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Guidance on the Uniform Voidable Transactions Act

IN JULY 2014, THE NATIONAL CONFERENCE of Commissioners on Uniform State Law, also known as the Uniform Law Commission (ULC), amended the Uniform Fraudulent Transfer Act of 1984¹ (UFTA) and renamed it the Uniform Voidable Transactions Act of 2014 (UVTA).² Fraudulent transfer laws fall largely under the jurisdiction of each individual state³ or territory, with a notable exception being the fraudulent transfer provision of the U.S. Bankruptcy Code.⁴ Thus, in an attempt to establish uniformity among the various fraudulent transfer laws in different jurisdictions, the ULC studies and prepares proposed legislation on a number of topics, which it then forwards to individual jurisdictions for consideration and adoption.⁵ The ULC has proposed uniform legislation on the laws governing fraudulent transfers for almost 100 years.⁶

In 1918, the ULC, in its first attempt to codify and unify the various fraudulent transfer laws in the United States, introduced the Uniform Fraudulent Conveyances Act of 1918 (UFCA).⁷ The UFCA is based on the principles propounded in the Fraudulent Conveyances Act of 1571, also known as Statute 13 of Elizabeth, which had been enacted by the English Parliament in the sixteenth century and was still widely used (in some form or another) in the United Kingdom, the Commonwealth, and the various jurisdictions of the United States.⁸ The UFCA provided that a transfer by a debtor meant to shield the debtor's property from creditors was a fraudulent one, and thus could be avoided by the creditor, thereby treating the transfer as if it never occurred.⁹ The UFCA was adopted by 25 jurisdictions, including New York, which, along with Maryland, still continues to use the UFCA.¹⁰

In 1984, the ULC amended the UFCA, replacing the term "conveyance" with "transfer," and renamed it the UFTA in order to more accurately reflect the applicability of the UFTA to real and personal property conveyances.¹¹ Although the UFTA was similar to the UFCA in most respects, the UFTA allowed, among other changes, an existing or subsequent creditor to avoid a fraudulent transfer and eliminated a creditor's ability to avoid a security transfer on the grounds that the value of the collateral securing an obligation was disproportionate to the secured debt (thus prohibiting foreclosures from being attacked and avoided as fraudulent transfers).¹² The UFTA has been adopted by 43 states, Washington, D.C., and the U.S. Virgin Islands.¹³ Since its adoption, the provisions of the UFTA have been subject to conflicting interpretations in different jurisdictions across the United States, sometimes creating an inconsistent and unpredictable litigation environment.¹⁴ In order to address certain issues that arose as a result of conflicting judicial interpretations of the UFTA, the ULC amended the UFTA in 2014, renaming it the UVTA.¹⁵

The most obvious amendment to the UVTA is the removal of "fraudulent" and "transfer" from its title, which have been replaced with "voidable" and "transactions" respectively. The name change from "fraudulent transfer" to "voidable transactions" reflects the cor-

rection of the misnomer that has plagued fraudulent transfer law for years.¹⁶ Fraud has never been a required element in the prosecution of a claim under the UFTA, and its incorporation into the UFTA has been a source of confusion.¹⁷ The word "fraud" has created some trouble in the litigation of claims under the UFTA due to the heightened standard of pleading required for claims of fraud pursuant to the Federal Rules of Civil Procedure. It was incorrect to assume that UFTA claims require the same heightened standard of pleading as traditional fraud claims.

Rule 9(b) of the Federal Rules of Civil Procedure requires that "a

The UVTA makes clear that the determination of a debtor's location must be made "on the basis of authentic and sustained activity."

party must state with particularity the circumstances constituting fraud...."¹⁸ This heightened pleading requirement has led to courts' dismissing fraudulent transfer claims against debtors if the creditor has not specifically pled that the debtor had fraudulent intent in completing the transfer at issue.¹⁹ However, since fraudulent transfer claims are not common law fraud claims, the pleading of a fraudulent transfer claim does not need to meet the heightened standard set by the Federal Rules of Civil Procedure.²⁰ The phrase "hinder, delay or defraud" in the UFTA refers not to a fraudulent transaction but instead one that "unacceptably contravenes norms of creditors' rights."²¹ Therefore, the term "fraudulent" was replaced with "voidable" to clear the confusion that has surrounded the litigation of fraudulent transfer claims. The word "transfer" was also replaced with the word "transactions" to include obligations incurred as well as transfers made.²²

A significantly substantive amendment to the UVTA is the addition of a choice of law provision that identifies which jurisdiction's fraudulent transfer law is to be used in determining claims under the UVTA, thus resolving any conflicts of law issues that may arise when litigating a fraudulent transfer claim that involves multiple jurisdictions. As mentioned above, while the ULC's goal in drafting the UFCA, UFTA, and UVTA was to create uniform fraudulent transfer laws nationwide, many states, including California, have modified their versions of the UFTA, while others, including New York, have modified their versions of the UFCA.²³ Such irregularities in fraudulent transfer laws affect the outcomes of certain multijurisdictional actions, depending on which jurisdiction's fraudulent transfer law is used.

