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FOR DISCUSSION ONLY

UNIFORM FRAUDULENT TRANSFER ACT

(As Amended in 2014)

2014 AMENDMENTS ARE INDICATED BY UNDERSCORE AND STRIKEOUT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

October 2013 Interim Draft

With Reporter's Notes, Prefatory Notes, and Official Comments

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ON UNIFORM STATE LAWS

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October 25, 2013

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UNIFORM FRAUDULENT TRANSFER ACT

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UNIFORM FRAUDULENT TRANSFER ACT

PREFATORY NOTE (1984)

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. ~~Since~~ Because the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction to jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The Conference was persuaded in 1979 to appoint a committee to undertake a study of the Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

(1) The Bankruptcy Reform Act of 1978 has made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.

(2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.

(3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The Drafting Committee appointed by the Conference held its first meeting in January of 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was had at the Conference's meeting in Boca Raton, Florida, on July 27, 1983. The Committee held four meetings in addition to a meeting held in connection with the Conference meeting in Boca Raton. Meetings were also attended by the following representatives of interested organizations:

Robert Rosenberg, Esq., of the American Bar Association;

Richard Cherin, Esq., of the Commercial Financial Services Committee of the Corporation, Banking and Business Law Section of the American Bar Association;

Robert Zinman, Esq., of the American College of Real Estate Lawyers;

Bruce Bernstein, Esq., of the National Commercial Finance Association;

Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of the American Bar Association.

The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. As noted in Comment (2) accompanying ~~§ 1(2)~~ <u>§ 1</u> and Comment ~~(8)~~ <u>(9)</u> accompanying § 4, however, this Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the Uniform Fraudulent Conveyance Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) is an adaptation of three sections of the U.F.C.A.; § 5(a) is an adaptation of another section of the U.F.C.A.; and § 5(b) is new. One section of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent—*i.e.,* without regard to the actual intent of the parties—under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged <u>or was about to engage</u>;

(2) the debtor intended to incur, or believed or reasonably should have believed that he would incur, more debts than he would be able to pay; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the original Uniform Fraudulent Conveyance Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by ~~the financial~~ a condition specified in § 4(a)(2)(i) or ~~the mental state specified in~~ § 4(a)(2)(ii).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy ~~Act~~ Code, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good-faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to him before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any

transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the original Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 7 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the original Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the Uniform Fraudulent Conveyance Act the Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. A bracketed paragraph is included in Section 7 for adoption by those states that elect to make such a remedy available.

Section 8 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under § 5(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good-faith effort to stave off forced liquidation and rehabilitate the debtor. Section 8 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from Section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

PREFATORY NOTE (2014)

In 2014 the Uniform Law Commission approved a set of amendments to the Uniform Fraudulent Transfer Act, which retitled it the Uniform Voidable Transactions Act. The amendment project was instituted to address a small number of narrowly-defined issues, and was not a comprehensive revision. The principal features of the amendments are listed below.

Further explanation of provisions added or revised by the amendments may be found in the comments to those provisions.

Choice of Law. The amendments add a new Section 10, which sets forth a choice of law rule for claims of the nature governed by the Act.

Evidentiary Matters. New Sections 4(c), 5(c), 8(g), and 8(h) add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the Act. Language in the former comments to Section 2 defining the effect of the presumption of insolvency created by Section 2(b) has been moved to the text of that provision, the better to assure its uniform application.

Deletion of the Special Definition of "Insolvency" for Partnerships. Section 2(c) of the original Act set forth a special definition of "insolvency" applicable to partnerships. The amendments delete original Section 2(c), with the result that the general definition of "insolvency" in Section 2(a) now applies to partnerships. One reason for this change is that original Section 2(c) gave a partnership full credit for the net worth of each of its general partners. That makes sense only if each general partner is liable for all debts of the partnership, but such is not the case under modern partnership statutes. A more fundamental reason is that the general definition of "insolvency" in Section 2(a) does not credit a non-partnership debtor with any part of the net worth of its guarantors. To the extent that a general partner is liable for the debts of the partnership, that liability is analogous to that of a guarantor. There is no good reason to define "insolvency" more generously for a partnership debtor than for a non-partnership debtor some of whose debts are guaranteed by contract.

Defenses. The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

(i) As originally written, Section 8(a) creates a complete defense to an action under Section 4(a)(1) (which renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good faith and for a reasonably equivalent value. The amendments add to Section 8(a) the further requirement that the reasonably equivalent value must be given the debtor.

(ii) To the extent that a transfer is avoidable under the Act, Section 8(b) creates a defense for a subsequent transferee (that is, a transferee other than the first transferee or a person for whose benefit the first transfer was made) that takes in good faith and for value, and for any subsequent transferee from such a person. As originally written, this defense literally applied only to an action for a money judgment. The amendments make clear that the defense also applies to recovery of or from the transferred property or its proceeds, by levy or otherwise. This clarification parallels Bankruptcy Code §§ 550(a), (b) (2014).

(iii) Section 8(e)(2) as originally written creates a defense to an action under Section 4(a)(2) or Section 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligations

it secures (a so-called "strict foreclosure").

Series Organizations. A new Section 11 provides that each "protected series" of a "series organization" is to be treated as a person for purposes of the Act, even if it is not treated as a legal entity for other purposes. This change responds to the emergence of the "series organization" as a significant form of business organization.

Medium Neutrality. In order to accommodate modern storage media, references in the Act to a "writing" have been replaced with "record," and related changes made.

"Voidable." As amended, the Act consistently uses the word "voidable" to denote a transfer or obligation for which the Act provides a remedy. As originally written the Act sometimes inconsistently used "fraudulent." No change in meaning is intended.

Official Comments. Comments were added explaining the provisions added by the amendments, and the original comments and Prefatory Note were supplemented and otherwise refreshed.

UNIFORM FRAUDULENT TRANSFER ACT

SECTION 1. DEFINITIONS. As used in this [Act]:

(1) "Affiliate" means:

(i) a person ~~who~~ that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person ~~who~~ that holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person ~~who~~ that directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person ~~who~~ that holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person ~~who~~ that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person ~~who~~ that has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person ~~who~~ that is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~(7)~~ (8) "Insider" includes:

(i) if the debtor is an individual,

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation,

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership,

(A) a general partner in the debtor;

(B) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

~~(8)~~ (9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

~~(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.~~

(10) "Organization" means a person other than an individual.

(11) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal

entity.

~~(10)~~ (12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

~~(11)~~ (14) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

~~(12)~~ (16) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

~~(13)~~ (17) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Official Comment

(1) The definition of "affiliate" is derived from Bankruptcy Code § 101(2) (1984). ~~of the Bankruptcy Code.~~

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the Uniform Fraudulent Conveyance Act. The definition in this Act, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, subrogation, restitution, contribution, or the like~~, or subrogation~~ may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under § 2 of this Act, although applicable law may not

allow such an asset to be levied on and sold by a creditor. *Cf. Manufacturers & Traders Trust Co. v. Goldman (In re Ollag Construction Equipment Corp.),* 578 F.2d 904, 907-09 (2d Cir. 1978).

Subparagraphs (i), (ii), and (iii) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like ~~its predecessor~~ the Uniform Fraudulent Conveyance Act and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 Am.Bankr.L.J. 255, 258-59 (1974). The levyable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the Uniform Fraudulent Conveyance Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that cannot be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest cannot be subjected to liability for a debt unless it is an obligation owed jointly by the debtor with his or her cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in § 1(2)(ii) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 (1979) and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

~~Since~~ Because this Act is not an exclusive law on the subject of voidable transfers and obligations (see Comment ~~(8)~~ (9) to § 4 *infra*), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not

precluded by the Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an "asset" thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

(3) The definition of "claim" is derived from Bankruptcy Code § 101(4) (1984). ~~of the Bankruptcy Code.~~ ~~Since~~ Because the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words "claim" and "debt" as used in the Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted. See, *e.g.*, ~~§§ (1)(i)(B) and 1(8)~~ §§ 1(1)(i)(B) and 1(9).

(4) The definition of "creditor" in combination with the definition of "claim" has substantially the same effect as the definition of "creditor" under § 1 of the Uniform Fraudulent Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act.

(5) The definition of "debt" is derived from Bankruptcy Code § 101(11) (1984). ~~of the Bankruptcy Code.~~

(6) The definition of "debtor" is new.

(7) The definition of "electronic" is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014.

~~(7)~~ (8) The definition of "insider" is derived from Bankruptcy Code § 101(28) (1984). ~~of the Bankruptcy Code.~~ In this Act, as in the Bankruptcy Code, the definition states that the term "includes" certain listed persons; it does not state that the term "means" the listed persons. Hence the definition is not exclusive, and the statutory list is merely exemplary. See also Bankruptcy Code § 102(3) (1984). Accordingly, a person may be an "insider" of a debtor that is an individual, corporation or partnership even though the person is not designated as such by the statutory list. Thus, for example, a trust may be found to be an "insider" of a beneficiary. Similarly, a court may find a person living with an individual debtor for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." See also, *e.g.*, *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008 (5th Cir.1992) (former spouse of debtor was an "insider" because of their continued personal relationship, even though they had long ago divorced and remarried others). Likewise, a person may be an "insider" of a debtor that is not an individual, corporation or partnership. See, *e.g.*, *In re Longview Aluminum, L.L.C.*, 657 F.3d 507 (7th Cir. 2011) (holding an "insider" of a limited liability company an individual on its Board of Managers and having a 12% membership interest, when its organic documents vested management authority "in the Board of Managers and the Members").

The differences between the definition in this Act and that in the Bankruptcy Code are slight. In this Act, the ~~The~~ definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D) to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The definition of "insider" in the Bankruptcy Code does not purport to make a limited partner an insider of the partners or of the partnership with which the limited partner is associated, but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership. The definition of "insider" in this Act also differs from the definition in the Bankruptcy Code in omitting the reference in ~~11 U.S.C.~~ § 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. ~~As in the Bankruptcy Code (see 11 U.S.C. § 102(3)), the word "includes" is not limiting, however. Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.~~

~~(8)~~ (9) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of Bankruptcy Code § 101 (1984), ~~of the Bankruptcy Code,~~ which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

~~(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code, defining "organization" and "person" respectively.~~

(10) The definition of "organization" is derived from Uniform Commercial Code § 1-201(b)(25) (2014).

