at least three different security mechanisms on each project: a Lien on Funds owed to the debtor and rights against both the general contractor’s and the Debtor’s payment bonds. United Rentals also had a fourth security mechanism on the private Mayfaire project, mechanic’s lien rights in the real property.

A paid construction material supplier cannot be worse off under the Bankruptcy Code than an unpaid supplier. The proper standard is whether the creditor received more than it would have in a Chapter 7 and did not diminish the estate, not proof that the creditor actually did perfect or actually would have perfected mechanic’s lien or bond rights in the absence of the payments.

The District Court and Bankruptcy Court for the Eastern District of North Carolina are the only courts in the country, and even the only courts in North

Carolina, ruling that a construction material supplier as a preference defendant must prove that it had actually perfected mechanic's lien rights prior to payment or that it would have perfected mechanic's lien or bond rights prepetition in the absence of the Transfers. The case law throughout the country is consistently at odds with these conclusions, where the time to perfect mechanic's lien or bond rights had not expired at the time of the Transfers and the bankruptcy estate was not diminished.

The Bankruptcy Court erred in holding that the Trustee had met its burden under 11 U.S.C. § 547. The Bankruptcy Court further erred in the evidentiary burden placed on United Rentals. Even with this improper burden, however, United Rentals met any burden under 11 U.S.C. § 547(c) with uncontradicted evidence. The Transfers are not avoidable on at least three bases.

First, the Transfers did not enable United Rentals to receive more than it would have in a Chapter 7 and did not diminish the estate. United Rentals had a direct security interest in property of the estate, by its inchoate Lien on Funds owed at the time of the Transfers. The Trustee most clearly had the burden of proof on this issue and failed to meet that burden. An *unperfected* inchoate mechanic's lien has priority over a bona fide purchaser, a judgment lien creditor and over a bankruptcy trustee. This is also true for United Rentals' mechanic's lien on the Mayfaire real property.

United Rentals' Bond claims and the subrogation rights of the bonding company US Fire meant that these same funds owed to Debtor would not become property of the estate until the Debtor made the Transfers. There were sufficient funds owed to Debtor at the time that the Transfers were made, such that the Transfers and discharge of lien and bond rights placed United Rentals in no better position than it would have been in a hypothetical Chapter 7 and the estate was not diminished. The Trustee has the burden here also.

Third, the same facts can also be characterized as new value to Debtor that contemporaneously discharged security held against the Debtor's estate. United Rentals met any burden under 11 U.S.C. § 547(c) and the Transfers are unavoidable.

STANDARD OF REVIEW

The Court of Appeals exercises de novo review of the district court, "effectively standing in its shoes to consider directly the findings of fact and conclusions of law by the bankruptcy court." *Cypher Chiropractic Ctr. v. Runski (In re Runski)*, 102 F.3d 744, 745 (4th Cir. 1996). "[W]e review legal conclusions by the bankruptcy court de novo and may overturn its factual determinations only upon a showing of clear error." *Id.* "The proper construction of the Bankruptcy Code is a question of law subject to plenary review." *Id.*

The essential facts in this dispute were undisputed or uncontradicted. It is the proper application of law to those facts that is now before this Court.

ARGUMENT

I. UNITED RENTALS' MECHANIC'S LIEN RIGHTS

Under the N.C. GEN. STAT. § 44A-18, (hereinafter “Lien on Funds Statute”), any funds owed to Debtor on both the Mayfaire and Doshier Projects were impressed with a lien for the benefit of United Rentals. N.C. GEN. STAT. § 44A-18 (2009). According to North Carolina’s Lien on Funds Statute:

A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the first tier subcontractor with whom the second tier subcontractor dealt and that arise out of the improvement on which the second tier subcontractor worked or furnished materials.

Id.

Therefore, United Rentals had a statutory lien on funds owed to Debtor by EMJ on the Mayfaire Project and Bovis on the Doshier Project from the date of the first furnishing of rental equipment and had priority over all other interests or claims, including those of the Trustee. *See* N.C. GEN. STAT. § 44A-22 (2009).

According to N.C. GEN. STAT. § 44A-18, Liens on Funds have:

priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, levy, *judgment*, assignments, security interests, *and any other type of transfer*, whether voluntary or involuntary.

N.C. GEN. STAT. § 44A-18 (2009) [Emphasis added].

The Trustee's interest has the priority of the hypothetical judgment lien creditor as of the date of the petition. *H.T. Bowling v. Bain*, 64 B.R. 581, 582-83 (W.D.Va. 1986). The Lien on Funds was a security interest in property of the Debtor at the time of the Transfers. United Rental's interest as a secured creditor in this property of the Debtor had priority over the interest of the Trustee.

Discussing this same Lien on Funds, the Bankruptcy Court for the Western District of North Carolina has stated that “[b]ecause monies owed the debtor would be estate property under § 541, such liens could give the creditor secured status and present a bar to recovery under § 547(b)(5).” *In re Lockwood Greene Eng., Inc. v. Binsky & Snyder, Inc. (In re J.A. Jones, Inc.)*, 361 B.R. 94, 101, n. 6 (Bankr. W.D.N.C. 2007); *see also In re Murphy Elec. Co., Inc.*, 78 B.R. 451, 453 (Bankr. D.S.C. 1987) (“subcontractors have statutory liens in the proceeds, pursuant to S.C. CODE §29-7-10 [South Carolina Lien on Funds Statute] which the Trustee may not avoid.”).

A pre-petition payment to a secured creditor of the debtor is not preferential. *Smith v. Creative Fin. Mgmt., Inc. (In re Virginia-Carolina Fin. Corp.)*, 954 F.2d 193, 199 (4th Cir. 1992). Such a creditor would be paid, if not by the debtor's pre-petition transfer, then out of its collateral. A pre-petition transfer on a secured debt eliminates one debtor asset (transferred property), but simultaneously augments

another (by increasing debtor's equity in the collateral). Since no net depletion of assets occurs, other creditors are not harmed, and the transfers are not avoidable.

Id.

In addition to the Lien on Funds, United Rentals also had mechanic's lien rights against the Mayfaire Project real estate. United Rentals supplied rental equipment to Debtor that was used in the construction of permanent improvements on the Mayfaire Project. Joint Appx. at 356-357 (Def. Ex. 14-*Martin Depo. Trans.*, pp. 17:15-18:1). North Carolina law allows a furnisher of rental equipment the right to file a lien on the real property "at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing...at the site of the improvement..." N.C. GEN. STAT. § 44A-12 (2009). United Rentals was well within the statutory period to file a lien on the property at the time that the Transfers were made, and even after the bankruptcy petition, since it furnished rental equipment on the Mayfaire Project until September 22, 2004. Joint Appx. at 211 (*Trial Trans.*, Febr. 28, 2008, pp. 18:3-16.)

As a second tier subcontractor, United Rentals was subrogated to Debtor's lien rights against EMJ and thereby EMJ's lien rights against the Mayfaire Project. N.C. GEN. STAT. § 44A-23 (2009); *see Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 587 S.E.2d 87 (2003)(holding that a lien in favor of a subcontractor may arise either directly under N.C. GEN. STAT. § 44A-18 and N.C.

GEN. STAT. § 44A-20, or by subrogation under N.C. GEN. STAT. § 44A-23). The evidence again shows that at the time of the Transfers, sufficient funds were owed between the Mayfaire Owners, EMJ and Debtor that United Rentals was fully secured by its lien rights. *See* Status of Accounts Summary above.

