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Reception of the Uniform Fraudulent Transfer Act

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RECEPTION OF THE UNIFORM FRAUDULENT TRANSFER ACT

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As of January 1, 1992, twenty-nine states had adopted all or a substantial part of the Uniform Fraudulent Transfer Act (UFTA), which the National Conference of Commissioners on Uniform State Laws promulgated in 1984.[1] The UFTA also has been incorporated with minor changes as Subchapter D of the Federal Debt Collection Procedures Act of 1990.[2] The enactments of the twenty-nine states are cited

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Professor Kennedy participated in writing the brief for the appellant in United States v. Tabor Court Realty Corp., 803 F.2d 1289 (3d Cir. 1986), which is cited *infra* note 154.

1. UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 639 (1985). A brief history and general analysis of the UFTA may be found in Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UCC L.J. 195 (1986).

2. Pub. L. No. 101-647, 104 Stat. 4959 (codified at 28 U.S.C.A. §§ 3301-08 (West

in Appendix I at the end of this Article. Variations in the enactments from the UFTA as approved by the Conference are briefly summarized in Appendix II. Commentaries on the Uniform Act are cited in Appendix III.

Arizona and California deleted section 5(b), which declares that preferential transfers to insiders are fraudulent, and section 8(f), which specifies defenses that may be asserted in actions to avoid such transfers.[3] On the assumption that these deletions rendered the definitions of "affiliate" and "insider" unnecessary, the same two states deleted

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Supp. 1992)). The principal departures from the UFTA in the Federal Debt Collection Procedures Act's subchapter on fraudulent transfers are the limitation of its scope to transfers and obligations fraudulent "as to a debt to the United States," 28 U.S.C.A. § 3304 (West Supp. 1992), and its extension of periods of limitation by substituting "6 years" where the UFTA prescribes "4 years," and "2 years" where the UFTA prescribes "one year." *Compare id.* § 3306 *with* UNIF. FRAUDULENT TRANSFER ACT § 9, 7A U.L.A. 665 (1985). In Federal Deposit Insurance Corp. v. British-American Corp., 755 F. Supp. 1314 (E.D.N.C. 1991), the court cited but did not apply the Federal Debt Collection Procedures Act, explaining that the explicitness of the statute in specifying its effective date as 180 days from the date of enactment, November 29, 1990, precluded its application to a challenged transfer that had occurred earlier. *Id.* at 1324-25. *But cf. infra* text accompanying notes 104-25 (discussing the retroactive application of the UFTA). The transfer involved in *British-American Corp.* was a purchase from a Bahamian insurer of the assets of its Fiji subsidiary. The court deemed federal common law, as opposed to the law of a particular state, to be controlling and selected the Uniform Fraudulent Conveyance Act (UFCA) as a statement of the federal common law. 755 F. Supp. at 1325. At the time of its decision, the UFTA had been enacted in 29 states, and the UFCA remained effective in only nine states. Moreover, the Federal Debt Collection Procedures Act, which the court was at pains not to apply, conforms more closely to the UFTA than to the UFCA. The court justified its choice of the UFCA by pointing out that on May 5, 1983, when the challenged transfer occurred, 24 states had adopted the UFCA and that the adopting states included California, North Dakota, and Wyoming, three states having relevant connections with the transfers involved in the case. *Id.* The UFTA would not, however, have dictated a result different from that reached on the basis of the reference to the UFCA. The court held on the merits that the challenged transfer was voidable. It further held that the transfer of two million dollars for the assets of the Fiji subsidiary was fraudulent because the seller never executed the document evidencing a transfer of possession and never obtained the approval of the Fiji Commissioner of Insurance that was required for the transfer to be legally effective. *Id.* at 1326-27. For the transferee to retain the transfer by an indebted entity without receipt of any consideration in exchange against attack by or on behalf of creditors, the court held that the transferee had the burden to prove the transferor's solvency at or after the transfer. *Id.* at 1327-28. The court rendered judgment for the receiver of the purchasing bank on failure of proof of solvency. The court then awarded prejudgment interest at the rate prescribed by the federal statute governing postjudgment interest. *Id.* at 1328. Neither the UFCA nor the UFTA speaks to the matter of interest on recovery of the value of fraudulently transferred property.

3. *See* ARIZ. REV. STAT. ANN. §§ 44-1005, -1008 (Supp. 1991); CAL. CIV. CODE §§ 3439.05, .08 (West Supp. 1992).

paragraphs (1) and (7) of section 1.[4] Although "insider" appears in section 4(b), it is undefined in the Arizona Act, and California also deleted section 4(b).[5] Alabama deleted all reference to obligations, indicating in a comment that prior Alabama law is to be applied by analogy to determine whether an obligation is fraudulent.[6]

Notable departures from the Bankruptcy Code and the Uniform Fraudulent Conveyance Act (UFCA)[7] are made in sections 3(b) and 8(e) of the UFTA. Section 3(b) protects a transfer obtained "pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale" from attack on the ground that the transferee did not give a reasonably equivalent value.[8] Section 8(e) insulates from avoidance under the UFTA a transfer that results from termination of a lease for default by the debtor or from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code (UCC).[9] California and Montana have deleted section 3(b),[10] but California has provided a broader degree of protection in section 8(e)(2) by insulating from avoidance "[e]nforcement of a lien in a noncollusive manner and in compliance with applicable law," including Article 9 of the UCC.[11] California has, however, excepted from the scope of this saving provision the retention of collateral under section 9-505(2) of the UCC and a voluntary transfer of collateral in satisfaction of a secured obligation.[12] Curiously, one article, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*,[13] surmised that section 3(b) of the UFTA could prove inefficacious because "[c]reative counsel and judges . . . may construe the '*regularly* conducted, *noncollusive*' language of UFTA section 3(b) to reach a result similar to that accom-

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4. *See* ARIZ. REV. STAT. ANN. § 44-1001 (Supp. 1991); CAL. CIV. CODE § 3439.01 (West Supp. 1992).

5. *See* ARIZ. REV. STAT. ANN. §§ 44-1001, -1004 (Supp. 1991); CAL. CIV. CODE § 3439.04 (West Supp. 1992).

6. ALA. CODE § 8-9A-1 cmt. 1 (Supp. 1991). The Alabama act therefore diverges not only from the UFTA but also from § 548 of the Bankruptcy Code, 11 U.S.C. § 548 (1988 & Supp. II 1990), by leaving the voidability of obligations to case law development. Alabama did not enact the UFCA, which first assimilated the treatment of fraudulent obligations and fraudulent transfers. The Chandler Act of 1938 incorporated this feature of the UFCA into § 67d of the Bankruptcy Act. Chandler Act, ch. 575, § 67d, 52 Stat. 840, 877-78 (1938) (repealed 1978).

7. UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 427 (1985).

8. UNIF. FRAUDULENT TRANSFER ACT § 3(b), 7A U.L.A. 650 (1985).

9. *Id.* § 8(e), 7A U.L.A. at 662.

10. *See* CAL. CIV. CODE § 3439.03 (West Supp. 1992); MONT. CODE ANN. § 31-2-330 (1991).

11. CAL. CIV. CODE § 3439.08(e)(2) (West Supp. 1992).

12. *Id.*

13. Peter A. Alces & Luther M. Dorr, Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527.

plished by the *Durrett* rule."[14] Notwithstanding the continuing viability of the *Durrett* doctrine in the bankruptcy context,[15] under which trustees and debtors can successfully attack foreclosure sales for less than reasonably equivalent value, state cases allowing creditors relief from those sales are nonexistent. It would be easier to support an argument that section 3(b) is an unnecessary limitation on the application of fraudulent transfer law than that it will be rendered nugatory by the courts.

Most of the adopting states have accepted the time limits prescribed by section 9, but Minnesota, which otherwise made no changes in the UFTA, deleted section 9 altogether.[16] Alabama adopted a ten-year limitation for an action to avoid a transfer of real property under section 4(a)(1),[17] whereas Montana imposed a two-year bar on actions under sections 4 and 5(a).[18] Texas included a special two-year limitation on an action on behalf of a spouse, minor, or ward,[19] but it is not clear whether it operates as a limitation or an extension of the periods prescribed for other persons. Texas also added a section that renders any gift of personal property void unless evidenced by a recorded deed, probated will, or possession in the donee.[20]

Other noteworthy changes are referred to at relevant points in the discussion below of the sections that have received particular attention in the cases and the commentaries. Not surprisingly, sections 4(a) and 5(a) of the UFTA, which follow their precursors in the UFCA, section 67d of the Bankruptcy Act,[21] and section 548 of the Bankruptcy Code[22] have stimulated little commentary or notable case law development.

I. SECTION 2. THE DEFINITION OF "ASSET"

The definition of "asset" in section 1(2) has been criticized because, by excluding property to the extent encumbered by a valid lien,

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14. *Id.* at 550. Section 3(b) of the UFTA rejects the rule of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), which avoided a foreclosure sale as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its appraised value.

15. *See, e.g.*, Bundles v. Baker (*In re* Bundles), 856 F.2d 815, 819-21 (7th Cir. 1988) (discussing *Durrett* and the fact that several jurisdictions follow the doctrine); Mark E. Budnitz, *The Duties Imposed by Bankruptcy Courts upon Mortgagees at Foreclosure Sales: How to Avoid Avoidance Under Section 548*, 46 BUS. LAW. 1183 (1991).

16. *See* MINN. STAT. ANN. §§ 513.41 to .51 (West 1990).

17. ALA. CODE § 8-9A-9(1) (Supp. 1991).

18. MONT. CODE ANN. § 31-2-341(2) (1991).

19. TEX. BUS. & COM. CODE ANN. § 24.010(b) (West 1987).

20. *Id.* § 24.013.

21. Bankruptcy Act § 67d, 11 U.S.C. § 107(d) (1976) (repealed 1978).

22. 11 U.S.C. § 548 (1988 & Supp. II 1990).

the UFTA insulates transfers of such property from avoidance as fraudulent. Property that is generally exempt from creditor process is expressly excluded from the property that may be the subject of a fraudulent transfer voidable under the UFTA.[23] The exclusion of property to the extent that it is encumbered by a valid lien implements the same approach.[24] Similar exclusions applied under the UFCA,[25] although the exclusion of property subject to a valid lien was implied rather than express in that Act.[26] The explicit exclusion of validly encumbered property from the definition of "asset" in the UFTA originated from the Drafting Committee's conclusion that a tenant by the entirety should not be deemed insolvent if the property subject to process is sufficient to pay all debts except any obligation validly secured by property held by the entirety.[27]

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23. UNIF. FRAUDULENT TRANSFER ACT § 1(2)(ii), 7A U.L.A. 644 (1985). A similar provision in § 1(2)(iii) excludes "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." *Id.* § 1(2)(iii).

24. *Id.* § 1(2)(i). As pointed out in Comment (2) accompanying § 1 of the UFTA:

> The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest[s] 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.

Id. § 1 cmt. 2, 7A U.L.A. at 645-46.

25. Section 1 of the UFCA begins as follows: "In this act 'Assets' of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets." UNIF. FRAUDULENT CONVEYANCE ACT § 1, 7A U.L.A. 430 (1985); *see, e.g.*, Haskins v. Certified Escrow & Mortgage Co., 216 P.2d 90, 93 (Cal. Dist. Ct. App. 1950) ("Cases decided under the Uniform Act have consistently held that prejudice to the plaintiff is essential to relief."); Kopf v. Engelke, 1 N.W.2d 760, 761 (Wis. 1942) ("It is settled in this state that a conveyance of a homestead is not fraudulent to creditors even if a fraudulent intent exists."); Pomputis v. Frese, 279 N.W.2d 508 (Wis. Ct. App. 1979) (unpublished opinion available on Westlaw) ("The conveyance of an exempt homestead is not fraudulent as to creditors because creditors cannot reach the homestead and therefore are not harmed by its conveyance.").

The UFCA does not refer to interests in property that are held in tenancy by the entireties. The effect of the transfer of a nonlevyable interest in property that is held by the entireties seldom arises because single tenants by the entirety cannot transfer their interests.

26. *See, e.g.*, *Haskins*, 216 P.2d at 92 ("A creditor does not sustain injury unless the transfer puts beyond his reach property which he otherwise would be able to subject to the payment of his debt."); Holthaus v. Parsons, 469 N.W.2d 536 (Neb. 1991) (denying an attorney-creditor relief from the transfer of over-encumbered property because the transfer inflicted no injury on the creditor).

27. For a discussion of a problem involving the use of "valid lien" in § 8(f) of the UFTA, see *infra* text accompanying notes 146-53.

Professor Philip Blumberg has noted with apparent approval that the Comment accompanying UFTA's section 1(2) includes in a debtor's assets the "contingent claim of a surety for reimbursement, contribution, or subrogation."[28] Professor Blumberg disapproved, however, of the definition of "claim" in section 1(3),[29] which was derived from section 101(5) of the Bankruptcy Code,[30] because of its failure explicitly to authorize, or accommodate a construction that would authorize, an adjustment of the amount of a guarantor's liability that is based on the probability that the liability would be released by virtue of payment by the primary obligor.[31] The result of the first definition is to increase the value of a guarantor's assets, but the tendency of the second is to increase its liabilities. The effects thus tend to neutralize each other. No cases have been found to illustrate the judicial construction of these definitions.

II. SECTION 3. VALUE

Professor Shupack criticized the statement in the comment accompanying section 3 of the UFTA that " '[c]onsideration having no utility from a creditor's viewpoint does not satisfy the statutory definition' " of value.[32] Professor Shupack based his criticism upon his interpretation of the Comment: although consideration for an exchange was fair at the time of the exchange, a subsequent loss in value as measured by the utility of the consideration to the creditor would render the transfer fraudulent.[33] The implication of his criticism is that section 3(a) is flawed for not acknowledging that value which may be fair at the time of the transfer may become unfair if measured at a later time. The

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28. UNIF. FRAUDULENT TRANSFER ACT § 1 cmt. 2, 7A U.L.A. 645 (1985), *cited with approval in* Philip I. Blumberg, *Intragroup (Upstream, Cross-Stream, and Downstream) Guaranties Under the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 685, 699-700 (1987).

29. UNIF. FRAUDULENT TRANSFER ACT § 1(3), 7A U.L.A. 644 (1985) (" '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.").

30. 11 U.S.C. § 101(5) (Supp. II 1990).

31. Blumberg, *supra* note 28, at 700-01.

32. Paul M. Shupack, *Confusion in Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811, 832 (1987) (quoting UNIF. FRAUDULENT TRANSFER ACT § 3 cmt. 2, 7A U.L.A. 651 (1985)).

33. Professor Shupack posed the example of a retailer-debtor who exchanges an inventory of bicycles for an inventory of hula-hoops, which loses much of its value after the exchange. He argued that the comment's limitation of value to the utility of the consideration from a creditor's viewpoint provides a ground for attacking the exchange as fraudulent when a post-transfer depreciation of the consideration occurs. *Id.* at 832-33.

failure of the UFCA and the Bankruptcy Code provisions dealing with value and fair consideration to warn courts to disregard post-transfer depreciation of value, unsurprisingly, seems not to have misled the judges in the reported cases.[34]

Professor Shupack also lamented the failure of the UFTA to answer the question of whether a transfer in payment for services may constitute an exchange for value.[35] As he acknowledged, the question is unanswered in the Bankruptcy Code,[36] and it was not answered in the UFCA or the Bankruptcy Act.[37] Although a categorical answer presumably would reduce litigation, the approach taken in the UFTA and its progenitors has allowed the courts to consider the value of the services as a factor in adjudicating the avoidability of a transfer for such consideration. The reported cases do not reveal misplaced confidence in the courts' ability to deal with this issue.[38]

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34. The courts have not needed statutory direction to disregard post-transfer changes of value in either the property transferred or the property received when determining whether a transfer was made for a reasonably equivalent value. *See, e.g.*, Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654, 655 n.2 (8th Cir. 1991) (noting, in the context of determining whether the debtor received reasonably equivalent value for maintenance contracts it had sold prepetition, that the contracts were "sort of a 'wasting asset,' deteriorating in value as customers canceled their contracts with the debtor" and adding that "[f]airness to creditors requires collection by the trustee of the value of the contracts *at the time of transfer* to defendants, of which value defendants obtained the benefit and should reimburse the estate accordingly"); Harper v. Lloyd's Factors, Inc., 214 F.2d 662, 663 (2d Cir. 1954) (finding that when consideration for the debtor's transfer to the factor was an executory promise to buy notes and the promise was fully performed within five days, fair consideration was given by the factor, holding that the losses occurring later because of the acts of the debtor did not affect the sufficiency of consideration given by the factor, and dismissing the trustee's action to avoid the transfer); Chester Woodworking, Inc. v. S.S. Keely & Sons, Inc. (*In re* Chester Woodworking, Inc.), 56 B.R. 711, 712 (Bankr. E.D. Pa. 1986) (denying avoidance of a transfer of executory contracts for making cabinetry for failure to show that the contracts had value at time of transfer although the contracts were transferred by an insolvent debtor without receipt of consideration and the contracts generated a profit for the transferee months later); Wagoner v. Wallace Turnbull Corp. & Lumber Terminals, Inc., 160 A. 105, 107 (Pa. 1932) ("The test would not be what the stock was worth after the new corporations ceased to profitably function, but what was the stock worth at the time the transfer was made?").