(11) The definition of "person" is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014. Section 11 may have the effect of rendering a "protected series" of a "series organization" a "person" for purposes of this Act, even though it may not otherwise qualify as such.

~~(10)~~ (12) The definition of "property" is derived from Uniform Probate Code § 1-201(33) (1969). ~~of the Uniform Probate Code.~~ Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(13) The definition of "record" is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014.

~~(11)~~ (14) The definition of "relative" is derived from Bankruptcy Code § 101(37) (1984) ~~of the Bankruptcy Code~~ but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(15) The definition of "sign" is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014.

~~(12)~~ (16) The definition of "transfer" is derived principally from Bankruptcy Code

§ 101(48) (1984). ~~of the Bankruptcy Code.~~ The definition of "conveyance" in § 1 of the Uniform Fraudulent Conveyance Act was similarly comprehensive, and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the Uniform Fraudulent Conveyance Act. While the definition in the Uniform Fraudulent Conveyance Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, *e.g., Hearn 45 St. Corp. v. Jano*, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); *Lefkowitz v. Finkelstein Trading Corp.,* 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); *Langan v. First Trust & Deposit Co.,* 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), *aff'd*, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); *Catabene v. Wallner*, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

~~(13)~~ (17) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, *e.g., Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

SECTION 2. INSOLVENCY.

(a) A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets ~~at a fair valuation~~.

(b) A debtor ~~who~~ that is generally not paying ~~his [or her]~~ the debtor's debts as they become due is presumed to be insolvent. The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

~~(c) A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.~~

~~(d)~~ (c) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this [Act].

~~(e)~~ (d) Debts under this section do not include an obligation to the extent it is secured by

a valid lien on property of the debtor not included as an asset.

Reporter's Note

Comment (1) states that the "fair valuation" referred to in subsection (a) applies to the debts as well as the assets of the debtor. At the Drafting Committee's meeting in Minneapolis it was observed that the text of subsection (a) is opaque on that point. The change to subsection (a) makes the point more lucidly.

The sentence added to subsection (b) that defines the effect of the presumption created therein is not new language, but rather elevates to the statutory text language that appears in Comment (2) of the original UFTA. That language belongs in the text because there is a long and continuing difference in the authorities as to the effect that should be given to a presumption as a general matter. Some authorities opt for the burden-shifting effect stated in subsection (b) while others opt for the "bursting bubble" approach, under which the presumption evaporates if evidence is presented to rebut it. At least some states follow the Federal Rules of Evidence in following the "bursting bubble" approach as a default matter (i.e., unless the statute that creates the presumption provides otherwise). E.g., Mississippi Rules of Evidence 301; Ohio Rules of Evidence 301. It is not clear that a mere comment would be respected by such jurisdictions. At least two states have already placed the language of Comment (2) into their enactments of UFTA § 2(b). Some uniform laws define the effect of a presumption created by that law as per the "bursting bubble" approach, e.g., U.C.C. § 1-206; Uniform Residential Landlord and Tenant Act § 5.101, while others adopt the "burden-shifting" approach, e.g., Uniform Land Transactions Act § 1-201; Uniform Marital Property Act § 1. It is notable that all of the foregoing uniform laws state the desired effect, whatever it may be, in the statutory text.

New Section 5(c) allocates to the plaintiff creditor the burden of proving all elements of a claim under Section 5, which includes the debtor's insolvency. The foregoing change to Section 2(b) makes obvious the need to qualify Section 5(c) by making that allocation subject to Section 2(b). This point was overlooked in previous drafts.

Official Comment

(1) Subsection (a) is derived from the definition of "insolvent" in Bankruptcy Code § 101(29)(A) (1984). ~~of the Bankruptcy Code.~~ The definition in subsection (a) ~~and the correlated definition of partnership insolvency in subsection (c) contemplate~~ contemplates a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the Uniform Fraudulent Conveyance Act exempt property is excluded from the computation of the value of the assets. See § 1(2) *supra*. For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See ~~the Comment to § 1(2)~~ Comment (2) to § 1 *supra*. ~~Since~~ Because a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See § 1(2) *supra* and subsection ~~(c)~~ (d) of this section.

(2) ~~Section 2(b)~~ Subsection (b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under Bankruptcy Code § 303(h)(1) (1984). ~~of the Bankruptcy Code. See also U.C.C. § 1-201(23), which declares a person to be "insolvent" who "has ceased to pay his debts in the ordinary course of business."~~ See also U.C.C. § 1-201(b)(23) (2014), which defines "insolvency" to include "having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute." ~~The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in § 2(a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 301(a).~~

Subsection (b) defines the effect of the presumption to be (in paraphrase) that the burden of persuasion on the issue of insolvency shifts to the defendant. That conforms to the default definition of the effect of a presumption in civil cases set forth in Uniform Rules of Evidence (1974 Act), Rule 301(a) (later Rule 302(a) (1999 Act as amended 2005)). It also ~~The 1974 Uniform Rule 301(a)~~ conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence in 1973. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301, 56 F.R.D. 183, 208 (1973). See also 1 J. Weinstein & M. Berger, Evidence ¶ 301 [01] (1982). It should be noted that the Federal Rule of Evidence as finally enacted gave by default a different effect to presumptions in civil cases, in effect adopting the "bursting bubble" definition. See Fed. R. Evid. 301 (1975) (carried forward in the 2011 revision).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, *The Archaic Concept of Balance-Sheet Insolvency*, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a ~~noncooperative~~ debtor who is apt to be noncooperative, but the debtor's records are ~~more often than not~~ apt to be incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, *Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada*, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan, Bankruptcy 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under Bankruptcy Code § 303(h)(1) (1984) ~~of the Bankruptcy Code~~ has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. See, *e.g.*,

Hill v. Cargill, Inc. (In re Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bankr. D.Minn. 1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); *In re All Media Properties, Inc.,* 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bankr. S.D.Tex. 1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); *In re Kreidler Import Corp.,* 4 B.R. 256, 6 B.C.D. 608, 2 C.B.C.2d 159 (Bankr. D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. *Cf.* ~~11 U.S.C. § 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.~~ Bankruptcy Code § 303(h)(1) (as amended in 1984) (making this point explicitly).

~~(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the Uniform Fraudulent Conveyance Act.~~

~~(4)~~ (3) Subsection ~~(d)~~ (c) follows the approach of the definition of "insolvency" in Bankruptcy Code § 101(29) (1984) ~~of the Bankruptcy Code~~ by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been ~~fraudulently~~ concealed or removed with intent to hinder, delay, or defraud creditors.

~~(5)~~ (4) Subsection ~~(e)~~ (d) is new. It makes clear ~~the purpose not to render~~ that a person is not rendered insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also ~~Comments to §§ 1(2) and 2(a) *supra*~~ Comment (2) to § 1 and Comment (1) to § 2 *supra*.

SECTION 3. VALUE.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or

disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

Official Comment

~~(1) This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:~~

~~4(a)(2) ("reasonably equivalent value");~~
~~4(b)(8) ("value ... reasonably equivalent");~~
~~5(a) ("reasonably equivalent value");~~
~~5(b) ("present, reasonably equivalent value");~~
~~8(a) ("reasonably equivalent value");~~
~~8(b), (c), (d), and (e) ("value");~~
~~8(f)(1) ("new value"); and~~
~~8(f)(3) ("present value").~~

(1) This section defines when "value" is given for a transfer or an obligation. "Value" is used in that sense in various contexts in this Act, frequently with a qualifying adjective. Used in that sense the word appears in the following provisions:

4(a)(2) ("reasonably equivalent value");
4(b)(8) ("value ... reasonably equivalent");
5(a) ("reasonably equivalent value");
8(a) ("reasonably equivalent value");
8(b)(1)(ii) and (d) ("value");
8(f)(1) ("new value"); and
8(f)(3) ("present value").

"Value" is also used in other senses in this Act, to which this section is not relevant. See, *e.g.*, §§ 8(b)(1), 8(c) ("value" in the sense of the value of an asset voidably transferred).

(2) Section 3(a) is adapted from Bankruptcy Code § 548(d)(2)(A) (1984). ~~of the Bankruptcy Code.~~ See also § 3(a) of the Uniform Fraudulent Conveyance Act. The definition in Section 3 is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act—*e.g.*, love and affection. See, *e.g.*, *United States v. West*, 299

F.Supp. 661, 666 (D.Del. 1969).

(3) Section 3(a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under Bankruptcy Code § 548(a)(2) (1984), ~~of the Bankruptcy Code,~~ a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, ~~since~~ because the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, *e.g., Peoples-Pittsburgh Trust Co. v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa.*, 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See, *e.g., In re Peoria Braumeister Co.*, 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a $3,000 note held to be ~~fraudulent~~ voidable when the debt secured was only $2,500); *Hartford Acc. & Indemnity Co. v. Jirasek*, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be ~~fraudulent~~ voidable to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a ~~fraudulent~~ voidable obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as ~~fraudulent~~ voidable. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Section 5(b).

(4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, *e.g., Harper v. Lloyd's Factors, Inc.*, 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); *Schlecht v. Schlecht*, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); *Farmer's Exchange Bank v. Oneida Motor Truck Co.*, 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also *Hummel v. Cernocky*, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable ~~as a fraud on creditors of the transferor~~. See, *e.g., Springfield Ins. Co. v. Fry,* 267 F.Supp. 693 (N.D.Okla. 1967); *Sandler v. Parlapiano*, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); *Warwick Municipal Employees Credit Union v. Higham*, 106 R.I. 363, 259 A.2d 852 (1969); *Hulsether v. Sanders*, 54 S.D. 412, 223 N.W. 335 (1929); *Cooper v. Cooper*, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, *Rights of Creditors in Property Conveyed in Consideration of Future Support*, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(5) Subsection (b) rejects the rule of such cases as *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a ~~fraudulent~~ voidable transfer when the property of an insolvent mortgagor was sold for less than 70% of its

fair value); and *Abramson v. Lakewood Bank & Trust Co.,* 647 F.2d 547 (5th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be ~~fraudulent~~ voidable transfer if made without fair consideration). Subsection (b) adopts the view taken in *Lawyers Title Ins. Corp. v. Madrid (In re Madrid)*, 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on another ground*, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a ~~public~~ regularly conducted and noncollusive foreclosure sale determines the fair value of the property sold. See also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 n.3 (1994) (similarly construing Bankruptcy Code § 548; opinion expressly limited to foreclosure of real estate mortgages).

Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. Subsection (b) applies only to a sale under a mortgage, deed of trust, or security agreement. Subsection (b) thus does not apply to a sale foreclosing a nonconsensual lien, such as a tax lien. However, the subsection does apply ~~The rule of this subsection applies~~ to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 83-84, 95-97 (1979). ~~The premise of the subsection is that "a sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral . . .." 2 G. Gilmore, Security Interests in Personal Property 1227 (1965).~~

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Section 5(b) *infra*. Subsection (b) does not apply to an action under Section 4(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(6) Subsection (c) is an adaptation of Bankruptcy Code § 547(c)(1) (1984). ~~of the Bankruptcy Code.~~ A transfer to an insider for an antecedent debt may be voidable under § 5(b) *infra*.

SECTION 4. TRANSFERS AND OBLIGATIONS ~~FRAUDULENT~~ VOIDABLE AS TO PRESENT AND FUTURE CREDITORS.

(a) A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or

1 obligation, and the debtor:

2 (i) was engaged or was about to engage in a business or a transaction for

3 which the remaining assets of the debtor were unreasonably small in relation to the business or

4 transaction; or

5 (ii) intended to incur, or believed or reasonably should have believed that

6 ~~he [or she]~~ the debtor would incur, debts beyond ~~his [or her]~~ the debtor's ability to pay as they

7 became due.

8 (b) In determining actual intent under subsection (a)(1), consideration may be given,

9 among other factors, to whether:

10 (1) the transfer or obligation was to an insider;

11 (2) the debtor retained possession or control of the property transferred after the

12 transfer;

13 (3) the transfer or obligation was disclosed or concealed;

14 (4) before the transfer was made or obligation was incurred, the debtor had been

15 sued or threatened with suit;

16 (5) the transfer was of substantially all the debtor's assets;

17 (6) the debtor absconded;

18 (7) the debtor removed or concealed assets;

19 (8) the value of the consideration received by the debtor was reasonably

20 equivalent to the value of the asset transferred or the amount of the obligation incurred;

21 (9) the debtor was insolvent or became insolvent shortly after the transfer was

22 made or the obligation was incurred;

23 (10) the transfer occurred shortly before or shortly after a substantial debt was

incurred; and

(11) the debtor transferred the essential assets of the business to a lienor ~~who~~ that transferred the assets to an insider of the debtor.

(c) A creditor making a claim under subsection (a) has the burden of proving the elements of the claim by a preponderance of the evidence.

Reporter's Note

The comments to Section 4 were numbered up to (12) in the Annual Meeting Draft and are numbered only up to (11) in this draft. None was deleted. The reason for the difference is that the comment that was numbered (8) in the Annual Meeting Draft has been redesignated (7(k)) in this draft, and the succeeding comments renumbered. That comment glosses the badge of fraud stated in Section 4(b)(11), and (notwithstanding the inexplicable decision of the 1984 drafters to do otherwise) it belongs in Comment (7) along with the other comments that gloss the badges of fraud enumerated in Section 4(b).

Official Comment

(1) Section 4(a)(1) is derived from § 7 of the Uniform Fraudulent Conveyance Act, which in turn was derived from the Statute of 13 Elizabeth, c. 5 (1571). Factors appropriate for consideration in determining actual intent under paragraph (1) are specified in subsection (b).

(2) Section 4, unlike § 5, protects creditors of a debtor whose claims arise after as well as before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no requirement in § 4(a)(1) that the intent referred to be directed at a creditor existing or identified at the time of transfer or incurrence. For example, promptly after the invention in Pennsylvania of the spendthrift trust, the assets and beneficial interest of which are immune from attachment by the beneficiary's creditors, courts held that a debtor's establishment of a spendthrift trust for his own benefit is a voidable transfer *per se* under the Statute of 13 Elizabeth. *Mackason's Appeal*, 42 Pa. 330, 338-39 (1862); see also *Ghormley v. Smith*, 139 Pa. 584, 591-94 (1891); *Patrick v. Smith*, 2 Pa. Super. 113, 119 (1896). Likewise, for centuries § 4(a)(1) and its predecessors have been employed to invalidate nonpossessory property interests that are thought to be potentially deceptive, without regard to whether the deception is directed at an existing or identified creditor. See, *e.g.*, *McGann v. Capital Sav. Bank & Trust Co.*, 89 A.2d 123, 183-84 (Vt. 1952) (seller's retention of possession of goods after sale held voidable *per se* as to creditors of the seller); *Superior Partners v. Prof'l Educ. Network, Inc.*, 485 N.E.2d 1218, 1221 (Ill. App. Ct. 1985) (similar); *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819) (holding, in the absence of a public notice system, that a nonpossessory chattel mortgage is voidable *per se*).

~~(2)~~ (3) Section 4(a)(2) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the Uniform Fraudulent

Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under § 8 *infra*.

~~(3)~~ (4) Unlike the Uniform Fraudulent Conveyance Act, ~~as originally promulgated,~~ this Act does not prescribe different tests ~~when a transfer~~ for voidability of a transfer that is made for the purpose of security and ~~when it~~ a transfer that is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a voidable transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. *Cf.* ~~U.C.C. § 9-311.~~ U.C.C. § 9-401 (2014) (providing that a debtor's interest in collateral subject to a security interest is transferable notwithstanding an agreement with the secured party prohibiting transfer, thereby rendering the debtor's equity in the collateral available to other creditors unless a special rule of Article 9 or other law renders the debtor's interest inalienable).

~~(4)~~ (5) Subparagraph (i) of § 4(a)(2) is an adaptation of § 5 of the Uniform Fraudulent Conveyance Act but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the Uniform Fraudulent Conveyance Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of ~~fraudulent~~ voidable transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.,* unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

~~(5)~~ (6) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a ~~fraudulent~~ voidable transfer or incurred a ~~fraudulent~~ voidable obligation. The list of factors includes most of the so-called "badges of fraud" that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain badges in combination establishes ~~fraud~~ voidability conclusively—*i.e.*, without regard to the actual intent of the parties—when they concur as provided in § 4(a)(2) or in § 5. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of ~~fraud~~ intent to hinder, delay, or defraud creditors. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and

fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in *Twyne's Case*, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is ~~fraudulent~~ voidable only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of ~~a fraudulent~~ intent to hinder, delay, or defraud creditors.

~~(6)~~ (7) In considering the factors listed in § 4(b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting ~~fraud~~ intent to hinder, delay, or defraud creditors, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: *Salomon v. Kaiser (In re Kaiser)*, 722 F.2d 1574, 1582-83 (2d Cir. 1983) (insolvent debtor's purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence ~~fraudulent~~ intent to hinder, delay, or defraud creditors); *Banner Construction Corp. v. Arnold*, 128 So.2d 893 (Fla.Dist.App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); *Travelers Indemnity Co. v. Cormaney*, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); *Hatheway v. Hanson*, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of ~~fraud~~ intent to hinder, delay, or defraud creditors, warranted avoidance); *Lumpkins v. McPhee,* 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of ~~fraud~~ intent to hinder, delay, or defraud creditors, but transfer held not to be ~~fraudulent~~ voidable due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); *Stephens v. Reginstein*, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be ~~fraudulent~~ voidable); *Allen v. Massey*, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of ~~fraud~~ intent to hinder, delay, or defraud creditors).

(c) Whether the transfer or obligation was concealed or disclosed: *Walton v. First National Bank*, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, ~~fraud~~ intent to hinder, delay, or defraud creditors may be inferred, transfer was held not to be ~~fraudulent~~ voidable when made in good faith and

transferor surrendered possession); *W.T. Raleigh Co. v. Barnett*, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence ~~fraud~~ intent to hinder, delay, or defraud creditors, and transfer held not to be ~~fraudulent~~ voidable).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer held to be ~~fraudulent~~ voidable when causally connected to pendency of litigation and accompanied by other badges of fraud); *Pergrem v. Smith*, 255 S.W.2d 42 (Ky.App. 1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held ~~fraudulent~~ voidable when accompanied by insolvency of transferor who was related to transferee); *Bank of Sun Prairie v. Hovig,* 218 F.Supp. 769 (W.D.Ark. 1963) (although threat or pendency of litigation said to be an indicator of ~~fraud~~ intent to hinder, delay, or defraud creditors, transfer was held not to be ~~fraudulent~~ voidable when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be ~~fraudulent~~ voidable); *Cole v. Mercantile Trust Co.,* 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be ~~fraudulent~~ voidable); *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate ~~fraud~~ intent to hinder, delay, or defraud creditors, transfer held not to be ~~fraudulent~~ voidable because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: *In re Thomas*, 199 F. 214 (N.D.N.Y. 1912) (when debtor collected all of his money and property with the intent to abscond, ~~fraudulent~~ intent to hinder, delay, or defraud creditors was held to be shown).