II. UNITED RENTALS' PAYMENT BOND RIGHTS

This evidence also showed that United Rentals was a secured creditor under the Payment Bonds (“Bonds”) executed between Debtor and U.S. Fire Insurance Company (“U.S. Fire”) for the construction of the Mayfaire and the Doshier Hospital Projects. Joint Appx. at 231 (*Trial Trans.*, Febr. 28, 2008, pp. 38:7-23); Joint Appx. at 357-358 (Def. Ex. 14-*Martin Depo. Trans.*, pp. 18:21-19:3); Joint Appx. at 299 (Def. Ex. 6-*Foxhall Aff.* at ¶ 4); Appx. at 309-319(Def. Ex. 7-Doshier Payment Bond, Def. Ex. 8-Mayfaire Payment Bond).

The same evidence again showed that there were sufficient funds owed to Debtor to fully secure United Rentals’ Bond claim. *See* Status of Account Summary above. US Fire was subrogated to the funds owed to Debtor by EMJ and Bovis.

The Fourth Circuit has held that a surety’s “right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.” *Western Cas. v. Brooks*, 362 F.2d 486, 490 (4th Cir.

1966)(quoting *Memphis & L.R.R. v. Dow*, 120 U.S. 287, 301-02, 7 S. Ct. 482, 488, 30 L. Ed. 595 (1887)).

If the Transfers were not received by United Rentals, US Fire would have made payment to United Rentals for rental equipment supplied to all Bonded Projects. US Fire would have been entitled to payment directly from EMJ and Bovis (“Bond Obligees”) based upon its subrogation rights. *See Western Cas.*, 362 F.2d at 491. US Fire held an equitable right to ““make demand and to receive any balances due under the contracts, to the extent of such balances or to the extent of the payments so made....”” *See id.* at 492.

The balances held by EMJ and Bovis would never become property of Debtor’s estate. Since US Fire’s equitable right to these funds relates back to the date of the Bond, it entitles US Fire “to priority in payment over all subsequent lien holders and general creditors.” *See Western Cas.*, 362 F.2d at 490. According to the Fourth Circuit, by “the surety’s acquiring this equitable interest in retained funds,” those funds become the property interest of the surety and never become a part of the bankruptcy estate ““to be administered, liquidated, and distributed to general creditors of the bankrupt.”” *See id.*(quoting *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 136, 141, 83 S. Ct. 232, 234, 9 L. Ed. 2d 190 (1962)).

Under similar facts in *Field v. Insituform East, Inc. (In re Abatement Environmental Resources, Inc.)*, 307 B.R. 491 (Bankr. D. Md. 2004), the court

reasoned that where the collateral held by the indemnified bonding company is “sufficient to fully secure the claim of the creditor receiving or benefiting from the questioned transfer, the creditor is placed in no better position than it would have been in a hypothetical liquidation under Chapter 7. Likewise the estate for unsecured creditors is not depleted because simultaneous with the transfer of the unliened funds out of the estate, the estate receives the transfer by release of creditor’s lien upon the collateral.” *Id.* at 500. The *In re Abatement* Court held that “if the funds transferred were collateral secured by [the surety’s] contingent subrogation lien, no avoidable preference exists...” *Id.* at 499. United Rentals was assured to receive 100% payout in a Chapter 7 liquidation and the estate was not diminished.

United Rentals presented evidence that sufficient estate funds existed to fully secure the bonding company US Fire. *See* Status of Accounts Summary above. The Trustee presented no evidence at trial to suggest that *any* subcontractor or supplier of Debtor on either the Mayfaire or Doshier Projects would not have been paid by the U.S. Fire bond. The Bankruptcy Court had no reason to believe that similarly situated creditors *would not have been similarly treated in a hypothetical Chapter 7* and that United Rentals would not have been paid 100% of the Transfers, no matter what the burden of proof.

III. TRUSTEE DID NOT MEET ITS BURDEN

The Trustee did not meet its burden under §547(b) of the Bankruptcy Code. In order to establish an avoidable preference, the Trustee has the burden to prove that a transfer payment made in the 90-day preference period *is an interest of the debtor in property* and was made:

(1) to or for the benefit of a creditor; (2) for an account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; (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 the extent provided by the provisions of this title.*

11 U.S.C. §547(b) (2009) [Emphasis added].

The Transfers were not property of the estate and did not enable United Rentals to receive more than it would receive under Chapter 7 liquidation, because of United Rentals' Lien on Funds, payment bond and mechanic's lien on real property rights. The Trustee has the burden of proof on all these issues.

The Fourth Circuit Court of Appeals imposes the "common sense notion that a creditor need not return a sum received from the debtor prior to bankruptcy if the creditor is no better off vis-à-vis the other creditors of the bankruptcy estate than he or she would have been had the creditor waited for liquidation and distribution of the assets of the estate." *In re Virginia-Carolina Fin. Corp.*, 954 F.2d at 199 (incorporating the rule from *Palmer Clay Prod. Co. v. Brown*, 297 U.S. 227, 229,

56 S. Ct. 450 (1936)). In other words, if the creditor could successfully obtain payment after a bankruptcy petition, then receipt of the same payment prepetition cannot be an avoidable preference, as long as the bankruptcy estate was not diminished.

According to the Fourth Circuit, payments which have the effect of releasing assets of comparable value to the claims of general creditors are not preferential. *Small v. Williams*, 313 F.2d 39, 44 (4th Cir. 1963). They are not preferential because “they do not deplete the debtor’s estate or diminish the assets available for distribution among general creditors.” *Id.* The test of whether a preference has occurred is “not what the creditor receives but what the bankrupt’s estate has lost...[because] it is the diminution of the bankrupt’s estate, not the unequal payment to creditors, which is the evil sought to be remedied by the avoidance of a preference transfer.” *Virginia Nat’l Bank v. Woodson*, 329 F.2d 836, 840 (4th Cir. 1964).

Unless the Transfers by the debtor to the creditor are such that “the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer.” *National Bank of Newport, NY v. National Herkimer County Bank of Little Falls*, 225 U.S. 178, 184, 32 S. Ct. 633, 635 (1912); *see also Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co.*, 229 U.S. 435, 33 S. Ct. 829 (1913). The Supreme Court has held that transfers

amounting to preferences “contemplate the parting with the bankrupt’s property for the benefit of the creditor and the consequent diminution of the bankrupt’s estate.”

National Bank of Newport, 225 U.S. at 185, 32 S. Ct. at 635.

The Trustee had the burden to prove that the Transfers placed United Rentals in a better position than it would have been in a hypothetical Chapter 7 and that the estate was diminished. *Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet)* 412 F.3d 545, 551 (4th Cir. 2005)(requiring that the trustee establish that the creditor “received more from pre-petition payments than it would have received in a Chapter 7 proceeding”); *Batlan v. Transamerica Commercial Fin. Corp. (In re Smith’s Home Furnishings, Inc.)*, 265 F.3d 959 (9th Cir. 2001); *Kimmelman v. Port Authority (In re Kiwi Int’l Air Lines)* 344 F.3d 311, 317 (3rd Cir. 2003)(“the trustee must establish that the transfer yielded the creditor a greater return on its debt than it would have received if the transfer had not taken place and it had received a distribution under a Chapter 7 liquidation”); *Krafsur v. Scurlock Permian Corp. (In re El Paso Refinery)* 171 F.3d 249, 253 (5th Cir. 1999)(stating that the trustee must establish that the creditor received a greater percentage on its debt than it would otherwise have received from the Chapter 7 estate).