35. Shupack, *supra* note 32, at 833.

36. *See* 11 U.S.C. § 548(d)(2)(A) (1988).

37. *See* UNIF. FRAUDULENT CONVEYANCE ACT § 3(a), 7A U.L.A. 448 (1985); Bankruptcy Act § 67d(d)(1)(e)(1), 11 U.S.C. § 107(d)(1)(e)(1) (1976) (repealed 1978).

38. *See, e.g.*, Merrill v. Allen (*In re* Universal Clearing House Co.), 60 B.R. 985, 997-1000 (D. Utah 1986) (holding that services rendered to a debtor by sales agents constituted value notwithstanding the bankruptcy court's ruling to the contrary based on its conclusion that the services deepened the debtor's insolvency by furthering a fraudulent scheme and remanding the case for a determination of whether the agents' services constituted reasonably equivalent value for the commissions received); McColley v. Jacobs

III. SECTION 5(b). PREFERENTIAL TRANSFERS TO INSIDERS

Section 5(b) adds a new category of fraudulent transfers—namely, a preferential transfer by an insolvent debtor to an insider who had reasonable cause to believe that the debtor was insolvent.[39] In a critique of the UFTA, Michael Cook and Richard Mendales made several criticisms of section 5(b) that are based on misapprehensions of its words and in any event unsupported by any citations of authority.[40] In arguing that a creditor may avoid a transfer to an innocent insider who has obtained no unfair advantage,[41] the authors ignored the unfairness and the advantage that accrues to an insider whenever an insolvent debtor makes a transfer to an insider who had reasonable cause to believe that the debtor was insolvent. The authors' description of the operation of section 5(b) as routine subordination of insider claims without misconduct[42] glosses over the subordinating effect of avoidance of a preference to an insider under section 547 of the Bankruptcy Code,[43] which operates without regard to the insider's conduct and therefore differs from section 5(b)'s reasonable-cause-to-believe requirement. In suggesting that governmental agencies, particularly the Internal Revenue Service, will now be able to attack virtually all payments from business organizations to insiders,[44] the authors ignored (1) that the

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(*In re* North Am. Dealer Group, Inc.), 62 B.R. 423, 428-31 (Bankr. E.D.N.Y. 1986) (holding that the former president and shareholder of a debtor corporation gave reasonably equivalent value for prepetition receipt of $105,000 in the form of services rendered to the corporation); Ellenberg v. Chapel Hill Harvester Church, Inc. (*In re* Moses), 59 B.R. 815, 817-19 (Bankr. N.D. Ga. 1986) (holding that church's services, including marital, business, financial, and religious counseling, rendered to debtors constituted reasonably equivalent value for the debtors' contributions when challenged under § 548(d)(2)(A) of the Bankruptcy Code, the analogue to § 3(a) of the UFTA); Schlecht v. Schlecht, 209 N.W. 883, 886-87 (Minn. 1926) (finding that a promise to make repairs and improvements on the transferor's homestead constituted fair consideration under §§ 3 and 4 of the UFCA); *cf.* Cole v. Loma Plastics, Inc., 112 F. Supp. 138, 141-42 (N.D. Tex. 1953) (holding that although the defendant's obligation under an executory contract to manufacture a product meeting particular specifications was not fair consideration for a deposit by an insolvent partnership, the defendant was allowed a lien for expenses incurred in preparing for performance of the contract); Bailey v. Metzger, Shadyac & Schwarz (*In re* Butcher), 72 B.R. 447, 450 (Bankr. E.D. Tenn. 1987) (holding that although the defendant's agreement to perform future legal services for the debtor's family did not constitute value as defined in § 548(d)(2)(A) of the Bankruptcy Code, the trustee was denied recovery to the extent of the value of services performed pursuant to the contract).

39. UNIF. FRAUDULENT TRANSFER ACT § 5(b), 7A U.L.A. 657 (1985).

40. Michael L. Cook & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87 (1988).

41. *Id.* at 89.

42. *Id.*

43. 11 U.S.C. § 547 (1988).

44. Cook & Mendales, *supra* note 40, at 89-90.

agency will have the burden of proof with respect to all of the elements of a preference and the reasonable cause to believe that the debtor was insolvent and (2) that the defendant is provided a defense not available under section 547 of the Bankruptcy Code—namely, that the transfer was made in a good faith effort to rehabilitate the debtor and that the transfer secured present value as well as an antecedent debt. In suggesting that the statutory limitation of section 9(c) of the UFTA may not be binding on federal agencies,[45] the authors discounted the explicit language of section 9 that extinguishes the cause of action for every plaintiff after the statutory period has run.[46] The suggestion is tantamount to an attack on any state legislation that creates a cause of action to which the trustee may be subrogated under the Bankruptcy Code and is not supported by any cited instance of such an application of the Code.

Professor Blumberg has questioned the failure of section 5(b) to deal with an obligation incurred to or for the benefit of an insider.[47] He suggested that section 4 of the UFCA did render such an obligation fraudulent if the debtor was insolvent at the time the guaranty or other obligation was incurred.[48] Section 4 made voidable an obligation incurred without fair consideration by a debtor who was insolvent or would be rendered insolvent by the obligation.[49] Blumberg's suggestion rested on the assumption that an obligation incurred by an insolvent debtor to an insider lacks good faith.[50]

In *Bullard v. Aluminum Co. of America*[51] the court held that a payment of an antecedent debt owed to a supplier by an insolvent

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45. *Id.* at 90.

46. In repeating the criticisms of Cook and Mendales and recommending the deletion of the modification of § 5(b) from the draft of the UFTA under consideration for enactment in Connecticut, Edward Weiss, in his article, *Connecticut Fraudulent Conveyance Law*, 11 U. BRIDGEPORT L. REV. 489 (1991), failed to recognize the countervailing considerations referred to in the text. *See id.* at 527-28. The Connecticut legislature did not heed Mr. Weiss's advice. *See* 1991 Conn. Acts § 5(b), at 297 (Reg. Sess.).

47. Blumberg, *supra* note 28, at 703-07.

48. *Id.* at 706. "UFTA section 5(b) . . . could have included obligations and guaranties just as its predecessor enactment, UFCA section 4, had done." *Id.*

49. UNIF. FRAUDULENT CONVEYANCE ACT § 4, 7A U.L.A. 474 (1985).

50. Professor Blumberg argued that courts routinely have held that transfers benefiting an insider-guarantor constitute fraudulent transfers under §§ 3 and 4 of the UFCA and 67d(2)(a) of the Bankruptcy Act because the transfers could not satisfy the good faith factor in fair consideration. Blumberg, *supra* note 28, at 712. His argument is an oversimplification of the cases that have construed the cited sections. *Cf.* Brown v. Harris (*In re* Auxano, Inc.), 96 B.R. 957 (Bankr. W.D. Mo. 1989). Good faith always has involved a factual determination based on a consideration of all the relevant evidence. *See* Roth v. Fabrikant Bros. (*In re* Flato), 175 F.2d 665 (2d Cir. 1949); Security Discount Co. v. Wesner (*In re* Peoria Braumeister Co.), 138 F.2d 520 (7th Cir. 1943).

51. 468 F.2d 11 (7th Cir. 1972).

debtor was fraudulent under section 67d(2)(a) of the Bankruptcy Act because the consideration went to third parties, not the debtor. The court found that "the primary and important" beneficiaries of the payment were the debtor's president, who had personally guaranteed the debt, and the debtor's principal stockholder, whose debt to the supplier also was satisfied by the payment.[52] Section 67d(2)(a) of the Bankruptcy Act was substantially similar to section 4 of the UFCA. In 1978, by enacting the new Bankruptcy Code, Congress rejected the part of the rule of *Bullard* that required a transferee who gave reasonably equivalent value to show good faith in order to withstand an attack against the transfer as constructively fraudulent.[53]

The UFTA accords the same treatment as section 548 of the Bankruptcy Code to a transferee who gave reasonably equivalent value in exchange for the transfer. At the same time that Congress undercut the ground for the decision in *Bullard*, it focused on the problem of preferences to insiders by extending the period of vulnerability of a preferential transfer to or for the benefit of an insider from four months to one year and by including comprehensive definitions of "insider" and "affiliate."[54] Congress did not undertake to deal with preferential obligations. The UFTA, in subjecting a preferential transfer to an insider to avoidance as a fraudulent transfer, adheres closely to the treatment accorded such preferences in the Bankruptcy Code and includes similar definitions of "insider" and "affiliate."[55] Neither the Bankruptcy Code nor the UFTA purports to render voidable a preferential obligation incurred to an insider unless accompanied by evidence of intent to hinder, delay, or defraud.

Professor Blumberg also has raised the question of whether section 5(b) makes voidable a transfer by a debtor to a third party creditor in payment of or to secure an antecedent debt that is guaranteed by an

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52. *Id.* at 14.

53. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 548, 92 Stat. 2549, 2600 (current version at 11 U.S.C. § 548 (1988 & Supp. II 1990)); *see* Steph McEvily, Note, *The New Bankruptcy Act: A Revision of Section 67d—The Death of a Dilemma*, 7 HOFSTRA L. REV. 537 (1979) (approving the elimination of good faith as an element of fairness of consideration and criticizing *Bullard* for its failure to analyze properly the roles of good faith and quantitative valuation of the consideration given by the transferee); *see also* Cook & Mendales, *supra* note 40, at 92 (noting that "[b]izarre results, like that in *Bullard v. Aluminum Company of America*, will be avoided" by eliminating judicial inquiry into "the transferee's thought processes when creditors of the transferor have not been prejudiced").

54. The amendments involved 11 U.S.C. § 547(b)(4)(B) (1988) (extending the period of vulnerability of a preferential transfer to or for the benefit an insider), 11 U.S.C. § 101(2) (Supp. II 1990) (definition of an "affiliate"), and 11 U.S.C. § 101(31) (Supp. II 1990) (definition of an "insider").

55. *See* UNIF. FRAUDULENT TRANSFER ACT § 1(1), (7), 7A U.L.A. 643-44 (1985).

insider of the debtor-transferor.[56] Professor Blumberg set forth a panoply of arguments that section 5(b) ought to apply to such a transfer. He argued that the policy of the provision extends as much to an indirect transfer as to a direct transfer to an insider and inferred that the drafters intended this result.[57] Conscious of the objections made by some participants in the debates during the consideration and drafting of section 5(b), the Conference's Drafting Committee decided not to recommend a version of the section that would render transfers that were only indirectly preferential constructively fraudulent.[58] Thus, preferences to an insider that result from an application of the two-point "improvement in position" test of section 547(c)(5) of the Bankruptcy Code[59] to shifting collateral would not be vulnerable to attack as fraudulent transfers under section 5(b) of the UFTA.[60]

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56. Blumberg, *supra* note 28, at 712-15.

57. *Id.* at 713-15.

58. Adoption of the Blumberg proposal would subject a creditor who had taken the precaution of obtaining a guaranty from an insider of a debtor's obligation to the risk of extended liability, not only inside of bankruptcy but also outside of bankruptcy, as a fraudulent transferee of the amount paid by the debtor on the guaranteed debt. The recovery in bankruptcy would be predicated on the pernicious *Deprizio* doctrine generated by the decision in Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989), which allowed the trustee to recover a payment on a debt that was guaranteed by an insider to a creditor of Deprizio Co., the debtor, as an insider preference, although the payment was made more than 90 days before the bankruptcy filing. The decision and doctrine emanating from it have been widely criticized. *See, e.g.*, Peter L. Borowitz, *Waiving Subrogation Rights and Conjuring Up Demons in Response to* Deprizio, 45 BUS. LAW. 2151, 2151 n.2 (1990) (citing five cases in support of the *Deprizio* result, six cases that took the contrary view, and fourteen "secondary commentaries" on the *Deprizio* issue); Walter A. Effross, *Deprizio's Honor: Lenders, Insider Guarantors and the Prisoners' Dilemma*, 21 SETON HALL L. REV. 774 (1991); David I. Katzen, Deprizio *and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guarantees, and Other Perils of Initial Transferee Liability*, 45 BUS. LAW. 511 (1990). The National Bankruptcy Conference has approved a proposal to amend the Bankruptcy Code to excise the doctrine.

59. 11 U.S.C. § 547(c)(5) (1988).

60. It is unlikely that an insolvent debtor will make preferential transfers to an insider guarantor, rather than to the creditor secured by inventory or receivables, so as to trigger liability under § 5(b) of the UFTA as well as § 547 of the Bankruptcy Code.

Alces and Dorr have lamented the failure of the UFTA to incorporate the two-point test of § 547(c)(5) of the Bankruptcy Code as "manifestly pro-financial institution." Alces & Dorr, *supra* note 13, at 557. Although the two-point test has never been a feature of the law of fraudulent transfers, the authors suggested that, as a result of its omission in the UFTA, "unsecured creditors may lose an important safeguard against fraudulent transfers." *Id.* Their criticism turned the two-point test on its head. The two-point test was introduced into the preference section of the Bankruptcy Code as a defense for financiers of inventory and accounts receivable against avoidance actions by the trustee in bankruptcy as a representative of unsecured creditors! *See* Irving A. Breitowitz, *Article 9 Security Interests as Voidable Preferences* (pt. 2), 4 CARDOZO L. REV. 1 (1982); Vern

IV. SECTION 6. TIMING OF TRANSFER OR OBLIGATION

Professor Shupack has criticized the timing provision of section 6(1) of the UFTA,[61] which determines when a transfer occurs for any purpose other than the application of the statute of limitations.[62] He acknowledged that similar provisions have been employed in the Bankruptcy Act[63] and the Bankruptcy Code.[64] He posed two situations in which he argued that the timing provisions produce anomalous results. The first involves a gift by a transferor in anticipation of being sued, where the transferee failed to record the transfer before the transferor died. Professor Shupack discussed the absurdity of a "solemn inquiry" into the intent of a corpse.[65] Because section 6 deems the transfer to have occurred upon the recording of the deed, the time of the transfer, which is the time to inquire into the intent of the transferor, is after the transferor's death. Professor Shupack ignored the utility of section 6 in facilitating the avoidance of transfers under those sections of the UFTA that do not require the debtor's intent to hinder, delay, or defraud a creditor.[66]

The second situation posed by Professor Shupack is based on *Jackson v. Star Sprinkler Corp.*[67] That case involved two transfers, the first of which was found to be unavoidable and the second was ruled to be voidable. The court applied section 67d(5) of the Bankruptcy Act,[68] which is similar to section 6(1) of the UFTA, and used the date of perfection of the security agreements at issue as the date of the transfer in applying the one-year time limitation of section 67d(2).[69] On the date of perfection the debtor was not insolvent, nor

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Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 790-801 (1985) (noting that § 547(c)(5) has proved to be of little importance); Thomas Ross, *The Impact of Section of 547 of the Bankruptcy Code upon Secured and Unsecured Creditors*, 69 MINN. L. REV. 39 (1984).

