

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HOWARD MILLS, Superintendent of the Insurance :  
Department of the State of New York, in his :  
capacity as Rehabilitator of FRONTIER :  
INSURANCE COMPANY, :  
:  
Plaintiff, :  
:  
-against- :  
:  
EVEREST REINSURANCE COMPANY and :  
BENFIELD INC., f/k/a E.W. BLANCH CO., :  
:  
Defendants. :  
----- X

Case No. 05-CV-8928 (WWE)

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO  
RECONSIDER THE COURT'S MEMORANDUM OF DECISION  
ON MOTIONS FOR SUMMARY JUDGMENT DATED MARCH 6, 2009**

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## PRELIMINARY STATEMENT

Plaintiff, the Rehabilitator of Frontier Insurance Company (the “Rehabilitator”), respectfully submits this Memorandum of Law in support of his Motion to Reconsider the Court’s *Memorandum of Decision on Motions for Summary Judgment* dated March 6, 2009 (the “Summary Judgment Order”). This Motion to Reconsider, made pursuant to Rule 6.3 of the Local Civil Rules for the District Court of the Southern District of New York, seeks reconsideration of that portion of the Summary Judgment Order that dismissed the Complaint with prejudice as against defendant Everest Reinsurance Company (“Everest”).<sup>1</sup>

Plaintiff respectfully submits that the Summary Judgment Order presents the rare circumstance in which this Court misconstrued and, thus, misapplied the relevant law that was put before it. The Court’s review of the Summary Judgment Order will establish that the Court incorrectly applied the legal standard governing the Rehabilitator’s claims for constructive fraudulent conveyance under the New York Debtor and Creditor Law (the “DCL claims”).

The Summary Judgment Order incorrectly dismissed the Complaint against Everest based on two related, but, incorrect holdings (i) that an antecedent debt, *ipso facto*, establishes fair consideration and (ii) that the challenged monetary transfers related to a valid, prior contract (the UPL Contract, defined below).

As to the first, incorrect, ruling, the decision cited by this Court, In re Sharp Int’l Corp. v. State St. Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005), does not support dismissal of the Complaint against Everest, and, in fact, the Second Circuit held there that in circumstances where no insiders are involved (as here), the issue of whether there is an antecedent debt is

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<sup>1</sup> The Court denied the motion for summary judgment filed by Defendant Benfield, Inc., (“Benfield”) and thus that portion of the Summary Judgment Order is not placed at issue in this Motion to Reconsider.

distinct from whether there is fair equivalent (or reasonably equivalent) value as required for fair consideration under § 272 of the New York Debtor and Creditor Law (the “DCL”).

As to the second incorrect ruling, the Summary Judgment Order misconstrued and misapplied the January 23, 2006 decision in this case of the Honorable Colleen McMahon, reported at Mills v. Everest, 410 F. Supp. 2d 243 (S.D.N.Y. 2006). There, Judge McMahon denied the Defendants’ Fed. R. Civ. P. 12(b)(6) motion to dismiss Plaintiff’s DCL claims even though the challenges to the UPL Contract which spawned the challenged transfers were time-barred. The Summary Judgment Order misapplied Judge McMahon’s ruling and incorrectly held that because the UPL Contract could not be challenged, the Rehabilitator could not assert that there was no fair consideration for transfers of money, even if made after the date on which the statute of limitations ran. To the contrary, Judge McMahon’s Order expressly held that the Rehabilitator’s DCL claims were timely, to the extent that transfers occurred after May 24, 1999, but that for purposes of evaluating fair consideration, under Second Circuit law, a court should collapse those same transfers and evaluate the value given at the point in time when the contract was entered into.

The relevant case-law on both of these issues was before this Court in the context of Everest’s summary judgment motion and cited in the Summary Judgment Order, but was misapplied. As a result, the Court incorrectly granted Everest’s motion for summary judgment. Plaintiff submits that upon reconsideration, the Court will conclude that it erred, rectify the Order by granting this Motion to Reconsider and denying Everest’s motion for summary judgment, and thus enable this case to proceed to trial.