11 U.S.C. § 547(c)(1) is also relevant to a subcontractor's inchoate lien or payment bond rights. 11 U.S.C. § 547(c)(1) is an affirmative defense that shields

otherwise preferential transfers made in a contemporaneous exchange for new value. *See* 11 U.S.C. §547(c)(1) (2009). The burden of proof is on the Defendants to demonstrate existence of the § 547(c) affirmative defense. 11 U.S.C. §547(g) (2009); *In re J.A. Jones, Inc.*, 361 B.R. at 99 (*citing Hager v. Gibson*, 109 F.3d 201, 210 (4th Cir. 1997)).

The case law is somewhat in conflict whether the release of inchoate lien or payment bond rights in exchange for payment invokes the Trustee's burden of proof or United Rentals' affirmative defense. Cases are sometimes clear that the Trustee has the burden. This is most certainly true for United Rentals' Lien on Funds, since this is a security interest in property of the estate. *See In re J.A. Jones, Inc.*, 361 B.R. at 101, n.6; *In re Electron Corp.*, 336 B.R. 809 (BAP 10th Cir. 2006); *see In re JKJ Chevrolet*, 412 F.3d at 551; *see also In re Smith's Home Furnishings*, 265 F.2d at 964.

The burden of proof in cases involving release of payment bond rights or mechanic's lien rights in real property not owned by the debtor is not as consistent. Most cases simply do not discuss the relative burdens or how to determine those burdens. Many of these cases treat the issue as a "below the line" new value affirmative defense, while others indicate that these are above "above the line" matters on which the trustee has the burden. *In re 360 Networks (USA), Inc.*, 327 B.R. 187, 189 (Bankr. S.D.N.Y. 2005); *In re Abatement Environmental Resources*,

Inc., 307 B.R. 491; *See In re Askenaizer*, 2007 U.S. Dist. LEXIS 24632 at * 6-7 (D.N.H. 2007) (where the Bankruptcy Court found in a lien and bond preference case that “the preference transfer test set forth in 11 U.S.C. § 547(b)(5) [was] not met, and declined the Trustee's request to avoid them.” *Id.* at *5 The District Court remanded for a finding on “what the creditor, Seacoast, got paid, and what it (or its subrogee) would have been paid in a chapter 7 proceeding.” *Id.* *13); *See In re Askenaizer*, 391 B.R. 7 (Bkcy D.N.H. 2007) (where the Bankruptcy Court on remand found that the owner “would have had a fully secured indemnity claim if the Debtor defaulted” but for some reason changed theories, stating that the “release of lien rights conferred ‘new value’ to the debtor in a substantially contemporaneous exchange and the Payments cannot be avoided under section 547(b). *Id.* at 11-12.

11 USC 506(a)(1) defines secured status in bankruptcy and states:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title [11 USCS § 553], is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be.

11 USC § 506(a)(1)(2009).

The direct Lien on Funds is the easiest case, since it certainly provides United Rentals a lien on property in which the estate has an ownership interest.

As recognized by many cases, however, the setoff rights of the general contractors and the subrogation rights of the bonding companies also provide United Rentals a secured claim, even in the indirect lien on the Mayfaire real property and the payment bond claims. The indirect transfer theory can be asserted as a §547(b)(5) trustee burden issue and a § 547(c)(1) affirmative defense. *In re J.A. Jones, Inc.*, 361 B.R. at 102, n. 7(citing *In re Mason and Dixon Lines, Inc.*, 65 B.R. 973, 979 (Bankr. M.D.N.C. 1986)).

It does seem that the release of payment bond rights or mechanic's lien rights should be above "above the line" matters and that the Trustee has at least the initial burden, since the Trustee cannot show that the Transfers were more than United Rentals would have received in a chapter 7 liquidation and that the estate was not diminished.

This may be a case of "shifting burdens." The Trustee may have the burden in every case of proving that no defendant has mechanic's lien or bond rights. Perhaps, once the Trustee shows that unsecured creditors would receive no distribution in a hypothetical chapter 7, the burden may shift to the defendant to show that mechanic's lien or bond rights applied to the work and perhaps that the time for perfection of those rights had not expired at the time of the Transfers. It is not so clear at this point whether the Trustee or the defendant has the burden of proving the value of those security rights.

It does seem clear that once there is undisputed evidence that mechanic's lien or bond rights applied to the work, that the time for perfection of those rights had not expired at the time of the Transfers and that there were sufficient funds owed to Debtor at the time of the Transfers and paid to Debtor after the Transfers to fully secure United Rentals, then the burden must be in or shift back to the Trustee to prove that there were other claimants to those funds that would result in a diminution of the estate. This information is peculiarly in the Trustee's and not the defendant's possession. The Debtor knows what other subcontractors and suppliers it hired on the project, the dollar amount owed to them and the dollar amount the Debtor claimed due from each owner or general contractor. It is difficult or impossible for a preference defendant to get this information, except from the Debtor. In the instant case, this information was requested from the Trustee in written discovery without response. The Trustee cannot complain at this point that United Rentals failed to prove that there were no other claimants to the funds. The Trustee had this burden and United Rentals cannot prove the nonexistence of other claimants in any event.

The same set of facts, at least in the instant case, can present both a §547(b) trustee burden issue and a § 547(c) affirmative defense. It may depend on how the issue is framed by the parties or the court. *See O'Rourke v. Coral Construction, Inc. (In re E.R. Fegert, Inc.)*, 88 B.R. 258 (BAP 9th Cir. 1988)(where the parties

“stipulated that the elements of a preference set out in Section 547(b) existed”). It does seem clear that if the issue is characterized as whether “the creditor received more than it would have under a Chapter 7 liquidation,” then it is a §547(b) trustee prima facie burden issue. If the issue is characterized as whether “the creditor provided new value,” then it is § 547(c) affirmative defense. Whether the Debtor’s estate was diminished is a consistent element.

Regardless, United Rentals presented ample competent evidence that it did not receive more than it would have under a Chapter 7 liquidation and did not diminish the Debtor’s estate. The Trustee presented no evidence to the contrary. Accordingly, to the extent that United Rentals had any burden of proof, that burden was met.

United Rentals was within the time period for filing Payment Bond Claims or Mechanic’s Liens at the time the Transfers cleared Debtor’s bank. Joint Appx. at 211 (*Trial Trans.*, Febr. 28, 2008, pp. 18:3-16.). United Rentals supplied rental equipment to Debtor for use on the Projects through June 1, 2004 on the Doshier Hospital Project and after the Petition until September 22, 2004 on the Mayfaire Town Center Project. *Id.* The Petition was filed September 1, 2004. Joint Appx. at 5-8 (Plaintiff’s Complaint.). Accordingly, United Rentals was still within the time period to enforce its Payment Bond and Mechanic’s Lien rights for at least four (4) weeks after the Petition. *See* N.C. GEN. STAT. § 44A-27 (2008). United Rentals

could have enforced its rights Payment Bonds, Liens on Funds and its mechanic's lien on real estate post petition to receive the same payment as the Transfers. That post petition Transfer would not be preferential.

The evidence presented by United Rentals at trial also leaves no doubt that there were sufficient funds owed to Debtor at the time of the Transfers and paid to Debtor after the Transfers to fully secure United Rentals and result in no diminution of the estate. *See* Status of Accounts Summary above. Evidence of the funds owed to Debtor by Bovis and EMJ was never disputed by the Trustee. Accordingly, the Transfers did not enable United Rentals to receive more than it would have in a liquidation and the estate was not diminished.