61. UNIF. FRAUDULENT TRANSFER ACT § 6(1), 7A U.L.A. 658-59 (1985).

62. Shupack, *supra* note 32, at 820-23.

63. *See* Bankruptcy Act § 3b, 11 U.S.C. § 21(b) (1976) (repealed 1978); Bankruptcy Act § 60a(2), 11 U.S.C. § 96(a)(2) (1976) (repealed 1978); Bankruptcy Act § 67(d)(5), 11 U.S.C. § 107(d)(5) (1976) (repealed 1978).

64. 11 U.S.C. §§ 547(e), 548(d)(1) (1988).

65. Shupack, *supra* note 32, at 821. The difficulty of applying a statutory test containing a mental element to a transaction or event that is deemed to occur after the transferor's death seems not to have embarrassed the application of the sections of the bankruptcy law cited *supra* note 63 that have been in effect for over fifty years.

66. *See* UNIF. FRAUDULENT TRANSFER ACT §§ 4(a)(2)(i)-(ii), 5(a), 7A U.L.A. 653, 657 (1985).

67. 575 F.2d 1223 (8th Cir. 1978).

68. Bankruptcy Act § 67d(5), 11 U.S.C. § 107d(5) (1976) (repealed 1978).

69. Bankruptcy Act § 67d(2), 11 U.S.C. § 107d(2) (1976) (repealed 1978).

did it act then with the intent to hinder, delay, or defraud creditors.[70] Thus, the transfer occurring on that date was not voidable. However, the court properly declined to refer to the date of perfection for the purpose of determining the voidability of a subsequent transfer that occurred on seizure of the assets of the debtor by an assignee of a secured creditor at a later time when the debtor was insolvent.[71] The court appropriately recognized that the seizure constituted a transfer within the definition of the term in section 1(30) of the Bankruptcy Act.[72] Because of its fixation on the date of perfection of the security agreements for the purpose of determining the timeliness of the avoidance action, the court made the same mistake as the Ninth Circuit in *Madrid v. Lawyers Title Insurance Corp. (In re Madrid)*.[73] In both cases the courts failed to distinguish the transfers creating the security interests that were unavoidable from the transfers that occurred when the secured creditors sought to enforce their interests by taking property of their insolvent debtors in excess of the debts that were secured.[74] Neither case casts any doubt on the appropriateness of an unstinting application of the timing provisions of section 67d(5) of the Bankruptcy Act, section 548(e) of the Bankruptcy Code, or section 6 of the UFTA.

The utility of applying the provisions to issues other than the running of the period of limitations is illustrated by *Kindom Uranium Corp. v. Vance*.[75] In *Kindom* the debtor Cole, while presumably solvent, executed a deed of her residence to a corporation of which she was a stockholder, director, and officer. Thereafter, she was involved in an automobile accident, which later resulted in a judgment of $15,000 against her. During the course of the trial, the corporation recorded its deed. Eleven months later, Cole filed a petition in bankruptcy. Cole's

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70. *Jackson*, 575 F.2d at 1231, 1236-37.

71. Professor Shupack refers to this event as "[t]he foreclosure," Shupack, *supra* note 32, at 822, but the court pointed out that no valid foreclosure had ever occurred. *Jackson*, 575 F.2d at 1233-34. The exercise of self-help by the assignee of the security interest was nonetheless a transfer, entirely independent of the transfer effected by the perfection of the security interest nine months earlier. *Id.* at 1230.

72. Bankruptcy Act § 1(30), 11 U.S.C. § 1(30) (1976) (repealed 1978).

73. 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984).

74. The failure of the court in *Madrid* to recognize that the enforcement of the secured creditor's lien was a transfer separate from the transfer creating the lien was the reason Congress amended the definition of "transfer" in the Bankruptcy Code in 1984 to include "foreclosure of the debtor's equity of redemption." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(i), 98 Stat. 333, 368 (current version at 11 U.S.C. § 101(54) (Supp. II 1990)). The misconstruction of the Bankruptcy Code in *Madrid* and related developments are discussed in Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 554-59, 564-66 (1987).

75. 269 F.2d 104 (10th Cir. 1959).

trustee sued the corporate transferee to avoid Cole's transfer under provisions of the Bankruptcy Act substantially similar to section 4(a) and (b) of the UFTA.[76] Although the judgment creditor had unsuccessfully sought to avoid the transfer as a fraudulent conveyance under state law, the court concluded that the state court action did not affect the trustee's rights under section 67d.[77] Because the time of the transfer was during the trial when the deed was recorded, the court found that "the deduction is inescapable that at that time she contemplated incurring liabilities which she could not discharge as they matured."[78]

Section 6(5) of the UFTA provides that an obligation is incurred when it becomes effective between the parties if the obligation is oral, or, if the obligation is written, upon the delivery of the written document to or for the benefit of the obligee.[79] The provision rejects the

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76. Bankruptcy Act § 67d, 11 U.S.C. § 107d (1976) (repealed 1978).

77. *Kindom*, 269 F.2d at 106-07.

78. *Id.* at 107. The court, however, also decided that the record did not justify a finding that Cole had an actual intent to defraud future or existing creditors because no connivance with the transferee at the time of the recording was shown. *Id.* Numerous appellate rulings have accepted a finding of fraudulent intent on the part of the transferee as sufficient proof of the intent requirement in fraudulent transfer actions. *See* Kennedy, *supra* note 74, at 577 n.194.

Kindom Uranium Corp. v. Vance is included in at least two widely adopted law school casebooks: DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 368-71 (2d ed. 1990); VERN COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 155-58 (2d ed. 1974). Dean Jackson has criticized *Kindom* on alternative and inconsistent grounds. *See* Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 784-86 (1984). He disregarded the court's finding of lack of fair consideration in declaring "the problem raised by that delayed recording is inherently one of preference law, not fraudulent conveyance law." *Id.* at 784. When a creditor receives more than full payment of its debt from an insolvent debtor, not only a preference, but also a fraudulent transfer occurs. The fact that the creditor manages to obtain both a preference and a fraudulent transfer in a single transaction does not and should not entitle it to retain the excess payment merely because the preference was not timely avoided. Dean Jackson then acknowledged alternatively that Cole and the corporate transferee in *Kindom* were probably guilty of actual intent to hinder, delay, or defraud and argued from that premise that the case was inappropriate for application of the "rule-oriented branch of fraudulent conveyance law." *Id.* at 786. Contrary to his account of the case, the court did address the "fact-specific question" of actual intent. As noted in the first paragraph of this footnote, the court inappropriately rejected the trustee's attack based on § 67d(2)(d) of the Bankruptcy Act for lack of proof of the debtor's connivance with the transferee. *See* Bankruptcy Act § 67d(2)(d), 11 U.S.C. § 107d(2)(d) (1976) (repealed 1978) (requiring actual intent to hinder, delay, or defraud creditors). The court nevertheless appropriately affirmed the judgment for the trustee on the basis of factual findings that fully satisfied the requirements of § 67d(2)(c). *See* Bankruptcy Act § 67d(2)(c), 11 U.S.C. § 107d(2)(c) (1976) (repealed 1978) (allowing avoidance if the transfer or obligation was made or incurred by an insolvent debtor without fair consideration).

79. UNIF. FRAUDULENT TRANSFER ACT § 6(5), 7A U.L.A. 659 (1985).

rule of *Rubin v. Manufacturers Hanover Trust Co.*,[80] which found that an obligation of a guaranty was incurred when advances covered by the guaranty were made rather than when the obligation became effective between the parties.[81] *Rubin* apparently involved discretionary advances.[82] It has been pointed out in a perceptive analysis that:

> Logic and policy compel the result that the *Rubin* case should be limited to its facts. . . . [I]f the future advance is to be made pursuant to a committed loan agreement, then the 'obligation [would be] incurred' . . . when the loan agreement has been executed and the upstream guaranty has been made . . . .[83]

Even when the future advances are discretionary, however, the guarantor's obligation to the lender is not discretionary. The lender who relied on that guaranty should be entitled to enforce it notwithstanding the intervening insolvency of the guarantor. To require a lender who has agreed to make discretionary advances to verify that a guarantor of the loan obligation was not only solvent when the original guaranty commitment was assumed but remained so when each and every advance was made, may impose a serious transactional burden. In any event, it is not clear that the policy of protecting creditors of a guarantor or other obligor against the incurring of fraudulent obligations is so strong that a lender should not be permitted to obtain and rely on a continuing guaranty without verifying the obligor's solvency before each and every advance.

Professor Blumberg disapproved of the UFTA's departure from the *Rubin* rule in section 6(5) because he concluded that *Rubin* is the rule governing comparable situations under the Bankruptcy Code.[84] Professor Blumberg did not, however, differentiate between discretionary and obligatory advances and discretionary and unconditional obligations. Additionally, the cases that he cited in support of his statement of the rule applicable under the Bankruptcy Code did not involve guaranties of future advances.[85] His criticism of section 6(5) for depart-

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80. 661 F.2d 979 (2d Cir. 1981).

81. *Id.* at 990.

82. *See* Steven L. Schwarcz, *The Impact of Fraudulent Conveyance Law on Future Advances Supported by Upstream Guaranties and Security Interests*, 9 CARDOZO L. REV. 729, 733 (1987) (citing and quoting Rubin v. Manufacturers Hanover Trust Co., 4 B.R. 447, 450 (S.D.N.Y. 1980), *vacated*, 661 F.2d 979 (2d Cir. 1981)).

83. *Id.* at 741.

84. Blumberg, *supra* note 28, at 725-26.

85. Professor Blumberg cited three bankruptcy court opinions in support of a statement that "[t]he *Rubin* case has generally been accepted by the courts." *Id.* at 725. The statement is part of a two-paragraph critique of § 6(5) of the UFTA, which discussed only the ruling of the *Rubin* case that a guaranty obligation " 'may be deemed to be incurred when advances covered by the guaranty are made rather than when the

ing from the rule that generally is accepted under the Bankruptcy Code is not substantiated by the case law.

Professor Shupack criticized the UFTA's reversal of *Rubin* because it will enable a bank that is assured by a guaranty to make, on the eve of the debtor-guarantor's bankruptcy, a discretionary advance that will "impoverish the general creditors [of the guarantor] without a reasonably equivalent value in return."[86] This passage assumes that, contrary to most well-considered lender-liability law, a lender has a duty not merely to its stockholders, but also to protect the creditors of any guarantor of obligations owed the lender.[87] Professor Shupack em-

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guaranty first became effective between the parties.'" *Id.* (quoting UNIF. FRAUDULENT TRANSFER ACT § 6 cmt. 3, 7A U.L.A. 660 (1985)). The three cases cited by Professor Blumberg and their actual holdings are as follows: Ear, Nose & Throat Surgeons of Worcester, Inc. v. Guaranty Bank & Trust Co. (*In re* Ear, Nose & Throat Surgeons of Worcester, Inc.), 49 B.R. 316, 319-21 (Bankr. D. Mass. 1985) (allowing the trustee to set aside a corporate debtor's guaranty and agreement securing a bank's $135,000 loan to the debtor's president for lack of reasonably equivalent value under 11 U.S.C. § 548(a)(2)(A), when evidence showed only an $8,000 benefit to the debtor); Corporate Jet Aviation, Inc. v. Vantress (*In re* Corporate Jet Aviation, Inc.), 45 B.R. 629, 633-38 (Bankr. N.D. Ga. 1985) (denying summary judgment to the former director of a corporate debtor for need to resolve a material question of whether the redemption of the director's stock to facilitate a sale of the debtor's assets constituted reasonably equivalent value); Beemer v. Walter E. Heller & Co. (*In re* Holly Hill Medical Ctr., Inc.), 44 B.R. 253, 255 (Bankr. M.D. Fla. 1984) (holding that a payment of interest by a debtor on a loan to a third party was not a fraudulent transfer when the loan proceeds had been turned over to the debtor for its use and that the indirect benefit accruing from access to borrowed funds constituted reasonably equivalent value for payment of interest).

The cases cited by Professor Blumberg do not involve or discuss the issue of when a guaranty obligation is deemed to be incurred. All three cases cited and accepted the *Rubin* case only with respect to its holding that reasonably equivalent value may be found to have been given even though the benefit to the debtor-guarantor is indirect. Comment 3 accompanying § 6 of the UFTA explicitly recognizes that well-accepted holding of the *Rubin* case. UNIF. FRAUDULENT TRANSFER ACT § 6 cmt. 3, 7A U.L.A. 660 (1985). The issue of when a guaranty obligation is incurred is entirely different from the issue of whether value received by the guarantor may be indirect. *Compare* Blumberg, *supra* note 28, at 725 ("The *Rubin* case has generally been accepted by the courts . . . .") *with* Mellon Bank N.A. v. Metro Communications, Inc., 945 F.2d 635, 648-49 (3d Cir. 1991) ("Under section 548, insolvency is to be measured at the time the debtor transferred value or incurred an obligation. In present case, Metro's solvency must be measured on April 6, 1984, the date on which Metro guaranteed the acquisition loan."), *cert. denied*, 112 S. Ct. 1476 (1992).

86. Shupack, *supra* note 32, at 816.

87. A creditor, however, has no fiduciary obligation to a debtor or other creditors of the debtor in the collection of its claims or conduct of its financial affairs. Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357-59 (7th Cir. 1990); Holt v. Federal Deposit Ins. Corp. (*In re* CTS Truss, Inc.), 868 F.2d 146, 149 (5th Cir. 1989); Cosoff v. Rodman (*In re* W.T. Grant Co.), 699 F.2d 599, 609 (2d Cir.), *cert. denied*, 464 U.S. 822 (1983); Zimmerman v. Central Penn Nat'l Bank (*In re* Ludwig Honold Mfg. Co.), 46 B.R. 125, 128-29 (Bankr. E.D. Pa. 1985).

phasized his disapproval of this result by categorizing the lending bank's discretionary advance as the imposition of a "deliberate and intentional harm" on creditors of the debtor-guarantor.[88] However, the bank's discretionary loan could be described as the infliction of a "deliberate and intentional harm" on the guarantor of the loan only if the bank's management was motivated by a perverse animus against its guarantor and the guarantor's creditors and lacked any rational concern for the considerations that ordinarily and legitimately influence a bank's management.

If a lender requires that a solvent guarantor must provide a perfected security interest as a precondition for making a loan, the security interest would not be rendered fraudulent or otherwise unenforceable because of the subsequent insolvency of the guarantor that was not foreseeable when the security interest was given.[89] If the lender obtains only an unsecured guaranty as a precondition for making the loan, the lender would run the risk that subsequent insolvency of the guarantor might render the unsecured guaranty valueless, but it should not render the unsecured guaranty any more vulnerable to attack as fraudulent than if the guaranty had been executed as a security agreement.

Section 6(5) has been questioned for an alleged inconsistency with the rule that renders voidable an agreement to transfer, or an executed transfer of, corporate assets by an insolvent corporation to a stockholder, even if the agreement to make the transfer was entered into when the corporation was solvent.[90] The fact that the stockholder

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88. Shupack, *supra* note 32, at 816.

89. *See* Kenneth J. Carl, *Fraudulent Transfer Attacks on Guaranties in Bankruptcy*, 60 AM. BANKR. L.J. 109, 118-20 (1986); Schwarcz, *supra* note 82, at 736-39. *But cf.* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS IN THE BANKRUPTCY OR REORGANIZATION OF PARENT AND SUBSIDIARY CORPORATIONS, INCLUDING THE LAW OF CORPORATE GUARANTIES § 6.13 (1985) (stating that some courts have invalidated guaranties of solvent corporations against subsequent creditors); First Nat'l Bank v. Minnesota Util. Contracting, Inc. (*In re* Minnesota Util. Contracting, Inc.), 101 B.R. 72, 82-87 (Bankr. D. Minn. 1989) (holding that a security interest in partnership assets that was granted to secure a loan to a corporation owned by the partners was fraudulent under § 548(a)(2) because the indirect benefit to the partnership was not shown to be of a reasonably equivalent value to the partnership and the partnership was shown to be insolvent at the time of or as a result of the loan), *aff'd in part and rev'd in part on other grounds*, 110 B.R. 414 (D. Minn. 1990).