## **BACKGROUND RELEVANT TO THIS MOTION TO RECONSIDER<sup>2</sup>**

### **A. JUDGE MCMAHON'S JANUARY 23, 2006 RULING**

The central issue in this case is the Rehabilitator's allegation that the Estate of Frontier Insurance Company has the right to recover substantial sums transferred from Frontier Insurance Company ("Frontier") to Everest and Benfield, because those transfer are constructive fraudulent conveyances under New York Debtor and Creditor law. The transfers at issue were made based on the terms set forth in the Underlying Professional Liability Excess of Loss Reinsurance Contract (the "UPL Contract"<sup>3</sup>), effective as of January 1, 1999.

Upon ruling on Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss the Complaint filed on May 26, 2005, Judge McMahon noted that the Rehabilitator sought "rescission of the [UPL] Contract ... on the grounds of mutual mistake, the equitable remedy of avoidance, [constructive] fraudulent conveyance claims under *New York Debtor and Creditor Law* §§ 273-275, and fraud under *New York Debtor and Creditor Law* § 276." Mills, 410 F. Supp. 2d at 245-46.

By Order dated January 23, 2006, Judge McMahon dismissed all claims except for the three DCL claims. Mills, 410 F. Supp. 2d at 253-54. In doing so, Judge McMahon, applying Second Circuit law, held that the Rehabilitator could proceed with his allegation that the UPL Contract lacked "fair consideration" because there was no risk transfer thereunder. Judge McMahon also rejected Defendants' claims that the DCL claims were time barred based

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<sup>2</sup> The Rehabilitator provides only the background information necessary to the Court's decision on this motion. For a fuller recitation of the background, including the fact issues raised by the Defendants' motions, the Rehabilitator respectfully refers the Court to all previously filed pleadings in this matter.

<sup>3</sup> Should the Court wish to review Plaintiff's submissions in relation to the summary judgment motion, the UPL Contract was defined as the UPL Agreement.

on the parties being bound under the UPL Contract, as of March 25, 1999. Id. at 249. The Court held that the DCL claims were independent of the contract claims, even though the challenged monetary transfers were made in relation to the UPL Contract.

In holding that the statute of limitations had not run for any transfers made after March 24, 1999, although the transfers were made in relation to the UPL Contract, for which a rescission claim was time barred, Judge McMahon explained:

Defendants claim that plaintiff fails to plead a claim for fraudulent conveyance under New York Debtor and Creditor Law §§ 273-275. Alternatively, defendants contend that plaintiff's fraudulent conveyance claims are time-barred. The court disagrees on both accounts and denies defendants' motion with respect to plaintiff's third, fourth, and fifth causes of action.

Mills, 410 F. Supp. 2d at 253. Judge McMahon held that the fraudulent conveyance claims were not time-barred, because Second Circuit case-law collapsing challenged transfers did not allow collapsing for purposes of applying the statute of limitations on a DCL claim. Judge McMahon made that ruling while recognizing that a series of transfer should be collapsed, and a court should look to the underlying contractual obligation, to establish whether the obligation constitutes fair equivalent value. Judge McMahon also held that the legal issues relevant to the DCL claims were two-fold: (i) fair consideration, based on whether there was risk transfer for amounts transferred under the time-barred UPL Contract and (ii) Frontier's insolvency at the time of the transfers. Id. at 254.

After Judge McMahon issued the January 23, 2006 Order, the parties proceeded with discovery relating to the DCL claims. The factual disputes as to whether Frontier received fair consideration and Frontier's insolvency are detailed in the parties' summary judgment submissions. Upon the completion of discovery, Defendants filed summary judgment motions, for which reply briefs were filed in May of 2007. The parties also negotiated a Joint Pre-Trial

Order, and submitted all other pre-trial submissions (such as exhibits and memoranda) required by Judge McMahon's Individual Rules. In short, under Judge McMahon's administration of the case, the parties were ready for trial of the DCL claims, after a ruling on the summary judgment motions.

