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THE 2014 AMENDMENTS TO THE UNIFORM VOIDABLE TRANSACTIONS ACT
(and, before the amendments, known as the Uniform Fraudulent Transfer Act)

Edwin E. Smith[1]

Amendments to the Uniform Fraudulent Transfer Act (the "Act") were approved by the Uniform Law Commission at its annual meeting in the summer of 2014 and are now being, or will be, considered in state legislatures throughout the country. A copy of the amendments, together with changes to the Official Comments to the Act as amended, is available at the Uniform Law Commission's web site.[2] After a brief introduction, this paper will summarize the substance of the amendments, the transition rules and some of the changes to the Official Comments to the Act.[3]

I. INTRODUCTION

[1] Mr. Smith is a partner in the Finance Practice Group of Morgan, Lewis & Bockius LLP. He is also a Uniform Law Commissioner for the Commonwealth of Massachusetts and served as chair of the drafting committee for the 2014 amendments. This paper expands upon an earlier article by the author that appeared in the Summer 2014 edition of the Commercial Law Newsletter of the American Bar Association's Business Law Section's Commercial Finance and Uniform Commercial Code Committees.

[2] www.uniformlaws.org.

[3] For a more comprehensive and detailed analysis of the amendments, *see* Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 BUS. LAW. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541949.

What has been commonly known as "fraudulent transfer" law addresses certain transfers of property and incurrences of obligations that violate norms of the debtor-creditor relationship. The law has a long history, starting with Roman law[4] and being codified in England in 1571 in the Statute of 13 Elizabeth.[5] In the United States the first uniform law on the subject was the Uniform Fraudulent Conveyance Act, promulgated by the Uniform Law Commission in 1918. The Act that is the subject of this article was promulgated by the Uniform Law Commission in 1984 to replace the Uniform Fraudulent Conveyance Act with a statute more consistent with the federal Bankruptcy Code, which had been enacted in 1978. The Act has been enacted in 43 states, the District of Columbia and the U.S. Virgin Islands.[6]

The Act provides for avoidance of a transfer of property made or an obligation incurred by a debtor with intent to hinder, delay, or defraud a creditor of the debtor.[7] The Act also provides for avoidance of a transfer of property made or an obligation incurred by a debtor, regardless of the debtor's intent, if the debtor receives less than reasonably equivalent value in exchange for the transfer or obligation and afterwards the debtor is insolvent, is unable to pay the debtor's debts as they become due, or is left with unreasonably small capital to operate the debtor's business or conduct the debtor's other activities.[8]

The Act provides remedies as matter of state law, but the Act is also relevant if the debtor is subject to a federal bankruptcy case. The Bankruptcy Code contains its own fraudulent transfer provision in Section 548. In addition, though, under Section 544(b) of the Bankruptcy Code the debtor's bankruptcy trustee may set aside a transfer of property or the incurrence of an obligation which an actual creditor of the debtor may set aside under the fraudulent transfer law of the applicable state. If, pursuant to Section 544(b), a transfer or obligation is avoided under state fraudulent transfer law in a debtor's bankruptcy case, the remedy differs from the remedy applicable outside of bankruptcy. In a bankruptcy case, the transfer or obligation is avoided completely, rather than merely to the extent of the actual creditor's claim. Furthermore, the recovery inures to the benefit of the bankruptcy estate rather than to the actual creditor.[9] The look-back period under Section 548 is generally two years from the time of the transfer or incurrence,[10] while the look-back period under the Act is generally four years.[11]

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[4] *See* Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931).
[5] 13 Eliz. c. 5 (Eng.)
[6] The Act is in effect in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. The Uniform Fraudulent Conveyance Act, with some non-uniform amendments, is still in effect in New York and Maryland. In five states - Alaska, Kentucky, Louisiana South Carolina and Virginia - neither uniform act is in effect.
[7] Act § 4(a)(1). In referring to a section of the Act where a 2014 amendment is relevant, the citation will be followed by "(2014)". In referring to a former section of the Act amended by a 2014 amendment but before giving effect to the amendment, the citation will be followed by "(1984)". No date follows the citation if the cited section was not materially amended by the 2014 amendments.
[8] *See* Act §§ 4(a)(2) and 5(a).
[9] These consequences follow from the Supreme Court's decision in *Moore v. Bay*, 284 U.S. 4 (1931),
[10] Bankruptcy Code § 548(a)(1).
[11] Act § 9.