IV. NO BURDEN TO SHOW LIEN OR BOND RIGHTS WERE PERFECTED OR WOULD HAVE BEEN PERFECTED

The Bankruptcy Court improperly put the burden on United Rentals to show that it would have enforced its Lien or Bond rights if the Transfers had not been received.

First, the Trustee and not United Rentals had the burden of proof. At a minimum, this is true in the Lien on Funds. The Trustee presented no evidence that United Rentals did not enforce its Lien or Bond rights, or that United Rentals would not have done so if the Debtor had not made the Transfers.

Payments which have the effect of releasing assets of comparable value to the claims of general creditors are not preferential. *Small v. Williams*, 313 F.2d at

44. They are not preferential because “they do not deplete the debtor’s estate or diminish the assets available for distribution among general creditors.” *Id.* There is no need to prove that the creditor would have enforced those security rights. The Transfers *had the effect* of releasing assets of comparable value.

Fortunately, we have a clear statute and a long history of North Carolina case law to establish that an unperfected mechanic’s lien has priority over the interest of the trustee as a hypothetical judgment lien creditor. North Carolina lien law provides that a lien is inchoate. *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 667, 242 S.E.2d 785, 789 (1978); *see also Equitable Life Assurance Soc’y*, 234 N.C. 347, 67 S.E. 2d 390. An inchoate lien provides a present security interest from the time labor or material is furnished.

According to N.C. GEN. STAT. § 44A-18, Liens on Funds have:

priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, levy, *judgment*, assignments, security interests, *and any other type of transfer*, whether voluntary or involuntary.

N.C. GEN. STAT. § 44A-18 (2009) [Emphasis added].

According to N.C. GEN. STAT. § 44A-10:

Effective date of claim of lien on real property

A claim of lien on real property granted by this Article shall relate to and *take effect from the time of the first furnishing of labor or*

materials at the site of the improvement by the person claiming the claim of lien on real property.

N.C. GEN. STAT. § 44A-10 (2009) [Emphasis added].

“By virtue of this statute, a contractor's lien for all labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site.” *Frank H. Conner, Co.*, 294 N.C. at 667, 242 S.E.2d at 789; *see Heating Co. v. Realty Co.*, 263 N.C. 641, 140 S.E. 2d 330 (1965); *see Equitable Life Assurance Soc’y*, 234 N.C. 347, 67 S.E. 2d 390.

It is accurate to say that the lien rights are “lost” if not perfected and or enforced in a timely manner. However, the lien rights could not be “lost” if not already possessed.

Case law is scant in any state on the nature of the security interest *before* perfection and enforcement of the lien rights. By the time a mechanic’s lien case gets to a state supreme (or even the trial) court, the time to perfect has expired. The state court decides either that the claimant failed to follow the statute and is now unsecured *or* that the lien rights were properly perfected and enforced *and* has priority over all other security interests created after work began on the project. The scenario in a bankruptcy preference case is that the claimant never perfected *because the claimant was paid in full*. This is very rare factually and rarely relevant in a state court mechanic’s lien case. Fortunately, we do have surprisingly

direct Supreme Court of North Carolina case law in *McCoy v. Wood*, 70 N.C. 125 (1874).

In *McCoy*, the Supreme Court of North Carolina held that an inchoate lien had priority over a *registered* consensual security instrument, notwithstanding that the inchoate lien was *never perfected*. *Id.* at 128-29. The intervening act of payment, during the prescribed period for perfection, alleviated the need to perfect. *Id.* at 129. The inchoate lien attached and was a security interest in property with priority from the time of the first supply of labor. *Id.* at 128-29. Consequently, under North Carolina law a payment relieves a party of the necessity of perfecting a lien that attaches upon the first supply of labor and does not eliminate the security interest held by that party at the time of payment. *Id.* at 129. As hypothetical holder of a security interest, the Trustee is in the same position as the holder of the consensual security interest in *McCoy*. *McCoy v. Wood* remains a controlling decision that has not been addressed by the Trustee.

While this decision did not deal directly with the modern mechanics lien statutes, the North Carolina Supreme Court has expressly noted that the statutes construed in *McCoy* were the genesis of today's modern mechanic's lien statutes. *See Equitable Life Assurance Society v. Basnight*, 234 N.C. 347, 351 (1951). The North Carolina Supreme Court also stated in *Equitable* that:

the relation back doctrine was not begotten by [the statutes construed in *McCoy*], and is not nurtured by its present day counterpart.

The doctrine is inherent in the very statutes which give the contractor the lien upon the property improved by his labor or materials, and allow him six months after the completion of the labor or the final furnishing of the materials in which to claim it; for it is plain that unless the contractor's lien when filed relates back to the time at which the contractor commenced the performance of the work or the furnishing of the materials, the object of the statutes can be defeated at the will of the owner of the property, by his selling or encumbering his estate. To hold that the doctrine of relation back is not inherent in these statutes would be to "keep the word of promise to our ear, and break it to our hope."

Id. [Citations omitted]. An inchoate mechanic's lien survives a sale of the property, whether or not the lien has been filed in the land records. *Rural Plumbing and Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 653; 140 S.E.2d 330, 339 (1965). An *unperfected* inchoate mechanic's lien also has priority over a bona fide purchaser or a judgment lien creditor and over a bankruptcy trustee perfecting after work commenced. *In re Golfview Developmental Center, Inc. v. All Tech Decorating Co.*, 309 B.R. 758, 768-69 (Bankr. N.D. Ill. 2004).

The fact that there is construction activity on the property is the public notice that the property may be subject to unrecorded mechanic's liens. This is why property sellers and mortgagors must always sign affidavits at settlement, affirming under oath that they have not ordered labor or materials to improve the property in the ninety days prior to the settlement. The inchoate mechanic's lien, which may be filed after settlement, will be prior to the rights of the buyer or the new lender that records its mortgage after work commences, but before the

mechanic's lien is perfected. *See id.* The inchoate mechanic's lien will also be prior to a judgment lien creditor that perfected after work commences, but before the mechanic's lien is perfected. For all the same reasons, an inchoate mechanic's lien survives a bankruptcy and prevails over the Trustee.

Because its mechanic's liens were inchoate and had priority over the Trustee's interest, United Rentals had the right to perfect its mechanic's lien rights after the Bankruptcy Petition, without obtaining Relief from the Automatic Stay. *See* 11 U.S.C. § 546(b) (2009); *See also H.T. Bowling*, 64 B.R. at 582-83. This is because United Rentals "acquire[d] rights in such property before the date of perfection" within the meaning of 11 U.S.C. § 546(b)(1)(A). *See H.T. Bowling*, 64 B.R. at 582-83. United Rentals would not improve its position by filing a mechanic's lien, during the preference period or post petition. United Rentals *always had* the secured mechanic's lien rights. Filing a mechanic's lien would only provide additional notice of the security rights that United Rentals already had.

Inchoate mechanic's lien rights are substantively different than the remedies of garnishment or attachment. Both attachment and garnishment are remedies borne of an *in personam* claim against a person or entity. Once a claim against a person or entity is established via judgment, the creditor must execute on the

judgment to establish a claim against the property of the judgment debtor. The judgment does not attach to the property until execution.