In August 2007, after all pre-trial submissions were complete, the case was transferred to the Honorable Kenneth Karas, due to Judge McMahon's move from the courthouse in White Plains to the Daniel Patrick Moynihan Courthouse in New York, New York. In December of 2008, the parties were informed that the Honorable Warren W. Eginton would hear the summary judgment motions. At the Court's suggestion, Plaintiff submitted a sur-reply and the Defendants later submitted sur-sur-replies. The Summary Judgment Order was issued on March 6, 2009 and dismissed the Complaint as against Everest but not against Benfield.

#### **B. POINTS FOR RECONSIDERATION IN THE SUMMARY JUDGMENT ORDER**

Plaintiff asks this Court to reconsider its ruling that transfers made to Everest under the UPL Contract related to an antecedent debt, and thus Frontier could not challenge whether there was fair consideration. The Summary Judgment Order's holding on this legal question provides:

Everest argues that it is entitled to summary judgment because, among other reasons, any payments by Frontier were on account of an antecedent debt incurred through the UPL Contract. Frontier responds that because the UPL Contract was not a proper reinsurance contract, it cannot create an antecedent debt for which repayment would qualify as fair consideration under the law. **Because the Court finds that Everest's payments were on account of an antecedent debt and did constitute fair consideration, it will grant Everest's motion for summary judgment.**

Summary Judgment Order at p. 9 (emphasis added). This statement in the Summary Judgment Order follows on a prior statement that, ipso facto, "payment on account of an antecedent debt



constitutes fair consideration under New York law. See HBE Leasing Corp. v. Frank, 48 F.3d 623, 633 (2d Cir. 1995).” Summary Judgment Order at p. 7 (emphasis added).

As explained below, the Summary Judgment Order misapplied the Second Circuit’s rule on evaluating fair consideration, where an antecedent debt may exist, as articulated in HBE Leasing and Sharp Int’l Corp. v. State St. Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005) (cited in the Summary Judgment Order for this proposition). Moreover, the Summary Judgment Order also reflects a misapplication of Judge McMahon’s rulings that the UPL Contract was time-barred. A reconsideration of these two points necessitates denial of Everest’s summary judgment motion.

## **ARGUMENT**

### **POINT I**

#### **THE COURT SHOULD RECONSIDER THE SUMMARY JUDGMENT ORDER**

##### **I. Legal Standard**

“A motion for reconsideration under Local Rule 6.3 is appropriate where ‘the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.’” See Henderson v. Metro. Bank & Trust Co., 502 F. Supp. 2d 372, 375-76 (S.D.N.Y. 2007). See also Morser v. AT & T Info. Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989) (party can successfully assert motion to reargue if it presents “matters or controlling decisions the court overlooked that might materially have influenced its earlier decision.”).

Reconsideration is also justified by “an intervening change in controlling law, the availability of new evidence, *or the need to correct a clear error or prevent manifest injustice.*” Doe v. New York City Dep’t of Soc. Servs., 709 F.2d 782, 789 (2d Cir. 1983) (emphasis added).

## II. **The Court Misapplied The Second Circuit's Law On Whether An Antecedent Debt Involves Fair Consideration**

Defendants had incorrectly argued to the Court that, as long as a debt existed, and the debtor's payments were made in accordance with the agreement setting out the debt, there should be no inquiry as to whether the debtor received fair consideration for the transfers under that agreement. Extending this argument, Everest contended that because the UPL Contract was time barred, the Court could not look back to the UPL Contract to determine if there was fair consideration, even for the monetary transfers that Judge McMahon had held were not time barred. Memorandum in Response to Plaintiff's Sur-Reply in Opposition to Everest Reinsurance Company's Motion for Summary Judgment dated February 13, 2009 at pp. 7-8. The Court incorrectly adopted this argument and found that "payment on account of an antecedent debt constitutes fair consideration under New York law. See HBE Leasing Corp. v. Frank, 48 F.3d 623, 633 (2d Cir. 1995)." Summary Judgment Order at 7. See also id. at 9 (incorrectly stating if there is an antecedent debt, fair consideration is not required).