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The UVTA sought to erase the irregularity that results from conflicts of law issues by adding a new choice of law section. Section 10 of the UVTA provides that a claim under it is “governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.”²⁴ The UVTA further provides that a debtor who is a natural person is located at his principal residence and that a debtor who is an organization is located either at its principal place of business (if it only has one location) or at its chief executive’s office (if it has multiple locations).²⁵ Because the determination of the debtor’s location is made at the time the fraudulent transfer occurs, a debtor will be prevented from making a fraudulent transfer in one jurisdiction and then moving to another jurisdiction in which the fraudulent transfer laws are more relaxed.²⁶ The UVTA makes clear that the determination of a debtor’s location must be made “on the basis of authentic and sustained activity” and not “on manipulations employed to establish a location artificially.”²⁷ This addition will help avoid unnecessary litigation surrounding conflicts of law issues in the prosecution and defense of fraudulent transfer claims.

Another important amendment made to the UFTA in the UVTA is the revision of the insolvency presumption. A debtor’s insolvency is an integral element in fraudulent transfer claims since under the UFTA and UVTA a transfer can only be avoided if the debtor was insolvent at the time of the transfer—unless the creditor can prove that the transfer was made with actual intent to “hinder, delay, or defraud” creditors.²⁸ Since proof of insolvency can be difficult and expensive, the UFTA and the UVTA provide for an insolvency presumption. Under both acts, a debtor is considered insolvent if his or her liabilities exceed assets, or “balance sheet insolvency,” while a presumption of insolvency arises when a debtor is not paying his or her debts as they become due, or “cash flow insolvency.”²⁹ This presumption was intended to allocate the final burden of proof of noninsolvency to the debtor, since the debtor is more likely to have access to information to prove that he or she is, in fact, solvent.

Despite the burden shift, some courts have applied a “bursting bubble” theory of presumptions, meaning that if the debtor has provided enough evidence to overcome the presumption of insolvency, the burden of proof again shifts to the creditor to prove the debtor’s insolvency.³⁰ Other courts have kept the ultimate burden of proof of solvency with the debtor.³¹ In keeping in line with the goal of making the litigation of fraudulent transfer claims more predictable and less expensive, the UVTA sought to resolve the jurisdictional differences regarding the insolvency presump-

tion by explicitly noting that the presumption of insolvency “imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.”³² In other words, the UVTA makes clear that after a creditor has shown that the debtor cannot pay his or her bills as they become due, the debtor must ultimately prove that he or she is more likely solvent rather than insolvent.

Apart from revising the insolvency presumption, the UVTA also updates the definition of insolvency for partnerships. Pursuant to the UFTA, a partnership is insolvent if “the sum of the partnership’s debts is greater than the aggregate, at fair valuation, of all of the partnership’s assets and the sum of the excess value of each general partner’s nonpartnership assets of the partner’s nonpartnership debts.”³³ In other words, the UFTA includes the net worth of each of the partnership’s general partners in the value of the partnership’s assets.³⁴ The UVTA deletes this special definition of insolvency for partnerships and employs the general balance sheet definition of insolvency used for individual and business debtors for partnerships as well. This revision was made in part because the definition of partnership insolvency under the UFTA credited the partnership with the net worth of each of its general partners while many partnership statutes do not require that all general partners be liable for all of the debts of the partnership.³⁵

Similar to streamlining the insolvency presumption, the UVTA also amends the UFTA by clearly stating and allocating the burdens of proof and persuasion that are to be used in litigating fraudulent transfer claims, provi-

sions which were lacking in the UFTA. These burdens are particularly important in fraudulent transfer claims because debtors are often uncooperative and untruthful in providing information to creditors.³⁶ The UVTA explicitly states that the standard of persuasion for all claims under it is the “preponderance of the evidence.”³⁷ It also allocates this burden of persuasion to specific parties with respect to specific claims.