(g) Whether the debtor had removed or concealed assets: *Bentley v. Young*, 210 F. 202 (S.D.N.Y. 1914), *aff'd*, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale ~~fraudulent~~ voidable); *Cioli v. Kenourgios,* 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be ~~fraudulent~~ voidable notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: *Toomay v. Graham*, 151 S.W.2d 119 (Mo.App. 1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be ~~fraudulent~~ voidable when accompanied by badges of fraud); *Texas Sand Co. v. Shield*, 381 S.W.2d 48 (Tex. 1964) (inadequate consideration said to be an indicator of ~~fraud~~ intent to hinder, delay, or defraud creditors, and transfer held to be ~~fraudulent~~ voidable because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all nonexempt property was transferred); *Weigel v. Wood*, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be ~~fraudulent~~ voidable when inadequacy not gross and not accompanied by any other badge; fact that transfer was from

father to son held not sufficient to establish ~~fraud~~ intent to hinder, delay, or defraud creditors).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held ~~fraudulent~~ voidable when accompanied by other badges of fraud); *Bank of Sun Prairie v. Hovig*, 218 F.Supp. 769 (W.D. Ark. 1963) (although the insolvency of the debtor said to be a badge of fraud, transfer held not ~~fraudulent~~ voidable when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); *Wareheim v. Bayliss*, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of ~~fraud~~ intent to hinder, delay, or defraud creditors, transfer held not to be ~~fraudulent~~ voidable when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: *Commerce Bank of Lebanon v. Halladale A Corp.*, 618 S.W.2d 288, 292 (Mo.App. 1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be ~~fraudulent~~ voidable due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtor's property was transferred).

~~(7)~~ (k) Whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor: The evil addressed by § 4(b)(11) is collusive and abusive use of a lienor's superior position to eliminate junior creditors while leaving equity holders unaffected. ~~The effect of the two transfers described in § 4(b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests.~~ The kind of disposition sought to be reached ~~here~~ is exemplified by that found in *Northern Pacific Co. v. Boyd*, 228 U.S. 482, 502-05 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a ~~fraudulent~~ voidable disposition. ~~(*id.* at 502-05). See Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va.L.Rev. 541, 693 (1933).~~ See Bruce A. Markell, *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan.L.Rev. 69, 74-83 (1991). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206 (3d Cir. 1990) (lender foreclosed on assets of steel company at 5:00 p.m. on a Friday, then transferred the assets to an affiliate of the debtor; lender made a loan to the affiliate to enable it to purchase at the foreclosure sale on almost the same terms as the old loan; new business opened Monday morning); *Jackson v. Star Sprinkler Corp. of Florida*, 575 F.2d 1223, 1231-34 (8th Cir. 1978); *Heath v. Helmick*, 173 F.2d 157, 161-62 (9th Cir. 1949); *Toner v. Nuss*, 234 F.Supp. 457, 461-62 (E.D.Pa. 1964); and see *In re*

Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md. 1933).

(8) The phrase "hinder, delay, or defraud" in § 4(a)(1), carried forward from the primordial Statute of 13 Elizabeth, is potentially applicable to any transaction that unacceptably contravenes norms of creditors' rights. Section 4(a)(1) is sometimes said to require "actual fraud," by contrast to § 4(a)(2) and § 5(a), which are said to require "constructive fraud." That shorthand is highly misleading. Fraud is not a necessary element of a claim under any of those provisions. By its terms, § 4(a)(1) applies to a transaction that "hinders" or "delays" a creditor, even if it does not "defraud" the creditor. See, *e.g., Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932); *Means v. Dowd*, 128 U.S. 273, 280-83, 288 (1888); *Consove v. Cohen (In re Roco Corp.)*, 701 F.2d 978, 984 (1st Cir. 1983); *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927); *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 374 (S.D.N.Y. 2003). "Hinder, delay, or defraud" is best considered as a single term of art describing a transaction that unacceptably contravenes norms of creditors' rights. Such a transaction need not bear any resemblance to common-law fraud. Thus, the Supreme Court held a given transfer voidable because made with intent to "hinder, delay, or defraud" creditors, but emphasized: "We have no thought in so holding to impute to [the debtor] a willingness to participate in conduct known to be fraudulent.... [He] acted in the genuine belief that what [he] planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted on them by the law." *Shapiro v. Wilgus.* 287 U.S. 348, 357 (1932).

Diminution of the assets available to the debtor's creditors is not necessarily required to "hinder, delay, or defraud" creditors. For example, the age-old legal skepticism of nonpossessory property interests, which stems from their potential for deception, has often resulted in their avoidance under § 4(a)(1) or its predecessors. See Comments (2) and (7(b)). A transaction may "hinder, delay, or defraud" creditors even though it neither reduces the assets available to the debtor's creditors nor involves any potential deception. See, *e.g., Shapiro v. Wilgus,* 287 U.S. 348 (1932) (holding voidable a solvent individual debtor's conveyance of his assets to a wholly-owned corporation for the purpose of instituting a receivership proceeding not available to an individual).

A transaction that does not place an asset entirely beyond the reach of creditors may nevertheless "hinder, delay, or defraud" creditors if it makes the asset more difficult for creditors to reach. Simple exchange by a debtor of an asset for a less liquid asset, or disposition of liquid assets while retaining illiquid assets, may be voidable for that reason. See, *e.g., Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927) (L. Hand, J.) (credit sale by a corporation to an affiliate of its plant, leaving the seller solvent with ample accounts receivable, held voidable because made for the purpose of hindering creditors of the seller, due to the comparative difficulty of creditors realizing on accounts receivable under then-current collection practice). Overcollateralization of a debt for the purpose of making the debtor's equity in the collateral more difficult for creditors to reach is similarly voidable. See Comment (4) *supra.* Likewise, it is voidable for a debtor intentionally to hinder creditors by transferring assets to a wholly-owned corporation or other organization, as may be the case if the equity interest in the organization is more difficult to realize upon than the assets (either because the equity interest is less liquid, or because the applicable procedural rules are more demanding). *See, e.g., Addison v. Tessier*, 335 P.2d 554, 557 (N.M. 1959); *First Nat'l Bank. v. F. C. Trebein*

Co., 52 N.E. 834, 837-38 (Ohio 1898); Anno., 85 A.L.R. 133 (1933).

Under the same principle, § 4(a)(1) would render voidable an attempt by the owners of a corporation to convert it to a different legal form (*e.g.*, limited liability company or partnership) for the purpose of hindering the owners' creditors, as may be the case if an owner's interest in the alternative organization would be subject only to a charging order, and not to execution (which would typically be available against stock in a corporation). See, *e.g.*, *Firmani v. Firmani*, 752 A.2d 854, 857 (N.J. Super. Ct. App. Div. 2000); *cf. Interpool Ltd. v. Patterson*, 890 F. Supp. 259, 266-68 (S.D.N.Y. 1995) (similar, but relying on a "good faith" requirement of the former Uniform Fraudulent Conveyance Act rather than its equivalent of § 4(a)(1)). If such a conversion is done with intent to hinder creditors, it contravenes § 4(a)(1) regardless of whether it is effected by conveyance of the corporation's assets to a new entity or by conversion of the corporation to the alternative form. In both cases the owner begins with the stock of the corporation and ends with an ownership interest in the alternative organization, a property right with different attributes. Either is a "transfer" under the designedly sweeping language of § 1(16), which encompasses "every mode...of...parting with an asset or an interest in an asset." *Cf., e.g., United States v. Sims (In re Feiler)*, 218 F.3d 948 (9th Cir. 2000) (debtor's irrevocable election under the Internal Revenue Code to waive carryback of net operating losses is a "transfer" under the substantially similar definition in the Bankruptcy Code); *Weaver v. Kellogg*, 216 B.R. 563, 573-74 (S.D. Tex. 1997) (exchange of notes owed to debtor by its shareholders for new notes having different terms is a "transfer" under that definition).

The phrase "hinder, delay, or defraud" in § 4(a)(1) is a term of art whose words do not have their dictionary meanings. For example, every grant of a security interest "hinders" the debtor's unsecured creditors in the dictionary sense of that word. Yet it would be absurd to suggest that every grant of a security interest contravenes § 4(a)(1). The line between permissible and impermissible grants cannot coherently be drawn by reference to the debtor's mental state, for a sane person knows the natural consequences of his actions, and that includes the adverse consequences to unsecured creditors of any grant of a security interest. Whether a transaction is captured by § 4(a)(1) ultimately depends upon whether the transaction unacceptably contravenes norms of creditors' rights, given the devices legislators and courts have allowed debtors that may interfere with those rights. Section 4(a)(1) is the regulatory tool of last resort that restrains debtor ingenuity to decent limits.

Thus, for example, suppose that entrepreneurs organize a business as a limited liability company, contributing assets to capitalize it, in the ordinary situation in which none of the owners has particular reason to anticipate personal liability or financial distress and no other unusual facts are present. Assume that the LLC statute has the creditor-thwarting feature of precluding execution upon equity interests in the LLC and providing only for charging orders against such interests. Notwithstanding that feature, the owners' transfers of assets to capitalize the LLC is not voidable under § 4(a)(1) as in force in the same state. The legislature in that state, having created the LLC vehicle having that feature, must have expected it to be used in such ordinary circumstances. By contrast, if owners of an existing business were to reorganize it as an LLC under such a statute when the clouds of personal liability or financial distress have gathered over some of them, and with the intention of gaining the benefit of that creditor-thwarting feature, that should voidable under § 4(a)(1), at least absent a clear indication that the legislature

truly intended the LLC form, with its creditor-thwarting feature, to be available even in such circumstances.

Because the laws of different jurisdictions differ in their tolerance of particular creditor-thwarting devices, choice of law considerations may be important in interpreting § 4(a)(1) as in force in a given jurisdiction. For example, recall that, as noted in Comment (2) *supra*, the language of § 4(a)(1) historically has been interpreted to render voidable *per se* a transfer to a self-settled spendthrift trust. Suppose that jurisdiction X, in which this Act is in force, also has in force a statute permitting an individual to establish a self-settled spendthrift trust and transfer assets thereto, subject to stated conditions. If an individual Debtor whose principal residence is in X establishes such a trust and transfers assets thereto, then under § 10 of this Act the voidable transfer law of X applies to that transfer. That transfer cannot be considered voidable *per se* under § 4(a)(1) as in force in X, for the legislature of X, having authorized the establishment of such trusts, must have expected them to be used. (Other facts might still render the transfer voidable under X's enactment of § 4(a)(1), even though it is not voidable *per se*.) By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. The transfer would be voidable *per se* under § 4(a)(1) as in force in Y, as there is no reason to deviate from the established interpretation of that provision in Y.