However, the Court's holding misapplies both of the Second Circuit cases (HBE Leasing and In re Sharp) cited on this point. See Summary Judgment Order at 7 & 11. The Summary Judgment Order, citing Sharp, suggests that Frontier's decision to sign the UPL Contract, in itself concedes consideration:

Frontier agreed to an insurance contract with terms apparent on the agreement's face. Although the agreement did not provide what Frontier thought it did, to allow the Rehabilitator to recover payments made under the UPL Contract because Frontier did not receive what it expected to receive would change the nature of contract law. Here, there is no dispute that there was performance by Everest of the contractual terms actually agreed upon, even if they did not meet Frontier's expectations prior to the entering of the agreement. See Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp Int'l Corp.), 403 F.3d 43, 54 (2d Cir. 2005) (noting only one case in which a payment on an antecedent debt or made to an outsider was found lacking in fair consideration; debtor had

swore that the payment was made to evade creditors); Ede v. Ede, 193 A.D.2d 940, 941 (3d Dep't 1993).

Summary Judgment Order at p. 11.

However, the Court misapplied Sharp. As the portion of the Sharp decision that precedes the page cited in the Summary Judgment Order states, the language of DCL § 272 makes clear that the test for fair consideration is comprised of *three elements*:

(1) ...the recipient of the debtor's property [ ] must either (a) convey property in exchange or (b) discharge an antecedent debt in exchange; and (2) such exchange must be a 'fair equivalent of the property received; and (3) such exchange must be 'in good faith.'

In Re Sharp Int'l Corp., 403 F.3d at 53-54 (quoting HBE Leasing Corp., 61 F.3d 1054, 1058-59 (2d Cir. 1995) (emphasis added). Under this three-element standard for fair consideration, even if this Court may have accepted the existence of one element (discharge of an antecedent debt) by virtue of the UPL Contract, that finding does not eradicate the necessity for evaluating elements (2) and (3), which must be shown for fair consideration to exist. That is, the Court should still have considered that the factual issues on element (2) – an exchange of something that is a “fair equivalent,” – and element (3) – an exchange made in good faith – remained, even if the UPL Contract constitutes an antecedent debt.<sup>4</sup>

The Court's misapplication of In re Sharp on the antecedent debt point, is also reflected in the Summary Judgment's citation to that case, even though the issue of element (2), whether there was a fair equivalent, was not before the Second Circuit. As a reading of the Sharp decision reveals, the Second Circuit held that Sharp had conceded both element (1) by conceding an antecedent debt and element (2) whether there was a fair equivalent. See In re Sharp Int'l Corp., 403 F.3d at 54 (“Sharp **acknowledges** that the payment at issue discharged an

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<sup>4</sup> Element 3, good faith, was not raised in Everest's summary judgment submissions.

antecedent debt **and was made for a ‘fair equivalent’**”) (emphasis added). In short, antecedent debt and fair equivalent value were not before the Sharp Court.

The only issue left before the Sharp Court was whether a transfer could nonetheless be avoided based on allegations that the transferee acted in bad faith. In re Sharp Int’l Corp., 403 F.3d at 54. As the Summary Judgment Order acknowledges, the third element of good faith was not at issue in Everest’s motion for summary judgment.

In short, the factual question of fair consideration – whether an exchange is a “fair equivalent” was not present in Sharp, unlike in this case before this Court. Sharp stands for the holding that fair consideration is not eviscerated when a defendant simply asserts that the transfers relate to a debt incurred prior to the transfers. Thus, the Summary Judgment Order misapplied Sharp in ruling that an antecedent debt in itself constitutes fair consideration.

### **III. The Court Misapplied Judge McMahon’s Order**

The Summary Judgment Order’s misapplication of the DCL standard on fair consideration was magnified by its incorporation of Judge McMahon’s dismissal of the Rehabilitator’s contract claims in a manner which eviscerated the claims Judge McMahon explicitly ruled should proceed – the DCL claims.