90. *See* Consove v. Cohen (*In re* Roco Corp.), 21 B.R. 429 (Bankr. 1st Cir. 1982) (holding that a redemption of worthless stock for a corporate debtor's note and a security interest in debtor's property was fraudulent under § 548(a)(1) when the corporation was insolvent or would be left with unreasonably small capital), *aff'd*, 701 F.2d 978 (1st Cir. 1983); BLUMBERG, *supra* note 89, §§ 2.12, 15.06 (1985 & Supp. 1991); Robert C. Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 554-60 (1977).

holds what purports to be a perfected security agreement has typically been unavailing to the stockholder. The transfer by the corporation to its stockholder may be distinguished from a transfer by a guarantor to the assured creditor by at least two considerations:

(1) To allow a stockholder to enforce an agreement that secures a claim from a corporate dividend or corporate obligation to redeem stock would sanction circumvention of the policy and rules that protect the priority of the claims of creditors of the corporation over the equity interests of its owner.[91]

(2) The lender who makes a nonobligatory advance to a borrower in reliance on a legal commitment of a third-party guarantor as well as the financial responsibility of the borrower has a stronger legal and moral position than the stockholder who seeks to enforce the promise of an insolvent corporation to pay a dividend or redeem his stock.

V. Section 7. Remedies

Section 7 of the UFTA enumerates four remedies of creditors against fraudulent transfers and consolidates into one section the remedies that the UFCA provided in separate sections for creditors with matured and unmatured claims.[92] The courts that have construed the UFTA have emphasized the remedial character of the UFTA[93] and have given liberal scope to the section.

Notably, the Illinois Court of Appeals upheld the issuance of equitable relief against the consummation of a transfer by a parent of a corporate subsidiary that was alleged to threaten the depletion of the subsidiary's assets to the detriment of creditors holding a multi-million dollar judgment against the subsidiary.[94] After explicitly recognizing

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91. *See* Garrard Glenn, Fraudulent Conveyances and Preferences § 604 (rev. ed. 1940) (stating that dividends paid by an insolvent corporation are recoverable, not because they constitute a fraudulent transfer, but because "the prohibition is implicit in every statute that sanctions the birth and life of a corporation," but also acknowledging an exception to the rule that a stockholder who receives a dividend in the innocent belief that the dividends were paid out of surplus profits is not properly subject to a duty to disgorge the dividend).

92. Unif. Fraudulent Transfer Act § 7, 7A U.L.A. 660 (1985). Section 9 of the UFCA authorized (1) avoidance of a transfer or an obligation so far as necessary to satisfy the creditor's claim, or (2) attachment or levy of execution on transferred property. Unif. Fraudulent Conveyance Act § 9, 7A U.L.A. 577-78 (1985). Section 10 of the UFCA provided for the holder of an unmatured claim, in addition to the remedy of avoidance, restraint against disposition of property by the defendant, appointment of a receiver, or any order that is required by the circumstances of the case. *Id.* § 10, 7A U.L.A. at 630.

93. *See* cases cited *infra* notes 113-18.

94. Cannon v. Whitman Corp., 569 N.E.2d 1114 (Ill. App. Ct.), *appeal denied*, 580

the court's power to enjoin the transfer,[95] the court withheld issuance of an injunctive order because of the potentially drastic consequences that such an order would have on the parties to the transfer and entered instead an order requiring the corporate parent to execute a guarantee that would protect the complainants' rights to payment of their claims.[96]

Professor Shupack noted that subdivision (a) of the remedies section of the UFTA is explicitly declared to be subject to section 8,[97] which prescribes the defenses, liability, and protection of the transferee.[98] Section 7(b) authorizes a creditor who has obtained a judgment against the debtor to levy on property that has been fraudulently transferred or its proceeds, but the subdivision conditions the authority by requiring a court order.[99] If the transferee or any other claimant to an interest in the property transferred is not a party to a proceeding in the court that issues the order, constitutional objections may be raised by the claimant to a levy that would deprive the claimant of its interest without notice and a hearing.[100] As Professor Shupack suggested, sections 7 and 8 are premised on the assumption that the transferee or other claimant to the property transferred or its proceeds is a party to any creditor's proceeding that would affect the claimant's rights in the property.[101] Like the UFCA,[102] the UFTA does not particularize the requisites of due process, including notice and a hearing, to which parties claiming interests in the property transferred and its

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N.E.2d 109 (Ill. 1991).

95. *Id.* at 1118.

96. *Id.* The court explained its ruling as follows:

> Enjoining the spin-off would have stopped an approximately one-half billion dollar transaction dead in its tracks with concomitant tremors in the financial markets, but the circuit court would not have abused its discretion had it entered such an order. Requiring an $18 million guarantee is unquestionably less onerous than what the circuit court could have done. Since the circuit court could have enjoined the spin-off, *a fortiori*, it could require Whitman to post the guarantee, and in this manner protect the judgment creditors, prevent tremors in the financial markets, while still allowing Whitman to conduct its business.

Id.

97. Shupack, *supra* note 32, at 835-37.

98. UNIF. FRAUDULENT TRANSFER ACT § 8, 7A U.L.A. 662 (1985).

99. *Id.* § 7(b), 7A U.L.A. at 660.

100. *See* RONALD D. ROTUNDA ET AL., 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.9, at 287 (1986); Frank R. Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on* Sniadach v. Family Finance Corp., 19 AM. U. L. REV. 158 (1970).

101. Shupack, *supra* note 32, at 836.

102. *See* UNIF. FRAUDULENT CONVEYANCE ACT, §§ 9-10, 7A U.L.A. 577-78, 630 (1985).

proceeds are entitled.[103]

A. Retroactive Application

The UFTA as promulgated by the Commissioners on Uniform State Laws does not contain an effective date or any provision specifying the temporal applicability of the Act. The absence of any such provision was of concern to the committee of the California Bar Association that studied the UFTA, and the California Legislature amended the Act after its enactment to limit its applicability to transfers made and obligations incurred on and after January 1 of the year following its enactment.[104]

Several court decisions have dealt with the applicability of the Act to transactions antedating its enactment. The traditional approach has been to deny application,[105] but several decisions have allowed retroactive application on varying rationales.

Two appellate court opinions have applied the Illinois Fraudulent Transfer Act to transfers antedating its enactment.[106] In both cases the court declared generally that "whether a statute should be retroactively applied is primarily a question of legislative intent."[107] A somewhat different focus was suggested in another passage in both opinions to the effect that "whether a new statute should be applied retroac-

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103. *See supra* note 100.

104. *See* CAL. CIV. CODE § 3439.12 (West Supp. 1991).

105. *See, e.g.*, Aluminum Mills Corp. v. Citicorp N. Am. (*In re* Aluminum Mills Corp.), 25 Collier Bankr. Cas. 2d (MB) 1120, 1137 n.14 (Bankr. N.D. Ill. 1991) (applying the Illinois statutory provisions in effect in January 1988, the date of an alleged LBO and its related transfers, because "there is no indication from the Illinois legislature that the new provisions [of the UFTA] should apply to transfers that occurred before the effective date of January 1, 1991"); Heritage Bank Tinley Park v. Steinberg (*In re* Grabill Corp.), 121 B.R. 983, 996-97 n.8 (Bankr. N.D. Ill. 1990) (holding that in the absence of evidence of contrary legislative intent, the "presumption that statutory provisions apply only prospectively to conduct that occurs on or after the statute's effective date" is controlling); *In re* Martin, 113 B.R. 949, 956 n.2 (Bankr. N.D. Ill. 1990) (manifesting a readiness to apply the UFTA retroactively on a showing of legislative intent for such an application but applying prior law because of an absence of such a showing); Holthaus v. Parsons, 469 N.W.2d 536, 538 (Neb. 1991) (declining to follow the parties and the trial court, which treated the UFTA as controlling despite the fact that it was enacted after all circumstances giving rise to the action arose, because "the substance of the law in effect at the time of the transaction governs, not the later enacted statutes").

106. Cannon v. Whitman Corp., 569 N.E.2d 1114 (Ill. App. Ct.), *appeal denied*, 510 N.E.2d 109 (Ill. 1991); Farm Credit Bank v. Lynn, 561 N.E.2d 1355 (Ill. App. Ct. 1990). *But cf.* the three Northern District of Illinois cases cited *supra* note 105.

107. *Cannon*, 569 N.E.2d at 1118; *Farm Credit Bank*, 561 N.E.2d at 1357 (citing Champaign County Nursing Home v. Petry Roofing, Inc., 452 N.E.2d 847 (Ill. App. Ct. 1983)).

tively is decided on the basis of whether justice, fairness, and equity require retroactive application to a particular class of persons."[108] Noting that "the legislature's express purpose was to harmonize Illinois law with the laws of other States,"[109] the court came close to inferring that retroactive application would be appropriate because it would serve the legislative objective of uniformity. Uniformity is of course an avowed objective of most laws that the National Conference of Commissioners on Uniform State Laws have promulgated and is explicitly acknowledged in section 11 of the UFTA.[110] In the earlier of the two Illinois opinions, the court emphasized the importance of inquiry into the good faith expectations of a class affected by the statute.[111] Both courts concluded their discussions of retroactivity by avowing that "justice would be served by applying this act retroactively."[112]

The Illinois Court of Appeals added in the later opinion that "[o]ther States which have enacted the Uniform Act have held that the statute is remedial in nature and thus can be given retroactive effect."[113] Both cases involved challenges to the court's power to enjoin further transfers by the defendant transferees. In upholding the grant of relief in the second case, the court found it sustainable alternatively on common law grounds, thus avoiding exclusive reliance on a retroactive application of the UFTA's provision authorizing the issuance of injunctive relief.[114]

The retroactive applicability of the UFTA as a remedial statute was recognized earlier in *Shapiro v. Gherman (In re Gherman)*,[115] in which Bankruptcy Judge Britten acknowledged that he was receding from a contrary conclusion expressed in a previous opinion.[116] Neither

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108. *Cannon*, 569 N.E.2d at 1118; *accord Farm Credit Bank*, 561 N.E.2d at 1357 (citing National Can Corp. v. Industrial Comm'n, 500 N.E.2d 437 (Ill. App. Ct. 1986)).

109. *Cannon*, 569 N.E.2d at 1118; *Farm Credit Bank*, 561 N.E.2d at 1357 (citing ILL. REV. STAT. ch. 59, para. 112 (1989)).

110. "This [A]ct shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [A]ct among states enacting it." UNIF. FRAUDULENT TRANSFER ACT § 11, 7A U.L.A. 667 (1985) (brackets supplied by statute).

111. *Farm Credit Bank*, 561 N.E.2d at 1357.

112. *Cannon*, 569 N.E.2d at 1118; *Farm Credit Bank*, 561 N.E.2d at 1357.

113. *Cannon*, 569 N.E.2d at 1118.

114. *Id.*

115. 103 B.R. 326 (Bankr. S.D. Fla. 1989).

116. *Id.* at 331 n.1. For the previous opinion, see *In re* Mart, 88 B.R. 436, 438 n.1 (Bankr. S.D. Fla. 1988) (quoting a provision of the enacting statute that specified the effective date and limited application solely to "transactions entered into and events occurring after that date"). Judge Britten apparently was persuaded that remedial legislation must be given retroactive application without regard for the legislative language or intent. Apart from constitutional considerations, a state legislature presumably may provide for only prospective operation of a remedial statute. Recent opinions of the Su-

Judge Britten nor the Illinois appellate court judges undertook an analysis of the UFTA to identify which provisions are only remedial and which, if any, are substantive or inappropriate for retroactive application. That sections 4 and 5 of the Uniform Act are substantive rather than merely procedural provisions cannot be seriously controverted.[117] The issue of retroactivity may be finessed by the conclusion that the UFTA does not significantly alter the rights and liabilities of the parties to transfers challenged under the new law or the procedure for their subordination. Neither Florida nor Illinois had enacted the UFCA, and the defendants in these cases might have raised constitutional objections to the application of the constructive fraud provisions of the UFTA to pre-enactment transfers.[118]

The California legislature added a section 12 to its version of the UFTA to express an intent not to change the law insofar as the provisions of the UFTA are substantially the same as the UFCA.[119] Commentators generally have recognized that the UFTA is more a clarification of the law of fraudulent transfers than it is a change.[120] When a plaintiff in the Bankruptcy Court for the District of Minnesota could not decide whether to rely on the repealed UFCA or the UFTA, the court indicated that the choice of either law would not change the result.[121]

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preme Court have, however, given increasing weight to the factor of equality of treatment in determining whether to give retroactive effect to decisions that establish new principles of law. *Retroactivity, The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 339-49 (1991).

117. *See* James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 407 (1933) ("The most important substantive provision of the Uniform [Fraudulent Conveyance] Act is section 4 [the predecessor of § 4(a)(2) of the UFTA].").

118. For a relatively recent illustration of the viability of due process objections to retroactive application of legislation deemed to affect property rights, see United States v. Security Industrial Bank, 459 U.S. 70, 80 (1982).

119. The last sentence of § 12 of the California UFTA declares that its provisions insofar as they are substantially the same as the provisions of the repealed California UFCA "shall be construed as restatements and continuations, and not as new enactments." CAL. CIV. CODE § 3439.12 (West Supp. 1991).

120. *See, e.g.*, Weiss, *supra* note 46, at 490 ("As a result of the Connecticut case law, present Connecticut fraudulent conveyance law is more similar to the UFCA and UFTA than one might conclude from first examining Section 52-552 [of the Connecticut General Statutes, which purports to avoid only transfers with intent to avoid debts].") (footnote omitted).

121. In Palatine National Bank v. Strom (*In re* Strom), 97 B.R. 532 (Bankr. D. Minn. 1989), *aff'd in part and rev'd in part on other grounds*, 921 F.2d 836 (8th Cir. 1991), the court noted that the plaintiff relied on both the UFCA and the UFTA. *Id.* at 538 n.17. The UFCA had been repealed and replaced by the UFTA after the occurrence of the transactions that the plaintiff challenged as fraudulent. The court acknowledged that although Minnesota statute § 645.35 might have authorized the plaintiff to choose

In *Cannon v. Whitman Corp.*,[122] the more recent of the two Illinois Appellate Court decisions, the court did not squarely face the issue of whether the challenged transfers were fraudulent and voidable. In sustaining the injunction, the court observed that the question was "whether a creditor may invoke the aid of a court to prevent, what more likely than not, could be a fraudulent conveyance."[123] As noted above,[124] the court relied on alternate grounds in approving the injunction, citing holdings from other states that sustained injunctions against "the disposition of assets."[125]

B. Relation of UFTA to Other Laws

A novel defense has been interposed with mixed success to the application of the UFTA and its ancestor, the UFCA. When labor unions have sought relief against the disposition of assets by their employers on the ground that the disposition constituted a transfer in fraud of the rights of their members as creditors, the United States Court of Appeals for the Eighth Circuit[126] and the Illinois Supreme Court[127] have dismissed the complaints on the ground that federal legislation regulating railroads and labor relations has completely preempted the state law of fraudulent transfers. The United States Court of Appeals for the Third Circuit,[128] the Wisconsin Supreme Court,[129] and a New

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between the acts, the plaintiff's switch to the UFTA nine weeks after trial in a post-trial memorandum was too late. The court added, however, that "regardless of which Act is applied, the result is the same." *Id.* The court nevertheless applied the UFCA law in passing on a statute-of-limitations issue later in its opinion. *Id.* at 540 (holding that Minnesota's six-year statute of limitations is applicable to actions "for relief on the ground of fraud" and that the equitable doctrine of tolling applied).

122. 569 N.E.2d 1114 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 109 (Ill. 1991).

