

JULY 1, 2013

traditional tort theory of assumption of duty.<sup>7</sup> Finally, section 547(b)(4)(B) of the Bankruptcy Code,<sup>8</sup> while not imposing liability, may extend the reach of the preference period from ninety days to one year for creditors who are held to be insiders by virtue of their control over a debtor.<sup>9</sup>


When a debtor defaults on a loan agreement or when it owes money to a creditor beyond the agreed payment period, concern about repayment often will lead its creditors to demand drastic concessions as the price of forbearance. Without another source of financing, the debtor may accede to a number of creditor demands and grant a right of consultation and veto power over expenditure of funds. The debtor may also give the creditor significant authority over decisions such as which creditors will be paid and when payments will be made, the manner in which the debtor will conduct its business, whom the debtor will retain and hire, which assets will be held and which sold, and which contracts will be accepted.<sup>10</sup>

With increasing frequency, lenders and trade creditors are also given equity in the debtor's company in exchange for the debt. This accommodation dramatically increases the ability of creditors to exercise substantial control over their debtors. With these factors in mind, an examination of the decisions defining the boundaries of creditor liability begins.

## II. THEORIES OF LIABILITY

### A. *The Instrumentality or Alter Ego Theory*

An early case considering the extent of control necessary to impose liability on lenders is *Harris Trust & Savings Bank v. Keig (In re Prima Co.)*.<sup>11</sup> Certain banks that had lent Prima Company large sums of money became dissatisfied with its management when the company was operating un-

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7. See *infra* text accompanying notes 122-31.

8. 11 U.S.C. § 547(b)(4)(B) (1982).

9. See *infra* text accompanying notes 132-40.

10. See, e.g., *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973), *modified and petition for reh'g denied*, 490 F.2d 916 (5th Cir. 1974). See also J. KUSNET & J. ANTROPOL, *MODERN BANKING FORMS* (1981), for a compilation of standard forms and agreements.

11. 98 F.2d 952 (7th Cir. 1938), *cert. denied*, 305 U.S. 658 (1939).