II. THE AMENDMENT PROCESS

In the summer of 2014, the Uniform Law Commission approved amendments to the Act that, among other things, change the name of the Act to the Uniform Voidable Transactions Act. The amendments culminated a three-year process that began with work by a study committee from 2011 to 2012 and continued with work by a drafting committee from 2012 to 2014.[12] The amendments are now completed and are being introduced, or are being considered for introduction, in state legislatures.

III. THE AMENDMENTS

The amendments are not a wholesale revision of the Act. Rather, they make discrete changes without any one unifying theme. The following is a brief summary of the amendments:

A. Change of Terminology.

The Act, like its predecessor, has always provided for the avoidance of a transfer of property or the incurrence of an obligation by a debtor if the debtor's intent was to hinder or delay a creditor of the debtor. The debtor need not have intended to defraud the creditor in order for the transaction to be avoidable under the Act. However, the Act, as originally promulgated, used inconsistent words to refer to a transfer or obligation for which the Act provides a remedy. It sometimes used the word "voidable", and at other times it used the word "fraudulent." The amendments substitute the word "voidable" for "fraudulent," both as a matter of consistency and to emphasize that intent to defraud is not required in order for the Act to provide a remedy.[13]

The Official Comments point out that the change of terminology does not affect other law, such as law dealing with third party liability for aiding and abetting or civil conspiracy, rules of professional conduct for a lawyer who facilitates a transfer or obligation voidable under the Act, the crime-fraud exception to attorney-client privilege applicable to communications between a lawyer and a client relating to a transfer or obligation voidable under the Act, or criminal sanctions for facilitating or making a transfer or obligation voidable under the Act.[14]

B. Change of the Title of the Act.

[12] In addition to being chair of the drafting committee, the author was the chair of the study committee. Professor Kenneth C. Kettering was the reporter for the drafting committee and provided helpful comments for this article. The American Bar Association Advisor was Patricia A. Redmond. Jay David Adkisson, Daniel S. Kleinberger, Charles D. Schmerler, James J. Schneider and David J. Slenn served as Section Advisors. A number of the members of the Commercial Finance and Uniform Commercial Code Committees of the Business Law Section of the American Bar Association participated in the project. The study committee and the drafting committee also benefited from the participation of numerous observers, including those from the American Bankruptcy Institute, the American College of Commercial Finance Lawyers and the Uniform Commercial Code Committee of the California Bar Association, and from comments from the Avoiding Powers Committee of the National Bankruptcy Conference and the Policy Committee of the American College of Bankruptcy.

[13] Act §§ 4(a), 5(a) and 5(b) (2014). *See also* Act § 15 cmt. 4 (2014).

[14] Act § 15 cmt. 5 (2014).

Likewise, the amendments change the title of the Act from the "Uniform Fraudulent Transfer Act" to the "Uniform Voidable Transactions Act".[15]

There is precedent for changing the title of the Act. The title of the Uniform Fraudulent Conveyance Act suggested that it covered only conveyances of real property, though conveyances of personal property were also addressed by that statute. The drafters of the Act in 1984 decided that the title of the Act should use the word "transfer" in place of "conveyance" to emphasize that the Act applies to transfers of any property, whether real or personal.

The 2014 amendments change the title of the Act for similar reasons. The change in title reflects the fact, not changed by the 2014 amendments, that a transfer of property or the incurrence of an obligation need not be fraudulent in order for the Act to provide a remedy. The new title also reflects the fact that the Act applies to the incurrence of an obligation by a debtor, as well as to a transfer of property by a debtor.