123. *Id.* at 1117.

124. *See supra* text accompanying note 114.

125. *Cannon*, 569 N.E.2d at 1118 (citing Lipskey v. Voloshen, 141 A. 402 (Md. Ct. App. 1928) (granting a judgment creditor an injunction); Oliphant v. Moore, 293 S.W. 541 (Tenn. 1927) (granting a tort creditor an injunction restraining the alleged tortfeasor's disposition of property)).

126. Deford v. Soo Line R.R., 867 F.2d 1080 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989).

127. Gendron v. Chicago & N. W. Transp. Co., 564 N.E.2d 1207 (Ill. 1990).

128. Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R., 858 F.2d 936 (3d Cir. 1988). This case involved an invocation of the Pennsylvania UFCA by an association of union officers to preserve employees' rights that were jeopardized by a proposed sale of the assets of a railroad. The Third Circuit remanded the association's action to the state court for lack of subject matter jurisdiction. The association claimed that the employees were creditors "for accrued but unpaid wages, vacation pay, labor protection pay, life, health and insurance premiums, pension plan premiums, and pending grievance claims," and that their unions were creditors because of the railroad's obligations for union dues. *Id.* at 938. However, the court wrote, "Because there is no RLA [Railway

York Supreme Court[130] have reached contrary conclusions.

It is at first blush an astonishing conclusion that employees may have no remedy for avoiding transfers and obligations that hinder, delay, or defraud them in their efforts to collect their claims for wages and other pecuniary benefits. In their discussions of the issues presented, the courts accepting the preemption defense have emphasized a legislative intent to vest comprehensive jurisdiction of the resolution of disputes regarding disposition of railroad assets and labor relations in federal administrative agencies and the federal courts.[131] These courts did not identify any legislative history that suggests a congressional concern to protect employees or any other class of creditors against their debtors' disposition of assets that hinder the collection of their claims, or, on the other hand, to protect employers or other entities against litigation seeking vindication and enforcement of rights under state law. The unarticulated premise of these courts' ap-

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Labor Act] or ICA [Interstate Commerce Act] cause of action within the scope of which [the plaintiff association's] state claim falls and because we do not find the requisite Congressional intent, we hold that there is no removal jurisdiction in this case." *Id.* at 943.

In Deford v. Soo Line R.R., 867 F.2d 1080 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989), the court criticized the Third Circuit's approach in *Railway Labor Executives Ass'n* as "unnecessarily narrow," but supported its conclusion only by vague references to "such factors as the history and purpose" of the Railway Labor Act (RLA). *Id.* at 1086. The majority in the *Deford* case undertook no analysis of the RLA to determine whether the cause of action and rights asserted by the association and plaintiff employees were protected by the RLA.

129. International Ass'n of Machinists & Aerospace Workers v. United States Can Co., 441 N.W.2d 710 (Wis. 1989), *cert. denied*, 493 U.S. 1019 (1990).

130. International Ass'n of Machinists & Aerospace Workers v. Allegis Corp., 545 N.Y.S.2d 638 (Sup. Ct. 1989).

131. *See Deford*, 867 F.2d at 1085 ("In analyzing the statutory scheme of the RLA, we conclude that it 'pervasively occupies' the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements."); *id.* at 1088 ("Additionally, we believe that the Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts Deford's state law claims." (citation omitted)); *see also Gendron*, 564 N.E.2d at 1220 ("A thorough reading of the ICA's provisions pertinent to rail line acquisitions reveals that Congress intended to vest in the ICC, and not in State courts, the authority to examine the various aspects of such rail line transactions and to authorize and regulate those transactions.").

In both *Deford* and *Gendron* the courts referred to "Congress' intent to delegate to the ICC the exclusive responsibility to evaluate all aspects, including financial viability, of rail line transfers" and the impact of such transfers upon all employees involved. *Deford*, 867 F.2d at 1091; *Gendron*, 564 N.E.2d at 1220 (quoting *Deford*, 867 F.2d at 1091). Even if accepted at face value, these sweeping statements fall considerably short of evidencing a congressional intent that the ICC and the federal courts should exercise exclusive responsibility for assuring that the parties to rail line transfers honor all their prior obligations and do not engage in any transfers or incur any obligations that would hinder, delay, or defraud their creditors.

proach appears to be that if the comprehensive regulatory system provided by Congress permits employers, in their status as creditors, to inflict hardships on employees, it is a matter for legislative amendment, but meanwhile litigation in the state courts against the regulated employers constitutes impermissible disruption and interference with the regulatory system that has been established. The problem, however, is one that has been judicially created by needless expansion of the extraordinary doctrine of complete preemption.[132]

The courts that have disagreed with this approach have pointed to the Supreme Court's recognition of the proper role of the state courts in vindicating rights asserted in state causes of action that do not necessitate any significant construction of federal regulatory legislation or interference with its administration.[133] Justice Brennan, speaking for a unanimous Supreme Court in *Caterpillar Inc. v. Williams*,[134] in which employees were suing for breach of employment contracts, pointed out that "a *defendant* cannot, merely by injecting a federal question into

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132. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987).

> There does exist, however, an "independent corollary" to the well-pleaded complaint rule, known as the "complete pre-emption" doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."

Id. (quoting Metropolitan Life Ins. Co. v Taylor, 481 U.S. 58, 65 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22 (1983)).

133. *See* Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R., 858 F.2d 936, 942 (3d Cir. 1988) ("If the federal statute creates no federal cause of action vindicating the same interest the plaintiff's state cause of action seeks to vindicate, . . . there is no claim arising under federal law to be removed and litigated in the federal court."); *Allegis Corp.*, 545 N.Y.S.2d at 642 ("[I]t is unnecessary for this court to interpret any terms of the collective bargaining agreement in order to determine plaintiffs' fraudulent conveyance claims."); *United States Can Co.*, 441 N.W.2d at 717 (" 'The state statute creates an entitlement independent of the collective bargaining agreement, and is not preempted by the RLA.' ") (quoting *Deford*, 867 F.2d at 1092 (Lay, C.J., dissenting)). Both the New York and Wisconsin courts cited Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), for their holdings. In *Lingle* the Supreme Court held that § 301 of the Labor Management Relations Act did not completely preempt a state retaliatory discharge claim. The majority in *Deford* distinguished *Lingle* on the ground that the factual issues presented in that case did not "require a court to interpret the terms of a collective bargaining agreement." *Deford*, 867 F.2d at 1087. The majority did not, however, address Justice Stevens's additional comments:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise preempted, would stand.

Lingle, 486 U.S. at 413 n.12 (citation omitted).

134. 482 U.S. 386 (1987).

an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated."[135] "State courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary."[136] Even when the application of preemption doctrines warrants removal of a case to a federal forum, however, congressional intent for complete preemption for purposes of removal jurisdiction does not in itself displace applicable state law.[137]

Curiously, the cases that have considered the issue of complete preemption have debated whether the UFTA creates any substantive rights.[138] A statute that declares a transfer by an insolvent without receipt of reasonably equivalent value to be voidable as a matter of law certainly has a substantive effect when enacted by a state that previously declared such a transfer to be voidable only if made without receipt of any value.[139] Chief Justice Heffernan of the Wisconsin Supreme Court correctly characterized the argument about the classification of fraudulent transfer law as "irrelevant" for the purpose of determining the proper forum for its application.[140]

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135. *Id.* at 399.

136. *Railway Labor Executives Ass'n*, 858 F.2d at 942.

137. *Id.* at 941. After summarizing the Supreme Court's holding in Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987), the court concluded, "Justice Brennan, joined by Justice Marshall, embraced the opinion of the Court but wrote separately to emphasize that the relevant congressional intent was not an intent that the statute should displace state law, but rather an intent that claims purportedly based on state law be removable . . . ." *Railway Labor Executives Ass'n*, 858 F.2d at 941.

138. *See* Deford v. Soo Line R.R., 867 F.2d 1080, 1087 (8th Cir.) ("The Minnesota Uniform Fraudulent Transfer Act is not substantive in nature, but instead merely confers an alternate remedy for protecting preexisting creditor rights."), *cert. denied*, 492 U.S. 927 (1989); International Ass'n of Machinists & Aerospace Workers v. United States Can Co., 441 N.W.2d 710, 718 (Wis. 1989) ("We see no force in the argument that UFCA is inapplicable because it confers no substantive rights. It does not. It is not intended to."), *cert. denied*, 493 U.S. 1019 (1990).

139. *Compare* UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A U.L.A. 657 (1985) *with* VA. CODE ANN. § 55-81 (Michie 1986 & Supp. 1991), *applied in* C-T of Va., Inc. v. Euroshoe Assocs., 762 F. Supp. 675, 678-79 (W.D. Va.), *aff'd*, 953 F.2d 637 (4th Cir. 1991).

140. *United States Can Co.*, 441 N.W.2d at 717. Chief Justice Heffernan's comment was addressed to the UFCA, but the UFCA and the UFTA are not significantly different from each other for the purposes of the substantive/procedure classification. Chief Judge Heffernan gratuitously added, however, that the defendants' characterization of the UFCA was true. *Id.*

VI. SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEREES

A. *Subsequent Transferees*

Section 8(b), which prescribes the measure of monetary recovery from transferees,[141] is derived from section 550(a) and (b) of the Bankruptcy Code,[142] and the considerable body of law that has developed in construing the latter section should be persuasive in the application of the former. In one case that has considered the rights of subsequent transferees, the United States Court of Appeals for the Eighth Circuit, after declaring that "[u]nder Arkansas law, transfers generally are not voidable against subsequent transferees,"[143] sustained "fraudulent transfer judgments" against subsequent transferees on the basis of section 8(b) because the court found that the transfers were not made "in good faith or in exchange for reasonable equivalent value."[144] Like

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141. UNIF. FRAUDULENT TRANSFER ACT § 8(b), 7A U.L.A. 662 (1985).

142. Section 550(a) of the Bankruptcy Code specifies who is liable for a fraudulent transfer and what may be recovered, and § 550(b) provides defenses for certain transferees. 11 U.S.C. § 550(a)-(b) (1988).

143. First Nat'l Bank & Trust Co. v. Hollingsworth, 931 F.2d 1295, 1307 (8th Cir. 1991).

144. *Id.* The court misread § 8(b)(2) of the UFTA, which insulates from avoidance under § 7(a)(1) a transfer by the initial transferee to a second person who took in good faith for value or any subsequent transferee. The court apparently thought that the term "subsequent transferee" that is referred to in § 8(b)(2) included any transferee taking after the initial transfer. By adding the word "generally" to its sweeping summarization of the effect of the Arkansas law, the court seemed to be willing to read the Arkansas law to render the remedies provided by the UFTA to be unenforceable against any person other than the initial transferee, irrespective of the consideration exchanged or the good or bad faith of any party to the transfer. The court did not take seriously its misconstruction, however, because, as noted in the text, it actually sustained judgments against subsequent transferees. *Id.*

A somewhat different misconstruction of § 8(b)(2) is made in Weiss, *supra* note 46, at 537, in which it is asserted that this provision apparently protects "a good faith transferee (of a subsequent transferee) who did not take for value even where no prior transferee gave value." *Id.* The third and other subsequent transferees referred to in § 8(b)(2) are liable unless they are subsequent to "a good faith transferee who took for value." UNIF. FRAUDULENT TRANSFER ACT § 8(b)(2), 7A U.L.A. 662 (1985). The result is identical to that provided by § 550(a)(2) and (b) of the Bankruptcy Code.

The following summary of the effects of § 8(b)(2) of the UFTA and § 550(b) of the Bankruptcy Code in PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTIONS 5-130 (1989) is garbled:

> Section 550(b) of the Bankruptcy Code and Section 8(b)(2) of the UFTA continue the rule that a remote transferee who takes in good faith and for a reasonably equivalent value is immune from attack by a trustee or complaining creditor of the debtor. Under both Section 550(b)(2) of the Bankruptcy Code and Section 8(b)(2) of the UFTA, the remote transferee need only show that

some careless opinions that have construed section 550(b) of the Bankruptcy Code,[145] the court failed to give due weight to the language of section 8(b)(2) that protects a subsequent transferee who took for value in good faith. The statement of facts fails to reveal whether the transferees may have given any value. Insofar as the district court's judgment was predicated on a failure of the consideration given by the transferees to be reasonably equivalent in value to the property received, it denied the transferees the full benefit of the statutory defense provided by subsection (b)(2). If, as is likely the case, the transferees suffering the judgment were found to be lacking in good faith, the extent of the value given would be immaterial. Because the court's opinion is susceptible of a reading that one of the transferees may have been in good faith but failed to give a reasonably equivalent value in exchange, its construction of the statute is subject to criticism. The opinion is also careless in suggesting that the subsequent transfers were voidable because they were not made in good faith by the subsequent *transferor.* It is the subsequent *transferee's* good faith that is relevant under subsection (b)(2).

B. Defenses Under Section 8(f)

Professor Shupack focused criticism on the first defense to an action to avoid a fraudulent preference under section 5(b).[146] As he noted, "[a] creditor who receives a preference and then subsequently advances new value, undoes the preference to the extent of the new value."[147] This defense is an adaptation of section 547(c)(4) of the Bankruptcy Code[148] and, like the Bankruptcy Code provision, limits its

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he acted in good faith to avoid a trustee's recovery of property from him. He does not have to show that he took for value and without knowledge of the facts that would reveal the fraudulent character of the initial transfer.

Id.

145. *See, e.g.*, Brown v. Harris (*In re* Auxano, Inc.), 96 B.R. 957, 966 (Bankr. W.D. Mo. 1989) (holding that although the mortgagee was identified as a good faith transferee of an initial transferee from the debtor corporation to its principal owner and was found to be without knowledge of the voidability of that initial transfer, the mortgagee was "not eligible for the exception under Section 550(b)(2) but that it [should] retain a lien of $59,000 against the property" because the $59,000 given by the mortgagee for property appraised at $87,000 was woefully insufficient); Burtrum v. Laughlin, (*In re* Laughlin), 18 B.R. 778 (Bankr. W.D. Mo. 1982) (holding that although the subsequent transferees gave $6000 in good faith for property worth $40,000 without knowledge of the voidability of the initial transfer by the debtor to the transferor, the subsequent transfer to them was voidable except to the extent they gave value and therefore reading § 548(c) into § 550(a)(1)).

146. Shupack, *supra* note 32, at 826-28.

147. *Id.* at 826.

148. Section 547(c)(4) reads as follows:

availability to the creditor who makes an unsecured advance. As under the Bankruptcy Code provision, the UFTA treats an advance secured by a transfer that is voidable by a judicial lien creditor as an unsecured advance that may be set off against the prior preference.[149] Professor Shupack detected a problem under section 8(f)(1) when a debtor with the purpose of utilizing the defense to a trustee's avoidance action makes an unsecured advance, but thereafter perfects a lien to secure the advance. He concluded that if the debtor is solvent at the time of the belated perfection, the creditor will be able to "effect precisely the transaction that section 8(f)(l) set out to prohibit."[150] The same bizarre scenario may be possible under the Bankruptcy Code. If the solvency of the debtor does not render the issues that are generated by this sequence of events moot, a court should have no difficulty in denying the creditor any unfair benefit that is sought to be gained by its post-preference maneuvers.[151] The problem is one more amenable to judicial solution, whether it arises under the UFTA or the Bankruptcy Code, than to treatment by additional legislation.[152] In any event the supposititious situation and the issue it poses hardly demonstrates, as suggested by Professor Shupack, that " 'valid lien' is an overworked concept in the UFTA."[153]

The trustee may not avoid under this section a transfer—

. . .

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

11 U.S.C. § 547(c)(4) (1988).

149. *See* UNIF. FRAUDULENT TRANSFER ACT § 8 cmt. 6, 7A U.L.A. 664-65 (1985). Section 547(c) of the Bankruptcy Code is perceptively discussed in Countryman, *supra* note 60, at 781-90.