In contrast, the inchoate mechanic's lien is an *in rem* claim directly against specific property. “[A] claim of lien on real property takes effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien.” N.C. GEN. STAT §44A-10 (2009). The mechanic's lien claim attaches to the property from the time of the “first furnishing of labor or materials” and is not reliant on notice for attachment. *See id.*

The legislative history of 11 U.S.C. § 546 clarifies the limitations upon the trustee's avoiding powers. If United Rentals has the opportunity to perfect its lien against an intervening interest holder as of the date of the petition, then it may perfect its interest against the Trustee. The rights granted to United Rentals prevail over the Trustee, because perfection relates back to a date that is before the commencement of the case. *H.T. Bowling*, 64 B.R. 581, 582-83 (*citing* H. R. Rep. No. 95-595, 95th Cong., 2d Sess. 371, reprinted in 1978 U. S. Code Cong. & Ad. News 5963, 6327; S. Rep. No. 95-989, 95th Cong., 2d Sess. 86, 1978 U. S. Code Cong. & Ad. News 5785, 5872). If United Rentals' inchoate lien rights prevail over the Trustee post petition, how can the Trustee now avoid a prepetition payment in discharge of those rights?

Similarly, United Rentals also would not violate the bankruptcy stay by perfecting or enforcing *bond* rights after the bankruptcy petition. The bonding company was not the debtor in bankruptcy. There would be no bankruptcy stay. If United Rentals had perfected or enforced its bond rights after the bankruptcy petition, however, the bonding company would still have its equitable right of subrogation against the balances owed to the Debtor by the General Contractors on the Doshier and Mayfaire projects. *See Western Cas.*, 362 F.2d at 492; *In re Jones Constr. & Renovation, Inc.*, 337 B.R. 579, 585 (Bankr. E.D. Va. 2006). The equitable lien granted the surety entitles it to precedence over the Trustee in bankruptcy of the debtor-contractor. *O'Rourke v. Coral Construction, Inc. (In re E.R. Fegert, Inc.)*, 88 B.R. 258, 260 (BAP 9th Cir. 1988), *aff'd* 887 F.2d 955 (9th Cir. 1989). The surety could still enforce this equitable right of subrogation post petition. *Tri-City Serv. Dist. v. Pacific Marine Dredging and Constr. (In re Pacific Marine Dredging and Constr.)*, 79 B.R. 924, 929 (Bankr. D. Ore. 1987). Again, the Transfers did not allow United Rentals to receive more than it would have under a Chapter 7 liquidation and did not diminish the Debtor's estate. United Rentals could assert the same rights post petition and United Rentals, the Debtor and the general unsecured creditors would all be in the exact same financial position.

The fact that United Rentals did not actually file a lien or bond claim does not impact United Rentals' status at the time of the Transfers or the fact that the estate was not diminished. When a debtor contractor breaches its contract, it precludes debtor's entitlement to retained funds, and thus these funds are not property of the estate. *In re Jones Constr. & Renovation, Inc.*, 337 B.R. at 585, (citing *First Indem. of Am. Ins. Co. v. Modular Structures (In re Modular Structures)*, 27 F.3d 72 (3d Cir. N.J. 1994)); *In re Pacific Marine Dredging and Constr.*, 79 B.R. at 929). The court is less concerned with whether payment has yet been made than with the obligation to pay claimants. The surety's obligation, brought about by the debtor's breach of contract, makes the doctrine of equitable subrogation applicable. In other words, if the Debtor had not paid United Rentals the Transfers, the property of the estate and value of assets available to general unsecured creditors would automatically be reduced by the same dollar amount. *Id.* "A hypothetical liquidation (assuming the payment was not made) would not have provided any greater estate for distribution to unsecured creditors." *In re Abatement Environmental Resources, Inc.*, 307 B.R. at 499.

"[T]he fact that the surety did not actually make the payments to the subcontractors [does not] require the application of a different equitable rule." *In re E.R. Fegert, Inc.*, 88 B.R. at 260 (BAP 9th Cir. 1988), *aff'd* 887 F.2d 955 (9th Cir. 1989). Since the transfers "avoided the imposition of an equitable lien by the

surety on future payments under the contract, there was no diminution of the estate.” *Id.* The surety’s equitable lien “prevails over the trustee even though the surety has not perfected its rights under the Uniform Commercial Code (“U.C.C.”) . . .” *Id.*; see also *National Shawmut Bk. of Boston v. New Amsterdam Cas. Co.*, 411 F.2d 843, 849 (1st Cir. 1969); *First Ala. Bk. v. Hartford Acc. & Indem. Co.*, 430 F. Supp. 907, 910 (N.D. Ala. 1977).

The Transfers “are in the nature of a trust to reimburse the surety who is forced to pay on its bond.” *In re Pacific Marine Dredging and Constr.*, 79 B.R. at, 928. US Fire’s equitable lien is “superior to all other liens.” *Id.* at 928. The “surety has no filing obligations. The lien is one created by equity, not by statute.” *Id.* at 929. The estate was not diminished by the Transfers, because the discharge of the surety’s equitable lien provided the debtor money from the general contractors equal to the amount of the Transfer.

The Trustee has never addressed North Carolina law establishing that an unperfected inchoate lien has priority over the interest of the trustee as a hypothetical judgment lien creditor. The Trustee has also never addressed the near universal federal bankruptcy law providing that the Trustee fails to meet his burden or that a defendant has at least an affirmative defense to a preference action when the time had not expired to perfect lien or bond rights at the time of the Transfers and where there was no diminution of the estate. The Trustee instead prevailed at

the bankruptcy and district court by relying on case law unique to the bankruptcy and district court of the Eastern District of North Carolina.

The District Court cited its own prior decision in *Precision Walls v. Crampton*, 196 B.R. 299, 301-02 (E.D.N.C. 1996) in affirming the bankruptcy court's summary judgment in favor of the Trustee on United Rentals' mechanic's lien and bond rights.

[Trustee] submitted affidavits which proved that there were inadequate funds to provide a payout in full to unsecured creditors. [United Rentals], as an unsecured creditor [Ftn3], would not have received payment in full had the debtor not provided it. Thus, [United Rentals] received more than it would have if the transfers had not been made.

[Ftn3] [United Rentals] is an unsecured creditor because it failed to file notice. See N.C. GEN. STAT. § 44A-18(6); See also *Precision Walls v. Crampton*, 196 B.R. 299 (E.D.N.C. 1996).

Joint Appx. at 471 (Dist. Ct. Order, E.D.N.C., Jan. 2009, at p. 5).

Precision Walls is cited by other courts as holding that a transfer is avoidable unless the recipient had actually perfected mechanic's lien rights. *In re J.A. Jones, Inc.*, 361 B.R. at 102-03. It is respectfully submitted that there may be no case law anywhere else in the nation supporting this proposition. It is not entirely clear that even *Precision Walls* supports this proposition. The primary variant of most cases is whether the transfer recipient still had time to enforce mechanic's lien or bond rights at the time of the transfer and/or whether sufficient sums were still owed to

the debtor on the project at the time the preference payment was made “to permit a setoff,” so that the estate was not diminished. *Id.* at 103.

United Rentals submitted sufficient evidence to eliminate both variants. The evidence showed that United Rentals was within the time period for filing Payment Bond Claims or Mechanic’s Liens at the time the Transfers cleared Debtor’s bank. Joint Appx. at 211 (*Trial Trans.*, Febr. 28, 2008, pp. 18:3-16.) and that the amounts owed to Debtor by general contractors, at the time of and after the Transfers, exceeded the amount of the Transfers. *See* Status of Account Summary above.

In *Precision Walls*, the Court stated that the subcontractor had not proven the value of its lien rights or that the owner owed sufficient funds on the project to satisfy the lien. *See Precision Walls*, 196 B.R. at 301-02. This may be the basis of the *Precision Walls* decision. It is also not clear whether the preference defendant’s lien rights had expired at the time of the transfers in *Precision Walls*.