The primary basis for the Summary Judgment Order’s finding that the fraudulent conveyance claims against Everest should be dismissed was the incorrect ruling that Judge McMahon’s dismissal of the Rehabilitator’s contract claims (on statute of limitations grounds) necessarily established the validity of the UPL Contract – and thus that there was a fair exchange of fair equivalent value. The Court misapplied Judge McMahon’s ruling dismissing the contract claims on the statute of limitations grounds, as reflected by the following section of the Summary Judgment Order:

The Court has previously ruled that the Rehabilitator cannot challenge the validity of the UPL Contract because the statute of limitations to do so has run. See Mills, 410 F. Supp. 2d at 252. It follows then that any liabilities or obligations stemming from the UPL Contract are owed and must be paid by Frontier. It does not matter that Frontier did not enter into the contract that it thought it had... Having agreed to it, however, Frontier and the Rehabilitator are bound by the agreement's terms. Representations that it intended otherwise cannot enable Frontier to escape its obligations.

Therefore, Frontier's expectations when it entered into the UPL contract are immaterial as compared with the actual language of the agreement...

**With its obligations established by the UPL Contract, the Court must next consider whether the payments to Everest constituted fair consideration.** DCL § 272(b) provides that payment on an antecedent debt constitutes fair consideration provided that the debt is not "disproportionately small" compared to the payments. Plaintiff has not proffered any evidence that the debt to Everest was disproportionately small relative to the payments made under the UPL Contract...

**Moreover, the court does not accept Frontier's argument that the consideration for which it contracted is not fair. First, Frontier cannot argue that consideration was not provided because that argument is foreclosed by the expiration of the statute of limitations.**

Summary Judgment Order at p. 9-11. (emphasis added).

Judge McMahon expressly rejected this approach in her January 26, 2006 ruling allowing the DCL claims to go forward. Judge McMahon's ruling stated that the issue of fair consideration is directly tied to the issue of whether the UPL Contract provided reinsurance, regardless of whether the UPL Contract could be substantively challenged. In explaining why the Plaintiff had adequately pled claims for constructive fraudulent conveyance under the DCL, the Court cited to paragraphs 16 and 20 of the Complaint, and the Rehabilitator's allegations that since "there was only a 1 in 100 chance that Everest would suffer any loss under the contract, '[t]he defendants received grossly excessive and inappropriate compensation for their

participation [in the contract].” See Mills v. Everest Reins. Co., 410 F. Supp. 2d 243, 254 (S.D.N.Y. 2006).

As Judge McMahon explained, for purposes of when the statute of limitations runs on a DCL claim, the court must look at the timing of each separate transfer:

The court also rejects defendants' contention that plaintiff's fraudulent conveyance claims are untimely. Like plaintiff's claims of mutual mistake, fraud and equitable rescission, plaintiff's third, fourth and fifth causes of action are subject to a six-year statute of limitations. However, unlike those claims, **plaintiff's claims under §§ 273-275 are claims for fraudulent conveyance and "arise[] at the time the fraud or conveyance occurs."** See *N.Y. C.P.L.R. § 213(1)*; see also *Bloomfield v. Bloomfield*, 280 A.D.2d 320, 721 N.Y.S.2d 15 (2d Dept. 2001). Where there are multiple conveyances, the New York Debtor and Creditor Law requires examination of "every conveyance made." N.Y. Debt & Credit §§ 273-275.

In this case, plaintiff alleges that Frontier incrementally transferred funds to defendants which, in the aggregate, exceeded \$ 40 million (Cplt P17). Each transfer had the effect of reducing the assets available to Frontier. Therefore, **each transfer constitutes a separate conveyance for purposes of calculating the date upon which the statute of limitations accrued.** Even though the March 30, 1999, transfer occurred more than six years prior to the filing of this action, and thus is beyond the statute of limitations, plaintiff's claims with respect to the remaining transfers are timely.

Mills at 254.