Sections 4(c) and 5(c) of the UVTA explicitly state that the creditor asserting a fraudulent transfer claim under those sections bears the burden of proving the elements of the fraudulent transfer claim by a preponderance of the evidence. Sections 8(g) and 8(h) of the UVTA state that a party seeking to use the defenses available to a good faith transferee carries the burden of proof of the defense by a preponderance of the evidence. This means that pursuant to the UVTA, a transferee who wants to defend against avoidance of a transfer must ultimately prove, by a preponderance of the evidence, that he or she paid reasonably equivalent value for the property and made the transfer in good faith.³⁸

The UVTA also goes a step further with regard to the burdens of proof and persuasion and explicitly states that courts “should not apply nonstatutory presumptions” that reverse the allocation and “should be wary of nonstatutory presumptions” that would dilute the allocation.³⁹ Because of this, the UVTA goes against volumes of precedent that have resulted in nonuniform application of the UFTA and provides for more uniform prosecution of fraudulent transfer claims across the United States.⁴⁰

The UVTA also makes minor revisions to

CONFLICTS OF LAW PROVISION

The Uniform Voidable Transactions Act of 2014 (UVTA) includes a provision that addresses which jurisdiction’s fraudulent transfer laws will govern in the case of a multijurisdictional fraudulent transfer action. This conflicts of law provision is not present in the Uniform Fraudulent Transfer Act of 1984 (UFTA), which is currently adopted in a majority of the states. The main impetus for inclusion of this provision is to limit a debtor’s ability to game the system by engaging in a fraudulent transfer in one jurisdiction and then moving to another jurisdiction to take advantage of less strict fraudulent transfer laws in that jurisdiction. The benefits of the new conflict of laws provision is exemplified below.

A debtor who lives in California “sells” his very expensive art collection in California on January 1, 2010 (without receiving reasonably equivalent value for the art collection and incurring debts that he cannot pay) and moves to Nevada, where he continues to incur debts and live a lavish lifestyle. The debtor knows that the statute of limitations in Nevada on fraudulent transfer actions is four years. When January 1, 2014, comes around, he can celebrate because under the current state of the law any creditor is out of luck in attempting to avoid that fraudulent transfer.

If the UVTA is adopted, the debtor is in trouble because the UVTA provides that the fraudulent transfer laws of the jurisdiction in which a debtor is located at the time of the fraudulent transfer governs in an action to avoid the transfer. Thus, because the debtor was in California when he putatively sold the expensive art, the debtor’s creditors have up to seven years, or until January 1, 2017, to sue the debtor to avoid the fraudulent transfer. Thus, the debtor will have to keep his champagne in the freezer for a few more years.—B.Y.

defenses available to transferees in fraudulent transfer actions. Pursuant to the UFTA and UVTA, an otherwise voidable fraudulent transfer is not voidable if the transferee takes the property in good faith and has paid a reasonably equivalent value for the property.⁴¹ Unlike the UFTA, however, the UVTA also requires that the reasonably equivalent value must be paid to the debtor.⁴²

The UVTA also modifies a defense to fraudulent transfers resulting from the “enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code,” which provides that a secured party must enforce its rights in good faith, in a commercially reasonable manner, and must provide substantial protection to the debtor’s other creditors.⁴³ The UVTA revision provides that a transfer that results from the enforcement of a security interest under UCC Article 9 “other than acceptance of collateral in full or partial satisfaction of the obligation it secures” is not voidable.⁴⁴ This carve-out for strict foreclosures means that a transferee who receives its collateral due to a strict foreclosure is still subject to having that transfer voided; it is meant to protect a debtor’s other creditors since a debtor may not sufficiently protect his equity in the asset that is being foreclosed upon.⁴⁵

The new UVTA also contains a provision that discusses its applicability to series orga-

nizations. A series organization is a special business organization comprising a series of membership classes in which each membership class, or series within the organization, owns a specific asset of the business organization.⁴⁶ The benefit of a series organization is that each of the series within the organization is treated like a separate entity.⁴⁷ Therefore, if one series defaults in an obligation, the default will not expose the assets of the other, non-defaulting series to the defaulting series’ creditors.⁴⁸ Section 11 of the UVTA makes transfers between separate series in series organizations susceptible to avoidance actions under the UVTA by noting that for the purposes of the UVTA, the series organization, and each protected series of the series organization, is treated like a separate entity.⁴⁹ This new provision will prevent series organizations from purposefully being used to circumvent fraudulent transfer liability.