~~(8) Nothing in § 4(b) is intended to affect the application of § 2-402(2), 9-205, 9-301, or 6-105 of the Uniform Commercial Code. Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." Section 9-205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of § 9-301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally, like the Uniform Fraudulent Conveyance Act this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.~~

(9) This Act is not an exclusive law on the subject of voidable transfers and obligations. See § 1, Comment (2). Nothing in this Act is intended to affect the application of Uniform Commercial Code § 2-402(2) (2014). Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be voidable, but limits the application of the rule by negating any imputation of voidability from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or

identification." (Indeed, independently of § 2-402(2), retention of possession of goods in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification should not in itself be considered to "hinder, delay, or defraud" any creditor of the merchant-seller under § 4(a)(1) in any case.) Similarly, like the Uniform Fraudulent Conveyance Act, this Act does not preempt statutes governing bulk transfers (including Article 6 of the Uniform Commercial Code in jurisdictions where it remains in force).

In the same way, this Act operates independently of rules in an organic statute applicable to a business organization that limit distributions by the organization to its equity owners. Compliance with those rules does not insulate such a distribution from being voidable under this Act. It is conceivable that such an organic statute might contain a provision preempting the application of this Act law to such distributions. *Cf.* Model Business Corporation Act § 152 (optional provision added in 1979 preempting the application of "any other statutes of this state with respect to the legality of distributions;" deleted 1984). Such a preemptive statute of course must be respected if applicable, but choice of law considerations may well render it inapplicable. See, *e.g., Faulkner v. Kornman (In re The Heritage Organization, L.L.C.),* 413 B.R. 438, 462-63 (Bankr. N.D. Tex. 2009) (action under the Texas enactment of this Act challenging a distribution by a Delaware limited liability company to its members; held, a provision of the Delaware LLC statute imposing a three-year statute of repose on an action under "any applicable law" to recover a distribution by a Delaware LLC did not apply, because choice of law rules directed application of the voidable transfer law of Texas).

(10) Subsection (c) was added in 2014. Sections 2(b), 4(c), 5(c), 8(g), and 8(h) together provide uniform rules on burdens and standards of proof relating to the operation of this Act.

Pursuant to subsection (c), proof of intent to "hinder, delay, or defraud" a creditor under § 4(a)(1) is sufficient if made by a preponderance of the evidence. That is the standard of proof ordinarily applied in civil actions. Subsection (c) thus rejects cases that have imposed an extraordinary standard, typically "clear and convincing evidence," by analogy to the standard commonly applied to proof of common-law fraud. That analogy is misguided. By its terms, § 4(a)(1) applies to a transaction that "hinders" or "delays" a creditor even if it does not "defraud," and a transaction to which § 4(a)(1) applies need not bear any resemblance to common-law fraud. See Comment (8) *supra*. Furthermore, the extraordinary standard of proof commonly applied to common-law fraud originated in cases that were thought to involve a special danger that claims might be fabricated. In the earliest such cases, a court of equity was asked to grant relief on claims that were unenforceable at law for failure to comply with the Statute of Frauds, the Statute of Wills, or the parol evidence rule. In time, extraordinary proof also came to be required in actions seeking to set aside or alter the terms of written instruments. See *Herman & MacLean v. Huddleston,* 459 U.S. 375, 388-89 (1983) and sources cited therein. Those reasons for extraordinary proof do not apply to claims under § 4(a)(1).

For similar reasons, a procedural rule that imposes extraordinary pleading requirements on a claim of "fraud," without further gloss, should not be applied to a claim under § 4(a)(1). The elements of a claim under § 4(a)(1) are very different from the elements of a claim of common-law fraud. Furthermore, the reasons for such extraordinary pleading requirements do not apply to a claim under § 4(a)(1). Unlike common-law fraud, a claim under § 4(a)(1) is not

unusually susceptible to abusive use in a "strike suit," nor is it apt to be of use to a plaintiff seeking to discover unknown wrongs. Likewise, a claim under § 4(a)(1) is unlikely to cause significant harm to the defendant's reputation, for the defendant is the transferee or obligee, and the elements of the claim do not require the defendant to have committed even an arguable wrong. See *Janvey v. Alguire*, 846 F.Supp.2d 662, 675-77 (N.D. Tex. 2011); *Carter-Jones Lumber Co. v. Benune*, 725 N.E.2d 330, 331-33 (Ohio App. 1999). *Cf.* Federal Rules of Civil Procedure, Appendix, Form 21 (2010) (illustrative form of complaint for a claim under § 4(a)(1) or similar law, which Rule 84 declares sufficient to comply with federal pleading rules).

(11) Subsection (c) allocates to the party making a claim under § 4 the burden of persuasion as to the elements of the claim. Courts should not apply nonstatutory presumptions that reverse that allocation, and should be wary of nonstatutory presumptions that would dilute it. The command of § 13—that this Act is to be applied so as to effectuate its purpose of making uniform the law among states enacting it—applies with particular cogency to nonstatutory presumptions, for given the elasticity of key terms of this Act (*e.g.*, "hinder, delay, or defraud") and the potential difficulty of proving others (*e.g.*, the financial condition tests in § 4(a)(2) and § 5), employment of divergent nonstatutory presumptions by enacting jurisdictions may render the law nonuniform as a practical matter. It is not the purpose of subsection (c) to forbid employment of any and all nonstatutory presumptions. Indeed, in some instances a rule of avoidance law applied with a judicially-crafted presumption has won such favor as to be codified as a separate statutory creation, such as the bulk sales laws, the absolute priority rule applicable to reorganizations under Bankruptcy Code § 1129(b)(2)(B)(ii) (2014), and the so-called "constructive fraud" provisions of § 4(a)(2) and § 5(a) of this Act itself. However, subsection (c) and § 13 mean, at the least, that a nonstatutory presumption is suspect if it would alter the statutorily-allocated burden of persuasion, would upset the policy of uniformity, or is an unwarranted carrying-forward of obsolescent principles. An example of a nonstatutory presumption that should be rejected for those reasons is a presumption that the transferee bears the burden of persuasion as to the debtor's compliance with the financial condition tests in § 4(a)(2) and § 5, in an action under those provisions, if the transfer was for less than reasonably equivalent value (or, as another example, if the debtor was merely in debt at the time of the transfer). See *Fidelity Bond & Mtg. Co. v. Brand*, 371 B.R. 708, 716-22 (E.D. Pa. 2007) (rejecting such a presumption previously applied in Pennsylvania).

SECTION 5. TRANSFERS AND OBLIGATIONS ~~FRAUDULENT~~ VOIDABLE AS TO PRESENT CREDITORS.

(a) A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is ~~fraudulent~~ voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) Subject to Section 2(b), a creditor making a claim under subsection (a) or (b) has the burden of proving the elements of the claim by a preponderance of the evidence.

Official Comment

(1) Subsection (a) is derived from § 4 of the Uniform Fraudulent Conveyance Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in Comment ~~(2)~~ (3) accompanying § 4, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer—*i.e.*, a transfer by an insolvent debtor for or on account of an antecedent debt—to an insider ~~vulnerable as a fraudulent transfer~~ voidable when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as *Jackson Sound Studios, Inc. v. Travis*, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be ~~fraudulent~~ voidable); *In re Lamie Chemical Co.*, 296 F. 24 (4th Cir. 1924) (corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); *Stuart v. Larson*, 298 F. 223 (8th Cir. 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (Rev. ed. 1940). Subsection (b) overrules such cases as *Epstein v. Goldstein*, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); *Hartford Accident & Indemnity Co. v. Jirasek*, 254 Mich. 131, 139, 235 N.W. 836, 839 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not ~~fraudulent~~ voidable).

(3) Subsection (b) does not extend as far as § 8(a) of the Uniform Fraudulent Conveyance Act and Bankruptcy Code § 548(b) (1984) ~~of the Bankruptcy Code~~ in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under ~~§ 4(b)~~ § 5(b) unless the transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the Uniform Fraudulent Conveyance Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

(4) Subsection (c) was added in 2014. Sections 2(b), 4(c), 5(c), 8(g), and 8(h) together provide uniform rules on burdens and standards of proof relating to the operation of this Act. The principles stated in Comment (11) to § 4 apply to subsection (c).

SECTION 6. WHEN TRANSFER IS MADE OR OBLIGATION IS INCURRED.

For the purposes of this [Act]:

(1) a transfer is made:

(i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this [Act] that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in paragraph (1) and the transfer is not so perfected before the commencement of an action for relief under this [Act], the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in paragraph (1), the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred:

(i) if oral, when it becomes effective between the parties; or

(ii) ~~if evidenced by a writing, when the writing executed~~ otherwise, when the

record evidencing the obligation, signed by the obligor, is delivered to or for the benefit of the obligee.

Official Comment

(1) One of the uncertainties in the law governing the avoidance of ~~fraudulent~~ transfers and obligations of the nature governed by this Act is the difficulty of determining when the cause of action arises. ~~Subsection (b)~~ Section 6 clarifies ~~this~~ that point in time. For transfers of real estate, ~~section 6(1)~~ paragraph (1)(i) fixes the time as the date of perfection against a good-faith purchaser from the transferor. ~~and for~~ For transfers of fixtures and assets constituting personalty, ~~the time is fixed~~ paragraph (1)(ii) fixes the time as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection under paragraph (1) typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See ~~U.C.C. §§ 9-302, 9-304, and 9-305~~ U.C.C. §§ 9-310, 9-313 (2014) (security interest in personal property generally is perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of Bankruptcy Code § 548(d)(1) (1984). ~~of the Bankruptcy Code.~~ When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers—*e.g.,* an assignment of a bank account, ~~creation of a security interest in money,~~ or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement—may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph ~~(11)~~ (1), paragraph (3) provides that the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in ~~§ 1(12)~~ § 1(16) *supra.*

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e) (1984); ~~U.C.C. § 9-203(1)(c).~~ U.C.C. § 9-203(b)(2) (2014).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from *Rubin v. Manufacturers Hanover Trust Co.,* 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided ~~as fraudulent~~ under this Act if it is incurred under the circumstances specified in § 4(a) or § 5(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; *Williams v. Twin City Co.*, 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.