150. Shupack, *supra* note 32, at 828.

151. In Carter v. Homesley (*In re* Strom), 46 B.R. 144 (Bankr. E.D.N.C. 1985), the court appropriately held that when postpreference payments were made to a secured creditor whose failure to record promptly its deeds of trust rendered the security transfer preferential, the payments constituted new value and could be set off pursuant to § 547(c)(4) against the creditor's liability for prepetition preferences. *Id.* at 149. The subsequent advance provision in § 60c of the Bankruptcy Act apparently could have disqualified from setoff a credit extension secured by a transfer that was later avoided, but the issue apparently was never decided. Countryman, *supra* note 60, at 782 n.349.

152. The appropriate solution would no doubt be affected by the length of the delay in the perfection, its chronological relation to the filing of the petition, the purpose of the creditor, and the effect of recognition of the belated perfection on the administration of the estate.

153. Shupack, *supra* note 32, at 828.

VII. SECTION 9. TIME LIMITATIONS

Unlike the UFCA, the UFTA contains a statute of limitations in section 9. It is entitled "Extinguishment of [Claim for Relief][Cause of Action]" in recognition of its purpose to negate the application of the rule declared and followed in *United States v. Gleneagles Investment Co.*[154] In that case the court held that the United States, as a plaintiff seeking avoidance of fraudulent transfers under the Pennsylvania UFCA, was not subject to the state's statute of limitations. Because under the rule of *Moore v. Bay*[155] a trustee in a bankruptcy case may step into the shoes of any creditor with a right to avoid a transfer or obligation as to all creditors and because the United States is a creditor in nearly every bankruptcy case, the *Gleneagles* case renders any transfer made or obligation incurred by a debtor vulnerable to avoidance *in toto* without any time limitation unless every creditor's claim or cause of action is extinguished by the passage of a period of time prescribed by the statute that creates the cause of action.

Time limitations on the initiation of actions to avoid fraudulent transfers have been subject not only to wide variations from state to state but also to considerable uncertainty in many states.[156] Section 9 is intended not only to establish greater uniformity in these limitations but also to reduce the time that is generally available under state statutes of limitations to four years for most transfers and obligations and one year for preferential transfers to insiders. When a transfer or obligation is alleged to have been made or incurred with actual intent to hinder, delay, or defraud and to have been neither discovered nor reasonably discoverable within the four-year period ordinarily allowed, section 9(a) grants a claimant an extension. In such a case the claimant may commence an avoidance action within a year after the transfer or obligation was or could reasonably have been discovered by the claimant.[157]

The obvious intent is to authorize any creditor who did not discover and could not reasonably have been expected to discover the transfer or obligation within four years after its occurrence to institute suit anytime within a year after its discovery. The statute plainly does

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154. 565 F. Supp. 556, 583 (M.D. Pa. 1983), *aff'd sub nom.* United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *see* UNIF. FRAUDULENT TRANSFER ACT § 9 cmt. 1, 7A U.L.A. 666 (1985).

155. 284 U.S. 4 (1931).

156. *See* Samuel M. 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); UNIF. FRAUDULENT TRANSFER ACT § 9 cmt. 2, 7A U.L.A. 666 (1985) (citing five A.L.R. annotations on this subject).

157. UNIF. FRAUDULENT TRANSFER ACT § 9(a), 7A U.L.A. 665 (1985).

not provide a four-year period of repose as does section 9(e) of the Securities Exchange Act of 1934, which the United States Supreme Court recently construed in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.[158] The one-year grace period is not operative except when the transfer or obligation is not discovered and is not reasonably discoverable during the first three years after its occurrence. If it is discovered or becomes discoverable by a claimant after the passage of three years, the claimant has one year thereafter in which to proceed under the UFTA. Although the UFTA is susceptible to a literal reading that would allow each claimant a year after discovery or discoverability occurred, its occurrence with respect to any one claimant is likely to afford the defendant a basis for arguing that the transfer or obligation became discoverable at the same time by other claimants. The statute in *Lampf* imposed in its first clause a one-year limitation from the date of the discovery of the facts constituting the violation and added a three-year limitation after the violation as a period of repose.[159]

The date when a transfer or obligation becomes reasonably discoverable is likely to be largely a factual determination. An issue that sometimes has been litigated is whether public recordation of a transfer renders it reasonably discoverable so as to trigger the running of the statute of limitations or laches on its voidability as a fraudulent transfer.[160]

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158. 111 S. Ct. 2773, 2780 (1991) (Blackmun, J.) (Scalia, J., specially concurring) (O'Connor, Stevens, Kennedy, and Souter, JJ., dissenting) (5-4 decision).

159. Section 9(e) of the Securities Exchange Act of 1934 reads as follows: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(e) (1981). Justice Blackmun elaborated the rationale for his construction of § 9(e) as follows:

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling. One commentator explains: "[T]he inclusion of the three-year period can have no significance in this context other than to impose an outside limit."

Lampf, 111 S. Ct. at 2782 (quoting Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235, 288 (1989)).

Justice Kennedy, with the concurrence of Justice O'Connor, argued in dissent that the one-year limitations period contained in the 1934 Act was appropriate, but not the accompanying three-year period of repose. *Id.* at 2788-90 (Kennedy, J., dissenting). Justice Blackmun countered that "the one-and-three year scheme represents an indivisible determination by Congress as to the appropriate cutoff point for claims under the statute." *Id.* at 2782 n.8 (plurality opinion).

160. *See, e.g.*, Bristow v. Lange, 266 N.W. 808, 812 (Iowa 1936), in which the court observed:

Because most actions to avoid fraudulent transfers are litigated in cases under the Bankruptcy Code, it is appropriate to consider the interrelationship of section 9 of the UFTA and the time limitations imposed by the Bankruptcy Code. Although a trustee or debtor in possession may avoid any transfer that is voidable under applicable nonbankruptcy law by a creditor holding an unsecured claim against the transferor, the case law requires that the voidability of the transfer be determined as of the date of the filing of the petition.[161] Unlike the Bankruptcy Act, the Bankruptcy Code does not in terms extend a period of limitations applicable to an avoidance action that is about to expire when the petition is filed by or against a debtor.[162] Instead, section 546 of the Bankruptcy Code[163] imposes a federal two-year time limitation applicable to any action that may be brought under section 544(b). The closing or dismissal of the bankruptcy case appears to impose an absolute bar, but the two-year limit is not imposed by section

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> It is the universal rule of law that the recording of an instrument in the recorder's office is notice to all the world of its contents. It is likewise the rule of law that if the contents of a deed reveal the existence of fraud or put any person reading the same upon inquiry thereof, the fraud is deemed discovered at the time such deed is placed on record.

Id.; *see also* Smith v. Gaylord, 47 Conn. 380, 383 (1879) (holding that a creditor had constructive notice of a recorded mortgage when it extended credit and was equitably barred from seeking avoidance of the transfer as fraudulent); Somers v. Spaulding, 294 N.W. 610 (Iowa 1940) (holding that an action that was filed in 1938 and that attacked a transfer recorded promptly in 1932 was barred by laches, although the creditor could not have obtained a judgment on his claim against the transferor until 1934 when his claim matured).

161. Mahoney, Trocki & Assocs. v. Kunzman (*In re* Mahoney, Trocki & Assocs.), 111 B.R. 914, 917-18 (Bankr. S.D. Cal. 1990) (holding that the debtor in possession timely brought an avoidance action that could have been brought immediately prior to the commencement of the case because it filed the action within the time limitations of § 546(a) of the Bankruptcy Code); *cf.* Evans v. Robbins (*In re* Robbins), 91 B.R. 879, 883 (Bankr. W.D. Mo. 1988) (holding that the trustee timely brought an action pursuant to §§ 544(b) and 546 of the Bankruptcy Code because it brought the action within five years after the postpetition discovery of fraud under a state statute that started the statute of limitations running from discovery).

162. *Mahoney*, 111 B.R. at 917-18 (holding that § 108 of the Bankruptcy Code does not extend the time allowable to the debtor in possession for bringing an action to avoid a fraudulent transfer under § 544(b) of the Bankruptcy Code); McCoy v. Grinnell (*In re* Radcliffe's Warehouse Sales, Inc.), 31 B.R. 827 (Bankr. W.D. Wash. 1983) (holding that § 108 of the Bankruptcy Code does not extend the time for avoiding a bulk sale that occurred over six months before the filing of the petition under the Bankruptcy Code). *But cf.* Murdock v. Plymouth Enters., Inc. (*In re* Curtina Int'l, Inc.), 23 B.R. 969 (Bankr. S.D.N.Y. 1982) (extending the time for avoiding a bulk transfer for two years pursuant to § 108(a)).

163. 11 U.S.C. § 546 (1988 & Supp. II 1990).

546(a) on the filing of an avoidance action by a debtor in possession.[164] The application of section 546 to a debtor in possession is controversial and is discussed elsewhere in this symposium.[165]

The extinguishment of a cause of action under the UFTA by section 9 after the prescribed periods have lapsed may generate an argument that the trustee or debtor in possession cannot avail itself of the right to pursue a remedy that has been terminated. The short answer to such an argument is that the trustee or debtor in possession suing on a cause of action created by section 544(b) and in existence on the date of the filing of the petition is pursuing a federal right that cannot be negated by state legislation.[166] The need to give a trustee or debtor in possession a grace-period for instituting actions on prepetition causes of action that are vested in the office has been properly recognized by Congress in both the Bankruptcy Act and the Bankruptcy Code.[167] As explained above, the extinguishment by section 9 of the UFTA of the cause of action for relief under the Act after the statutory periods have lapsed was designed to protect transferees and the courts against actions brought under section 544(b) predicated on the argument that no state statute of limitations applies to such actions when instituted by the United States or any person subrogated to its position.[168] A decision upholding the primacy of section 546(a) of the

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164. Section 546(a) reads in pertinent part as follows:
"An action or proceeding under section 544 . . . of this title may not be commenced after the earlier of—(l) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or (2) the time the case is closed or dismissed." *Id.* § 546(a).

165. *See* Gerald K. Smith & Frank R. Kennedy, *Fraudulent Transfers and Obligations: Issues of Current Interest*, 43 S.C. L. REV. 709 (1992).

166. *See Mahoney*, 111 B.R. at 918.

> The fraudulent transfer action under § 544(b) is not an action to assert an independent state law created right on behalf of a trustee which was and is cognizable without the filing of a bankruptcy petition. This right, on behalf of a trustee or debtor-in-possession to recover a fraudulent transfer, is clearly the creation of the bankruptcy code.

Id. But cf. McCoy, 31 B.R. at 832 (denying a trustee the right to avoid a bulk sale because of the lapse of a six-month statute of limitations during the pendency of the bankruptcy case, but not addressing the effect of § 546(a) of the Bankruptcy Code).

167. Section 11e of the Bankruptcy Act provided as follows:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

Bankruptcy Act § 11e, 11 U.S.C. § 29(e) (1976) (repealed 1978). Section 546(a) of the Bankruptcy Code, the counterpart of § 11e of the Bankruptcy Act, is quoted in pertinent part *supra* note 164.

168. *See supra* text accompanying notes 154-55.

Bankruptcy Code over differing state time limitations does not compel the conclusion that the United States or any plaintiff subrogated to its position in a section 544(b) action is not subject to the time limitations imposed by section 9 of the UFTA. Clearly, Congress has the power to prescribe time limitations for actions instituted under section 544(b) of the Bankruptcy Code that differ from the limitations applicable when actions are pursued under nonbankruptcy law.[169] " 'Once the case has commenced, section 546(a) . . . specifies the time within which the trustee must act under section 544(b).' "[170]

Bankruptcy Judge Britten may have misapprehended the grace period provision in *Shapiro v. Gherman (In re Gherman)*.[171] In that case an action was brought to avoid a series of transfers that occurred over a period of six years commencing in December 1982 and ending on August 8, 1988, when the transferor absconded. The court found that none of the transfers could have been discovered prior to August 8, 1988. After quoting an excerpted version of section 9(a) of the UFTA, the court stated that "the statute of limitations has not expired on any cause of action asserted here by the trustee under § 544(b)" of the Bankruptcy Code.[172] This section authorizes the trustee to step into the shoes of any creditor for the purpose of avoiding any transfer voidable by nonbankruptcy law. The court then concluded that the statute of limitations would not expire until August 8, 1992, four years after the discovery of the fraudulent transfers. If applicable, the four-year period of limitations would have barred all of the transfers that occurred prior to August 10, 1984, which was the date of the trustee's avoidance action. The one-year grace period, however, would have applied to all of the hidden transfers occurring prior to August 8, 1988, the date of their discovery or discoverability, and as a result they would have been voidable by action instituted prior to August 8, 1989. Transfers occurring on or after August 10, 1984, would all have been actionable for four years under UFTA's section 9(1) without any need to refer to the one-year period. The four-year period of limitations would, however, allow suit to be brought on or before August 8, 1992, with respect to transfers occurring on August 8, 1988. Section 6(1) of the UFTA provides that a transfer is made for the purposes of the Act

169. Rosania v. Haligas (*In re* Dry Wall Supply, Inc.), 111 B.R. 933, 936 (D. Colo. 1990) (holding that an action filed under § 544(b) within two years after the trustee was appointed was timely filed although the applicable state limitation period had expired); Mancuso v. Continental Bank Nat'l Ass'n Chicago (*In re* Topcor, Inc.), 132 B.R. 119, 123 (Bankr. N.D. Tex. 1991) (citing six decisions in accord).

170. *Rosania*, 111 B.R. at 936 (quoting 4 COLLIER ON BANKRUPTCY ¶ 544.03[2], at 544-21 to -22 (Lawrence P. King et al. eds., 15th ed. 1989)).

171. 103 B.R. 326 (Bankr. S.D. Fla. 1989).

172. *Id.* at 332.

when it is perfected against a bona fide purchaser if the transfer is of real property or against a judicial lien creditor if the transfer is of personal property.[173] If a transfer is unperfected, section 6(2) postpones its effect under the Act until a date immediately before the commencement of an action under the UFTA.[174] The statement of facts in *Gherman* does not disclose whether any of the challenged transfers were unperfected. Judge Britten's statement that the expiration of the applicable period of limitations was postponed to August 8, 1992, would be correct only if they were all unperfected on August 8, 1988.

In his critique of the UFTA, Professor Shupack correctly pointed out that section 5(b) declares only a transfer to be fraudulent, making no reference to an obligation, although section 9(c) purports to extinguish after one year a cause of action under section 5(b) with respect to an obligation.[175] Professor Shupack opined that the discrepancy between the two sections should be cured by an amendment of the former section to extend its applicability to an obligation, although it is unlikely that an obligation could ever constitute a violation of the policy and letter of section 5(b).[176] The proposed amendment would run counter to the conclusion of the Drafting Committee,[177] which was to restrict rather than to extend the scope of section 5(b) to reach all transactions that conceivably have a preferential effect. Professor Shupack provided a "strained example" that he suggested illustrates how a debtor may incur an obligation to an insider for an antecedent debt and that he argued ought to be declared fraudulent under section 5(b).[178] The "ingenious evasion" described by Professor Shupack is so unlikely to arise and is so far removed from the kind of transaction found to be fraudulent under the case law that the drafters intended to codify in section 5(b) that this author's recommendation for curing the disjunction between the two sections is to eliminate the words "or the obligation" from section 9(c).

173. UNIF. FRAUDULENT TRANSFER ACT § 6(1), 7A U.L.A. 658-59 (1985).
174. *Id.* § 6(2), 7A U.L.A. at 659.
175. Shupack, *supra* note 32, at 834-35.
176. *Id.*
177. *See supra* text accompanying notes 58-60.
178. Shupack, *supra* note 32, at 834-35.

APPENDIX I — CITATION LIST

ALABAMA
ALA. CODE §§ 8-9A-1 to -12 (Supp. 1991).

ARIZONA
ARIZ. REV. STAT. ANN. §§ 44-1001 to -1010 (Supp. 1990).

ARKANSAS
ARK. CODE ANN. §§ 4-59-201 to -212 (Michie Supp. 1991).