A similar holding *In re Joseph M. Eaton Bldrs, Inc* has also been cited for the proposition that a transfer is avoidable unless the recipient had actually perfected mechanic’s lien rights. *See In re J.A. Jones, Inc.*, 361 B.R. at 100. In *Eaton Bldrs*, however, the Court found that the defendants’ lien rights had expired well before defendants received the preferential payments from the debtor. *See In re Joseph M. Eaton Bldrs, Inc.*, 84 B.R. 56, 59 (W.D. Pa. 1988). The Court held that where that the defendants did not perfect its lien rights *and lien rights had*

expired at the time of the transfers, the defendants had no new value defense. *See id.* United Rentals has no quarrel with this result.

Accordingly, there may be *no* case law supporting the Trustee's position herein, where there was time to enforce lien and bond rights at the time of the Transfer and the estate was augmented in an amount equal to the Transfer by the discharge of lien or bond rights. However, there is much case law consistently supporting United Rentals' position.

“The sole purpose of filing liens is to secure payment. Surely the receipt of payment itself should not be less secure than the lien which could have secured it.” *Ricotta v. Burns Coal & Bldg Supply Co.*, 264 F.2d 749, 750 (2d. Cir. 1959).

“Because the creditor was paid for the work, its inchoate lien was satisfied and it had no cause to record a lien against the debtor's property.” *Schnittjer v. Pippert (In Re Carney)*, 396 B.R. 22, 26 (Bankr. N.D. Iowa 2008)(citing *In re Golfview Developmental Center, Inc. v. All Tech Decorating Co.*, 309 B.R. 758, 769-70 (Bankr. N.D. Ill. 2004); *In re R.M. Taylor, Inc.*, 257 B.R. 289, 295 (Bankr. W.D. Mo. 2000).

“If the debtor pays the debt during the time that the materialman could perfect and as a consequence the materialman does not proceed with the perfection of the lien, the courts have recognized that the materialman relinquished a right that constitutes ‘new value’ within the meaning of section 547(a)(2).” *In re Mason*

and Dixon Lines, Inc., 65 B.R. at 979; *see also In re J.A. Jones, Inc.*, 361 B.R. at 103-04.

The Ninth Circuit reasons that since the time for perfecting defendant's lien had not expired prior to the receipt of payments, the defendant accepted the payment in satisfaction of its inchoate mechanic's lien right. *Greenblatt v. Utley*, 240 F.2d 243, 247 (9th Cir. 1956); *see also In re 360 Networks (USA), Inc.*, 327 B.R.187 (Bankr. S.D.N.Y. 2005) (identifying *Precision Walls* as "the one case under the Code that holds that an unperfected statutory lien should be treated no differently from any other unperfected lien"); *See also Mullins v. Noland Co.*, 406 F. Supp. 206 (N.D. Ga. 1975); *See also In re Electron Corp.*, 336 B.R. 809 (BAP 10th Cir. 2006); *See also Schnittjer v. Pippert (In Re Carney)*, 396 B.R. 22 (Bankr. N.D. Iowa 2008); *See also In re Golfview Developmental Center, Inc.*, 309 B.R. at 758; *See Simon v. Engineered Protection Sys., Inc. (In re Hartfield Elec. Co.)*, 91 B.R. 782, 786 (Bankr. N.D. Ohio 1988); *LaRose v. Crosby & Son Towing, Inc. (In re Dick Henley, Inc.)*, 38 B.R. 210, 214 (Bankr. M.D. La. 1984). There is no need for a preference defendant to prove actual perfection of a mechanic's lien, if there was still time to perfect on receipt of the transfer and there was no diminution of the estate.

The Bankruptcy and District Courts in the instant case struggled with the need to prove and the difficulty of proving that enforcement of mechanic's lien or

bond rights *would have* occurred absent payment. Joint Appx. at 471-472 (Dist. Ct. Order, E.D.N.C., Jan. 2009, at pp. 5-6); Joint Appx. at 430 (Final Order, Bankr. E.D.N.C. Mar. 2008, at p. 3). The Bankruptcy and District Courts relied only on other authority from the same Bankruptcy Court, involving the same Trustee, and in the same bankruptcy case, *Angell v. Pennington et al. (In re Partitions Plus of Wilmington, Inc.)*, 2008 Bankr. LEXIS 1994 at *8-9 (Bankr. E.D.N.C. 2008), to place the burden on United Rentals to prove “that it would have timely filed a claim against the project’s payment bond and been paid in full had it not received payment from the debtor.” Joint Appx. at 471-472 (Dist. Ct. Order, E.D.N.C., Jan. 2009, at pp. 5-6). This is unique to this District, at odds with all case law from other districts, and at odds with logic and public policy considerations.

Research has not revealed any case law *anywhere else in the country* stating that a creditor must prove it would have enforced its rights if not for the payment. Any such rule would be very problematic. The Bankruptcy Court for the Western District of North Carolina dealt with this in an illuminating public policy analysis:

Since an individual subcontractor's reaction is unknowable, an objective approach should be employed, asking "what would a reasonable materialman have done in response to that nonpayment." It takes little commercial construction expertise to answer. A reasonable subcontractor would assert his legal rights, liening the project, perfecting those liens and forcing payment through the owner.

We should also assume a reasonable behavior by the project owner. Again, this requires almost no imagination. With liens on this project, the owner would have no reasonable alternative but to pay the

subcontractor and then seek indemnification from the general contractor.

To make any other assumption would defy reality. It would also penalize the lien creditor for accepting payments. (*citing Ricotta*, 264 F.2d at 750 "The sole purpose of filing liens is to secure payment. Surely the receipt of payment itself should not be less secure than the lien which could have secured it.") It would also defy commercial reality. A subcontractor would not long remain in business if it made a practice of refusing payments from its general contractor in favor of enforcing lien rights against the underlying project. No one would hire such a subcontractor.

In re J.A. Jones, Inc., 361 B.R. at 103.

There is no need for United Rentals to prove what it would have done absent payment. The Transfer payments automatically discharged lien and bond rights in United Rentals with a value equal to the Transfer payments and "had the effect of releasing assets of comparable value to the claims of general creditors." *Small v. Williams*, 313 F.2d 39, 44 (4th Cir. 1963). The Transfer payments are not preferential because "they do not deplete the debtor's estate or diminish the assets available for distribution among general creditors." *Id.*

If a preference defendant has to show that it did or that it would have enforced its lien or bond rights if the Transfers had not been received, the public policy ramifications are enormous.

First, any construction supplier or subcontractor would need to refuse payment and instead file mechanic's lien or bond claims as an ordinary practice (as soon as the debtor was one day beyond its ordinary terms) to avoid bankruptcy

preference claims, even if there is no reason to suspect an imminent bankruptcy. A creditor could not prove it had actually filed a mechanic's lien or bond claim, if it had not. How could a creditor be confident that a bankruptcy court would accept evidence in a future preference claim that it *would have* enforced its rights? If *Precision Walls* stands for the proposition that that a creditor must actually enforce lien and bond rights, it would be insufficient in any event for the creditor to prove that it would have enforced those rights.

The only safe path would be to actually file mechanic's lien or bond claims in all cases, to be released on receipt of payment. This would disrupt projects and business relations, generate legal fees and consume court resources towards no end.