The ULC, in amending the UFTA and renaming it the UVTA, sought to harmonize fraudulent transfer laws across the country and make the litigation and determination of fraudulent transfer claims more efficient, cost-effective, and predictable. Since the UVTA was amended in July 2014, it has been enacted in one iteration or another in Idaho, New Mexico, North Dakota, Minnesota, Kentucky, North Carolina, and Georgia. It

also has been introduced, but not yet enacted, in California, Nevada, Colorado, Indiana, and Massachusetts. Thus, time will tell whether the revised UVTA will meet the goals the ULC intended for it. ■

¹ Unif. Fraudulent Transfer Act (1984).

² Unif. Voidable Transfer Act (2014). See also Hon. Charles G. Case II (ret.) & Brian Yeretian, *The Times, They Are a Changin’: The Uniform Fraudulent Transfer Act Becomes the Uniform Voidable Transactions Act*, 6 INT’L INSOLVENCY L.R. 106 (Spring 2015) [hereinafter Case & Yeretian].

³ See, e.g., CIV. CODE §§3439 *et seq.* California’s fraudulent transfer laws are based on the UFTA.

⁴ See 11 U.S.C. §548.

⁵ See ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION (2013), <http://www.uniformlaws.org> [hereinafter STEIN]. See also Case and Yeretian, *supra* note 2, at 107. Since the amended UVTA has only been around since July 2014, it has not yet been adopted by any jurisdiction.

⁶ See Case & Yeretian, *supra* note 2, at 107.

⁷ See STEIN, *supra* note 5; see also Jay Adkisson, *The Uniform Voidable Transactions Act—What’s With The Name Change*, FORBES, <http://www.forbes.com/sites/jayadkisson/2014/07/18/the-uniform-voidable-transactions-act-whats-with-the-name-change/> (last visited Apr. 20, 2015) [Hereinafter Adkisson I].

⁸ See Unif. Voidable Transactions Act, Prefatory Note (2014); see also Adkisson I, *supra* note 7.

⁹ See Adkisson I, *supra* note 7; see generally N.Y. DEBT. & CRED. LAW §§270-281 (New York state’s Fraudulent Conveyance Act, based on the UFCA).

¹⁰ See Chandler Act of 1938, Pub. L. No. 696, 52 Stat. 840, 841 (codified at 11 U.S.C. §§501-676, 801-926 (1976)) (superseded by Bankruptcy Reform Act of 1978).

¹¹ See Unif. Voidable Transactions Act, Prefatory Note; see also Adkisson I, *supra* note 7.

¹² See Unif. Voidable Transactions Act, Prefatory Note.

¹³ See Steven J. Boyadjian, *Reconsidering the Uniformity of Uniform Fraudulent Transfer Act*, AM. BANKR. INST. J., Apr. 2014, at 28 [hereinafter Boyadjian]. The UFTA has not been adopted in Alaska, Kentucky, Louisiana, Maryland, New York, South Carolina, Virginia, or Puerto Rico. *Id.* at 28 n.2.

¹⁴ *Id.*

¹⁵ See Unif. Voidable Transactions Act, Prefatory Note.

¹⁶ See 2014 AMENDMENTS TO THE UNIFORM VOIDABLE TRANSACTION ACT (FORMERLY THE UNIFORM FRAUDULENT TRANSFER ACT), UNIFORM LAW COMMISSION, available at <http://www.uniformlaws.org> [hereinafter 2014 AMENDMENTS].

¹⁷ See *id.*; see also Adkisson I, *supra* note 7; Unif. Voidable Transactions Act, Prefatory Note.

¹⁸ Fed. R. Civ. P. 9(b).

¹⁹ See *Kranz v. Koenig*, 240 F.R.D. 453, 455 (D. Minn. 2007) (holding that Fed. R. Civ. P. 9(b) applies in prosecution of fraudulent transfer claims under Minnesota’s uniform fraudulent transfer act, therefore granting a motion to dismiss and dismissing complaint for failure to plead fraud with particularity); *Indiana Bell Tel. Co. v. Lovelady*, 2006 U.S. Dist. LEXIS 7996 at 5-8, 13 (W.D. Tex. Jan. 11, 2006) (holding that Fed. R. Civ. P. 9(b) applies in prosecution of fraudulent transfer claims under Texas’s uniform fraudulent transfer act, therefore granting, in part, a motion to dismiss and ordering plaintiff to amend complaint to comport with requirements of Fed. R. Civ. P. 9(b)); *Kelleher v. Kelleher*, 2014 U.S.