CALIFORNIA
CAL. CIV. CODE §§ 3439.01 to .12 (West Supp. 1992).

COLORADO
COLO. REV. STAT. §§ 38-8-101 to -112 (Supp. 1991).

CONNECTICUT
Uniform Fraudulent Transfer Act, 1991 Conn. Acts. 297 (Reg. Sess.).

FLORIDA
FLA. STAT. chs. 726.101 to .112 (1989).

HAWAII
HAW. REV. STAT §§ 651C-1 to -10 (1988).

IDAHO
IDAHO CODE §§ 55-910 to -921 (1988).

ILLINOIS
ILL. ANN. STAT. ch. 59, paras. 101-112 (Smith-Hurd Supp. 1991).

MAINE
ME. REV. STAT. ANN. tit. 14, §§ 3571-3582 (West Supp. 1991).

MINNESOTA
MINN. STAT. ANN. §§ 513.41 to .51 (West 1990).

MONTANA
MONT. CODE ANN. §§ 31-2-326 to -342 (Supp. 1991).

NEBRASKA
NEB. REV. STAT. §§ 36-701 to -712 (Supp. 1990).

NEVADA
NEV. REV. STAT. ANN. §§ 112.140 to .250 (Michie Supp. 1991).

NEW HAMPSHIRE
N.H. REV. STAT. ANN. §§ 545-A:1 to :12 (Supp. 1991).

NEW JERSEY
N.J. STAT. ANN. §§ 25:2-20 to -34 (West Supp. 1991).

NEW MEXICO
N.M. STAT. ANN. §§ 56-10-14 to -25 (Michie Supp. 1991).

NORTH DAKOTA
N.D. CENT. CODE §§ 13-02.1-01 to -10 (1991).

OHIO
OHIO REV. CODE ANN. §§ 1336.01 to .11 (Anderson Supp. 1991).

OKLAHOMA
OKLA. STAT. ANN. tit. 24, §§ 112-123 (West 1987).

OREGON
OR. REV. STAT. §§ 95.200 to .310 (1989).

RHODE ISLAND
R.I. GEN. LAWS §§ 6-16-1 to -12 (Supp. 1991).

SOUTH DAKOTA
S.D. CODIFIED LAWS ANN. §§ 54-8A-1 to -12 (1990).

TEXAS
TEX. BUS. & COM. CODE ANN. §§ 24.001 to .013 (West 1987).

UTAH
UTAH CODE ANN. §§ 25-6-1 to -13 (1989).

WASHINGTON
WASH. REV. CODE ANN. §§ 19.40.011 to .901 (West 1989).

WEST VIRGINIA
W. VA. CODE §§ 40-1A-1 to -12 (Supp. 1991).

WISCONSIN
WIS. STAT. ANN. §§ 242.01 to .11 (West Supp. 1991).

APPENDIX II — VARIATIONS FROM THE UFTA

This Appendix outlines the modifications, if any, that states have made in adopting the UFTA. Reference to a state statute as "parallel" indicates that the only changes made to the statute are minor grammatical changes, paragraph renumbering, addition of headings, or minor form changes. Form changes may be included when a number of states have adopted the same change.

ALABAMA
ALA. CODE §§ 8-9A-1 to -12 (Supp. 1991).

All references to "obligations" are deleted. The comments to §§ 8-9A-1 and -3 to -9 state:

> Although the Uniform Act covers both transfers and obligations, this

> Chapter applies only to transfers. . . . Whether an obligation is void as a fraudulent conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this Chapter. This Chapter is neutral on this issue concerning an obligation.

Id. § 8-9A-1 cmt. 1.

§ 1 Definitions

Paragraph (2)c changes "tenancy by the entireties" to "tenancy in common for life with cross contingent remainder to the survivor in fee." *Id.* cmt. 2. The comment notes uncertainty as to whether Alabama law recognizes tenancy by the entirety. *Id.*

Paragraph (7) was added, which reads as follows: "Includes. Is not a limiting term." *Id.* § 8-9A-1(7). According to the comment to this section, this addition is intended to "eliminate confusion in interpretation of this Chapter." *Id.* cmt 3.

Paragraph (11) expands the definition of "property" as follows: "Both real and personal property, whether tangible or intangible, and any interest in property whether legal or equitable and includes anything that may be the subject of ownership." *Id.* § 8-9A-1(11). This definition is derived from the Alabama Probate Code. *Id.* cmt. 4.

§ 3 Value

The phrase "to furnish support to the debtor or another person" was inserted after "unperformed promise" in subsection (a). *Id.* § 8-9A-3 cmt. 1. The comment notes an incorrect reference in Official Comment 1 of the UFTA to the use of the phrase "present, reasonably equivalent value" in § 5(b) of the UFTA. *Id.*

The reference in subsection (b) to § 4(a)(2) was changed to § 4(c) (the constructive fraud provision as rearranged by Alabama). *Id.*

§ 4 Transfers Fraudulent as to Present and Future Creditors

This section was rearranged, but is substantively identical to the UFTA. The modifications are set forth in comment 1:

> Subsection (4)(b) of the Uniform Act is moved to immediately follow the provision for actual fraud in subsection (a) of this section. The badges of fraud listed in subsection (b) of this section apply to actual fraud, . . . and should follow subsection (a). Two forms of constructive fraud are contained in subsection (c) of this section.

Id. § 8-9A-4 cmt. 1.

Comment 2 specifically disregards the following portion of Official Comment 5 to the UFTA because the "language is confusing and not properly placed in the comments":

> "Proof of the presence of certain badges in combination establishes fraud conclusively — i.e., without regard to the actual intent of the

parties — when they concur as provided in § 4(c) 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. 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)."

Id. cmt. 2.

§ 6 When Transfer Is Made or Obligation Is Incurred

Paragraph (4) was amended to read as follows: "Except with respect to personal property and fixtures where a lender has perfected its security interest in such property in which event paragraph (1)a shall apply, a transfer is not made until the debtor has acquired rights in the asset transferred." *Id.* § 8-9A-6.

Paragraph (5) was deleted from this section.

§ 7 Remedies of Creditors

To ensure that this section is not construed as limiting the available remedies, the introductory sentence was amended to read: "In an action for relief against a transfer under this chapter, the remedies available to creditors, subject to the limitations in section 8-9A-8, include . . . ." *Id.* § 8-9A-7(a).

§ 8 Defenses, Liabilities and Protection of Transferee

The phrase "who took in good faith" was added to the end of paragraph (a). Comment 1 explains that there is no defense provided in cases of actual fraud and that a subsequent transferee who is a party to the fraud does not take in good faith. *Id.* § 8-9A-8 cmt. 1.

Paragraph (b) was amended to allow a creditor to recover "judgment for conveyance of the asset transferred" in addition to actions allowed under the UFTA. *Id.* § 8-9A-8(b).

To protect good faith transferees, paragraph (d) was amended to read as follows: "Notwithstanding voidability of a transfer under this chapter, a good faith transferee is entitled, to the extent of the value given to the debtor for the transfer or to another person as a consequence of the debtor's making such transfer, to . . . ." *Id.* § 8-9A-8(d).

As stated in comment 4, to "eliminate any negative implication" that this section limits the definition of value, paragraph (e)(2) was amended to read as follows: "Enforcement of a security interest in compliance with article 9 of Title 7 of the Uniform Commercial Code or a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor under a mortgage or deed of trust." *Id.* § 8-9A-8(e)(2). The lan-

guage in § 3(b) was not changed.

§ 9 Extinguishment of Claim for Relief

This provision is amended to read as follows:

> A claim for relief with respect to a fraudulent transfer under this chapter is extinguished unless action is brought:
> (1) Under section 8-9A-4(a) within 10 years after the transfer of real property was made.
> (2) Under section 8-9A-4(a) within six years after the transfer of personal property was made.
> (3) Under section 8-9A-4(c) or 8-9A-5(a), within four years after the transfer was made when the action is brought by a creditor whose claim arose before the transfer was made.
> (4) Under section 8-9A-4(c), within one year after the transfer was made when the action is brought by a creditor whose claim arose after the transfer was made; or
> (5) Under section 8-9A-5(b), within one year after the transfer was made.

Id. § 8-9A-9.

ARIZONA

ARIZ. REV. STAT. ANN. §§ 44-1001 to -1010 (Supp. 1990).

§ 1 Definitions

Paragraphs (1), (7), and (11) were deleted. *Id.* § 44-1001.

§ 2 Insolvency

A new paragraph was added, which reads as follows:

> Debts under this section include the full amount of the debtor's potential liability under contracts of guarantee and surety. The assets of the debtor shall include a fair valuation of the rights of the debtor in connection with the contracts under indemnity or similar agreements and under equitable principles, including contribution and subrogation.

Id. § 44-1002(F).

§ 3 Value

The phrase "to furnish support to the debtor or another person unless the promise is" was added after "unperformed promise." *Id.* § 44-1003(A).

§ 4 Transfer Fraudulent as to Present and Future Creditors

The phrase "under any of the following" was added to the end of paragraph (A), and "either" was added to the end of subsection (a)(2). *Id.* § 44-1004.

§ 5 Transfer Fraudulent as to Present Creditors

Paragraph (b) was deleted. *Id.* § 44-1005.

§ 6 When Transfer Is Made or Obligation Is Incurred

In subsection (1)(b), the phrase "through attachment, garnishment, levy, or other process" was inserted before "otherwise." *Id.* § 44-1006.

§ 7 Remedies of Creditors

Paragraph (A) was amended by referring to the statute of limitations section and clarifying that creditors may seek one or more of the remedies listed. A new subparagraph was added, which reads as follows: "Garnishment against the fraudulent transferee or the recipient of the fraudulent obligation, in accordance with the procedure prescribed by Law in obtaining such remedy." *Id.* § 44-1007(A)(1).

The phrase "subject to the limitations in §§ 44-1008 and 44-1009" was added to paragraph (B). *Id.* § 44-1007(B).

§ 8 Defenses, Liabilities and Protection of Transferee

Paragraph (f) was deleted.

§ 9 Extinguishment of Claim for Relief

In paragraph (a), the phrase "fraudulent nature of the" was inserted before "transfer or obligation." The phrase "could reasonably have been discovered" was deleted, and was replaced by "or through the exercise of reasonable diligence could have been discovered." *Id.* § 41-1009(1).

Paragraph (c) was deleted.

ARKANSAS

ARK. CODE ANN. §§ 4-59-201 to -212 (Michie Supp. 1991).

The Arkansas Fraudulent Transfer Act is parallel to the UFTA.

CALIFORNIA

CAL. CIV. CODE §§ 3439.01 to .12 (West Supp. 1992).

§ 1 Definitions

Paragraphs (1), (7), and (11) were deleted. Paragraph (4) was amended to read "a person who has a claim, and includes an assignee of a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, of a debtor." *Id.* § 3439.01(c). Comment 3 explains that this definition, in conjunction with the definition of "claim," has "substantially the same effect as the definition of 'creditor' under section 1 of the [UFTA]." *Id.* § 3439.01 cmt. 3.

§ 3 Value

Paragraphs (b) and (c) were deleted. Comment 3 explains:

> This section does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, . . . a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a dis-

> crepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. 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.

Id. § 3439.03 cmt. 3 (citation omitted).

§ 4 Transfers Fraudulent as to Present and Future Creditors

Paragraph (b) was deleted.

§ 5 Transfers Fraudulent as to Present Creditors

Paragraph (b) was deleted.

§ 7 Remedies of Creditors

In paragraphs (a)(3)(A) and (a)(3)(B), the phrase "its proceeds" replaced "of other property" and "of other property of the transferee," respectively. *Id.* § 3439.07(a)(3)(A)-(B).

The phrase "if the court so orders" was deleted from paragraph (b), and this section is now paragraph (c) of the California statute. Two new paragraphs were added:

> 3439.07(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset transferred or its proceeds if the remedy of attachment is available in the action under applicable law and the property is subject to attachment in the hands of the transferee under applicable law.
>
> . . . .
>
> 3439.07(d) A creditor who is an assignee of general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, may exercise any and all of the rights and remedies specified in this section if they are available to any one or more creditors of the assignor who are beneficiaries of the assignment, and, in that event (1) only to the extent the rights or remedies are so available and (2) only for the benefit of those creditors whose rights are asserted by the assignee.

Id. § 3439.07(b), (d).

§ 8 Defenses, Liabilities and Protection of Transferee

Paragraph (e)(2) was amended to read as follows:

> Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with section 9101) of the Commercial Code, other than a retention of collateral under subdivision (2) of Section 9505 of the Commercial Code and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

Id. § 3439.08(e)(2).

Comment 5 notes that this paragraph rejects the results in Durrett

v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), and adopts the rationale of Lawyer's Title Insurance Corp. v. Madrid (*In re* Madrid), 21 B.R. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, 469 U.S. 833 (1984).

> Paragraph (2) of subdivision (e) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this paragraph 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. . . . [T]his paragraph does not extend its automatic protection to strict foreclosures such as deeds in lieu of foreclosure or similar devices. . . . [It] also protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the [UCC].

CAL. CIV. CODE § 3439.08 cmt. 5 (West Supp. 1992) (citation omitted).

Paragraph (f) was deleted.

§ 9 Extinguishment of Cause of Action

The phrase "pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07" was added to the end of the introductory paragraph. *Id.* § 3439.09.

Paragraph (c) was deleted and replaced by the following: "Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred." *Id.* § 3439.09(c).

California added a new section (3439.12) entitled "Application; prior provisions; construction," which states that the statute only applies to "transfers made or obligations incurred on or after January 1, 1987." *Id.* § 3439.12.

COLORADO

COLO. REV. STAT. §§ 38-8-101 to -112 (Supp. 1991).

§ 1 Definitions

The introductory phrase was reworded. The phrase "immediately prior to the time of transfer" before "nonbankruptcy" was inserted in paragraph (2)(b). *Id.* § 38-8-102(2)(b).

The following new paragraph was added:

> "Control" of a debtor or debtor's property by another person does not include conduct undertaken by the other person to enforce rights existing under a valid agreement, entered into in good faith and not primarily for the purpose of obtaining control of the debtor or the

debtor's property, including without limitation a lease of such property.

Id. § 38-8-102(4).

§ 2 Insolvency

In paragraph (c), the phrase "at a fair valuation" was moved to follow "partnership's assets." *Id.* § 38-8-103(3).

§ 3 Value

Paragraph (b) was slightly reworded: "noncollusive sale, foreclosing on assets subject to a lien, or pursuant to the execution." *Id.* § 38-8-104(2).

§ 8 Defenses, Liabilities and Protection of Transferee

In paragraph (b)(2), the phrase "or obligee" was inserted after the second and third occurrences of the word "transferee." *Id.* § 38-8-109(2)(b).

CONNECTICUT

Uniform Fraudulent Transfer Act, 1991 Conn. Acts 297 (Reg. Sess.).

In § 9, paragraph (a), the phrase "or against any subsequent transferee or obligee" was deleted. Paragraph (b) refers to adjustments in paragraph (d) instead of paragraph (c); this appears to be a typographical error. Paragraph (e)(2) was deleted. *Id.*

FLORIDA

FLA. STAT. chs. 726.101 to .112 (1989).

The Florida Fraudulent Transfer Act is parallel to the UFTA.

HAWAII

HAW. REV. STAT. §§ 651C-1 to -10 (1988).

§ 1 Definitions

In paragraph (1)(i)(B), the phrase "in fact" was inserted before "exercised." *Id.* § 651C-1(1)(B). In paragraph (1)(ii)(A), the word "discretionary" was inserted before "power." *Id.* § 651C-1(1)(A). The phrase "against a debtor" was added to the end of paragraph (4). *Id.* § 651C-4.

Paragraph (6) now reads: " 'Debtor' means a person against whom a creditor has a claim." *Id.* In paragraph (11), the phrase "by consanguinity" was deleted. *Id.* § 651C-5. In paragraph (12), the word "other" preceding "encumbrance" was deleted. *Id.*

§ 5 Transfers Fraudulent as to Present Creditors

In paragraph (b), the phrase "for other than a present, reasonably equivalent value" replaced "for an antecedent debt." *Id.* § 651C-5(b).