However, applying Second Circuit law, Judge McMahon expressly stated that where the issue before a court is fair consideration for the challenged transfers, the court must collapse a series of transfers made in relation to a single agreement, and evaluate the agreement – here the UPL Contract – to address fair consideration. As explained in Judge McMahon's ruling, which was cited by this Court:

The court rejects defendants' assertion that Frontier's multiple transfers should be "collapsed" into one transaction for the purpose of determining when the statute of limitations began to run on plaintiff's fraudulent conveyance claims. As defendants point out,

there is a well- recognized exception to the rule that each transfer must be evaluated as a separate conveyance. "Where a transfer is actually 'only a step in a general plan,' an evaluation is made of the entire plan and its overall implications." ***In re Sunbeam Corp.*, 284 B.R. 355, 370 (Bankr.S.D.N.Y. 2002) (citing *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993))**. Applying this exception, courts have "collapsed" a series of transfers to assess the existence of fair consideration and the knowledge and intent of the parties, in order to determine whether or not a particular transaction constitutes a fraudulent conveyance. See, e.g., *Orr*, 991 F.2d at 35. This exception, however, has never been invoked for the purpose of determining whether a fraudulent conveyance claim is or is not timely under a statute of limitations. Indeed, because a new claim for fraudulent conveyance accrues at the time of each conveyance, it would be illogical and contrary to the spirit of the law to treat a series of transfers as one transaction for the purpose of determining when the statute of limitations was triggered.

Mills at 254-55 (emphasis added).

Without this approach, it would be difficult for many insolvent estates to recover fraudulent conveyances that occurred as part of a complex scheme of integrated transactions, rather than as a discrete improper transfer. Judge McMahon's ruling was consistent with the Second Circuit's rulings, holding that specific fraudulent conveyances cannot be viewed in isolation, and must be analyzed in conjunction with the documents and related acts, that gave rise to fraudulent scheme. Thus, Judge McMahon correctly held that under Second Circuit law, the court would look to the alleged value of the UPL Contract and whether it transferred fair equivalent value to Frontier, when determining the merits of the Rehabilitator's fraudulent conveyance claim, even if a contract action on the UPL Contract was time-barred.

Despite citing to this controlling case-law (Summary Judgment Order at p.5, n.2), which is the law of the case, the Summary Judgment Order inconsistently and incorrectly ruled that Frontier could not challenge the consideration for the UPL Contract, "because that argument is foreclosed by the expiration of the statute of limitations." Similarly, the Summary Judgment

Order misstates that challenging fair consideration was “a path unavailable here.”<sup>5</sup> Summary Judgment Order at p. 11.

The Summary Judgment Order and Judge McMahon’s ruling, which correctly applies the Second Circuit’s ruling in Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2d Cir. 1993), cannot be reconciled. Judge McMahon correctly held that a series of transfers challenged as fraudulent conveyances, should be collapsed, and a court should look to the underlying contractual obligation – whether or not that obligation is time barred – to establish whether the obligation constitutes fair equivalent value.

The Summary Judgment Order, did not consider that Judge McMahon expressly held that, regardless of the whether actions on the UPL Contract were time-barred, was relevant to determining the issue of fair consideration. This error should be remedied by granting this motion to reconsider, and, on reconsideration, Everest’s motion for summary judgment should be denied.

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<sup>5</sup> In relation to this same issue, the Summary Judgment Order incorrectly put the burden on the Rehabilitator to provide “case law to support its argument that a rehabilitator can recover a fraudulent conveyance based on *a valid contract*.” Summary Judgment Order at 11-12 (emphasis added). This finding was also incorrect, because Judge McMahon had never ruled that the UPL Contract was “valid.” Rather, she had simply held that the statute of limitations had expired, and thus the validity of the contract could not be challenged if the legal claim was styled as a contract claim.



## CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiff's prior submissions in relation to the motions for summary judgment, (May 21, 2007 and January 30, 2009), Plaintiff respectfully request that the Court reconsider, and vacate the March 16, 2009 Order. Everest's Motion should be denied in its entirety, and this Court should reserve judgment on the Rehabilitator's constructive fraudulent conveyance claims until there has been a full and fair trial on the merits.

Dated: New York, New York  
March 20, 2009

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