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Dist. LEXIS 2773 at 16-17, 27 (N.D. Cal. Jan. 9, 2014) (holding that Fed. R. Civ. P. 9(b) applies in prosecution of actual fraudulent transfer claims under California's uniform fraudulent transfer act but does not apply in the prosecution of constructive fraudulent transfer claims under the same statute, therefore granting, in part, motion to dismiss and ordering plaintiff to amend complaint); *Nishibun v. Prepress Solutions*, 1997 U.S. App. LEXIS 6678 (9th Cir. Apr. 8, 1997) (holding that Fed. R. Civ. P. 9(b) applies in prosecution of actual fraudulent transfer claims under California's uniform fraudulent transfer act therefore affirming the district court's dismissal of plaintiff's second amended complaint).

²⁰ Unif. Voidable Transactions Act §4, cmt. 8.

²¹ *Id.*

²² See Adkisson I, *supra* note 7.

²³ See Jay Adkisson, *The Uniform Voidable Transactions Act and Conflict of Laws*, FORBES, <http://www.forbes.com/sites/jayadkisson/2014/07/22/the-uniform-voidable-transactions-act-and-conflict-of-laws/> (last visited Apr. 20, 2015) [hereinafter Adkisson II]. See generally CIV. CODE §3439.09 (extending the statute of limitations for fraudulent transfer claims to seven years in certain circumstances); N.Y. DEBT. & CRED. LAW §§270-281.

²⁴ Unif. Voidable Transactions Act §10(b).

²⁵ Unif. Voidable Transactions Act §10(a)(1)-(3).

²⁶ See Adkisson II, *supra* note 23.

²⁷ Unif. Voidable Transactions Act §10, cmt. 3.

²⁸ Unif. Voidable Transactions Act §2(c).

²⁹ See Case & Yeretian, *supra* note 2, at 111; see also Unif. Voidable Transactions Act §2(a), (b).

³⁰ See Boyadjian, *supra* note 13, at 28; see also Statutory Committee of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating, LLC), 373 B.R. 283, 342-43 (Bankr. S.D. N.Y. 2007); *Prairie Lakes Health Care System v. Wookey*, 583 N.W. 2d 405, 414 n.6 (S.D. 1998).

³¹ See Boyadjian, *supra* note 13, at 28; see also *Asarco, LLC v. Americas Mining Corp.*, 396 B.R. 278, 403-04 (S.D. Tex. 2008); *The 1992 Republican-Senate House Dinner Comm. v. Carolina's Prime Seafood, Inc.*, 158 F.R.D. 223 (D.D.C. 1994).

³² Unif. Voidable Transactions Act §2(b).

³³ Unif. Fraudulent Transfer Act §2(c) (1984).

³⁴ See 2014 AMENDMENTS, *supra* note 16.

³⁵ See Unif. Voidable Transactions Act, Prefatory Note.

³⁶ See Case & Yeretian, *supra* note 2, at 113; see also Jay Adkisson, *The Uniform Voidable Transactions Act And The Shifting of Burdens*, FORBES, <http://www.forbes.com/sites/jayadkisson/2014/07/27/the-uniform-voidable-transaction-act-and-the-shifting-of-burdens/> (last visited Apr. 20, 2015) [hereinafter Adkisson III].

³⁷ Unif. Voidable Transactions Act §§2(b), 4(c), 5(c), 8(g), 8(h).

³⁸ See Adkisson III, *supra* note 36.

³⁹ See Unif. Voidable Transactions Act §4, cmt. 11.

⁴⁰ See Boyadjian, *supra* note 13, at 100.

⁴¹ Unif. Voidable Transactions Act §8(a).

⁴² *Id.*

⁴³ See Unif. Fraudulent Transfer Act §8(e)(2); Unif. Voidable Transactions Act §8, cmt. 5; see generally U.C.C. §§9-101-9-709 (2010).

⁴⁴ Unif. Voidable Transactions Act §8, cmt. 5.

⁴⁵ *Id.*

⁴⁶ See Jay Adkisson, *The Uniform Voidable Transactions Act - New Section 11 and Series LLCs*, FORBES, <http://www.forbes.com/sites/jayadkisson/2014/08/31/the-uniform-voidable-transactions-act-new-section-11-and-series-llcs/> (last visited Apr. 20, 2015).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Unif. Voidable Transactions Act, §11.

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