

Attorneys Richard Thorner, Charles F. Cleary and Stephen L. Boyd represented Bankruptcy Trustee Victor Dahar in Dahar v. Jackson, First Circuit Docket No. 05-2702. Attorney Boyd presented the oral argument before the First Circuit. Dahar affirmed the setting aside of transfers found to be fraudulent pursuant to the **New Hampshire Fraudulent Transfer Act (N.H. R.S.A. 545-A:4)**. The New Hampshire Bankruptcy Court found that the debtor did not receive "reasonably equivalent value in exchange" for the subject parcels, and that the debtor was engaged "in a business ... for which the remaining assets of the debtor were unreasonably small in relation to the business." The defendant argued that the debtor's remaining assets were not unreasonably small, because the Bankruptcy Court should have taken into account his personal assets. Regardless, the debtor's business had negative equity after the transfers, and the debtor could no longer pay his own debts. Therefore, the First Circuit concluded that the Bankruptcy Court did not err in finding that the debtor's remaining assets were unreasonably small.

The First Circuit also affirmed an equitable adjustment in favor of the defendant "for the expenditures she made, that the debtor could have made without objection [if he had not transferred properties], during the [one-year period that] the business was winding down." The defendant wanted more than one year included, but the First Circuit said that the Bankruptcy Court's ascertainment of how long the winding-up took was reasonable, and the defendant did not provide any better reason to include a longer period of time.

Finally, the First Circuit found that since the New Hampshire Uniform Fraudulent Transfer Act did not indicate which burden of proof should be applied, then it should determine which standard the New Hampshire Supreme Court would be expected to apply. The First Circuit did not find any reason to apply a heightened burden of proof in a constructive fraud case. Consequently, the First Circuit held that the Bankruptcy Court had correctly applied the preponderance of the evidence standard.

This case provides many of the heretofore unknown answers on the specific requirements for setting aside a constructive fraudulent conveyance.