Second, all construction suppliers or subcontractors would want to file mechanic's lien and bond claims immediately on any bankruptcy for money *it has been paid* in the ninety days prior to the petition. This would certainly disrupt projects and business relations, and make any orderly bankruptcy reorganization impossible. It is, of course, very questionable whether a supplier or subcontractor *can* file a mechanic's lien or bond claim for money it has been paid. At a minimum the claimant would have to swear a false affidavit that it was owed the sum paid. *In re Golfview Developmental Center, Inc.*, 309 B.R. at 768. An unpaid supplier would be better off than a paid supplier on bankruptcy.

Third, a debtor that really wanted to avoid paying a certain lien or bond creditor could accomplish that end by *actually paying* the creditor right before bankruptcy. “The Debtor/Contractor could, in effect, avoid payment of any or all subcontractors by paying them within 90 days of bankruptcy and then simply waiting until 60 days after substantial completion of the work before filing the action to recover the preference. By doing so, the subcontractor could effectively be denied its lien rights.” *In re Dick Henley, Inc.*, 38 B.R. at 215.

It is significant that United Rentals still had mechanic’s lien and bond rights after the bankruptcy petition was filed. How can an unpaid supplier be better off than a paid supplier after a bankruptcy petition? A construction supplier or subcontractor that had not been paid could still file its mechanic’s lien or bond claim post petition (and be entitled to full payment if the security had sufficient value). If a construction supplier or subcontractor had the misfortune of being paid before a bankruptcy petition, however, they would no longer have a mechanic’s lien or bond claim and would have to repay any funds received.

V. TIMING OF THE SECURITY INTEREST AND ESTATE VALUATION

Even assuming *arguendo* that United Rentals was an unsecured creditor at the time of the Transfers, the Trustee still has the burden to show that United Rentals would not have been a secured creditor at the time of the hypothetical Chapter 7. The bankruptcy code puts the burden of making this showing

exclusively on the trustee. 11 U.S.C. § 547(g) (2009). The distribution under this hypothetical Chapter 7 is *not* deemed to take place at the time of the transfers. *See In re JKJ Chevrolet*, 412 F.3d at 549. It is well established that the hypothetical Chapter 7 is deemed to take place on the date of the bankruptcy filing. *Id.*; *See Sloan v. Zions First National Bank (In re Castletons)*, 990 F.2d 551, 554 (10th Cir. 1993) (holding “the petition date is the relevant date for purposes of the hypothetical creditor test under 547(b)(5)); *See also Neuger v. United States (In re Tenna Corporation)*, 801 F.2d 819, 822 (6th Cir. 1986)(stating that the date of the petition is the date “that a payment should be tested”).

Not only must the court consider what would have happened in a distribution under a Chapter 7 on the petition date, but it must also ignore that the transfers were actually made to the creditor. 11 U.S.C. § 547(b)(5)(B) (2009). This requires the court to determine *and gives the Trustee the burden to show* what would have happened in the time period between the date the transfer was made and the date the bankruptcy petition was filed, with the assumption that no transfer was made on the transfer date.

In response, many courts apply a dichotomy of secured creditors versus unsecured creditors. For unsecured creditors, the showing by the trustee is relatively simple. Timing is not an issue. A bankrupt debtor was almost always insolvent in the 90 days prior to the petition. Therefore, general unsecured

creditors would almost always receive little or no payment in a Chapter 7 liquidation, whether that valuation is performed at the time of the transfer or the time of the petition. Generally, the trustee's burden is automatically met in avoiding a payment to a general unsecured creditor, by *simply showing that the payment was made*.

The process with a secured creditor is more complicated. For example, the debt of a creditor can be partially secured and partially unsecured. A creditor will still receive 100 percent of the debt that is secured by collateral. The portion that is not secured will be subject to the same distribution as other unsecured creditors. The value of the collateral, the extent to which a creditor is secured and the extent to which a transfer is avoidable can all change from the time of the transfer to the time of the hypothetical chapter 7 liquidation on the petition date. *See In re JJJ Chevrolet*, 412 F.3d at 551. However, the burden of showing that the debt is either unsecured or under secured *remains with the trustee*. *Id.* Showing that a creditor was unsecured at the point of the transfer does not meet the burden of proving the creditor's status in the hypothetical Chapter 7. *Id.*

If *Precision Walls* means that a lien or bond claimant must actually perfect prepetition in order to protect against preference claims, that case applied this dichotomy strictly as of the time of the transfer. Because the creditor had not perfected its lien rights *before the transfer*, it was an unsecured creditor at the time

of the hypothetical Chapter 7. The lien or bond claimant was unsecured *at the time of the transfer* and the trustee can satisfy its burden merely by showing that unsecured creditors would not receive payment of their claims in full. *Precision Walls*, 196 B.R. at 302.

Even assuming *arguendo* that a lien or bond claimant is unsecured at the time of transfer, this logic is flawed. It assumes that a creditor unsecured at the time of the transfer is necessarily unsecured at the time of the hypothetical Chapter 7. This Court has rejected any implicit connection between a creditor's status at the time of a transfer and a creditor's status at the time of the hypothetical Chapter 7. *See In re JKJ Chevrolet*, 412 F.3d at 549 (“the amount [creditor] would have received in a Chapter 7 proceeding cannot be determined by reference to any security interest [creditor] might have enjoyed at the time of the preference”). The status of a creditor is not established by lack of security at the time of the transfer, when that creditor could have become a secured creditor between the transfer and the hypothetical Chapter 7 distribution.

Most creditors who are unsecured at the time of a transfer have no means or ability to become a secured creditor in the time period between the transfer and the bankruptcy filing. However, United Rentals is not a creditor of this type. Even if unsecured at the time of the transfer, a creditor with valid lien or bond rights would have the ability to convert from an unsecured creditor to a secured creditor prior to

the hypothetical Chapter 7 distribution by perfecting or enforcing those lien or bond rights. Even if United Rentals was unsecured at the time of the transfers, it was still the Trustee's burden to prove that United Rentals would not have been secured at the time of the hypothetical Chapter 7 distribution. The Trustee presented no evidence to meet this burden at trial. In fact, the evidence presented by United Rentals of their security rights and the funds owed to the Debtor's estate on the Doshier and Mayfaire projects was *the only evidence* presented on United Rentals' status in a hypothetical Chapter 7 liquidation on the petition date.

United Rentals cannot arbitrarily be grouped with unsecured creditors in the required analysis under § 547(b)(5). The Bankruptcy Court erred in finding that the Trustee met its burden under § 547(b)(5). The Bankruptcy Court further erred in giving United Rentals the burden of proving it had actually perfected lien rights or the burden of showing it would have enforced its lien or bond rights. This relied on the unsubstantiated assumption that a creditor who is unsecured at the time of a transfer is necessarily unsecured at the time of the hypothetical Chapter 7. In fact, the bankruptcy court in this case required United Rentals to present evidence to rebut this presumption as if they were offering an affirmative defense. Whether the creditor would have been a fully secured creditor for the sake of the hypothetical Chapter 7 distribution is an element of a preference claim, not an affirmative defense. Applying a presumption that an unsecured creditor at the time

of a transfer is necessarily unsecured at the time of the hypothetical Chapter 7 inappropriately shifted to United Rentals the burden established in the Trustee by Congress.

This may be another way of saying that a payment discharging lien or bond rights cannot be preferential, if the lien or bond rights could have been enforced post petition, with the creditor, the debtor and all general unsecured creditors left in exactly the same financial position.

Given the evidence at trial, this Court must only decide that United Rentals did *not* have the burden of proving it *would have* enforced its Lien on Funds rights or Bond rights and judgment can and should be entered by this Court in favor of United Rentals.

