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A company owes me money but is now in liquidation

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If you are a creditor of a deregistered company, the first thing you need to establish is whether you are a secured or an unsecured creditor.

A secured creditor is a creditor that has a security interest (for example a mortgage or a charge) over an asset of the company so that if the company does not pay its debt you can at least recover the asset from the company.

An unsecured creditor is a creditor without a mortgage or charge; an example would be someone that has an unpaid debt or a court judgement for debt.

When a company is wound up through a process of liquidation a liquidator is appointed.

It is the liquidator's role to assess the assets of the company, sell those assets, report to ASIC and creditors and distribute funds to creditors and shareholders if possible and then deregister the company. Once the assets of the company are sold, the secured creditors are paid before the unsecured creditors.

A liquidator has the ability to recover, for the benefit of the creditors of the company that has been liquidated, payments (known as unfair preference payments) made by the company to individual creditors in the six months before the start of the liquidation. This is possible under section 588FA of the *Corporations Act 2001 (Cth).*

For example a creditor of the company has received an unfair preference payment if at some time during the six months prior to liquidation the company is insolvent and the creditor suspects the company is insolvent but nevertheless receives payment of their debt before other creditors of the company. If a payment by the insolvent company puts the creditor receiving it in a more favourable position than other unsecured creditors then this is an unfair preference.

Unfair preference payments are a class of voidable transactions under clause 588FE of the *Corporations Act 2001 (Cth).* Other types of voidable transactions include:

- Uncommercial transactions; for example the sale, transfer or purchase of assets that were not beneficial to, and were in fact detrimental to the company;
- Unfair loans with extortionate interest rates; and
- Unreasonable director-related transactions; an example of this is where there are ‘indirect benefits’ to a director or close associate of a director of the company such that the director or associate of the company is benefiting from the directors loss, for example through transfer or sale of an asset of the company.

To be voidable the transaction must be an insolvent transaction and have occurred within the 6 month period prior to the liquidation or bankruptcy.

We note that not all payments from the company to a creditor in the six months before liquidation are unfair preferences. The *Corporations Act* provides various defences to an unfair preference claim. Therefore it is important to get legal advice if a liquidator seeks to recover a payment that has been made to you to establish whether you need to repay the money or not.