Under paragraph (5), if an oral obligation is effective between the parties it is incurred when it so becomes effective, and later confirmation of the oral obligation by a record does not reset the time of incurrence to that later time.

Reporter's Note

1. The committee should consider whether the language added to Comment (3) is adequate in itself, without revision of the text of Section 6(5)(ii) (apart from the unrelated changes of "writing" to "record" and "executed" to "signed"). The text as originally written reads more easily than the revision, and the comment makes the desired point more lucidly. Review of case annotations to Section 6 in *Uniform Laws Annotated* reveals none to date raising any similar issue.

2. The reference in Section 6(5)(ii) to a record being "delivered," without a definition of that term, is consistent with usage in other uniform laws. Thus, § 17(a)(2) of the Uniform Certificate of Title for Vessels Act provides as follows: "If the certificate of title is an electronic certificate of title, the transferor promptly shall sign and deliver to the transferee a record evidencing the transfer of ownership to the transferee." That act defines "sign" but not "deliver." Many uniform laws give legal consequence to the "delivery" of certain records to a Secretary of State or other governmental authority, without defining that term. See, e.g., Uniform Law Enforcement Access to Entity Information Act § 4; Uniform Limited Partnership Act (2001) § 204; Uniform Limited Liability Act (2006) § 203. Some uniform laws refer to "receipt" of a record without definition, which is much the same as "delivery." See Uniform Consumer Leases Act § 305(a).

UCC § 9-102(a)(18) defines "communicate" in respect of records, and under that definition "communication" occurs when the record is sent or transmitted. That places the risk of nondelivery on the intended recipient. Uniform Certificate of Title Act § 2(a)(7) likewise defines "delivery" of a record to occur upon its transmission (though "giv[ing] of possession" is also defined to be an alternative method of "delivery"). No reason is apparent to revise Section 6(5)(ii) to place risk of nondelivery on the intended recipient. (Indeed, it may be questioned whether these defined terms always work properly in the statutes in which they appear. For example, UCC § 9-516(a) provides that a financing statement is filed upon its "communication" to the filing office, and as defined that occurs when the financing statement is sent or transmitted even if the filing office never receives it. [Filing also requires "tender of the filing fee," but that provides no assurance of receipt of the financing statement because tender of the fee might occur via a standing line of credit, previous provision of a credit card number or deposit, etc.])

Uniform Electronic Transactions Act § 15 (captioned "Time and Place of Sending and Receipt") elaborately defines when a record is received, among other things. The Reporter is of the view that inclusion of such a provision in UFTA is not appropriate. Its length would be disproportionate to the modest role it would have in UFTA, and difficult calls about when a record is "delivered" under UFTA § 6(5)(ii) seem very unlikely to arise. In situations to which

that provision applies, the record in question is not being sent to a person who is not expecting to receive it or who is unwilling to receive it. Review of case annotations to Section 6 in *Uniform Laws Annotated* reveals none to date raising any issue about the meaning of "delivery."

SECTION 7. REMEDIES OF CREDITORS.

(a) In an action for relief against a transfer or obligation under this [Act], a creditor, subject to the limitations in Section 8, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

[(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by [ ];]

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Official Comment

(1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment ~~for~~ from the proceeds of a sale on execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a ~~fraudulent~~ transfer or obligation. See, *e.g.*, *Britton v. Howard Sav. Bank*, 727 F.2d 315, 317-20 (3d Cir. 1984); *Computer Sciences Corp. v. Sci-Tek Inc.*, 367 A.2d 658, 661 (Del. Super. 1976); *Great Lakes Carbon Corp. v. Fontana*, 54 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Section 7(a)(2) continues the authorization for the use of attachment contained in § 9(b) of the Uniform Fraudulent Conveyance Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the Uniform Fraudulent Conveyance Act authorized the court, in an action on a ~~fraudulent~~ voidable transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, *e.g.*, *Lipskey v. Voloshen*, 155 Md. 139, 143-45, 141 Atl. 402, 404-05 (1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); *Matthews v. Schusheim*, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); *Oliphant v. Moore*, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See §§ 1(3) and ~~(4)~~ 1(4) *supra*; *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev. ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a ~~fraudulently~~ transferred asset continues the availability of a remedy provided in § 9(b) of the Uniform Fraudulent Conveyance Act. See, *e.g.*, *Doland v. Burns Lbr. Co.*, 156 Minn. 238, 194 N.W. 636 (1923); *Montana Ass'n of Credit Management v. Hergert*, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); *Corbett v. Hunter*, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also *American Surety Co. v. Conner*, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 441-42 (1933).

(6) The remedies specified in § 7, like those enumerated in §§ 9 and 10 of the Uniform Fraudulent Conveyance Act, are cumulative. *Lind v. O. N. Johnson Co.*, 204 Minn. 30, 40, 282 N.W. 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair

or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); *Conemaugh Iron Works Co. v. Delano Coal Co., Inc.*, 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev. ed. 1940).

(7) If a transfer or obligation is voidable under § 4 or § 5, the basic remedy provided by this Act is its avoidance under subsection (a)(1). "Avoidance" is a term of art in this Act, for it does not mean that the transfer or obligation is simply rendered void. It has long been established that a transfer avoided by a creditor under this Act or its predecessors is nevertheless valid as between the debtor and the transferee. For example, in the case of a transfer of property worth $100 by Debtor to Transferee, held voidable in a suit by Creditor-1 who is owed $80 by Debtor, "avoidance" of the transfer should leave the $20 surplus with Transferee. Debtor is not entitled to recover the surplus. Nor is Debtor's Creditor-2 entitled to the windfall, at Transferee's expense, of being able to pursue the surplus by reason of Creditor-1's action (though Creditor-2 may be entitled to bring his own avoidance action to pursue the surplus). The foregoing principle is embedded in the language of subsection (a)(1), which prescribes "avoidance" only "to the extent necessary to satisfy the creditor's claim." Section 9(a) of the Uniform Fraudulent Conveyance Act was similarly limited. See, *e.g.*, *Becker v. Becker*, 416 A.2d 156, 162 (Vt. 1980); *De Martini v. De Martini*, 52 N.E.2d 138, 141 (Ill. 1943); *Markward v. Murrah*, 156 S.W.2d 971, 974 (Tex. 1941); *Society Milion Athena, Inc. v. National Bank of Greece*, 22 N.E.2d 374, 377 (N.Y. 1939); *National Radiator Corp. v. Parad*, 8 N.E.2d 794, 796-97 (Mass. 1937); *Doty v. Wheeler*, 182 A. 468, 471 (Conn. 1936); *Brownell Realty , Inc. v. Kelly*, 303 N.W.2d 871, 875 (Mich. Ct. App. 1981); *Patterson v. Missler*, 48 Cal.Rptr. 215, 222-24 (Cal. Dist. Ct. App. 1965); 1 G. Glenn, Fraudulent Conveyances and Preferences § 114, at 225 (Rev. ed. 1940). The transferee's mental state is irrelevant to the foregoing, but a good-faith transferee may also be afforded protection by § 8.

It follows that "avoidance" of an obligation under subsection (a)(1) likewise should not mean its cancellation, but rather a remedy that recognizes the existence of the obligation and the superiority of the plaintiff creditor's interest over the obligee's interest. Ordinarily that should mean subordination of the obligation to the plaintiff creditor's claim against the debtor. That would entail disgorgement by the obligee of any payments received or receivable on the obligation, to the extent necessary to satisfy the plaintiff creditor's claim, with the obligee being subrogated to the plaintiff creditor when the latter's claim is paid. Of course, if the obligation is unenforceable for reasons other than contravention of this Act, contravention of this Act does not render the obligation enforceable.

This Comment relates to the meaning of subsection (a)(1). If this Act is invoked in a bankruptcy proceeding, the remedial entitlements provided by the Bankruptcy Code may differ from those provided by this Act.

SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEREE OR OBLIGEE.

(a) A transfer or obligation is not voidable under Section 4(a)(1) against a person ~~who~~ that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

(b) To the extent a transfer is avoidable in an action by a creditor under Section 7(a)(1), the following provisions apply:

(1) Except as otherwise provided in this section, ~~to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1),~~ the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

~~(1)~~ (i) the first transferee of the asset or the person for whose benefit the transfer was made; or

~~(2)~~ (ii) any subsequent transferee other than a good-faith transferee ~~who~~ that took for value or from any subsequent transferee.

(2) Recovery pursuant to Section 7(a)(1) or 7(b) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person referred to in subsection (b)(1)(i) or (b)(1)(ii).

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this [Act], a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or

1 obligation, to

2 (1) a lien on or a right to retain any interest in the asset transferred;

3 (2) enforcement of any obligation incurred; or

4 (3) a reduction in the amount of the liability on the judgment.

5 (e) A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results

6 from:

7 (1) termination of a lease upon default by the debtor when the termination is

8 pursuant to the lease and applicable law; or

9 (2) enforcement of a security interest in compliance with Article 9 of the Uniform

10 Commercial Code, other than acceptance of collateral in full or partial satisfaction of the

11 obligations it secures.

12 (f) A transfer is not voidable under Section 5(b):

13 (1) to the extent the insider gave new value to or for the benefit of the debtor after

14 the transfer was made unless the new value was secured by a valid lien;

15 (2) if made in the ordinary course of business or financial affairs of the debtor and

16 the insider; or

17 (3) if made pursuant to a good-faith effort to rehabilitate the debtor and the

18 transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

19 (g) The following rules determine the burden of proving matters referred to in this

20 section:

21 (1) A party that seeks to invoke subsection (a), (d), (e) or (f) has the burden of

22 proving the applicability of that provision.

23 (2) Except as otherwise provided in paragraphs (3) and (4), the creditor has the

burden of proving each applicable element of subsection (b) or (c).

(3) The transferee has the burden of proving good faith and value under subsection (b)(1)(ii).