C. Burdens and Standards of Proof.

States have applied different burdens and standards of proof in voidable transfer litigation.[16] The amendments provide uniformity among the states on those subjects. The Act places on the plaintiff creditor the burden of proving the elements of a voidable transaction under the Act, and generally places on the transferee the burden of proving the elements of a defense to a voidable transaction under the Act.[17] Consistent with the theme that a transfer of property or the incurrence of an obligation need not be fraudulent for the Act to provide a remedy, the Act provides for a "preponderance of the evidence" standard of proof.[18] The Act, as amended, thus avoids the "clear and convincing" standard that courts in some states have applied under the Act, based on inappropriate analogy to the standard typically applied to claims of common-law fraud.

D. Choice of Law.

Courts have applied different theories to determine which jurisdiction's voidable transactions law should apply to a transfer of property or the incurrence of an obligation.[19] The diverse approaches courts have taken to choice of law on this subject, and the lack of clarity in the rules often employed, complicates the planning of transactions and adds to the cost of litigation.

In order to resolve the choice of law issue in a clear and uniform way, the Act provides a choice of law rule that looks to the location of the debtor at the time when the transfer of property was made or the obligation was incurred.[20] An individual is considered to be located at his or her principal residence.[21] An organization is considered to be located at its place of

[15] Act § 15 (2014).
[16] *See* Kettering, *supra*, note 3 at 34-37.
[17] Act §§ 4(c), 5(c) and 8(g) (2014).
[18] Act §§ 4(c), 5(c) and 8(h) (2014).
[19] The different theories are explored in Kenneth C. Kettering, *Codifying a Choice of Law Rule for Fraudulent Transfer: A Memorandum to the Uniform Law Commission*, 19 AM. BANKR. INST. L. REV. 319 (2011).
[20] Act § 10(b) (2014).
[21] Act § 10(a)(1) (2014).

business or, if it has more than one place of business, at its chief executive office.[22] Section 6 of the Act, which has not been materially altered by the amendments, provides rules for determining when property is considered to be transferred and when an obligation is considered to be incurred for purposes of the Act, including the new choice of law rule.

For example, assume that A, a resident of State X, is thinking of divorcing A's spouse. In anticipation of the divorce and to avoid a likely unwelcome property settlement, A transfers securities to a trust established under the laws of State Y and administered by a trustee in State Y. If A's spouse, as a creditor in the divorce proceedings, later brings a claim to the securities under the Act in a forum located in a state that has adopted the amendments, the forum would look to the choice of law rule in § 10 of the Act and apply the voidable transactions law of State X, where A resided at the time of the transfer, to determine whether the Act provides a remedy.

Could A have moved to State Y before making the transfer so that the forum would apply the law of State Y rather than State X? The Official Comments strongly encourage courts to be on the lookout for "asset tourism" by which a debtor changes location to a new jurisdiction to take advantage of debtor friendly laws in the new jurisdiction. The Official Comments emphasize that any change of location must be genuine and not merely transitory for purposes of manipulating the choice of law rule.[23]

The choice of law rule cannot and will not resolve all choice of law problems for voidable transactions of the sort governed by the Act. Not all states have adopted the Act even as originally promulgated. It is possible that a dispute over a voidable transaction may arise in a jurisdiction that has not enacted the Act as amended by the 2014 amendments.

Moreover, in a federal bankruptcy case, the choice of law rules are uncertain as a matter of federal law. The Supreme Court has never stated what choice of law rule a bankruptcy court should apply to an issue governed by state law, and lower courts are much divided on the issue. Some bankruptcy courts apply the choice of law rule of the forum state, some apply a uniform federal choice of law rule, and still others apply the choice of law rule of the forum state unless a federal interest requires the application of a different choice of law rule.[24]

Still, the Act's choice of law rules may be instructive to courts that would otherwise consider applying a different choice of law rule.