VI. UNITED RENTALS MET ANY BURDEN UNDER 11 U.S.C. § 547(c)

A. Money Debtor Received For Discharge Of Bond And Mechanic's Lien Rights Is New Value

The same evidence also establishes that the discharge of United Rentals' mechanic's lien and bond rights constitutes new value within the meaning of 11 U.S.C. § 547(c)(1). *See O'Rourke v. Coral Construction, Inc. (In re E.R. Fegert, Inc. II)*, 887 F.2d 955, 959 (9th Cir. 1989); *see also In re J.A. Jones, Inc.*, 361 B.R. at 102. Section 547(c)(1) of the Bankruptcy Code provides that a preferential transfer may not be avoided to the extent the 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 (B) in fact a substantially contemporaneous exchange[.]” 11 U.S.C. § 547(c)(1) (2009). For the purpose of § 547 “new value” is defined as:

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, including proceeds of such property, but does not include an obligation substituted for an existing obligation[.]

11 U.S.C. § 547(a)(2) (2009).

The release of claims against a surety is an exchange of new value under the Bankruptcy Code. *In re E.R. Fegert, Inc. II*, 887 F.2d at 959 (holding that payments to subcontractors in exchange for subcontractors’ release of unsecured claims against debtor and Miller Act surety constitutes new value under 11 U.S.C. § 547(c)(1), since debtor’s payments to subcontractors avoided imposition of an equitable lien by the surety on future payments under the contract); *see also In re Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d 224, 229-30 (5th Cir. 1988)(holding that the value of the debtor’s estate is not diminished by payments which result in waiver of claims against surety).

The “new value” received by the Debtor was money. The evidence shows that Debtor was still owed funds by both Bovis and EMJ at the time of the Transfers well in excess of the Transfer amounts and on which US Fire had its equitable lien by right of subrogation. *See* Status of Accounts Summary above.

The Debtor did in fact receive this money. United Rentals “had a matured claim against the surety bond, the surety had an equitable lien on the contract amounts held by [Bovis and EMJ], and [Bovis and EMJ] could fully recoup the amount from retainage due [Debtor].” *See In re GEM Constr.*, 262 B.R. 638, 651-52 (Bankr. E.D. Va. 2000). The release of United Rentals’ rights against US Fire, “which in turn could have exercised its lien rights, constituted new value being given in a substantially contemporaneous exchange.” *Id.* at 652.

The Transfers also discharged United Rentals’ lien rights on the Mayfaire real property and constituted new value to the Debtor because the Transfers contemporaneously discharged EMJ’s setoff rights against Debtor. *In re J.A. Jones, Inc.*, 361 B.R. at 102. The “indirect transfer theory” holds that the release of a subcontractors’ lien against the owner causes a coincident release of the owner’s claims against the debtor, thereby creating new value to the debtor. *Id.*; *See In re GEM Constr.*, 262 B.R. at 646. This is consistently established by case law throughout the country in the case of inchoate mechanic’s lien rights. *See In re Hartfield Elec. Co.*, 91 B.R. at 786; *In re Mason and Dixon Lines, Inc.*, 65 B.R. at 979; *In re Dick Henley, Inc.*, 38 B.R. at 214.

B. The Transfers Fell Within The Fixing Of A Statutory Lien

The Transfers prevented the imposition of a statutory lien in property of the Debtor and are thus unavoidable by the Trustee. Section 547(c)(6) of the

Bankruptcy Code provides that the Trustee may not avoid a transfer “that is the fixing of a statutory lien that is not avoidable under §545 of this title.”

11 U.S.C. § 547 (c)(6) (2009). In the instant case, North Carolina’s Lien on Funds Statute is just such a statutory lien. *See* N.C. GEN. STAT. § 44A-18 (2009). As discussed above, United Rentals was vested with a valid statutory lien to the extent that it remained unpaid for equipment supplied to each Project. *Id.* The Transfers were in satisfaction of, and discharged United Rentals’ statutory lien, dollar for dollar. Transfers precluding the imposition of a statutory lien are not avoidable as a preference. *In re 360 Networks (USA), Inc.*, 327 B.R. at 189; *In re White*, 64 B.R. 843, 851 (Bankr. E.D. Tenn. 1986).

The critical question under § 547(c)(6) is whether United Rentals’ lien rights “had value at the time” the Transfers were made. *In re Cocolat, Inc.*, 176 B.R. 540, 549 (Bankr. N.D. Cal. 1995). The evidence clearly establishes that there were sufficient funds owed to Debtor by EMJ and Bovis such that United Rentals Lien on Funds rights had value at the time the Transfers were made. *See* Status of Account Summary. Therefore the Transfers are not avoidable by the Trustee pursuant to 11 U.S.C. § 547(c)(6) (2009).

CONCLUSION

The simplest and narrowest way to resolve this case is to decide that the money received by the Debtor for discharge of United Rentals' bond rights was a contemporaneous exchange of new value. United Rentals did not need to prove that it would have enforced its payment bond rights to establish a contemporaneous exchange of new value. United Rentals met even this affirmative defense burden of proof, with no contrary evidence from the Trustee. United Rentals respectfully prays that it be granted judgment in this case and that the Complaint against it be dismissed with prejudice.

This Court could also determine that United Rentals was a secured creditor in the Lien on Funds, with a collateral value greater than the amount of the Transfers. The Trustee most clearly had the burden of proof on this issue and failed to meet that burden. Even though the burden was put on United Rentals, United Rentals met even an affirmative defense burden of proof in establishing its Lien on Funds and that the estate was not diminished. United Rentals again respectfully prays that it be granted judgment in this case and that the Complaint against it be dismissed with prejudice.

To the extent that the evidence presented or the burden of proof is an issue, the Bankruptcy Court most clearly erred in placing the burden of proof on United Rentals to prove an affirmative defense, when United Rentals was a secured

creditor. This is mostly clearly true in United Rentals' statutory Lien on Funds, but also true in United Rentals' mechanic's lien in real property and payment bond rights. In any event, summary judgment should not have been granted the Trustee. It had not met its burden of establishing a preferential transfer. In the alternative, United Rentals respectfully prays that the decisions of the District Court and Bankruptcy Court be reversed or vacated and that this case be remanded with instructions that the District Court and Bankruptcy place the burden on the Trustee to prove that United Rentals would not have been a secured creditor on the date of the bankruptcy petition and to prove that the extent of United Rentals' collateral was less than the amount of the Transfers.

REQUEST FOR ORAL ARGUMENT

United Rentals hereby requests oral argument pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure. *See* FED. R. APP. P. 34 (2009). This case ultimately hinges on statutory interpretation of the Bankruptcy Code. All of the issues presented are unique to this Court with respect to the interplay between the Bankruptcy Code and state law on lien on funds, mechanic's liens and payment bonds. Other district courts within the Fourth Circuit have come to results that conflict with the District Court in this case. Various district courts and at least one Circuit Court decision nationwide have also consistently come to results that conflict with the District Court in this case. The issues discussed are not frivolous

and have not been authoritatively decided by this Court. The decisional process would be significantly aided by oral argument.

Respectfully submitted this the 29th day of April, 2009.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1209

Caption: United Rentals, Inc. v. James B. Angell, Chapter 7 Trustee

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(s) James D. Fullerton

Attorney for Appellant United Rentals, Inc.

Dated: 4/29/09

CERTIFICATE OF SERVICE

All Case Participants Are CM/ECF Participants

I hereby certify that on April 29, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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