(4) A party that seeks adjustment under subsection (c) has the burden of proving the adjustment.

(h) Proof of matters referred to in this section is sufficient if established by a preponderance of the evidence.

Official Comment

(1) Subsection (a) ~~states the rule that applies when the transferee establishes~~ sets forth a complete defense to ~~the~~ an action for avoidance ~~based on Section~~ under § 4(a)(1). The subsection is an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance Act. ~~The~~ Pursuant to subsection (g), the person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. ~~*Chorost v. Grand Rapids Factory Showrooms, Inc.*, 77 F. Supp. 276, 280 (D.N.J. 1948), *aff'd*, 172 F.2d 327, 329 (3d Cir. 1949).~~

(2) Subsection (b) is derived from Bankruptcy Code §§ 550(a), (b) (1984). ~~of the Bankruptcy Code.~~ The value of the asset transferred is limited to the value of the levyable interest ~~on~~ of the transferor, exclusive of any interest encumbered by a valid lien. See § 1(2) *supra*.

The requirement of Bankruptcy Code § 550(b)(1) (1984) ~~of the Bankruptcy Code~~ that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) is new. The measure of the recovery of a ~~defrauded~~ creditor against a ~~fraudulent~~ transferee is usually limited to the value of the asset transferred at the time of the transfer. See, *e.g.*, *United States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981); *Hamilton Nat'l Bank of Boston v. Halstead*, 134 N.Y. 520, 31 N.E. 900 (1892); *cf. Buffum v. Peter Barceloux Co.*, 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may

require a departure from that measure of the recovery, however, as the cases decided under the Uniform Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good-faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d) (1984); *Janson v. Schier,* 375 A.2d 1159, 1160 (N.H. 1977); Anno., 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See *Damazo v. Wahby*, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaptation of Bankruptcy Code § 548(c) (1984). ~~of the Bankruptcy Code.~~ An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good-faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred. If a foreclosure sale does not qualify for the benefit of § 3(b) or § 8(e)(2) because it was not conducted in accordance with the requirements of applicable law, the buyer, if in good faith, will still be entitled to the benefit of subsection (d) to the extent of the value paid by the buyer in the sale.

(5) Subsection (e)(1) rejects the rule adopted in *Darby v. Atkinson (In re Farris),* 415 F.Supp. 33, 39-41 (W.D.Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a ~~fraudulent~~ voidable transfer.

Subsection (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement ~~of a secured creditor's~~ by a secured party (who may but need not be the transferee) of rights pursuant to and in compliance with the provisions of ~~Part 5~~ Part 6 of Article 9 of the Uniform Commercial Code. *Cf. Calaiaro v. Pittsburgh Nat'l Bank (In re Ewing*), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bankr. W.D.Pa. 1983) (sale of pledged stock held subject to avoidance ~~as fraudulent transfer in~~ under § 548 of the Bankruptcy Code), *rev'd*, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). ~~Although a secured creditor may enforce rights in collateral without a sale under § 9-502 or § 9-505 of the Code, the creditor must proceed in good faith (U.C.C. § 9-103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in U.C.C. § 9-502(2) and is implicit in § 9-505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).~~ The global requirement of Article 9 that the secured party enforce its rights in good faith, and its further requirement that certain remedies be conducted in a commercially reasonable manner, provide substantial protection to the other creditors of the debtor. See U.C.C. §§ 1-304, 9-607(b), 9-610(b) (2014). The exemption afforded by subsection (e)(2) does not extend to acceptance of collateral in full or partial satisfaction of the obligations it secures. That remedy, contemplated by U.C.C. §§ 9-620–

9-622 (2014), is sometimes referred to as "strict foreclosure." An exemption for strict foreclosure is inappropriate because compliance with the rules of Article 9 relating to strict foreclosure may not sufficiently protect the interests of the debtor's other creditors if the debtor does not act to protect equity the debtor may have in the asset.

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under § 5(b).

Paragraph (1) is adapted from Bankruptcy Code § 547(c)(4) (1984), ~~of the Bankruptcy Code,~~ which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See, *e.g., In re Ira Haupt & Co.*, 424 F.2d 722, 724 (2d Cir. 1970); *Baranow v. Gibraltor Factors Corp. (In re Hygrade Envelope Co.),* 393 F.2d 60, 65-67 (2d Cir.), *cert. denied*, 393 U.S. 837 (1968); *In re John Morrow & Co.,* 134 F. 686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (2) is derived from ~~§ 546(c)(2) of the Bankruptcy Code,~~ Bankruptcy Code § 547(c)(2) (1984), which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under § 5(b). See Tait & Williams, *Bankruptcy Preference Laws: The Scope of Section 547(c)(2),* 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good-faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. *Blackman v. Bechtel*, 80 F.2d 505, 508-09 (8th Cir. 1935); *Olive v. Tyler (In re Chelan Land Co.),* 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re Robin Bros. Bakeries, Inc.,* 22 F.Supp. 662, 663-64 (N.D.Ill. 1937); see *Dean v. Davis,* 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

(7) Subsections (g) and (h) were added in 2014. Sections 2(b), 4(c), 5(c), 8(g), and 8(h)

together provide uniform rules on burdens and standards of proof relating to the operation of this Act. The principles stated in Comment (11) to § 4 apply to subsections (g) and (h).

(8) The provisions of § 8 are integral elements of the rights created by this Act. Accordingly, they should apply if this Act is invoked in a bankruptcy proceeding pursuant to Bankruptcy Code § 544(b) (2014). That follows from the fundamental principle that property rights in bankruptcy should be the same as outside bankruptcy, unless a federal interest compels a different result. See *Butner v. United States*, 440 U.S. 48, 55 (1979). Section 8(b) limits damages under this Act to the amount of the plaintiff creditor's claim, and that limitation is overridden in bankruptcy by the rule of *Moore v. Bay*, 284 U.S. 4 (1931), which Congress unmistakably maintained when it enacted the Bankruptcy Code. In the absence of a clear override by the Bankruptcy Code or other federal law, however, other aspects of § 8 should apply if this Act is invoked in bankruptcy. See, *e.g.*, *Decker v. Tramiel (In re JTS Corp.)*, 617 F.3d 1102, 1110-16 (9th Cir. 2010) (holding that § 8(d) applies to a claim brought under this Act in a bankruptcy proceeding pursuant to Bankruptcy Code § 544(b)).

SECTION 9. EXTINGUISHMENT OF [CLAIM FOR RELIEF] [CAUSE OF ACTION]. A [claim for relief] [cause of action] with respect to a ~~fraudulent~~ transfer or obligation under this [Act] is extinguished unless action is brought:

(a) under Section 4(a)(1), within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under Section 4(a)(2) or 5(a), within 4 years after the transfer was made or the obligation was incurred; or

(c) under Section 5(b), within one year after the transfer was made ~~or the obligation was incurred~~.

Reporter's Note

Section 5(b), the insider preference provision, by its terms applies only to a transfer of property; it does not apply to the incurrence of an obligation. The reference to obligations in Section 9(c) is therefore meaningless.

Official Comment

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. ~~See Restatement of Conflict~~

~~of Laws 2d § 143 Comments (b) & (c) (1971).~~ The section rejects the rule applied in *United States v. Gleneagles Inv. Co.*, 565 F.Supp. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act). Another consequence of barring the right and not merely the remedy is that, under *Restatement (Second) of Conflict of Laws* § 143 (1971), if an action is brought in jurisdiction A and the action is determined to be governed by this Act as enacted in jurisdiction B, the action cannot be maintained if it is time-barred in jurisdiction B. The 1988 revision of §§ 142 and 143 of the *Restatement (Second) of Conflict of Laws*, which eliminated the right/remedy distinction, should not be applied to this Act. Because a voidable transfer or obligation may injure all of a debtor's many creditors, there is need for a uniform and predictable cutoff time.

(2) Statutes of limitations applicable to the avoidance of ~~fraudulent~~ transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. See Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations,* 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with § 6, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to ~~fraudulent~~ avoid transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by ~~the~~ a creditor ~~defrauded~~ or by a purchaser at a sale on execution levied pursuant to § 7(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See ~~§ 10~~ § 12 and the accompanying Comment *infra*.

(3) Subsection (a) provides that the four-year period ordinarily applicable to a claim under § 4(a)(1) is extended to "one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Antecedents to that "discovery rule" have long existed in common law and in other statutes, and courts may take different approaches to filling out the meaning of subsection (a) by reference to such precedents. Thus, subsection (a) literally starts the one-year period when the transfer was or could reasonably have been discovered by the claimant, but cases applying subsection (a) have held that the period starts only when the transfer and its wrongful nature were or could reasonably have been discovered. See, *e.g.*, *Freitag v. McGhie*, 947 P.2d 1186 (Wash. 1997); *State Farm Mut. Auto. Ins. Co. v. Cordua*, 834 F.Supp.2d 301, 306-08 (E.D. Pa. 2011). A recurring situation to which that distinction may be relevant is Spouse X's transfer of assets beyond the reach of creditors, made in anticipation of divorcing Spouse Y after the four-year period has elapsed and made for the purpose of thwarting Spouse Y's economic interests in the divorce. Spouse Y may well know of the transfer long before Spouse Y learns its wrongful purpose. Of course, even if the period specified in subsection (a) is held to have lapsed in a given case, law other than this Act might allow the transferred assets to be considered in making a division of assets in the ensuing divorce case.

SECTION 10. GOVERNING LAW.

(a) In this section the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(b) A claim in the nature of a claim under Section 4 or 5 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.

Official Comment

(1) Section 10, added in 2014, codifies a simple and predictable choice of law rule for claims of the nature governed by the Act. It provides that a claim in the nature of a claim under the Act is governed by the local law of the jurisdiction in which the debtor is "located" at the time the challenged transfer is made or the challenged obligation is incurred. Section 6 defines the time at which a transfer is made or obligation is incurred for purposes of the Act, including this section.