E. Determination of "Insolvency".

In determining whether a debtor was insolvent when a transfer of property was made or an obligation was incurred, the amendments clarify that the debtor's debts, in addition to the debtor's assets, must be valued at a fair valuation.[25] The Official Comments point out that a contingent debt should be valued based on the likelihood that the contingency would occur and further note that trading values or accounting valuations should not be used. For example,

[22] Act §§ 10(a)(2), 10(a)(3) and 1(10) (defining "organization") (2014).
[23] Act § 10 cmt. 3 (2014).
[24] *See* Kettering, *supra* note 19, at 323-24.
[25] Act § 2(a) (2014).

consider a non-contingent debt owed by the debtor with a face amount of $100 and trading at a price of $60. Even though the debt has a value in the marketplace of $60, the debtor still owes $100 on the debt. The debt should be valued at $100.[26]

The Act also contains a presumption that a debtor is insolvent if the debtor is not generally paying the debtor's debts when due.[27] There is no similar presumption in the Bankruptcy Code. The amendments move into the statute two points currently appearing only in the Official Comments: that a debt that is subject to a bona fide dispute should not be counted as debt for this purpose and that, if the presumption on insolvency goes into effect, the result is to shift the burden of persuasion on solvency to the transferee.[28]

Furthermore, the amendments delete the special rule in the Act, as originally promulgated,[29] by which the net worth of a general partner of a partnership debtor is included as an asset of the debtor in determining the solvency of the debtor. That special rule has no justification in current practice. Consider a limited liability partnership. A limited liability partnership is typically a general partnership,[30] but a general partner of a limited liability partnership is not generally liable for the partnership's obligations.[31] It makes no sense to count the net worth of a general partner of a limited liability partnership in determining the partnership's solvency. More generally, it is not appropriate to count the net worth of a general partner even of an ordinary general partnership. Because the Act does not count the net worth of a guarantor in determining the solvency of a debtor, it is anomalous to count the net worth of a general partner, even if the general partner is liable for the partnership's debts.

F. Defenses.

The amendments modify defenses in the Act in several relatively minor respects.

1. *Intentional transfers for reasonably equivalent value.*

The Act, as originally promulgated, provided a complete defense, not found in the Bankruptcy Code, to the transferee of a transfer made with intent to hinder, delay or defraud any creditor of the debtor if the transferee acted in good faith and gave reasonably equivalent value.[32] Resolving a split in the case law,[33] the amendments provide that, for the transferee to qualify for the defense, the reasonably equivalent value must be given *to the debtor*.[34]

2. *Recovery of property instead of a money judgment.*

[26] Act § 2 cmt. 1 (2014).
[27] Act § 2(b).
[28] Act § 2(b) (2014).
[29] Act § 2(c) (1984). The amendments delete § 2(c) in its entirety.
[30] *See* Revised Uniform Partnership Act § 201(b) (2013).
[31] *See* Revised Uniform Partnership Act § 306(c) (2013).
[32] Act § 8(a) (1984).
[33] *Compare, e.g.,* In re Chapman Lumber Co., 2007 WL 2316528 (Bankr. N. D. Iowa 2007) (value need not be given to the debtor) *with* Klein v. King & King & Jones, 571 F. App'x 702 (10th Cir. 2014) (value must be given to the debtor).
[34] Act § 8(a) (2014).

The Act, as originally promulgated, afforded a subsequent transferee a defense if the subsequent transferee took in good faith and for value and afforded a subsequent transferee from that transferee a like defense, but in each case the defense literally applied only to an action for a money judgment.[35] The amendments clarify that the defense in each case applies also to an action to recover of or from the transferred property or its proceeds, by levy or otherwise.[36] This clarification makes the defense consistent with Sections 550(a) and (b) of the Bankruptcy Code.

3. *The UCC Article 9 enforcement exclusion*.

The Act, as originally promulgated, created a defense for a "constructively" voidable transfer (i.e., a transfer that is voidable for reasons other than intent by the debtor to hinder, delay or defraud a creditor of the debtor) if the transfer resulted from the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code (the "UCC").[37]

The amendments exclude from that defense a so-called "strict foreclosure", i.e., an acceptance by the secured party of collateral in whole or partial satisfaction of the secured obligations under UCC § 9-620.[38] The protection of a strict foreclosure from a voidable transfer challenge is not appropriate if the secured party accepts collateral having a value in excess of the secured obligations and afterwards the debtor was insolvent, the debtor was unable to pay the debtor's debts as they became due, or the debtor was left with unreasonably small capital. Unlike enforcement by way of collection under UCC § 9-607[39] or disposition under UCC § 9-610,[40] in a strict foreclosure there is no requirement that the secured party act in a commercially reasonable manner. Moreover, in the case of a strict foreclosure, there may not be another secured party or lien holder notified of, and entitled to object to, the secured party's acceptance of collateral having a value in excess of the secured obligation.[41]

G. Series Organizations.

The Act, as originally promulgated, did not address "series organizations," which have emerged in recent years as a new form of business organization.