§ 6 When Transfer is Made or Obligation is Incurred

The word "deemed" was omitted from paragraph (2). *Id.* § 651C-

6(2).

IDAHO

IDAHO CODE §§ 55-910 to -921 (1988).

Aside from deletion of § 1, paragraph (2)(iii), the Idaho Fraudulent Transfer Act is parallel to the UFTA.

ILLINOIS

ILL. ANN. STAT. ch. 59, paras. 101-112 (Smith-Hurd Supp. 1991).

In § 1, paragraph (2)(ii), the statute substituted "laws of this State" for "nonbankruptcy law". *Id.* ¶ 102(b)(2). Otherwise, the Illinois Fraudulent Transfer Act is parallel to the UFTA.

MAINE

ME. REV. STAT. ANN. tit. 14, §§ 3571-3582 (West Supp. 1991).

§ 1 Definitions

The phrase "Unless the context otherwise indicates" was added to the introductory language of this provision. *Id.* § 3572. Paragraph (2)(iii) was omitted.

§ 2 Insolvency

In paragraph (c), the phrase "at a fair valuation" was moved to follow "partnership's assets." *Id.* § 3573(3).

§ 7 Remedies of Creditors

In paragraph (a)(2), a comma and the phrase "trustee process" were inserted after "attachment." *Id.* § 3578(1)(B). A new subparagraph was added to paragraph (a)(3), which reads as follows: "Damages in an amount not to exceed double the value of the property transferred or concealed; or . . . ." *Id.* § 3578(1)(C)(3).

§ 8 Defenses, Liabilities and Protection of Transferee

In paragraph (b)(2), the phrase "or obligee" was inserted after the second and third occurrences of the word "transferee." *Id.* § 3579(2)(B).

§ 9 Extinguishment of Claim for Relief

This provision now reads as follows:

> A cause of action with respect to a fraudulent transfer or obligation under this Act is extinguished unless action is brought:
>
> 1. Intent to defraud. Under section 3575, subsection 1, paragraph A, within 6 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or reasonably could have been discovered by the claimant; or
>
> 2. Failure to receive reasonably equivalent value; transfer to insider. Under section 3575, subsection 1, paragraph B, or section 3576, subsection 1 or 2, within 6 years after the transfer was made or the obligation was incurred.

Id. § 3580.

MINNESOTA

MINN. STAT. ANN. §§ 513.41 to .51 (West 1990).

Section 9 of the UFTA was deleted. Otherwise, the Minnesota Fraudulent Transfer Act is parallel to the UFTA.

MONTANA

MONT. CODE ANN. §§ 31-2-326 to -342 (Supp. 1991).

§ 1 Definitions

In paragraph (1)(ii)(B), the words "in fact" were deleted. *Id.* § 31-2-328(1)(b)(ii). In paragraph (3), the words "disputed, undisputed" were deleted. *Id.* § 31-2-328(3).

§ 2 Insolvency

This provision now reads as follows:

> (1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's property at a fair valuation and the debtor is generally not paying his debts as they become due.
> (2) Property under this section does 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 part.

Id. § 31-2-329.

§ 3 Value

In paragraph (a), "other" replaced "otherwise." Paragraph (b) was deleted. *Id.* § 31-2-330(1).

§ 9 Extinguishment of Cause of Action

The statute of limitations was reduced from four years to two in paragraphs (a) and (b). *Id.* § 31-2-341(1), (2).

NEBRASKA

NEB. REV. STAT. §§ 36-701 to -712 (Supp. 1990).

§ 5 Transfer Fraudulent as to Present Creditors

In paragraph (b), the last phrase was amended to read "and the insider knew or reasonably should have known that the debtor was insolvent." *Id.* § 36-706(b).

§ 9 Extinguishment of Cause of Action

Paragraph (c) was deleted; accordingly, there apparently is no limitation applicable to actions based on § 5(b). *Id.* § 36-710.

NEVADA

NEV. REV. STAT. ANN. §§ 112.140 to .250 (Michie Supp. 1991).

§ 1 Definitions

The phrase "unless the context otherwise requires" was added to the end of the introductory paragraph. *Id.* § 112.150. The phrase "or as community property" was inserted in paragraph (2)(iii) after "tenancy by the entireties." *Id.* § 112.150(2)(c).

Paragraph (9) of the UFTA was amended to read as follows: " 'Person' includes a government and a governmental subdivision or agency." *Id.* § 112.150(9). Paragraph (11) substituted "natural person" for "individual." *Id.* § 112.150(11).

§ 7 Remedies of Creditors

Paragraph (2) of the UFTA was amended to read as follows: "An attachment or garnishment against the asset transferred or other property of the transferee pursuant to NRS 31.010 to 31.460, inclusive; and . . . ." *Id.* § 112.210(1)(b).

NEW HAMPSHIRE

N.H. REV. STAT. ANN. §§ 545-A:1 to :12 (Supp. 1991).

The New Hampshire Fraudulent Transfer Act is parallel to the UFTA.

NEW JERSEY

N.J. STAT. ANN. §§ 25:2-20 to -34 (West Supp. 1991).

The New Jersey Fraudulent Transfer Act is parallel to the UFTA.

NEW MEXICO

N.M. STAT. ANN. §§ 56-10-14 to -25 (Michie Supp. 1991).

The New Mexico Fraudulent Transfer Act is parallel to the UFTA.

NORTH DAKOTA

N.D. CENT. CODE §§ 13-02.1-01 to -10 (1991).

§ 1 Definitions

In paragraph (2), the word "excluding" was substituted for the phrase "but the term does not include." *Id.* § 13-02.1-01.2.

In paragraph (7), the phrase "a general partner in a partnership in which the debtor is a general partner" was substituted for "a partnership described in clause . . ." in paragraphs (i)(C), (ii)(E), and (iii)(D). *Id.* § 13-02.1-01.7(a)-(c).

The phrase "obtained by legal or equitable process or proceedings" was deleted from paragraph (8). *Id.* § 13-02.1-01.8. The phrase "or equitable" was deleted from paragraph (13). *Id.* § 13-02.1-01.13.

§ 2 Insolvency

The word "his" was deleted from paragraph (b), and the phrase "under subsection (a)" was deleted from paragraph (c). *Id.* § 13-02.1-02.1.

OHIO

OHIO REV. CODE ANN. §§ 1336.01 to .11 (Anderson Supp. 1991).

§ 1 Definitions

The phrase "any of the following" was added after "'Affiliate' means" in paragraph (1). *Id.* § 1336.01(A).

The following was added at the end of paragraph (2)(ii): a comma, and the phrase "including, but not limited to, section 2329.66 of the Revised Code." *Id.* § 1336.01(B)(2). In paragraph (2)(ii)(A), the word "discretionary" was inserted after "sole," and the phrase "in fact" was deleted from paragraph (1)(ii)(B). *Id.* § 1336.01(A)(2)(a), (b).

Paragraph (2)(iii) was amended to read in full as follows: "An interest in property held in the form of a tenancy by the entireties created under section 5302.17 of the Revised Code prior to April 4, 1985, to the extent it is not subject to process by a creditor holding a claim against only one tenant." *Id.* § 1336.01(B)(3).

§ 5 Transfers Fraudulent as to Present Creditors

The phrase "or an obligation incurred" was inserted after each occurrence of the phrase "transfer made." *Id.* § 1336.05.

§ 7 Remedies of Creditors

Paragraph (a)(2) reads as follows: "An attachment or garnishment against the asset transferred or other property of the transferee in accordance with Chapters 2715. and 2716. of the Revised Code." *Id.* § 1336.07(A)(2). The phrase "in accordance with Chapter 2329. of the Revised Code" was added at the end of paragraph (b). *Id.* § 1336.07(B).

Other Changes

The phrase "fraudulent under section 1336.04 or 1336.05 of the Revised Code" replaced "voidable under this [Act]" in § 2, paragraph (d), § 6, paragraph (2), and § 7, paragraph (a). *Id.* §§ 1336.02(C)(1), 1336.06(A)(2)(a), 1336.07(A). The word "fraudulent" replaced "voidable" in § 8, paragraphs (a), (e), and (f). *Id.* § 1336.08(A), (D), (E).

OKLAHOMA

OKLA. STAT. ANN. tit. 24, §§ 112-123 (West 1987).

The Oklahoma Fraudulent Transfer Act is parallel to the UFTA.

OREGON

OR. REV. STAT. §§ 95.200 to .310 (1989).

§ 1 Definitions

In paragraph (1)(i)(B), the phrase "in fact" was inserted before "exercised." *Id.* § 95.200(1)(a)(B). In paragraph (1)(ii)(A), the word "discretionary" was inserted before "power." *Id.* § 95.200(1)(b)(A). The phrase "against a debtor" was added to the end of paragraph (4).

Id. § 95.200(4).

Paragraph (6) now reads: " 'Debtor' means a person against whom a creditor has a claim." *Id.* § 95.200(6). In paragraph (11), the phrase "by consanguinity" was deleted. *Id.* § 95.200(11). In paragraph (12), the word "other" preceding "encumbrance" was deleted. *Id.* § 95.200(12).

§ 2 Insolvency

The phrase "at a fair valuation" was moved to precede "sum of the debtor's debts" in paragraph (a), and "sum of the partnership's debts" in paragraph (c). *Id.* § 95.210(1), (3).

§ 5 Transfers Fraudulent as to Present Creditors

In paragraph (b), the phrase "for other than a present, reasonably equivalent value" replaced "for an antecedent debt." *Id.* § 95.240(2).

§ 6 When Transfer Is Made or Obligation Is Incurred

The word "deemed" was omitted from paragraph (2). *Id.* § 95.250(2).

§ 7 Remedies of Creditors

In paragraph (b), the phrase "and if the court so orders" was moved to precede "the creditor." *Id.* § 95.260(2).

§ 8 Defenses, Liabilities and Protection of Transferees

In paragraph (a), the word "as" was inserted before "against." *Id.* § 95.270(1). The phrase "other than a good faith transferee who took for value or from any subsequent transferee" was deleted from paragraph (b)(2) and was incorporated into a new subparagraph. *Id.* § 95.270(2)(b), (4).

RHODE ISLAND

R.I. GEN. LAWS §§ 6-16-1 to -12 (Supp. 1991).

The Rhode Island Fraudulent Transfer Act is parallel to the UFTA.

SOUTH DAKOTA

S.D. CODIFIED LAWS ANN. §§ 54-8A-1 to -12 (1990).

In § 1, references to "a person" were changed to "any person" throughout. *Id.* § 54-8A-1. In § 7, paragraph (a)(2), the phrase "in accordance with the procedure prescribed by [ ]" was deleted. *Id.* § 54-8A-7(a)(2).

TEXAS

TEX. BUS. & COM. CODE ANN. §§ 24.001 to .013 (West 1987).

§ 1 Definitions

A comma and the phrase "under the law of another jurisdiction" was added to the end of paragraph (2)(iii). *Id.* § 24.002(2)(C). In para-

graph (3), the phrase "or property" was inserted after "payment." *Id.* § 24.002(3). In paragraph (4), a comma and the phrase "including a spouse, minor or ward," was inserted after "person." *Id.* § 24.002(4).

§ 3 Value

A new paragraph (d) was added, which reads as follows: " 'Reasonably equivalent value' includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have wilfully [sic] sold the assets in an arms length transaction." *Id.* § 24.004(d).

§ 4 Transfer Fraudulent as to Present and Future Creditors

In paragraph (a), the phrase "within a reasonable time" was inserted prior to "before." *Id.* § 24.005(a). In paragraph (a)(2)(ii), the phrase "or reasonably should have believed" was deleted. *Id.* § 24.005(a)(2)(B). In paragraph (b)(3), the phrase "disclosed or" was deleted. *Id.* § 24.005(b)(3).

§ 8 Defenses, Liabilities and Protection of Transferee

In paragraph (d), a comma and the phrase "at the transferee's or obligee's election" was inserted after "entitled." In addition, the phrase "of any improvements made by a good faith transferee or obligee, and" was inserted after "value." *Id.* § 24.009(d)(1).

A new subparagraph was added, which reads as follows:

> In this subsection, "improvement" includes:
> (A) physical additions or changes to the property transferred;
> (B) repairs to such property;
> (C) payment of any tax on such property;
> (D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and
> (E) preservation of such property.

Id. § 24.009(d)(2).

§ 9 Extinguishment of Claim for Relief

A new subparagraph was added, which reads as follows:

> A cause of action with respect to a fraudulent transfer of [sic] obligation under this chapter is extinguished as to a spouse, minor, or ward unless the action is brought within two years after the cause of action accrues, or if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant, subject to the provisions relating to disabilities under Chapter 16, Civil Practice and Remedies Code.

Id. § 24.010(b).

New Provision

A new provision was added, which reads as follows:

A gift of tangible personal property is void unless:
(1) the gift is evidenced by:
(A) a deed that has been duly acknowledged or proved and recorded; or
(B) a will that has been duly probated; or
(2) actual possession of the subject matter of the gift is in the donee or someone claiming under him.

Id. § 24.013.

UTAH

UTAH CODE ANN. §§ 25-6-1 to -13 (1989).

In § 3(b), the phrase "For the purposes of" was replaced by "Under." *Id.* § 25-6-4(2). Section 8 was renamed "Good faith transfer," but is substantively the same. *Id.* § 25-6-9. An applicability section was added, which reads: "This act applies when any transfer occurs after the effective date of this act." *Id.* § 25-6-13. In § 10, the phrase "equitable subordination" was inserted before "estoppel." *Id.* § 25-6-11.

WASHINGTON

WASH. REV. CODE ANN. §§ 19.40.011 to .901 (West 1989).

In § 1, paragraph (2)(iii) was deleted. *Id.* § 19.40.011(2). In § 2, paragraph (c), the phrase "at a fair valuation" was moved to follow "partnership's assets." *Id.* § 19.40.021(c).

WEST VIRGINIA

W. VA. CODE §§ 40-1A-1 to -12 (Supp. 1991).

§ 3 Value

In paragraph (a), the phrase "furnish support to the debtor" was changed to read "furnish support of the debtor." *Id.* § 40-1A-3(a). In paragraph (b), the phrase "all of this article" was inserted before "a person gives." *Id.* § 40-1A-3(b).

§ 6 When Transfer Is Made or Obligation Is Incurred

In paragraph (2), the word "considered" was substituted for "deemed." *Id.* § 40-1A-6(2)(b).

§ 7 Remedies of Creditors

The phrase "in accordance with the procedure prescribed by []" was deleted. *Id.* § 40-1A-7(a)(2).

WISCONSIN

WIS. STAT. ANN. §§ 242.01 to .11 (West Supp. 1991).

§ 1 Definitions

The phrase "any of the following" was added to the introductory language to paragraphs (1) and (7). *Id.* § 242.01(1), (7). In paragraph (1)(ii)(A), the word "discretionary" was inserted after "sole." *Id.*

§ 242.01(1)(a)(1). A new subparagraph was added to paragraph (2), which reads: "Property to the extent it is exempt under s. 815.18." *Id.* § 242.01(2)(b). Paragraph (11) substituted the phrase "of kinship as computed under s. 852.03(2)" for "as determined by the common law." *Id.* § 242.01(11).

§ 2 Insolvency

Paragraphs (d) and (e) precede paragraphs (a), (b), and (c), but the terms are substantively identical. *Id.* § 242.02.

§ 4 Transfers Fraudulent as to Present and Future Creditors

Paragraph (a) uses "obligations" instead of "obligation." *Id.* § 242.04(1).

§ 7 Remedies of Creditors

The phrase "the procedure prescribed by" was deleted from paragraph (2). *Id.* § 242.07(1)(b).

§ 9 Extinguishment of Claim for Relief

This provision now reads as follows: "Actions under this chapter are barred as provided in s. 893.425." *Id.* § 242.09. However, this provision incorporated the uniform language.

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