Basing choice of law on the location of the debtor is analogous to the rule set forth in U.C.C. § 9-301 (2014), which provides that the priority of a security interest in intangible property is generally governed by the law of the jurisdiction in which the debtor is located. The analogy is apt, because the substantive rules of this Act are a species of priority rule, in that they determine the circumstances in which a debtor's creditors, rather than the debtor's transferee, have superior rights in property transferred by the debtor. In keeping with that analogy, the definition of the debtor's "location" in subsection (a) is identical to the baseline definition of that term in U.C.C. § 9-307(b) (2014). Subsection (a) does not include any of the exceptions to the baseline definition that are set forth in Article 9 of the Uniform Commercial Code, such as U.C.C. § 9-307(e) (2014) (providing that the location of a domestic corporation or other "registered organization" is its jurisdiction of organization), and U.C.C. § 9-307(c) (2014) (providing in effect that if the baseline definition would locate a debtor in a jurisdiction that lacks an Article 9-style filing system, then the debtor is instead located in the District of Columbia). Those exceptions are not included in subsection (a) because their primary purpose relates to the operation of Article 9's perfection rules, which have no analogue in this Act.

(2) As used in subsection (a), the terms "chief executive office," "place of business," and "principal residence" are to be evaluated on the basis of authentic and sustained activity, not on the basis of manipulations employed to establish a location artificially (*e.g.*, by such means as establishing a notional "chief executive office" by use of straw-man officers or directors in a jurisdiction in which creditors' rights are substantially debased, or establishing a notional

"principal residence" for a short term in such a jurisdiction for the purpose of making an asset transfer while there). Notwithstanding the adaptation of subsection (a) from U.C.C. § 9-307(b) (2014), the foregoing terms need not necessarily have the same meanings in both statutes. Debtors are likely to have greater incentive and ability to employ "asset tourism" for the purpose of seeking to evade the substantive rules of this Act than for the purpose of seeking to manipulate the perfection and priority rules of secured transactions law. Interpretation and application of this Act should so recognize.

(3) "Location" under this Act has no relation to the concept of "center of main interests" ("COMI"), as that term is used in Chapter 15 of the Bankruptcy Code. Chapter 15, which applies to transnational insolvency proceedings, requires United States courts to defer in various ways to a foreign proceeding in the jurisdiction of the debtor's COMI. Those consequences are quite different from the consequences of "location" under this Act. Furthermore, if the debtor is an organization, the debtor's jurisdiction of organization has no bearing on the debtor's "location" under subsection (a), by contrast to the presumption in Bankruptcy Code § 1516(c) (2014) that the jurisdiction in which the debtor has its registered office (*i.e.*, its jurisdiction of organization) is its COMI.

SECTION 11. APPLICATION TO SERIES ORGANIZATIONS.

(a) In this section, "series organization" means an organization that, pursuant to the statute under which the organization is organized, satisfies the following conditions:

(1) the organic record of the organization provides for creation by the organization of one or more protected series (however denominated) with respect to specified property of the organization, and provides for records to be maintained for each protected series that identify the property of the protected series;

(2) debt incurred or existing with respect to the activities or property of a particular protected series is enforceable against the property of the protected series only, and not against the property of the organization or of other protected series thereof; and

(3) debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of any protected series thereof.

(b) A series organization and each protected series of the series organization is a separate

person for purposes of this [Act], even if for other purposes a protected series is not an entity separate from the series organization or other protected series thereof.

Official Comment

This section, added in 2014, accommodates developments in business organization statutes exemplified by the Uniform Trust Entity Act §§ 401-404 (2009) and Del. Code Ann. tit. 6, § 18-215 (2012) (pertaining to Delaware limited liability companies). The definition of "series organization" in subsection (a) is adapted from §§ 401-402 of the Uniform Trust Entity Act. If the statute under which an organization is organized permits it to divide its assets and debts among "protected series" (however denominated), such that assets and debts of each "protected series" are separated in accordance with subsections (a)(2) and (a)(3), and if the organization does so, then the provisions of this Act apply to each "protected series" as if it were a legal entity, regardless of whether it is considered to be a legal entity for other purposes. The conditions referred to in subsections (a)(2) and (a)(3) are satisfied if the statute under which the organization is organized so provides. It does not matter whether the separation of assets and debts described in subsections (a)(2) and (a)(3) would be respected by another jurisdiction in which the organization does business, or would be given effect by the Bankruptcy Code in the bankruptcy of the organization. An organization may be a "series organization" having "protected series," as those terms are used in this section, even though the statute under which the organization is organized uses different terminology. This section uses the term "protected series," which is not used in either the Uniform Trust Entity Act or the Delaware provisions cited above, to emphasize that the application of this section does not depend upon the terminology used by the applicable statute.

SECTION ~~10~~ 12. SUPPLEMENTARY PROVISIONS. Unless displaced by the provisions of this [Act], the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Official Comment

This section is derived from § 11 of the Uniform Fraudulent Conveyance Act and ~~§ 1-103 of the~~ Uniform Commercial Code § 1-103 (1984) (later § 1-103(b) (2014)). The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a ~~fraudulent~~ transfer under this Act. See *Louis Dreyfus Corp. v. Butler*, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); *Cooch v. Grier,* 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

SECTION ~~11~~ 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION ~~12~~ 14. SHORT TITLE. This [Act], which was formerly cited as the Uniform Fraudulent Transfer Act, may be cited as the ~~Uniform Fraudulent Transfer Act~~ Uniform Voidable Transactions Act.

Official Comment

(1) The 2014 amendments change the short title of the Act from "Uniform Fraudulent Transfer Act" to "Uniform Voidable Transactions Act." The change of title is not intended to effect any change in the meaning of the Act. The retitling is not motivated by the substantive revisions made by the 2014 amendments, which are relatively minor. Rather, the word "Fraudulent" in the original title, though sanctioned by historical usage, was a misleading description of the Act as it was originally written. Fraud is not, and never has been, a necessary element of a claim under the Act. The misleading intimation to the contrary in the original title of the Act led to confusion in the courts. See, *e.g.*, § 4, Comment (10). The misleading insistence on "fraud" in the original title also contributed to the evolution of widely-used shorthand terminology that further tends to distort understanding of the provisions of the Act. Thus, several theories of recovery under the Act that have nothing whatever to do with fraud (or with intent of any sort) came to be widely known by the oxymoronic and confusing shorthand tag "constructive fraud." See §§ 4(a)(2), 5(a). Likewise, the primordial theory of recovery under the Act, set forth in § 4(a)(1), came to be widely known by the shorthand tag "actual fraud." That shorthand is misleading, because that provision does not in fact require proof of fraudulent intent. See § 4, Comment (8).

In addition, the word "Transfer" in the original title of the Act was underinclusive, because the Act applies to incurrence of obligations as well as to transfers of property.

(2) The Act, like the earlier Uniform Fraudulent Conveyance Act, has never purported to be an exclusive law on the subject of voidable transfers and obligations. See Prefatory Note (1984), ¶5; § 1, Comment (2), ¶6; § 4, Comment (9), ¶1. It remains the case that the Act is not the exclusive law on the subject of voidable transfers and obligations.

(3) The retitling of the Act should not be construed to affect references to the Act in other statutes or international instruments that use the former terminology. See, *e.g.*, Convention on International Interests in Mobile Equipment, art. 30(a)(3), opened for signature Nov. 16, 2001, S. Treaty Doc. No. 108-10 (referring to "any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a … transfer in fraud of creditors").

(4) The 2014 amendments also make a correction to the text of the Act that is consonant with the change of the Act's title. As originally written, the Act inconsistently used different words to denote a transfer or obligation for which the Act provides a remedy: sometimes "voidable" (see original § 2(d), §§ 8(a), (d), (e), (f)), and sometimes "fraudulent" (see original § 4(a), §§ 5(a), (b), § 9). The amendments resolve that inconsistency by using "voidable" consistently or deleting the word as unnecessary. No change in meaning is intended.

Reporter's Note

The Drafting Committee has submitted to the ULC's Executive Committee, for consideration at its meeting in January 2014, a recommendation that the title of the Act be changed to "Uniform Voidable Transactions Act." Section 14 and the accompanying Official Comment implement the Drafting Committee's view as to how the transition to the new title should be implemented if the Executive Committee approves that recommendation.

Amended Section 14 includes the language ", which was formerly cited as the Uniform Fraudulent Transfer Act,". That language is included in order to avoid any possibility of confusion about the provenance of the Act as amended, and also to assure that a database search against the original title will continue to locate the Act as amended.

If the Executive Committee approves the change of title, the Drafting Committee is of the view that the legend on the cover page of these amendments should be revised to read as follows:

UNIFORM VOIDABLE TRANSACTIONS ACT

(Formerly Uniform Fraudulent Transfer Act)
(As Amended in 2014)

2014 AMENDMENTS ARE INDICATED BY UNDERSCORE AND STRIKEOUT

Furthermore, the words "Uniform Fraudulent Transfer Act" should be changed to "Uniform Voidable Transactions Act" in the captions preceding (i) the list of members of the Drafting Committee, (ii) the Table of Contents, (iii) Prefatory Note (1984), and (iv) Section 1 of the Act. The foregoing legend is based on the style employed by the 2008 amendments to the Uniform Interstate Family Support Act, which likewise restated the entire act (but which did not change the title of that act).

SECTION ~~13~~ 15. REPEAL. The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

Official Comment

If enacted by this State, the Uniform Fraudulent Conveyance Act should be listed among the statutes repealed.

1 ***Legislative Note (2014):*** *The legislation enacting the 2014 amendments in a jurisdiction in*
2 *which the Act is already in force should provide as follows: (i) the amendments apply to a*
3 *transfer made or obligation incurred on or after the effective date of the enacting legislation,*
4 *(ii) the amendments do not apply to a transfer made or obligation incurred before the effective*
5 *date of the enacting legislation, (iii) the amendments do not apply to a right of action that has*
6 *accrued before the effective date of the enacting legislation, and (iv) for the foregoing purposes a*
7 *transfer is made and an obligation is incurred at the time provided in § 6 of the Act. In addition,*
8 *the enacting legislation should revise any reference to the Act by its former title in other*
9 *permanent legislation of the enacting jurisdiction.*