Although the term "series organization" is defined in the Act as amended,[42] some further background may be helpful to a reader who is not aware of the developments in this area. A number of states have enacted statutes providing for the creation of organizations that may establish separate series.[43] Typically, the organizations that may establish series under these statutes are limited liability companies, limited partnerships and statutory business trusts. Each

[35] Act § 8(b) (1984).
[36] Act § 8(b) (2014).
[37] Act § 8(e)(2) (1984).
[38] Act § 8(e)(2) (2014).
[39] UCC § 9-607(c) (2010).
[40] UCC § 9-610(b) (2010).
[41] *See* UCC § 9-621 (2010).
[42] Act § 11(a)(2) (2014).
[43] *See* Del. Code. Ann. tit. 6, §18-215 for an example of state statute permitting a limited liability company series organization.

series has associated with it its own interest holders, assets and liabilities and may formulate its own investment objectives or business purposes. If the conditions stated in the relevant state statute are satisfied, the debts of one series generally are enforceable only against the assets of that series and not against assets of another series of the series organization or against the series organization itself. The state statutes are generally silent or ambiguous as to whether a series of a series organization is a legal entity separate from the series organization itself.

The amendments treat each series of a series organization as a separate legal entity for purposes of the Act, whether or not it is a separate legal entity for other purposes.[44] In this way, a transfer of property by a series to another series or the series organization itself is subject to the provisions of the Act. Otherwise, an argument could be made that such a transfer would not be subject to the Act because the transfer occurred within the same "person", i.e., the series organization, rather than by one person to another person.

A legislative note to § 11 of the amended Act emphasizes that, even if a state has not adopted series legislation, the state should nevertheless include § 11 in its adoption of the amendments. That is because the choice of law rule in § 10 of the amended Act may point to the voidable transfer law of a jurisdiction other than the jurisdiction under whose law the series organization is organized.

H. Medium Neutrality.

In order to accommodate electronic commerce and the electronic storage of data, the amendments replace references in the Act to a "writing" with "record",[45] with related changes being made in the definitions.[46]

IV. TRANSITION

The amendments provide for no uniform effective date. A legislative note at the end of the amendments states that the enacting bill should provide that the amendments apply to a transfer of property or the incurrence of an obligation that becomes effective, as determined under § 6 of the Act, on or after the effective date selected by the legislature of the enacting state.

V. OFFICIAL COMMENTS

The Official Comments to the Act have been expanded to provide commentary on the amendments.

In addition, the original Official Comments and Prefatory Note have been supplemented and otherwise refreshed in light of the three decades of experience under the Act as originally promulgated. For example, the Official Comments explain why creditors are not prejudiced by the transfer of assets of a growing sole proprietorship business into a limited liability organization if no financial distress exists or is anticipated, while creditors of a debtor might be

[44] Act § 11(b) (2014).
[45] Act § 6(5)(ii) (2014).
[46] Act §§ 1(7), 1(13) and 1(15) (2014). *See also* Act § 14 (2014) (electing out of the federal E-Sign legislation).

prejudiced if, anticipating financial distress, the debtor converted shares in the debtor's corporation to interests in a limited liability company for which lien creditor remedies are more limited.[47] As another example, the Official Comments explain that "avoidance" of an obligation means that the "avoided" obligation is subordinated to the obligation owed to the plaintiff creditor; "avoidance" does not mean that the "avoided" obligation ceases to exist.[48]

Although the amendments themselves are central, the expanded Official Comments may prove helpful in practice in further explaining the amended provisions of the Act as well as provisions of the Act not affected by the amendments.

[47] Act § 4 cmt. 8 (2014).
[48] Act § 7 cmt. 7 (2014).